ANNOTATIONS

FOR THE CONSTITUTION OF OREGON

Preamble

NOTES OF DECISIONS

"Ordain" is equivalent to "be it enacted" or any like expression. State v. Dalles City, (1914) 72 Or 337, 350, 143 P 1127, Ann Cas 1916B, 855.

The perpetuation of liberty includes the protection of the right to contract. Crouch v. Cent. Labor Council, (1930) 134 Or 612, 293 P 729, 83 ALR 193.

FURTHER CITATIONS: Federal Cartridge Corp. v. Helstrom, (1954) 202 Or 557, 276 P2d 720.

Article I

Bill of Rights

Section 1

NOTES OF DECISIONS

A law prohibiting barbering on Sunday did not conflict with the declaration in this section that all men are equal in right. Ex parte Northrup, (1902) 41 Or 489, 69 P 445.

A law limiting the working hours of female employes did not violate the declaration of this section that all men are equal in right. State v. Muller, (1906) 48 Or 252, 85 P 855, 120 Am St Rep 805, 11 Ann Cas 88, aff'd on other grounds, (1908) 208 US 412, 28 S Ct 324, 52 L Ed 551, 13 Ann Cas 957.

A law limiting the employment of children under 16 years of age did not violate the declaration in this section that all men are equal in right. State v. Shorey, (1906) 48 Or 396, 86 P 881, 24 LRA(NS) 1121.

This section is authority for the people to strip the legislature of every power it enjoys. Kalich v. Knapp, (1914) 73 Or 558, 582, 142 P 591, 145 P 22, Ann Cas 1916E, 1051.

The declaration in this section that governments are instituted for the peace, safety and happiness of the people makes the general welfare of the people one of the lawful objects of the exercise of the police power of the government. Portland v. Public Serv. Comm., (1918) 89 Or 325, 173 P 1178.

The word "men," as used in the declaration that all men are equal in right, includes women. State v. Chase, (1923) 106 Or 263, 211 P 920.

This section was cited in holding that regulation of hotels and lodging houses was a proper subject for legislative action under the police power. Daniels v. Portland, (1928) 124 Or 677, 265 P 790, 59 ALR 512.

The Alien Land Law effectively denying certain aliens not eligible for citizenship the right to acquire, possess, enjoy and transfer interests in real property, providing for escheat to the state of interests illegally acquired and containing other discriminatory provisions, violated this section. Namba v. McCourt, (1949) 185 Or 579, 204 P2d 569.

A provision in a will stating that a beneficiary would forfeit her rights if she married a Catholic before she reached 32 was valid. United States Nat. Bank v. Snodgrass, (1954) 202 Or 530, 275 P2d 860.

The negligent homicide statute predicating criminality upon negligence did not violate this section. State v. Wojahn, (1955) 204 Or 84, 282 P2d 675.

The acreage tax on Class C forest lands was constitutional as an exercise of the police power. Sproul v. State Tax Comm., (1963) 234 Or 579, 383 P2d 754.

The statute, requiring protective headgear on cyclists, bears a real relationship to public safety and was constitutional. State v. Fetterly, (1969) 254 Or 47, 456 P2d 996.

FURTHER CITATIONS: Federal Cartridge Corp. v. Helstrom, (1954) 202 Or 557, 276 P2d 720; Smallman v. Gladden, (1956) 206 Or 262, 291 P2d 749; Scales v. United States, (1961) 367 US 203, 275, 81 S Ct 1469, 6 L Ed 2d 782; Priester v. Thrall, (1961) 229 Or 184, 349 P2d 866, 365 P2d 1050; Scales v. Spencer, (1967) 246 Or 111, 424 P2d 242.

ATTY. GEN. OPINIONS: Effective date of Act referred to people, 1948-50, p 431; Philippine citizens and corporations engaging in business in Oregon, 1966-68, p 154.

LAW REVIEW CITATIONS: 44 OLR 123; 49 OLR 127-187.

Section 2

NOTES OF DECISIONS

The guaranty of religious freedom in the Federal Constitution is identical in meaning with the constitutional provisions of this state relative to the same right although expressed in different language. Portland v. Thornton, (1944) 174 Or 508, 149 P2d 972, cert. denied, 323 US 770, 65 S Ct 123, 89 L Ed 616; Baer v. City of Bend, (1956) 206 Or 221, 292 P2d 134.

The people are entitled, as an incident of the right which this section guarantees, to form associations, organize churches, establish theological seminaries, and acquire property for the accomplishment of these ends. Liggett v. Ladd, (1888) 17 Or 89, 95, 21 P 133.

The word "men," as used in this section, includes women. State v. Chase, (1923) 106 Or 263, 271, 211 P 920.

A provision in a will stating that a devisee would forfeit her rights if she married a Catholic before she reached 32 was valid. United States Nat. Bank v. Snodgrass, (1954) 202 Or 530, 275 P2d 860.

Fluoridation of city water supply did not violate this section. Baer v. City of Bend, (1956) 206 Or 221, 292 P2d 134.

Action of the city council in denying a building permit to a religious corporation to build a church in a zoned district because of traffic congestion and depreciation in property values was a reasonable exercise of police power and, under these circumstances, was not unconstitutional under this section. Jehovah's Witnesses v. Mullen, (1958) 214 Or 281, 330 P2d 5, cert. denied, 359 US 436, 79 S Ct 940, 3 L Ed 2d 932, 74 ALR2d 347.

The erection and maintenance of a cross in a city park, with the city's permission, violated this section. Lowe v. Eugene, (1969) 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360, cert. denied, 397 US 1042.

FURTHER CITATIONS: Alexander v. Gladden, (1955) 205 Or 375, 288 P2d 219; Dilger v. Sch. Dist. 24CJ, (1960) 222 Or 108, 132, 352 P2d 564.

ATTY. GEN. OPINIONS: The subject "Bible study" as within prohibition against teaching religious education in schools, 1952-54, p 46; religious prohibitions of public school student against taking showers and against running, 1952-54, p 53; requiring Saturday attendance at Oregon Dental School, 1956-58, p 5; construction of chapel at state institution, 1956-58, p 257; distribution of Gideon Bibles in public schools, 1964-66, p 209; effect of this section on authority of state to include parochial schools in plan to administer federal aid funds for instructional material, 1966-68, p 14; constitutionality of allowing prayers by student body chaplain, 1966-68, p 354.

LAW REVIEW CITATIONS: 18 OLR 122; 49 OLR 184.

Section 3

NOTES OF DECISIONS

The guaranty of religious freedom in the Federal Constitution is identical in meaning with the constitutional provisions of this state relative to the same right although expressed in different language. Portland v. Thornton, (1944) 174 Or 508, 149 P2d 972, cert. denied, 323 US 770, 65 S Ct 123, 89 L Ed 616; Baer v. City of Bend, (1956) 206 Or 221, 292 P2d 134.

A statute relating to the transaction of business on Sunday did not violate this section. Brunswick-Balke-Collander Co. v. Evans, (1916) 228 Fed 991.

Fluoridation of city water supply did not violate this section. Baer v. City of Bend, (1956) 206 Or 221, 292 P2d 134.

FURTHER CITATIONS: United States Nat. Bank v. Snodgrass, (1954) 202 Or 530, 275 P2d 860; Dilger v. Sch. Dist. 24CJ, (1960) 222 Or 108, 132, 352 P2d 564; Lowe v. City of Eugene, (1969) 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360.

ATTY. GEN. OPINIONS: Rule requiring pupils to salute the flag, 1938-40, p 565; the subject "Bible study" as within prohibition against teaching religious education in schools, 1952-54, p 46; religious prohibitions of public school student against taking showers and against running, 1952-54, p 53; application form asking whether applicant regularly attends house of worship, 1956-58, p 27; construction of chapel at state institution, 1956-58, p 257; distribution of Gideon Bibles in public schools, 1964-66, p 209; effect of this section on authority of state to include parochial schools in plan to administer federal aid funds for instructional material, 1966-68, p 14; constitutionality of allowing prayers by student body chaplain, 1966-68, p 354.

LAW REVIEW CITATIONS: 49 OLR 184.

Section 4

NOTES OF DECISIONS

The guaranty of religious freedom in the Federal Constitution is identical in meaning with the constitutional provisions of this state relative to the same right although expressed in different language. Portland v. Thornton, (1944) 174 Or 508, 149 P2d 972, cert. denied, 323 US 770, 65 S Ct 123, 89 L Ed 616; Baer v. City of Bend, (1956) 206 Or 221, 292 P2d 134.

Fluoridation of city water supply did not violate this section. Baer v. City of Bend, (1956) 206 Or 221, 292 P2d 134.

FURTHER CITATIONS: Dilger v. Sch. Dist. 24CJ, (1960) 222 Or 108, 132, 352 P2d 564; Lowe v. Eugene, (1969) 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360.

LAW REVIEW CITATIONS: 49 OLR 184.

Section 5

NOTES OF DECISIONS

The free textbook statute, ORS 337.150, violated this section. Dickman v. Sch. Dist. 62C, (1961) 232 Or 238, 366 P2d 533, 371 US 823, 83 S Ct 41, 9 L Ed 2d 62, 93 ALR2d 969.

The erection and maintenance of a cross in a city park, with the city's permission, violated this section. Lowe v. Eugene, (1969) 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360, cert denied, 397 US 1042.

FURTHER CITATIONS: Dilger v. Sch. Dist. 24CJ, (1960) 222 Or 108, 132, 352 P2d 564; State v. Buchanan, (1968) 250 Or 244, 436 P2d 729.

ATTY. GEN. OPINIONS: Gift by religious sect to institution receiving money from state, 1924-26, p 14; appropriation of school funds for religious education, 1926-28, p 587; maintenance of chapel and employment of chaplain at an institution of higher education, 1948-50, p 59; the subject "Bible study" as within prohibition against teaching religious education in schools, 1952-54, p 46; construction of chapel at

state institution, 1956-58, p 257; free textbooks to parochial schools, 1960-62, p 430; constitutionality of religious ceremonies at graduation, 1962-64, p 429; distribution of Gideon Bibles in public schools, 1964-66, p 209; effect of this section on authority of state to include parochial schools in plan to administer federal aid funds for instructional material, 1966-68, p 14; constitutionality of granting Hill-Burton funds for a facility operated by a religious sect, 1966-68, p 351; constitutionality of allowing prayers by student body chaplain, 1966-68, p 354; state aid to students at private institutions of higher education, (1968) Vol 34, p 109; state aid to students attending private or parochial schools, (1970) Vol 35, p 262; using state grants for tuition at religious educational institution, contracts for secular instruction at religious institutions, (1971) Vol 35, p 483.

LAW REVIEW CITATIONS: 49 OLR 134, 184; 4 WLJ 509.

Section 6

NOTES OF DECISIONS

Dying declarations are admissible without proof that the decedent entertained religious belief. State v. Ah Lee, (1880) 8 Or 214.

Evidence that deceased did not believe in future rewards or punishments may not be considered as bearing on the credibility of his dying declaration. State v. Yee Gueng, (1910) 57 Or 509, 112 P 424. **Contra,** Goodall v. State, (1857) 1 Or 333, 80 Am Dec 396.

This section applies to character witnesses. State v. Estabrook, (1939) 162 Or 476, 91 P2d 838.

This section prevents the examination of a witness as to tenets of the Christian Science Church and the particulars of his religious beliefs. Id.

Whether the prohibition in this section, against inquiry into the religious beliefs of prospective jurors, would prevent defendant from receiving a fair trial can not be raised by demurrer. State v. Barnett, (1967) 248 Or 614, 433 P2d 1018.

This section does not prevent a prospective juror being asked his religious belief. State v. Barnett, (1968) 251 Or 234, 445 P2d 124.

FURTHER CITATIONS: Dilger v. Sch. Dist. 24CJ, (1960) 222 Or 108, 132, 352 P2d 564; State v. Barnett, (1968) 249 Or 226, 436 P2d 821, 34 ALR3d 852; Lowe v. Eugene, (1969) 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360.

LAW REVIEW CITATIONS: 41 OLR 333; 49 OLR 184.

Section 7

NOTES OF DECISIONS

"May" should not be construed to mean "must". Andros v. Dept. of Motor Vehicles, (1971) 5 Or App 418, 485 P2d 635.

ATTY. GEN. OPINIONS: Affirming rather than swearing to loyalty oath, 1952-54, p 251.

LAW REVIEW CITATIONS: 49 OLR 184.

Section 8

NOTES OF DECISIONS

Libelous publications are not made lawful by this section. Upton v. Hume, (1893) 24 Or 420, 33 P 810, 41 Am St Rep 863, 21 LRA 493; Kilgore v. Koen, (1930) 133 Or 1, 288 P 192.

Criminal syndicalism statutes did not violate this section. State v. Laundy, (1922) 103 Or 443, 204 P 958, 206 P 290; State v. De Jonge, (1936) 152 Or 315, 51 P2d 674; State v. Pugh, (1935) 151 Or 561, 51 P2d 827; State v. Denny, (1936) 152 Or 541, 53 P2d 713.

An injunction to restrain picketing is not forbidden by this section where no actual bona fide dispute exists concerning terms or conditions of employment and the purpose of the picketing is to injure such business. Crouch v. Cent. Labor Council, (1930) 134 Or 612, 293 P 729, 83 ALR 193; Moreland Theatres Corp. v. Portland Moving Picture Mach. Operators' Protective Union, (1932) 140 Or 35, 12 P2d 333.

Anti-picketing ordinance was invalid. Hall v. Johnson, (1917) 87 Or 21, 169 P 515, Ann Cas 1918E, 49.

The term "law," as used in this section, includes a court order. Crouch v. Cent. Labor Council, (1930) 134 Or 612, 293 P 729, 83 ALR 193.

The civil service law was constitutional. Stowe v. Ryan, (1931) 135 Or 371, 296 P 857.

As to courtroom proceedings, liberty of the press should not be carried to the point of an undue abridgement of the court's own freedom. State v. Langley, (1958) 214 Or 445, 315 P2d 560, 323 P2d 301, cert. denied, 358 US 826, 79 S Ct 45, 3 L Ed 2d 66.

ORS 167.150 (1), former statute prohibiting publication, etc., of obscene material, imposed no prior restraint. State v. Jackson, (1960) 224 Or 337, 356 P2d 495.

Retraction statute governing actions for defamation was not unconstitutional under this section. Holden v. Pioneer Broadcasting Co., (1961) 228 Or 405, 365 P2d 845, cert. denied, 370 US 157, 82 S Ct 1253, 8 L Ed 2d 402.

A city has constitutional remedies by injunction against abuse of the liberty protected by this section. Portland v. Welch, (1961) 229 Or 308, 364 P2d 1009, 367 P2d 403.

Censorship by licensing is a prior restraint and unconstitutional. Id.

This provision applies to motion pictures. Id.

ORS 241.520, former statute prohibiting a county civil servant from being a candidate for public office, was an unconstitutional abridgement of this section because of overbreadth. Minielly v. State, (1966) 242 Or 490, 411 P2d 69, 28 ALR3d 705.

A reporter may not preserve the anonymity of an informer in the face of a court order requiring disclosure. State v. Buchanan, (1968) 250 Or 244, 436 P2d 729, cert. denied, 392 US 905.

A statute prohibiting political advertising on election day was invalid under this section and U.S. Const., Am. 1. KPOJ, Inc. v. Thornton, (1969) 253 Or 512, 456 P2d 76.

Labor newspaper had a right to publish and sell papers containing references to an employer and his business. Crouch v. Cent. Labor Council, (1930) 134 Or 612, 293 P 729, 83 ALR 193.

FURTHER CITATIONS: Fordham v. Stearns, (1927) 122 Or 311, 258 P 822; State v. Mesher, (1962) 231 Or 436, 373 P2d 410; Martin v. Reynolds Metals Co., (1963) 224 F Supp 978; Brush v. State Bd. of Higher Educ., (1966) 245 Or 373, 422 P2d 268; State v. Childs, (1968) 252 Or 91, 447 P2d 304; State v. Sands, (1970) 2 Or App 575, 469 P2d 795, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Restriction of picketing, 1952-54, p 118; validity of law relating to defamation actions against periodicals, radio and television, 1954-56, p 74; constitutionality of restricting endorsement of candidates by political parties, 1960-62, p 192; relation to statute prohibiting unlawful electioneering, 1960-62, p 444; constitutionality of proposal to bar persons registering under Subversive Activities Control Act from using tax supported buildings, 1964-66, p 163; restricting the use of the term "re-elect" in voting material, 1966-68, p 150; validity of prohibition against picketing during harvesting of perishable crops, (1970) Vol 35, p 305; constitutionality of proposed legislation to regulate

labor relations between agricultural employes and employers, (1971) Vol 35, p 744.

LAW REVIEW CITATIONS: 33 OLR 73; 36 OLR 75; 41 OLR 170-172; 47 OLR 248; 49 OLR 137, 184.

Section 9

NOTES OF DECISIONS
1. In general
2. Unreasonable search and seizure
3. Issuance of warrants
4. Admissibility of illegally obtained evidence

1. In general

The prohibition is addressed not only to the legislature, but to every officer of the state, including the judiciary. State v. McDaniel, (1925) 115 Or 187, 231 P 965, 237 P 373; State v. Duffy, (1931) 135 Or 290, 297, 295 P 953.

This provision applies solely to search and seizure by governmental officers or agents and does not prevent admission of evidence unlawfully obtained by private individuals. Walker v. Penner, (1951) 190 Or 542, 227 P2d 316; State v. Olsen, (1957) 212 Or 191, 317 P2d 938.

This provision, and the statute regulating procedure thereunder, are mandatory, and are to be strictly construed in favor of the individual. State v. McDaniel, (1925) 115 Or 187, 231 P 265, 237 P 377.

This section shall be construed in conformity with the principles of the common law. State v. Lee, (1927) 120 Or 643, 253 P 533.

An arrest for one offense may justify seizure of property used in the commission of other offenses. State v. Johnson, (1962) 232 Or 118, 374 P2d 481.

When evidence has been taken under a search warrant, the burden of showing the illegality of its seizure is upon the defendant. State v. Sanford, (1966) 245 Or 397, 421 P2d 988.

This section does not prohibit the admission of evidence obtained by private individuals who, without the knowledge or participation of law enforcement officers, conduct their own search. State v. Bryan, (1969) 1 Or App 15, 457 P2d 661.

To challenge a search warrant on appeal, it and any other papers essential to a decision must be included in the record. State v. Cameron, (1969) 1 Or App 247, 462 P2d 529.

Prison authorities may subject inmates to institutional searches unimpeded by Fourth Amendment barriers. State v. Brotherton (dictum), (1970) 2 Or App 157, 465 P2d 749, Sup Ct **review denied.**

A valid search may be conducted based upon the voluntary consent of the defendant. State v. Hinsvark, (1970) 3 Or App 195, 471 P2d 859, Sup Ct **review denied.**

If the evidence with reference to consent is in conflict, the issue is one of fact for the trial court. Id.

Probable cause to arrest is the sum total of information and the synthesis of what the police have heard, what they know and what they observe as trained officers. State v. Shaw, (1970) 3 Or App 346, 473 P2d 159, Sup Ct **review denied.**

Illegally seized evidence should only be excluded in a criminal or quasicriminal proceeding and if obtained by law enforcement officers investigating criminal activity. State Forester v. Umpqua R. Nav. Co., (1970) 258 Or 10, 478 P2d 631.

The defendant had abandoned the premises prior to the search, and so a warrantless search was proper. State v. Maxfield, (1970) 3 Or App 308, 472 P2d 845, Sup Ct **review denied.**

2. Unreasonable search and seizure

A search may follow an arrest even though the arrest is for a violation which does not import a search. State v. Hayes, (1926) 119 Or 293, 249 P2d 637; State v. Christensen, (1935) 151 Or 529, 51 P2d 835.

If there is a bona fide arrest for a known offense the officer may make a search as an incident of the arrest. State v. Chinn, (1962) 231 Or 259, 373 P2d 392; State v. McKenzie, (1962) 232 Or 633, 377 P2d 18; State v. Cloman, (1969) 254 Or 1, 456 P2d 67; State v. Newcomer, (1970) 2 Or App 181, 465 P2d 916, Sup Ct **review denied.**

Objects observed at the time of arrest during a search (without a warrant) reasonable as to space, time, and intensity may be seized if such objects could lawfully have been seized under a search warrant. State v. Chinn, (1962) 231 Or 259, 373 P2d 392; State v. Elk, (1968) 249 Or 614, 439 P2d 1011; State v. Cloman, (1969) 254 Or 1, 456 P2d 67.

Evidence of a crime in plain view from a place where an officer is entitled to be is subject to seizure. State v. Brown, (1969) 1 Or App 322, 461 P2d 836, Sup Ct **review denied;** State v. Robbins, (1970) 3 Or App 472, 474 P2d 772; State v. Elliott, (1971) 92 Or App Adv Sh 1812, 486 P2d 1296, Sup Ct **review denied.**

Police may search without warrant if there is probable cause to search and if they have probable cause to believe that an immediate search is necessary to protect the safety of an officer or bystander or to avoid the loss of evidence. State v. Keith, (1970) 2 Or App 133, 465 P2d 724, Sup Ct **review denied;** State v. Murphy, (1970) 2 Or App 251, 465 P2d 900, Sup Ct **review denied;** State v. Peterson, (1970) 3 Or App 17, 469 P2d 40, Sup Ct **review denied;** State v. Edwards, (1970) 3 Or App 179, 471 P2d 843, Sup Ct **review denied;** State v. Murphy, (1970) 3 Or App 82, 471 P2d 863; State v. Diaz, (1970) 3 Or App 498, 473 P2d 675, Sup Ct **review denied;** State v. Erickson, (1970) 4 Or App 119, 476 P2d 944; State v. Hall, (1970) 4 Or App 30, 476 P2d 930.

A search by an officer without a warrant, not as an incident of an arrest, is within the purview of the constitutional prohibition. State v. McDaniel, (1925) 115 Or 187, 231 P 965, 237 P 373.

An officer may arrest and search a person for a crime committed in his presence, but if he does not arrest such person he cannot search him without a search warrant. Id.

Reasonableness is determined by the place searched, the thing seized, the circumstances of the search and seizure, and the presence or absence of probable cause therefor. State v. Lee, (1927) 120 Or 643, 253 P 533.

The Constitution denounces "unreasonable" searches and seizures; and the force of the word "unreasonable" is not to be disregarded. State v. De Ford, (1927) 120 Or 444, 250 P 220.

The presence or absence of a warrant is not determinative of the question. Id.

A statute permitting search without a warrant where an officer has reason to suspect a violation of law, was valid. Id.

An officer effecting an arrest may lawfully seize the instrumentality with which the crime has been committed. State v. Duffy, (1931) 135 Or 290, 297, 295 P 953.

The search of an automobile can be more readily sustained than that of a stationary piece of property. Id.

The fact that the search precedes the arrest does not render it illegal. Id.

Seeing a violation of law authorizes an officer to seize an instrumentality by which the violation is accomplished. State v. Walker, (1931) 135 Or 680, 296 P 850.

That the accused is not the owner of the seized property does not render the seizure unlawful. State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

Proof of waiver of this constitutional protection need be only by clear and convincing evidence, not beyond a reasonable doubt. State v. Marshall, (1963) 234 Or 183, 380 P2d 799.

Before an officer has a right to seize the implements of a crime committed in his presence, other than that for which the arrest was made, he must have reasonable grounds to believe the article is contraband and therefore another crime is being committed. State v. Elkins, (1966) 245 Or 279, 422 P2d 250.

A search without a lawful arrest cannot be sustained. State v. Rater, (1969) 253 Or 109, 453 P2d 680.

Open-field investigation, even though upon private property, is not unreasonable. State v. Brown, (1969) 1 Or App 322, 461 P2d 836, Sup Ct **review denied.**

Recording of telephone conversation with the consent of one of the parties does not constitute an unreasonable search and seizure to the nonconsenting party. State v. Young, (1970) 1 Or App 562, 463 P2d 374, Sup Ct **review denied.**

Evidence seized in a search that goes beyond the authority of the warrant is inadmissible. State v. Hawkins, (1970) 255 Or 39, 463 P2d 858.

Officer may search for weapon when juvenile is taken into temporary custody and may seize contraband discovered during such search. State v. Brammeier, (1970) 1 Or App 612, 464 P2d 717, Sup Ct **review denied.**

Whether the police did, in fact, arrest the defendant at the time they had probable cause to do so is immaterial in determining the reasonableness of the search which resulted in the seizure of the evidence. State v. Dixon, (1971) 5 Or App 113, 481 P2d 629.

The burden is on the state to prove reasonable cause for a warrantless search. State v. Fisher, (1971) 5 Or App 483, 484 P2d 864.

A routine traffic stop is of itself not sufficient cause for making a warrantless search. Id.

The right to search an automobile glove compartment at the time of a warrantless arrest is not conditioned upon using a key to open the compartment. State v. Knutson, (1970) 5 Or App 344, 485 P2d 875.

The search and seizure were reasonable because of the facts observed before the search. State v. Turner, (1964) 237 Or 609, 390 P2d 177; State v. Riley, (1965) 240 Or 521, 402 P2d 741; State v. Erickson, (1970) 1 Or App 546, 464 P2d 707; State v. Murphy, (1970) 2 Or App 251, 465 P2d 900, Sup Ct **review denied.**

Search of defendant's apartment without a warrant was unreasonable. State v. Howell, (1964) 238 Or 251, 393 P2d 158; State v. Brothers, (1970) 4 Or App 253, 478 P2d 442.

The search was not unreasonable. State v. Barron, (1964) 238 Or 527, 395 P2d 158, cert. denied, 380 US 920; State v. Jones, (1968) 249 Or 55, 436 P2d 110; State v. McCoy, (1968) 249 Or 160, 437 P2d 734; State v. Elk, (1968) 249 Or 614, 439 P2d 1011; State v. Keith, (1970) 2 Or App 133, 465 P2d 724, Sup Ct **review denied**; State v. Diaz, (1970) 3 Or App 498, 473 P2d 675, Sup Ct **review denied**; State v. Douglas, (1971) 5 Or App 175, 481 P2d 653.

Subpena duces tecum, requiring production of plaintiff's records showing persons from whom plaintiff had purchased forest products, and the amounts, during a specified year, did not violate this section, although plaintiff was not under investigation. Pope & Talbot, Inc. v. State Tax Comm., (1959) 216 Or 605, 340 P2d 960.

When defendant was stopped by police officer, acting upon third parties' information and the whole episode from halting to discovery of the gun and making of arrest took only minutes, search and seizure did not violate this section regardless of whether search preceded or followed arrest. State v. Hoover, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695.

The search was not related to the original arrest or any lawful subsequent arrest of the relators and was unreasonable and without probable cause. United States ex rel. Krogness v. Gladden, (1965) 242 F Supp 499. Superseding State v. Krogness, (1963) 238 Or 135, 388 P2d 120.

A subpena issued pursuant to ORS 657.630 was not an unreasonable search and seizure. State ex rel. Cameron v. Van Drimmelen, (1965) 240 Or 347, 401 P2d 298.

The search was illegal because the arrest was illegal. State v. Roderick, (1966) 243 Or 105, 412 P2d 17.

The seizure was lawful. State v. Tracy, (1967) 246 Or 349, 425 P2d 171.

Other evidence related to the crime, which was found while making a search for a specific purpose with the consent of another person involved in the crime, was admissible. State v. Frazier, (1966) 245 Or 4, 418 P2d 841.

Even though defendant's original detention was illegal, he was lawfully arrested at the police station before he was searched. State v. Dempster, (1967) 248 Or 404, 434 P2d 746.

Removal of trash, containing evidence, from hotel room by maids, did not constitute an unlawful invasion of defendant's privacy. State v. Purvis, (1968) 249 Or 404, 438 P2d 1002.

As an incident of the arrest, the officer was entitled to search for any weapons that might imperil him. State v. Cole, (1968) 252 Or 146, 448 P2d 523.

Motion to suppress was properly denied when the articles were validly seized from a person in custody under ORS 426.215. State v. Marsh, (1969) 1 Or App 351, 462 P2d 459.

The search was incident to a lawful arrest. State v. Newcomer, (1970) 2 Or App 181, 465 P2d 916, Sup Ct **review denied.**

There was probable cause to search for and seize the evidence of the crime. State v. Shaw, (1970) 3 Or App 346, 473 P2d 159, Sup Ct **review denied.**

3. Issuance of warrants

A search warrant may be based on hearsay but there must be in the affidavit a substantial basis for crediting the hearsay. State v. Dunavant, (1968) 250 Or 570, 444 P2d 1; State v. Flores, (1968) 251 Or 628, 447 P2d 387; Wright v. Cupp, (1970) 3 Or App 586, 475 P2d 979.

Where the record reveals adequate proof of probable cause without the informer's identity, the defendant has no right to insist upon disclosure of his identity. State v. Cortman, (1968) 251 Or 566, 446 P2d 681, cert. denied, 394 US 951; State v. Evans, (1970) 1 Or App 489, 463 P2d 378, Sup Ct **review denied.**

The requirement of probable cause may be satisfied by hearsay information if (1) the affidavit sets forth sufficient underlying circumstances to enable the magistrate independently to judge the validity of the informant's conclusions, and (2) if the affiant supports his claim that the informant was credible or his information reliable. State v. Dinney, (1969) 1 Or App 473, 462 P2d 698, Sup Ct **review denied**; State v. Miller, (1970) 2 Or App 87, 465 P2d 894, Sup Ct **review denied.**

An adequate description of the premises to be searched is essential to the validity of a search warrant. Smith v. McDuffee, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

An affidavit showing probable cause to believe that the law has been violated is essential to the lawful issuance of a search warrant; affidavits on information and belief or alleging only legal conclusions being insufficient. State v. Quartier, (1925) 114 Or 657, 236 P 746.

The averments of the affidavit are not to be viewed with greater strictness than those for the issuance of a warrant charging the commission of a crime. State v. Flynn, (1931) 137 Or 8, 20, 299 P 694, 300 P 1024.

Determining probable cause is a judicial function. Id.

A verified information was sufficient basis for issuance of search warrant. Id.

An action of malicious prosecution may be maintained against one obtaining a search warrant without probable cause. Peterson v. Cleaver, (1928) 124 Or 547, 265 P 428.

An affidavit based on hearsay, if sufficient to convince

the issuing magistrate, is sufficient for issuance of a valid search warrant. State v. Tacker, (1965) 241 Or 597, 407 P2d 851, 10 ALR 3d 355.

When there is consent to the search, no warrant is necessary. State v. Pogue, (1966) 243 Or 163, 412 P2d 28.

A description of the premises is sufficient if it permits the officer executing the warrant to locate with reasonable effort the premises to be searched. State v. Cortman, (1968) 251 Or 566, 446 P2d 681, cert. denied, 394 US 951.

The affidavit must set forth facts sufficient to support the assertion of the informant that the accused is engaged in criminal activity. State v. McDonald, (1969) 253 Or 533, 456 P2d 80.

Where hearsay is corroborated by sufficient facts within affiant's knowledge, hearsay is sufficient to justify probable cause for issuance of a warrant. State v. Spicer, (1969) 254 Or 68, 456 P2d 965.

The affidavit must be tested and interpreted in a common sense and realistic fashion. Id.

Even if the information on which search warrant is based is gained by committing a trespass, it will not invalidate the subsequent warrant seizure of evidence in plain sight. State v. Brown, (1969) 1 Or App 322, 461 P2d 836, Sup Ct **review denied.**

The recital of illegally obtained evidence, if any, in the affidavit, does not invalidate the warrant, provided the other information in the affidavit shows probable cause. State v. Albertson, (1969) 1 Or App 486, 462 P2d 458, Sup Ct **review denied.**

The mere filing of a criminal complaint does not ipso facto solo constitute the probable cause for issuance of a warrant of arrest. State v. Redeman, (1971) 92 Or App Adv Sh 1197, 485 P2d 655, 486 P2d 1311.

Probable cause exists where the facts and circumstances within the officer's knowledge and of which he had reasonably trust worthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Elliott, (1971) 92 Or App Adv Sh 1812, 486 P2d 1296, Sup Ct **review denied.**

The affidavit was defective in view of the time lapse between the facts reported in and the date of the affidavit. State v. Ingram, (1968) 251 Or 324, 445 P2d 503; State v. Scheideman, (1968) 252 Or 70, 448 P2d 358; State v. Cameron, (1969) 1 Or App 247, 461 P2d 529.

The affidavit contained nothing to support a conclusion by the judge issuing the warrant that the informant was credible or his information reliable. Wright v. Cupp, (1970) 3 Or App 586, 475 P2d 979; State v. Leo, (1971) 4 Or App 543, 480 P2d 456.

Information gained without committing a trespass and without the aid of any electronic device could properly be made the basis for the issuance of a search warrant. State v. Cartwright, (1966) 246 Or 120, 418 P2d 822, cert. denied, 386 US 937.

The property and the place where it was to be seized were described with sufficient particularity. State v. Skrelunas, (1969) 1 Or App 82, 460 P2d 869.

The affidavit was sufficient. State v. Spicer, (1970) 3 Or App 120, 473 P2d 147.

4. Admissibility of illegally obtained evidence

Evidence illegally obtained by police officers may not be used by the state in a criminal prosecution. State v. Chinn, (1962) 231 Or 259, 373 P2d 392; State v. Krogness, (1963) 238 Or 135, 388 P2d 120, cert. denied, 377 US 992, 84 S Ct 1919, 12 L Ed 2d 1045.

Evidence seized in violation of the state and federal constitutions may not be used in a criminal prosecution. State v. Chinn, (1962) 231 Or 259, 373 P2d 392; State v. Johnson, (1962) 232 Or 118, 374 P2d 481.

A motion to suppress evidence must be made before trial, unless the defendant was unaware of the seizure or had no opportunity to present his motion before trial. State v. Haynes, (1962) 233 Or 292, 377 P2d 166; State v. Sanford, (1966) 245 Or 397, 421 P2d 988; State v. Cameron, (1969) 1 Or App 247, 461 P2d 529; State v. Marcus, (1970) 2 Or App 269, 467 P2d 121, Sup Ct **review denied.**

Evidence seized in a search that goes beyond the authority of the warrant is inadmissible. State v. Hawkins, (1970) 255 Or 39, 463 P2d 858.

The use in evidence of articles which have been taken by unlawful search or seizure was not permissible. State v. Laundy, (1922) 103 Or 443, 448, 204 P 958, 206 P 290; State v. McDaniel, (1925) 115 Or 187, 231 P 965, 237 P 373; State v. Hilton, (1926) 119 Or 441, 249 P 1103.

FURTHER CITATIONS: Slovanian Literary Assn. v. Portland, (1924) 111 Or 335, 224 P 1098; State v. Harris, (1926) 119 Or 422, 249 P 1046; White v. Pac. Tel. & Tel. Co., (1939) 162 Or 270, 90 P2d 193; Sprigg v. Stump, (1881) 8 Fed 207, 7 Sawy 280; Elkins v. United States, (1960) 364 US 206, 230, 80 S Ct 1452, 4 L Ed 2d 1685; Monroe v. Pape, (1961) 365 US 167, 209, 81 S Ct 473, 5 L Ed 2d 492; State v. Ervin, (1965) 241 Or 475, 406 P2d 901; United States ex rel. Krogness v. Gladden, (1965) 242 F Supp 499; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634; State v. Hill, (1967) 245 Or 510, 422 P2d 675; State v. Kipp, (1968) 249 Or 681, 440 P2d 369; Portland v. James, (1968) 251 Or 8, 444 P2d 554; State v. Olson, (1969) 1 Or App 380, 462 P2d 681; State v. Boyd, (1970) 3 Or App 222, 472 P2d 844.

ATTY. GEN. OPINIONS: Authorized searches under prohibition and game laws, 1920-22, pp 186, 214, 1922-24, p 714, 1928-30, pp 76, 611, 1930-32, p 427, 1936-38, p 578; information required for search warrants, 1922-24, p 522; search by special agents, 1936-38, p 424; statute required surrender of license as authority for search, 1946-48, p 425; chemical tests to establish intoxication, 1958-60, p 299; arrest for misdemeanor upon reasonable suspicion but without warrant, 1958-60, p 330; warrantless search of automobile for liquor under prohibition provisions, 1960-62, p 178.

LAW REVIEW CITATIONS: 3 OLR 179; 4 OLR 160; 5 OLR 244; 6 OLR 177; 14 OLR 355; 18 OLR 265; 44 OLR 330-335; 46 OLR 353-359; 49 OLR 133, 184; 4 WLJ 167, 247-261; 6 WLJ 431-448.

Section 10

NOTES OF DECISIONS

1. Administration of justice
   (1) Openly and without purchase
   (2) Without delay
2. Protection of remedies
3. Remedies against political subdivision

1. Administration of justice

(1) Openly and without purchase. The administration of justice "without purchase" means without bribery or exorbitant charges, but does not prevent the collection of reasonable fees as court costs. Bailey v. Frush, (1873) 5 Or 136; Northern Counties Trust v. Sears, (1897) 30 Or 388, 41 P 931, 35 LRA 188.

Inasmuch as justice is to be administered "openly," a newspaper may publish a fair report of a judicial proceeding. Thomas v. Bowen, (1896) 29 Or 258, 264, 45 P 768.

The court should not appoint inexperienced counsel in a capital case, and the guaranteed right of a fair and impartial trial is denied if such counsel is appointed. State v. Bouse, (1953) 199 Or 676, 264 P2d 800.

Although requirements of payment of fees for appeal bond, transcript and notice of appeal are an unconstitu-

tional requirement barring the appeal of an impoverished applicant on a state writ of habeas corpus, an applicant cannot apply for habeas corpus in the federal courts until he has exhausted all of his state remedies, including an original proceeding of habeas corpus in forma pauperis in the State Supreme Court. Daugharty v. Gladden, (1957) 150 F Supp 887, aff'd, 257 F2d 750, 760.

Where the Supreme Court knew virtually nothing about the appeal, appointment of counsel for indigent defendant on appeal was postponed until the transcript of record reached the court's files. State v. Delaney, (1960) 221 Or 620, 332 P2d 71, 351 P2d 85.

(2) Without delay. A defendant in a criminal action is, by this provision, guaranteed a speedy trial. State v. Breaw, (1904) 45 Or 586, 78 P 896; State v. Clark, (1917) 86 Or 464, 168 P 944; State v. Lee, (1924) 110 Or 682, 224 P 627.

Failure to make objection may lead to the conclusion that a defendant in a criminal action has waived his right to demand that justice be administered without delay. State v. Chapin, (1915) 74 Or 346, 144 P 1187; State v. Moss, (1919) 92 Or 449, 181 P 347.

The right to a speedy trial is waived by dilatory tactics on the part of the defendant. Johnston v. Circuit Court for Multnomah County, (1932) 140 Or 100, 12 P2d 1027; State v. Swain, (1934) 147 Or 207, 31 P2d 745, 32 P2d 773, 93 ALR 921; State v. Chadwick, (1935) 150 Or 645, 649, 47 P2d 232.

This section is construed to mean that there should be no unreasonable delay after a formal complaint has been filed. State v. Vawter, (1963) 236 Or 85, 386 P2d 915; State v. Evans, (1967) 249 Or 314, 432 P2d 175, cert denied, 390 US 971; State v. Downing, (1970) 4 Or App 269, 478 P2d 420.

Delay in bringing defendant to trial must not be purposeful or oppressive. State v. Sieckman, (1970) 3 Or App 454, 474 P2d 367; State v. Downing, (1970) 4 Or App 269, 478 P2d 420.

The fact that litigation has been prolonged may cause the appellate court to refuse to remand the case. Hough v. Porter, (1909) 51 Or 318, 449, 95 P 732, 98 P 1083, 102 P 728.

A speedy trial is one which is had as soon as the prosecution can with reasonable diligence prepare for it. State v. Harris, (1921) 101 Or 410, 415, 200 P 926.

Abuse of the court's power to grant an extension of time for bills of exceptions violated this section. Hooton v. Jarman Chevrolet Co., (1931) 135 Or 269, 293 P 604, 296 P 36.

A defendant does not necessarily receive a speedy trial by being tried in the next term of court following the term in which the indictment was returned. State v. Kuhnhausen, (1954) 201 Or 478, 266 P2d 698, 272 P2d 225.

ORS 134.120 does not define "without delay" for this section. Id.

Injury is presumed from unreasonable delay. Bock v. Portland Gas & Coke Co., (1954) 202 Or 609, 277 P2d 758.

The requirement of a speedy trial may be waived by voluntary consent of the accused, which remains effective until withdrawn. State v. D'Autremont, (1957) 212 Or 344, 317 P2d 932.

A defendant tried and convicted in a justice or district court who appeals to the circuit court has the burden to prosecute his appeal with reasonable diligence. State v. Dodson, (1961) 226 Or 458, 360 P2d 782.

The defendant does not forfeit his right to a speedy trial because he is in prison on another charge. State v. Vawter, (1963) 236 Or 85, 386 P2d 915. **But see** State v. Storm, (1966) 244 Or 357, 418 P2d 261 and State v. Evans, (1967) 249 Or 314, 432 P2d 175, cert. denied, 390 US 971.

A federal prisoner upon his request is entitled to a speedy trial of a criminal charge pending against him in Oregon. State v. Evans, (1967) 249 Or 314, 432 P2d 175, cert. denied, 390 US 971.

This section does not require the final dismissal of a juvenile proceeding when a summons has not been issued within 60 days after the original petition is filed. State v. Zauner, (1968) 250 Or 96, 441 P2d 81.

Consideration must be given to at least three basic factors in judging the reasonableness of a particular delay: the source of the delay, the reason for it and whether the delay prejudiced interests protected by the speedy trial clause. State v. Robinson, (1970) 3 Or App 200, 473 P2d 152.

Reasonable statutory procedural requirements may be adopted to implement the requirement of a speedy trial. State v. Downing, (1970) 4 Or App 269, 478 P2d 420.

Under the circumstances, a period of 10 months from offense to trial was not undue delay. State v. Hays, (1969) 1 Or App 347, 462 P2d 702; State v. Rowley, (1971) 92 Or App Adv Sh 1386, 485 P2d 1120, Sup Ct **review denied.**

The defendant was not denied the right to a speedy trial when his trial was postponed beyond the next term of court in which the indictment was triable without good cause. State v. Kuhnhausen, (1954) 201 Or 478, 266 P2d 698, 272 P2d 225.

Defendant by his demurrer consented to reasonable delay, including court's unattacked orders continuing the cause from one term to the next. State v. Robinson, (1959) 217 Or 612, 343 P2d 886.

The delay occasioned by the state exercising its statutory right to appeal in a criminal case was not prohibited by the state or federal constitutions. State v. Robinson, (1970) 3 Or App 200, 473 P2d 152.

2. Protection of remedies

Arbitration agreements did not violate this section. School Dist. 48 v. Sch. Dist. 115, (1911) 60 Or 38, 118 P 169; Rueda v. Union Pac. R.R. (1936) 180 Or 133, 175 P2d 778.

Vested rights are protected by this section but not expectancies or possibilities. Templeton v. Linn County, (1892) 22 Or 313, 29 P 795, 15 LRA 730.

For injury to one's reputation this section guarantees a remedy. Thomas v. Bowen, (1896) 29 Or 258, 264, 45 P 768.

An Indian has, by virtue of this provision, a right to sue in the state courts. Smith v. Mosgrove, (1909) 51 Or 495, 94 P 970.

The right to appeal is not guaranteed by this section. Clay v. Clay, (1910) 56 Or 538, 108 P 119, 109 P 129.

An injunction against a public officer for violation of private rights is as available under this section as is any other remedy. Wiegand v. West, (1914) 73 Or 249, 254, 144 P 481.

The workmen's compensation law did not contravene this section. Evanhoff v. State Ind. Acc. Comm., (1915) 78 Or 503, 517, 154 P 106.

The fact that damage is slight does not justify denial of a remedy. Talbot v. Joseph, (1916) 79 Or 308, 317, 155 P 184.

A testamentary provision which purports to forfeit a devise or bequest in the event that the devisee or legatee contests the validity of the will is invalid as being an attempt to deprive the contestant of a remedy which the law accords to him. Wadsworth v. Brigham, (1928) 125 Or 428, 259 P 299, 266 P 875.

A fair and full hearing on the merits is assured by this section. Carter v. La Dee Logging Co., (1933) 142 Or 439, 18 P2d 234, 20 P2d 1086.

Rights which were recognized prior to the adoption of the Constitution were intended by this section to be protected from invasion by Act of legislature. Stewart v. Houk, (1928) 127 Or 589, 271 P 998, 272 P 893, 61 ALR 1236.

Statute relieving driver of vehicle from liability for injury to guest was constitutional. Perozzi v. Ganiere, (1935) 149 Or 330, 350, 40 P2d 1009. **But see** Stewart v. Houk, (1928) 127 Or 589, 271 P 998, 272 P 893, 61 ALR 1236.

Fishermen are entitled to maintain suit to enjoin acts which destroy their nets and interfere with their fishing.

Columbia R. Fishermen's Protective Union v. City of St. Helens, (1939) 160 Or 654, 87 P2d 195.

This section does not prevent the creation of new rights or the abolition of rights recognized by the common law. Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808.

An action lies for libelous matter contained in a will published after the death of a testator. Kleinschmidt v. Matthieu, (1954) 201 Or 406, 269 P2d 686.

Notice and right to be heard of nonconsenting parent satisfy the due process requirement where parent with legal custody consents to adoption. Burdell v. Simpson, (1955) 203 Or 472, 280 P2d 368.

When a husband inflicts intentional harm upon the person of his wife she may maintain an action. Apitz v. Dames, (1955) 205 Or 242, 287 P2d 585.

This section did not give a wife a right of action against her husband for damages caused by his negligence. Smith v. Smith, (1955) 205 Or 286, 287 P2d 572.

A child has a cause of action for injuries sustained by her before birth while she was a viable child. Mallison v. Pomeroy, (1955) 205 Or 690, 291 P2d 225.

This article does not purport to grant a right of appeal in any case, civil or criminal. State v. Endsley, (1958) 214 Or 537, 331 P2d 338.

"Due course of law" need not be given a limited meaning, requiring some form of judicial procedure to adjust the remedy. Holden v. Pioneer Broadcasting Co., (1961) 228 Or 405, 365 P2d 845, cert. denied, 370 US 157, 82 S Ct 1253, 8 L Ed 2d 402.

The legislature may limit the remedy previously available to one injured by a tort-feasor. Holden v. Pioneer Broadcasting Co., (1961) 228 Or 405, 365 P2d 845, cert. denied, 370 US 157, 82 S Ct 1253, 8 L Ed 2d 402. **But see** Stewart v. Houk, (1928) 127 Or 589, 271 P 998, 272 P 893.

Due process of law requires there be some correlation between a parent's conduct as a parent and the state's power to cut off his parental rights. Simons v. Smith, (1961) 229 Or 277, 366 P2d 875. **Distinguished in** State v. Blum, (1970) 1 Or App 409, 463 P2d 367.

Procedural due process does not require an adversary proceedings to fix school district boundaries. School Dist. 7 v. Weissenfluh, (1963) 236 Or 165, 387 P2d 567.

The habitual criminal Act did not violate this section. State v. Custer, (1965) 240 Or 350, 401 P2d 402.

An ordinance that prohibited being on the street at night without a lawful purpose was unconstitutional for vagueness. Portland v. James, (1968) 251 Or 8, 444 P2d 554.

When a state conducts a jury trial, the trial must measure up to reasonable standards of regularity. Braley v. Gladden, (1968) 403 F2d 858.

This section requires a remedy to be available to test the constitutionality of treatment afforded an inmate of a penal institution. Newton v. Cupp (1970) 3 Or App 434, 474 P2d 532.

Under the rule of federal preemption, where the National Labor Relations Board has exclusive jurisdiction, it is exclusive regardless of this section purporting to provide a remedy for all wrongs. Operating Engrs., Local 701 v. Brady-Hamilton Stevedore Co., (1971) 258 Or 484, 483 P2d 1303.

Notice of a motion to renew a judgment is not required. Shepard & Morse Lbr. Co. v. Clawson, (1971) 259 Or 154, 486 P2d 542.

A defendant has no constitutional right to receive a copy of a presentence investigation report. Buchea v. Sullivan, (1971) 92 Or App Adv Sh 1501, 485 P2d 1244.

A statute authorizing the striking of a pleading was applied in a way which violated this section. Anderson v. Stanwood, (1946) 178 Or 319, 167 P2d 315.

Plaintiff received notice sufficient under this section. Chalaby v. Driskell, (1964) 237 Or 245, 390 P2d 632, 391 P2d 624.

3. Remedies against political subdivision

Exemption of a city from liability for injury from defective streets is not forbidden by this section. Pullen v. Eugene, (1915) 77 Or 320, 146 P 822, 147 P 768, 151 P 474; Humphry v. Portland, (1916) 79 Or 430, 154 P 897; Platt v. City of Newberg, (1922) 104 Or 148, 205 P 296; Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808. **But see** Mattson v. City of Astoria, (1901) 39 Or 577, 65 P 1066, 87 Am St Rep 687 and Batdorff v. Oregon City, (1909) 53 Or 402, 100 P 937, 18 Ann Cas 287.

A tort action is not maintainable, by virtue of this section, against the state or a political subdivision thereof. Clark v. Coos County, (1916) 82 Or 402, 161 P 702; Gearin v. Marion County, (1924) 110 Or 390, 223 P 929.

The repeal of a statute making counties liable for injuries to the rights of persons arising from acts or omissions of such counties was not in conflict with this section. Templeton v. Linn County, (1892) 22 Or 313, 29 P 795, 15 LRA 730. **But see** Eastman v. Clackamas County, (1887) 32 Fed 24, 12 Sawy 613.

The state need not provide any means by which a suit can be brought against itself. Federal Land Bank v. Schermerhorn, (1937) 155 Or 533, 64 P2d 1337.

Failure to award court-appointed attorney more than is authorized by statute did not violate this section. Keene v. Jackson County, (1970) 3 Or App 551, 474 P2d 777, Sup Ct **review denied,** cert. denied, 402 US 995.

FURTHER CITATIONS: Manning v. Klippel, (1881) 9 Or 367; State v. Thompson, (1906) 47 Or 492, 84 P 476, 8 Ann Cas 646, 4 LRA(NS) 480; State v. Cochran, (1909) 55 Or 157, 104 P 419, 105 P 884; Williams v. Pacific Sur Co., (1913) 66 Or 151, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186; Coleman v. City of LaGrande, (1914) 73 Or 521, 144 P 468; Theiler v. Tillamook County, (1915) 75 Or 214, 146 P 828; White v. E. Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736; Portland R.R. v. McGrath, (1918) 88 Or 346, 171 P 1181; State v. Putney, (1924) 110 Or 634, 224 P 279; Mount v. Welsh, (1926) 118 Or 568, 247 P 814; Morrison v. Clackamas County, (1933) 141 Or 564, 18 P2d 814; Commercial Sec. Co. v. Mast, (1934) 145 Or 394, 28 P2d 635, 92 ALR 194; Seufert v. Stadelman, (1946) 178 Or 646, 167 P2d 936; Parsons v. Parsons, (1953) 197 Or 420, 253 P2d 914; Olson v. Chuck, (1953) 199 Or 90, 259 P2d 128; M&M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082; Federal Cartridge Corp. v. Helstrom, (1954) 202 Or 557, 276 P2d 720; Landgraver v. Emanuel Lutheran Charity Bd., Inc., (1955) 203 Or 489, 280 P2d 301; Smallman v. Gladden, (1956) 206 Or 262, 291 P2d 749; State v. Huffman, (1956) 207 Or 372, 297 P2d 831; Parker v. Title & Trust Co., (1956) 233 F2d 505; Barber v. Gladden, (1956) 210 Or 46, 298 P2d 986, 309 P2d 192; Wollam v. United States, (1957) 244 F2d 212; Plummer v. Donald M. Drake Co., (1958) 212 Or 430, 320 P2d 245; State v. Crosby, (1959) 217 Or 393, 342 P2d 831; Edmonds v. Erion, (1960) 221 Or 104, 350 P2d 700; Horn v. Calif.-Ore. Power Co., (1960) 221 Or 328, 351 P2d 80; Fahrenwald v. Wachter, (1960) 221 Or 535, 352 P2d 152; John I. Haas, Inc. v. State Tax Comm., (1961) 227 Or 170, 361 P2d 820; White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302; Bloor v. Gladden, (1961) 227 Or 600, 363 P2d 57; State v. Jackson, (1961) 228 Or 371, 365 P2d 294, 89 ALR2d 1225; Priester v. Thrall, (1961) 229 Or 184, 349 P2d 866, 365 P2d 1050; Portland v. Welch, (1961) 229 Or 308, 364 P2d 1009; State v. Jairl, (1962) 229 Or 533, 368 P2d 323; State v. Paquin, (1962) 229 Or 555, 368 P2d 85; State v. Johnson, (1962) 233 Or 103, 377 P2d 331; State v. Hedrick, (1962) 233 Or 137, 377 P2d 325; Zumwalt v. Lindland, (1964) 239 Or 26, 396 P2d 205; Oregon City v. Hartke, (1965) 240 Or 35, 400 P2d 255; State v. Clifton, (1965) 240 Or 378, 401 P2d 697; State v. Keller, (1965) 240 Or 442, 402 P2d 521; State v. Thompson, (1965) 240 Or 468, 402 P2d 243; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634;

Froembling v. Gladden, (1966) 244 Or 314, 417 P2d 1020; Haynes v. Gladden, (1967) 245 Or 487, 422 P2d 678; Scales v. Spencer, (1967) 246 Or 111, 424 P2d 242; Harris v. Harris, (1967) 247 Or 479, 430 P2d 993; Leathers v. City of Burns, (1968) 251 Or 206, 444 P2d 1010; Shipman v. Gladden, (1969) 253 Or 192, 453 P2d 921; Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938; Robertson v. Green, (1969) 254 Or 292, 459 P2d 871; State v. Newton, (1969) 1 Or App 376, 462 P2d 696; State v. Holbert, (1970) 1 Or App 552, 464 P2d 834; State ex rel. Allen v. Martin, (1970) 255 Or 401, 465 P2d 228; State v. Patterson, (1970) 3 Or App 480, 475 P2d 91; State v. McMaster, (1970) 4 Or App 112, 476 P2d 814, rev'd, 259 Or 291, 486 P2d 567; Leech v. Ga.-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

ATTY. GEN. OPINIONS: Restrictions on sale of the frozen dessert, "Mellorine," 1952-54, p 98; forfeiture of gambling devices adaptable to lawful use, 1952-54, p 197; validity of law relating to defamation actions against periodicals, radio and television, 1954-56, p 74; prohibiting women participants in boxing and wrestling matches, 1954-56, p 92; hearings of State Unemployment Compensation Commission as public, 1954-56, p 161; regulation of use of property for advertising signs, 1958-60, p 110; effective date of tax measure referred to people, 1958-60, p 287; legislation declaring city a utility when furnishing water outside its boundaries, 1960-62, p 197; delay when defendant is in federal prison outside of state, 1960-62, p 394.

LAW REVIEW CITATIONS: 8 OLR 274; 12 OLR 109, 250; 15 OLR 258; 18 OLR 314; 31 OLR 185; 36 OLR 72, 74; 39 OLR 171; 40 OLR 263; 41 OLR 170-172; 46 OLR 144; 48 OLR 154; 49 OLR 127-187; 1 WLJ 357; 6 WLJ 488; 7 WLJ 356; 1 EL 72.

Section 11

NOTES OF DECISIONS

1. In general
2. Right to counsel
3. Venue
4. Jury
5. Accusation
6. Confrontatior

1. In general

Wade Gilbert requirements regarding police line-ups do not apply to on-the-scene investigatory confrontations of a suspect and witness conducted shortly after the crime. State v. Madden, (1969) 1 Or App 242, 461 P2d 834; State v. Miller, (1970) 2 Or App 87, 465 P2d 894, Sup Ct **review denied.**

A statute allowing informations to be filed by the district attorney did not infringe the rights which are guaranteed by this section. State v. Tucker, (1899) 36 Or 291, 61 P 894, 51 LRA 246.

The court shall give the defendant ample time to present his defense, but may restrict the argument to relevant matters. State v. Rogoway, (1904) 45 Or 601, 78 P 987, 81 P 234, 2 Ann Cas 431.

Where a statute provides punishment by imprisonment or fine, the violation thereof comes within the terms of this section. Baxter v. State, (1907) 49 Or 353, 88 P 677, 89 P 369.

By pleading guilty, a defendant waives his right to a trial and admits the truth of the charge. Sustar v. County Court, (1921) 101 Or 657, 201 P 445.

The accused may waive the right to be heard by himself and counsel. State v. Butchek, (1927) 121 Or 141, 253 P 367, 254 P 805.

The 1932 amendment was valid. State v. Osbourne, (1936) 153 Or 484, 57 P2d 1083.

In habeas corpus proceeding, the trial court erred in excluding evidence that guilty plea was obtained through misrepresentation. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

In all criminal prosecutions, whether for felonies or misdemeanors, the accused is entitled to a fair impartial trial. State v. Biggs, (1953) 198 Or 413, 255 P2d 1055, 38 ALR2d 720.

A defendant does not necessarily receive a speedy trial by being tried in the next term of court following the term in which the indictment was returned. State v. Kuhnhausen, (1954) 201 Or 478, 266 P2d 698, 272 P2d 225.

Statute providing crime of burglary with explosives did not violate this section. Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

Failure of a trial judge to grant a request to poll the jury is not a denial of a fair and impartial trial. Brooks v. Gladden, (1961) 226 Or 191, 358 P2d 1055, cert. denied, 366 US 974, 81 S Ct 1942, 6 L Ed 1263.

It is unnecessary verbiage to include in the indictment the lesser included offenses. State v. Gibbons, (1961) 228 Or 238, 364 P2d 611.

This does not prevent simplification of indictment by elimination of unnecessary verbiage. Id.

Post-trial due process requirements are less rigid than during trial. Kloss v. Gladden, (1962) 233 Or 98, 377 P2d 146.

Ordering defendant to rise so that victim who was testifying could better determine his identity did not violate this section. State v. Carcerano, (1964) 238 Or 208, 390 P2d 923, cert. denied, 380 US 923.

The purpose behind due process requirements is not to protect the guilty from consequences of their crime but to prevent conviction by methods inconsistent with fair play. McWilliams v. Gladden, (1966) 242 Or 333, 407 P2d 833.

An accused has a constitutional right to be found guilty only if the fact finder finds beyond a reasonable doubt that defendant committed the act charged. State v. Arenas, (1969) 253 Or 215, 453 P2d 915.

The guaranty of compulsory process is a fundamental element of due process. State v. Gann, (1969) 254 Or 549, 463 P2d 570.

Any clear and unambiguous conduct by a person who has been advised of his rights which indicates his willingness to answer questions without a lawyer is sufficient to constitute a waiver. State v. Capitan, (1970) 2 Or App 338, 468 P2d 533.

The state must take the arrested person before a magistrate without delay, but if conditions make it impossible to do so prior to taking statements the arrested person may want to give, the state must explain his rights as directed in the Neely case. State v. Sunderland, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct **review denied.**

It is no longer the law of Oregon that constitutional guarantees applicable to criminal cases do not apply to prosecutions for violations of a city ordinance having as a possible consequence loss of liberty. Miller v. Jordan, (1970) 3 Or App 134, 472 P2d 841.

A defendant has no constitutional right to receive a copy of a presentence investigation report. Buchea v. Sullivan, (1971) 92 Or App Adv Sh 1501, 485 P2d 1244.

Exclusion of public was a prejudicial error. State v. Osborne, (1909) 54 Or 289, 103 P 62, 20 Ann Cas 627.

This section was not violated when the court refused to order the state to advance funds to aid the defendant in securing out-of-state witnesses. State v. Blount, (1953) 200 Or 35, 264 P2d 419, cert. denied, 347 US 962, 74 S Ct 711, 98 L Ed 1105.

The statements of defendant were not coerced so that fear overcame his knowledge and the Miranda warnings, but voluntary and within the constitutional concept of due process. State v. Pressel, (1970) 2 Or App 477, 468 P2d 915, Sup Ct **review denied.**

2. Right to counsel

The court should not appoint inexperienced counsel in a capital case, and the guaranteed right of a fair and impartial trial is denied if such counsel is appointed. State v. Bouse, (1953) 199 Or 676, 264 P2d 800.

Although it has the power to appoint counsel for the indigent defendant-appellant, the Supreme Court will not do so until the transcript and any other information properly before the court disclose the necessity of counsel for the adequate presentation of questions presented therein. State v. Delaney, (1958) 221 Or 620, 332 P2d 71.

The right to counsel does not prevent admission of statements made by defendant to police officers in the absence of defendant's attorney when he has not asked for his attorney and the record indicates the statements were voluntary and true. State v. Kristich, (1961) 226 Or 240, 359 P2d 1106. **But see** State v. Neely, (1965) 239 Or 487, 395 P2d 557, 398 P2d 482.

The right to counsel on appeal is established. Holbert v. Gladden, (1969) 253 Or 435, 455 P2d 45.

This section mandates the appointment of counsel for indigent defendants whose convictions may result in loss of liberty. Stevenson v. Holzman, (1969) 254 Or 94, 458 P2d 414.

Even if counsel makes an error in judgment, it does not render his representation inadequate. State v. Gaffield, (1969) 1 Or App 202, 460 P2d 863.

Defendant has the right to conduct his own defense if he chooses, provided (1) he is sui juris, (2) mentally competent, and (3) such conduct does not disrupt the judicial process or jeopardize fair trial. State v. Dalebout, (1971) 4 Or App 601, 480 P2d 451, Sup Ct **review denied.**

Defendant made an informed decision to conduct his own defense. State v. Edwards, (1970) 3 Or App 179, 471 P2d 843, Sup Ct **review denied.**

3. Venue

A change of venue should be granted by the trial judge when it appears impossible that an impartial trial can be obtained in consequence of the excited state of public sentiment against the accused. State v. Olds, (1890) 19 Or 397, 427, 24 P 394; State v. Humphreys, (1902) 43 Or 44, 70 P 824.

The venue is a material allegation of the pleading which charges the accused with commission of the offense, and must be proved beyond a reasonable doubt. State v. Harvey, (1926) 117 Or 466, 242 P 440; State v. Jones, (1965) 240 Or 129, 400 P2d 524; State v. Cooksey, (1965) 242 Or 250, 409 P2d 335.

Venue statutes were constitutional. State v. Lehman, (1929) 130 Or 132, 279 P 283; State v. Anderson, (1930) 133 Or 632, 290 P 1094.

The defendant may waive his right to trial in the county in which the offense was committed by a proper application for a change of the place of trial. State v. Black, (1929) 131 Or 218, 282 P 228; State v. Biggs, (1953) 198 Or 413, 255 P2d 1055, 38 ALR2d 720.

Venue cannot be proved by judicial knowledge which is not declared to the jury. State v. Jones, (1965) 240 Or 129, 400 P2d 524; State v. Cooksey, (1965) 242 Or 250, 409 P2d 335; State v. Rutherford, (1970) 1 Or App 599, 465 P2d 243, Sup Ct **review denied.**

Venue need not be proved directly but may be inferred by the jury from all the evidence. State v. Jones, (1965) 240 Or 129, 400 P2d 524; State v. Cooksey, (1965) 242 Or 250, 409 P2d 335.

The right to a trial in the county where the crime is committed is designed to assure a fair and impartial trial. Kneefe v. Sullivan, (1970) 2 Or App 152, 465 P2d 741, Sup Ct **review denied**; State v. Johnson, (1971) 92 Or App Adv Sh 1679, 487 P2d 115, Sup Ct **review denied.**

A preliminary examination must be had in the county in which the offense is committed. In re Kelly, (1890) 46 Fed 653.

Venue on retrial after reversal on appeal derives from the original indictment. State v. Parker, (1963) 235 Or 366, 384 P2d 986.

Receipt of a plea and pronouncement of sentence upon the express request and waiver of the accused in county other than county where offense was committed did not violate this section. Alexander v. Gladden, (1955) 205 Or 375, 288 P2d 219.

Defendant was properly tried in Marion County. State v. Hutcheson, (1968) 251 Or 589, 447 P2d 92.

Escapee, who was on work release, could be tried in the county where he was physically or constructively in custody. Kneefe v. Sullivan, (1970) 2 Or App 152, 465 P2d 741, Sup Ct **review denied.**

4. Jury

A criminal contempt proceeding is not a criminal prosecution within the meaning of this section. State v. Sieber, (1907) 49 Or 1, 11, 88 P 313; Rust v. Pratt, (1937) 157 Or 505, 72 P2d 533.

A statute authorizing women to sit as jurors was constitutional. State v. Chase, (1923) 106 Or 263, 211 P 920; State v. Putney, (1924) 110 Or 634, 224 P 279.

The burden of proving prejudice in the selection of jurors is upon the party asserting prejudice. State v. Stultz, (1963) 235 Or 534, 385 P2d 763; State v. Anderson, (1971) 92 Or App Adv Sh 1290, 485 P2d 446, Sup Ct **review denied.**

Defendant is not entitled to a jury trial relative to prior convictions. State v. Hoffman, (1963) 236 Or 98, 385 P2d 741; State v. Griffin, (1964) 238 Or 103, 392 P2d 642, cert. denied, 379 US 924; State v. Ellis, (1964) 238 Or 104, 392 P2d 647, cert. denied, 379 US 981.

A jury trial is not a constitutional right in juvenile court proceedings. State v. Turner, (1969) 253 Or 235, 453 P2d 910; State v. Oman, (1969) 254 Or 59, 457 P2d 496.

A unanimous verdict is not required under this section or the United States Constitution. State v. Galbert, (1969) 1 Or App 293, 462 P2d 452; State v. Hays, (1969) 1 Or App 347, 462 P2d 702.

A unanimous verdict is not required by U.S. Const., Am. 14. State v. Gann, (1969) 254 Or 549, 463 P2d 570; State v. Plumes, (1969) 1 Or App 483, 462 P2d 691, Sup Ct **review denied**; State v. Wade, (1969) 1 Or App 480, 462 P2d 701, Sup Ct **review denied**; State v. Amory, (1970) 1 Or App 496, 464 P2d 714; State v. Speer, (1970) 1 Or App 514, 464 P2d 709, Sup Ct **review denied**; State v. Matt, (1970) 1 Or App 624, 463 P2d 595, Sup Ct **review denied**; State v. Dollarhide, (1970) 1 Or App 627, 464 P2d 721, Sup Ct **review denied**; State v. Smock, (1970) 2 Or App 20, 465 P2d 251, Sup Ct **review denied**; State v. Hale, (1970) 2 Or App 101, 465 P2d 251, Sup Ct **review denied**; State v. Morris, (1970) 2 Or App 149, 465 P2d 892, Sup Ct **review denied**; State v. Teeman, (1970) 2 Or App 212, 465 P2d 915, Sup Ct **review denied**; State v. Gardner, (1970) 2 Or App 265, 467 P2d 125, Sup Ct **review denied**; State v. Hecket, (1970) 2 Or App 273, 467 P2d 122, Sup Ct **review denied**; State v. Truxall, (1970) 2 Or App 214, 467 P2d 643; State v. Matinka, (1970) 2 Or App 499, 468 P2d 903, Sup Ct **review denied**; State v. Whitelock, (1970) 2 Or App 530, 469 P2d 37, Sup Ct **review denied**; State v. Andrews, (1970) 2 Or App 595, 469 P2d 802, Sup Ct **review denied**; State v. Kniss, (1970) 2 Or App 615, 471 P2d 866; Delaney v. Gladden, (1968) 397 F2d 17.

A proceeding for violation of an ordinance of a city is not a criminal prosecution within this section. Wong v. City of Astoria, (1886) 13 Or 538, 11 P 295.

Statutes governing the challenges of jurors must be constructed so as to accord with this provision. State v. Miller, (1905) 46 Or 485, 487, 81 P 363.

A statute relating to qualifications of jurors was consti-

tutional. State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

The mere expression of an opinion by a sheriff, who had selected the talesmen, as to the guilt of the accused, does not prevent him from having a fair trial by an impartial jury. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.

This section does not prohibit the court from excusing a prospective juror. State v. Savan, (1934) 148 Or 423, 36 P2d 594, 96 ALR 497.

The manner in which an alternate juror becomes a member of the jury is not governed by this section. State v. Henderson, (1947) 182 Or 147, 184 P2d 392.

Defendant received a fair trial although the judge excused jurors and ordered additional jurors summoned as part of the regular course of court business before he disqualified himself as judge and testified as witness for the prosecution. State v. Nagel, (1949) 185 Or 486, 202 P2d 640, cert. denied, 338 US 818, 70 S Ct 60, 94 L Ed 39.

A jury may be impartial within this section even though all of the jurors believe in capital punishment. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds, 343 US 790, 72 S Ct 1002, 96 L Ed 901.

In prosecution for second-degree murder, instruction that verdict must be unanimous was not prejudicial when verdict was unanimous. State v. Avent, (1956) 209 Or 181, 302 P2d 549.

The prisoner has no right to a jury trial at a hearing on a writ of habeas corpus to test a warrant of extradition. Storms v. Lambert, (1960) 224 Or 189, 355 P2d 766.

As to confessions, the jury must first determine voluntariness without regard to truthfulness, and second determine truthfulness if found to be voluntary. State v. Brewton, (1964) 238 Or 590, 395 P2d 874.

Inadvertent failure to furnish jury with not-guilty form along with opposite form was so significantly irregular as to require a new trial. Bradley v. Gladden, (1968) 403 F2d 858.

This section prevails over a statute requiring a unanimous verdict. State v. Larson, (1969) 252 Or 624, 450 P2d 754.

Waiver of the right to trial by jury must consist of an intelligent and competent decision by the accused. State v. Swint, (1970) 3 Or App 528, 475 P2d 434.

In the absence of particular statutory provisions disqualifying them, it is the general rule that a police officer is not disqualified from jury service on that ground alone. Parks v. Cupp, (1971) 5 Or App 51, 481 P2d 372.

A showing that the proportion of Negroes on the jury is less than their proportion of the general population is insufficient to prove an unconstitutional, systematic exclusion of a cognizable group from jury service. State v. Anderson (1971) 92 Or App Adv Sh 1290, 485 P2d 446, Sup Ct **review denied.**

Defendant's waiver of jury trial was an intelligent and competent decision. State v. Swint, (1970) 3 Or App 528, 475 P2d 434.

5. Accusation

An indictment or information which informs the defendant of the nature and cause of the accusation is sufficient. **Assault with intent to kill,** State v. Doty, (1875) 5 Or 491; **local option,** State v. Runyon, (1912) 62 Or 246, 124 P 259; **libel,** State v. Hosmer, (1914) 72 Or 57, 142 P 581; **violation of liquor laws,** State v. Wilbur, (1917) 85 Or 565, 116 P 51, 167 P 569; State v. Rosasco, (1922) 103 Or 343, 205 P 290; **criminal syndicalism,** State v. Laundy, (1922) 103 Or 443, 465, 204 P 958, 206 P 290; **murder,** State v. Casey, (1923) 108 Or 386, 213 P 771, 217 P 632; State v. Trent, (1927) 122 Or 444, 252 P 975, 259 P 893; State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182; State v. Nunn, (1958) 212 Or 546, 321 P2d 356; State v. House, (1971) 5 Or App 519, 485 P2d 33, Sup Ct **review allowed; manslaughter,** State v. Lockwood, (1928) 126 Or 118, 268 P 1016; State v. Davis, (1956) 207 Or 525, 296 P2d 240; **rape,** State v. Hilton, (1926) 119 Or 441, 249 P 1103; State v. Nesmith, (1931) 136 Or 593, 300 P 356; **first degree arson,** State v. Molitor, (1955) 205 Or 698, 289 P2d 1090.

An indictment must charge commission of a crime with directness and certainty, and must concisely and clearly allege the elements thereof. State v. Brandon, (1907) 49 Or 86, 87 P 535; State v. Emmons, (1910) 55 Or 352, 104 P 882, 106 P 451; State v. Burke, (1928) 126 Or 651, 269 P 869, 270 P 756.

Simplification of criminal pleading and abolition of technical forms is not precluded by this section. State v. Dormitzer, (1927) 123 Or 165, 261 P 426; State v. Smith, (1948) 182 Or 497, 188 P2d 998.

Information as to the accusation against him is imparted to an accessory when he is charged with commission of the overt act or crime. State v. Kirk, (1882) 10 Or 505; State v. Steeves, (1896) 29 Or 85, 43 P 947.

The accessory is informed as to the accusation regardless of whether he is charged jointly with the principal or separately. State v. Branton, (1899) 33 Or 533, 56 P 267.

The grade of the offense, as being a felony or a misdemeanor, must be disclosed by the indictment. State v. Minnick, (1909) 54 Or 86, 102 P 605.

The right to demand the nature and cause of an accusation is not modified by Ore. Const. Art. VII (A), §3. State v. Townsend, (1911) 60 Or 223, 118 P 1020.

A statute defining a crime must show with reasonable certainty what acts or omissions the law-making body intended to prohibit and punish. State v. Bailey, (1925) 115 Or 428, 236 P 1053.

As a general rule an indictment is sufficient when it alleges acts constituting the crime charged in the words of the statute defining it. State v. Nesmith, (1931) 136 Or 593, 300 P 356.

A negligent homicide statute did not violate this section. State v. Wojahn, (1955) 204 Or 84, 282 P2d 675.

A statute punishing assault "by means of force likely to produce great bodily injury" was not unconstitutional as too indefinite and uncertain. State v. Popiel, (1959) 216 Or 140, 337 P2d 303.

Information as to the accusation against him is imparted to an accessory when he is charged with commission of the overt act or crime. State v. Fitz, (1970) 2 Or App 383, 468 P2d 898.

An indictment charging receiving and concealing stolen property consisting of "certain hand tools" was not sufficiently definite. State v. Green, (1966) 245 Or 319, 422 P2d 272.

6. Confrontation

Where, at a former trial the accused has had a right to confront a witness, his constitutional right to meet the witness face to face is not violated by the admission of the evidence of the witness. State v. Meyers, (1911) 59 Or 537, 117 P 818; State v. Von Klein, (1914) 71 Or 159, 168, 142 P 549, Ann Cas 1916C, 1054.

The admission of dying declarations does not infringe the right of confrontation. State v. Saunders, (1886) 14 Or 300, 304, 12 P 441.

Having cross-examined the witness by his counsel at the time when the witness's deposition was taken, the accused is not entitled to assert that his constitutional right has been infringed. State v. Bowker, (1894) 26 Or 309, 38 P 124.

The statements of a codefendant are inadmissible under this section. State v. Steeves, (1896) 29 Or 85, 102, 43 P 947.

Admissions of a co-conspirator, made after the crime was fully committed, are inadmissible. State v. Hinkle, (1898) 33 Or 93, 97, 54 P 155.

The guaranty of this section is satisfied when at some stage of the trial the defendant is confronted with the

witness and given an opportunity to cross-examine him. State v. Belding, (1903) 43 Or 95, 71 P 330.

The constitutional right to meet witnesses face to face renders improper the admission of a statement made by a witness before the trial. State v. Weston, (1923) 109 Or 19, 219 P 180.

This section guarantees the defendant the right to confront witnesses in his favor as well as witnesses against him, and legislation which prohibited prisoners from testifying violated this section. State v. Lonergan, (1954) 201 Or 163, 269 P2d 491.

The right of the accused to face his own witnesses does not imply a constitutional right to have a trial postponed because the whereabouts of a desired witness is unknown. State v. Varney, (1966) 244 Or 583, 419 P2d 430.

When the privilege against self-incrimination is claimed, former testimony may be repeated or read to the court and jury. State v. Rawls, (1969) 252 Or 556, 451 P2d 127.

The right to be confronted by witnesses is subordinate to the privilege against self-incrimination. Id.

When defendant had the opportunity at the preliminary hearing to confront and cross-examine the witness, defendant's rights were not violated by the admission at the trial of evidence of the witness' testimony. State v. Crawley, (1966) 242 Or 601, 410 P2d 1012.

Voluntary review of presentence report by trial judge, in the course of the trial and in the absence of and without the knowledge of petitioner and his counsel, denied petitioner his right of confrontation guaranteed by the U.S. Const., Am. 6 and Ore. Const. Art. I, §11. Hurt v. Cupp, (1971) 5 Or App 89, 482 P2d 759. **Distinguished in** State v. Burgess, (1971) 5 Or App 164, 483 P2d 101.

FURTHER CITATIONS: State v. Holland, (1954) 202 Or 656, 277 P2d 386; State v. Goesser, (1955) 203 Or 315, 280 P2d 354; State v. Pirkey, (1955) 203 Or 697, 281 P2d 698; State v. Berry, (1955) 204 Or 69, 267 P2d 993, 267 P2d 995, 282 P2d 344, 282 P2d 347; Smallman v. Gladden, (1956) 206 Or 262, 275, 291 P2d 749; State v. Anderson, (1956) 207 Or 675, 298 P2d 195; Daugharty v. Gladden, (1957) 150 F Supp 887; State v. Poierier, (1958) 212 Or 369, 320 P2d 255; State v. Langley, (1958) 214 Or 445, 315 P2d 560, 323 P2d 301; State v. Hoover, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695; Lilly v. Gladden, (1959) 220 Or 84, 348 P2d 1; Bartkus v. Illinois, (1959) 359 US 121, 141, 79 S Ct 676, 3 L Ed 2d 684; State v. Rollo, (1960) 221 Or 428, 351 P2d 422; State v. Jackson, (1960) 224 Or 337, 356 P2d 495; Bloor v. Gladden, (1961) 227 Or 600, 363 P2d 57; State v. Bloor, (1961) 229 Or 49, 365 P2d 103, 1075; State v. Jairl, (1962) 229 Or 533, 368 P2d 323; State v. Cruse, (1962) 231 Or 326, 372 P2d 974; State v. Mims, (1963) 235 Or 540, 385 P2d 1002; United States v. Plattner, (1964) 330 F2d 271; Speers v. Gladden, (1964) 237 Or 100, 390 P2d 635; State v. Adams, (1965) 240 Or 181, 400 P2d 549; State v. Blank, (1965) 241 Or 627, 405 P2d 373; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634; Tucker v. Gladden, (1966) 245 Or 109, 420 P2d 625; Ortega v. Williard, (1966) 245 Or 331, 421 P2d 966; Dorsciak v. Gladden, (1967) 246 Or 233, 425 P2d 177; DeStefano v. Woods, (1968) 392 US 631, 88 S Ct 2093, 20 L Ed 2d 1308; Delaney v. Gladden, (1968) 297 F2d 17; Evans v. Cupp, (1969) 415 F2d 844; State v. Lippanen, (1969) 252 Or 352, 449 P2d 447; State v. Mershon, (1969) 1 Or App 305, 459 P2d 551, Sup Ct **review denied;** State v. Skinner, (1969) 254 Or 447, 461 P2d 62; North v. Cupp, (1969) 254 Or 451, 461 P2d 271; Erickson v. Reed, (1969) 1 Or App 251, 461 P2d 839; Harper v. Cupp, (1969) 1 Or App 256, 461 P2d 841; Schram v. Gladden, (1970) 425 F2d 612; Williams v. Florida, (1970) 399 US 78, 141, 90 S Ct 1893, 26 L Ed 2d 446, 475, 477; Frady v. Cupp, (1970) 2 Or App 14, 465 P2d 485; State v. Keith, (1970) 2 Or App 133, 465 P2d 724, Sup Ct **review denied;** State v. Stephenson, (1970) 2 Or App 38, 465 P2d 720; State v. McIntire, (1970) 2 Or App 429, 468 P2d 536, Sup Ct **review denied;** State v. Evans, (1970) 2 Or App 441, 468 P2d 657, rev'd, 258 Or 439, 483 P2d 1300; State v. Sunderland, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct **review denied;** Wheeler v. Cupp, (1970) 3 Or App 1, 470 P2d 957, Sup Ct **review denied;** State v. Combs, (1970) 3 Or App 260, 473 P2d 672; State v. McIntosh, (1970) 4 Or App 407, 477 P2d 228, 479 P2d 763; State v. Naughten, (1971) 3 Or App 241, 480 P2d 448, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Right of prisoner to interview counsel, 1924-26, p 515; findings of fact without jury for purposes of sentencing, 1956-58, p 97; right of accused to be confronted by officer signing complaint for misdemeanor not committed in his presence, 1960-62, p 79; fees of court appointed counsel, 1960-62, p 301; jurisdiction to reduce bail or dismiss proceedings after defendant is held to answer, 1964-66, p 403; defining school board's authority to hold closed meetings, 1966-68, p 286; venue for prosecution of escapee from forest work camp, (1969) Vol 34, p 540.

LAW REVIEW CITATIONS: 20 OLR 30; 9 OLR 395; 17 OLR 139; 21 OLR 298; 34 OLR 190; 35 OLR 2; 36 OLR 346; 37 OLR 248, 255; 38 OLR 278; 41 OLR 313; 42 OLR 207; 44 OLR 257-291; 46 OLR 14; 47 OLR 417-429; 49 OLR 134; 5 WLJ 663-670; 7 WLJ 43-73, 268-278.

Section 12

NOTES OF DECISIONS
1. Double jeopardy
2. Self-incrimination

1. Double jeopardy

A person performing an act which constitutes more than one crime may be subjected to more than one prosecution. **Kidnaping — assault and battery,** State v. Stewart, (1883) 11 Or 52, 4 P 128; **loaning or converting public funds,** State v. Howe, (1895) 27 Or 138, 44 P 672; **malicious injury to burial casket — illegal interment,** State v. Magone, (1899) 33 Or 570, 56 P 648; **rape — sodomy,** State v. Weitzel, (1937) 157 Or 334, 69 P2d 958.

A prosecution for the same crime as that with which the defendant is now charged is essential to support the plea of former jeopardy. State v. Stewart, (1883) 11 Or 52, 238, 4 P 128; Bailleaux v. Gladden, (1962) 230 Or 606, 370 P2d 722, cert. denied, 371 US 848, 83 S Ct 86, 9 L Ed 2d 84.

Jeopardy attaches at that stage of the proceedings when the jury is impaneled and sworn. State v. Steeves, (1896) 29 Or 85, 43 P 947; Ex parte Tice, (1897) 32 Or 179, 49 P 1038; State v. Chandler, (1929) 128 Or 204, 274 P 303; State v. Buck, (1965) 239 Or 577, 398 P2d 176, 399 P2d 367.

The failure to plead former jeopardy constitutes a waiver of former jeopardy as a defense. State v. Monk, (1953) 199 Or 165, 260 P2d 474; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 US 947.

When only one crime has been committed, a conviction or acquittal on one indictment may be successfully pleaded as a bar to subsequent prosecution on another indictment. State v. McCormack, (1880) 8 Or 236.

The discharge of a jury for inability to agree upon a verdict is not a bar to further prosecution for the same offense. State v. Shaffer, (1893) 23 Or 555, 32 P 545.

A conviction of manslaughter under an indictment for murder is an acquittal of the charge of murder in the first and second degrees, and operates as a bar to another prosecution therefor. State v. Steeves, (1896) 29 Or 85, 43 P 947.

When an act violated both state and federal law, prosecution for violation of the federal law barred prosecution for violation of the state law. State v. Smith, (1921) 101 Or 127, 199 P 194, 16 ALR 1220. **But see** United States v. Barnhart, (1884) 10 Sawy 491, 22 Fed 285, prosecution for state law violation did not bar federal prosecution.

Proceedings which have not affected the liberty or property of the defendant do not support a plea of former jeopardy. State v. Young, (1927) 122 Or 257, 257 P 806.

A judgment of conviction or acquittal is not essential to the sustaining of a plea of former jeopardy. State v. Chandler, (1929) 128 Or 204, 274 P 303.

A filiation proceeding did not place defendant in jeopardy of life or liberty. State v. Morrow, (1938) 158 Or 412, 75 P2d 737, 76 P2d 971.

A prosecution which was dismissed on motion did not constitute jeopardy. Portland v. Stevens, (1947) 180 Or 514, 178 P2d 175.

The habitual criminal Act did not violate this section. State v. Hicks, (1958) 213 Or 619, 325 P2d 794, cert. denied, 359 US 917, 79 S Ct 594, 3 L Ed 2d 579.

The McNabb-Mallory rule, that a confession made during a period of illegal detention is inadmissible, is not applicable in state courts and has not been adopted in Oregon. State v. Shipley, (1962) 232 Or 354, 375 P2d 237, cert denied, 374 US 811, 83 S Ct 1701, 10 L Ed 2d 1034.

Failure to appeal from an adverse ruling in the trial court as to the matter of prior jeopardy waives the defense. Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614.

If the jeopardy is annulled for any reason, including the reasons set forth in ORS 135.890, the proceedings stand on the same footing as if the defendant had never been in jeopardy. State v. Jones, (1965) 240 Or 546, 402 P2d 738.

When on resentencing defendant receives no greater sentence than he could have been subjected to had there been no error in the original sentence, he has not been placed in double jeopardy. Froembling v. Gladden, (1966) 244 Or 314, 417 P2d 1020.

A single act may constitute both an offense against a municipality and a crime against the state. Barnett v. Gladden, (1966) 255 F Supp 450. **But see** State v. Miller, (1971) 5 Or App 501, 484 P2d 1132.

Individual is not placed in double jeopardy when punished by the prison disciplinary board and then by a court for an escape or attempted escape from official detention. State v. Bowling, (1969) 1 Or App 103, 459 P2d 454.

If an erroneous sentence imposed to run concurrent to another sentence is vacated, the sentence imposed to replace the vacated sentence may be imposed to run consecutively. Ebarb v. Cupp, (1970) 2 Or App 365, 468 P2d 905.

This section does not prevent a person on probation who commits illegal acts from being responsible for those acts through both criminal prosecution and probation revocation. State v. Montgomery, (1970) 3 Or App 555, 474 P2d 780, Sup Ct **review denied.**

A former prosecution, although it has been for a violation of a different statutory provision, will bar a subsequent prosecution if the subsequent prosecution is for an offense based on the same conduct, unless the offense requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil. State v. Miller, (1971) 5 Or App 501, 484 P2d 1132.

A plea of former jeopardy was faulty in form and substance. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389.

2. Self-incrimination

See also annotations under ORS 136.540.

A proceeding is criminal in its nature, within the purview of this section, where the purpose thereof is to impose a fine or imprisonment. Portland v. Erickson, (1900) 39 Or 1, 62 P 753; State v. McDaniel, (1901) 39 Or 161, 65 P 520; Baxter v. State, (1907) 49 Or 353, 88 P 677, 89 P 369.

A defendant who testifies in his own behalf may be cross-examined for the purpose of impeachment as to whether he has not made at other times statements which are inconsistent with his testimony. State v. Bartmess, (1898) 33 Or 110, 54 P 167.

In a contempt proceeding, a party may rely on this constitutional guaranty if the question propounded tends in any manner to incriminate him. State v. Sieber, (1907) 49 Or 1, 11, 88 P 313.

By testifying in his own behalf, the accused waives the benefit of the constitutional guaranty. State v. Deal, (1908) 52 Or 568, 98 P 165.

Papers obtained from the defendant's agents by private individuals were admissible. State v. Barrett, (1927) 121 Or 57, 254 P 198.

If a direct response to a question will not incriminate the witness, he must answer. In re Jennings, (1936) 154 Or 482, 59 P2d 702.

An examination as to a defendant's insanity, with his consent, does not constitute self-incrimination. State v. Nelson, (1939) 162 Or 430, 92 P2d 182.

The constitutional privilege against self-incrimination was withdrawn in gambling cases under former statute as to witnesses subpenaed by the state and absolute immunity from prosecution was substituted therefor. State v. Hennessy, (1952) 195 Or 355, 245 P2d 875.

The privilege is meaningless if the state may refer to the defendant's silence with impunity. State v. Wederski, (1962) 230 Or 57, 368 P2d 393.

Even though defendant is not promptly taken before a magistrate, a confession given voluntarily during the delay is admissible. State v. Shipley, (1962) 232 Or 354, 375 P2d 237, cert. denied, 374 US 811, 83 S Ct 1701, 10 L Ed 2d 1034.

This section does not attempt to conceal from the jurors what is in their plain view. State v. Carcerano, (1964) 238 Or 208, 390 P2d 923, cert. denied, 380 US 923.

The privilege of a person not to testify against himself may be waived and once waived the privilege as to the testimony given is gone both in the initial and subsequent proceedings. State v. Griffin, (1965) 242 Or 284, 409 P2d 326.

Where a plea of insanity has been made, the state has a right to a mental examination of defendant even if defendant refuses to consent to the examination. State v. Phillips, (1967) 245 Or 466, 422 P2d 670. **But see** State v. Smith, (1967) 248 Or 56, 426 P2d 463, cert. denied, 389 US 849.

Defendant cannot be ordered to answer incriminating questions during a pretrial psychiatric examination. Shepard v. Bowe, (1968) 250 Or 288, 442 P2d 238.

When the privilege is claimed, former testimony may be repeated or read to the court and jury. State v. Rawls, (1969) 252 Or 556, 451 P2d 127.

A witness may avail himself of the privilege at a later trial; a waiver made at one trial does not continue into the next. Id.

The right to be confronted by witnesses is subordinate to the privilege against self-incrimination. Id.

This privilege protects an accused only from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature. State v. Brotherton, (1970) 2 Or App 157, 465 P2d 749, Sup Ct **review denied.**

A juvenile's statement made during custodial interrogation which is preceded by Miranda advice and waiver of rights is admissible in a criminal trial upon remand where it is made clear to the juvenile that the interrogating officer is not acting in loco parentis, but as a police officer. State v. Lewis, (1970) 2 Or App 378, 468 P2d 899.

No affirmative waiver of the privilege need be shown. State v. Skinner, (1971) 5 Or App 259, 483 P2d 87.

Admission of the defendant's confessions without proof that he was cautioned as to his legal rights, or that his confession was voluntary, was erroneous. State v. Andrews, (1899) 35 Or 388, 58 P 765.

Remote allusions in argument to the failure of the defen-

dant to testify were not improper. State v. Black, (1935) 150 Or 269, 42 P2d 171, 44 P2d 162.

The taking of a blood sample and the admission of testimony disclosing its alcoholic content was not self-incrimination. State v. Cram, (1945) 176 Or 577, 160 P2d 283.

Convict's act of giving evidence to a supervisor was a physical response, nontestimonial in nature. State v. Brotherton, (1970) 2 Or App 157, 465 P2d 749, Sup Ct **review denied.**

Where the intent and affect of remarks made by the district attorney are ambiguous, limiting instructions may suffice to cure any harm. State v. Conway, (1970) 2 Or App 49, 465 P2d 722.

Admitting a recording of police officer's conversation with defendant during on-the-spot investigation of traffic charge was not error although defendant's refusal to answer certain questions was included on the tape when the case was tried to the court. State v. Carnathan, (1970) 2 Or App 67, 465 P2d 899.

It was not improper for the prosecutor on rebuttal to argue that the jury should not consider statements by defendant (acting as his own counsel) in closing argument unless supported by testimony under oath or subject to cross-examination. State v. Polk, (1971) 5 Or App 605, 485 P2d 1241.

FURTHER CITATIONS: State v. Wood, (1948) 183 Or 650, 195 P2d 703; State v. Patton, (1956) 208 Or 610, 303 P2d 513; Wollam v. United States, (1957) 244 F2d 212; State v. Nunn, (1958) 212 Or 546, 321 P2d 356; State v. Neely, (1965) 239 Or 487, 395 P2d 557, 398 P2d 482; State v. Evans, (1965) 241 Or 567, 407 P2d 621; State v. Fisher, (1965) 242 Or 419, 410 P2d 216; State v. Ford, (1965) 242 Or 449, 410 P2d 223; Barnett v. Gladden, (1965) 246 F Supp 250; State v. Johnson, (1966) 243 Or 532, 413 P2d 383; State v. Mayes, (1966) 245 Or 179, 421 P2d 385; State v. Tracy, (1967) 246 Or 349, 425 P2d 171; State v. Turner, (1967) 247 Or 301, 429 P2d 565; State v. O'Malley, (1967) 248 Or 601, 435 P2d 812; State v. George, (1969) 253 Or 458, 455 P2d 615; State v. Austin, (1970) 1 Or App 556, 465 P2d 256; State v. Evans, (1970) 2 Or App 441, 468 P2d 657, rev'd, 258 Or 439, 483 P2d 1300; State v. Sands, (1970) 2 Or App 575, 469 P2d 795, Sup Ct **review denied;** State v. Molatore, (1970) 3 Or App 424, 474 P2d 7.

ATTY. GEN. OPINIONS: Chemical tests to establish intoxication, 1958-60, p 299; admission of evidence of refusal to submit to chemical tests to determine intoxication, 1958-60, p 330.

LAW REVIEW CITATIONS: 1 OLR 35; 13 OLR 161; 18 OLR 36; 25 OLR 271; 30 OLR 178; 39 OLR 377; 41 OLR 312, 317; 43 OLR 312; 49 OLR 22; 4 WLJ 167.

Section 13

NOTES OF DECISIONS

Writ of habeas corpus will not issue because of an assault on a prisoner by a prison guard, even if the assault is unlawful, unless petitioner shows his constitutional rights will probably be violated. Grenfell v. Gladden, (1965) 241 Or 190, 405 P2d 532, cert. denied, 382 US 998.

FURTHER CITATIONS: Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634; Penn Phillips Lands, Inc. v. State Tax Comm., (1968) 251 Or 583, 446 P2d 670; Newton v. Cupp, (1970) 1 Or App 645, 465 P2d 734.

LAW REVIEW CITATIONS: 43 OLR 312.

Section 14

NOTES OF DECISIONS

Bail should be denied when the circumstances disclosed indicate a fair likelihood that defendant is in danger of being convicted of murder or treason. State ex rel. Connall v. Roth (dictum), (1971) 258 Or 428, 482 P2d 740.

The indictment alone is not the proof contemplated by Ore. Const. Art. I, §14 to establish evident or strong proof or presumption of guilt. Id.

In evaluating the proof needed, the trial court has broad discretion. (dictum) Id.

FURTHER CITATIONS: State v. Belding, (1903) 43 Or 95, 71 P 330; Mozorosky v. Hurlburt, (1923) 106 Or 274, 198 P 556, 211 P 893, 15 ALR 1076; Hanson v. Gladden, (1967) 246 Or 494, 426 P2d 465.

ATTY. GEN. OPINIONS: Constitutionality of proposed bill to deny bail, (1971) Vol 35, p 603.

LAW REVIEW CITATIONS: 47 OLR 194.

Section 15

NOTES OF DECISIONS

Laws for the infliction of capital punishment are not prohibited by this section. State v. Anderson, (1882) 10 Or 448; State v. Finch, (1909) 54 Or 482, 103 P 505.

The present theory of penalization is, not merely that the penalty shall fit the crime, but that it shall fit the individual. State v. Black, (1935) 150 Or 269, 291, 42 P2d 171, 44 P2d 162.

A sentence of imprisonment for one year for assault and battery was not disproportionate to the offense and did not violate this section. Id.

A negligent homicide statute did not violate this section. State v. Wojahn, (1955) 204 Or 84, 282 P2d 675.

The Habitual Criminal Act does not violate this section. State v. Hicks, (1958) 213 Or 619, 325 P2d 794, cert denied, 359 US 917, 79 S Ct 594, 3 L Ed 2d 579.

This provision was substantially copied from a provision of the Indiana Constitution. Tuel v. Gladden, (1963) 234 Or 1, 379 P2d 553.

This section does not require that reformation be sought at substantial risk to the people of the state. Id.

Defendant's arrest record was properly included in the presentence report. State v. Scott, (1964) 237 Or 390, 390 P2d 328.

FURTHER CITATIONS: State v. Walton, (1907) 50 Or 142, 91 P 490, 13 LRA(NS) 811; State v. Grady, (1962) 231 Or 65, 371 P2d 68; State v. Brannon, (1964) 238 Or 189, 393 P2d 770; State v. Murray, (1964) 238 Or 567, 395 P2d 780; State v. Harp, (1965) 239 Or 481, 398 P2d 182; State v. Shannon, (1965) 242 Or 404, 409 P2d 911; State v. Thornton, (1966) 244 Or 104, 416 P2d 1; State v. Tuck, (1969) 1 Or App 516, 462 P2d 175, Sup Ct **review denied,** cert. denied, 402 US 982; State v. Gabie, (1970) 1 Or App 576, 463 P2d 595, Sup Ct **review denied;** State v. Chilton, (1970) 1 Or App 593, 465 P2d 495; Newton v. Cupp, (1970) 3 Or App 434, 474 P2d 532.

ATTY. GEN. OPINIONS: Requirement that punishment fit the individual, 1954-56, p 208; parole under consecutive sentences of 10 years and life, 1966-68, p 549.

LAW REVIEW CITATIONS: 45 OLR 36; 5 WLJ 159.

Section 16

NOTES OF DECISIONS

1. In general

The appellate court is empowered to enforce this section and avoid the judgment so far as excessive by reversal of the objectionable part and affirmance of the remainder. State v. Ross, (1910) 55 Or 450, 473, 104 P 596, 106 P 1022, 42 LRA(NS) 601, app. dis., 227 US 150, 33 S Ct 220, 57 L Ed 458.

2. Cruel and unusual punishment

Sentences of imprisonment were excessive and in violation of this section. **Larceny of public funds,** State v. Ross, (1910) 55 Or 450, 104 P 596, 106 P 1022, 42 LRA(NS) 601, app. dis., 227 US 150, 33 S Ct 220, 57 L Ed 458; **robbery by minor,** State v. Walton, (1907) 50 Or 142, 91 P 490, 13 LRA(NS) 811.

A habitual criminal Act did not violate this section. State v. Smith, (1929) 128 Or 515, 273 P 323; State v. Hicks, (1958) 213 Or 619, 325 P2d 794, cert. denied, 359 US 917, 79 S Ct 594, 3 L Ed 2d 579; State v. Custer, (1965) 240 Or 350, 401 P2d 402.

When the sentence was within the statutory authority of the court, the appellate court would not substitute its judgment for that of the trial court. State v. Tuck, (1969) 1 Or App 516, 462 P2d 175, Sup Ct **review denied,** cert. denied, 402 US 982; State v. Smith, (1971) 92 Or App Adv Sh 1655, 487 P2d 90.

In order that a punishment may be declared "cruel and unusual" with reference to its duration, it must be so proportioned to the offense as to shock the moral sense of all reasonable men as to what is right and proper in the circumstances. Sustar v. County Court, (1921) 101 Or 657, 201 P 445.

A provision imposing, for violation of the liquor law, a fine of not less than $100 nor more than $500, or imprisonment of not more than six months, or both, did not conflict with this section. Id.

The penalty of death by hanging, as punishment for murder in first degree, was not cruel and unusual punishment. State v. Butchek, (1927) 121 Or 141, 253 P 367, 254 P 805.

A statute denouncing the crime of aiding escape of prisoner and fixing penalties varying in severity according to extent of punishment which person whose escape was intended or effected would receive, did not violate this section. Kelley v. Meyers, (1928) 124 Or 322, 263 P 903, 56 ALR 661.

The fixing of the penalty involves an exercise of discretion on the part of the trial court. State v. Boloff, (1932) 138 Or 568, 647, 4 P2d 326, 7 P2d 775.

A penalty imposed by a trial judge is presumed to be reasonable. Id..

A statute authorizing a greater punishment for assault with intent to commit rape than was provided for in sections relating to the crime of rape violated this section. Cannon v. Gladden, (1955) 203 Or 629, 281 P2d 233.

A statute which gave the grand jury and magistrate discretion as to whether a crime was a felony or misdemeanor was unconstitutional. State v. Pirkey, (1955) 203 Or 697, 281 P2d 698.

Sentence to term not exceeding 25 years for crime of burglary with explosives did not conflict with this section. Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

Although defendant had no substantial previous criminal record, a 12-year sentence for forgery did not violate this section. State v. Teague, (1959) 215 Or 609, 336 P2d 338.

Sentence of 20 years for conviction of assault with intent to rob while armed was constitutional even though assault statute provided for 15-year maximum sentence since robbery statute included the lesser offense. Merrill v. Gladden, (1959) 216 Or 460, 337 P2d 774.

Penalty provisions of overload statutes are constitutional. State v. Pyle, (1961) 226 Or 485, 360 P2d 626.

The sentence for an indeterminate term not exceeding life, provided by ORS 167.050 [repealed 1971] for subsequent morals convictions, being founded on an arguably rational basis, is not excessive. Jensen v. Gladden, (1962) 231 Or 141, 372 P2d 183.

An indeterminate life sentence for sex offenders under ORS 137.111 to 137.115 [repealed 1971] did not violate this section. State v. Dixon, (1964) 238 Or 121, 393 P2d 204.

Writ of habeas corpus will not issue because of an assault on a prisoner by a prison guard, even if the assault is unlawful, unless petitioner shows his constitutional rights will probably be violated. Grenfell v. Gladden, (1965) 241 Or 190, 405 P2d 532, cert. denied, 382 US 998.

The penalty under ORS 166.230 [repealed 1971] for carrying a firearm capable of being concealed, imposed in addition, and to run consecutively, to penalty for assault and robbery while armed, was not unconstitutional. State v. Humphrey, (1969) 253 Or 183, 452 P2d 755.

Concurrent sentences of life imprisonment for armed robbery and 10 years for assault with a dangerous weapon did not constitute cruel and unusual punishment. State v. Hecket, (1970) 2 Or App 273, 467 P2d 122, Sup Ct **review denied.**

A sentence to imprisonment is not excessive on grounds that because of changed personal circumstances imprisonment would serve no useful purpose. State v. Fraley, (1970) 2 Or App 238, 467 P2d 683.

Legislation providing the same maximum punishments for both successful and unsuccessful assaults with intent to commit unlawful homicide did not violate this section. State v. Eddins, (1971) 5 Or App 277, 482 P2d 757.

3. Jury's function

The jurors must accept and apply the law as given to them by the court. The power of the jury to disobey the directions of the court as to the law does not imply either a legal or moral right to do so. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173; State v. Daley, (1909) 54 Or 514, 103 P 502, 104 P 1; State v. Wong Si Sam, (1912) 63 Or 266, 127 P 683; State v. Layne, (1966) 244 Or 510, 419 P2d 35.

The court shall instruct the jury concerning lesser included offenses. State v. Cody, (1890) 18 Or 506, 23 P 891. **But see** State v. Foot You, (1893) 24 Or 61, 32 P 1031, 33 P 537 and State v. Reyner, (1907) 50 Or 224, 91 P 301.

The jury in a criminal case may return a verdict of not guilty, however clear the proof of guilt may be, and the court is without power to order a new trial. State v. Reed, (1908) 52 Or 377, 389, 97 P 627.

This section does not make it obligatory upon the court, in a criminal case where the defense is insanity, to instruct the jury concerning commitment of the defendant in an insane asylum. State v. Daley, (1909) 54 Or 514, 103 P 502, 104 P 1.

Where a jury returns and asks for certain evidence the trial judge may decline to state to the jury his recollection of the evidence. State v. Jennings, (1929) 131 Or 455, 472, 282 P 560.

A motion for a new trial is addressed to the judge rather than the jury. State v. Merten, (1941) 175 Or 254, 152 P2d 942.

4. Excessive bail

Mere showing that bail was set at $15,000 pending appeal from conviction of assault with intent to commit rape, when before trial bail had been set at $3,000, did not establish that bail was excessive. Delaney v. Shobe, (1959) 218 Or 626, 346 P2d 126.

Mere fact of inability to give bail in the amount set is not sufficient reason for holding the amount excessive. Id.

Setting of bail is in the sound discretion of the trial judge and will be disturbed only for an abuse of discretion. State v. Keller, (1965) 240 Or 442, 402 P2d 521.

FURTHER CITATIONS: State v. Kelly, (1958) 213 Or 197, 324 P2d 486; State v. Popiel, (1959) 216 Or 140, 337 P2d 303; State v. Gust, (1959) 218 Or 498, 345 P2d 808; State ex rel. Chapman v. Appling, (1960) 220 Or 41, 348 P2d 759; State v. Fleming, (1962) 232 Or 412, 375 P2d 831; Tuel v. Gladden, (1963) 234 Or 1, 379 P2d 553; State v. Montgomery, (1964) 237 Or 593, 392 P2d 642; State v. Clark, (1964) 237 Or 596, 392 P2d 643; State v. Brannon, (1964) 238 Or 189, 393 P2d 770; State v. Gressinger, (1964) 238 Or 490, 395 P2d 441; State v. Harp, (1965) 239 Or 481, 398 P2d 182; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634; State v. Shannon, (1965) 242 Or 404, 409 P2d 911; State v. Collis, (1966) 243 Or 222, 413 P2d 53; Macomber v. Gladden, (1966) 243 Or 244, 412 P2d 523; Shannon v. Gladden, (1966) 245 Or 305, 421 P2d 694; Newton v. Cupp, (1970) 1 Or App 645, 465 P2d 734; Newton v. Cupp, (1970) 3 Or App 434, 474 P2d 532.

ATTY. GEN. OPINIONS: Fixing increased fines for "moving traffic violations," 1954-56, p 94; driving under the influence of liquor as felony, 1958-60, p 330.

LAW REVIEW CITATIONS: 10 OLR 269; 39 OLR 170; 40 OLR 13.

Section 17

NOTES OF DECISIONS

1. In general
2. Proceedings requiring jury trial
3. Questions for the jury
4. Suits in equity
5. Waiver of jury trial

See also cases under Art. VII(A), §3

1. In general

Cases which, under the common law, are triable by jury as a matter of right, are the cases which are contemplated by this section. Tribou v. Strowbridge, (1897) 7 Or 156, 158; Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

If the evidence requires submission of the case to the jury, a withdrawal thereof by the trial court is erroneous. Willetts v. Scudder, (1914) 72 Or 535, 548, 144 P 87; Union Cent. Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 222, 3 P2d 536, 8 P2d 587.

The right which is guaranteed by the section is not limited strictly to those cases in which it had existed before adoption of the Constitution, but it extends to cases of like nature thereafter arising. State v. 1920 Studebaker, (1927) 120 Or 254, 251 P 701, 50 ALR 81; In re Idleman's Commitment, (1934) 146 Or 13, 27 P2d 305. **But see** Mallatt v. Luihn, (1956) 206 Or 678, 294 P2d 871.

A submission of all questions to the jury, notwithstanding a motion for a nonsuit, is not required by this provision. Reed v. W. Union Tel. Co., (1914) 70 Or 273, 141 P 161.

A levy of execution on a wife's property by virtue of a judgment against the husband was an attempted violation of this section. Dale v. Marvin, (1915) 76 Or 528, 148 P 1116, 1151, Ann Cas 1917C, 557.

The practice of directing verdicts does not violate this section. Ford v. Schall, (1925) 114 Or 688, 236 P 745.

A narrow construction should not be given to this provision. State v. 1920 Studebaker, (1927) 120 Or 254, 251 P 701, 50 ALR 81.

This section was not repealed by Art. VII(A), §3. Johnson v. Ladd, (1933) 144 Or 268, 293, 14 P2d 280, 24 P2d 17.

The nature of the particular issue in a proceeding, determines whether the issue is to be tried with a jury. Cornelison v. Seabold, (1969) 254 Or 401, 460 P2d 1009.

2. Proceedings requiring jury trial

Statutes authorizing the court to assess damages without the intervention of a jury were constitutional. Kendall v. Post, (1879) 8 Or 141; Deane v. Willamette Bridge Co., (1892) 22 Or 167, 29 P 440, 15 LRA 614; King v. Bingham, (1892) 23 Or 262, 31 P 601, 18 LRA 361.

Statutes creating rights and remedies which precluded trial by jury did not violate this section. **Remedy against county,** Pruden v. Grant Co., (1885) 12 Or 308, 7 P 308; **equitable relief in boundary disputes,** Love v. Morrill, (1890) 19 Or 545, 24 P 916; Smith v. Cain, (1914) 69 Or 479, 139 P 566; **suit to determine adverse interests,** McLeod v. Lloyd, (1903) 43 Or 260, 71 P 794, 74 P 491; Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193; **maintenance of relatives,** In re Idleman's Commitment, (1934) 146 Or 13, 27 P2d 305; Mallatt v. Luihn, (1956) 206 Or 678, 294 P2d 871.

Trial for violation of a municipal ordinance is not within the contemplation of this section. Wong v. City of Astoria, (1886) 13 Or 538, 11 P 295; Cranor v. City of Albany, (1903) 43 Or 144, 71 P 1042.

In an action which is tantamount to the ancient proceeding of quo warranto, the right to trial by jury does not exist. State v. Sengstacken, (1912) 61 Or 455, 122 P 292, Ann Cas 1914B, 230.

Probate proceedings are not "civil cases," within the purview of this section. Stevens v. Myers, (1912) 62 Or 372, 121 P 434, 126 P 29.

On appeal to the circuit court from the district court, a defendant is entitled to a jury trial, though the controversy involves only $37.50. Schnitzer v. Stein (1920) 96 Or 343, 189 P 984.

A proceeding in rem to enforce a forfeiture is a suit at common law, and the claimants or owners of the property are entitled to a jury trial. State v. 1920 Studebaker, (1927) 120 Or 254, 251 P 101, 50 ALR 81.

One who brings an action on a promissory note is entitled to a jury trial. Cripe v. Wade, (1927) 123 Or 111, 118, 261 P 72.

In a contempt proceeding, the defendant is not entitled to a jury trial. Rust v. Pratt, (1937) 157 Or 505, 72 P2d 533.

3. Questions for the jury

The reasonableness of attorney's fees was a question for the jury. Cox v. Alexander, (1897) 30 Or 438, 46 P 794.

Where negligence on the part of a litigant is to be determined, notwithstanding there may be no conflict in the testimony, it must be left to the jury. Shobert v. May, (1901) 40 Or 68, 66 P 466, 91 Am St Rep 453, 55 LRA 810.

Failure to submit the issue of reasonable value to the jury in an action to recover on a quantum meruit was erroneous. Whitten v. Griswold, (1911) 60 Or 318, 118 P 1018.

One who holds property by claim of right is entitled to a jury trial of a question as to whether his possession shall be disturbed. Oliver v. Berg, (1936) 154 Or 1, 20, 58 P2d 245.

In an action by an insurer for a declaration of nonliability to defendant on account of an automobile accident, legal defenses are triable by a jury. Pacific Indem. Co. v. McDonald, (1938) 25 F Supp 522.

This section does not require that the issue of necessity

in a condemnation proceeding be determined by the jury. Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

The right to a jury trial does not extend to the issue of whether the Workman's Compensation Act provides the sole remedy. Cornelison v. Seabold, (1969) 254 Or 401, 460 P2d 1009.

4. Suits in equity

Issues involving accounts may be made the subject of reference without infringement of the right of trial by jury. Tribou v. Strowbridge, (1879) 7 Or 156; McDonald v. Am. Mtg. Co., (1889) 17 Or 626, 21 P 883; Trummer v. Konrad, (1897) 32 Or 54, 51 P 447; Mitchell v. Ore. Flax Assn., (1901) 38 Or 503, 63 P 881; Pearson v. Ore.-Wash. R.R. & Nav. Co., (1930) 135 Or 336, 295 P 201, 296 P 50.

Suits in equity are not referred to by the constitutional guaranty of trial by jury. **Constructive trusts,** Raymond v. Flavel, (1895) 27 Or 219, 40 P 158; **accounting,** Beach v. Guar. Sav. Assn., (1904) 44 Or 530, 76 P 16, 1 Ann Cas 418; **partition,** Chauncey v. Wollenberg, (1911) 59 Or 214, 115 P 419.

After a court of equity has acquired jurisdiction to restrain a nuisance, it may render a judgment for damages as an incident of the suit for an injunction, and in so doing, the right of trial by jury is not violated. Fleischner v. Citizen's Inv. Co., (1893) 25 Or 119, 35 P 174.

If the remedy at law is inadequate a trial by jury is not required. Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193.

5. Waiver of jury trial

The right of trial by jury may be waived by consent of the parties in the trial of issues of fact on contract, and with the consent of the court in other actions. Reade v. Pac. Supply Assn., (1901) 40 Or 60, 66 P 443.

An action at law may not be tried by the judge without a jury unless a jury trial has been waived by the parties. Puffer v. Am. Ins. Co., (1906) 48 Or 475, 87 P 523.

Defendant by moving for a nonsuit expressly waived his right to a jury trial. Patty v. Salem Flouring Mills Co., (1909) 53 Or 350, 96 P 1106, 98 P 521, 100 P 298.

FURTHER CITATIONS: Hindman v. Coy, (1956) 207 Or 279, 297 P2d 1097; Plummer v. Donald M. Drake Co., (1958) 212 Or 430, 320 P2d 245.

ATTY. GEN. OPINIONS: Paternal blood test legislation and its effect on the guaranty of trial by jury, 1952-54, p 233.

LAW REVIEW CITATIONS: 2 OLR 30; 6 OLR 387; 21 OLR 298; 35 OLR 2, 28, 150; 45 OLR 212; 46 OLR 145; 4 WLJ 97-103; 6 WLJ 556.

Section 18

NOTES OF DECISIONS

1. In general
   (1) Effect generally
   (2) Constitutionality of laws
2. Taking
3. Property
4. Use
5. Compensation
   (1) Generally
   (2) "Just" compensation
6. Demanding of services

1. In general

(1) Effect generally. Statutes authorizing condemnation must be strictly construed. Clark v. Portland, (1912) 62 Or 124, 123 P 708; Portland v. Kamm, (1930) 132 Or 317, 285 P 236.

This provision is self executing, and the injured individual has a remedy at law to recover damages sustained apart from eminent domain proceedings. Morrison v. Clackamas County, (1933) 141 Or 564, 18 P2d 814; Tomasek v. Ore. Hwy. Comm., (1952) 196 Or 120, 248 P2d 703; Walker v. Mackey, (1953) 197 Or 197, 251 P2d 118, 253 P2d 280.

The legislature was empowered by this provision to enact sections authorizing issuance by a city of an order on its treasurer to pay damages awarded in condemnation proceedings. Skelton v. City of Newberg, (1915) 76 Or 126, 148 P 53, 57.

The right to condemn was not a defense to an action of trespass brought against an irrigation company. Williams v. Goose Lake Valley Irr. Co. (1917) 83 Or 302, 163 P 81.

A drainage district may condemn land by following the procedure prescribed by statute. Re Scappoose Drainage Dist., (1925) 115 Or 541, 237 P 684, 1117, 1118, 239 P 193.

An amendment of this section did not revive an Act which had been declared unconstitutional. Smith v. Cameron, (1928) 123 Or 501, 262 P 946.

Corporations and associations are affected by the provision equally with individuals. State Land Bd. v. Davidson, (1934) 147 Or 504, 34 P2d 608.

Common-law riparian rights have been restricted by this provision. Minton v. Coast Property Corp., (1935) 151 Or 208, 46 P2d 1029.

Where the power to take private property for public use is conferred by the legislature, it rests with the grantee to determine when and to what extent it shall be exercised, provided that the power is not exceeded or abused. Coos Bay Logging Co. v. Barclay, (1938) 159 Or 272, 79 P2d 672.

The right guaranteed by this section to the owner of private property carries with it the consent of the state to be sued for its violation. Tomasek v. Ore. Hwy. Comm., (1952) 196 Or 120, 248 P2d 703.

For purpose of determining venue, action by owner of property to recover compensation from state for injuries to his land which constituted a taking of his property without condemnation proceedings is one for injuries to land. State Hwy. Comm. v. Goodwin, (1956) 208 Or 514, 303 P2d 216.

The right guaranteed by this section to the owner of private property carries with it the consent of the state to be sued for its violation. Id.

Statutes authorizing condemnation should not be construed to defeat the intent and manifest purpose of the legislature. Port of Umatilla v. Richmond, (1958) 212 Or 596, 321 P2d 338.

"Necessary" means "reasonably necessary," not indispensable. Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

There is no statute allowing attorneys' fees in "inverse condemnation" action. Cereghino v. State Hwy. Comm., (1962) 230 Or 439, 370 P2d 694.

Condemnor is not a successor of a party within scope of the statute of frauds. City of Medford v. Bessonette, (1970) 255 Or 53, 463 P2d 865.

No reasons of public policy strong enough to counterbalance the constitutional demand that reparations be paid were shown for denying plaintiff recovery for a continuing noise nuisance from defendant's use of its land as an airport. Thornburg v. Port of Portland, (1962) 233 Or 178, 376 P2d 100.

(2) Constitutionality of laws. Provisions relating to reassessment of benefits for local improvements in case of invalidity of the original assessment were valid. Duniway v. Portland, (1905) 47 Or 103, 81 P 945; Hughes v. Portland, (1909) 53 Or 370, 100 P 942.

A city charter provision relating to the disposition of the proceeds from a resale of property violated this section. Gaston v. Portland, (1906) 48 Or 82, 84 P 1040.

The power of eminent domain conferred on quasi-

municipal drainage districts did not violate this section. State v. Nyssa-Arcadia Drainage Dist., (1916) 80 Or 524, 157 P 804.

Statutes relating to the formation of water districts did not infringe this provision. Smith v. Hurlburt, (1923) 108 Or 690, 217 P 193.

A zoning ordinance was valid. Kroner v. Portland, (1925) 116 Or 141, 240 P 536.

A statute requiring a divorce applicant to pay a fee to cover the appearance of the district attorney in such suit was constitutional. Wright v. Beveridge, (1927) 120 Or 244, 251 P 895.

The requirements of a housing code did not violate this section. Daniels v. Portland, (1928) 124 Or 677, 265 P 790, 59 ALR 512.

A tax or local improvement assessment which is arbitrarily imposed without reference to some system of just apportionment cannot be upheld. MacVeagh v. Multnomah County, (1928) 126 Or 417, 270 P 502.

Statutes relating to maintenance of inmates confined in public institutions did not violate this provision. In re Idleman's Commitment, (1934) 146 Or 13, 27 P2d 305.

A statute regulating advertising by dentists did not violate the section. Semler v. Ore. State Bd. of Dental Examiners, (1934) 148 Or 50, 34 P2d 311.

The Alien Land Law denying aliens certain property rights violated this section. Namba v. McCourt and Neuner, (1949) 185 Or 579, 204 P2d 569.

Horse roundup statute violated this section. Bowden v. Davis, (1955) 205 Or 421, 289 P2d 1100.

Statute granting ports power to condemn property was constitutional. Port of Umatilla v. Richmond, (1958) 212 Or 596, 321 P2d 338.

A city's use of a zoning ordinance so that the state may later acquire property at depreciated value is a taking of private property for public use without just compensation. Robertson v. Salem, (1961) 191 F Supp 604. Superseding Shaffner v. Salem, (1954) 201 Or 45, 268 P2d 599.

2. Taking

The damage resulting from a change of street grade was not a "taking" within the meaning of this section. Brand v. Multnomah County, (1900) 38 Or 79, 92, 60 P 390, 62 P 209, 84 Am St Rep 772, 50 LRA 389; Wilson v. Portland, (1930) 132 Or 509, 285 P 1030.

An obstruction or diversion of waters for a public use so that the stream invades and destroys private property or materially decreases its value, amounts to a taking. Morrison v. Clackamas County, (1933) 141 Or 564, 18 P2d 814; Metzger v. City of Gresham, (1936) 152 Or 632, 54 P2d 311.

Legislation prohibiting the catching of certain types of fish in the Columbia River by fixed gear did not constitute a taking of property without compensation. Anthony v. Veatch, (1950) 189 Or 462, 220 P2d 493, 221 P2d 575, app. dis., 340 US 923, 71 S Ct 499, 95 L Ed 667; Miles v. Veatch, (1950) 189 Or 506, 220 P2d 511, 221 P2d 905.

Damage caused by flooding which destroys private property or materially decreases its value is a taking within the meaning of the state and federal constitutions. Tomasek v. Oregon Hwy. Comm., (1952) 196 Or 120, 248 P2d 703; Cereghino v. State Hwy. Comm., (1962) 230 Or 439, 370 P2d 694.

An indirect encroachment resulting from the state's exercise of its power of eminent domain is not a taking. Willamette Iron Works v. Oregon Ry. & Nav. Co., (1894) 26 Or 224, 37 P 1016.

A destruction of property or dispossession of the owner is not necessary in order to constitute a taking within the meaning of this provision. Morrison v. Clackamas County, (1933) 141 Or 564, 18 P2d 814.

Construction of a spur railroad track, a curve of which approached within 42 inches of plaintiff's line, was such a taking of private property as to require payment before construction. Kurtz v. So. Pac. Co., (1916) 80 Or 213, 155 P 367, 156 P 794.

A taking for public use signifies a possession, occupation and enjoyment of property by the public at large or by a public agency. Gearin v. Marion County, (1924) 110 Or 390, 223 P 929.

Destruction of private property by the release into a stream of logs, trees and stumps by a county did not constitute a taking. Id.

Construction of a bridge approach within the confines of a street, so as to interfere with access to and from abutting property, is not a "taking" of property. Barrett v. Union Bridge Co., (1926) 117 Or 220, 243 P 93, 45 ALR 521.

There is no "taking" of an easement of access when a new nonaccess highway is established by condemnation. State Hwy. Comm. v. Burk, (1954) 200 Or 211, 265 P2d 783.

The wisdom, expediency or necessity for taking is a legislative question and not one for the courts in absence of an abuse of discretion. Port of Umatilla v. Richmond, (1958) 212 Or 596, 321 P2d 338.

Defendant's blasting operations did not sufficiently damage or interfere with plaintiff's use and enjoyment of property to constitute taking by inverse condemnation. Moeller v. Multnomah County, (1959) 218 Or 413, 345 P2d 813.

An award of permanent damages in an "inverse condemnation" action is equivalent to acquisition of an easement or other interest in the land by condemnation. Cereghino v. State Hwy. Comm., (1962) 230 Or 439, 370 P2d 694.

The definition of "taking," as any destruction, restriction or interruption of the common and necessary use and enjoyment of the property of a person for a public purpose, is broad enough to cover a continuing nuisance. Thornburg v. Port of Portland, (1962) 233 Or 178, 376 P2d 100.

If the governmental interference with the use and enjoyment of the land is substantial enough to impose a servitude upon the land, such interference may constitute a taking. Id.

It is for the jury to determine when a noise burden becomes so unreasonable that the government must pay for the privilege of being permitted to make the noise. Id.

Congressional declaration that certain airspace is in the public domain for navigational purposes does not limit or determine the rule of property law applicable in inverse condemnation cases. Id.

Acts done in the proper exercise of governmental power, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of this section. Oregon Inv. Co. v. Schrunk, (1965) 242 Or 63, 408 P2d 89.

It was error to instruct the jury that the blocking of a property owner's access to one street was not a taking so long as he had access to another street. Ail v. Portland, (1931) 136 Or 654, 299 P 306.

The closing of a street which is intersected by that upon which plaintiff's property abuts, was not a taking of property. Cooke v. Portland, (1931) 136 Or 233, 298 P 900.

3. Property

Repeal of an Act granting tide-water lands violated this section. Corvallis & E. R. Co. v. Benson, (1912) 61 Or 359, 121 P 418.

A wharf right granted by the state to an upland owner on a navigable stream, though unused, is property for which compensation must be made if it is to be taken for public use. Pacific Elevator Co. v. Portland, (1913) 65 Or 349, 402, 133 P 72, 46 LRA(NS) 363.

An abutter who owns the fee in a street cannot be deprived thereof by a railroad company until he receives compensation for his damages as provided in this section.

Tooze v. Willamette Valley S. Ry., (1915) 77 Or 157, 150 P 252.

The use of the property of a public utility may not be taken without just compensation in the form of adequate rates or charges. Hammond Lbr. Co. v. Pub. Serv. Comm., (1920) 96 Or 595, 189 P 639, 9 ALR 1223; Pacific Tel. & Tel. Co. v. Wallace, (1938) 158 Or 210, 226, 75 P2d 942.

Property is property, within the meaning of this section, whether it consists of much or little, or is of large or small value. Bowden v. Davis, (1955) 205 Or 421, 289 P2d 1100.

A horse constitutes private property within the meaning of this provision. Id.

The right of lateral support is an interest in land and "property" under this section. Kropitzer v. Portland, (1964) 237 Or 157, 390 P2d 356.

4. Use

A taking for any public use does not contravene this section. Oregon Cascade R.R. v. Baily, (1869) 3 Or 164; Witham v. Osburn, (1873) 4 Or 318, 18 Am Rep 287; Dalles Lumbering Co. v. Urquhart, (1888) 16 Or 67, 19 P 78; Towns v. Klamath County, (1898) 33 Or 225, 53 P 604; Sullivan v. Cline, (1898) 33 Or 260, 54 P 154.

Before the 1920 amendment, statutes authorizing private roads across the land of another were in conflict with this section. Witham v. Osburn, (1873) 4 Or 318, 18 Am Rep 287; Anderson v. Smith-Powers Logging Co., (1914) 71 Or 276, 139 P 736, LRA 1916B, 1089.

A taking for private use is not authorized even though just compensation is paid. Grande Ronde Elec. Co. v. Drake, (1905) 46 Or 243, 78 P 1031; Smith v. Cameron, (1922) 106 Or 1, 210 P 716, 27 ALR 510.

Statutes authorizing condemnation of land for irrigation ditches by private parties were valid. Smith v. Cameron, (1922) 106 Or 1, 210 P 716, 27 ALR 510.

The question as to whether the proposed use is in fact public is one for the determination of the court. Coos Bay Logging Co. v. Barclay, (1938) 159 Or 272, 79 P2d 672; Port of Umatilla v. Richmond, (1958) 212 Or 596, 321 P2d 338.

The measures which housing authorities can take to rid areas of blight and repel its recurrence, subject the property in the area to public use. Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

The term "public use" demands that the public's use be direct. Id.

In determining the amount of land to be taken, a port commission was entitled to consider probable future needs as well as those of the present. Port of Umatilla v. Richmond, (1958) 212 Or 596, 321 P2d 338.

5. Compensation

(1) Generally. A taking by the state need not be preceded by assessment and tender. Branson v. Gee, (1894) 25 Or 462, 36 P 527, 24 LRA 355; State v. Mohler, (1925) 115 Or 562, 237 P 690, 239 P 193.

A statute authorizing road supervisors to take materials for the repair of public roads did not conflict with this section. Branson v. Gee, (1894) 25 Or 462, 36 P 527, 24 LRA 355; Cherry v. Lane County, (1894) 25 Or 487, 36 P 531.

Equity will intervene to prevent the taking of property until compensation has been assessed and tendered. Willamette Iron Works v. Ore. R. Co., (1894) 26 Or 224, 37 P 1016, 46 Am St Rep 620, 29 LRA 88; Kurtz v. So. Pac. Co., (1916) 80 Or 213, 155 P 367, 156 P 794; Minto v. Salem Water Co., (1926) 120 Or 204, 250 P 722.

Interest is recoverable from the time that the state takes possession of the property or the date of judgment. State Hwy. Comm. v. Sauers, (1953) 199 Or 417, 262 P2d 678; State Hwy. Comm. v. Superbilt Mfg. Co., (1955) 204 Or 393, 281 P2d 707.

The rule of compensation in case of a taking for highway purposes did not conflict with the requirement of "just" compensation. Putnam v. Douglas County, (1877) 6 Or 328, 25 Am Rep 527.

Where the payment of damages is made a condition to an order for the taking of property, the order does not violate this provision. Fanning v. Gilliland, (1900) 37 Or 369, 61 P 636, 62 P 209, 82 Am St Rep 758.

The right to appeal from the judgment on the award is waived where it appears that the plaintiff paid the damage awarded into the court, and took possession of the land. Oregon Elec. Ry. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 334, 930.

The failure or refusal of the state to institute condemnation proceedings does not bar the injured property owner from bringing suit for just compensation against the state. Tomasek v. Ore. Hwy. Comm., (1952) 196 Or 120, 248 P2d 703.

Even though there are two or more owners of the land condemned, the court may award damages in a lump sum which will be paid by the state into the court for distribution. State Hwy. Comm. v. Burk, (1954) 200 Or 211, 265 P2d 783.

The cost of removing trade fixtures is not to be included in the compensation. State Hwy. Comm. v. Superbilt Mfg. Co., (1955) 204 Or 393, 281 P2d 707.

When condemnation is instituted after condemnor is already in trespassory possession, compensation is determined by valuation at time of entry. State Hwy. Comm. v. Stumbo, (1960) 222 Or 62, 352 P2d 478, 2 ALR2d 1028.

The landowner waived his right to compensation when he admitted that the defendant had the right to construct a drainage ditch across his land. Arstill v. Fletcher, (1920) 95 Or 308, 187 P 854.

(2) "Just" compensation. Special benefits may not be set off against the value of the land actually seized, but may be set off against injury to the residue of the tract. State Hwy. Comm. v. Bailey, (1957) 212 Or 261, 319 P2d 906; State Hwy. Comm. v. Hooper, (1970) 2 Or App 450, 468 P2d 546, Sup Ct **review allowed.**

The price paid recently for similar parcels is admissible on the question of value. State Hwy. Comm. v. Parker, (1960) 225 Or 143, 357 P2d 548; State Hwy. Comm. v. Parker, (1960) 225 Or 324, 358 P2d 274.

The defendant is entitled to the actual value of the land appropriated, plus the amount that any injury to unappropriated land exceeds the benefits enuring to the defendant from the appropriation. Oregon Cent. R.R. v. Wait, (1869) 3 Or 91.

Conversion of a county road into a city street did not require the payment of additional compensation to the owner of the fee. Huddleston v. Eugene, (1899) 34 Or 343, 352, 55 P 868, 43 LRA 444.

The "just compensation" required by this section is such an award as may be agreed upon by a court of competent jurisdiction or a jury of appraisers appointed by law for that purpose. Crane v. Ore. R. & N. Co., (1913) 66 Or 317, 332, 133 P 810.

The defendant is entitled to his costs up to final adjudication of his damages, and the plaintiff's costs on appeal, on which it has obtained a reversal, are not taxable against defendant. Oregon R. & Nav. Co. v. Taffe, (1913) 67 Or 102, 116, 134 P 1024, 135 P 332, 515.

Damages for loss of rentals occasioned by alteration of the street in course of the construction of a railroad track therein were not allowed. Kurtz v. So. Pac. Co., (1916) 80 Or 213, 155 P 367, 156 P 794.

An allowance for attorney fees incurred by landowners in appealing from the order of the circuit court awarding damages is not authorized by this provision. Re Petition of Reeder, (1924) 110 Or 484, 222 P 724.

The cost of moving a house not on the right of way was not allowed as compensation. Pape v. Linn County, (1931) 135 Or 430, 296 P 65.

Individual items of damage should not be added together to ascertain compensation due. Id.

"Just compensation" includes interest at a rate of six percent per annum from the day of the taking, on whatever sum is found to be the fair market value of the condemned property. State Hwy. Comm. v. Deal, (1951) 191 Or 661, 233 P2d 242.

When a nonaccess highway is to be constructed across certain land partially taken by condemnation, the landowner is entitled to damages for the loss attributable to the nonaccess character of the highway. State Hwy. Comm. v. Burk, (1954) 200 Or 211, 265 P2d 783.

Offers to buy and sell comparable property are not admissible to establish the value of the land under condemnation. State Hwy. Comm. v. Morehouse Holding Co., (1960) 225 Or 62, 357 P2d 266.

Testimony as to value based on witnesses' general knowledge of real estate is admissible in the absence of objections as to his qualifications. Portland v. Therrow, (1962) 230 Or 275, 369 P2d 762.

The trier of facts is not bound by the opinion of experts on value even though it be uncontradicted. Portland v. Ruggers, (1962) 231 Or 624, 373 P2d 970.

It is the true market value of property not its cost that is protected. State Hwy. Comm. v. Anderson, (1963) 234 Or 328, 381 P2d 707.

Consideration of the utility of the airport should have had no place in the jury's consideration of a decrease in fair market value. Thornburg v. Port of Portland, (1966) 244 Or 69, 415 P2d 750.

Evidence of the probability of a zone change is admissible as proof of special benefits to the remaining property. State Hwy. Comm. v. Oswalt, (1970) 1 Or App 449, 463 P2d 602.

Estimate of loss from severance of property based on capitalization of rents is proper. City of Medford v. Bessonette, (1970) 255 Or 53, 463 P2d 865.

6. Demanding of services

A statute providing that witnesses in criminal cases residing within two miles of the place of trial shall receive neither fees nor mileage did not require "particular services" within the meaning of this provision for which compensation may be demanded. Daly v. Multnomah County, (1886) 14 Or 20, 12 P 11.

Where a prosecuting witness was held in custody in default of bail his services were not the "particular services" for which compensation may be demanded. Morin v. Multnomah County, (1889) 18 Or 163, 167, 22 P 490.

A public officer who is required to perform certain services for a county is entitled to collect fees therefor, but he cannot require payment in advance. Baker County v. Benson, (1901) 40 Or 207, 214, 66 P 815.

Mayor was not entitled to compensation when he was absent from the city for over 30 days in compliance with an ordinance. Sloan v. Baker, (1932) 139 Or 370, 10 P2d 362.

Failure to award court-appointed attorney more than is authorized by statute did not violate this section. Keene v. Jackson County, (1970) 3 Or App 551, 474 P2d 777, Sup Ct **review denied,** cert. denied, 402 US 995.

FURTHER CITATIONS: Harland v. Chandler, (1956) 208 Or 167, 300 P2d 412; Kliks v. Dalles City, (1959) 216 Or 160, 335 P2d 366; Webb v. State, (1959) 217 Or 1, 340 P2d 968; Bartkus v. Illinois, (1959) 359 US 121, 141, 79 S Ct 676, 3 L Ed 2d 684; Colombo v. Hewitt, (1960) 221 Or 121, 350 P2d 893; Northwestern Ice & Cold Storage Co. v. Multnomah County, (1961) 228 Or 507, 365 P2d 876; State Hwy. Comm. v. Assembly of God, Pentecostal, (1962) 230 Or 167, 368 P2d 937; Portland v. Holmes, (1962) 232 Or 505, 376 P2d 120; Wassom v. State Tax Comm., (1964) 1 OTR 468; Willoughby v. State Tax Comm., (1964) 1 OTR 484; Miller v. State Tax Comm., (1964) 1 OTR 488; Borden v. Salem, (1968) 249 Or 39, 436 P2d 734; Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938; Klamath Falls Assembly of God v. State Hwy. Comm., (1970) 255 Or 211, 465 P2d 697; Boggs v. Multnomah County, (1970) 2 Or App 517, 470 P2d 159; State v. Patterson, (1970) 3 Or App 480, 475 P2d 91.

ATTY. GEN. OPINIONS: Bonus for oil wells, 1920-22, p 77; payment of notaries public, 1920-22, p 639; justices of the peace compensation, 1924-26, p 473; taking of property by irrigation district, 1930-32, p 133; raising or lowering of water in lake, 1946-48, p 183; when State Board of Forestry can condemn land to create a right of way, 1948-50, p 408; validity of regulations promulgated by a county court which provide that the county will dispose of logs left on a highway, 1950-52, p 142; validity of bill authorizing additional fines for traffic violation to pay the cost of student driving training, 1954-56, p 94; arbitrarily defining class to whom power of eminent domain is granted, 1954-56, p 97; constitutionality of law regulating location of advertising signs, 1958-60, p 110; conviction of driving while under influence of intoxicating liquors as felony, 1958-60, p 330; limitations on authority to lease public land, 1960-62, p 172; legislator's firm representing plaintiff in an action in an "inverse condemnation" proceedings, 1960-62, p 262; compensable damage for loss of value caused by capitol mall zoning, 1960-62, p 270; fees of court appointed counsel, 1960-62, p 301; damages resulting from blasting, 1962-64, p 169; authority of State Highway Commission to comply with Highway Beautification Act, 1964-66, p 336; Philippine citizens and corporations engaging in business in Oregon, 1966-68, p 154; state liability insurance coverage for state employe reimbursed for mileage, (1969) Vol 34, p 712; owner of interest earned by deposit in condemnation proceedings, (1970) Vol 35, p 266; legislative authority to transfer title of building owned by Public Employes' Retirement Fund, title to Military Headquarters Building, (1971) Vol 35, p 472.

LAW REVIEW CITATIONS: 16 OLR 155; 19 OLR 171; 33 OLR 16, 25; 36 OLR 182; 39 OLR 152, 156, 158; 40 OLR 241, 263; 42 OLR 197-198; 46 OLR 125-158; 47 OLR 214-221; 49 OLR 127-187; 2 WLJ 500-505; 3 WLJ 281.

Section 19

NOTES OF DECISIONS

Imprisonment for disobedience of a decree ordering payment of alimony or money for support of children is not prohibited by this provision. State v. Francis, (1928) 126 Or 253, 269 P 878; State v. Hambrecht, (1929) 128 Or 305, 274 P 507; Dean v. Dean, (1931) 136 Or 694, 300 P 1027, 86 ALR 79.

Only contractual obligations are debts to which this provision applies. United States v. Walsh, (1867) 1 Deady 281, 28 Fed Cas No. 16,635.

Arrest in an action to recover a penalty is not forbidden by this section. Id.

An "absconding debtor" is one who is about to leave the state without discharging his obligations to creditors and without any definite purpose to return. Norman v. Manciette, (1871) 1 Sawy 484, 18 Fed Cas No. 10,300.

An action to recover for a wrong, accomplished by force, is not one in which the defendant is immune from arrest under this section. Hanson v. Fowle, (1871) 1 Sawy 497, 11 Fed Cas No. 6,041.

The liability to repay money won at gaming, together with a penalty, is not a "debt" within the purview of this provision. Mozorosky v. Hurlburt, (1923) 106 Or 274, 198 P 556, 211 P 893, 15 ALR 1076.

Imprisonment for failure to pay a fine is not contrary to this section as being imprisonment for debt. Harlow v. Clow, (1924) 110 Or 257, 223 P 541.

A person disobeying a lawful order of court cannot be

committed for alleged contempt without hearing and opportunity to present defense, when disobedience is not committed in presence of court. State ex rel. Hubble v. Hubble, (1929) 128 Or 46, 273 P 395.

LAW REVIEW CITATIONS: 34 OLR 156; 36 OLR 178; 39 OLR 371, 375.

Section 20

NOTES OF DECISIONS
1. In general
2. Licensing and taxing laws
3. Laws regulating occupations
4. Food, drug and liquor laws
5. Labor laws
6. Miscellaneous laws

1. In general

Legislation which affects alike all persons who pursue the same occupation in the same circumstances is not class legislation which is forbidden by this section. In re Oberg, (1891) 21 Or 406, 28 P 130, 14 LRA 577; Jones v. Union County, (1913) 63 Or 566, 127 P 781, 42 LRA(NS) 1035; Churchill v. City of Albany, (1913) 65 Or 442, 133 P 632, Ann Cas 1915A, 1094; Wright v. Wimberly, (1919) 94 Or 1, 184 P 740; State v. Kincaid, (1930) 133 Or 95, 285 P 1105, 288 P 1015; State v. Franklin, (1940) 163 Or 500, 98 P2d 724; Plummer v. Drake, (1958) 212 Or 430, 320 P2d 245; Bennett v. Oregon State Bar, (1970) 256 Or 37, 470 P2d 945.

A statute which grants special privileges to or imposes special burdens upon persons engaged in substantially the same business, under the same conditions, is unconstitutional. State v. Wright, (1909) 53 Or 344, 100 P 296, 21 LRA(NS) 349.

This provision does not prohibit or regulate a common carrier's power to grant exclusive rights to a transfer company. Baggage & Omnibus Transfer Co. v. Portland, (1917) 84 Or 343, 164 P 570, LRA 1917F, 1080.

This section is not applicable to resident aliens. Alsos v. Kendall, (1924) 111 Or 359, 227 P 286.

Classification of cities by population is not improper if size difference has a reasonable bearing on the needs and conditions to which the legislature should give heed. Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

Courts will not undertake to disturb a legislative classification unless the legislature could not have had any reasonable grounds for believing that there were valid public considerations for the distinctions made. Mallatt v. Luihn, (1956) 206 Or 678, 294 P2d 871.

The right to contract is a property right protected by this section. General Elec. Co. v. Wahle, (1956) 207 Or 302, 296 P2d 635.

Failure of county officials to comply with statutes in selecting jury panels does not amount to denial of equal protection of the laws. Anderson v. Gladden, (1963) 234 Or 614, 383 P2d 986, cert. denied, 375 US 975, 84 S Ct 485, 11 L Ed 2d 420.

Systematic exclusion from the jury of members of a defendant's race, if proven, would be a denial of equal protection of the laws. Id.

Authorization for abortion performed by physician when necessary to preserve the health of the expectant mother did not violate this section. State v. Elliot, (1963) 234 Or 522, 383 P2d 382.

That a person could be charged with larceny under ORS 164.310 [repealed 1971] or shoplifting under ORS 164.390 [repealed 1971] was not unconstitutional under this section. Black v. Gladden, (1964) 237 Or 631, 393 P2d 190.

This section applies only to Oregon citizens. Berry v. State Tax Comm., (1964) 1 OTR 524, aff'd, 241 Or 580, 397 P2d 780, 399 P2d 164.

Treaties grant to Indians rights not shared by other citizens. Sohappy v. Smith, (1969) 302 F Supp 899.

As long as any reasonable basis exists for distinguishing between two criminal statutes, there can be no constitutional objection to the fact that a particular defendant's unlawful acts constitute a violation of both statutes and therefore subject him to prosecution under either statute. State v. Dumont, (1970) 3 Or App 189, 471 P2d 847.

It was not a denial of equal protection for the court to be influenced in sentencing and denying probation by the fact defendant was a minister. State v. Smith, (1971) 92 Or App Adv Sh 1655, 487 P2d 90.

2. Licensing and taxing laws

The statute relative to licensing of sailors' boarding houses by a board of commissioners cannot be construed by them so as to limit the number of persons who may engage in keeping such boarding house. White v. Holman, (1903) 44 Or 180, 74 P 933, 1 Ann Cas 843; White v. Mears, (1904) 44 Or 215, 74 P 931.

License laws which do not operate equally and uniformly upon all persons in similar circumstances are invalid. **Peddler's license,** State v. Wright, (1909) 53 Or 344, 100 P 296, 21 LRA(NS) 349; Ideal Tea Co. v. Salem, (1915) 77 Or 182, 150 P 852, Ann Cas 1917D, 684; **motor club licenses,** United States Auto. Service Club v. Van Winkle, (1929) 128 Or 274, 274 P 308; **license to transport fish,** State v. Winegar, (1937) 157 Or 220, 69 P2d 1057.

Tax or license laws which operate equally and uniformly upon all persons in similar circumstances do not violate this section. **Peddler's license,** Rosa v. Portland, (1917) 86 Or 438, 168 P 936, LRA 1918B, 851; Phillips v. City of Bend, (1951) 192 Or 143, 234 P2d 572; **dog licenses,** Hofer v. Carson, (1922) 102 Or 545, 203 P 323; **motor vehicle licenses,** State v. Kozer, (1926) 116 Or 581, 242 P 621; **inheritance tax,** In re Estate of Heck, (1926) 120 Or 80, 250 P 735; **license to practice medicine,** State v. Smith, (1929) 127 Or 680, 273 P 343; State v. Burroughs, (1929) 130 Or 480, 280 P 653; **income tax,** McPherson v. Fisher, (1933) 143 Or 615, 23 P2d 913; Middlekauff v. Galloway, (1940) 163 Or 671, 99 P2d 24; **excise tax on contractors,** General Constr. Co. v. Fisher, (1934) 149 Or 84, 39 P2d 358, 97 ALR 1252; **chain store tax,** Safeway Stores Inc. v Portland, (1935) 149 Or 581, 42 P2d 162; State v. Hurst, (1935) 149 Or 519, 41 P2d 1079; **employer's payroll tax,** Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

The state may impose a tax or require a license from persons engaged in certain callings or trades, without being bound to include all persons or all property, but the classification must be on some reasonable basis, and the law, when enacted, must apply alike to all engaged in the business or occupation. State v. Wright, (1909) 53 Or 344, 100 P 296, 21 LRA(NS) 349.

The Act exempting property of charitable institutions from taxation did not violate this provision. Sisters of Mercy v. Lane County, (1927) 123 Or 144, 261 P 694.

To the extent that tax relief afforded to a charitable corporation is not based on a reasonable classification for sound public ends, it is a denial of equal protection of the laws. Oregon Physicians' Serv. v. State Tax Comm., (1960) 220 Or 487, 349 P2d 831.

The Electrical Safety Law in which corporations and individuals are put in separate classifications is constitutional. Nilsen v. Davidson Ind., Inc., (1961) 226 Or 164, 360 P2d 307.

Tax imposed on lessees of the United States is not discriminatory. Sproul v. Gilbert, (1961) 226 Or 392, 359 P2d 543.

Construing "time of war" to end with cessation of actual

hostilities with respect to World War I does not violate this section. Jarvie v. State Tax Comm., (1962) 1 OTR 1.

As to plaintiff bakery, city ordinance was not unreasonable in classification exempting from license any business conducted incidental to a general business for which a license had been issued, since all bakeries were grouped together. Davidson Baking Co. v. Jenkins, (1959) 216 Or 51, 337 P2d 352.

3. Laws regulating occupations

Laws regulating occupations do not violate this provision if they operate equally and uniformly upon all persons in similar circumstances. **Examinations for physicians,** State v. Randolph, (1892) 23 Or 74, 31 P 201, 37 Am St Rep 655, 17 LRA 470; **ticket scalpers law,** State v. Thompson, (1906) 47 Or 492, 84 P 476, 8 Ann Cas 646, 4 LRA(NS) 480; **fishing regulations,** State v. Catholic, (1915) 75 Or 367, 147 P 372, Ann Cas 1917B, 913; Union Fishermen's Co. v. Shoemaker, (1921) 98 Or 659, 193 P 476, 194 P 854; **transportation,** Fenwick v. City of Klamath Falls, (1931) 135 Or 571, 297 P 838; Anderson v. Thomas, (1933) 144 Or 572, 26 P2d 60.

The grant of an exclusive right to fish in a navigable stream is the creation of a monopoly which comes within the prohibition of this section. Hume v. Rogue R. Packing Co., (1908) 51 Or 237, 259, 83 P 391, 92 P 1065, 96 P 856, 131 Am St Rep 732, 31 LRA(NS) 396; Eagle Cliff Fishing Co. v. McGowan, (1914) 70 Or 1, 137 P 766; Monroe v. Withycombe, (1917) 84 Or 328, 165 P 227; Johnson v. Hoy, (1935) 151 Or 196, 47 P2d 252.

A Sunday law which did not apply to certain businesses was valid. State v. Nicholls, (1915) 77 Or 415, 151 P 473; Brunswick v. Evans, (1916) 228 Fed 991.

The operation of a fish trap which deprived fishermen from fishing with gill nets in navigable waters violated this section. Driscoll v. Berg, (1931) 137 Or 499, 293 P 586, 1 P2d 611; Radich v. Fredrickson, (1932) 139 Or 378, 10 P2d 352.

Legislation prohibiting the catching of certain types of fish in the Columbia River by fixed gear, excepting Indians "under federal regulations," did not grant to any one class of citizen a privilege or immunity, in violation of this section. Anthony v. Veatch, (1950) 189 Or 462, 220 P2d 493, 221 P2d 575, appeal dismissed, 340 US 923, 71 S Ct 499, 95 L Ed 667; Miles v. Veatch, (1950) 189 Or 506, 220 P2d 511, 221 P2d 905.

A statute providing that seamen shall not be imprisoned for debt did not violate this section. In re Oberg, (1891) 21 Or 406, 28 P 130, 14 LRA 577.

Statutes relating to the sale of tub butter were invalid. State v. Goodhue, (1912) 63 Or 117, 126 P 986.

An ordinance regulating the time of closing business establishments is not objectionable as being class legislation if it applies equally to persons who are engaged in the specified occupation. Churchill v. City of Albany, (1913) 65 Or 442, 133 P 632, Ann Cas 1915A, 1094.

An ordinance which regulated the opening and closing of some businesses but not others was invalid. Chan Sing v. City of Astoria, (1916) 79 Or 411, 155 P 378.

The enactment prohibiting the taking of crabs for the purpose of sale, which was inapplicable to those engaged in the canning business, was discriminatory class legislation. State v. Savage, (1920) 96 Or 53, 184 P 567, 189 P 427.

Statutes granting certain contract rights and special remedies to cooperatives did not violate this section. Oregon Growers' Coop. Assn v. Lentz, (1923) 107 Or 561, 212 P 811.

A city ordinance that prohibits auction sales of jewelry under proper regulation was invalid. Korber v. Portland, (1931) 135 Or 233, 295 P 203.

An ordinance regulating wholesale trade vehicles and excepting certain vehicles violated this section. Bell Potato Chip Co. v. Rogers, (1937) 156 Or 75, 66 P2d 287.

A statute creating a lien for poundage fees on fish did not deny "equal protection." State v. Franklin, (1940) 163 Or 500, 98 P2d 724.

Classifying employers on the basis of whether they accepted or rejected the Workmen's Compensation Law was improper in legislation dealing with safety regulations. M. & M. Wood Working Co. v. State Ind. Acc. Comm., (1945) 176 Or 35, 155 P2d 933.

The right to pursue any legitimate trade, occupation or business is a natural, essential and inalienable right and is protected by our Constitution. General Elec. Co. v. Wahle, (1956) 207 Or 302, 296 P2d 635.

Statute prohibiting female wrestling did not violate this section. State v. Hunter, (1956) 208 Or 282, 300 P2d 455.

An ordinance licensing nonassociated solicitors but not associated solicitors was unconstitutional. Aluminum Utensil Co. v. City of North Bend, (1957) 210 Or 412, 311 P2d 464.

Classification of school districts by student population for determining applicability of teacher tenure law did not violate this section. Bock v. Bend Sch. Dist. 1, (1968) 252 Or 53, 448 P2d 521.

Authorizing only attorneys to establish a client security fund is not an unreasonable classification in violation of Ore. Const. Art. IV, §20. Bennett v. Oregon State Bar, (1970) 256 Or 37, 470 P2d 945.

Failure to award court-appointed attorney more than is authorized by statute did not violate this section. Keene v. Jackson County, (1970) 3 Or App 551, 474 P2d 777, Sup Ct **review denied,** cert. denied, 402 US 995.

4. Food, drug and liquor laws

The local option law of 1905 was valid. State v. Richardson, (1906) 48 Or 309, 316, 85 P 225, 8 LRA(NS) 362; State v. Cochran, (1909) 55 Or 157, 104 P 419, 105 P 884.

Ordinance forbidding the sale of liquor in a private room, but excepting hotels from the operation of the law, was valid. Sandys v. Williams, (1905) 46 Or 327, 80 P 642.

A city charter section authorizing the city to license saloons did not infringe this section. Hall v. Dunn, (1908) 52 Or 475, 489, 97 P 811, 25 LRA(NS) 193.

An Act regulating the itinerant venders of drugs and requiring a license fee did not contravene the provisions of this section. State v. Miller, (1909) 54 Or 381, 386, 103 P 519.

A city ordinance providing inspection for meats and slaughterhouses which exempts packing plants subject to federal inspection was void as discriminatory. Sterett & Oberle Packing Co. v. Portland, (1916) 79 Or 260, 272, 154 P 410, 415.

Statutes regulating the practice of pharmacy and the possession and disposal of poisons and other drugs, did not contravene this section. Anderson v. Farr, (1920) 97 Or 137, 191 P 346.

A produce dealers and peddlers Act did not violate this provision. Cancilla v. Gehlhar, (1933) 145 Or 184, 27 P2d 179.

A milk control Act was constitutional. Savage v. Martin, (1939) 161 Or 660, 91 P2d 273.

An ordinance excluding farm products from an occupation tax was constitutional. Wittenberg v. Mutton, (1955) 203 Or 438, 280 P2d 359.

5. Labor laws

The statute regulating the hours of labor by females did not violate this section. State v. Muller, (1906) 48 Or 252, 85 P 855, 120 Am St Rep 805, 11 Ann Cas 88; Muller v. Oregon, (1908) 208 US 412, 28 S Ct 324, 52 L Ed 551, 13 Ann Cas 957.

An order of the industrial welfare commission fixing minimum wages which applied only to Portland, did not grant to others privileges denied to an employer in Portland

in contravention of this section. Stettler v. O'Hara, (1914) 69 Or 519, 534, 139 P 743, Ann Cas 1916A, 217; Simpson v. O'Hara, (1914) 70 Or 261, 141 P 158.

The Act declaring eight hours to be a day's labor in all cases of labor employed by the state, either directly or through the agency of a contractor, did not violate this section. Ex parte Steiner, (1913) 68 Or 218, 137 P 204.

Statutes prohibiting employment of labor for more than 10 hours in one day in mills, factories and manufacturing establishments were constitutional. State v. Bunting, (1914) 71 Or 259, 139 P 731, Ann Cas 1916C, 1003, LRA 1917C, 1162.

A statute denying the right of appeal from an order of the Industrial Accident Commission to a noncitizen residing in a foreign country was valid. Liimatainen v. State Ind. Acc. Comm., (1926) 118 Or 260, 246 P 741.

Dangerous employments have long been recognized in law as a proper category for special classification, calling for different treatment. Mallatt v. Ostrander Ry. & Tbr. Co., (1942) 46 F Supp 250.

A statute which treated companies rejecting the Workmen's Compensation Law differently from companies accepting such law was constitutional. M&M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082.

"Immunity clause" of Workmen's Compensation Law did not violate this section. Plummer v. Drake, (1958) 212 Or 430, 320 P2d 245.

The Occupational Disease Act does not provide an unreasonable classification. White v. State Ind. Acc. Comm., (1961) 227 Or 306, 362 P2d 302.

The statutes which designated dependents under the Workmen's Compensation Act, although some dependents were not included, was constitutional. Leech v. Georgia-Pac. Corp., (1971) 259 Or 161, 485 P2d 1195.

Denial of workmen's compensation death benefits to mentally retarded daughter over 18 was not unreasonable. Id.

6. Miscellaneous laws

Statutes which apply equally and uniformly to all persons under similar circumstances do not violate this section. **Fees for officers in counties over 50,000,** State v. Frazier, (1899) 36 Or 178, 59 P 5; **election nominating laws applying to certain parties,** Ladd v. Holmes, (1901) 40 Or 167, 66 P 714, 91 Am St Rep 457; **completion of irrigation project by the state,** McMahan v. Olcott, (1913) 65 Or 537, 133 P 836; **indemnity contracts,** Wallace & Co. v. Ferguson, (1914) 70 Or 306, 140 P 742, 141 P 542; **fee in primary election,** Patton v. Withycombe, (1916) 81 Or 210, 159 P 78; **witness fees,** City of Seaside v. Ore. Sur. Co., (1918) 87 Or 624, 171 P 396; **bond issuance by irrigation district,** Gard v. Henderson, (1920) 95 Or 520, 187 P 839; **tax to rebuild city after fire,** Kenney v. City of Astoria, (1923) 108 Or 514, 217 P 840; **attorneys' fees on insurance policy actions,** Spicer v. Benefit Assn., (1933) 142 Or 574, 17 P2d 1107, 21 P2d 187; Lane v. Bhd. of Locomotive Enginemen, (1937) 157 Or 667, 693, 73 P2d 1396; **maintenance of inmates at institutions,** In re Idleman's Commitment, (1934) 146 Or 13, 27 P2d 305.

Statutes restricting use of injunction in labor disputes were valid. Starr v. Laundry and Dry Cleaning Union, (1937) 155 Or 634, 63 P2d 1104; Wallace Co. v. International Assn., (1937) 155 Or 652, 673, 63 P2d 1090.

Action of the city council in denying a building permit to a religious corporation to build a church in a zoned district because of traffic congestion and depreciation in property values was a reasonable exercise of police power and, under these circumstances, was not unconstitutional under this section. Jehovah's Witnesses v. Mullen, (1958) 214 Or 281, 330 P2d 5, cert. denied, 359 US 436, 79 S Ct 40, 3 L Ed 2d 932, 74 ALR2d 347; Archdiocese of Portland v. County of Washington, (1969) 254 Or 77, 458 P2d 682.

A statute giving leave to a named person to institute suit against the state did not violate this section. Altschul v. State, (1914) 72 Or 591, 144 P 124.

Homestead statutes did not violate this section. Watson v. Hurlburt, (1918) 87 Or 297, 170 P 541.

The Act empowering women to claim exemption from jury service did not violate this provision. State v. Putney, (1924) 110 Or 634, 224 P 279.

A statute denouncing failure to support wife and children did not violate this section. State v. Bailey, (1925) 115 Or 428, 236 P 1053.

A statute requiring an applicant for divorce to pay a fee for the district attorney's appearance was constitutional. Wright v. Beveridge, (1927) 120 Or 244, 251 P 895.

A statute providing that only persons owning more than 5,000 square feet of land within a proposed tunnel district should be entitled to vote at the election was invalid. Oregon Tunnel Dist. v. Moore, (1927) 120 Or 594, 253 P 1.

A provision authorizing a city council to discharge improvement liens or other charges against any land up to $150,000 was unconstitutional. Hauke v. Ten Brook, (1927) 122 Or 485, 259 P 908.

The Oregon Grazing Law of 1923 was unconstitutional as an attempt, by the exercise of the police power of the state, to grant to residents of the state a privilege it withheld from the residents of other states. Mendiola v. Graham, (1932) 139 Or 592, 10 P2d 911.

The Alien Land Law which denied certain aliens property rights was unconstitutional. Namba v. McCourt, (1949) 185 Or 579, 204 P2d 569.

An ordinance making it unlawful for any person to roam or be upon the streets or public place, without having and disclosing a lawful purpose was constitutional. Portland v. Goodwin, (1949) 187 Or 409, 210 P2d 577.

Curative legislation validating the enlargement of a recreation district board under a prior statute was not invalid as special legislation, as a corporation is not a citizen within the meaning of the privileges and immunities clause. State v. James, (1950) 189 Or 268, 219 P2d 756.

An Act specially providing for incompetents did not violate this section. Administrator of Veterans' Affairs v. United States Nat. Bank, (1951) 191 Or 203, 229 P2d 213.

An urban redevelopment statute limited to cities in counties with a population of 70,000 or more did not violate this section. Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

A statute authorizing a circuit judge in a judicial district having a population of 200,000 or more to reside outside of the district did not violate this section. Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749.

A statute affecting only the Port of Portland was constitutional. Port of Portland v. Reeder, (1955) 203 Or 369, 280 P2d 324.

A statute which gave the grand jury and magistrate discretion as to whether a crime was a felony or misdemeanor was unconstitutional. State v. Pirkey, (1955) 203 Or 697, 281 P2d 698.

Habitual criminal statute was unconstitutional since it gave district attorneys unlimited discretion regarding prosecution as a habitual criminal. State v. Cory (1955) 204 Or 235, 282 P2d 1054.

A statute fixing relative support liability with reference to gross income as shown by state tax return did not violate this section. Mallatt v. Luihn, (1956) 206 Or 678, 294 P2d 871.

Fair Trade Act, ORS 646.310 to 646.370, was unconstitutional and void as to nonsigners of fair trade contracts. General Elec. Co. v. Wahle, (1956) 207 Or 302, 296 P2d 635.

A statute authorizing exclusion from boundaries of city having population of 2,000 or less, upon showing as provided in statute by an owner of 20 or more acres included

therein, was unconstitutional. Schmidt v. City of Cornelius, (1957) 211 Or 505, 316 P2d 511.

A city, in fixing minimum rates for water usage, may fix a rate which the customer must pay even though he uses less than the minimum amount of water for which he is charged. Kliks v. Dalles City, (1959) 216 Or 160, 335 P2d 366.

In determining the validity of a municipal utility's rate charged for water, there is a presumption that classification in rates charged is not discriminatory. Id.

A municipal utility is entitled to make differentiations in the rate charged for water if based upon a proper classification. Id.

Statute making felony for ex-convict to be in possession of firearm capable of concealment was constitutional. State v. Robinson, (1959) 217 Or 612, 343 P2d 886.

Where district attorney could have prosecuted defendant under larceny statute, prosecution under false pretenses statute, carrying a greater maximum penalty, was proper. Lilly v. Gladden, (1960) 220 Or 84, 348 P2d 1.

A statute providing for appointment of guardians for persons "incapable of conducting their own affairs" was constitutional. Fahrenwald v. Wachter, (1960) 221 Or 535, 352 P2d 152.

A county building code ordinance, applicable only to unincorporated areas lying west of the Willamette Meridian, excluding certain farming and timber areas, was constitutional. Warren v. Marion County, (1960) 222 Or 307, 353 P2d 257.

ORS 167.210 [repealed 1971] which prohibited contributing to the delinquency of a child was constitutional. State v. Harmon, (1961) 225 Or 571, 358 P2d 1048. **But see** State v. Hodges, (1969) 254 Or 21, 457 P2d 491 and Coon v. Cupp, (1970) 2 Or App 214, 467 P2d 140.

Classification of trucks according to cargo in overload statutes was constitutional. State v. Pyle, (1961) 226 Or 485, 360 P2d 626.

Retraction statute governing actions for defamation was not unconstitutional under this section. Holden v. Pioneer Broadcasting Co., (1961) 228 Or 405, 365 P2d 845, cert. denied, 370 US 157, 82 S Ct 1253, 8 L Ed 2d 402.

Unequal enforcement of a law does not come within the purview of this section. Bailleaux v. Gladden, (1962) 230 Or 606, 370 P2d 722, cert. denied, 371 US 848, 83 S Ct 86, 9 L Ed 2d 84.

The prevention of fraud, deceit, cheating and imposition is within the ambit of the police power. State v. Hudson House, Inc., (1962) 231 Or 164, 371 P2d 675.

Failure to provide defendant with a copy of psychiatrist's report did not violate this section. Good v. Gladden, (1963) 233 Or 437, 378 P2d 994.

A statute requiring a bond for rent on appeal of an action for forcible entry and wrongful detainer did not violate this section. Scales v. Spencer, (1967) 246 Or 111, 424 P2d 242.

The statute, requiring protective headgear on cyclists, bears a real relationship to public safety and was constitutional. State v. Fetterly, (1969) 254 Or 47, 456 P2d 996.

Denial by county board of commissioners of conditional use permit to build church and school in zoned area where board had previously granted such permits to others under similar circumstances was not violation of this section. Archdiocese of Portland v. County of Washington, (1969) 254 Or 77, 458 P2d 682.

Criminal statute directed only against males was constitutional. State v. Bearcub, (1970) 1 Or App 579, 465 P2d 252.

The Relatives' Responsibility Law was constitutional. Kerr v. State Pub. Welfare Comm., (1970) 3 Or App 27, 470 P2d 167, Sup Ct **review denied**, cert. denied, 402 US 950.

Relatives' Responsibility Law does not deny equal protection to children of a person receiving welfare aid. Id.

An ordinance requiring prepayment of jury fees to obtain a jury trial was unconstitutional as a denial of equal protection of the laws in a case where prepayment would not have been required if officer had cited violator under state statute. Miller v. Jordan, (1970) 3 Or App 134, 472 P2d 841.

Plaintiffs did not prove that a city ordinance fixing minimum water rates for their property was unreasonable simply by showing that their average water consumption was less than the minimum set for their property. Kliks v. Dalles City, (1959) 216 Or 160, 335 P2d 366.

Municipality's classification of apartment houses at a rate different from other commercial users, for water used, was an arbitrary classification where the material billing factors were substantially the same between the two classifications. Id.

FURTHER CITATIONS: Safeway Stores, Inc. v. State Bd. of Agriculture, (1953) 198 Or 43, 86, 255 P2d 564; Daugharty v. Gladden, (1959) 217 Or 567, 582, 341 P2d 1069; State v. Bailleaux, (1959) 218 Or 356, 343 P2d 1108; State v. Hoover, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695; Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223; Croft v. Lambert, (1960) 228 Or 76, 357 P2d 513, 88 ALR2d 1227; State v. Gordineer, (1961) 229 Or 105, 366 P2d 161; Priester v. Thrall, (1961) 229 Or 184, 349 P2d 866, 365 P2d 1050; State v. McDonald, (1962) 231 Or 24, 361 P2d 1001; Jensen v. Gladden, (1962) 231 Or 141, 372 P2d 183; Broome v. Gladden, (1962) 231 Or 502, 373 P2d 611; General Elec. Cred. Corp. v. State Tax Comm., (1962) 231 Or 570, 373 P2d 974; Delaney v. Gladden, (1962) 232 Or 306, 374 P2d 746; State ex rel. Nilsen v. Whited, (1964) 239 Or 149, 396 P2d 758; Berry v. State Tax Comm., (1964) 241 Or 580, 397 P2d 780, 399 P2d 164; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634; Minielly v. State, (1966) 242 Or 490, 411 P2d 69, 28 ALR3d 705; State v. Cook, (1966) 242 Or 509, 411 P2d 78; State v. Cheek, (1966) 245 Or 232, 421 P2d 685; Feris v. Balcom, (1967) 249 Or 343, 432 P2d 684; Anderson v. Gladden, (1967) 303 F Supp 1134, aff'd, 416 F2d 447; Leathers v. City of Burns, (1968) 251 Or 206, 444 P2d 1010; Sohappy v. Smith, (1969) 302 F Supp 899; Robertson v. Green, (1969) 254 Or 292, 459 P2d 871; Portland v. Trumbull Asphalt Co., (1970) 2 Or App 1, 463 P2d 606, Sup Ct **review denied**; Girt v. Tri-County Metropolitan Transp. Dist., (1970) 4 OTR 92; Portland v. Fry Roofing Co., (1970) 3 Or App 352, 472 P2d 826, Sup Ct **review denied**; State v. Patterson, (1970) 3 Or App 480, 475 P2d 91; State v. Wickenheiser, (1970) 3 Or App 509, 475 P2d 422; Myers v. Bd. of Directors, (1971) 3 Or App 518, 475 P2d 436.

ATTY. GEN. OPINIONS: Exempting veterans from taxation, 1920-22, p 74; inheritance tax exemptions, 1922-24, pp 126, 131, 1924-26, p 128; state aid to city after disaster, 1922-24, p 194; classification of motor carriers, 1924-26, p 134; exemptions for cooperatives, 1928-30, p 135; granting of scholarships, 1932-34, p 579; money to be used for buying government bonds exempt from garnishment, 1942-44, p 136; school board's authority to bargain with labor union, 1946-48, p 84; bill allowing only persons under 14 years of age to fish in an area, 1950-52, p 110; Act subjecting certain intrastate telephone companies to regulation by the state and exempting others, 1950-52, p 145; Act preventing a lender from making a loan conditioned by purchase of insurance from a certain agency, 1950-52, p 149, 1954-56, p 14; discount purchases of liquor, 1952-54, p 86; regulating business hours of retail merchant stores, 1952-54, p 88; legislative delegation of arbitrary authority to fish commission, 1952-54, p 96; law specially excluding land suitable for development of saw timber, 1954-56, p 84; law giving benefits to certain disabled persons, 1954-56, p 89; law prohibiting women wrestling, 1954-56, p 92; bill authorizing the taking of property in a certain area for recreational purposes, 1954-56, p 97; classification between cities and unincorporated areas, 1954-56, p 197; discrimination in publicly

aided housing, 1956-58, pp 86, 90; licensing of certain professions as denial of equal protection of the laws, 1958-60, p 59; legislation applicable to only one county regulating county business hours, 1958-60, p 67; statute limiting Governor's power to fill vacancies in constitutional offices, 1958-60, p 113; collective bargaining contracts for public employes, 1958-60, p 136; filing fee requirement in an election law, 1958-60, p 236; granting exclusive right to catch salmon in navigable stream, 1958-60, p 311; pensions and claims legislation, 1960-62, p 49; State Land Board's authority to grant pipeline easements across ocean beaches, 1960-62, p 106; authority to legislate regarding city water rates to outside users, 1960-62, p 197; legislation creating trust fund for care of monument to Samuel Thurston, 1962-64, p 178; constitutionality of law mandatory only in Multnomah County, 1962-64, p 193; public funds for benefit of specific private corporation, 1962-64, p 355; statutory tax valuation of state-owned, leased industrial park, 1962-64, p 363; prorating welfare payments to vendors, 1962-64, p 409; Philippine citizens and corporations engaging in business in Oregon, 1966-68, p 154; proposed bill to assess milk producers, 1966-68, p 203; state loans for irrigation projects by qualified individuals, 1966-68, p 235; Basic School Support Fund apportionment formula, 1966-68, p 430; proposed brand inspection bill, (1969) Vol 34, p 547; denying state funds to county in which circuit court has no juvenile jurisdiction, (1970) Vol 34, p 1063; residency of Oregon student upon marriage to a nonresident, (1970) Vol 35, p 266; validity of prohibition against picketing during harvesting of perishable crops, (1970) Vol 35, p 305; constitutionality of citizenship requirement for certificate to practice optometry, (1970) Vol 35, p 367; title to Military Headquarters Building, (1971) Vol 35, p 472; constitutionality of proposed bill allowing reimbursement for court-related expenses to person acquitted as justified in defending life or property, (1971) Vol 35, p 697.

LAW REVIEW CITATIONS: 36 OLR 76, 178; 37 OLR 36; 39 OLR 152, 156, 158, 172; 40 OLR 66, 262; 46 OLR 105; 49 OLR 127-187, 310; 4 WLJ 535; 5 WLJ 316; 6 WLJ 488.

Section 21

NOTES OF DECISIONS
1. Ex post facto laws
2. Laws impairing obligation of contract
3. Laws depending on authorization
4. Laws submitted to electors

1. Ex post facto laws

A law which is not retrospective, but prospective, in its effect is not an ex post facto law. State v. Thompson, (1906) 47 Or 492, 84 P 476, 8 Ann Cas 646, 4 LRA(NS) 480.

An amendment increasing the penalty for commission of a crime is an ex post facto law as to offenses committed before the amendment takes effect. State v. Smith, (1910) 56 Or 21, 107 P 980.

"Ex post facto laws" are criminal in nature, as distinguished from Acts which affect property rights. Fisher v. City of Astoria, (1928) 126 Or 268, 269 P 853, 60 ALR 260.

A charter provision authorizing reassessment against adjoining property for expenses of constructing street-lighting systems, ornamental and otherwise, was valid. Id.

Statutes relating to expense of maintenance at state institutions, not being criminal statutes, did not violate the prohibition against the enactment of ex post facto laws. In re Idleman's Commitment, (1934) 146 Or 13, 27 P2d 305.

This section does not apply to a retroactive income taxation. Collins v. State Tax Comm., (1968) 3 OTR 275.

2. Laws impairing obligation of contract

A charter provision exempting the city from liability for an injury to the person growing out of the defective condition of a sidewalk or street did not impair the obligation of a contract. O'Harra v. Portland, (1869) 3 Or 525; Batdorff v. Oregon City, (1909) 53 Or 402, 406, 100 P 937, 18 Ann Cas 287.

The law taxing mortgages, whether made before or after the passage of the Act, does not impair the obligation of contracts. Mumford v. Sewall, (1883) 11 Or 67, 4 P 585, 50 Am Rep 462; Dundee Mtg. Co. v. Sch. Dist. 1, (1884) 19 Fed 359.

A statute giving creditors a new remedy against stockholders of a bank cannot affect those who took stock before its passage. Haberlach v. Tillamook County Bank, (1930) 134 Or 279, 293 P 927, 72 ALR 1245; Schramm v. Done, (1930) 135 Or 16, 293 P 931; Hibernia Sec. Co. v. Pirie, (1935) 149 Or 434, 457, 41 P2d 431; Skinner v. Davis, (1937) 156 Or 174, 67 P2d 176.

An Act authorizing the State Treasurer to convert currency funds into coin in certain cases was unconstitutional. Goldsmith v. Brown, (1875) 5 Or 418.

An Act enlarging the time for redeeming property sold on execution as applied to sales on foreclosure of mortgages that have been executed prior to the passage of such Act, violated this section. State v. Sears, (1896) 29 Or 580, 582, 43 P 482, 46 P 785, 54 Am St Rep 808.

Contracts made after enactment of the disputed statute are not within the purview of this section. State v. Thompson, (1906) 47 Or 492, 84 P 476, 8 Ann Cas 646, 4 LRA(NS) 480.

A license to conduct a business is not a contract within the purview of this section. Portland v. Cook, (1906) 48 Or 550, 87 P 772, 9 LRA(NS) 733.

Statutes relating to railroad fares were applicable notwithstanding a contract between railroad and predecessor with respect to fares. Portland Ry., Light & Power Co. v. Railroad Comm., (1910) 56 Or 468, 105 P 709, 109 P 273.

A statute releasing a county treasurer and his bondsmen from liability for money lost by the failure of a bank in which county funds were deposited, was valid. Miller v. Henry, (1912) 62 Or 4, 124 P 197, 41 LRA(NS) 97.

The statute restricting the use of the term "co-operative" was not valid so far as it affected a corporation already organized, and using the term "co-operative" as a part of its name. Lorntsen v. Union Fishermen's Co., (1914) 71 Or 540, 143 P 621.

An irrigation district which has incurred obligations cannot include within its boundaries the land of a district improvement company without violating this section. Rathfon v. Payette-Ore. Slope Irr. Dist., (1915) 76 Or 606, 149 P 1044.

Moratorium legislation did not impair the obligation of contracts. Pierrard v. Hoch, (1920) 97 Or 71, 184 P 494, 191 P 328.

The obligation of a contract of accident insurance is not impaired by provisions calling for the payment of attorney's fees. Spicer v. Benefit Assn. of Ry. Employes, (1933) 142 Or 574, 17 P2d 1107, 21 P2d 187.

The Oregon excise law, in imposing a tariff upon the income of an independent contractor derived from a contract with the Federal Government, did not violate this provision. General Constr. Co. v. Fisher, (1934) 149 Or 84, 39 P2d 358, 97 ALR 1252.

A law requiring the payment of a price differential between different grades of milk was constitutional. State v. Farmers Union Coop. Creamery, (1938) 160 Or 205, 84 P2d 471.

A statute requiring an affidavit of renewal to extend a chattel mortgage did not violate this provision where a reasonable time for compliance was afforded in case of a mortgage executed prior to its enactment. Evans v. Finley, (1941) 166 Or 227, 111 P2d 833.

3. Laws depending on authorization

This provision is violated where the question as to whether there is to be a law, or as to what the terms of a law are to be, is determined, not by the legislature, but by a group of persons who represent a particular industry. Van Winkle v. Fred Meyer, Inc., (1935) 151 Or 455, 49 P2d 1140; La Forge v. Ellis, (1945) 175 Or 545, 154 P2d 844.

An election statute providing alternative rules, the determination as to which rule would operate depending upon the constitutionality of another law, was not complete when enacted, within the requirements of this section. Portland v. Coffey, (1913) 67 Or 507, 135 P 358.

A livestock inspection statute, the application of which was suspended in one county while a certain condition existed, violated this section. State v. Hones, (1920) 94 Or 607, 186 P 420.

Legislation made contingent upon whether or not other legislation came into operation did not violate this section where the legislative Acts were complete in themselves and merely dormant until brought into operation. Marr v. Fisher, (1947) 182 Or 383, 187 P2d 966.

The legislature must fix the condition or event on which a statute is to operate but may delegate the factfinding function as to whether the condition exists. Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

Fair Trade Act, ORS 646.310 to 646.370, was unconstitutional and void as to nonsigners of fair trade contracts as an attempted unconstitutional delegation of legislative power. General Elec. Co. v. Wahle, (1956) 207 Or 302, 296 P2d 635.

A statute authorizing exclusion from boundaries of city having population of 2,000 or less, upon showing as provided in statute by an owner of 20 or more acres included therein, was unconstitutional. Schmidt v. City of Cornelius, (1957) 211 Or 505, 316 P2d 511.

State agency having authority to adopt electrical safety code could not constitutionally adopt code of Bureau of Standards, including its future amendments. Hillman v. No. Wasco County P.U.D., (1958) 213 Or 264, 323 P2d 664.

Law adopting national electrical code, including future amendments, was unconstitutional. Id.

Law authorizing the Drug Advisory Council to designate dangerous drugs was not unconstitutional. State v. Sargent, (1969) 252 Or 579, 449 P2d 845.

Reference to standard metropolitan statistical areas in existence at time of passage of the mass transit district Act was not invalid under this section. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

4. Laws submitted to electors

The question as to location of a county seat was properly submitted to the voters by the legislature. Simpson v. Bailey, (1869) 3 Or 515; McWhirter v. Brainard, (1875) 5 Or 426; Murdoch v. Klamath County Court, (1912) 62 Or 483, 126 P 6.

The annexation of a part of a county to another is both local and special within the meaning of this section. Baker County v. Benson, (1901) 40 Or 207, 220, 66 P 815.

The proviso relating to local and special laws is merely a qualification of the preceding clause, and does not make it obligatory on the legislature to submit to interested electors the question whether certain territory in one county should be separated therefrom and annexed to another. Id.

A delegation of law-making power did not result from permitting the people of a district to determine the question as to whether a law shall be in force in the district. State v. Kline, (1908) 50 Or 426, 93 P 237.

The local option law was declared by the Governor's proclamation to be effective June 24, 1904, and went into effect on that date rather than on the date on which it was approved by the electorate. Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193.

The statute requiring a special election to be held, at which should be submitted for the people's approval all measures passed by the Legislative Assembly upon which the referendum might be invoked, did not violate this section. Libby v. Olcott, (1913) 66 Or 124, 134 P 13.

FURTHER CITATIONS: Seale v. McKennon, (1959) 215 Or 562, 336 P2d 340; State v. Hudson House, Inc., (1962) 231 Or 164, 371 P2d 675; State ex rel. Heinig v. City of Milwaukie, (1962) 231 Or 473, 373 P2d 680; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634; Hallberg v. Housing Authority of Portland, (1966) 243 Or 204, 412 P2d 374; State v. Hodges, (1969) 254 Or 21, 457 P2d 491; Bach v. Dept. of Rev., (1970) 4 OTR 1; State v. Gulbrandson, (1970) 2 Or App 511, 470 P2d 160; State v. McMaster, (1971) 259 Or 291, 486 P2d 567, rev'g 4 Or App 112, 476 P2d 814.

ATTY. GEN. OPINIONS: Bill giving option to district to operate under either of two laws, 1922-24, p 114; establishing county seat without vote of people, 1926-28, p 83; liquor revenue Act with retroactive features, 1932-34, p 628; moratorium legislation, 1934-36, pp 262, 264; retroactive bill increasing payments of workmen's compensation benefits, 1942-44, p 144; law containing alternative income tax exemptions, 1946-48, p 357; an Act affecting security transactions, 1948-50, p 157; effect of amendment of apprenticeship Act on contract approved by the apprenticeship council, 1948-50, p 332; Act changing the boundary line between counties, 1950-52, p 175; provision in proposed Act giving an administrative board the power to confer powers and duties upon an administrator, 1950-52, p 187; legislative modification of public employes' retirement system, 1952-54, p 81; authority of legislature to refer a plan to divide a county into representative districts to the people of the county, 1954-56, p 66; retroactive bill increasing payments of workmen's compensation benefits, 1954-56, p 77; power of legislature to provide that a special election shall be called if a certain law is referred to the people, 1954-56, p 83; effect of state statute adopting future federal legislation, 1958-60, p 128; legislative approval of basic school support ratio determined by Superintendent of Public Instruction, 1958-60, p 191; effective date of measure referred to the people, 1958-60, p 287; fixing location of State Public Welfare Commission, 1960-62, p 45; authority to legislate regarding city water rates to outside users, 1960-62, p 197; effect of proposed revision of Ore. Const. Art. IX, §7, 1962-64, p 18; legislative review of administrative rules, 1962-64, p 161; measuring state income tax by federal tax, 1962-64, p 202; construing "local" law, 1962-64, p 240; effect of 1963 amendment to ORS 144.310 on persons previously sentenced to life imprisonment and paroled, 1964-66, p 236; time when grantee's rights became vested under ORS 273.620 [repealed 1967; see ORS 273.356 to 273.376], 1966-68, p 144; constitutionality of proposed brand inspection bill, (1969) Vol 34, p 547; payment of retainages on public contracts, (1969) Vol 34, p 839; application of enhanced interest rates to new and existing state veteran's loans and transfers, (1969) Vol 34, p 850; legislative authority to transfer title of building owned by Public Employes' Retirement Fund, (1971) Vol 35, p 472; propriety of retroactive provisions in taxing statutes, (1971) Vol 35, p 735.

LAW REVIEW CITATIONS: 31 OLR 97, 103; 33 OLR 107; 49 OLR 127-187.

Section 22

NOTES OF DECISIONS

The legislature has power to permit the operation of the

laws to be suspended by an officer or tribunal of the state. Martin v. Ore. R. Co., (1911) 58 Or 198, 113 P 16.

FURTHER CITATIONS: Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 265, 256 P2d 752; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634.

ATTY. GEN. OPINIONS: Governor's authority to suspend operation of statute, 1922-24, p 766; effect of failure to enforce Act, 1934-36, p 411; prohibiting of primary indorsements by major political parties, 1960-62, p 192; legislative review of administrative rules, 1962-64, p 161.

Section 23

NOTES OF DECISIONS

The writ of habeas corpus is available in suits in equity even though the legislature has not so provided. Turner v. Hendryx, (1917) 86 Or 590, 167 P 1019, 169 P 109; Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402.

Under statute authorizing right of appeal from orders discharging a prisoner from custody, reversal of the order on appeal and remand of the prisoner to custody does not violate this section. Malcomber v. Alexander, (1953) 197 Or 685, 255 P2d 164.

Coram nobis will not lie when habeas corpus provides a remedy. State v. Poierier, (1958) 212 Or 369, 320 P2d 255.

FURTHER CITATIONS: Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634.

LAW REVIEW CITATIONS: 39 OLR 338, 342, 346.

Section 24

NOTES OF DECISIONS

Punishment of acts which have not ripened into treason not precluded by this section. State v. Laundy, (1922) 103 Or 443, 204 P 958, 206 P 290.

FURTHER CITATIONS: Dombrowski v. Pfister, (1964) 227 F Supp 556.

Section 25

NOTES OF DECISIONS

While, under the rule of the common law, an appeal might be prosecuted by heirs or personal representatives to reverse a conviction of a felony which caused a forfeiture of estate, this right of appeal is not now sustainable since a conviction does not work a forfeiture of estate. State v. Martin, (1896) 30 Or 108, 47 P 196.

This section was not intended to prevent the courts from adjusting interests of a wrongdoer and his victim in property held in co-ownership. Hargrove v. Taylor, (1964) 236 Or 451, 389 P2d 36. Overruling Wenker v. Landon, (1939) 161 Or 265, 88 P2d 971.

FURTHER CITATIONS: Sujette v. Wilson, (1886) 13 Or 514, 11 P 267; Ex parte Biggs, (1908) 52 Or 433, 97 P 713.

ATTY. GEN. OPINIONS: Meaning of "forfeiture," 1964-66, p 171.

Section 26

NOTES OF DECISIONS

An Act making it a felony to become a member of an organization advocating syndicalism or to assemble with such organization, did not violate this section. State v. Laundy, (1922) 103 Or 443, 204 P 958, 206 P 290; State v. Boloff, (1932) 138 Or 568, 623, 4 P2d 326, 7 P2d 775; State v. De Jonge, (1936) 152 Or 315, 329, 51 P2d 674, rev'd on other grounds, 299 US 353, 57 S Ct 45, 255, 81 L Ed 278; State v. Denny, (1936) 152 Or 541, 53 P2d 713.

An Act providing for the holding of primary elections under the supervision of the general election officers, prescribing a test for the indication of party affiliations, and directing the manner of electing committeemen, fixing their terms of office and specifying their duties, did not infringe the rights guaranteed by this section. Ladd v. Holmes, (1901) 40 Or 167, 66 P 714, 91 Am St Rep 457.

Issuance of an injunction to restrain the picketing of a business is not precluded where no actual bona fide dispute exists concerning terms or conditions of employment, and the purpose of the picketing is to injure such business. Moreland Theatres Corp. v. Moving Picture Mach. Operators' Union, (1932) 140 Or 35, 12 P2d 333.

ATTY. GEN. OPINIONS: Collective bargaining contracts for public employes, 1958-60, p 136; constitutionality of restricting endorsement of candidates by political parties, 1960-62, p 192; constitutionality of proposal to bar persons registering under Subversive Activities Control Act from using tax supported buildings, 1964-66, p 163; use of school funds for dues to Oregon School Board Association used in part to hire lobbyist, 1966-68, p 277.

Section 27

NOTES OF DECISIONS

Statute making felony for ex-convict to be in possession of firearm capable of concealment was constitutional. State v. Robinson, (1959) 217 Or 612, 343 P2d 886; State v. Cartwright, (1966) 246 Or 120, 418 P2d 822, cert. denied, 386 US 937.

LAW REVIEW CITATIONS: 39 OLR 172.

Section 32

NOTES OF DECISIONS

1. In general
2. Classification; equalization
3. Exemptions
4. Income and inheritance taxes
5. Licenses and excise taxes
6. Assessments

See also cases under Ore. Const. Art IX, §1.

1. In general

A mortgage tax law did not violate this section. Crawford v. Linn County, (1884) 11 Or 482, 484, 5 P 738. **But see** Dundee Mtg. Co. v. Sch. Dist. 1, (1884) 19 Fed 359.

A public burden may be apportioned, in accordance with benefits from the expenditure, among all of the taxpayers of the state or among those of a particular section. Cook v. Port of Portland, (1891) 20 Or 580, 27 P 263, 13 LRA 533.

A statute authorizing the issuance of bonds by a county for interstate bridges and the payment of interest and ownership and management of the bridge by the state was not violative of this section. Stoppenback v. Multnomah County, (1914) 71 Or 493, 508, 142 P 832.

Construction of an armory in a city financed by the issuance of bonds was not in contravention of this section. Rankin v. Yoran, (1914) 72 Or 224, 143 P 894.

The organization of drainage districts and the imposition of taxes was not invalid under this section. State v. Nyssa-Arcadia Drainage Dist., (1916) 80 Or 524, 157 P 804.

The legislature may tax municipal property. State v. Preston, (1922) 103 Or 631, 206 P 304, 23 ALR 414.

Appropriating state taxes to a city where much of the private and public property had been destroyed by fire, did

not violate this section. Kinney v. City of Astoria, (1923) 108 Or 514, 217 P 840.

A county high school fund law contravened this section. Smith v. Barnard, (1933) 142 Or 567, 21 P2d 204.

A penalty of 10 percent of the cost imposed by a statute against timberland owners for failure to supply adequate fire protection required by statute is not a tax within this section. Starker v. Scott, (1948) 183 Or 10, 190 P2d 532.

A statute which directed the counties to levy a tax to collect proceeds for the county public assistance fund did not violate this section. State v. Malheur County, (1949) 185 Or 392, 203 P2d 305.

This section and Ore. Const. Art. IX, §1 are to be read together. Id.

A statute giving the State Public Welfare Commission the power to approve or revise a county public welfare commission's estimate of its county's public assistance needs, and directing the state commission's final amount to be included in the county budget, was not invalid as a delegation of taxing power to the state commission. Id.

This section does not restrict the state in the exercise of its police power as distinguished from the taxing power. Sproul v. State Tax Comm., (1963) 234 Or 579, 383 P2d 754.

Arbitrary or systematic discrimination must be shown for plaintiff to claim a violation of the requirement of uniformity. Westward Properties, Inc. v. Dept. of Rev., (1969) 3 OTR 496.

The employer payroll tax levied by defendant was imposed with the consent of the legislature. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion) 256 Or 124, 471 P2d 798.

The uniformity exacted in the imposition of an excise tax is geographical not intrinsic. Id.

2. Classification; equalization

Exact equality of classification cannot be attained, but it is sufficient if the tax is made on a reasonable basis, and includes all within the class. Kellaher v. Portland, (1911) 57 Or 575, 110 P 492, 112 P 1076; Portland Van & Storage Co. v. Hoss, (1932) 139 Or 434, 9 P2d 122, 81 ALR 1136.

The board of equalization could not, by adopting dissimilar classifications, secure the uniformity and equality in values which is contemplated by this section. Dayton v. Board of Equalization, (1898) 33 Or 131, 147, 50 P 1009.

Failure of the board of equalization properly to equalize assessments upon personal property throughout the several counties of the state, did not produce such a want of equality and uniformity of taxation as to invalidate its acts in equalizing values on real property and render them inimical to the requirements of this section. Dayton v. Multnomah County, (1898) 34 Or 239, 55 P 23.

A statute requiring livestock owners who have no real property to pay at the rate of the previous year, without provision for ultimate equalization, was invalid. Lake County v. Schroder, (1905) 47 Or 136, 81 P 942.

Uniformity of taxation does not require that the subjects of a class which has been selected for taxation shall be precisely alike in all respects, but rather that they must be alike in the essential particulars which caused them to be included in one classification. Standard Lbr. Co. v. Pierce, (1924) 112 Or 314, 228 P 812.

This section does not restrain the taxing power of the legislature beyond the restrictions of U.S. Const., Am. 14, except that inherent uniformity, as well as territorial uniformity, is required. Id.

The legislature may select and classify property for taxation purposes under this provision. McPherson v. Fisher, (1933) 143 Or 615, 23 P2d 913.

Occupations may be classified for the purpose of taxation. State v. Winegar, (1937) 157 Or 220, 69 P2d 1057.

A statute requiring foreign charitable corporations to pay personal property taxes was not invalid for lack of uniformity. Methodist Book Concern v. State Tax Comm., (1949) 186 Or 585, 208 P2d 319.

Ordinances increasing license fees on certain designated businesses and occupations, and creating new classifications levied upon the basis of gross revenue or by a fixed fee, were constitutional. Garbade v. Portland, (1950) 188 Or 158, 214 P2d 1000.

A property tax on property of people's utility districts was not invalid for lack of uniformity. Northern Wasco County P.U.D. v. Wasco County, (1957) 210 Or 1, 305 P2d 766.

This section was not violated by an assessment of plaintiff's and other similar property at true cash value, although one similar property was evaluated at a substantially lower amount. Robinson v. State Tax Comm., (1959) 216 Or 532, 339 P2d 432.

Denial to a taxpayer of a blanket reduction in assessed valuation ordered by the board of equalization is denial of equality of assessment. Reynolds Metal Co. v. State Tax Comm., (1961) 227 Or 467, 362 P2d 705.

Distinctions made in classification, if reasonably related to the object of the legislation, are sufficient to justify the classification. A.C. Dutton Lbr. Corp. v. State Tax Comm., (1961) 228 Or 525, 365 P2d 867.

Residence is a proper classification for allowing or disallowing personal deductions in the administration of a state income tax. Berry v. State Tax Comm., (1964) 241 Or 580, 397 P2d 780, 399 P2d 164, app. dis., 382 US 16, 86 S Ct 57, 15 L Ed 2d 12, aff'g 1 OTR 524.

Taxing authorities may not single out one taxpayer for discriminatory, or selective, enforcement of a tax law that should apply equally to all similarly situated taxpayers. Penn Phillips Lands, Inc. v. State Tax Comm. (1967) 247 Or 380, 430 P2d 349, aff'g as modified 2 OTR 373.

3. Exemptions

A statute exempting property of charitable institutions from taxation did not contravene this section. Corporation of Sisters of Mercy v. Lane County, (1927) 123 Or 144, 261 P 694; Waller v. Lane County, (1936) 155 Or 160, 63 P2d 214.

The amendment to a city charter, excepting the city from the jurisdiction of the county court, and making certain exemptions, did not violate this provision. East Portland v. Multnomah County, (1876) 6 Or 62.

An Act purporting to exempt a railroad from the payment of taxes for 20 years, in consideration of its carrying the troops and munitions of war of the state, was in conflict with this section. Hogg v. Mackay, (1893) 23 Or 339, 31 P 779, 37 Am St Rep 682, 19 LRA 77.

An Act which exempted a county treasurer from liability for a sum lost by the failure of a bank in which county funds have been deposited was constitutional. Miller v. Henry, (1912) 62 Or 4, 124 P 197, 41 LRA(NS) 97.

A charter exempting property in the city from road taxes and assessments, except those levied by the city council, did not violate this section. Johnson v. Jackson County, (1914) 68 Or 432, 435, 136 P 874.

The exemption of state-owned property is not prohibited by this provision. Security Savings & Trust Co. v. Lane County, (1935) 152 Or 108, 53 P2d 33.

Exemption of household equipment was proper. Allen v. Multnomah County, (1946) 179 Or 548, 173 P2d 475.

4. Income and inheritance taxes

A city ordinance requiring a corporation engaged in furnishing gas and electricity for commercial purposes to pay the city a license of three percent upon the gross receipts of its business within the city cannot be sustained as a property tax, and hence is void. Portland v. Portland Gas & Coke Co., (1916) 80 Or 194, 207, 150 P 273, 156 P 1070;

Portland v. Portland Ry., Light & Power Co., (1916) 80 Or 271, 306, 156 P 1058.

A statute imposing an inheritance tax did not violate this section. In re Heck's Estate, (1926) 120 Or 80, 250 P 735; Unander v. Pasquill, (1957) 212 Or 213, 319 P2d 579.

An intangibles income tax law violated this section. Redfield v. Fisher, (1931) 135 Or 180, 292 P 813, 295 P 461, 73 ALR 721; Kiernan v. Norblad, (1931) 135 Or 210, 292 P 821.

Incomes, whether growing out of ownership or use of property, or derived from salaries, wages, or compensation for personal service, may be grouped together for purpose of taxation. Standard Lbr. Co. v. Pierce, (1924) 112 Or 314, 228 P 812.

The classifying of incomes and the fixing of different rates and exemptions does not violate this provision. McPherson v. Fisher, (1933) 143 Or 615, 23 P2d 913.

An intangibles income tax law did not violate this provision. Id.

Statute allowing credit to residents of Oregon who paid "net" income taxes to foreign states on income also taxed in Oregon did not violate this section. Keyes v. Chambers, (1957) 209 Or 640, 307 P2d 498.

The transit district employer payroll tax met the requirement of uniformity. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct review denied (with opinion) 256 Or 124, 471 P2d 798.

5. Licenses and excise taxes

An ordinance requiring licenses from chain stores, the amount of the license depending upon the number of stores, did not violate this provision. State v. Hurst, (1935) 149 Or 519, 41 P2d 1079; Safeway Stores, Inc. v. Portland, (1935) 149 Or 581, 42 P2d 162.

The legislature is not prohibited from imposing a privilege tax on coin-operated music devices where it applies uniformly to all who are engaged in the same kind of business. Fox v. Galloway, (1944) 174 Or 338, 148 P2d 922; Terry v. Portland, (1955) 204 Or 478, 269 P2d 544.

A statute imposing a tax on bicycles, in addition to the ad valorem tax levied thereon, was valid. Ellis v. Frazier, (1901) 38 Or 462, 63 P 642, 53 LRA 454.

Requiring a license to engage in a business did not violate this section. State v. Hume, (1908) 52 Or 1, 95 P 808.

The imposition of a business or excise tax and also a franchise tax did not subject a corporation to double taxation in violation of this section. State v. Pac. Tel. & Tel. Co., (1909) 53 Or 162, 99 P 427.

A license fee required of attorneys was sustained. Abraham v. City of Roseburg, (1910) 55 Or 359, 105 P 401, Ann Cas 1912A, 597.

A license tax on vehicles was discriminatory. Kellaher v. Portland, (1911) 57 Or 575, 577, 110 P 492, 112 P 1076.

Excises are not within the purview of constitutional provisions requiring uniformity of taxation. Portland Van & Storage Co. v. Hoss, (1932) 139 Or 434, 9 P2d 122, 81 ALR 1136.

The Oregon excise law, in imposing a tariff upon the income of an independent contractor derived from a contract with the Federal Government, did not violate this provision. General Constr. Co. v. Fisher, (1934) 149 Or 84, 39 P2d 358, 97 ALR 1252.

Ordinances placing motor vehicle dealers in the classification of retail merchants for the purpose of levying license fees based on gross sales were not arbitrary and unreasonable. Barnard Motors v. Portland, (1950) 188 Or 340, 215 P2d 667.

6. Assessments

Special assessments for street improvements are not within the purview of this section. King v. Portland, (1865) 2 Or 146; Ladd v. Gambell, (1899) 35 Or 393, 59 P 113; King v. Portland, (1900) 38 Or 402, 63 P 2, 55 LRA 812.

Relative uniformity is the basic requirement of property taxation. State Tax Comm. v. Consumers' Heating Co., (1956) 207 Or 93, 294 P2d 887; Thomas v. State Tax Comm., (1968) 3 OTR 333; Bohnert v. State Tax Comm., (1969) 3 OTR 423.

A statute providing for special assessments on lands within an irrigation district did not violate this section. Northern Pac. Ry. v. John Day Irr. Dist., (1923) 106 Or 140, 211 P 781.

Unless the assessment exceeds the property's value, the individual taxpayer is not injured by an assessment which is too high or too low, provided the same error in proportionate degree is made throughout the tax levying district. Appeal of Kliks, (1938) 158 Or 669, 76 P2d 974.

Arbitrary and systematic discrimination is required before the plaintiff can complain that their assessment violates this section. Bohnert v. State Tax Comm., (1969) 3 OTR 423.

FURTHER CITATIONS: Smith v. Columbia County, (1959) 216 Or 662, 341 P2d 540; Weyerhaeuser Tbr. Co. v. State Tax Comm., (1960) 223 Or 280, 355 P2d 615; General Elec. Cred. Corp. v. State Tax Comm., (1962) 231 Or 570, 373 P2d 974; White Stag Mfg. Co. v. State Tax Comm., (1962) 232 Or 94, 373 P2d 999; Union Pac. R.R. v. State Tax Comm., (1962) 232 Or 521, 376 P2d 80; City of Woodburn v. Domogalla, (1964) 238 Or 401, 395 P2d 150, rev'g 1 OTR 292; Balderree v. State Tax Comm., (1965) 2 OTR 142; Columbia Motor Hotels, Inc. v. State Tax Comm., (1967) 3 OTR 48; Penn Phillips Lands, Inc. v. State Tax Comm., (1968) 251 Or 583, 446 P2d 670; Penn Phillips Lands, Inc. v. Dept. of Rev., (1970) 255 Or 488, 468 P2d 646; Girt v. Tri-County Metropolitan Transp. Dist., (1970) 4 OTR 92.

ATTY. GEN. OPINIONS: Veterans' exemptions, 1920-22, p 74; income tax, 1920-22, p 546, 1922-24, p 71; license fees for motor vehicles, 1920-22, p 140, 1928-30, p 90, 1932-34, p 135; taxation of banks, 1926-28, p 575; exemption of cooperatives, 1928-30, p 135; taxation by local and special law, 1932-34, p 162; forest tax, 1934-36, p 202; compromising of tax on federal lands by county court, 1934-36, p 215; cancellation of tax due from county to state, 1934-36, p 244; oleomargarine tax, 1934-36, p 254; tax on fire insurance premiums to finance firemen's pension, 1938-40, p 184; exemption of certain classes of real property, 1938-40, p 670, 1942-44, p 139; assessment of motor vehicle transportation companies, 1950-52, p 131; effect of consolidation on pending tax levy, 1948-50, p 234; requirement that food be served to be eligible for liquor license, 1952-54, p 68; use of revenue under "property tax relief" Act, 1952-54, p 107; Validity of commodity commission tax, 1952-54, p 109; annexation of school district, 1952-54, p 127; recomputation of rates by collector when property omitted from rolls, 1954-56, p 63; validity of bill authorizing additional fines for traffic violation to pay the cost of student driving training, 1954-56, p 94; use of drivers' license fees for high school driver training courses, 1956-58, p 101; municipal tax differentials, 1956-58, p 104; apportionment of levy by rural fire protection district composed of portions of two counties, 1956-58, p 150; constitutionality of school tax refund, 1956-58, p 228; tax upon school district for transportation or tuition of pupils attending school in another district, 1958-60, p 228; constitutionality of classification of zoned farm land, 1960-62, p 279; validity of classification of timber lands, 1960-62, p 337; constitutionality of tax differential for newly annexed land, 1960-62, p 396; measuring state income tax by federal tax, 1962-64, p 202; assessing farm property, 1962-64, p 221; statutory tax valuation of state-owned, leased industrial park, 1962-64, p 363; establishing of minimum number of appraisers, 1962-64, p 443; application of ad valorem tax exemption to holly trees, 1962-64, p 494; validity of proposal to provide loans for vocational training, 1964-66, p 73; legality of district tax which excludes part of area from levy,

1964-66, p 191; uniform reduction of millage levy under proposed limitation tied to percentage of market value, 1964-66, p 429; constitutionality of proposed bill to assess milk producers, 1966-68, p 203; power of city or county to levy sales or income tax, 1966-68, p 238; constitutionality of Basic School Support Fund apportionment formula, 1966-68, p 430; proposed one and one-half percent tax limit, (1968) Vol 34, p 203; tax levy by service area, (1968) Vol 34, p 356; constitutionality of classification of taxpayers in proposed bill, (1969) Vol 34, p 709; metropolitan service district taxing power, (1970) Vol 34, p 959; general duty of assessors and boards of equalization, (1971) Vol 35, p 448; classification based on services rendered, (1971) Vol 35, p 660.

LAW REVIEW CITATIONS: 11 OLR 104; 37 OLR 36, 38, 39; 39 OLR 158; 47 OLR 64; 49 OLR 150; 4 WLJ 432, 474, 537, 546, 584, 589; 5 WLJ 199, 316.

Section 33

CASE CITATIONS: Ladd v. Homes, (1901) 40 Or 167, 66 P 714, 91 Am St Rep 457; Ex parte Kerby, (1922) 103 Or 612, 205 P 279, 36 ALR 1451; Roman Catholic Archbishop of Oregon v. Baker, (1932) 140 Or 600, 15 P2d 391; Portland v. Goodwin, (1949) 187 Or 409, 210 P2d 577; State v. Fetterly, (1969) 254 Or 47, 456 P2d 996.

LAW REVIEW CITATIONS: 49 OLR 127-187.

Section 39

NOTES OF DECISIONS

The commission has authority to make regulations to aid the statute to accomplish the purpose of the Constitution. Van Riper v. Oregon Liquor Control Comm., (1961) 228 Or 581, 365 P2d 109.

Statute making liquor dispenser licensee liable for wage claims of employes of other employers at the same establishment is reasonable as an implementation of this section. State ex rel. Nilsen v. Whited, (1964) 239 Or 149, 396 P2d 758.

FURTHER CITATIONS: Oregon Newspaper Publishers Assn. v. Peterson, (1966) 244 Or 116, 415 P2d 21.

ATTY. GEN. OPINIONS: Discount purchases of liquor, 1952-54, p 86; effect of simultaneous elections on local option in county and city located therein, 1952-54, p 223; validity of bill authorizing sale of liquor by the glass in commercial aircraft, 1954-56, p 76; serving of food as a condition to acquiring a license to serve liquor by the drink, 1954-56, p 82; authority of legislature to authorize local option elections which could establish hours for the sale of liquor different from hours designated by the commission, 1954-56, p 102; power of commission to prescribe special closing hours for certain licensees, 1954-56, p 104; usage of the term "general election" in Constitution, 1960-62, p 252; authority to serve mixed wine drinks, 1966-68, p 424; authority for private party to serve liquor on unlicensed premises, 1966-68, p 486; authority to require refundable deposit on beverage container, (1970) Vol 35, p 296; authority of city zoning ordinance to supersede liquor laws, (1970) Vol 35, p 359.

Article II

Suffrage and Elections

Section 1

NOTES OF DECISIONS

The terms "free" and "equal" signify that the elections shall not only be open and untrammeled to all persons endowed with the elective franchise, but shall be closed to all not in the enjoyment of such privilege. Ladd v. Holmes, (1901) 40 Or 167, 178, 66 P 714, 91 Am St Rep 457.

The local option law did not violate this section. State v. Richardson, (1906) 48 Or 309, 317, 85 P 225, 8 LRA(NS) 362.

Limiting the right of suffrage to taxpayers and prescribing other qualifications for voters at road district meetings did not violate this section. Beirl v. Columbia County, (1914) 73 Or 107, 144 P 457.

Providing for nominations for primary elections by payment of a fee, as a method additional to that of providing for nominations without fee on petition, did not violate this section. Patton v. Withycombe, (1916) 81 Or 210, 159 P 78.

A candidate need not be nominated for office in order to receive the votes of electors at the free elections prescribed by this section. Henricksen v. Clark, (1921) 102 Or 250, 201 P 1071.

FURTHER CITATIONS: Warren v. Marion County, (1960) 222 Or 307, 353 P2d 257.

ATTY. GEN. OPINIONS: Requirement that nonpartisan petition for nomination to elective office contain signatures of electors, 1958-60, p 236; firemen "furthering the cause" of a political candidate, 1958-60, p 346; registration and residency requirements for candidacy, 1964-66, p 381; evidence sufficient to prove serviceman's residence, 1964-66, p 455; constitutionality of special district voter qualification, (1968) Vol 34, p 263; proposed amendment contingent upon binding choice of alternatives, (1970) Vol 34, p 1118.

LAW REVIEW CITATIONS: 40 OLR 262.

Section 2

NOTES OF DECISIONS

The qualifications of voters at school meetings are not determined by this section. Harris v. Burr, (1898) 32 Or 360, 52 P 17, 39 LRA 768; Setterlun v. Keene, (1906) 48 Or 520, 87 P 763.

In certain district elections the legislature may make the ownership of land a qualification of the right to vote. Board of Directors v. Peterson, (1913) 64 Or 46, 128 P 837, 129 P 123; Oregon Tbr. Co. v. Coos County, (1914) 71 Or 462, 142 P 575; Beirl v. Columbia County (1914) 73 Or 107, 144 P 457. **But see** Loe v. Britting, (1930) 132 Or 572, 287 P 74 and Peterkort v. E. Washington County Zoning Dist., (1957) 211 Or 188, 313 P2d 773, 314 P2d 912.

A person of foreign birth having proper residence is entitled to vote from and after the date of his final citizenship papers. Darragh v. Bird, (1870) 3 Or 229.

The state may make any Indian a voter, or the United States may make him a citizen, so that by the operation of the Fifteenth Amendment he becomes a voter within the state where he resides. United States v. Osborn, (1880) 6 Sawy 406, 2 Fed 58.

A statute directing that no person is entitled to vote at a primary election unless he complies with the law relating to registration of electors, did not exclude unregistered electors. Ladd v. Holmes, (1901) 40 Or 167, 189, 66 P 714, 91 Am St Rep 457.

An Act limiting party electors to the right to vote at their respective primaries was not in conflict with this provision. Id.

A city charter provision prohibiting a person from voting at a city election who has not paid a road poll tax violated this section. Livesley v. Litchfield, (1905) 47 Or 248, 83 P 142, 114 Am St Rep 920.

The qualifications of petitioners to initiate a local option election may be limited and restricted in such manner as may be prescribed. Roesch v. Henry, (1909) 54 Or 230, 103 P 439, 441.

Providing that when a certificate of registration is lost or destroyed by a natural calamity, the elector should establish that fact by the oath of two witnesses, is an unreasonable regulation of the right of suffrage. Portland v. Coffey, (1913) 67 Or 507, 135 P 358.

Charter provisions of a municipality limiting the right to vote upon matters relating to taxation within the city to taxpayers only were rendered nugatory by Ore. Const. Art. IV, former §1a and Art. XI, former §2. Johnson v. City of Pendleton, (1929) 131 Or 46, 280 P 873.

The word "election" may mean a general or special election, an election held to elect a public officer, or to enact a law, to repeal one which had theretofore been enacted by the legislature, to authorize the issuance of bonds, or to authorize a special tax levy. Loe v. Britting, (1930) 132 Or 572, 287 P 74.

Before the 1932 amendment, the legislature had no power to prevent nontaxpaying citizens from voting at a municipal election. Veatch v. City of Cottage Grove, (1930) 133 Or 144, 289 P 494.

The county clerk is not required to notify an elector before canceling his registration on account of failure to vote. State v. Clark, (1933) 143 Or 482, 22 P2d 900.

Statute authorizing special city annexation election, notice of which was given at same time the right to register was suspended under statute, was constitutional. Ivie v. City of Oceanlake, (1956) 208 Or 417, 302 P2d 221.

Statute limiting to resident freeholders the right to vote on formation of zoning district was unconstitutional. Peterkort v. E. Wash. County Zoning Dist., (1957) 211 Or 188, 313 P2d 773, 314 P2d 912.

A statute requiring a voter to reside in a proposed hospital district 90 days next preceding an election to form the district did not violate this section. Wright v. Blue Mountain Hosp. Dist., (1958) 214 Or 141, 328 P2d 314.

The qualifications of voters are all in affirmative, mandatory terms. State ex rel. Chapman v. Appling, (1960) 220 Or 41, 348 P2d 759.

FURTHER CITATIONS: Bradley v. Myers, (1970) 255 Or 296, 466 P2d 931; Oregon v. Mitchell, (1970) 400 US 112, 227, 91 S Ct 260, 27 L Ed 2d 272.

ATTY. GEN. OPINIONS: Period of residence as voting qualification, 1922-24, p 43; literacy of voters at school elections, 1924-26, p 142; effect of registration for special election, 1938-1940, p 108; validity and administration of absentee voters law, 1942-44, pp 158, 443, 447; voters on initiative petitions, 1944-46, p 56; persons living on land formerly a federal military reservation as "residents," 1950-52, p 6; voter qualifications at election to establish zoning district, 1952-54, p 76; construing to protect the privilege, 1952-54, p 92; limiting voting rights in zoning election to freeholders, 1952-54, p 102; restricting petitioners on zoning ordinances to landowners, 1954-56, p 98; right of person within newly annexed territory to vote in municipal election, 1956-58, p 22; residency requirement for candidates for constable, 1956-58, p 33; name and address of author and publisher of election campaign card in English language, 1958-60, p 11; candidates for whom voter may vote in precinct other than precinct of residence, 1958-60, p 240; citizenship requirement for director of county civil defense, 1960-62, p 133; construing "legal voter," 1960-62, p 405; avoiding cancellation of registration, 1962-64, p 165; issuance of special certificate during closed period, 1962-64, p 452; construing temporary lapse of registration, 1964-66, p 356; eligibility of serviceman to register to vote, 1964-66, p 359; period during which petitions may be circulated, 1966-68, p 48; effect of city registration ordinance, 1966-68, p 68; legislative prohibition of city ordinances for voter registration or property qualification of city officers, 1966-68, p 186; recalling a precinct committeeman, 1966-68, p 233; creating of tri-county stadium district as municipal corporation, 1966-68, p 263; certification of voter's signature on petition if signer's address is different on registration records, 1966-68, p 344; constitutionality of special district voter qualification, (1968) Vol 34, p 263; eligibility of 18-year-old to vote for and hold office of national nominating convention delegate, national committeeman and precinct committeeman, (1971) Vol 35, p 607.

LAW REVIEW CITATIONS: 8 OLR 171; 9 OLR 497; 47 OLR 62; 4 WLJ 563-566.

Section 3

NOTES OF DECISIONS

An absolute pardon restores the privilege of an elector to an offender. Wood v. Fitzgerald, (1870) 3 Or 568, 575.

The term "conviction" signifies a proving or finding that the defendant is guilty, either by a verdict of a jury or his plea to that effect. United States v. Watkinds, (1881) 7 Sawy 85, 6 Fed 152.

Depriving convicted felons of the franchise is not punishment but rather a nonpenal exercise of the power to regulate the franchise. Green v. Bd. of Elections, (1967) 380 F 2d 445.

ATTY. GEN. OPINIONS: Effect of commutation of sentence on voting privileges, 1928-30, p 110; restoration of ex-prisoner's voting rights, 1938-40, p 518; conviction in a sister state, 1944-46, p 499; legal capacity of person released from a mental institution, 1950-52, p 208; effect of suspended sentence on eligibility to hold office, 1956-58, p 183; primary election nominee having previous felony conviction, 1960-62, p 460; certification of voter's signature on petition if signer's address is different on registration records, 1966-68, p 344.

Section 4

NOTES OF DECISIONS

The word "deemed" creates a disputable, not a conclusive presumption. Zimmerman v. Zimmerman, (1945) 175 Or 585, 155 P2d 293; In re Shepard's Estate, (1948) 183 Or 629, 194 P2d 425.

An employe of the government may, if he chooses to do so, acquire a residence the same as any other citizen, and when so acquired, has a right to vote. Darragh v. Bird, (1870) 3 Or 229; Wood v. Fitzgerald, (1870) 3 Or 568.

The voting residence of attendants at a state institution is to be determined by evidence outside of the fact of their mere presence and employment. Day v. Salem, (1913) 65 Or 114, 131 P 1028, Ann Cas 1915A, 1011.

This section is declaratory of the common law, and it is open to a soldier to establish domicil. Zimmerman v. Zimmerman, (1945) 175 Or 585, 155 P2d 293.

ATTY. GEN. OPINIONS: Residence while in the military service, 1920-22, p 515, 1940-42, pp 61, 408, 1942-44, pp 443, 447, 449, 1944-46, p 382; residence qualification of an emancipated child, 1962-64, p 26; construing temporary lapse of registration, 1964-66, p 356; registration and residency requirements for candidacy, 1964-66, p 381.

LAW REVIEW CITATIONS: 8 OLR 171.

Section 5

NOTES OF DECISIONS

The word "deemed" creates a disputable, not a conclusive presumption. Zimmerman v. Zimmerman, (1945) 175 Or 585, 155 P2d 293; In re Shepard's Estate, (1948) 183 Or 629, 194 P2d 425.

This section does not give a soldier, sailor or marine discretion in the matter of voting in this state. Darragh v. Bird, (1870) 3 Or 229.

The constitutional provisions do not prevent the acquisition of domicil by a soldier under the rules of the common law. Zimmerman v. Zimmerman, (1945) 175 Or 585, 155 P2d 293.

FURTHER CITATIONS: Carrington v. Rash, (1965) 380 U.S. 89, 85 S Ct 775, 13 L Ed 2d 675.

ATTY. GEN. OPINIONS: **See also** opinions under Ore. Const. Art. II, §4. Eligibility of serviceman to register to vote, 1964-66, p 359; evidence sufficient to prove serviceman's residence, 1964-66, p 455.

LAW REVIEW CITATIONS: 2 WLJ 123.

Section 7

NOTES OF DECISIONS

The promise of a candidate for office, that if he was elected, he would pay part of his salary into the county treasury, was not an offer to "reward" a voter under this section, unless such voters were taxpayers and influenced by the offer, or would at least have been benefited by the payment of such sum into the county treasury. State v. Dustin, (1875) 5 Or 375, 20 Am Rep 746.

ATTY. GEN. OPINIONS: Promise of candidate for district attorney to refuse office space at county expenses as "bribery," 1920-22, p 7; offer to donate part of salary to civic groups, 1962-64, p 446.

Section 8

NOTES OF DECISIONS

This section does not exclude the right of the people to legislate on the subject of elections. Andrews v. Neil, (1912) 61 Or 471, 120 P 383, 123 P 32.

Election laws should be liberally construed. Kays v. McCall, (1966) 244 Or 361, 418 P2d 511.

The legislature may regulate the conduct of not only general election, but also party primary elections. Bradley v. Myers, (1970) 255 Or 296, 466 P2d 931.

FURTHER CITATIONS: Wright v. Blue Mountain Hosp. Dist., (1958) 214 Or 141, 328 P2d 314.

ATTY. GEN. OPINIONS: Authority of legislature to provide for the numbering of positions of representatives and senators within each county or district, 1952-54, p 87; candidates for whom voter may vote in precinct other than precinct of residence, 1958-60, p 240; authority to call city recall election, 1960-62, p 356; legislative prohibition of city ordinances for voter registration, 1966-68, p 186; authority of legislature to refer a question regarding Vietnam policy, 1966-68, p 428; legislative control of election procedure of taxing districts, (1968) Vol 34, p 203; proposed one and one-half percent tax limit, (1968) Vol 34, p 318; constitutionality of judicial reversal of voters' decision on a measure, (1969) Vol 34, p 704.

Section 10

NOTES OF DECISIONS

Appointment of a state senator as assistant to the corporation commissioner is inhibited by this section. Gibson v. Kay, (1914) 68 Or 589, 596, 137 P 864.

The acceptance of the office of judge of the district court by a justice of the peace worked a resignation of his office. State v. Beveridge, (1918) 88 Or 334, 171 P 1173.

Prior to amendment of Ore. Const. Art. V, §8, the Secretary of State became Governor and was entitled to receive compensation as such. Olcott v. Hoff, (1919) 92 Or 462, 181 P 466.

A lucrative office is one the pay of which is affixed to the performance of the duties of the office. Holman v. Lutz, (1930) 132 Or 185, 282 P 241, 284 P 825.

A statute authorizing the appointment of a circuit court judge to sit temporarily as a member of the Supreme Court did not violate this section. Id.

The determination of whether or not a notary public or attorney acting for the veterans' commission was eligible for the office of State Senator was not within the jurisdiction of the Supreme Court. Lessard v. Snell, (1937) 155 Or 293, 63 P2d 893.

The acceptance of a second lucrative office does not constitute an implied resignation of a former office and is void unless there is an express resignation of the first position. State v. Hill, (1947) 181 Or 585, 184 P2d 366. **But see** State v. Beveridge, (1918) 88 Or 334, 171 P 1173 and Holman v. Lutz, (1930) 132 Or 185, 282 P 241, 284 P 825.

Position of school teacher is not an office within this section. Monaghan v. Sch. Dist. 1 (dicta), (1957) 211 Or 360, 315 P2d 797.

Doctrine of implied resignation was applied when the Secretary of State during his term of office, was elected, qualified and sworn as Governor. State ex rel. O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482.

FURTHER CITATIONS: Pense v. McCall, (1966) 243 Or 383, 413 P2d 722.

ATTY. GEN. OPINIONS: Same person as: state employe and stenographer for legislature, 1920-22, p 95; legislator and attorney or appraiser for soldiers' bonus, 1920-22, p 261; district attorney and attorney for school district, 1920-22, p 339; dean of medical school and supervisor of physiotherapy, 1920-22, p 348; special prosecutor and deputy district attorney, 1922-24, p 469; county commissioner and overseer for State Highway Commission, 1922-24, p 788; county commissioner and justice of the peace, 1924-26, p 139; legislator and member of fish commission, 1924-26, p 328; deputy Superintendent of Banks and county assessor, 1924-26, p 686.

Same person as: legislator and county inspector, 1926-28, p 52; national guard officer and judge, 1926-28, p 223, 1928-30, p 226; legislator and justice of the peace, 1926-28, p 596; district school clerk and city recorder, 1928-30, p 146; city recorder and justice of the peace, 1928-30, p 338, 1934-36, p 525, 1950-52, p 72; legislator and member of State Board of Horticulture, 1928-30, p 496; school board dentist and member of State Board of Dental Examiners, 1930-32, p 212; watermaster and county engineer, 1930-32, p 315; legislator and secretary of State Board of Pharmacy, 1930-32, p 359.

Same person as: legislator and deputy Corporation Commissioner, 1932-34, p 67; district attorney and director of Federal Land Bank, 1932-34, pp 120, 176; legislator and employe of Home Owners' Loan Corporation, 1932-34, p 386; legislator and acting postmaster, 1932-34, p 404; legislator and employe of state liquor store, 1932-34, p 575; legislator and member of State Board of Agriculture, 1934-36, p 329; legislator and member of Liquor Control Commission, 1934-36, p 329; member of two veterans' commissions, 1934-36, p 365; legislator and commissioner of a port, 1934-36, p 368; district attorney and member of board of governors of the state bar, 1934-36, p 401.

Same person as: legislator and attorney for state veterans' commission, 1936-38, p 123; legislator and attorney for Superintendent of Banks, 1936-38, p 150; legislator and member of geology department, 1936-38, p 199; director of State Industrial Accident Commission and member of state medical board, 1936-38, p 528; municipal judge and justice of the peace, 1938-40, p 196; secretary of State Board of Health and member of cosmetic therapy board, 1938-40, p 274; county court member and director of public utility district, 1938-40, p 438; constable and city marshal, 1938-40, p 670, 1950-52, p 72; marshal and dog control district enforcement officer, 1938-40, p 685.

Same person as: public employe and elective officer in political party, 1938-40, p 707; director of state geology department and consultant for federal board, 1940-42, p 568; justice of peace and secretary of county rationing board, 1940-42, p 633; circuit judge and member of board of governors of state bar, 1942-44, p 43; public officer and member of Armed Forces, 1940-42, p 396, 1942-44, pp 51, 108, 384, 428, 1944-46, p 316; justice of the peace and city attorney, 1942-44, p 153; judge and war labor board member, 1942-44, p 204; city attorney and deputy district attorney, 1942-44, p 226; legislator and legal advisor to a state examining board, 1942-44, p 334; legislator and State Highway Commissioner, 1942-44, p 386.

Same person as: health officer for two cities, 1946-48, p 127; legislators and notary public, 1946-48, p 334; legislator and member of welfare commission, 1946-48, p 334; legislator and attorney for land board and veterans' department, 1946-48, p 334; legislator and elective officer in political party, 1946-48, p 376; legislator and judge pro tempore, 1948-50, p 242; constable and deputy sheriff, 1948-50, p 284; deputy sheriff and deputy coroner, 1950-52, p 36; legislator and member of dog control board, 1950-52, p 201.

State employe obtaining per diem as ex-officio member of board, 1926-28, p 378, 1948-50, p 333; commissioner of state board receiving money from city, 1926-28, p 413; national guard officer called to active duty receiving vacation

pay from state, 1940-42, p 93; Corporation Commissioner engaging in another occupation, 1944-46, p 110; per diem to fish commission representative while acting for tri-state compact, 1946-48, p 460; appointment of same person as constable for service of process in more than one justice of the peace district, 1948-50, p 282; lucrative character of office when incumbent relinquishes his fees, 1950-52, p 36; secretary of school board as a lucrative office, 1950-52, p 237; what constitutes an "office," 1952-54, p 97.

Right of agent of liquor commission to seek political office, 1952-54, p 228; varying duties of coroner from county to county, 1958-60, p 51; resignation by incumbent Secretary of State as condition of qualifying for office of Governor, 1958-60, p 98; power to fill vacancy in office of Secretary of State, 1958-60, p 98; per diem for salaried court reporter, 1958-60, p 186; compensating Adjutant General on "pay in grade" basis, 1958-60, p 392; circuit judge as consultant for United States bureau, 1960-62, p 112; paying salaries to teacher-legislators, 1962-64, p 187; salary of board member serving as secretary-treasurer, 1962-64, p 309; waiver of salary of one lucrative office, 1964-66, p 25; legality of legislator-professor receiving two salaries, 1964-66, p 117; limitations on a pro tempore judge acting as a notary public, (1968) Vol 34, p 380.

Same person as: legislator and medical examiner for the State Industrial Accident Commission, 1952-54, p 124; legislator and member of public school board, 1952-54, p 185; legislator and county hospital board member, 1952-54, p 204; legislator and mayor or councilman of a city, 1954-56, p 3; member of United States Fish and Wildlife Service and Oregon deputy game warden, 1954-56, p 184; superintendent, principal or teacher and clerk of district, 1956-58, p 44; legislator and delegate to state constitutional convention, 1956-58, p 108; legislator and public school teacher, 1956-58, p 112; legislator and paid employe of interim committee, 1956-58, p 173; commission member and executive secretary, 1956-58, p 283; legislator's secretary and teacher, 1958-60, p 118; district judge and supervisor of soil conservation district, 1958-60, p 147; legislator and member of mental health advisory committee, 1958-60, p 170; county judge, secretary of irrigation district and member of State Water Resources Board, 1958-60, p 308; legislative interim Committee employe and candidate for Legislative Assembly, 1958-60, p 347; ex officio fire warden and National Forest Service officer, 1958-60, 395; legislator and director of Panama Canal Company, 1960-62, p 212; appointed county school superintendent and secretary of rural school board, 1960-62, p 217; classroom teacher and member of State Board of Education, 1960-62, p 242; administrator of Forest Protection and Conservation Committee and executive assistant to assistant forester, 1960-62, p 296; juvenile counselor and municipal judge, 1962-64, p 65; teacher as legislator, 1962-64, p 209; legislator and attorney for a school board, 1964-66, p 122; state police as Deputy United States Marshal, 1964-66, p 230; judge and member of Juvenile Services Advisory Committee, 1964-66, p 267; legislator and member of metropolitan study commission, 1966-68, p 254; state employe on leave as legislator, 1966-68, p 537; justice of the peace and member of a board of education, 1966-68, p 609; member of school election board and county precinct board for primary election, (1968) Vol 34, p 39; county health officer and administrator of county mental health department, (1968) Vol 34, p 187; deputy sheriff and attendant at county hospital, (1969) Vol 34, p 429; county health officer and administrator of health department, (1969) Vol 34, p 783; legislator and city judge, (1970) Vol 35, p 252; legislator and member of National Advisory Council on Education Professions Development, (1971) Vol 35, p 560.

LAW REVIEW CITATIONS: 28 OLR 332; 39 OLR 140.

Section 11

CASE CITATIONS: State ex rel O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482.

ATTY. GEN. OPINIONS: Eligibility of candidate for office who has federal tax lien filed against his property for back taxes, 1954-56, p 196; right of person within area excluded from special tax levy to vote on district levy, 1964-66, p 191.

LAW REVIEW CITATIONS: 39 OLR 140.

Section 12

NOTES OF DECISIONS

Appointment of port commissioners under a statute providing that two of the five commissioners should hold office until January 1 following the succeeding general election, and the remaining three until January 1 following the second general election was pro tempore. Bennett Trust Co. v. Sengstacken, (1911) 58 Or 333, 345, 113 P 863.

ATTY. GEN. OPINIONS: Eligibility of State Treasurer pro tempore to succeed himself, 1934-36, p 639.

Section 14

NOTES OF DECISIONS

A general election is one at which the people may fill by election every elective office in the state not otherwise distinctly provided for by the Constitution or laws. State v. Johns, (1870) 3 Or 533.

School elections are neither general nor special elections. Breding v. Williams, (1900) 37 Or 433, 61 P 858.

A local option election was a general election. State v. Reed, (1908) 52 Or 377, 97 P 627.

An election for ratifying legislative enactments was a general election. Bethune v. Funk, (1917) 85 Or 246, 166 P 931.

A primary election is a special election to the extent that it is only for the purpose of nominating candidates. Henderson v. Salem, (1931) 137 Or 541, 1 P2d 128, 4 P2d 321.

Submission of amendments to a city charter by initiative petition at a primary nominating election is not authorized where the charter does not designate the primary election provided for therein as a general election, or provide for the submission of the initiative measures at a regular election. Id.

The term "all officers except the Governor" includes legislators. State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

FURTHER CITATIONS: State ex rel. Appling v. Chase, (1960) 224 Or 112, 355 P2d 631; State ex rel. McCormick v. Appling, (1964) 236 Or 485, 389 P2d 677.

ATTY. GEN. OPINIONS: When justice of the peace takes office, 1926-28, p 34, 1928-30, p 262; time for Superintendent of Public Instruction to take office, 1926-28, p 49; when legislators' terms commence, 1932-34, p 47; time for assumption of official duties by state officials, 1932-34, p 85; construing "general election," 1952-54, p 220; city of less than 2,000 establishing new tax base without nominating candidates for city office at that time, 1952-54, p 226; city under 2,000 submitting new tax base on separate ballot, 1958-60, p 62; date term commences for office of county coroner, 1960-62, p 27; abolishing of office of justice of peace and creating office of district judge, 1960-62, p 29; commencement of term of judge of newly created district court, 1960-62, p 74; date of election on state-wide initiative measure, 1960-62, p 252; term of district court clerk elected to

fill vacancy created by death, 1962-64, p 318; creating additional circuit judgeships, 1966-68, p 476; election of official at general election as for unexpired term of predecessor, (1969) Vol 34, p 391.

Section 14a

NOTES OF DECISIONS

This section was properly submitted by the legislature, and legally adopted. State v. Kellaher, (1919) 90 Or 538, 177 P 944.

A commissioner appointed July 2, 1917, under a city charter to fill a vacancy by resignation in a four-year commissionership lasting until June 30, 1919, was not entitled to office as against commissioner elected "at the next general municipal election," November 5, 1918. Id.

A municipality is not prohibited from calling a special election to elect commissioners after the adoption of a special charter for city government, and from specifying times and places of holding such an election other than those prescribed for holding state and county elections. State v. Andresen, (1924) 110 Or 1, 222 P 585.

A city charter amendment by initiative petition cannot be submitted at a regular May primary election. Henderson v. Salem, (1931) 137 Or 541, 1 P2d 128, 4 P2d 321.

Submission of charter amendments by initiative petition at a city primary nominating election is not authorized where the charter does not designate the primary election provided for therein as a general election nor provide for the submission of the initiative measures at a regular election. Id.

A municipality invoking the aid of a general statute as to the manner of holding a state and county election must substantially comply with the provisions thereof, and compliance with its own ordinance is not sufficient. State v. Boyer, (1932) 140 Or 637, 15 P2d 375.

ATTY. GEN. OPINIONS: When city measures may be printed on state and county ballots, 1932-34, p 319; legality of certain nominating procedures for municipal offices, 1942-44, p 442; duty of city to make its boundary lines and voting precincts conform, 1946-48, p 456; construing "general election," 1952-54, p 220; city of less than 2,000 establishing new tax base without nominating candidates for city office at that time, 1952-54, p 226; statute construing Constitution, 1956-58, p 89; use of separate ballot in establishing city tax base, 1958-60, p 62; application of Corrupt Practices Act to municipal elections, 1960-62, p 169; usage of term "general election" in Constitution, 1960-62, p 252; sharing regular election expenses between city and county, 1962-64, p 118; construing proposal for city-county consolidation, 1966-68, p 638.

Section 15

NOTES OF DECISIONS

The word "election" as used in this section includes appointments. State v. Compson, (1898) 34 Or 25, 54 P 349.

ATTY. GEN. OPINIONS: Election of Senate President, (1971) Vol 35, p 413.

Section 16

NOTES OF DECISIONS

Neither of two candidates receiving the highest and an equal number of votes for the same office is elected or can exercise the duties of such office until the matter has been decided by lot and he has been declared duly elected in the manner provided by statute. State v. McKinnon, (1880) 8 Or 493.

A city charter enacted by its voters is a law within this section. State v. Portland, (1913) 65 Or 273, 133 P 62.

A plurality of votes was sufficient when there was no statute declaring that a majority of votes was essential to election. Howell v. Bain, (1945) 176 Or 187, 156 P2d 576.

ATTY. GEN. OPINIONS: Eligibility of candidate who received next highest number of votes to certificate of election, when person receiving highest number died shortly after the election, 1952-54, p 61; legislative power of numbering of positions of representatives and senators within each district or county, 1952-54, p 87; duty of county clerk to issue certificate of nomination to candidate with majority of votes, 1958-60, p 9; prohibiting primary indorsements by major political parties, 1960-62, p 192; election of Senate President, (1971) Vol 35, p 413.

Section 17

NOTES OF DECISIONS

An elector must have some precinct as a residence in preference to all others to enable him to vote for county officers, and he must vote in such precinct. Darragh v. Bird, (1870) 3 Or 229.

The mere passing in and out of a precinct will not establish residence. Id.

An intention to remove immediately after the election does not amount to a loss or change of residence. Id.

An individual who is a bona fide resident of a county but has no fixed residence or domicile may vote in any precinct in which he finds himself on election day. Wood v. Fitzgerald, (1870) 3 Or 568, 581.

The fact that an elector did not vote for precinct officers affords no presumption that he was not a resident of the precinct in which he voted. Van Winkle v. Crabtree, (1899) 34 Or 462, 55 P 831, 56 P 74.

FURTHER CITATIONS: Wright v. Blue Mountain Hosp. Dist., (1958) 214 Or 141, 328 P2d 314.

ATTY. GEN. OPINIONS: Voting by elector who has moved to another address within the same precinct, 1954-56, p 177; candidates for whom voter may vote in precinct other than precinct of residence, 1958-60, p 240; certificate of registration as prerequisite to voting in precinct other than precinct of registration, 1958-60, p 240.

Section 18

NOTES OF DECISIONS

The sample ballot for a recall election properly stated the question directly whether the officer should be recalled, followed by the names of the officer and other candidates to be voted for. State v. Barbur, (1914) 73 Or 10, 144 P 126.

A recall election of a district attorney for a single county ordered pursuant to a petition filed with the county clerk and not with the Secretary of State was invalid. State v. Dillard, (1914) 73 Or 13, 16, 144 P 127.

Twenty-five percent of the electors who voted in the district at the preceding election for Judge of the Supreme Court were required by this section until laws were enacted for a petition signed by a less number. State v. Harris, (1915) 74 Or 573, 144 P 109, Ann Cas 1916A, 1156.

The provision for such additional legislation as may aid the operation of the section does not hold it in abeyance until such legislation is enacted. Id.

The failure of the legislature to provide for payment of campaign expenses of the officers subject to recall out of the public treasury as authorized by the section did not suspend the right of recall. Id.

The "preceding election for justice of the supreme court" means an election at which a Judge of the Supreme Court

was elected and not one in which only candidates for that office were nominated. State v. Clark, (1933) 143 Or 482, 22 P2d 900.

One who is ousted from office is ousted for the term for which he was elected. Recall Bennett Comm. v. Bennett, (1952) 196 Or 299, 249 P2d 479.

ATTY. GEN. OPINIONS: Recall of irrigation district directors, 1920-22, p 41; effect of section on school districts, 1926-28, p 168; ballot for recall of school district directors, 1926-28, p 218; persons qualified to sign recall petition, 1926-28, p 462; form of petition and number who must sign it, 1928-30, p 10, 1932-34, p 14; withdrawal of names from petition, 1930-32, p 583; recall election at the regular primary election, 1932-34, p 672; recall of school district clerk, 1934-36, p 279; recall of member of Congress, 1934-36, p 312; county clerk's duties in recall proceedings, 1946-48, p 170; ballot provisions in the recall of school directors, 1952-54, p 136; removal of conservation district officer for failure to attend meetings, 1956-58, p 59; recall of school directors, 1956-58, p 262; authority of county clerk of over city recorder in recall elections, 1960-62, p 356; effect of failure to give notice of election to fill a vacancy, 1964-66, p 96; legality of candidacy by a person recalled from previously held office, 1966-68, p 54; construing "office," 1966-68, p 99; commencement of 20-day period, 1966-68, p 228; recalling a precinct committeeman, 1966-68, p 233.

LAW REVIEW CITATIONS: 46 OLR 278.

Article III

Distribution of Powers

Section 1

NOTES OF DECISIONS

1. In general

This section is taken from Art. III, §1 of the 1851 Indiana Constitution. Monaghan v. School Dist. 1, (1957) 211 Or 360, 315 P2d 797; Eacret v. Holmes, (1958) 215 Or 121, 333 P2d 741.

The Constitution creates a clear duty to void encroachments of one department upon the domain and traditional independence of the others. Dagwell v. Thornton, (1953) 199 Or 8, 259 P2d 125.

2. Legislative and executive

The legislature is not precluded from filling newly created offices with incumbents of its own selection in joint session. Biggs v. McBride, (1889) 17 Or 640, 21 P 878, 5 LRA 115; Eddy v. Kincaid, (1896) 28 Or 537, 41 P 156, 655; State v. Compson, (1898) 34 Or 25, 54 P 349.

A member of the Legislative Assembly which passed the "Meussdorffer Act" was not thereby disqualified to serve as a member of the bridge committee created by the Act. State v. George, (1892) 22 Or 142, 29 P 356, 29 Am St Rep 586, 16 LRA 737.

A legislator cannot be the Corporation Commissioner. Gibson v. Kay, (1914) 68 Or 589, 137 P 864.

Expressions of the legislature as to the necessity of expending public moneys and the extent thereof are paramount to the judgment on that subject of any officer in the administrative department of the government. State v. West, (1914) 74 Or 112, 145 P 15.

Disbursement by state executive officers of state funds without an appropriation therefor by an Act of the Legislative Assembly is an usurpation of the legislative prerogative. Id.

A legislator cannot be a school teacher. Monaghan v. Sch. Dist. 1, (1957) 211 Or 360, 315 P2d 797.

3. Legislative and judicial

A declaration of the legislature that a law is necessary for the immediate preservation of the public peace, health, and safety is not reviewable in the courts nor an infringement of this section. Biggs v. McBride, (1889) 17 Or 640, 21 P 878, 5 LRA 115; Kadderly v. Portland, (1903) 44 Or 118, 150, 74 P 710, 75 P 222.

The railroad commission Act did not violate this provision. State v. Corvallis & E. R. Co., (1911) 59 Or 450, 459, 117 P 980; Oregon R. & N. Co. v. Campbell, (1909) 173 Fed 957.

A court is not privileged to consider the desirability, expediency, policy, justice or wisdom of an enactment in adjudging its validity. James v. Newberg, (1928) 101 Or 616, 201 P 212; Eastern & W. Lbr. Co. v. Patterson, (1928) 124 Or 112, 146, 258 P 193, 264 P 441, 60 ALR 528.

The legislature may not validate a street assessment which has been adjudicated a nullity. Thomas v. Portland, (1901) 40 Or 50, 66 P 439.

When the court declared certain special assessments invalid, the legislature had the power to enact a law authorizing the city to sue the property owners benefiting from the improvements. Id.

A statute validating appeals taken within six months after denial of a motion for new trial was unconstitutional. Macartney v. Shipherd, (1911) 60 Or 133, 117 P 814, Ann Cas 1913D, 1257.

A statute which provided that if the Supreme Court should hold invalid a provision that no elector not registered as provided therein should vote, then he may register as further provided, contravened this section. Portland v. Coffey, (1913) 67 Or 507, 135 P 358.

The Act creating the State Water Board did not violate this section. In re Willow Creek, (1915) 74 Or 592, 144 P 505, 146 P 475.

The Act creating the Industrial Accident Commission was not in contravention of this section. Evanhoff v. State Ind. Acc. Comm., (1915) 78 Or 503, 154 P 106.

The Supreme Court is precluded from inserting a word in a statute defining a city boundary on the assumption that such word was inadvertently omitted. City of Athena v. Jack, (1925) 115 Or 357, 236 P 760.

A statute providing for a change of judges on the filing of an affidavit of prejudice was constitutional. U'Ren v. Bagley, (1926) 118 Or 77, 245 P 1074, 46 ALR 1173.

Whether certain property should be exempt from taxation is purely a legislative question, which the judiciary is not permitted to determine. Corporation of Sisters of Mercy v. Lane County, (1927) 123 Or 144, 261 P 694.

Any interference by the courts or an executive officer with the enactment of any law is unconstitutional, even though the law that the legislature or people were attempting to enact was unconstitutional. State v. Kozer, (1928) 126 Or 641, 270 P 513.

An Act imposing legislative and executive functions on the judiciary is invalid. Enterprise v. State, (1937) 156 Or 623, 69 P2d 953.

The provisions of this section must be construed in the light of subsequent amendments to the Constitution. Woodward v. Pearson, (1940) 165 Or 40, 103 P2d 737.

A statute which gave any party to a litigation the right to a change of judge without showing bias or prejudice violated this section. State v. Vandenberg, (1955) 203 Or 326, 276 P2d 432, 280 P2d 344.

Within the express or implied limitations found in the Constitution, legislative action is not subject to control by the courts. State ex rel. Overhulse v. Appling, (1961) 226 Or 575, 361 P2d 86.

A statutory provision for de novo trial to determine whether a driver's license should be issued did not violate this section. Stehle v. Dept. of Motor Vehicles, (1962) 229 Or 543, 368 P2d 386, 97 ALR2d 1359.

If the duty imposed by the legislature on the courts calls for performance of functions to which judicial machinery is adaptable, there can be no constitutional objection to the delegation. Boyle v. City of Bend, (1963) 234 Or 91, 380 P2d 625.

The power of a constitutionally established court to punish for contempt may be regulated within reasonable bounds by the legislature but not to the extent that the

court's power is substantially impaired or destroyed. State ex rel. Oregon State Bar v. Lenske, (1965) 243 Or 477, 405 P2d 510, 407 P2d 250, cert denied, 384 US 943.

Cause was continued until after the next regular session of the Legislative Assembly to give that body an opportunity to correct the undenied apportionment imbalance that exists in Representative District 6. Cook v. McCall, (1966) 242 Or 480, 410 P2d 505.

4. Executive and judicial

A statute providing for a trial of the right of property taken under a writ of attachment by a sheriff's jury and that a verdict adverse to the claimant is a bar to a subsequent action by him against the sheriff, did not violate this section. Capital Lumbering Co. v. Hall, (1881) 9 Or 93.

The allowance of a claim by the Secretary of State is not a judicial determination so as to fall within the prohibition of this section. State v. Brown, (1882) 10 Or 215.

An Act authorizing the Governor to appoint special prosecutors when an Act is not being enforced by the prosecuting attorney did not violate this provision. State v. Farnham, (1925) 114 Or 32, 234 P 806.

The Secretary of State may not be compelled by mandamus to go beyond the official records in making up ballots. Putnam v. Kozer, (1928) 119 Or 535, 250 P 625.

A court is without authority to require the Governor by mandamus to issue a writ of election to fill a vacancy in the Senate. Putnam v. Norblad, (1930) 134 Or 433, 293 P 940.

The executive of the state is as independent of the courts, in the proper discharge of his duties under the Constitution, as he is of the legislature. Id.

The statute affording an appeal to the circuit court from an order of the State Engineer as to water rights did not confer administrative duties upon the court. Broughton's Estate v. Cent. Ore. Irr. Dist., (1940) 165 Or 435, 101 P2d 425, 108 P2d 276.

Statute providing that State Public Welfare Commission should determine need for old-age assistance and ability of relative to pay, with provision for a hearing and appeal to the courts, was constitutional. Mallatt v. Luihn, (1956) 206 Or 678, 294 P2d 871.

Mere fact that some functions usually performed by courts are conferred upon an administrative body does not necessarily conflict with the principle of the separation of powers. Id.

It is incompetent for judiciary to control, interfere with or advise the Governor in granting reprieves, commutations and pardons. Eacret v. Holmes, (1958) 215 Or 121, 333 P2d 741.

A statute requiring the Supreme Court to review ballot titles prepared by the Attorney General on measures was unconstitutional. In re Ballot Title, (1967) 247 Or 488, 431 P2d 1.

5. Delegation of powers

The power to determine what the law shall be cannot be conferred on any person, officer, agency, or tribunal. Van Winkle v. Fred Meyer, Inc., (1935) 151 Or 455, 49 P2d 1140; LaForge v. Ellis, (1945) 175 Or 545, 154 P2d 844.

A law giving a majority of the producers of a commodity price setting powers, was unconstitutional. Id.

Statutes relating to the inspection of hides were unconstitutional since they gave an association the power to determine their effect. State v. Hines, (1920) 94 Or 607, 186 P 420.

An Act reducing state employes' salaries according to specified percentages and authorizing the Board of Control to relieve against the full reductions in cases of special fitness, experience, ability and dependability was constitutional. State v. Hoss, (1933) 143 Or 41, 21 P2d 234.

Statutes providing for the creation of people's utility districts did not violate this provision. Petition of Bd. of Directors, (1939) 160 Or 530, 86 P2d 460.

An Act authorizing the Supreme Court to enter into a contract for publication of statutes was not subject to the objection that legislative functions are delegated to the court. Woodward v. Pearson, (1940) 165 Or 40, 103 P2d 737.

A statute authorizing the Hydroelectric Commission to establish a utility district was constitutional. Ravlin v. Hood R. P.U.D., (1940) 165 Or 490, 106 P2d 157.

A workmen's compensation law delegated legislative authority to a commission or administrative board without any rule or standard fixed for its guidance in violation of this section. M & M Wood Working Co. v. State Ind. Acc. Comm., (1945) 176 Or 35, 155 P2d 933.

There was no unconstitutional delegation of legislative power to the State Public Welfare Commission by reason of 1947 additions and amendments to the Oregon Welfare Code. State v. Malheur County, (1949) 185 Or 392, 203 P2d 305.

A law which leaves to a jury the determination of what constitutes reasonableness does not turn the jury into legislators. Mallatt v. Ostrander Ry. & Tbr. Co., (1942) 46 F Supp 250.

The power to determine what the law shall be cannot be conferred on any person, officer, agency or tribunal. Demers v. Peterson, (1953) 197 Or 466, 254 P2d 213.

The legislature cannot grant an administrative agency power to regulate, without making an unconstitutional delegation of legislative power, unless some standard is provided as a guide to the agency. Id.

A law giving state administrative agency authority to regulate crop dusting without any standard fixed for its guidance was in violation of this section. Id.

A statute providing for urban redevelopment did not violate this section. Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

The negligent homicide statute predicating criminality upon negligence does not require the jury to determine an issue of law in violation of this section. State v. Wojahn, (1955) 204 Or 84, 282 P2d 675.

Leaving solely to personal knowledge of a specified individual whether a given horse is immediately declared to be an abandoned horse subject to summary sale or destruction, or whether the horse is to be treated as a branded horse amounted to an unconstitutional delegation of legislative authority in violation of this section. Bowden v. Davis, (1955) 205 Or 421, 289 P2d 1100.

Fair Trade Act was held unconstitutional and void as to nonsigners of fair trade contracts as an attempted unconstitutional delegation of legislative power. General Elec. Co. v. Wahle, (1956) 207 Or 302, 296 P2d 635.

Law adopting National Electrical Code, including future amendments, was unconstitutional. Hillman v. No. Wasco County P.U.D., (1958) 213 Or 264, 323 P2d 664.

State agency having authority to adopt electrical safety code could not constitutionally adopt code of Bureau of Standards, including its future amendments. Id.

A statute authorizing exclusion from boundaries of city having population of 2,000 or less, upon showing as provided in statute by an owner of 20 or more acres included therein, was unconstitutional. Schmidt v. City of Cornelius, (1957) 211 Or 505, 316 P2d 511.

A statute requiring school officials to release pupils for religious instruction was constitutional. Dilger v. Sch. Dist. 24 CJ, (1960) 222 Or 108, 352 P2d 564.

A statute authorizing a county governing body to adopt ordinances establishing building codes was constitutional. Warren v. Marion County, (1960) 222 Or 307, 353 P2d 257.

The legislature may grant to cities the power to regulate utilities. Portland Stages, Inc. v. Portland, (1969) 252 Or 633, 450 P2d 764.

FURTHER CITATIONS: Baum v. Newbry, (1954) 200 Or 576, 267 P2d 220; M & M Wood Working Co. v. State Ind. Acc. Comm., (1954) 201 Or 603, 271 P2d 1082; State ex rel Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174; State v. Hunter, (1956) 208 Or 282, 300 P2d 455; Fredericks v. Gladden, (1957) 211 Or 312, 333, 315 P2d 1010; State ex rel. O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482; Warner Valley Stock Co. v. Lynch, (1959) 215 Or 523, 336 P2d 884; Seale v. McKennon, (1959) 215 Or 562, 336 P2d 340; Ramstead v. Morgan, (1959) 219 Or 383, 347 P2d 594, 77 ALR2d 481; Oregon State Bar v. Sec. Escrows, Inc. (dissenting opinion), (1962) 233 Or 80, 377 P2d 334; Hallberg v. Housing Authority of Portland, (1966) 243 Or 204, 412 P2d 374; Willamette Assn. of Elec. Contractors v. Nilsen, (1967) 245 Or 588, 423 P2d 497; Gortmaker v. Seaton, (1969) 252 Or 440, 450 P2d 547; Sprague v. Straub, (1969) 252 Or 507, 451 P2d 49; State v. Sargent, (1969) 252 Or 579, 449 P2d 845; State v. Wickenheiser, (1970) 3 Or App 509, 475 P2d 422.

ATTY. GEN. OPINIONS: Validity of Act calling for executive review of revenue measures, 1928-30, p 117; power of court to order bond issuance, 1930-32, p 505; change of law by Board of Control, 1930-32, p 548; advisory opinions by the Supreme Court, 1934-36, p 530; appropriation of money by Board of Control, 1934-36, p 678; reduction in sentences by the legislature, 1936-38, p 168; exercise of judicial function by the Insurance Commissioner, 1936-38, p 211; rule-making powers of state boards and commissions, 1938-40, p 549; initiative as an exercise of legislative power, 1948-50, p 105; validity of bill giving the executive department control over fiscal affairs, 1950-52, pp 139, 170; validity of provision in proposed Act giving an administrative board the power to confer powers and duties upon an administrator, 1950-52, p 187; legislative delegation to fish commission of power to classify and define terms for licenses, 1952-54, p 96; validity of commodity commission tax, 1952-54, p 109; determination of ownership by Secretary of State when issuing certificate of title, 1952-54, p 169; necessity for guidelines to Board of Control in constructing intermediary correctional institution, 1952-54, p 199; county authority to regulate trailer houses, 1952-54, p 230; state bar as administrative board, 1952-54, p 246; validity of law giving a board power to establish license fees, 1954-56, p 108; legislative delegation to Board of Control of power to discontinue state institutions, 1956-58, p 274; expenses of President of the Senate while acting as Governor, 1958-60, p 59; effect of state statute adopting future federal legislation, 1958-60, p 128; collective bargaining contracts for public employes, 1958-60, p 136; statute fixing minimum confinement preceding probation, 1958-60, p 157, statute inoperative until further legislation, 1958-60, p 191; as modeled after similar Indiana provision, 1960-62, p 45; Public Utility Commissioner's authority to authorize stock issue of foreign corporation, 1960-62, p 108; school districts and community colleges as state agencies, 1960-62, p 268; validity of application of county civil service to positions in juvenile department, 1960-62, p 322; presumption of constitutionality of statutes, 1962-64, p 8; appropriation with expenditure subject to approval of the Emergency Board, 1962-64, p 8; political activities of public school teachers, 1962-64, p 22; discretion to apply a retaliatory statute, 1962-64, p 119; legislative review of administrative rules, 1962-64, p 161; paying salaries to teacher-legislators, 1962-64, p 187; measuring state income tax by federal tax, 1962-64, p 202; legality of legislator-professor receiving two salaries, 1964-66, p 117; validity of restricting executive appointments to nominees of unofficial group, 1964-66, p 178; impounding of leased or jointly owned vehicles, 1966-68, p 421; validity of rules barring nonresidents and aliens from state employment, 1966-68, p 579; resolving conflicting federal and state laws for payments to representatives and imposition of sanctions, 1966-68, p 619; taxation of parking facilities rented to state employes on capitol mall, (1969) Vol 34, p 749; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977; authority to reapportion legislature, (1971) Vol 35, p 643.

Same person as: Legislator as member of a state board or commission, 1920-22, p 84; 1924-26, p 328, 1928-30, p 496, 1932-34, p 67, 1934-36, p 329, 1936-38, pp 149, 199, 1946-48, pp 335, 376, 1950-52, p 201; Secretary of State as an administrator, 1930-32, p 135; judge as member of state commission, 1932-34, p 401; county judge as member of school board, 1946-48, p 404; justice of the peace as a school teacher, 1948-50, p 219; appointment of a member of the legislature as judge pro tempore, 1948-50, p 242; legislator as medical examiner for the State Industrial Accident Commission, 1952-54, p 124, 1954-56, p 61; legislator as member of a school board, 1952-54, p 185; legislator as member of county hospital board, 1952-54, p 204; city mayor or councilman as a legislator, 1954-56, p 3; legislator's authority to complete duties as judge pro tempore, 1954-56, p 80; legislator as delegate to state constitutional convention, 1956-58, p 108; legislator as school teacher, 1956-58, pp 58, 112; legislator as teacher in public school, 1956-58, p 167; county judge serving as school director, 1956-58, p 296; legislator's secretary as teacher, 1958-60, p 118; district judge as supervisor of soil conservation district, 1958-60, p 147; legislator as member of mental health advisory committee, 1958-60, p 170; county judge, secretary of irrigation district and member of State Water Resources Board, 1958-60, p 308; circuit judge as consultant for United States bureau, 1960-62, p 112; legislator and bar examiner, 1960-62, p 170; teacher as legislator, 1962-64, p 209; legislator and attorney for a school board, 1964-66, p 122; legislator and member of metropolitan study commission, 1966-68, p 254; justice of the peace and member of a board of education, 1966-68, p 609; judge as member of Juvenile Services Advisory Committee, 1964-66, p 267; state employe on leave as legislator, 1966-68, p 537; limitations on a pro tempore judge acting as a notary public, (1968) Vol 34, p 380; legislator and city judge, (1970) Vol 35, p 252; legislator and member of National Advisory Council on Education Professions Development, (1971) Vol 35, p 560.

LAW REVIEW CITATIONS: 7 OLR 228; 15 OLR 260; 48 OLR 362; 1 WLJ 146.

Section 2

ATTY. GEN. OPINIONS: Application for funds by State Forester to Emergency Board, 1958-60, p 175; limitations on expenditures of State Board of Higher Education, 1960-62, p 289; lease-funding agreement between State Board of Higher Education and a school district, (1969) Vol 34, p 651.

Section 3

ATTY. GEN. OPINIONS: Authorization by Emergency Board to filbert commission to expend funds on advertising, 1954-56, p 112; application for funds by State Forester to Emergency Board, 1958-60, p 175; authority of Oregon Civil Defense Agency to disburse funds without approval of Emergency Board, 1958-60, p 220; State Public Welfare Commission as "institution" or state agency, 1960-62, p 45; existence of an "emergency," 1960-62, p 284; limitations on expenditures of State Board of Higher Education, 1960-62, p 289; transfer of mentally retarded persons to other institutions, 1964-66, p 30; power of board to authorize expenditure of Highway Fund by State Board of Health and State Police, 1964-66, p 277; conditions constituting an emergency, 1964-66, p 304; Emergency Board restoration of funds to inventory tax relief fund, (1968) Vol 34, p 84; acquisition of a residence for university president, (1969) Vol 34, p 796.

LAW REVIEW CITATIONS: 49 OLR 326.

Article IV

Legislative Department

Section 1

NOTES OF DECISIONS

1. In general

The form of the act of municipal authorities was not determinative as to whether the ordinance was legislative or administrative. Monahan v. Funk, (1931) 137 Or 580, 3 P2d 778.

Law authorizing the Drug Advisory Council to designate dangerous drugs was not unconstitutional. State v. Sargent, (1969) 252 Or 579, 449 P2d 845.

The crucial test in determining whether an ordinance is legislative or administrative is whether it is one making law or one executing law already in existence. Allen v. Martin, (1970) 255 Or 401, 465 P2d 228.

Municipal legislation was considered in the sense of general laws prescribed by the law-making power and of general application. Id.

A law is not invalid because power is given to some local officials to determine the existence of facts upon which the law will be effective in a given locality. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

The test for the validity of the delegation of the power to select the manner in which revenue for mass transit districts is to be raised, as in all cases, is whether the practical necessities of the efficient administration of legislative policy requiring the delegation outweigh the danger of discriminate action. Horner's Market, Inc. v. Tri-County Metropolitan Transp. Dist., (1970) 256 Or 124, 471 P2d 798, denying review, 2 Or App 288, 467 P2d 671.

A city ordinance providing for the purchase of property for a garbage incinerating plant, was merely an administrative act not subject to referendum. Monahan v. Funk, (1931) 137 Or 580, 3 P2d 778.

Initiative municipal charter amendment making existence of parking districts contingent on approval of majority of district property owners was municipal legislation. State ex rel Allen v. Martin, (1970) 1 Or App 550, 465 P2d 228.

The legislature had power to enact a general law providing for creation of a mass transit district. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

The mass transit district Act was not a denial of home rule rights. Id.

2. Under original section 1

(1) Legislative power generally. The power of the legislature over the subject of taxation was limited only by the conditions that it should be equal and uniform and extend alike to all property "excepting such only for municipal, literary, scientific, religious or charitable purposes as may be specially exempted by law." Crawford v. Linn County, (1884) 11 Or 482, 5 P 738.

Statutes proposed and enacted by the people were subject to the same constitutional limitations as legislative statutes, and after their adoption they existed at the will of the legislature just as did other laws. Kadderly v. Portland, (1903) 44 Or 118, 74 P 710, 75 P 222; Patton v. Withycombe, (1916) 81 Or 210, 159 P 78.

The legislative department of a state could enact any law not expressly or impliedly prohibited by the Constitution. Straw v. Harris, (1909) 54 Or 424, 103 P 777; Riggs v. City of Grants Pass, (1913) 66 Or 266, 134 P 776; Loe v. Britting, (1930) 132 Or 572, 287 P 74; Jory v. Martin, (1936) 153 Or 278, 56 P2d 1093.

Ore. Const. Art. XI, §2 merely restricted the legislative power so that it could not enact, amend or repeal any particular charter for any single municipality. City of Hillsboro v. Pub. Serv. Comm., (1920) 97 Or 320, 187 P 617, 192 P 390.

The legislature had as much power to prescribe when an Act should take effect as to enact the law itself. Cameron v. Stevens, (1927) 121 Or 538, 256 P 395.

Any interference by the courts or an executive officer with the enactment of any law, would be unconstitutional, even though the law that the legislature or people were attempting to enact was unconstitutional. State v. Kozer, (1928) 126 Or 641, 270 P 513.

The Constitution, as applied to the legislative department, was a limitation, and not a grant, of power. Loe v. Britting, (1930) 132 Or 572, 287 P 74.

The Fair Trade Law as applied to nonsigners did not violate this section. Federal Cartridge Corp. v. Helstrom, (1954) 202 Or 557, 276 P2d 720.

(2) Delegation of powers. While the legislature could not delegate its power to make a law, it could make a law to delegate a power to determine some fact or state of things on which the law made or intended to make its own action depend. Van Winkle v. Fred Meyer, Inc., (1935) 151 Or 455, 49 P2d 1140; Savage v. Martin, (1939) 161 Or 660, 91 P2d 273.

The utility district law did not unlawfully delegate legislative power. In re People's Utility District, (1939) 160 Or 530, 86 P2d 460; Ravlin v. Hood R. P.U.D., (1940) 165 Or 490, 106 P2d 157.

The State Highway Commission could not delegate the duties imposed by statute upon the State Engineer to the chief deputy State Engineer. Peterson v. Lewis, (1916) 78 Or 641, 154 P 101.

A statute relating to the transportation and inspection of hides was unconstitutional. State v. Hines, (1920) 94 Or 607, 186 P 420.

The statute denouncing as a crime the nonsupport by a husband of his wife and children, was not objectionable. State v. Bailey, (1925) 115 Or 428, 236 P 1053.

An Act authorizing a board to exercise discretion in the application of a scale of salary reductions, did not violate this provision. State v. Hoss, (1933) 143 Or 41, 21 P2d 234.

A law giving price setting powers to a majority of the producers of a commodity was unconstitutional. Van Winkle v. Fred Meyer, Inc. (1935) 151 Or 455, 49 P2d 1140.

A milk control Act did not violate this section as an unlawful delegation of legislative power. Savage v. Martin, (1939) 161 Or 660, 91 P2d 273.

An Act relating to barbers contravened this provision in that it attempted to make an unlawful and unauthorized delegation of legislative power. LaForge v. Ellis, (1945) 175 Or 545, 154 P2d 844.

There was no unconstitutional delegation of legislative power to the State Public Welfare Commission by reason of 1947 additions and amendments to the Oregon Welfare Code. State ex rel. State Pub. Welfare Comm. v. Malheur County, (1949) 185 Or 392, 203 P2d 307.

A statute providing for urban redevelopment did not violate this section. Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

The Fair Trade Act was unconstitutional and void as to nonsigners of fair trade contracts as an attempted unconstitutional delegation of legislative power. General Elec. Co. v. Wahle, (1956) 207 Or 302, 296 P2d 635.

Law adopting national electrical code, including future amendments, was unconstitutional. Hillman v. No. Wasco County P.U.D., (1958) 213 Or 264, 323 P2d 664.

State agency having authority to adopt electrical safety code could not constitutionally adopt code of Bureau of Standards, including its future amendments. Id.

A statute requiring school officials to release pupils for religious instruction was constitutional. Dilger v. Sch. Dist. 24 CJ, (1960) 222 Or 108, 352 P2d 564.

A statute authorizing a county governing body to adopt ordinances establishing building codes was constitutional. Warren v. Marion County, (1960) 222 Or 307, 353 P2d 257.

A statute authorizing the Department of Agriculture to regulate breadpan sizes was constitutional. State v. Hudson House, Inc., (1962) 231 Or 164, 371 P2d 675.

The board's attempt to regulate advertising of drugs was beyond the scope of the authority vested in the board. Oregon Newspaper Publishers Assn. v. Peterson, (1966) 244 Or 116, 415 P2d 21.

(3) Emergency measures; enacting clauses. The constitutional provision as to the style of all bills did not apply to municipal legislation or a city charter. State v. Dalles City, (1914) 72 Or 337, 350, 143 P 1127, Ann Cas 1916B, 855; Colby v. City of Medford, (1917) 85 Or 485, 508, 167 P 487; State v. Kelsey, (1913) 66 Or 70, 133 P 806.

An enacting clause for a statute was mandatory. Colby v. City of Medford, (1917) 85 Or 485, 167 P 487.

The emergency clause in a taxation measure did not excuse the Secretary of State from referring a request for a referendum as to such Act to the Attorney General. State v. Kozer, (1927) 121 Or 459, 255 P 900.

The state legislature had the exclusive right to determine when an emergency existed. Joplin v. Ten Brook, (1928) 124 Or 36, 263 P 893.

A general statement in an ordinance that immediate effect was necessary for the peace, health or safety of the community was valid if reasonable. Id.

(4) Initiative and referendum

(a) Generally. The initiative and referendum amendment was regularly proposed and adopted and did not conflict with the federal constitutional provision guaranteeing to every state a republican form of government. Kadderly v. Portland, (1903) 44 Or 118, 74 P 710, 75 P 222; Kiernan v. Portland, (1910) 57 Or 454, 475, 111 P 379, 112 P 402, 37 LRA(NS) 332; Pacific States Tel. & Tel. Co. v. Oregon, (1912) 223 US 151, 32 S Ct 231, 56 L Ed 386.

An initiative measure is not subject to the veto power of the Governor. State v. Kline, (1908) 50 Or 426, 93 P 237; State v. Pac. States Tel. & Tel. Co., (1909) 53 Or 162, 99 P 427; Pacific States Tel. & Tel. Co. v. Oregon, (1912) 223 US 118, 32 S Ct 224, 56 L Ed 377.

The power reserved to the people by the adoption of the initiative and referendum merely took from the legislature the exclusive right to enact law, at the same time leaving it a coordinate legislative body. Straw v. Harris, (1909) 54 Or 424, 103 P 777, 780; Kalich v. Knapp, (1914) 73 Or 558, 581, 142 P 594, 145 P 22, Ann Cas 1916E, 1051; State v. Slusher, (1926) 119 Or 141, 248 P 358.

The provisions of this amendment were intended to be self-executory, and supplementary laws are not a prerequisite to its effectiveness. State v. Langworthy, (1910) 55 Or 303, 104 P 424, 426, 106 P 336; Stevens v. Benson, (1907) 50 Or 269, 91 P 577; Carriber v. Lake County, (1918) 89 Or 240, 171 P 407, 173 P 573; State v. Snell, (1942) 168 Or 153, 121 P2d 930.

Any doubt should be resolved in favor of the exercise of the right of initiative. Othus v. Kozer, (1926) 119 Or 101, 248 P 146; State v. Snell, (1942) 168 Or 153, 121 P2d 930; Kays v. McCall, (1966) 244 Or 361, 418 P2d 511.

The Governor could not veto measures referred by the legislature. Kadderly v. Portland, (1903) 44 Or 118, 74 P 710, 75 P 222.

The section was not controlled by Ore. Const. Art. IV, §1a [repealed 1968; see subsection (5), this section]. Cameron v. Stevens, (1927) 121 Or 538, 256 P 395.

The people were without inherent power to hold an election unless authorized by law. State v. Hoss, (1933) 143 Or 383, 22 P2d 883.

The provision contemplated the enactment of other legislation to govern, to some extent, the exercise of the power conferred upon the people with reference to the initiative and referendum. Zimmerman v. Hoss, (1933) 144 Or 55, 23 P2d 897.

Any legislation tending to insure a fair and intelligent referendum aided the purpose of the provision, but had to be reasonable and not curtail the right or burden its exercise. State v. Snell, (1942) 168 Or 153, 121 P2d 930.

In the construction of initiative measures, the courts would presume that the people had knowledge of the historical facts including opposing theories, at the time of adoption of the Act. Anthony v. Veatch, (1950) 189 Or 462, 220 P2d 493, 221 P2d 575, app dis., 340 US 923, 71 S Ct 499, 95 L Ed 667.

The courts would not interfere with an attempt to enact a properly presented initiative measure, regardless of the legality of its subject matter. Unlimited Progress v. Portland, (1958) 213 Or 193, 324 P2d 239.

Legislation made contingent upon whether or not other legislation came into operation did not violate the section as the referendum could still be invoked against any part or all of such legislation. Marr v. Fisher, (1947) 182 Or 383, 187 P2d 966.

ORS 254.040 implemented the Constitution by requiring certification of signatures for a valid petition. Kays v. McCall, (1966) 244 Or 361, 418 P2d 511.

(b) Scope of operation. Ore. Const. Art. XVII, §1, had no reference to an amendment made under the former section. Farrell v. Port of Columbia, (1907) 50 Or 169, 175, 91 P 546, 93 P 254. **But see** Rose v. Port of Portland, (1917) 82 Or 541, 572, 162 P 498; State v. Port of Astoria, (1916) 79 Or 1, 25, 154 P 399.

Ore. Const. Art. II, §8, could not be construed to exclude the right of the people to legislate on the subject of elections, under the terms of the former section. Andrews v. Neil, (1912) 61 Or 471, 120 P 383, 123 P 32.

An Act requiring a special state election at which should be submitted for the people's approval all measures passed by a Legislative Assembly upon which the referendum might be invoked, did not violate the section. Libby v. Olcott, (1913) 66 Or 124, 129, 134 P 13.

The subject matter upon which the powers given by the section could be exercised were referred to collectively as "measures" merely as a matter of convenience and not with intent to include other and different powers. Herbring v. Brown, (1919) 92 Or 176, 180 P 328.

"Bill" meant a proposed law and "Act" meant a bill which had been enacted by the legislature into a law. Id.

A joint resolution was neither a bill nor an Act, and was not subject to referendum. Id.

A house bill, authorizing a special election to vote on a measure enacted by a Legislative Assembly, was a bill for a law and not an order for a special election. State v. Kozer, (1925) 115 Or 638, 239 P 805.

The section was not intended to control local elections on measures submitted through initiative petition of a city. State v. Gilmore, (1927) 122 Or 19, 257 P 21.

A municipality had authority to pass an emergency ordinance submitting to a vote of the people an ordinance authorizing the consolidation of electric power companies. Roy v. Beveridge, (1928) 125 Or 92, 266 P 230.

A measure authorizing a county to issue bonds could be submitted to the people for approval or rejection under the constitutional amendment. Loe v. Britting, (1930) 132 Or 572, 287 P 74.

Ore. Const. Art XI, §11, had not taken away from the legislature any of the powers conferred by the section regarding elections. Kneeland v. Multnomah County, (1932) 139 Or 356, 10 P2d 342.

Control of the highways of the state, including streets and alleys in incorporated cities, could be exercised through the initiative amendment to the Constitution. Portland v. Pac. Tel. & Tel. Co., (1933) 5 F Supp 79.

Through the operation of Ore. Const. Art. IV, §1a, [repealed 1968; see subsection (5), this section], the initiative and referendum provisions of the section applied to local elections, subject to modification by cities and towns. Kosydar v. Collins, (1954) 201 Or 271, 270 P2d 132.

The section authorized the use of the initiative to amend but not to revise the Constitution. Holmes v. Appling, (1964) 237 Or 546, 392 P2d 636.

An Act exempting certain property from taxation was not such an Act as to which the legislature could declare an emergency measure and thereby prevent a referendum. Wieder v. Hoss, (1933) 143 Or 57, 21 P2d 227.

(c) Petition. Only legal voters could sign an initiative petition, but such voters did not need to be registered. Woodward v. Barbur, (1911) 59 Or 70, 116 P 101; State v. Dalles City, (1914) 72 Or 337, 143 P 1127, Ann Cas 1916B, 855.

An initiative petition filed on the last day that it could be filed could not thereafter be withdrawn for the purpose of having the signatures certified, as required by statute. Kellaher v. Kozer, (1924) 112 Or 149, 228 P2d 1086; Kays v. McCall, (1966) 244 Or 361, 418 P2d 511.

The court in determining the number of signatures required to place an initiative measure on the ballot could properly consider contemporaneous construction given such provision by administrative officers. Othus v. Kozer, (1926) 119 Or 101, 248 P 146. **But see** Kays v. McCall, (1966) 244 Or 361, 418 P2d 511.

The petition had to carry the exact language of the proposed measure. Schnell v. Appling, (1964) 238 Or 202, 395 P2d 113; Bugas v. Appling, (1964) 238 Or 206, 394 P2d 1023.

A referendum petition containing a full and correct copy of the Act without the title was sufficient. Palmer v. Benson, (1907) 50 Or 277, 91 P 579.

The courts had jurisdiction to determine whether a referendum petition contained a sufficient percentage of names of legal voters to entitle the measure to be placed on the ballot. State v. Olcott, (1912) 62 Or 277, 125 P 303.

Petitioners for the referendum of a bill did not need to be registered voters. State v. Olcott, (1913) 67 Or 214, 135 P 95, 902.

Where the electors failed to file a referendum petition against an Act of the Legislative Assembly, it was presumed that not five percent of the legal voters of the state were opposed to the enactment. Stoppenback v. Multnomah County, (1914) 71 Or 493, 142 P 832.

An injunction would lie by the state to restrain the Secretary of State from certifying two ballot titles to the several county clerks, where two organizations had separately and successfully petitioned for a referendum. State v. Kozer, (1923) 108 Or 550, 217 P 827.

Only those signatures which had been certified either by county clerk or a notary public could be counted. Kellaher v. Kozer, (1924) 112 Or 149, 228 P 1086; Kays v. McCall, (1966) 244 Or 361, 418 P2d 511.

The vote cast for Attorney General could not be taken as basis in estimating number of signatures required to have initiative measure placed on ballot. Othus v. Kozer, (1926) 119 Or 101, 248 P 146.

Elimination of language from referendum petition was not fatal. State v. Hoss, (1930) 134 Or 138, 292 P 324.

The provisions for referendum did not contemplate placing more than one ordinance in a single referendum petition. Garbade v. Portland, (1950) 188 Or 158, 214 P2d 1000.

The highest number of votes cast for any one Supreme Court position was the proper basis upon which to compute the number of signatures required on a state-wide initiative petition. Kays v. McCall, (1966) 244 Or 361, 418 P2d 511.

The Secretary of State had no right to waive any requirement of the section. Id.

(d) Elections. An election for ratifying legislative enactments was a general election. Bethune v. Funk, (1917) 85 Or 246, 166 P 931.

The title of a measure was required to be printed but once on the ballot where two separate petitions for its referendum are filed. State v. Kozer, (1923) 108 Or 550, 217 P 827.

The defect in the title of a statute as enacted by the legislature could be remedied by the ballot title supplied by the Attorney General on the submission of the Act to the people. State v. Hawks, (1924) 110 Or 497, 222 P 1071.

The provision in the section relative to the time of elections on measures referred to people of state was not intended to control local elections on measures submitted through initiative petition by people of a city. State v. Gilmore, (1927) 122 Or 19, 257 P 21.

The courts had no authority to enjoin the Secretary of State from certifying an initiative measure and causing its

ballot title and numbers to be printed on official ballot, on ground that the bill, if enacted, would be unconstitutional. State v. Kozer, (1928) 126 Or 641, 270 P 513.

A short ballot title was sufficient where it alluded to the Acts of the legislature sought to be referred to the people as a "bill" and strictly followed the constitutional provision. Davis v. Van Winkle, (1929) 130 Or 304, 278 P 91, 280 P 495.

Where a vote upon a referendum at a special election was suspended by a temporary injunction, the referendum should be voted upon at a future election. Zimmerman v. Hoss, (1933) 144 Or 55, 23 P2d 897.

A court could not write a ballot title. Richardson v. Neuner, (1948) 183 Or 558, 194 P2d 989.

A bill which the house journal showed did not receive a constitutional majority in the house was not entitled to be placed on the ballot. State v. Boyer, (1917) 84 Or 513, 165 P 587.

The short ballot title, "Two Additional Circuit Judges Bill," for a referendum measure the purpose of which was to provide two additional circuit judges for the Fourth judicial district, was sufficient. Davis v. Van Winkle, (1929) 130 Or 304, 278 P 91, 280 P 495.

(e) Validity; effective date. The validity of laws adopted at the polls under the initiative had to be determined like enactments of the legislature. State v. Richardson, (1906) 48 Or 309, 85 P 225, 8 LRA(NS) 362.

The legislature was without power to regulate the time when an initiative measure should take effect. Bradley v. Union Bridge & Constr. Co., (1911) 185 Fed 544.

An initiative measure took effect on the day of its adoption, there being nothing to the contrary declared therein, without an official canvass of the votes and a proclamation by the Governor. Id.

The earliest possible effective date of measures referred to the people was the date of the election. Salem Hospital v. Olcott, (1913) 67 Or 448, 136 P 341.

The constitutional provision that every Act shall embrace but one subject applied to an Act adopted by the people in the exercise of the power of the initiative. Turnidge v. Thompson, (1918) 89 Or 637, 175 P 281.

Although the referred Act stated that it should "become effective on Jan. 1, 1952," it did not become law until it was approved by the people on Nov. 4, 1952, the date of the referendum election. Portland Pendleton Trans. Co. v. Heltzel, (1953) 197 Or 644, 255 P2d 124.

3. Initiative and referendum powers, municipalities and districts, under former section 1a

(1) Construction and general effect

(a) General effect. A city had power to pass an emergency ordinance. Thielke v. Albee, (1915) 79 Or 48, 153 P 793; Roy v. Beveridge, (1928) 125 Or 92, 266 P 230.

The right of referendum reserved to the voters of every municipality was superior to a city charter. Long v. Portland, (1909) 53 Or 92, 98 P 149, 1111.

The delegation of rights as to local self-government to municipal corporations did not alter their relation to the state, but left them as they were before, mere agencies of the state. Churchill v. City of Grants Pass, (1914) 70 Or 283, 141 P 164.

The provision was designed to insure to each incorporated community a full measure of home rule, and to place beyond the capacity of the legislature the power to make any change in the system of government of any municipality by legislation, other than that authority reserved to the legislature in Ore. Const. Art. XI, §2. Kalich v. Knapp, (1914) 73 Or 558, 575, 142 P 594, 145 P 22, Ann Cas 1916E, 1051.

The provision meant that every municipality could apply the initiative and referendum powers when enacting municipal legislation to carry out and make effective an authority previously granted. State v. Port of Astoria, (1916) 79 Or 1, 154 P 399.

The electors of a municipality could change the corporate boundaries by excluding territory previously included within its limits. Flavel Land Co. v. Leinenweber, (1916) 81 Or 353, 158 P 945.

The legal voters of a municipality, other than a city or a district, could apply the referendum to a special measure passed for that municipality by the Legislative Assembly. Rose v. Port of Portland, (1917) 82 Or 541, 162 P 498.

The power conferred upon cities and towns to provide for the manner in which the municipal voters would enact or reject local legislation was not limited to such voters, but was given to cities and towns which acted ordinarily through their councils with the approval of the mayor. Curtis v. Tillamook City, (1918) 88 Or 443, 171 P 574, 172 P 122.

The electors of a city could enact what the legislature of the state could formerly enact as to matters which pertained strictly to municipal affairs or to intramural transactions, subject to the Constitution and general laws of the state. Noonan v. City of Seaside, (1920) 97 Or 64, 191 P 651.

An ordinance for the care, investment and security of its public funds could be adopted under the section. Portland v. State Bank, (1923) 107 Or 267, 214 P 813.

A measure authorizing a county to issue bonds was a measure which could be submitted to the people for approval or rejection under the constitutional amendment. Loe v. Britting, (1930) 132 Or 572, 287 P 74.

The section granted to the people of a peoples' utility district the right to exercise the referendum only upon local, special and municipal legislation in and for their particular municipality. Northern Wasco County P.U.D. v. Kelly, (1943) 171 Or 691, 137 P2d 295.

(b) Construction. The words "of every character" in the section, forbade a narrow technical construction of the word "legislation." Barber v. Johnson, (1917) 86 Or 390, 167 P 800, 1183.

The section explained and limited the language of Ore. Const. Art. XI, §2, with the result that a city was debarred from assuming on its own initiative a power which was peculiarly a prerogative of the state itself. Portland v. Pub. Serv. Comm., (1918) 89 Or 325, 173 P 1178.

The constitutional provisions providing for the initiative and referendum were paramount to the statutes which carried the Constitution into effect. Campbell v. Eugene, (1925) 116 Or 264, 240 P 418.

A liberal construction was given to the provision and to the statutes enacted for the purpose of carrying it into effect. State v. Mack, (1930) 134 Or 67, 292 P 306.

The court considered, in construing the provision, the consequences of applying the powers of the initiative and referendum to the particular Act, and did not so interpret the provision as to make it inapplicable or impair the efficiency of the governmental power. Monahan v. Funk, (1931) 137 Or 580, 3 P2d 778.

So far as they related to the same subject matter, the former section and Ore. Const. Art. XI, §2 were read and construed together. Spence v. Watson, (1947) 182 Or 233, 186 P2d 785.

The former section 1a and Ore. Const. Art. XI, §2 extended the initiative power only to those municipalities and districts that had the power to legislate, basically cities. Hansell v. Douglass, (1963) 234 Or 315, 380 P2d 977, app. dis., 375 US 396, 84 S Ct 452, 11 L Ed 2d 412.

School districts were not a "municipality or district" granted initiative powers. Id.

(2) Local, special and municipal legislation

(a) Local and special. The words "local," "special," and "municipal" referred to enactments intended to affect certain persons only, or to operate in specified localities. Acme

Dairy Co. v. City of Astoria, (1907) 49 Or 520, 90 P 153; State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483; Couch v. Marvin, (1913) 67 Or 341, 136 P 6.

The qualifying words "local" and "special" were synonymous terms. Acme Dairy Co. v. City of Astoria, (1907) 49 Or 520, 90 P 153; State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483.

The terms "local" and "special" did not limit the authority of a city to prescribing the manner of exercising the initiative and referendum powers as to the enactment or repeal of ordinances only. Acme Dairy Co. v. City of Astoria, (1907) 49 Or 520, 90 P 153.

The words "local, special and municipal legislation" did not mean that a municipality could legislate unto itself a power to legislate. Portland v. Portland Gas & Coke Co., (1916) 80 Or 194, 150 P 273, 156 P 1070.

The establishment of a civil service system for firemen was a matter of local concern. State v. City of Milwaukie, (1962) 231 Or 473, 373 P2d 680; Boyle v. City of Bend, (1963) 234 Or 91, 380 P2d 625.

(b) Municipal. The phrase "municipal legislation" applied to the amendment of a charter. Acme Dairy Co. v. City of Astoria, (1907) 49 Or 520, 90 P 153; McBee v. City of Springfield, (1911) 58 Or 459, 462, 114 P 637.

The crucial test in determining whether an ordinance is legislative or administrative is whether it was one making law or one executing law already in existence. Monahan v. Funk, (1931) 137 Or 580, 3 P2d 778; Whitbeck v. Funk, (1932) 140 Or 70, 12 P2d 1019.

Municipal legislation did not include transient orders to and concerning a particular person. Long v. Portland, (1909) 53 Or 92, 98 P 149, 1111.

Municipal legislation could be considered in the sense of general laws prescribed by the law-making power and of general application. Id.

Municipal legislation, within the meaning of the provision, when applied to municipalities other than cities and towns, referred to legislation which was permitted and made necessary for carrying into effect a lawful power previously granted. State v. Port of Astoria, (1916) 79 Or 1, 154 P 399.

Changing the location of a county seat was local legislation within the provision. Barber v. Johnson, (1917) 86 Or 390, 167 P 800, 1183.

A police regulation in an initiative city charter requiring defendant to keep his mill race covered with planking was properly classified as local, special and municipal legislation within the provision. Gaston v. Thompson, (1918) 89 Or 412, 174 P 717.

An ordinance ordering a special election to vote on a proposed charter amendment was not municipal legislation, subject to the referendum. Campbell v. Eugene, (1925) 116 Or 264, 240 P 418.

The revision of a municipal charter, and the formation of a commission form of government, were matters of purely municipal concern, as to which the people of a city had power to legislate. State v. Portland, (1913) 65 Or 273, 284, 133 P 62.

(3) Municipality and district. A county was a "district" within the section. Briggs v. Stevens, (1926) 119 Or 138, 248 P 169; State v. Mack, (1930) 134 Or 67, 292 P 306; Kosydar v. Collins, (1954) 201 Or 271, 270 P2d 132.

The terms "municipality" and "district" meant a district created from a designated part of the state and organized to promote those conveniences of the public at large which were inherently local and special. Acme Dairy Co. v. City of Astoria, (1907) 49 Or 520, 90 P 153.

The word "district" had a broader signification than "county," and could designate a territory comprising more than a county, or containing less area. Schubel v. Olcott, (1912) 60 Or 503, 120 P 375.

The word "district" as used in the section could include subdivisions, municipal in their character. Thurber v. City of McMinnville, (1912) 63 Or 410, 128 P 43.

Territory to be annexed to enlarge the boundaries of a municipal corporation became a "district" for the purpose of voting on the question of annexation within the meaning of the section. Id.

A port was a municipality within the purview of the provision. State v. Port of Astoria, (1916) 79 Or 1, 154 P 399.

The word "municipality" was to be interpreted in a broad and comprehensive sense. Northern Wasco Co. P.U.D. v. Kelly, (1943) 171 Or 691, 137 P2d 295.

(4) Charter and charter amendments. The electors of a municipality could amend their charter through exercise of the initiative power. Phipps v. City of Medford, (1916) 81 Or 119, 156 P 787, 158 P 666; Cole v. City of Seaside, (1919) 93 Or 65, 182 P 165.

The right of the voters of a city to enact or amend their city charter existed by virtue of Ore. Const. Art. XI, §2, and not by the initiative and referendum amendments. McKenna v. Portland, (1908) 52 Or 191, 96 P 552.

The right to locate and construct a bridge over a navigable river at any point where the river was exclusively within the boundaries of a municipality could be provided for in a charter. Kiernan v. Portland, (1911) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332, app. dis., 223 US 151, 159, 32 S Ct 231, 56 L Ed 386.

Cities had power under the section to provide the manner of enacting new charters. Duncan v. Dryer, (1914) 71 Or 548, 552, 143 P 644.

The power of a municipality to adopt its charter under the initiative was subject to the right of action. Coleman v. City of LaGrande, (1914) 73 Or 521, 144 P 468.

The municipal home rule amendments to the Constitution did not authorize the people of a city to amend its charter so as to confer upon the municipality powers beyond what were purely municipal or inconsistent with a general law of the state constitutionally enacted. Portland Ry., Light & Power Co. v. Portland, (1914) 210 Fed 667.

A city council could not, by submitting a charter amendment to the electors on motion merely, repeal or supersede a provision in the charter that no franchise should be granted by the city for a longer period than 10 years. California-Ore. Power Co. v. City of Medford, (1915) 226 Fed 957.

The legal voters of a city, by amending their charter or enacting a new one, could take all or part of the whole sum of intramural power, which was set at large by former section 1a and Ore. Const. Art. XI, §2. Wilson v. City of Medford, (1923) 107 Or 624, 215 P 184.

An election was valid regardless of the validity of a proposed amendment to the city charter to provide for a municipal water system which might be constructed partly without the corporate limits of the city. Thompson v. Nelson, (1936) 155 Or 43, 62 P2d 267.

(5) Limitations upon operation. The only acts of a city council which were subject to the referendum such as could come within the term "municipal legislation." Long v. Portland, (1909) 53 Or 92, 98 P 149, 1111; Campbell v. Eugene, (1925) 116 Or 264, 240 P 418.

A municipality could not enlarge its boundaries without granting the people residing within the territory proposed to be annexed the right to vote on the annexation. State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483; Thurber v. City of McMinnville, (1912) 63 Or 410, 128 P 43; Couch v. Marvin, (1913) 67 Or 341, 136 P 6.

A county could not issue bonds for permanent roads on the majority of the electors voting in favor of bonds at an election called for that purpose, but not called pursuant to

this section for the purpose of enacting legislation. Andrews v. Neil, (1912) 61 Or 471, 120 P 383, 123 P 32.

An amendment to a city charter authorizing the council to incur indebtedness for general municipal purposes, within or without the city, was ultra vires as an attempt to ignore state authority and assume sovereign rights. Riggs v. City of Grants Pass, (1913) 66 Or 266, 134 P 776.

An ordinance, whether enacted by the legal voters of a city or passed by the council, had to be referable to a power embraced in the charter. Robertson v. Portland, (1915) 77 Or 121, 149 P 545.

A municipality could not, under the provision, reach out and assume unto itself the power to tax without limitation or restriction. Portland v. Portland Gas & Coke Co., (1916) 80 Or 194, 150 P 273, 156 P 1070.

The voters of a municipality could not invoke the referendum to determine whether they would be governed by a general law which had been passed for all municipalities. Rose v. Port of Portland, (1917) 82 Or 541, 162 P 498.

The voters of a county could not authorize the county court to levy taxes for the payment of bounties in the absence of an enabling Act passed by the legislature or people. Carriker v. Lake County, (1918) 89 Or 240, 171 P 407, 173 P 573.

A power to abolish the office of municipal judge or divest him of his power to act as ex-officio justice of the peace would not be presumed embraced in the initiative power. Application of Boalt, (1927) 123 Or 1, 260 P 1004.

No referendum of any law was valid except in pursuance of constitutional or statutory authority and regulation. State v. Mack, (1930) 134 Or 67, 292 P 306.

(6) Effect on power of legislature. The legislature was powerless to amend or repeal a municipal charter. Portland v. Nottingham, (1911) 58 Or 1, 5, 113 P 28; Branch v. Albee, (1914) 71 Or 188, 142 P 598.

The power of the legislature to enact a general law applicable alike to all cities was paramount and supreme over any conflicting charter provision or ordinance. **Enlargement of city boundaries,** McBee v. Town of Springfield, (1911) 58 Or 459, 114 P 637; **instalment payment of assessments,** Colby v. City of Medford, (1917) 85 Or 485, 167 P 487; Lovejoy v. Portland, (1920) 95 Or 459, 188 P 207; **refunding of bonds,** Burton v. Gibbons, (1936) 148 Or 370, 36 P2d 786; Covey v. Portland, (1937) 157 Or 117, 70 P2d 566; **speed of vehicles in cities,** Anderson v. Thomas, (1933) 144 Or 572, 26 P2d 60; State v. City of North Bend, (1943) 171 Or 329, 137 P2d 607. **But see** Kalich v. Knapp, (1914) 73 Or 558, 142 P 594, 145 P 22, Ann Cas 1916E, 1051.

Laws relating to school districts did not violate the section. State v. Hall, (1914) 73 Or 231, 144 P 475; State ex rel. Otto v. Sch. Dist. 3, (1915) 78 Or 188, 152 P 221; School Dist. 35 v. Holden, (1915) 78 Or 267, 151 P 702.

Drainage districts were not immune from statutes passed by the Legislative Assembly. State v. Mehaffey, (1917) 82 Or 683, 162 P 1068.

The legislature was not shorn of the power to enact general laws concerning cities and towns by former section 1a or Ore. Const. Art. XI, §2. Colby v. City of Medford, (1917) 85 Or 485, 167 P 487; Lovejoy v. Portland, (1920) 95 Or 459, 188 P 207; Application of Boalt, (1927) 123 Or 1, 260 P 1004.

The power of the legislature to declare an emergency was not denied by the section. Cameron v. Stevens, (1927) 121 Or 538, 256 P 395.

Statutory procedure for establishment of a utility district with revised boundaries after one unit voted against the proposed district complied with the "Home Rule" provisions of the Constitution. Ravlin v. Hood River P.U.D., (1940) 165 Or 490, 106 P2d 157.

A statute providing procedure for annexation of outside territories by a municipality was not unconstitutional as violating the reservation of initiative and referendum powers to the voters, as such annexation was an extramural act for which permission had to be granted by the legislature. Spence v. Watson, (1947) 182 Or 233, 186 P2d 785.

State legislation in an area was precluded unless the interest of the state was substantial enough to predominate over the interest of the city. State v. City of Milwaukie, (1962) 231 Or 473, 373 P2d 680; Boyle v. City of Bend, (1963) 234 Or 91, 380 P2d 625. Boyle v. City of Bend, supra, **distinguished in** City of Woodburn v. State Tax Comm., (1966) 243 Or 633, 413 P2d 606.

(7) Execution of provisions

(a) Self-executing characteristics. Former section 1a, as it related to other than incorporated cities and towns, was not self-executing. Long v. Portland, 53 Or 92, 98 P 149, 1111; State v. Portland Ry., Light & Power Co., (1910) 56 Or 32, 107 P 958; Schubel v. Olcott, (1912) 60 Or 503, 120 P 375; Barber v. Johnson, (1917) 86 Or 390, 167 P 800, 1183; Kosydar v. Collins, (1954) 201 Or 271, 270 P2d 132.

The provision, as it related to incorporated cities and towns, was self-executing. Acme Dairy Co. v. Astoria, (1907) 49 Or 520, 90 P 153; McBee v. Town of Springfield, (1911) 58 Or 459, 114 P 637.

The section was sufficient authority for legislation necessary to give it effect. Long v. Portland, (1909) 53 Or 92, 98 P 149, 1111.

The power of the referendum reserved to the people was not dependent on anything except a provision by general law as to the manner of its exercise. Id.

The right of the referendum reserved to the voters of every municipality was reserved to the voters of a city regardless of any provision in the charter thereon. Id.

(b) Effectuating statutes. A city or town could make use of the method provided by a general law enacted by the legislature for the exercise of the right of the initiative or referendum where such municipality did not adopt a method of its own. State v. Port of Astoria, (1916) 79 Or 1, 154 P 399; Curtiss v. Tillamook City, (1918) 88 Or 443, 171 P 574, 172 P 122; State v. Poulsen, (1932) 140 Or 623, 15 P2d 372; Seufert v. Stadelman, (1946) 178 Or 646, 167 P2d 936.

Cities and towns had unlimited authority to provide the manner and time of holding elections in respect to the adoption of charters or amendments thereto. State v. Andresen, (1924) 110 Or 1, 222 P 585; State v. Poulsen, (1932) 140 Or 623, 15 P2d 372; Thompson v. Nelson, (1936) 155 Or 43, 62 P2d 267.

Except as to municipal legislation the right of prescribing rules for the application of the initiative and referendum was not conferred upon cities or towns. Acme Dairy Co. v. City of Astoria, (1907) 49 Or 520, 90 P 153.

A general right of initiative and limited right of referendum conferred upon the people of a city prior to the adoption of the section was effective and still in force after the adoption of former section 1a. State v. Portland Ry., Light & Power Co., (1910) 56 Or 32, 35, 107 P 958.

The manner of exercising the initiative and referendum powers could as well be prescribed by resolution as by ordinance where the city charter was silent with respect to the matter of municipal legislation. State v. Kelsey, (1913) 66 Or 70, 77, 133 P 806.

The section authorized a city to prescribe by ordinance the manner in which an election to amend the charter by initiative would be held. Pearce v. City of Roseburg, (1915) 77 Or 195, 150 P 855.

A municipality not a city or town could not avail itself of initiative and referendum powers except in the manner prescribed by general law. State v. Port of Astoria, (1916) 79 Or 1, 154 P 399.

The provision that 90 days elapse between petition and election on an initiative measure, had no application to towns or cities which prescribed their own procedure. Colby v. City of Medford, (1917) 85 Or 485, 512, 167 P 487.

A city could change the method to be employed in the exercise of the initiative and referendum and pass a special election ordinance in disregard of the general ordinances on the subject. State v. Sanborn, (1921) 101 Or 686, 201 P 430; Salem v. Ore.-Wash. Water Serv. Co., (1933) 144 Or 93, 23 P2d 539.

A city seeking to submit a municipal initiative measure at an election held pursuant to general state law was required to comply substantially with a statute requiring certification of the measure to the county clerk within a certain time. State v. Boyer, (1932) 140 Or 637, 15 P2d 375.

(8) Conduct of initiative, referendum

(a) Petition. A city ordinance could not restrict to registered voters the signing of initiative petitions. Woodward v. Barbur, (1911) 59 Or 70, 116 P 101; State v. Dalles City, (1914) 72 Or 337, 143 P 1127, Ann Cas 1916B, 855.

It was a jurisdictional requirement that an initiative petition proposing a city charter amendment be filed within the time required to do so by a city ordinance. State v. City of Astoria, (1912) 63 Or 171, 126 P 999; State v. Andresen, (1915) 75 Or 509, 147 P 526; State v. Macy, (1916) 82 Or 81, 161 P 111; Henderson v. Salem, (1931) 137 Or 541, 1 P2d 128, 4 P2d 321.

Notaries public certifying petitions had to have personal knowledge of the residence and post-office address of the persons whose names were attached, and that they were legal voters of the state and of the county in which they resided. State v. Kozer, (1922) 105 Or 509, 210 P 172.

An initiative petition for the removal of a county seat, signed by over 15 percent of the legal voters was sufficient. Briggs v. Stevens, (1926) 119 Or 138, 248 P 169.

The provisions for referendum did not contemplate placing more than one ordinance in a single referendum petition. Garbade v. Portland, (1950) 188 Or 158, 214 P2d 1000.

(b) Election. The publication of an initiative petition in full was sufficient notice. Palmberg v. Kinney, (1913) 65 Or 220, 132 P 538.

A charter provision that an election to authorize an increase of indebtedness should be by the "legal voters" was proper. State v. Kelsey, (1913) 66 Or 70, 79, 133 P 806.

The city recorder had to include in a call for a special election to submit proposed charter amendments, an initiative measure to repeal part of a city charter not included by the common council. State v. Gilmore, (1927) 122 Or 19, 257 P 21.

To hold that an election on a proposed initiative ordinance submitted to the voters of a city could be held only on the date mentioned in the petition would permit the defeat of the right of the people to vote thereon by resort to delays and obstructive tactics, contrary to the spirit and intent of the Constitution. Seufert v. Stadelman, (1946) 178 Or 646, 167 P2d 936.

Whether or not a city council approved of a proposed initiative measure, it had no alternative under the Constitution and the city ordinance other than to submit it to a vote of the people at the earliest practicable and convenient date. Id.

(c) Defects and irregularities. Municipal ordinances or charter amendments initiated and adopted by the legal voters of a city were not void for want of an enacting clause. State v. Dalles City, (1914) 72 Or 337, 350, 143 P 1127, Ann Cas 1916B, 855; Colby v. City of Medford, (1917) 85 Or 485, 508, 167 P 487.

A misstatement in the printed proposed ordinance was fatal. Palmberg v. City of Astoria, (1912) 63 Or 222, 127 P 32.

The common council of a city could not, without first passing it, initiate an ordinance and submit it to a vote of the people as an initiative measure. Thielke v. Albee, (1915) 76 Or 449, 150 P 854.

The failure to publish and post an ordinance as required by the statute under which the city was incorporated was fatal. Provoost v. Cone, (1917) 83 Or 522, 162 P 1059, 1060.

An election on an initiative measure to move a county seat was void where pamphlets were not mailed to voters before the election, as required by statute. Hill v. Hartzell, (1927) 121 Or 4, 252 P 552.

Until the recorder checked the names of the petitioners, an initiative petition proposing a city charter amendment was not complete or part of the public records of the recorder's office. Henderson v. Salem, (1931) 137 Or 541, 1 P2d 128, 4 P2d 321.

Twenty-two ordinances constituting an integrated taxing program were not void because enacted separately, thereby requiring a separate referendum upon each ordinance. Garbade v. Portland, (1950) 188 Or 158, 214 P2d 1000.

FURTHER CITATIONS: State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123; School Dist. 17 v. Powell, (1955) 203 Or 168, 279 P2d 492; Schmidt v. City of Cornelius, (1957) 211 Or 505, 316 P2d 511; Barber v. Gladden, (1958) 215 Or 129, 332 P2d 641; Seale v McKennon, (1959) 215 Or 562, 336 P2d 340; Johnson v. City of Astoria, (1961) 227 Or 585, 363 P2d 571; Fischer v. Miller, (1961) 228 Or 54, 363 P2d 1109; Columbia R. Salmon & Tuna Packers Assn. v. Appling, (1962) 232 Or 230, 375 P2d 71; Smith Kline & French Labs. v. State Tax Comm., (1965) 241 Or 50, 403 P2d 385; Willamette Assn. of Elec. Contractors v. Nilsen, (1967) 245 Or 588, 423 P2d 497; Ivancie v. Thornton, (1968) 250 Or 550, 443 P2d 612; Girt v. Tri-County Metropolitan Transp. Dist., (1970) 4 OTR 92; Department of Rev. v. Multnomah County, (1970) 4 OTR 133; Myers v. Bd. of Directors, (1971) 5 Or App 142, 483 P2d 95.

ATTY. GEN. OPINIONS: Subsection (1) through (4): Time for voting on referendums, 1920-22, pp 106, 119, 1926-28, p 217, 1928-30, p 136, 1932-34, p 238; effective date of laws, 1920-22, p 440, 1924-26, p 358, 1926-28, p 174, 1928-30, p 101, 1946-48, p 109, 1948-50, p 431, 1952-54, p 56; delegation of powers by the legislature, 1922-24, p 484, 1928-30, p 257, 1938-40, p 549; computation of number of voters required on initiative or referendum petition, 1924-26, p 252, 1926-28, p 595; time for voting on initiative petitions, 1924-26, p 622, 1932-34, p 205, 1938-40, p 341.

Effect of failure of county court to declare that an approved initiative petition was in effect, 1926-28, p 48; investigations by the legislature, 1926-28, p 88; repeal by legislature of laws created by initiative, 1928-30, p 121; legislature's power to restrict local bond issuing elections, 1932-34, p 157; repeal of Act pending under referendum, 1934-36, p 564; effect of Governor's veto of the emergency clause in a bill, 1936-38, p 201; referring district board's action which has been approved by the people, 1942-44, p 264; use of emergency clause in revenue Acts, 1942-44, p 374, 1950-52, p 149; right of employes of Liquor Control Commission to vote on initiative, referendum and recall petition, 1948-50, p 313; effective date of referred measure, 1952-54, p 54; statute postponing effective date of referred measure, 1952-54, p 56; using initiative procedure to locate an institution outside of Marion County, 1952-54, p 89; names obtained on referendum petition prior to modification of title by Supreme Court, 1952-54, p 148.

Use of the initiative for an "advisory referendum" or memorial, 1952-54, p 183; validity of House rule restricting time in which bills may be introduced, 1954-56, p 57; legislator's authority to complete duties as judge pro tempore, 1954-56, p 80; power of legislature to provide that a special election shall be called if a certain law is referred to the people, 1954-56, p 83; validity of joint ways and means committee, 1956-58, p 92; legislative power as exclusively vested in legislature, 1956-58, p 302; compensation for preparation of Senate and House Journals, 1958-60, p 59; effect of state statute adopting future federal legislation, 1958-60, p 128; assistance by Legislative Counsel to litigant in order

to sustain a legislative Act, 1958-60, p 210; effective date of referendum measure having retroactive operative date, 1958-60, p 287; use of newspaper notice for referral method in lieu of voters' pamphlet, 1958-60, p 317; Article IV as grant of power, 1960-62, p 45; constitutionality of permitting allocation of utility service areas, 1960-62, p 199; appointment of emergency interim successors, 1960-62, p 228; date of election on state-wide initiative measure, 1960-62, p 252; submitting conflicting measures, 1960-62, p 252; circulation of petitions at polling places, 1960-62, p 448; legislative review of administrative rules, 1962-64, p 161; validity of proposition in the alternative, 1962-64, p 201; measuring state income tax by federal tax, 1962-64, p 202; statutory procedure for invoking initiative and referendum powers, 1962-64, p 240; restricting special election to one question, 1962-64, p 259; charge for verification of signatures on petitions, 1962-64, p 275; circulation of initiative petitions by minors, 1962-64, p 381; construing "full text of measure," 1964-66, p 9; constitutionality of certificating signatures after a petition is filed, 1964-66, p 126; legality of emergency clause on bill amending Workmen's Compensation Law, 1964-66, p 141; use of initiative to call constitutional convention, 1964-66, p 447; proper election for submission of county charter amendment or repeal, 1966-68, p 33; period during which petitions may be circulated, 1966-68, p 48; proposed legislation to authorize certification of signatures after deadline, 1966-68, p 90; power of city or county to levy sales or income tax, 1966-68, p 238; procedure to repeal county charter, 1966-68, p 242; constitutionality of proposed ballot title, 1966-68, p 283; calculation of number of signatures required, 1966-68, p 286; constitutionality of tax proposal to be referred, 1966-68, p 337, certification of voter's signature on petition if signer's address is different on registration records, 1966-68, p 344; constitutionality of tax proposal to be referred, 1966-68, p 364; authority of legislature to refer a question regarding Vietnam policy, 1966-68, p 428; resolving conflicting federal and state laws for payments to representative and imposition of sanctions, 1966-68, p 619; required number of signatures on petition circulating when this section was adopted, 1966-68, p 633; procedure for initiative to repeal zoning ordinance, 1966-68, p 644.

Proposed one and one-half percent tax limit, (1968) Vol 34, p 203; proposed tax limit, (1968) Vol 34, p 253; constitutionality of proposing alternatives in tax proposal, (1968) Vol 34, p 323; constitutionality of proposed brand inspection bill, (1969) Vol 34, p 547; setting out measures referred to in proposed amendment, (1969) Vol 34, p 594; constitutionality of judicial reversal of voters' decision on a measure, (1969) Vol 34, p 704; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977; proposed amendment contingent upon binding choice of alternatives, (1970) Vol 34, p 1118; emergency clause in bill amending cigarette tax law, (1971) Vol 35, p 556; authority to reapportion legislature, (1971) Vol 35, p 643; constitutionality of proposed legislation permitting use of "any means necessary" to protect life or property, (1971) Vol 35, p 697.

Subsection (5): Referendum of legislative Act affecting one county, 1920-22, p 58; voting on school matters, 1922-24, pp 771, 815, 1946-48, p 273; time for voting on local initiatives, referendums, 1926-28, p 217; validity of legislation conflicting with some city charter, 1928-30, pp 99, 127, 1940-42, p 144; printing and mailing of initiative, 1930-32, p 729; changing city boundaries without a vote, 1938-40, p 181; initiatives by residents of fire protection districts, 1938-40, p 341; issuance of trailer licenses by cities, 1942-44, p 119; referendum of issuance of bonds approved by the people, 1942-44, p 264; qualifications of voters and petition signers, 1944-46, p 56; voting on annexation of territory, 1944-46, p 71; construing "district," 1952-54, p 102; simultaneous local option elections on same subject by county and city therein, 1952-54, p 223.

Authority of legislature to refer a plan to divide a county into representative districts to the people of the county, 1954-56, p 66; general statute restricting general power of taxation of municipalities, 1956-58, p 204; ordinance prohibiting uninvited door-to-door solicitation of insurance, 1958-60, p 77; legislation concerning collective bargaining by public employes, 1958-60, p 136; legislation prescribing method of initiating ordinances, 1962-64, p 212; construing "district," 1962-64, p 240; nomination of candidates for city offices, 1964-66, p 80; effect of statute requiring proposed levy to be stated in dollars and cents; limitations on purpose of levy, 1964-66, p 156; constitutionality of proposed provision referring all of a bill if part is referred by petition of the voters, 1964-66, p 155; use of initiative and referendum to establish park district under ORS chapter 451, 1966-68, p 13; application of municipal ordinance to state agency, 1966-68, p 78; authority of home-rule counties to enact ordinances regulating pinball machines; application of ordinances within cities, 1966-68, p 174; power to levy sales or income tax, 1966-68, p 238; state statutes conflicting with home-rule authority, 1966-68, p 245; authority of legislature to prescribe limit of cities taxing powers, 1966-68, p 249; authority of legislature to refer a question regarding Vietnam policy, 1966-68, p 428; local legislation affecting noise of trains, 1966-68, p 457; county zoning procedure by initiative, 1966-68, p 481; effect of ordinance requiring state to withhold city income tax from state employes' salaries, 1966-68, p 547; construing proposal for city-county consolidation, 1966-68, p 638; procedure for initiative to repeal zoning ordinance, 1966-68, p 644; operation of sanitary authority ordinances within a city, (1968) Vol 34, p 183; authority to enact municipal tax legislation, (1968) Vol 34, p 203; authority to erect county buildings, (1971) Vol 35, p 500.

LAW REVIEW CITATIONS: 1 OLR 47; 8 OLR 343; 18 OLR 216; 19 OLR 73; 26 OLR 141; 28 OLR 395; 31 OLR 115; 37 OLR 276; 38 OLR 107, 108, 118, 119; 39 OLR 225; 40 OLR 262; 46 OLR 251-285; 49 OLR 147; 4 WLJ 462, 467; 5 WLJ 183-202, 295-310.

Section 2

NOTES OF DECISIONS

Power to pass upon the qualifications of a legislator lies exclusively in the branch of the Legislative Assembly to which he was elected to serve. Monaghan v. Sch. Dist. 1, (1957) 211 Or 360, 315 P2d 797.

FURTHER CITATIONS: Baum v. Newbry, (1954) 200 Or 576, 267 P2d 220; State ex rel. Chapman v. Appling, (1960) 220 Or 41, 348 P2d 759.

ATTY. GEN. OPINIONS: Limitations on reapportionment of Senators and Representatives, 1960-62, p 97; construing "bill," 1966-68, p 242.

Section 3

NOTES OF DECISIONS

An Act annexing a part of a county in one senatorial district to another county in a different district without an enumeration is not in conflict with this section or Ore. Const. Art. VI, §§5, 6 or 7. Baker County v. Benson, (1901) 40 Or 207, 222, 66 P 815.

Mandamus proceedings to require the Governor to issue a writ of election to fill a vacancy in the Senate should be instituted by authority of the law officer of the state. Putnam v. Norblad, (1930) 134 Or 433, 293 P 940.

This section authorizes the legislature to specify the manner in which a legislative office may be vacated. State v. Hill, (1947) 181 Or 585, 184 P2d 366.

FURTHER CITATIONS: State ex rel. Musa v. Minear, (1965) 240 Or 315, 401 P2d 36.

ATTY. GEN. OPINIONS: Procedure for filling vacancy in the legislature, 1924-26, p 542, 1930-32, p 63, 1942-44, p 182; changing of districts, 1932-34, p 161, 1934-36, p 225, 1952-54, p 87; legislator performing functions of another department, 1952-54, p 124; filling vacancy caused when State Senator representing more than one county resigns, 1954-56, p 8; constitutionality of proposed law authorizing central committees to fill vacancies in partisan offices, 1956-58, p 69; purpose as locating public institutions at seat of government in absence of referendum, 1958-60, p 251; eligibility of legislators to be members of Public Employes' Retirement System, (1971) Vol 35, p 628.

Section 4

NOTES OF DECISIONS

The legal existence of the Legislative Assembly continues after the adjournment of a regular biennial session. State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

ATTY. GEN. OPINIONS: When legislator's terms commence, 1932-34, pp 47, 85, 1942-44, p 108; term of office of legislator filling a vacancy, 1942-44, p 182; status of holdover senator whose district was abolished by reapportionment, 1950-52, p 97; authority to pay per diem to members of presession ways and means committees, 1964-66, p 133; considering eligibility for appointment to civil office during term, 1966-68, p 102; single-member districts for election of State Senators, (1969) Vol 34, p 589; eligibility of legislators to be members of Public Employes' Retirement System, (1971) Vol 35, p 628.

Section 6

NOTES OF DECISIONS

An Act annexing part of a county in one senatorial district to another county in a different district was constitutional. Baker County v. Benson, (1901) 40 Or 207, 66 P 815.

The legislature cannot by enactment enlarge the qualifications of the Governor, legislators or county surveyors over and above those specified in the Constitution. State v. Welch, (1953) 198 Or 670, 259 P2d 112.

Reapportionment provisions which gave the Secretary of State power to draft reapportionment legislation conforming to constitutional requirements did not violate this section. Baum v. Newbry, (1954) 200 Or 576, 267 P2d 220.

The 1952 amendment was constitutional. Id.

Elimination of one whole number from the county or district ratio is not a reasonable interpretation of the constitutional formula. In re Legislative Apportionment, (1961) 228 Or 562, 364 P2d 1004.

Reapportionment made by the Secretary of State was constitutional. In re Apportionment, (1961) 228 Or 575, 365 P2d 1042.

FURTHER CITATIONS: Holden v. Pioneer Broadcasting Co., (1961) 228 Or 405, 365 P2d 845; Jordan v. Thornton, (1962) 230 Or 292, 369 P2d 746; Baker v. Carr, (1962) 369 US 186, 311, 82 S Ct 691, 7 L Ed 2d 663.

ATTY. GEN. OPINIONS: Effect of reapportionment upon legislators from abolished districts, 1920-22, p 421; when district changes may be made, 1932-34, p 161, 1950-52, p 118; validity of reapportionment legislation, 1934-36, p 224, 1950-52, pp 182, 183, 1952-54, p 87; number of scholarships to Oregon State College, 1958-60, p 21; limitations on reapportionment of senators and representatives, 1960-62, p 97; constitutionality of reapportionment plan, 1960-62, p 165; use of the term "general election" in the Constitution, 1960-62, p 252; representative-at-large vote in county charter committee selection, 1964-66, p 49; validity of Multnomah County apportionment, 1964-66, p 201; reapportionment under Oregon or United States Constitution, (1970) Vol 35, p 328; frequency of reapportionment, (1971) Vol 35, p 643.

LAW REVIEW CITATIONS: 5 WLJ 203-227.

Section 7

NOTES OF DECISIONS

An Act transferring a part of a county in one senatorial district to another county in a different senatorial district was valid. Baker County v. Benson, (1901) 40 Or 207, 66 P 815.

Cause was continued until after the next regular session of the Legislative Assembly to give that body an opportunity to correct the undenied apportionment imbalance that exists in Representative District 6. Cook v. McCall, (1966) 242 Or 480, 410 P2d 505.

FURTHER CITATIONS: Baker v. Carr, (1962) 369 US 186, 311, 82 S Ct 691, 7 L Ed 2d 663.

ATTY. GEN. OPINIONS: Use of the word "district," 1952-54, p 87; number of scholarships to Oregon State College, 1958-60, p 21; representative-at-large vote in county charter committee selection, 1964-66, p 49; validity of Multnomah County apportionment, 1964-66, p 201; single-member districts for election of State Senators, (1969) Vol 34, p 589; reapportionment under Oregon or United States Constitution, (1970) Vol 35, p 321.

LAW REVIEW CITATIONS: 5 WLJ 216.

Section 8

CASE CITATIONS: Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749; Bradley v. Myers, (1970) 255 Or 296, 466 P2d 931.

ATTY. GEN. OPINIONS: Procedure when senator moves from the district he is representing, 1924-26, p 542; use of the word "district," 1952-54, p 87; qualifications of emergency interim successor, 1960-62, p 308.

Section 9

ATTY. GEN. OPINIONS: Garnishment of legislator's salary, 1920-22, p 83, 1962-64, p 214; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92; legislator as state employe when legislature is not in session, 1962-64, p 209.

LAW REVIEW CITATIONS: 32 OLR 217; 36 OLR 159; 48 OLR 115.

Section 10

NOTES OF DECISIONS

A continuing appropriation was valid. Eugene Sch. Dist. v. Fisk, (1938) 159 Or 245, 79 P2d 262.

The legal existence of the legislature continues after adjournment of the regular biennial session. State ex rel. Overhulse v. Appling, (1961) 226 Or 575, 361 P2d 86.

FURTHER CITATIONS: State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

ATTY. GEN. OPINIONS: Termination of existence of legislative interim committee, 1956-58, p 71; constitutionality of

Senate and House ways and means committees functioning jointly, 1956-58, p 92; use of funds appropriated for "regular" session to pay for expenses of "special" session, 1956-58, p 149; location of the capitol, 1960-62, p 45; bills dealing with same subject matter concurently before the Legislative Assembly, 1960-62, p 252; state university teacher as legislator, 1962-64, p 209; duties of county judge after adoption of charter, 1964-66, p 25; authority to pay per diem to members of presession ways and means committees, 1964-66, p 133; adjournment to a day certain the following year, 1966-68, p 396; authority of legislature to reconvene on a fixed date after adjournment, authority of presiding officers to reconvene legislature, (1971) Vol 35, p 564.

LAW REVIEW CITATIONS: 49 OLR 155.

Section 11

NOTES OF DECISIONS

Neither the Supreme Court nor the Secretary of State has the authority to pass upon the qualifications of a State Senator. Lessard v. Snell, (1937) 155 Or 293, 63 P2d 893.

A senator or representative continues as a public officer after adjournment of a regular biennial session. State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

Doctrine of implied resignation applied when the Secretary of State during his term of office was elected, qualified and sworn as Governor. State ex rel. O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482.

By reason of this section, the court has no jurisdiction to determine the qualifications of one elected to the Oregon State Senate. Combs v. Groener, (1970) 256 Or 336, 472 P2d 281.

FURTHER CITATIONS: Monaghan v. Sch. Dist. 1, (1957) 211 Or 360, 315 P2d 797.

ATTY. GEN. OPINIONS: Determination of the qualification of legislators, 1920-22, p 421, 1924-26, p 81, 1926-28, p 52, 1942-44, pp 108, 384, 1944-46, p 282, 1946-48, p 334, 1954-56, p 3; legality of form of bill, 1934-36, p 316; authorizing deputy to perform duties of Chief Clerk of the Senate, 1936-38, p 188; status of President of Senate while he is acting Governor, 1940-42, p 191; validity of House rule restricting time in which bills may be introduced, 1954-56, p 57; vote necessary to elect President of Senate, 1956-58, p 62; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92; officers at special session, 1956-58, p 160; power to suspend second reading of bills, 1958-60, p 114; authority of Senate to refer bill to Joint Ways and Means Committee with instructions, 1964-66, p 135; effect of ORS 171.555, establishing Joint Ways and Means Committee, on rules adopted by each house, 1964-66, p 166; procedures of Joint Ways and Means Committee as subject to regulation by respective houses, 1966-68, p 205; authority to call meeting of standing committees after adjournment sine die, 1966-68, p 311; necessity of taking oath of office, 1966-68, p 357; joint committee rule for reporting bills out, 1966-68, p 400; legislator as city judge, (1970) Vol 35, p 252; election of Senate President, (1971) Vol 35, p 413; authority to pay per diem to members if organization of legislature delayed, (1971) Vol 35, p 463; publication of results of gubernatorial election in presence of unorganized Senate, (1971) Vol 35, p 515; qualifications of member of National Advisory Council on Education Professions Development, (1971) Vol 35, p 560.

Section 12

CASE CITATIONS: State ex rel. Chapman v. Appling, (1960) 220 Or 41, 348 P2d 759.

ATTY. GEN. OPINIONS: Vote necessary to elect President of Senate, 1956-58, p 62; compensation of members if organization of legislature delayed, 1956-58, p 66; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92; state university teacher as legislator, 1962-64, p 209; number of votes necessary to elect President of the Senate, (1971) Vol 35, p 413; authority to compensate staff members and to pay per diem to members if organization of legislature delayed, (1971) Vol 35, p 463; use of state police to compel attendance, (1971) Vol 35, p 710.

Section 13

NOTES OF DECISIONS

The official signatures of the presiding officer and the Governor could not give a bill the force of law where the journals show in their face that it did not receive the requisite vote on its final passage. Currie v. So. Pac. Co., (1892) 21 Or 566, 28 P 884, 887; Oregon Business & Tax Research v. Farrell, (1945) 176 Or 532, 159 P2d 822.

A law will be sustained unless it affirmatively appears that the mandatory provisions of the Constitution have been disregarded. Portland v. Yick, (1904) 44 Or 439, 75 P 706, 102 Am St Rep 633; State v. Boyer, (1917) 84 Or 513, 165 P 587, 589; Young v. Galloway, (1945) 177 Or 617, 164 P2d 427.

The absence of a record of the legislative proceedings relative to a bill will not invalidate it, but the courts will refuse to recognize a law where it affirmatively appears from the journals that the bill did not in fact pass the legislature. State v. Rogers, (1892) 22 Or 348, 364, 30 P 74.

It will be presumed, in the absence of affirmative showing to the contrary, that the vote was in fact taken by yeas and nays, and that the constitutional majority voted for concurrence where House Journal affirmatively showed the senate amendments to a house bill were concurred in by the house. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

FURTHER CITATIONS: State v. Wright, (1887) 14 Or 365, 12 P 708.

ATTY. GEN. OPINIONS: Power to establish procedure of choosing officers, 1956-58, p 62; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92; compensation to presiding officer for preparing journal, 1958-60, p 59.

LAW REVIEW CITATIONS: 27 OLR 46.

Section 14

ATTY. GEN. OPINIONS: Constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92.

Section 15

ATTY. GEN. OPINIONS: Power to establish procedure of choosing officers, 1956-58, p 62; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92.

Section 16

ATTY. GEN. OPINIONS: Constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92.

Section 17

CASE CITATIONS: State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

ATTY. GEN. OPINIONS: Investigatory powers of the legislature, 1926-28, p 84; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92; Senate's authority to create interim committee with power to act after adjournment, 1956-58, p 117; power to suspend second reading of bills, 1958-60, p 114; authority of Senate to refer bills to Joint Ways and Means Committee with instructions, 1964-66, p 135; procedures of Joint Ways and Means Committee as subject to regulation by respective houses, 1966-68, p 205; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977.

Section 18

NOTES OF DECISIONS

A bill for raising revenue is a bill levying a tax on all or some of the persons, property or business of the county for a public purpose. Mumford v. Sewall, (1883) 11 Or 67, 4 P 585, 50 Am Rep 462; Dundee Mtg. Trust Inv. Co. v. Parrish, (1885) 24 Fed 197.

An Act to provide for licensing the sale of intoxicating liquors is not a bill to raise revenue, and may originate in either house. State v. Wright, (1883) 14 Or 365, 12 P 708.

An Act providing that certain fees in legal proceedings paid to certain officers who are paid a salary are to be turned into the treasury is not an Act for raising revenue. Northern Counties Inv. Trust v. Sears, (1897) 30 Or 388, 401, 41 P 931, 35 LRA 188.

ATTY. GEN. OPINIONS: Various Acts as revenue bills, 1930-32, p 113, 1934-36, p 242, 1938-40, pp 211, 254, 258, 1950-52, p 100; corporate excise tax bill as revenue raising measure, 1952-54, p 76; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92; effect of ORS 171.555, establishing Joint Ways and Means Committee, on rules adopted by each house, 1964-66, p 166; construing "bill," 1966-68, p 242; authority for joint committee on taxation, 1966-68, p 400.

Section 19

NOTES OF DECISIONS

The failure of the legislative journals to show affirmatively that some requirement of the Constitution was not complied with in the enactment of a bill is not sufficient to overthrow such bill where it has been regularly enrolled, signed by the presiding officers of the two houses, approved by the Governor and filed with the Secretary of State. Currie v. So. Pac. Co., (1892) 21 Or 566, 28 P 884; Portland v. Yick, (1904) 44 Or 439, 75 P 706, 102 Am St Rep 633.

The absence of a record in the journal of the reading of the bill or that the vote was taken by yeas and nays will not invalidate it. State v. Rogers, (1892) 22 Or 348, 30 P 74; Portland v. Yick, (1904) 44 Or 439, 75 P 706, 102 Am St Rep 633.

An Act is valid although the Senate Journal does not show that it was read three several days, or that such reading was dispensed with, where the original bill on file in the office of the Secretary of State does show that it was read, as required by the Constitution. Mumford v. Sewall, (1883) 11 Or 67, 4 P 585, 50 Am Rep 462.

A statute recognized and acted upon by the courts without question for a great length of time will be presumed to have been adopted in conformity with the constitutional requirements, and the courts will refuse to inquire into the facts relating to its passage. Mitchell v. Campbell, (1890) 19 Or 198, 211, 24 P 455.

The requirement that all bills be read by sections on three days in both the House and Senate does not require the whole bill, as amended during its progress through the legislature, to be so read. Evanhoff v. State Ind. Acc. Comm., (1915) 78 Or 503, 523, 154 P 106.

A vote is presumed in fact taken by yeas and nays in the absence of an affirmative showing to the contrary where the House Journal showed that the senate amendments on a house bill were concurred in by the house. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

FURTHER CITATIONS: State v. Boyer, (1917) 84 Or 513, 165 P 587.

ATTY. GEN. OPINIONS: Power to establish procedure of choosing officers, 1956-58, p 62; constitutionality of Senate and House ways and means committees functioning jointly, 1956-58, p 92; power to suspend second reading of bills, 1958-60, p 114; validity of consent calendar, 1962-64, p 170; application of this section to substitute bill germane to purpose of original bill, 1966-68, p 206; construing "bill," 1966-68, p 242.

LAW REVIEW CITATIONS: 27 OLR 46; 38 OLR 99.

Section 20

NOTES OF DECISIONS

1. Purpose and application
2. Single subject
3. Titles
   (1) Purpose and construction
   (2) Sufficient titles
   (3) Matter germane to title
   (4) Insufficient titles
4. Amendatory Acts
   (1) After the 1952 amendment
   (2) Prior to the 1952 amendment

1. Purpose and application

The object of this provision was to prohibit embracing in bills matters having no relation to each other, wholly incongruous and of which the title gives no notice, thus securing the adoption of measures by fraud without attracting attention, or combining subjects representing diverse interests, in order to unite the members of the legislature who favored either in support of all. Simpson v. Bailey, (1869) 3 Or 515; McWhirter v. Brainard, (1875) 5 Or 426; David v. Portland Water Committee, (1886) 14 Or 98, 118, 12 P 174; State v. Phenline, (1888) 16 Or 107, 17 P 572; State v. Shaw, (1892) 22 Or 287, 29 P 1028; Northern Counties Inv. Trust v. Sears, (1895) 30 Or 388, 41 P 931, 35 LRA 188; Clemmensen v. Peterson, (1899) 35 Or 47, 56 P 1015; State v. Frazier, (1899) 36 Or 178, 59 P 5; Spaulding Logging Co. v. Independence Imp. Co., (1903) 42 Or 394, 71 P 132; State v. Levy, (1915) 76 Or 63, 147 P 919; State v. Laundy, (1922) 103 Or 443, 204 P 958, 206 P 290; Nickerson v. Mecklem, (1942) 169 Or 270, 126 P2d 1095.

The interpretation of a statute enacted under an exercise of the initiative power is controlled by this section. State v. Richardson, (1906) 48 Or 309, 85 P 225, 8 LRA(NS) 362; State v. Runyon, (1912) 62 Or 246, 124 P 259.

An initiative measure must be entitled in conformity with this provision. State v. Langworthy, (1910) 55 Or 307, 104 P 424, 106 P 336; Turnidge v. Thompson, (1918) 89 Or 637, 175 P 281; Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

Municipal ordinances do not fall within this provision. Wagoner v. City of LaGrande, (1918) 89 Or 192, 173 P 305.

This section was not intended to restrict the scope or magnitude of the single subject of a legislative Act. State v. Allen, (1936) 152 Or 422, 53 P2d 1054.

This section has no application to ballot titles. Lechleidner v. Carson, (1937) 156 Or 636, 68 P2d 482.

The provisions of this section, though mandatory, are to be liberally construed. Anthony v. Veatch, (1950) 189 Or 462, 220 P2d 493, 221 P2d 575, app. dis., 340 US 923, 71 S Ct 499, 95 L Ed 667.

A ballot title is a part of the title of an Act, and may remedy defects and omissions in the legislative title. Id.

This section does not apply to constitutional amendments. Baum v. Newbry, (1954) 200 Or 576, 267 P2d 220.

This section was enacted to prevent log rolling practices and concealment from the public, as well as from the members of the legislature, of the true nature of the provisions of a bill. Northern Wasco County P.U.D. v. Wasco County, (1957) 210 Or 1, 305 P2d 766.

The purpose of this provision is to prevent parliamentary mischief, not to strike down valid legislation. Croft v. Lambert, (1960) 228 Or 76, 357 P2d 513, 88 ALR2d 1227.

2. Single subject

The word "subject" includes the chief thing to which the statute relates, and the matters properly connected therewith are matters germane to and having a natural connection with the general subject of the Act. State v. Laundy, (1922) 103 Or 443, 204 P 958, 206 P 290; Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

An Act, the effect of which was to amend the charter of every city containing similar provisions as to the sale of spirituous liquors, violated this section. State v. Wright, (1887) 14 Or 365, 12 P 708.

A civil and criminal provision may be embraced in the same Act. Ex parte Howe, (1894) 26 Or 181, 37 P 536.

An Act which embraces but one subject does not violate this section. **Acquisition of bridge and ferry by a city,** Simon v. Northrup, (1895) 27 Or 487, 40 P 560, 30 LRA 171; **compensation of local officers and appointment of deputies,** Northern Counties Inv. Trust v. Sears, (1895) 30 Or 388, 41 P 931, 35 LRA 188; **redemption of property and borrowing by executors,** Lawrey v. Sterling, (1902) 41 Or 518, 69 P 460; **creation of a city,** Adams v. Kelly, (1903) 44 Or 66, 74 P 399; **authorizing issuance of bonds for four improvements,** Noonan v. City of Seaside, (1920) 97 Or 64, 191 P 651; **fire patrol by landowners,** First State Bank v. Kendall Lbr. Co., (1923) 107 Or 1, 213 P 142; **improvements to streets,** City of Astoria v. Cornelius, (1926) 119 Or 264, 240 P 233; **liquor control Act,** City of Klamath Falls v. Ore. Liquor Control Comm., (1934) 146 Or 83, 29 P2d 564; **child labor Act,** Wind R. Lbr. Co. v. Frankfort Ins. Co., (1912) 116 CCA 160, 196 Fed. 340.

The provisions of a statute relating directly or indirectly to the same subject and actually connected with the subject expressed in the title are not in conflict with this section. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 529, 95 P 722, 98 P 160.

The rule that where an Act embraces two subjects contrary to this provision, it is invalid as to both, does not apply where the Act is otherwise unconstitutional as to one of the subjects embraced therein, in which case it may be upheld as to the other. Gantenbein v. West, (1915) 74 Or 334, 144 P 1171.

The term "subject" is to be given a broad and extensive meaning so as to allow the legislature full scope to include in one Act all matters having a logical or natural connection. Lovejoy v. Portland, (1920) 95 Or 459, 188 P 207.

The word "subject" is used in this provision in its ordinary sense and implies that there are numerous subjects of legislation and that only one of those subjects shall be embraced in any one Act. State v. Allen, (1936) 152 Or 422, 53 P2d 1054.

An Act designed to authorize the acceptance of the benefits of a federal law did not effectively cover future federal enactments, although it attempted to do so. Benson v. Olcott, (1920) 95 Or 249, 187 P 843.

An Act authorizing political entities to construct bridges and acquire ferries did not violate this section as both matters related to the subject of transportation which was expressed in the title. Eddins v. Wasco County, (1950) 189 Or 184, 219 P2d 159.

The subject of county building code ordinances was sufficiently related to the words in the title, "county planning." Warren v. Marion County, (1960) 222 Or 307, 353 P2d 257.

3.Titles

(1) Purpose and construction. The title renders important aid in construing an Act or in determining the legislative intent. State v. Robinson, (1897) 32 Or 43, 48 P 357; State v. Moore, (1900) 37 Or 536, 62 P 26; State v. Perry, (1915) 77 Or 453, 151 P 655.

The legislative title to an Act need not specify with particularity all the different provisions of the Act. In re Willow Creek, (1915) 74 Or 592, 144 P 505, 146 P 475; State v. Laundy, (1922) 103 Or 443, 204 P 958, 206 P 290; State v. Tazwell, (1928) 125 Or 528, 266 P 238, 59 ALR 1436.

A title need not be an index of the Act. State v. Slusher, (1926) 119 Or 141, 248 P 258; Wagner's Estate, (1931) 135 Or 615, 297 P 343; City of Klamath Falls v. Ore. Liquor Control Comm., (1934) 146 Or 83, 29 P2d 564; Northern Wasco County P.U.D. v. Wasco County, (1957) 210 Or 1, 305 P2d 766.

The constitutional provision requiring the title of an Act to express the subject matter is mandatory. State v. Hawks, (1924) 110 Or 497, 222 P 1071; In re Wagner's Estate, (1931) 135 Or 615, 297 P 343.

The subject of the Act, and not "the matters properly connected therewith," is to be expressed in the title. Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185.

The title of an Act defines its scope. Peterson v. Lewis, (1916) 78 Or 641, 154 P 101.

The provisions of a statute must be entirely disconnected with the subject as embraced in the title and must consist of matter of which the title gives no notice in order to render a portion of it void for the reason that its provisions are not embraced within its title. Clayton v. Enterprise Elec. Co., (1916) 82 Or 149, 161 P 411.

To warrant a court in holding an Act invalid under this provision a conflict with its requirements must be palpably plain. Calder v. Orr, (1922) 105 Or 223, 209 P 479.

That the title of an Act is sufficiently comprehensive to uphold legislation which might have been, but was not enacted, is not evidence that such omitted legislation was intended to be enacted. Carson v. Olcott, (1922) 105 Or 259, 209 P 610.

That a better title might have been written for a statute is not ground for holding the title invalid. State v. Slusher, (1926) 119 Or 141, 248 P 358.

The lack of an expression of its subject matter in the title cannot be supplied by reference to the body of the Act. State v. Latourette, (1942) 168 Or 584, 125 P2d 750.

If the words used in a title, taken in any sense or meaning are sufficient, the title is good even though such meaning is not the most common. Tompkins v. District Boundary Board, (1947) 180 Or 339, 177 P2d 416.

If a provision is omitted from a title which is an "index" of the contents, the bill cannot stand if the remainder of the title would affirmatively lead the reader to believe that the list in the title is a complete enumeration of like provisions in the Act. Northern Wasco County P.U.D. v. Wasco County, (1957) 210 Or 1, 305 P2d 766.

(2) Sufficient titles. The title of an Act is sufficient if the matter in the Act is reasonably connected with and germane to the title. **Title relating to specific appropriations and Act called for an appropriation to pay an existing**

deficiency, Burch v. Earhart, (1879) 7 Or 58; **title relating to creation of board of county commissioners and Act calling for removal of commissioner,** State v. Steele, (1901) 39 Or 419, 65 P 515; **title relating to construction of canal and Act calling for toll payment to state,** State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 95 P 722, 98 P 160; **title to port law,** Straw v. Harris, (1909) 54 Or 424, 103 P 777; **title relating to liens for laborers in mines and Act calling for liens on mines generally,** Escott v. Crescent Coal & Nav. Co., (1910) 56 Or 190, 106 P 452; **title relating to establishment of roads and Act calling for counties' liability,** Bailey v. Benton County, (1912) 61 Or 390, 111 P 376, 122 P 755; **title relating to sale of land and Act calling for gift of land,** Pacific Elevator Co. v. Portland, (1913) 65 Or 349, 133 P 72, 46 LRA(NS) 363; **water law,** In re Willow Creek, (1915) 74 Or 592, 144 P 505, 146 P 475; **title relating to constructing of roads and Act calling for vacation of roads,** Heuel v. Wallowa County, (1915) 76 Or 354, 159 P 77; **title relating to the creation of liens and Act calling for priorities,** Haines Commercial Co. v. Grabill, (1915) 78 Or 375, 152 P 877; **workmen's compensation Act,** Evanhoff v. State Ind. Acc. Comm., (1915) 78 Or 503, 154 P 106; **inheritance tax Act,** In re Clark's Estate, (1921) 100 Or 20, 195 P 370; In re Lewis' Estate, (1939) 160 Or 486, 85 P2d 1032; **homestead exemption law,** Iltz v. Kreiger, (1922) 104 Or 59, 202 P 409, 206 P 550; **market road Act,** State v. Hawks, (1924) 110 Or 497, 222 P 1071; **title relating to measure of hops and Act calling for measure by weight,** McLaughlin v. Helgerson, (1925) 116 Or 310, 241 P 50; **reenacting income tax laws,** State v. Slusher, (1926) 119 Or 141, 248 P 358; **insurance Act,** State v. Tazwell, (1928) 125 Or 528, 266 P 238, 59 ALR 1436; **Act creating the Industrial School for Girls,** State v. Allen, (1936) 152 Or 422, 53 P2d 1054; **small loan Act,** Wrenn v. Portland Loan Co., (1937) 155 Or 395, 64 P2d 520; **pilotage Act,** The Borrowdale, (1889) 39 Fed 376; **Act calling for grant of tide land not mentioned in title,** Case v. Loftus, (1890) 43 Fed 839; **criminal code,** Brunswick-Balke-Collander Co. v. Evans, (1916) 228 Fed 991 app. dis., (1916) 248 US 587, 39 S Ct 5, 63 L Ed 434.

The title of an Act defining boundaries of a particular county, need not state the name of every other county adjoining at the points of change. Allison v. Hatton, (1905) 46 Or 370, 80 P 101.

The title need not be an index to all matters contained in the Act to satisfy this section. Gilbertson v. Culinary Alliance and Bartenders' Union, (1955) 204 Or 326, 282 P2d 632.

The Constitution does not contain any limitation on the comprehensiveness of the subject. State v. Williamson, (1970) 4 Or App 41, 475 P2d 593, Sup Ct **review denied.**

Omission of civil remedy provision in title was not fatal. Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185; Starker v. Scott, (1948) 183 Or 10, 190 P2d 532.

Omission of penalty provisions in title was not fatal. State v. Koshland, (1893) 25 Or 178, 35 P 32.

An Act was constitutional even though its title indicated that it applied to the whole state, while the text limited it to a certain class of counties. State v. Frazier, (1899) 36 Or 178, 59 P 5.

The title of an Act making provision for the construction of a railroad without mentioning a grant of land contained in the Act was constitutional. Corvallis & E.R. Co. v. Benson, (1912) 61 Or 359, 369, 121 P 418.

An Act did not violate this section because the title purported to include all road districts, while the Act embraced only districts composed entirely of an island in a navigable river. Nicholas v. Yamhill County, (1922) 102 Or 615, 192 P 410, 203 P 593.

The title to an Act relating to the maintenance of inmates did not contain more than one subject. In re Idleman, (1934) 146 Or 13, 27 P2d 305.

The words "county planning" were sufficiently broad to embrace the provision enabling county to enact building ordinance codes. Warren v. Marion County, (1960) 222 Or 307, 353 P2d 257.

"An Act relating to mass transit districts; and providing penalties" was sufficient, without referring to the taxing power of the district. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

Title, "Relating to the Oregon State Bar," was sufficient to include provisions authorizing the State Bar to establish a client security fund. Bennett v. Oregon State Bar, (1970) 256 Or 37, 470 P2d 945.

(3) Matter germane to title. An Act "to regulate and tax foreign insurance, banking, express, and exchange corporations or associations," doing business in the state should not be construed to include foreign corporations other than those expressly specified in the title to such Act. Singer Mfg. Co. v. Graham, (1879) 8 Or 17, Am Rep 572; Oregon & Wash. Trust Inv. Co. v. Rathburn, 5 Sawy 32, Fed Cas No. 10,555; New England Mtg Sec. Co. v. Vade, (1886) 28 Fed 265.

If the subject matter of an Act is germane to the subject expressed in the title, the Act is valid. **Creation of board of equalization and prescribing duties of county clerk,** State v. Linn County, (1894) 25 Or 503, 36 P 397; **opium laws,** Ex parte Mon Luck, (1896) 29 Or 421, 44 P 693, 54 Am St Rep 804, 32 LRA 738; Ex Parte Yung Jon, (1886) 28 Fed 308; **ratifying and validating prior proceedings with title relating to incorporation of city,** Nottage v. Portland, (1899) 35 Or 539, 58 P 883, 76 Am St Rep 513; **functions of county managing committee in Act with title relating to elections,** Ladd v. Holmes, (1901) 40 Or 167, 66 P 714, 91 Am St Rep 457; **licensing barber schools with title relating to regulation of business of barbering,** State v. Briggs, (1904) 45 Or 366, 77 P 750, 78 P 361, 2 Ann Cas 424; **excepting contracts from insurance law with title relating to contracts,** Wallace & Co. v. Ferguson, (1914) 70 Or 306, 140 P 742, 141 P 542; **provision of employers' liability law protecting the public,** Clayton v. Enterprise Elec. Co., (1916) 82 Or 149, 161 P 411; **jurisdiction provisions in law regulating fishing,** State v. Blanchard, (1920) 96 Or 79, 189 P 421; **special road tax with title relating to roads,** Calder v. Orr, (1922) 105 Or 223, 209 P 479; **penalty for aiding embezzler with title relating to regulation of banking business,** State v. Kubli, (1926) 118 Or 5, 244 P 512; **support of minor children with title relating to married women,** Noble v. Noble, (1940) 164 Or 538, 103 P2d 293; **initiative measures with title relating to corrupt practices in elections,** Nickerson v. Mecklem, (1942) 169 Or 270, 126 P2d 1095; **declaring mortgages void with title relating to taxation,** Farmers' Loan & Trust Co. v. Ore. Ry., (1885) 24 Fed 407; **conferring authority on some corporations to issue two or more classes of stock, and denying it to others, with title relating to capital and capital stock of corporations,** Feero v. Housley, (1955) 205 Or 404, 288 P2d 1052; **prohibition of "moonlighting" in bill relating to salaries and hours,** Croft v. Lambert, (1960) 228 Or 76, 357 P2d 513, 88 ALR2d 1227.

Matters germane to or properly connected with the subject or matters of detail have no place in the title, although the circumstance of their being found there affords no constitutional reason for rendering the Act void. Northern Counties Inv. Trust v. Sears, (1895) 30 Or 388, 41 P 931, 35 LRA 188; Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185.

The sentence relating to the right of the city to impose license fees for selling milk, in an Act relating to peddler's licenses, was not germane to the title of the Act. Korth v. Portland, (1927) 123 Or 180, 261 P 895, 58 ALR 665.

The title contained nothing to suggest a legislative purpose to convey state-owned lands to federal patentees.

Bland v. Alsea Bay Port Comm., (1966) 243 Or 541, 414 P2d 814.

A section of a statute making hospital records available to a person against whom a personal injury claim is asserted was germane to the subject matter and title of the Act by which it was enacted and was constitutional under this section. Nielson v. Bryson, (1970) 256 Or 179, 477 P2d 714.

(4) Insufficient titles. The scope of an Act is restricted by its title. **Title restricted to prisoners did not include parolees,** State v. Perry, (1915) 77 Or 453, 151 P 655; **title restricted operation of Act to amend a statute,** State v. Lightner, (1915) 77 Or 587, 152 P 232; **title restricted to general incorporation law and Act could not repeal powers granted previously,** City of Albany v. McGoldrick, (1916) 79 Or 462, 155 P 717; **title restricting to grinding toll and Act could not relate to bridge requirements,** Gaston v. Thompson, (1918) 89 Or 412, 174 P 717; **title of employers' liability Law would not permit giving action to public generally,** Turnidge v. Thompson, (1918) 89 Or 637, 175 P 281; **title related to duties and powers of auditors and Act called for borrowing money,** Multnomah County v. First Nat. Bank, (1937) 151 Or 342, 50 P2d 129; **title restricted to insurance business did not permit reference to express business,** Northern Pac. Exp. Co. v. Metschan, (1898) 32 CCA 530, 90 Fed 80.

The title of the Act regulating suits against nonresident automobile owners did not include nonresident operators and the court could not enlarge the scope of the law to subject them to its provisions. State v. Latourette, (1942) 168 Or 584, 125 P2d 750.

An Act imposing upon the chief deputy State Engineer the work formerly performed by the State Highway Engineer, was void where the title of the statute in question provided for the transfer of his duties to the State Engineer. Peterson v. Lewis, (1916) 78 Or 641, 154 P 101.

Where the title of the Act did not include regulation of the placing of obstructions in the Rogue River, a section prohibiting such obstructions was unconstitutional. State Game Comm. v. Beaver Portland Cement Co., (1942) 169 Or 1, 124 P2d 524, 126 P2d 1094.

4. Amendatory Acts

(1) After the 1952 amendment. The 1952 amendment to this section refers only to those amendatory Acts passed subsequent to its adoption. Northern Wasco County P.U.D. v. Wasco County, (1957) 210 Or 1, 305 P2d 766.

(2) Prior to the 1952 amendment. The title of an amendatory Act was sufficient if it referred to the particular section it was intended to alter, unless the provisions of the statute were such as could not have been included in the original Act as matters properly connected therewith. State v. Phenline, (1888) 16 Or 107, 17 P 572; Murphy v. Salem, (1906) 49 Or 54, 87 P 532; State v. Hollinshead, (1915) 77 Or 473, 151 P 710; First Nat. Bank v. Yamhill County Court, (1924) 110 Or 74, 222 P 1077; State v. Hawks, (1924) 110 Or 497, 222 P 1071; State v. Putney, (1924) 110 Or 634, 224 P 279; City of Astoria v. Cornelius, (1926) 119 Or 264, 240 P 233; State v. Eaton, (1926) 119 Or 613, 250 P 233; Spicer v. Benefit Assn. of Ry. Employees (1933) 142 Or 574, 17 P2d 1107, 21 P2d 187; Semler v. Ore. State Bd. of Dental Examiners, (1934) 148 Or 50, 34 P2d 311; First Nat. Bank v. Benton County, (1944) 175 Or 485, 154 P2d 841; Tompkins v. Dist. Boundary Bd., (1947) 180 Or 339, 177 P2d 416.

In amending a section of an existing law, it was sufficient to designate such amendment as the subject of the amendatory Act. State v. Phenline, (1888) 16 Or 107, 17 P 572; State v. McPherson, (1915) 77 Or 151, 149 P 1021.

To refer in the title of a legislative Act to the particular section of an authorized compilation sought to be amended was a sufficient statement of the subject for an amendatory Act, and if the provisions of the amendment could have been included in the original Act without violating this provision, it was valid. Ex parte Howe, (1894) 26 Or 181, 37 P 536; Oregon Growers' Coop. Assn. v. Lentz, (1923) 107 Or 561, 212 P 811; McLaughlin v. Helgerson, (1925) 116 Or 310, 241 P 50; Brunswick-Balke-Collander Co. v. Evans, (1916) 228 Fed 991, app. dis., 248 US 587, 39 S Ct 5, 63 L Ed 434.

An Act to amend a certain section of the "codes of general laws of Oregon," without more, was insufficient as a title within this section. Hearn v. Louttit, (1903) 42 Or 572, 72 P 132; The Borrowdale, (1889) 39 Fed 376.

An amendatory Act which identified with reasonable certainty the law to be modified complied with this provision. State v. Banfield, (1903) 43 Or 287, 292, 72 P 1093.

Amendatory legislation which extended the operation of the amended legislation but involved the same subject, did not violate this section. State v. Miller, (1909) 54 Or 381, 103 P 519; State v. McPherson, (1915) 77 Or 151, 149 P 1021.

A provision of an Act repealing a prior statute was ineffective where the title of the Act did not mention the repeal of any existing laws. City of Grants Pass v. Rogue R. Corp., (1918) 87 Or 637, 171 P 400.

A title relating to executive paroles was not sufficient to introduce a statute restricting judicial paroles. State v. Chong Ben, (1918) 89 Or 313, 173 P 258, 1173.

If the title of the amendatory Act merely referred to the original Act, the subject matter of the amendment had to be germane to the subject of the original Act. First Nat. Bank v. Yamhill County, (1924) 110 Or 74, 222 P 1077; State v. Hawks, (1924) 110 Or 497, 222 P 1071; First Nat. Bank v. Benton County, (1944) 175 Or 485, 154 P2d 841.

The addition in an amendatory Act of the requirement of notice to adverse parties, was valid. In re Wagner's Estate, (1931) 135 Or 615, 297 P 343.

The subject matter of an amending statute had to be indicated by the earlier Act, and if the later statute was deemed original legislation, its subject matter had to be expressed in its title. State v. Latourette, (1942) 168 Or 584, 125 P2d 750.

An amendatory Act had to be limited in scope to subject matter listed in the title of the Act that it amended. Administrator of Veterans' Affairs v. United States Nat. Bank, (1951) 191 Or 203, 229 P2d 313; Northern Wasco County P.U.D. v. Wasco County, (1957) 210 Or 1, 305 P2d 766. **But see** Multnomah County v. First Nat. Bank, (1937) 151 Or 342, 50 P2d 129.

FURTHER CITATIONS: Port of Portland v. Reeder, (1955) 203 Or 369, 280 P2d 324; Moore v. Shermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180; Lucas v. State Ind. Acc. Comm., (1960) 222 Or 420, 353 P2d 223; State v. Harmon, (1961) 225 Or 571, 358 P2d 1048; Johnson v. City of Astoria, (1961) 227 Or 585, 363 P2d 571; DeLong Corp. v. Ore. State Hwy. Comm., (1964) 233 F Supp 7.

ATTY. GEN. OPINIONS: Validity of amendatory Acts, 1920-22, pp 73, 109, 1922-24, p 789, 1926-28, p 592, 1936-38, pp 174, 438; title requirements and restrictions, 1922-24, p 342, 1934-36, pp 233, 238, 264, 269, 1936-38, pp 190, 191, 1938-40, pp 67, 141, 263, 618, 1942-44, p 138, 1946-48, pp 128, 208, 1948-50, p 140, 1950-52, pp 153, 166.

Acts containing more than one subject, 1924-26, p 165, 1960-62, p 255; matters germane to one subject, 1926-28, p 114, 1928-30, p 125, 1932-34, p 666, 1942-44, p 140, 1948-50, p 135; extent of effect of repealing law, 1932-34, p 84; title as indicating legislative intent as to what shall have operation, 1952-54, p 37; title as part of the Act, 1952-54, p 105; use of revenue received under property tax relief Act, 1952-54, p 107; using title to construe context of Act, 1952-54, p 134; construing "proper title," 1954-56, p 71; refund of taxes paid on exempt property, 1954-56, p 120, 228; scope of bill as restricted by title, 1958-60, p 136; patronage refund certificates of farm cooperatives as income, 1960-62, p 174;

complaint and bill of particulars under Conciliation Service Act, 1964-66, p 50; requirement that officers be precinct committeemen or women, 1966-68, p 155; construing "Act," 1966-68, p 242; authority of legislature to change appropriations and expenditure limitations in one bill, 1966-68, p 402; proposed constitutional tax limit, (1968) Vol 34, p 203; application of authority to transfer road funds to school fund, (1969) Vol 34, p 770.

LAW REVIEW CITATIONS: 31 OLR 111; 38 OLR 108, 117; 39 OLR 145.

Section 21

ATTY. GEN. OPINIONS: Scope of inquiry authorized by joint resolution, 1958-60, p 159; constitutionality of law relating to certain counties only, 1962-64, p 193; construing "Act," 1966-68, p 242; regulating protective headgear of motorcyclists on private property, 1966-68, p 548.

LAW REVIEW CITATIONS: 38 OLR 117.

Section 22

NOTES OF DECISIONS

An amended Act or section must be set forth in full as amended or revised incorporating all changes. Noland v. Costello, (1863) 2 Or 57; Portland v. Stock, (1863) 2 Or 69; Dolan v. Barnard, (1875) 5 Or 390, 392; Skinner v. Davis, (1937) 156 Or 174, 67 P2d 176.

A statute that repeals another by implication is not within the restriction of this section. Delay v. Chapman, (1867) 2 Or 242; Grant County v. Sels, (1874) 5 Or 243; Fleischner v. Chadwick, (1874) 5 Or 152; Stingle v. Nevel, (1880) 9 Or 62; Patton v. Withycombe, (1916) 81 Or 210, 159 P 78; The Glaramara, (1880) 8 Sawy 22, 10 Fed 678.

A subsequent statute supplementing the provisions of a former one may be enacted without setting forth and publishing the prior provisions as amended. David v. Portland Water Comm., (1886) 14 Or 98, 12 P 174; Sheridan v. Salem, (1886) 14 Or 328, 12 P 925; State v. Rogers, (1892) 22 Or 348, 365, 30 P 74; Warren v. Crosby, (1893) 24 Or 558, 34 P 661; Northern Counties Inv. Trust v. Sears, (1897) 30 Or 388, 41 P 931, 35 LRA 188; Patton v. Withycombe, (1916) 81 Or 210, 159 P 78; Brown v. City of Silverton, (1920) 97 Or 441, 190 P 971; Ebbert v. First Nat. Bank, (1929) 131 Or 57, 279 P 534; In re Idleman's Commitment, (1934) 146 Or 13, 27 P2d 305.

Designating an amendment as the subject of an amendatory Act is sufficient, without any further expression of subject in the title. State v. Phenline, (1888) 16 Or 107, 110, 17 P 572; McCalla v. Bane, (1891) 45 Fed 828, 838.

A statute repealing an existing Act or limiting its territorial application need not set forth the whole Act. Bird v. Wasco County, (1871) 3 Or 282.

The Act amended need not be set forth at full length in the amendatory Act unless the amendments effect some change in every section of such Act. The Borrowdale, (1889) 39 Fed 376, 380.

The body of an Act need not declare that it is amendatory of a particular law for it to be effective as such, if that intent is otherwise clearly apparent. State v. Robinson, (1897) 32 Or 43, 47, 48 P 357.

A new title is not required. Northern Pac. Exp. Co. v. Metschan, (1898) 32 CCA 530, 90 Fed 80.

A slight error in the title of an amendatory Act is immaterial, where it is not liable to mislead or deceive an ordinarily intelligent man. Murphy v. Salem, (1907) 49 Or 54, 87 P 532.

Amendment of an Act by setting it out in full "so as to read as follows" operates as an entire obliteration of the former Act after the new one goes into effect. State v. Lightner, (1915) 77 Or 587, 152 P 232.

An Act, the title of which is sufficient to support it only as an amendment of an existing statute, is superseded by a subsequent Act amending the same statute. Id.

Statutes not amendatory or revisory in character, but original in form and complete in themselves, exhibiting on their face their purpose and scope, are not within this constitutional prohibition. State v. Phipps, (1931) 136 Or 454, 299 P 1009.

The purpose of this provision is to secure upon the face of every bill a full disclosure of its purpose, so as to enable the members of the legislature to know what they are doing, and to afford to all others an opportunity to acquaint themselves with the purpose of the bill. State v. Hoss, (1933) 143 Or 41, 21 P2d 234.

This section does not apply to constitutional amendments. Baum v. Newbry, (1954) 200 Or 576, 267 P2d 220.

An Act may amend federal law without setting forth such law in full. Gilbertson v. Culinary Alliance, (1955) 204 Or 326, 282 P2d 632.

Amendments to an Act in so far as the amendatory Act purported to amend the former Act by mere reference to the title, were void. Corvallis & E. R. Co. v. Benson, (1912) 61 Or 359, 375, 121 P 418; Martin v. Gilliam County, (1918) 89 Or 394, 173 P 938; Gaston v. Thompson, (1918) 89 Or 412, 174 P 717; State v. Hoss, (1933) 143 Or 41, 21 P2d 234.

FURTHER CITATIONS: State v. Buck, (1953) 200 Or 87, 262 P2d 495.

ATTY. GEN. OPINIONS: Sufficiency of merely setting out a numbered subsection, 1926-28, p 91; effect and requirements of a repeal, 1936-38, p 588; Acts as amendatory or original, 1932-34, p 153, 1938-40, p 141, 1950-52, pp 113, 153; effect of two amendments of one section in the same legislative session, 1952-54, p 161, (1971) Vol 35, p 782; construing "Act," 1966-68, p 242.

LAW REVIEW CITATIONS: 8 OLR 185; 31 OLR 111, 119; 39 OLR 120, 239.

Section 23

NOTES OF DECISIONS

1. In general
2. Jurisdiction and duties of justices of the peace
3. Punishment of crimes
4. Regulating practice in courts
5. Laying, opening and working on highways
6. Taxes for state, county, township or road purposes
   (1) Generally
   (2) Specific laws

1. In general

Special laws affect only particular individuals and things. Allen v. Hirsch, (1880) 8 Or 412; Crawford v. Linn County, (1884) 11 Or 482, 498, 5 P 738; Maxwell v. Tillamook County, (1891) 20 Or 495, 26 P 803; Evert v. Ore. & W. Colonization Co., (1927) 123 Or 225, 261 P 443; The Mortgage Tax Case (Dundee Mtg. Co. v. Parrish), (1885) 24 Fed 197.

The word "special" has the same meaning as "private" in the common law. Allen v. Hirsch, (1880) 8 Or 412; Crawford v. Linn County, (1884) 11 Or 482, 498, 5 P 738; Maxwell v. Tillamook County, (1891) 20 Or 495, 26 P 803; The Mortgage Tax Case (Dundee Mtg. Co. v. Parrish), (1885) 24 Fed 197.

A local statute is one that operates only upon the people of a particular locality. Manning v. Klippel, (1881) 9 Or 367; Crawford v. Linn County, (1884) 11 Or 482, 498, 5 P 738; Evert v. Ore. & W. Colonization Co., (1927) 123 Or 225, 261 P 443.

A law operating east of the Cascades exclusively was not objectionable. Bird v. Wasco County, (1871) 3 Or 282.

A tax on bicycles within certain counties only, was a local law. Ellis v. Frazier, (1901) 38 Or 462, 63 P 642, 53 LRA 454.

A primary election law was not repugnant to subdivision 13 of this section. Ladd v. Holmes, (1901) 40 Or 167, 66 P 714, 91 Am St Rep 457.

Excepting open and public restaurants and dining rooms from the operation of a liquor law, was proper. State v. City of Baker, (1907) 50 Or 381, 92 P 1076, 13 LRA(NS) 1040.

The fact that there is only one county in the state containing the required number of inhabitants making it amenable to a certain Act does not render such Act "special or local legislation," within this section. Tichner v. Portland, (1921) 101 Or 294, 200 P 466.

A statute operating equally within a certain classification of persons or things is not a local and special law, unless the classification is arbitrary, unreasonable or unjust. Evert v. Ore. & W. Colonization Co., (1927) 123 Or 225, 261 P 443.

A small loan Act did not violate this provision. Wrenn v. Portland Loan Co., (1937) 155 Or 395, 64 P2d 520.

A statute authorizing a circuit judge in a judicial district having a population of 200,000 or more to reside outside of the district did not violate this section. Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749.

2. Jurisdiction and duties of justices of the peace

Special laws giving the magistrates of one locality greater jurisdiction over causes of action or greater powers than those of another are prohibited. Ryan v. Harris, (1866) 2 Or 175; Craig v. Mosier, (1868) 2 Or 323; State v. Wiley, (1871) 4 Or 184; Portland v. Denny, (1874) 5 Or 160; Multnomah County v. Adams, (1876) 6 Or 114; Clemmensen v. Peterson, (1899) 35 Or 47, 56 P 1015.

The passing of special laws conferring upon the judge of a municipal court the powers of a justice of the peace within the municipal limits is not within the prohibition of this section. Ryan v. Harris, (1866) 2 Or 178; Craig v. Mosier, (1868) 2 Or 323; State v. Wiley, (1871) 4 Or 184; Portland v. Denny, (1874) 5 Or 160; Multnomah County v. Adams, (1876) 6 Or 114; Clemmensen v. Peterson, (1899) 35 Or 47, 50, 56 P 1015.

Acts creating cities properly invested the recorder and marshal with the powers of the justice of the peace. Clemmensen v. Peterson, (1899) 35 Or 47, 56 P 1015; Adams v. Kelly, (1903) 44 Or 66, 74 P 399.

The legislature cannot limit and restrict the jurisdiction of a police judge, when acting as a justice of the peace, to criminal matters. State v. Wiley, (1871) 4 Or 184.

The legislature may fix the compensation for services of a municipal officer invested with the powers of a justice of the peace within the municipality. Multnomah County v. Adams, (1876) 6 Or 114.

An Act extending the jurisdiction of a justice of the peace to complaints for violations of town ordinances was void. Town of Lafayette v. Clark, (1881) 9 Or 225.

Local laws affecting compensation of "justices of the peace and constables" are not prohibited. Portland v. Besser, (1882) 10 Or 242.

3. Punishment of crimes

A law containing a penalty which only affects certain persons is not objectionable if there is proper classification. **Barbering on Sunday,** Ex parte Northrup, (1902) 41 Or 489, 69 P 445; **license to operate sailors' boarding houses,** White v. Mears, (1904) 44 Or 215, 74 P 931; **local option Act,** Fouts v. City of Hood River, (1905) 46 Or 492, 81 P 370, 7 Ann Cas 1160, 1 LRA(NS) 483; State v. Cochran, (1909) 55 Or 157, 104 P 419, 105 P 884; **taking of crabs in one county,** State v. Savage, (1920) 96 Or 53, 184 P 567, 189 P 427.

A law providing a license tax for dogs, but excepting from its operation all the territory east of the summit of the Cascade Mountains and certain other counties, was violative of this section. Lewis v. Varney, (1917) 85 Or 400, 167 P 271.

A law providing different regulations for fishing in different counties of the state, was valid. State v. Blanchard, (1920) 96 Or 79, 189 P 421.

4. Regulating practice in courts

A local or special law which does not affect or change the practice or procedure in any court does not violate subdivision three of this section. **Salaries of county officials** Northern Counties Inv. Trust v. Sears, (1895) 30 Or 388, 41 P 931, 35 LRA 188; **trial fees,** State v. Frazier, (1899) 36 Or 178, 59 P 5; Fouts v. City of Hood River, (1905) 46 Or 492, 81 P 370, 7 Ann Cas 1160, 1 LRA(NS) 483; **injunction rights to cooperatives,** Oregon Growers' Coop. Assn. v. Lentz, (1923) 107 Or 561, 212 P 811; **appointment of special prosecutors by the Governor,** State v. Farnham, (1925) 114 Or 32, 234 P 806.

A statute attempting to transfer all probate jurisdiction in the county court to the circuit court, violated this section. In re McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425; Gantenbein v. West, (1915) 74 Or 334, 144 P 1171.

"Practice" in a court is the manner or order in which the proceedings are had and the business of the court transacted. State v. Frazier, (1899) 36 Or 178, 59 P 5.

A statute authorizing a suit against the state and containing special venue provisions, violated subdivisions three and four of this section. Altschul v. State, (1914) 72 Or 591, 144 P 124.

The term "practice" means those legal rules which direct the course of procedure to bring parties into court and the course of the court after they are brought in. In re McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425.

The phrase, "practice in courts of justice," means the forms of procedure usual in the trial of actions or suits in common law or equity and for the trial of which courts were expressly designated by the Constitution. Portland v. Hirsch-Weis Mfg. Co., (1928) 123 Or 571, 263 P 901.

"Practice in courts of justice" does not include special proceedings where the legislature might in its discretion give or withhold jurisdiction. Id.

A statute regulating procedure in the circuit court for the review of a condemnation award was not within the prohibition of subdivision three of this section. Id.

Proceedings in the department of domestic relations are to be determined as in all other circuit courts of the state. Bestel v. Bestel, (1936) 153 Or 100, 44 P2d 1078, 53 P2d 525.

5. Laying, opening and working on highways

This subdivision has no application to streets in cities, exclusive control of which may be vested in municipal authorities. East Portland v. Multnomah County, (1876) 6 Or 62; Multnomah County v. Sliker, (1881) 10 Or 65; Simon v. Northup, (1895) 27 Or 487, 499, 40 P 560, 30 LRA 171; Oregon City v. Moore, (1896) 30 Or 215, 46 P 1017, 47 P 851.

Prior to the 1912 amendment of Ore. Const. Art. XI, §7, Acts appropriating money for the building of local roads were void. Maxwell v. Tillamook County, (1891) 20 Or 495, 26 P 803; Sears v. Steel, (1910) 55 Or 544, 107 P 3.

An Act for the construction of a wagon road connecting two important divisions of the state, separated by a high range of mountains, was valid. Allen v. Hirsch, (1880) 8 Or 412.

The legislature may constitutionally confer upon a city the right to control the expenditure of the funds collected under general laws and applicable to the county roads within the municipality. Oregon City v. Moore, (1896) 30 Or 215, 46 P 1017, 47 P 851.

The streets of a city include bridges connecting streets. Schroeder v. Multnomah County, (1904) 45 Or 92, 76 P 772.

A city charter constituting county roads within the city a separate road district under the charge of the common council, is not obnoxious to this section. City of Nyssa v. Malheur County, (1909) 54 Or 286, 103 P 61.

The charter of a city providing that all bridges of certain character on county roads within the city should be replaced by the county, did not violate this section, where the general law gave the county jurisdiction over county roads in cities. Bowers v. Neil, (1913) 64 Or 104, 110, 128 P 433.

Subdivision seven of this section is impliedly repealed by the 1912 amendment to Ore. Const. Art. XI, §7. Stoppenback v. Multnomah County, (1914) 71 Or 493, 507, 142 P 832.

Laws empowering the highway commission to create a new state highway, despite the existence of a county road and highway in the same territory and roughly in the same route, did not violate this section. Rockhill v. Benson, (1920) 97 Or 176, 191 P 497.

Laws directing certain payments by the highway commission did not violate this section. Salmon R.-Grande Ronde Hwy. Improvement Dist. v. Scott, (1933) 145 Or 121, 27 P2d 183.

6. Taxes for state, county, township or road purposes

(1) Generally. The subject of fees and salaries of public officers was not within the requirements of subdivision 10 of this section. Northern Counties Inv. Trust v. Sears, (1895) 30 Or 388, 41 P 931, 35 LRA 188; Brownfield v. Houser, (1897) 30 Or 534, 49 P 843; Landis v. Lincoln County, (1897) 31 Or 424, 50 P 530; State v. Frazier, (1899) 36 Or 178, 59 P 5.

This subdivision was intended to prohibit the legislature from passing a special or local law providing a manner for the assessment and collection of taxes, and not to inhibit it from authorizing the county to levy and collect a special tax at the same time and in the same manner as other taxes are levied and collected for public purposes. Simon v. Northup, (1895) 27 Or 487, 500, 40 P 560, 30 LRA 171.

The word "taxes," as used in this provision, means a charge or pecuniary burden imposed upon an individual or his property for the support of the general government, or for some special purpose for which the state may make a requisition in a particular mode. State v. Frazier, (1899) 36 Or 178, 59 P 5.

The language "assessment and collection of taxes for state, county, township, or road purposes" was not intended to refer to anything other than to general or public taxes to be levied and collected for the benefit of the state, county, township or road district. Id.

A constitutional amendment, since repealed, authorizing the people of the several counties to regulate taxation and exemptions within their limits, modified this section. Schubel v. Olcott, (1912) 60 Or 503, 515, 120 P 375.

(2) Specific laws. A mortgage tax law violated this provision. Crawford v. Linn County, (1884) 11 Or 482, 498, 5 P 738.

A city charter, excluding from the jurisdiction of the county court for the purpose of road taxes, territory within the city, did not conflict with subdivision 10 of this provision. City of Nyssa v. Malheur County, (1909) 54 Or 286, 103 P 61.

Making an appropriation out of the general funds of the state for an irrigation project and reclamation of lands was not within the prohibition of this section. McMahan v. Olcott, (1913) 65 Or 537, 133 P 836.

A tax supervising and conservation commission Act did not violate this section. Tichner v. Portland, (1921) 101 Or 294, 200 P 466.

Laws appropriating state taxes to a city to be used by it in payment of interest on bonds to be issued for the reconstruction of its public property, and in providing a sinking fund for retirement bonds, did not violate this section. Kinney v. City of Astoria, (1923) 108 Or 514, 217 P 840.

A law containing mandatory provisions for a tax levy for the general road fund in counties with a population of 25,000 or less, and optional provisions as to counties having a population in excess of 25,000, was valid. City of Pendleton v. Umatilla County, (1926) 117 Or 140, 241 P 979.

A law providing for issuance of delinquent tax certificates against lands within irrigation and drainage districts was within this section. Evert v. Ore. & W. Colonization Co., (1927) 123 Or 225, 261 P 443.

The Motor Transportation Act was not a special tax law within the purview of subdivision 10 of this section. Portland Van & Storage Co. v. Hoss, (1932) 139 Or 434, 9 P2d 122, 81 ALR 1136.

Laws relating to power development, were not in violation of subdivision 10 of this section. Wieder v. Hoss, (1933) 143 Or 57, 21 P2d 227.

A public welfare law directing counties to levy taxes and turn the proceeds over to the state welfare agency, did not violate subdivision 10 of this section. State v. Malheur County Court, (1949) 185 Or 392, 203 P2d 307.

FURTHER CITATIONS: Gibbs v. Multnomah County, (1959) 219 Or 84, 346 P2d 636; Warren v. Marion County, (1960) 222 Or 307, 353 P2d 257; Croft v. Lambert, (1960) 228 Or 76, 357 P2d 513, 88 ALR2d 1227; State v. Elliott, (1963) 234 Or 522, 383 P2d 382; State ex rel. Hudson v. Weiss, (1964) 237 Or 358, 391 P2d 608; State Bd. of Ed. v. Fasold, (1968) 251 Or 274, 445 P2d 489.

ATTY. GEN. OPINIONS: Penalty for trapping without a permit in a certain county, 1928-30, p 100; penalty applicable to only one fish and game district, 1928-30, p 103; validity of Act limited in application to counties having a certain population at a certain time, 1934-36, p 216; validity of Act applicable to counties having between 20,000 and 21,000 population, 1934-36, p 247; legislation granting relief to one county, 1934-36, p 257; validity of county fish hatchery law, 1938-40, p 201; law increasing jurisdiction of justices of the peace, 1942-44, p 151; validity of Act preventing a lender from making a loan conditioned by purchase of insurance from a certain agency, 1950-52, p 149; election of legislators to numbered positions, 1952-54, p 86; commodity commission tax, 1952-54, p 109; Act preventing a lender from making a loan conditioned by purchase of insurance from a certain agency, 1954-56, p 14; authority of legislature to refer a plan to divide a county into representative districts to the people of the county, 1954-56, p 66; bill authorizing the taking of property in a certain area for recreational purposes, 1954-56, p 97; school tax refund, 1956-58, p 228; varying duties of coroner from county to county, 1958-60, p 51; legislative designation of a particular bridge, 1962-64, p 180; constitutionality of law mandatory only in Multnomah County, 1962-64, p 193; construing "local" law, 1962-64, p 240; proposed constitutional tax limit, (1968) Vol 34, p 203.

LAW REVIEW CITATIONS: 37 OLR 276; 40 OLR 262; 4 WLJ 474, 537, 546; 5 WLJ 316.

Section 24

NOTES OF DECISIONS

The court will look through the nominal parties to the record to ascertain whether the action, though against individuals, is an action against the state. Salem Mills Co. v. Lord, (1902) 42 Or 82, 69 P 1033, 70 P 832; Mohler v. Fish Comm., (1929) 129 Or 302, 276 P 691; Hanson v. Mosser, (1967) 247 Or 1, 427 P2d 97.

In an action by the state for damages, this section does

not bar a defense available against any other plaintiff. State v. Shinkle, (1962) 231 Or 528, 373 P2d 674; State Forester v. Umpqua R. Nav. Co., (1970) 258 Or 10, 478 P2d 631.

Neither the state nor its officers are subject to the process of garnishment, no provision having been made by the legislature for bringing a suit against the state. Keene v. Smith, (1904) 44 Or 525, 75 P 1065.

Where a state agency is a party, the immunity of the state from suit does not obtain. Butterfield v. State Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

An action against the State Fish Commission for rental value of land appropriated by the state under statute is an action against the state requiring the state's consent. Mohler v. Fish Comm., (1929) 129 Or 302, 276 P 691.

The state cannot be sued in its own courts without its consent. United Contracting Co. v. Duby, (1930) 134 Or 1, 292 P 309.

Highway contractors may not maintain an action against the highway commission to impeach a final award of the State Highway Engineer without the state's consent. Id.

This provision is not in conflict with Ore. Const. Art. I, §10, or §18. Federal Land Bank v. Schermerhorn, (1937) 155 Or 533, 64 P2d 1337.

There is no vested right in the legislative consent of the sovereign to be sued. Wood v. Sprague, (1940) 165 Or 122, 106 P2d 287.

An action against the State Board of Higher Education is an action against the state. James & Yost, Inc. v. State Bd. of Higher Educ., (1959) 216 Or 598, 340 P2d 577.

ORS 332.180 [now ORS 332.435] operates to lift the immunity of school districts only to the extent of the liability insurance actually purchased. Vendrell v. Sch. Dist. 26C, (1961) 226 Or 263, 360 P2d 282.

An intent to waive the state's immunity must be found in the statutes. State v. Shinkle, (1962) 231 Or 528, 373 P2d 674.

The doctrine of sovereign immunity should be held within the narrowest limits to which the language of this section is susceptible. Id.

A county cannot be sued without its consent unless the legislature lifts its immunity by general law. Kern County Land Co. v. Lake County, (1962) 232 Or 405, 375 P2d 817.

The Administrative Procedures Act consents to a form of suit against the state. Oregon Newspaper Publishers Assn. v. Peterson, (1966) 244 Or 116, 415 P2d 21.

A proceeding to recover escheated property is an action against the state and the statute giving the right of action involves a consent by the state to be sued. Stairs v. Price, (1967) 247 Or 190, 428 P2d 182.

Municipal corporations' immunity is based upon this section. Hale v. Smith, (1969) 254 Or 300, 460 P2d 351.

This section does not apply to the immunity of state employes. Smith v. Cooper, (1970) 256 Or 485, 475 P2d 78.

The court did not gain jurisdiction by State Board of Higher Education's demurrer since the board is incompetent to waive sovereign immunity. James & Yost, Inc. v. State Bd. of Higher Educ., (1959) 216 Or 598, 340 P2d 577.

FURTHER CITATIONS: Larson v. Heintz Constr. Co., (1959) 219 Or 25, 345 P2d 835; Vendrell v. Sch. Dist. 26C, (1962) 233 Or 1, 376 P2d 406; Jarrett v. Wills, (1963) 235 Or 51, 383 P2d 995; Hungerford v. Portland Sanitarium and Benevolent Assn., (1963) 235 Or 412, 384 P2d 1009; Hanson v. Mosser, (1967) 247 Or 1, 427 P2d 97; Fry v. Willamalane Park & Recreation Dist., (1971) 4 Or App 575, 481 P2d 648.

ATTY. GEN. OPINIONS: Garnishment of state employe's wages, 1930-32, p 497, 1942-44, p 137; state's liability for acts of its agents, 1954-56, p 39; purpose of this section, 1954-56, p 42; power of county court to compensate injured county official or employe, 1954-56, p 84; validity of law giving benefits to certain disabled persons, 1954-56, p 89; action by county against state, 1956-58, p 75; pension for injured member of Oregon National Guard, 1960-62, p 49; county claim for costs of reprinting primary ballot, 1960-62, p 125; coverage of volunteer worker, 1960-62, p 262; damages resulting from blasting, 1962-64, p 169; liability of soil and water conservation district for injuries from rented equipment, 1964-66, p 154; liability of soil and water conservation district supervisors for torts of employes, 1964-66, p 294; authority to pay claim for damages caused by escapee of Hillcrest School of Oregon, 1966-68, p 88; authority of city to sue the state to foreclose lien on escheated property, 1966-68, p 172; civil and criminal liability of National Guardsmen, 1966-68, p 556; insurer's agreement to waive defense of sovereign immunity, (1970) Vol 35, p 404.

LAW REVIEW CITATIONS: 43 OLR 274; 46 OLR 286-316; 47 OLR 357-376; 48 OLR 99; 7 WLJ 361.

Section 25

NOTES OF DECISIONS

The signatures of the presiding officers of the houses import absolute verity, unless affirmatively contradicted by the journals which the Constitution requires to be kept. Currie v. Southern Pacific, (1892) 21 Or 566, 28 P 884; McKinnon v. Cotner, (1897) 30 Or 588, 49 P 956; State v. Boyer, (1917) 84 Or 513, 165 P 587; Woodward v. Pearson, (1940) 165 Or 40, 103 P2d 737.

Failure to enact a bill is not one of the constitutional methods by which the assembly makes law. Hungerford v. Portland Sanitarium and Benevolent Assn., (1963) 235 Or 412, 384 P2d 1009.

FURTHER CITATIONS: Boyd v. Olcott, (1921) 102 Or 325, 351, 202 P 431; Oregon Business & Tax Research Inc. v. Farrell, (1945) 176 Or 532, 159 P2d 822; Young v. Galloway, (1945) 177 Or 617, 164 P2d 427; State ex rel. Chapman v. Appling, (1960) 220 Or 41, 348 P2d 759.

ATTY. GEN. OPINIONS: Votes required to propose constitutional amendment, 1920-22, p 439; time requirements relating to signing of bills by presiding officers, 1930-32, p 447; effect of vacancy on the number of votes required for a majority, 1940-42, p 213; constitutionality of law when enrolled bill which was signed by the presiding officers differed slightly from the bill passed by the legislature, 1950-52, p 229; power to establish procedure of choosing officers, 1956-58, p 62; time within which presiding officers must sign bills, 1960-62, p 188; number of votes necessary to elect President of the Senate, (1971) Vol 35, p 413.

LAW REVIEW CITATIONS: 27 OLR 46; 38 OLR 117.

Section 27

NOTES OF DECISIONS

Every general law is necessarily a public one, but every public law is not a general one, though the words "public" and "general" as applies to statutes are sometimes synonymous. Farrell v. Port of Columbia, (1907) 50 Or 169, 91 P 546, 93 P 254; Dundee Mtg. & Trust Inv. Co. v. Sch. Dist., (1884) 21 Fed 151.

FURTHER CITATIONS: Allen v. Hirsch, (1880) 8 Or 412, 427; Crawford v. Linn County, (1884) 11 Or 482, 5 P 738; King v. Dundee Mtg. & Trust Inv. Co., (1886) 28 Fed 33.

ATTY. GEN. OPINIONS: Existence of Legislative Assembly beyond end of legislative session, 1962-64, p 209.

Section 28

NOTES OF DECISIONS

The legislature is the exclusive judge of the necessity of emergency measures, and has the exclusive right to determine when an emergency exists. Biggs v. McBride, (1889) 17 Or 640, 21 P 878, 5 LRA 115; Kadderly v. Portland, (1903) 44 Or 118, 149, 74 P 710, 75 P 222; Bennett Trust Co. v. Sengstacken, (1911) 58 Or 333, 113 P 863; Joplin v. Ten Brook, Mayor, (1928) 124 Or 36, 263 P 893; Greenberg v. Lee, (1952) 196 Or 157, 248 P2d 324.

An Act containing an emergency clause which was passed over the Governor's veto, took effect from and after its passage. Biggs v. McBride, (1889) 17 Or 640, 21 P 878, 5 LRA 115.

The question as to the propriety of the declaration of emergency may not be raised where the right originated after the expiration of the 90-day period during which the operation of the law would have been suspended. Briedwell v. Henderson, (1921) 99 Or 506, 195 P 575.

A measure takes effect 90 days from the end of the session if the legislature is silent as to when it shall take effect. State v. Hecker, (1924) 109 Or 520, 221 P 808.

A salary law containing an emergency clause became effective when signed by the Governor, notwithstanding the fact that it was indicated in the emergency clause that the law was to be effective at an earlier date. State v. Hoss, (1933) 143 Or 41, 21 P2d 234.

A law passed at a session of the legislature takes effect, if the referendum is not invoked, 90 days from the end of the session. Zimmerman v. Hoss, (1933) 144 Or 55, 23 P2d 897.

FURTHER CITATIONS: State v. Smith, (1910) 56 Or 21, 107 P 980; State v. Siemens, (1913) 68 Or 1, 133 P 1173; Beamish v. Noon, (1915) 76 Or 415, 149 P 522; Cooper v. Fox, (1918) 87 Or 657, 171 P 408; Cameron v. Stevens, (1927) 121 Or 538, 256 P 395; Daly v. Horsefly Irr. Dist., (1933) 143 Or 441, 21 P2d 234; City of Klamath Falls v. Ore. Liquor Control Comm., (1934) 146 Or 83, 29 P2d 564; Brassfield v. Brassfield, (1948) 183 Or 217, 191 P2d 639; Namba v. McCourt and Neuner, (1949) 185 Or 579, 204 P2d 569; Portland Pendleton Motor Trans. Co. v. Heltzel, Pub. Util. Commr., (1953) 197 Or 644, 255 P2d 124; Clackamas Broadcasters, Inc. v. Scherer, (1959) 216 Or 471, 339 P2d 426; Hungerford v. Portland Sanitarium and Benevolent Assn., (1963) 235 Or 412, 384 P2d 1009.

ATTY. GEN. OPINIONS: Effective date of vetoed Act, 1920-22, p 440; computation of time, 1928-30, p 150; meaning of term "passage of the act," 1928-30, p 512; meaning of "the first day of the calendar month after this act goes into effect," 1930-32, pp 161, 262; effective date when emergency clause indicates that the law should be operative on a date prior to the Governor's signature, 1934-36, p 433; effect of Governor's veto of emergency clause, 1936-38, p 201; applicability of this section to the initiative, 1948-50, p 105; postponing operative date of provision by its own terms, 1952-54, p 27; emergency clause in bill which would amend law regulating taxes, 1954-56, p 87; emergency fire-fighting costs incurred before effective date of Act creating emergency fire fund, 1958-60, p 175; effective date of referendum measure having retroactive operative date, 1958-60, p 287; statute as speaking from effective date, 1958-60, p 288; effective date of workmen compensation benefits under 1965 Act, 1964-66, p 228; right to remarry after a divorce decree entered prior to effective date of 1965 amendment, 1964-66, p 244; construing "Act," 1966-68, p 242; adjournment to start 90 days running, 1966-68, p 396; setting out measures referred to in proposed amendment, (1970) Vol 34, p 594; operation of this section in case of adjournment to reconvene on a date certain, (1971) Vol 35, p 564; effect of removal of legislative limit on county's tax base for fiscal year 1971-72 effective after July 1, 1971, (1971) Vol 35, p 735.

LAW REVIEW CITATIONS: 38 OLR 117.

Section 29

NOTES OF DECISIONS

The legislature may authorize an appropriation to pay personal incidental expenses of members, if there is no limitation of power impliedly or specifically expressed in the Constitution. Jones v. Hoss, (1930) 132 Or 175, 285 P 205.

A statute providing for publication of the codes and requiring delivery of a set to each member of the legislature, did not violate this section. Woodward v. Pearson, (1940) 165 Or 40, 103 P2d 737.

A Senator or Representative continues as a public officer after adjournment of a regular biennial session. State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

Since the Constitution, prior to the 1950 amendment to this section, by clear and unambiguous language set the compensation of members of the Legislative Assembly, the Legislative Assembly could not change that compensation by statute. State ex rel. Chapman v. Appling, (1960) 220 Or 41, 348 P2d 759.

It is the prerogative of the legislature to decide how legislative expenses are to be incurred. State ex rel. Overhulse v. Appling, (1961) 226 Or 575, 361 P2d 86.

Reimbursement in excess of legislative expenses actually incurred amounts to additional compensation and is unauthorized. Id.

Reimbursement of legislative expenses incurred by a member acting individually and separately as he performs his legislative function is not prohibited by this section. Id.

The distinction between legislative and personal expenses can be drawn only as each expenditure is examined with reference to the end it was intended to serve. Id.

This section does not prohibit reimbursement of legislative expenses. Id.

ATTY. GEN. OPINIONS: Increase by legislature of its salary over and above that prescribed by the Constitution, 1930-32, p 128, 1940-42, p 113; legislator's right to retain and sell codes, 1938-40, p 208; allowance for personal expenses incurred by legislator while serving on an interim committee, 1950-52, p 125; whether salary can be paid other than annually, 1952-54, p 66; legislator serving also as member of a school board, 1952-54, p 185; legislator serving also as member of county hospital board, 1952-54, p 204; compensation of members if organization of legislature delayed, 1956-58, p 66; legislature fixing salaries of its members, 1956-58, p 83; allowance for personal expenses of state officer or employe, 1956-58, p 146; legislator as paid employe of interim committee, 1956-58, p 173; compensation for person who acts as Governor, 1958-60, p 59; compensation to presiding officer for preparing journal, 1958-60, p 59; cost of food, milk and nonalcoholic beverages as legislative expense under certain circumstances, 1958-60, p 141; effect of unconstitutional amendment (1959) on original statute, 1960-62, p 104; salary of doctor in attendance during session, 1960-62, p 223; auditing legislative expense claims, 1960-62, p 226; auditing standards for expense claims of legislators, 1960-62, p 276; authority to pay per diem to members if organization of legislature delayed, (1971) Vol 35, p 463; eligibility of legislators to be members of Public Employes' Retirement System, (1971) Vol 35, p 628.

LAW REVIEW CITATIONS: 40 OLR 273.

Section 30

NOTES OF DECISIONS

The position of a bridge commissioner under the Meussdorffer Act was not an office within the meaning of this section. State v. George, (1892) 22 Or 142, 29 P 356, 29 Am St Rep 586, 16 LRA 737.

The word "election," as used in the Constitution, includes both a choice by the electoral body at large and by the Legislative Assembly. State v. Compson, (1898) 34 Or 25, 54 P 349.

An appointee of the corporation commission, who at the time of his appointment was a member of the legislature and had been a member of the legislature when the Act creating the office was enacted, was within the inhibition of this section. Gibson v. Kay, (1914) 68 Or 589, 137 P 864.

ATTY. GEN. OPINIONS: Game and fish commissioners as officers within this section, 1920-22, p 84; applicability of section to appraisers and attorneys for commissions created by legislature, 1920-22, p 261; legislator as tax commissioner, 1928-30, p 210; manager and clerks of state liquor store as officers within this section, 1932-34, p 575; legislators holding other offices, 1934-36, p 329; appointment of a legislator as judge pro tempore, 1948-50, p 242; legislator as member of "bridge committee," 1952-54, p 185; legislator as member of mental health advisory committee, 1958-60, p 170; legislator as State Fire Marshal, 1962-64, p 228; eligibility of re-elected senator who participated in salary increase, 1966-68, p 102; legislator as member of metropolitan study commission, 1966-68, p 254; determination of eligibility of candidate to hold office, 1966-68, p 503.

LAW REVIEW CITATIONS: 28 OLR 332.

Section 31

ATTY. GEN. OPINIONS: Validity of oath taken before a notary public in another state, 1942-44, p 108; necessity of taking oath of office, 1966-68, p 357.

Article V

Executive Department

Section 1

NOTES OF DECISIONS

Power to appoint officers in order to fill vacancies is not conferred upon the Governor by this section. Biggs v. McBride, (1889) 17 Or 640, 21 P 878, 5 LRA 115.

The Governor being the chief executive, all other officers of the executive branch of the government are more or less subordinate to him. Olcott v. Hoff, (1919) 92 Or 462, 181 P 466.

FURTHER CITATIONS: State v. Wickenheiser, (1970) 3 Or App 509, 475 P2d 422.

ATTY. GEN. OPINIONS: Governor's power to apply for advance or loan of funds for State Unemployment Trust Fund, 1956-58, p 290; resignation by incumbent Secretary of State as condition of qualifying for office of Governor, 1958-60, p 98; authority of Governor to appoint acting adjutant general, 1958-60, p 145; prerogative powers of Governor, 1960-62, p 45; authority of Governor to require location of Public Welfare Commission in Salem, 1960-62, p 45; suspension of Article V by Article X, section 6, 1960-62, p 228; authority to cut authorized capital construction, (1969) Vol 34, p 788.

Section 2

NOTES OF DECISIONS

The legislature cannot by enactment enlarge the qualifications of the Governor above those specified in the Constitution. State v. Welch, (1953) 198 Or 670, 259 P2d 112.

FURTHER CITATIONS: Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749; State ex rel Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918.

Section 3

CASE CITATIONS: State ex rel. O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482.

ATTY. GEN. OPINIONS: Power to fill vacancy in office of Secretary of State, 1958-60, p 98; resignation by incumbent Secretary of State as condition of qualifying for office of Governor, 1958-60, p 98; effect of resignation conditioned upon qualification for another office, 1958-60, p 103.

LAW REVIEW CITATIONS: 39 OLR 140.

Section 4

CASE CITATIONS: State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123; State ex rel. O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482; State ex rel. Musa v. Minear, (1965) 240 Or 315, 401 P2d 36.

ATTY. GEN. OPINIONS: Election as by electors rather than by an election district, 1960-62, p 146; publication of election results in presence of unorganized Senate, (1971) Vol 35, p 515.

Section 5

NOTES OF DECISIONS

"Elect," as used with respect to the function of the Legislative Assembly in the event of a tie vote, means "appoint." State v. Compson, (1898) 34 Or 25, 54 P 349.

ATTY. GEN. OPINIONS: Publication of results of gubernatorial election in presence of unorganized Senate, (1971) Vol 35, p 515.

Section 6

ATTY. GEN. OPINIONS: As limiting newly elected successor to unexpired term of predecessor, 1958-60, p 58.

Section 8

NOTES OF DECISIONS

The Governor's successor becomes Governor in fact and is entitled to receive compensation as holder of the office. Olcott v. Hoff, (1919) 92 Or 462, 181 P 466.

The President of the Senate, once duly elected, is eligible to succeed the Governor during the life of the Legislative Assembly, although the regular legislative session is adjourned sine die. State v. Patterson, (1952) 197 Or 1, 251 P2d 123.

The legislature cannot by enactment enlarge the qualifications of the Governor. State v. Welch, (1953) 198 Or 670, 259 P2d 112.

FURTHER CITATIONS: Chadwick v. Earhart, (1889) 11 Or 389, 4 P 1180; State v. Olcott, (1920) 94 Or 633, 187 P 286.

ATTY. GEN. OPINIONS: Governor's right to salary during temporary absence, 1920-22, p 28; procedure during temporary absence of Governor, 1926-28, p 180, 1932-34, p 47, 1940-42, p 191; determining when successor's term expires, 1928-30, p 457; compensation for person who acts as Governor, 1958-60, p 59; use of term "general election" in Constitution, 1960-62, p 252; selection of interim committee chairman, 1966-68, p 316.

Section 9

ATTY. GEN. OPINIONS: Validity of a bill relating to the national guard, 1930-32, p 136; declaration of martial law by Governor, 1934-36, p 380, 1942-44, p 286; effect of Oregon Civil Defense Act on Governor's power to quell disorder caused by labor disputes, 1950-52, p 114; power of Governor to declare that a state of emergency exists, 1950-52, p 210; full-time employes of Oregon National Guard as on "active duty," 1960-62, p 6; power of National Guard to arrest, 1966-68, p 556.

Section 10

NOTES OF DECISIONS

Power is vested in the Governor by this section to maintain a proceeding by writ of mandamus to compel county officials and others to perform the duties imposed upon them by law in regard to the calling and holding of elections. State v. Stannard, (1917) 84 Or 450, 165 P 566, LRA 1917F, 215.

FURTHER CITATIONS: State v. Williams, (1959) 215 Or 639, 336 P2d 68.

ATTY. GEN. OPINIONS: Governor's power to replace a sheriff, 1932-34, p 227; Governor's duty regarding extradition, 1952-54, p 74; Attorney General's power to investigate and prosecute violations of criminal laws, 1952-54, p 194; Governor's power to apply for advance or loan of funds for State Unemployment Trust Fund, 1956-58, p 290; authority to accept conditional resignation of Secretary of State, 1958-60, p 103; power of National Guard to arrest, 1966-68, p 556.

LAW REVIEW CITATIONS: 39 OLR 142.

Section 12

NOTES OF DECISIONS

This provision implies the existence of a legislature notwithstanding the previous adjournment of the regular session. State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

ATTY. GEN. OPINIONS: Payment of expenses of special session, 1956-58, p 149; legislature as "in session" during special session, 1962-64, p 252; limitation of subjects that may be considered, 1966-68, p 343; authority of legislature to reconvene on a fixed date after adjournment, authority of presiding officers to reconvene legislature, (1971) Vol 35, p 564.

Section 13

ATTY. GEN. OPINIONS: Validity of bill giving the executive department control over fiscal affairs, 1950-52, p 139; validity of Act giving the Governor general powers over the financial administration of the government, 1950-52, p 170; control that the Governor may be given over the Secretary of State when the latter is performing duties assigned by statute, 1950-52, p 178; Governor's power to apply for advance or loan of funds for State Unemployment Trust Fund, 1956-58, p 290.

Section 14

NOTES OF DECISIONS

The effect of a pardon is to relieve the offender not only from the imprisonment but from the disabilities of the judgment of conviction, and restore him to the full enjoyment of his civil rights. Wood v. Fitzgerald, (1870) 3 Or 568. **But see** Darragh v. Bird, (1870) 3 Or 229.

The power to lawfully reprieve from the sentence of death presupposes the power to sentence to death, and is itself a recognition of the lawfulness of capital punishment. State v. Finch, (1909) 54 Or 482, 103 P 505.

A parole by the court cannot be construed to be a conditional pardon, and therefore does not deprive a person convicted of a crime of the right to appeal to the Supreme Court. State v. Goddard, (1914) 69 Or 73, 133 P 90, 138 P 243, Ann Cas 1916A, 146.

A pardon removes the punishment and legal disabilities but it does not obliterate or wipe out the fact, and upon judicial inquiry affecting the moral character of the person pardoned, the fact of his conviction may be considered notwithstanding the pardon. In re Spenser, (1878) 5 Sawy 195, Fed Cas No. 13,234.

Statutes providing for parole of prisoners do not involve any exercise of the pardon power of the Governor, even when the power of parole is vested in that official. Fredericks v. Gladden, (1957) 211 Or 312, 315 P2d 1010.

The discretion of the Governor in granting reprieves is not subject to control by the judiciary. Eacret v. Holmes, (1958) 215 Or 121, 333 P2d 741.

FURTHER CITATIONS: Ex parte Houghton, (1907) 49 Or 232, 89 P 801, 13 Ann Cas 1101, 9 LRA(NS) 737; Carpenter v. Lord, (1918) 88 Or 128, 171 P 577; Fehl v. Martin, (1937) 155 Or 455, 64 P2d 631; Fredericks v. Gladden, (1957) 209 Or 683, 308 P2d 613.

ATTY. GEN. OPINIONS: Effect of a reprieve, 1922-24, p 369; issuance of a conditional reprieve, 1922-24, p 762; parole of persons violating municipal ordinances, 1924-26, p 101, 1940-42, p 383; conditional pardons, 1924-26, p 140, 1926-28, pp 331, 364, 1934-36, p 489; effect of parole on second sentence of prisoner, 1924-26, p 548; Governor's power to grant petition for remittitur of forfeiture of bail, 1926-28, p 19; pardon for person in hospital rather than penitentiary, 1926-28, p 52; granting relief from penalties and forfeitures as well as imprisonment, 1926-28, p 71; convictions in municipal courts, 1930-32, p 301; revocation of license for violation which is pardoned, 1930-32, p 652; validity of legislation granting parole powers to persons other than the Governor, 1934-36, p 247; issuance of pardon for the purpose of deportation of prisoner by the Federal Government, 1934-36, p 599; power of justice of the peace to remit fine, 1936-38, p 110; commutation by Governor of sentence in the penitentiary to lesser sentence in the county jail, 1936-38, p 159; exclusiveness of Governor's power to remit a fine, 1936-38, p 490; Governor's power to relieve driver from complying with safety responsibility laws, 1936-38, p 632; remitting fine which has been paid, 1936-38, p 692; restoration of civil rights, 1938-40, p 518; Governor's powers before sentence is imposed and after conviction, 1938-40, p 733; commutations of juveniles, 1940-42, p 24; Governor's power to remit costs in criminal cases, 1942-44, p 376; courts' power to suspend imposition or execution of sentence, 1952-54, p 166; legislative authority to reduce judgment and sentence, 1958-60, p 246; meaning of "forfeiture," 1964-66, p 171.

LAW REVIEW CITATIONS: 16 OLR 405; 39 OLR 138; 45 OLR 27.

Section 15a

NOTES OF DECISIONS

An initiative measure is not subject to the veto power of the Governor. State v. Pac. States Tel. & Tel. Co., (1909) 53 Or 162, 99 P 427.

FURTHER CITATIONS: Moore v. Snell, (1938) 159 Or 675, 82 P2d 888.

ATTY. GEN. OPINIONS: Construction of term "single items," 1924-26, p 166; veto of single item in an appropriation bill, 1924-26, p 199; reconsideration by legislature of single items vetoed, 1932-34, p 478; effect of veto of emergency clause, 1936-38, p 201; validity of proposed bill authorizing Governor to reduce the amount of funds allotted to administrative agencies, 1950-52, p 194; circumventing veto power, 1958-60, p 191; authority to veto part of HB 2044 (1965), 1964-66, p 215.

LAW REVIEW CITATIONS: 19 OLR 73.

Section 15b

NOTES OF DECISIONS

Except proposed laws which the legislature may refer to the people for their approval or rejection, all legislative enactments must be passed upon by the Governor as prescribed by this section. Kadderly v. Portland, (1903) 44 Or 118, 74 P 710, 75 P 222.

This section was modified by Ore. Const. Art. IV, §1 [repealed 1968] to the effect that initiative laws are not subject to the Governor's veto powers. State v. Kline, (1908) 50 Or 426, 93 P 237.

A bill became a law when the Governor failed to return it to the house where it originated within five days from the date it was presented to him. Bennett Trust Co. v. Sengstacken, (1911) 58 Or 333, 113 P 863.

A bill is a proposed law. Herbring v. Brown, (1919) 92 Or 176, 180 P 328.

Where the Governor vetoed the emergency provision in a bill and returned it to the house, the action of the house in placing the bill, together with the veto message, on the table, amounted only to a refusal to take action with respect to the Governor's veto of the emergency clause, and the balance of the bill became law. Moore v. Snell, (1938) 159 Or 675, 82 P2d 888.

FURTHER CITATIONS: State v. Kozer, (1925) 115 Or 638, 239 P 805.

ATTY. GEN. OPINIONS: Computation of time for vetoes, 1924-26, p 148, 1926-28, p 131; procedure when through error a bill is not submitted to the Governor for approval, 1930-32, p 447; amending a vetoed bill before its reconsideration, 1956-58, p 170; prerequisites for Act to become effective, 1958-60, p 175; circumventing veto power, 1958-60, p 191; time within which presiding officers must sign bills, 1960-62, p 188; legislative review of administrative rules, 1962-64, p 161; construing "bill," 1966-68, p 242.

LAW REVIEW CITATIONS: 38 OLR 117, 118.

Section 16

NOTES OF DECISIONS

An office without an incumbent is vacant within this provision. Cline v. Greenwood, (1882) 10 Or 230.

No vacancy occurred where the successor of an incumbent circuit court judge died after election but before taking oath. State v. Tazwell, (1941) 166 Or 349, 111 P2d 1021.

FURTHER CITATIONS: State v. Johns, (1870) 3 Or 533; Howell v. Bain, (1945) 176 Or 187, 156 P2d 576; State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174; State ex rel. McCormick v. Appling, (1964) 236 Or 485, 389 P2d 677; State ex rel. Musa v. Minear, (1965) 240 Or 315, 401 P2d 36; Geiser v. Myers, (1968) 249 Or 543, 439 P2d 859.

ATTY. GEN. OPINIONS: Appointment of person to fill vacancy as justice of the peace, 1926-28, pp 245, 432, 604, 1928-30, p 245, 1934-36, pp 320, 525, 1946-48, p 443; procedure for filling vacancy in House of Representatives of Congress, 1926-28, p 269; vacancy in office of constable, 1926-28, p 396; appointment of persons to fill vacancies in state legislature, 1928-30, pp 105, 615, 1930-32, p 63, 1942-44, p 182; length of term of person filling a vacancy, 1928-30, pp 478, 593, 1932-34, p 469, 1934-36, p 195; validity of bill calling for the appointment of judge pro tempore by other judges, 1940-42,p 208; filling vacancies caused by call to military service, 1942-44, p 118; appointing new supervisor for a soil conservation district, 1942-44, p 437.

Validity of legislation calling for the appointment of pro tempore judges by the Chief Justice of the Supreme Court, 1954-56, p 68; terms of office of judges appointed to fill vacancy, 1956-58, p 28; constitutionality of proposed law authorizing central committees to fill vacancies in partisan offices, 1956-58, p 69; term of county judge appointed to fill vacancy, 1956-58, p 232; term of sheriff elected to fill vacancy created by resignation, 1958-60, p 58; power to fill vacancy in office of Secretary of State, 1958-60, p 98; constitutionality of statute limiting Governor's power to fill vacancies in constitutional offices, 1958-60, p 113; authority of Governor to appoint acting adjutant general, 1958-60, p 145; terms of office of county judges and commissioners appointed to fill vacancies, 1958-60, p 315; vacancy in office of United States Senator, 1958-60, p 353; creation of district court and termination of justice court when justice of the peace appointed, 1960-62, p 74; affidavit of non-engagement in private practice by district attorney appointed and then elected to office, 1960-62, p 101; failure to elect to fill vacancy, 1960-62, p 235; use of term "general election" in Constitution, 1960-62, p 252; term of district court clerk elected to fill vacancy created by death, 1962-64, p 318; construing proposal for city-county consolidation, 1966-68, p 638; procedure for implementing new district court judgeship, (1968) Vol 34, p 175; term for which incumbent Superintendent of Public Instruction was elected, (1969) Vol 34, p 391.

Section 17

NOTES OF DECISIONS

Special elections to fill vacancies in the Legislative Assembly are held at such times as the Governor may appoint in his writ authorizing the same. Breding v. Williams, (1900) 37 Or 433, 61 P 858.

The courts are without authority to require the Governor by mandamus to issue a writ of election to fill a vacancy in the State Senate. Putnam v. Norblad, (1930) 134 Or 433, 293 P 940.

Article VI

Administrative Department

Section 1

ATTY. GEN. OPINIONS: Effect of appointment pro tempore on eight-year provision, 1934-36, p 639; responsibility of Secretary of State for making independent post audits, 1960-62, p 361; State Treasurer's authority to enter contract with firm in which legislator has an interest, 1962-64, p 335; authority to determine accountability of officers handling Student Driver Training Fund and Motor Vehicle Accident Fund, 1966-68, p 222.

Section 2

NOTES OF DECISIONS

The drawing of a warrant on the State Treasurer is an act of auditing, and if the claim is authorized by law, the Secretary of State must draw a warrant for it even though no appropriation has been made to meet it. Brown v. Fleischner, (1871) 4 Or 132; Shattuck v. Kincaid, (1897) 31 Or 379, 399, 49 P 758; Croasman v. Kincaid, (1897) 31 Or 445, 49 P 764; Boyd v. Dunbar, (1904) 44 Or 380, 75 P 695.

In performing the duties of auditor, the Secretary of State does not act judicially in allowing or rejecting claims, nor do his decisions thereon have the conclusive effect of adjudications. State v. Brown, (1882) 10 Or 215.

The Secretary of State was well within his duty when he refused to draw his warrant for a claim under an Act before it became operative. Salem Hosp. v. Olcott, (1913) 67 Or 451, 136 P 341.

Procedure for presentation of claims for reimbursement of legislative expenses by legislators authorized by a Senate joint resolution was constitutional. State ex rel. Overhulse v. Appling, (1961) 226 Or 575, 361 P2d 86.

FURTHER CITATIONS: Linklater v. Nyberg, (1963) 234 Or 117, 380 P2d 631.

ATTY. GEN. OPINIONS: Claims not authorized by law, 1922-24, p 478, 1934-36, p 133, 1938-40, p 773; Secretary of State's authority to delegate his duty to sign warrants, 1928-30, p 39; supervision of traffic department by Secretary of State, 1930-32, p 135; warrant to person other than claimant who rendered services for state, 1946-48, p 15; validity of bill giving the executive department control over fiscal affairs, 1950-52, p 139; control that the Governor may be given over Secretary of State when the latter is performing duties assigned by statute, 1950-52, p 178; proposed amendment removing "auditor of public accounts" from duties of Secretary of State, 1952-54, p 77.

Original bills as official Acts of the legislature, 1956-58, p 166; refund where wheat taxes overpaid, 1956-58, p 267; examination and allowance of claims by State Auditor, 1956-58, p 277; maintenance of control accounting records, 1958-60, p 39; requirement that incumbent Secretary of State resign to be eligible to take oath as Governor, 1958-60, p 98; authority of Secretary of State to designate fund out of which warrant is payable by machine code punch, 1958-60, p 418; payment of authorized pension for which there is no current appropriation, 1960-62, p 49; requirement that state officers appoint interim successors, 1960-62, p 228; construing "auditor of public accounts," 1960-62, p 361; authority of Secretary of State to examine income tax returns during audit of State Tax Commission accounts, 1964-66, p 118; approval of expenses of Oregon Historical Society before payment from Highway Fund, 1964-66, p 200; authority to determine accountability of officers handling Student Driver Training Fund and Motor Vehicle Accident Fund, 1966-68, p 222.

Section 3

CASE CITATIONS: Kinney v. Gen. Constr. Co., (1967) 248 Or 500, 435 P2d 297.

LAW REVIEW CITATIONS: 46 OLR 28.

Section 4

NOTES OF DECISIONS

A statute defining the duties of the State Treasurer was consonant with and not in violation of this section. State v. Holman, (1933) 142 Or 339, 20 P2d 430.

ATTY. GEN. OPINIONS: Statute authorizing State Treasurer to deposit state funds in banks and trust companies, 1958-60, p 212; location of "seat of government," 1960-62, p 45; requirement that state officers appoint interim successors, 1960-62, p 228; State Treasurer's authority to enter contract with firm in which legislator has an interest, 1962-64, p 335.

Section 6

NOTES OF DECISIONS

The office of county surveyor is a constitutional office for which the qualifications are prescribed by the Constitution. State v. Welch, (1953) 198 Or 670, 259 P2d 112.

FURTHER CITATIONS: Lane v. Coos County, (1882) 10 Or 123; Stevens v. Carter, (1895) 27 Or 553, 40 P 1074, 31 LRA 342; Board of Directors v. Peterson, (1913) 64 Or 46, 128 P 837, 129 P 123; Ruonala v. Bd. of County Commrs., (1957) 212 Or 309, 319 P2d 898; State ex rel. Appling v. Chase, (1960) 224 Or 112, 355 P2d 631.

ATTY. GEN. OPINIONS: Validity of reapportionment legislation, 1942-44, p 115, 1950-52, p 182; status of office of county coroner where incumbent is re-elected and has failed to file his oath of office and certificate of election, 1952-54, p 65; effect of amendment to this section to delete the county coroner and surveyor, 1954-56, p 99; removal of sheriff from office upon judgment being obtained against his official bond, 1954-56, p 173; coroner as constitutional officer, 1958-60, p 51; term of newly elected sheriff where office became vacant before expiration of term of former sheriff, 1958-60, p 58; authority of legislature to establish qualifications for county officers, 1958-60, p 113; use of term "general election" in Constitution, 1960-62, p 252; authority

under county home rule to create county offices, 1960-62, p 388; authority for sick leave benefits of county elected officials, 1964-66, p 256; legislative extension of terms of county officers, 1966-68, p 242; construing proposal for city-county consolidation, 1966-68, p 638; accounting for road funds, (1970) Vol 35, p 1.

LAW REVIEW CITATIONS: 46 OLR 251, 277.

Section 7

NOTES OF DECISIONS

The legislature has power to provide by statute for the appointment of a school superintendent of a county school district. Stevens v. Carter, (1895) 27 Or 553, 40 P 1074, 31 LRA 342; Klamath County Sch. Dist. v. Am. Sur. Co., (1929) 129 Or 248, 275 P 917.

The legislature is empowered by this section to create such county offices as may be necessary. Lane v. Coos County, (1882) 10 Or 123.

This section does not confer on the legislature power to prescribe the qualifications of voters at municipal elections. Livesley v. Litchfield, (1905) 47 Or 248, 83 P 142, 144 Am St Rep 920.

Municipal water commissioners were not within the purview of this section. David v. Portland Water Committee, (1886) 14 Or 98, 12 P 174.

A detective on a city police force was not an officer within the meaning of this section. Reising v. Portland, (1910) 57 Or 295, 111 P 377, Ann Cas 1912D, 895.

FURTHER CITATIONS: State ex rel. Appling v. Chase, (1960) 224 Or 112, 355 P2d 631.

ATTY. GEN. OPINIONS: Effect of amendment to section 6 of this Article deleting the county coroner and surveyor, 1954-56, p 99; authority of legislature to establish qualifications for county officers, 1958-60, p 113; authority under county home rule to create county offices, 1960-62, p 388.

Section 8

NOTES OF DECISIONS

The county superintendent of schools is a county officer within the meaning of this section. State ex rel. Stevens v. Stevens, (1896) 29 Or 464, 44 P 898.

The office of county surveyor is a constitutional office for which the qualifications are prescribed by the Constitution. State ex rel. Powers v. Welch, (1953) 198 Or 670, 259 P2d 112.

If the Constitution prescribes the qualifications of an officer, it is beyond the power of the legislature to prescribe additional qualifications. State ex rel. Chapman v. Appling, (1960) 220 Or 41, 348 P2d 759.

FURTHER CITATIONS: Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749; State ex rel. Appling v. Chase, (1960) 224 Or 112, 355 P2d 631.

ATTY. GEN. OPINIONS: Alien as deputy district attorney, 1924-26, p 80; nonresident as county superintendent, 1930-32, p 85; residential requirement for county surveyor, 1930-32, p 116; nonresident as member of a county welfare commission, 1938-40, p 388; professional qualifications of county surveyor, 1944-46, p 135; a minor as deputy sheriff, 1944-46, p 215; requirement that county surveyors be registered as professional engineers or professional land surveyors, 1952-54, p 159; effect of amendment to section 6 of this Article deleting the county coroner and surveyor, 1954-56, p 99; effect upon candidacy of failure to pay a tax or satisfy a tax lien, 1954-56, p 196; coroner as constitutional officer, 1958-60, p 51; authority of legislature to establish qualifications for county officers, 1958-60, p 113; citizenship requirement for director of county civil defense, 1960-62, p 133; establishing qualifications for sheriff's deputies, 1962-64, p 109; construing proposal for city-county consolidation, 1966-68, p 638; a registered elector under 21 as an official registrar of voters, (1971) Vol 35, p 769.

Section 9

ATTY. GEN. OPINIONS: Constitutionality of proposed law authorizing central committees to fill vacancies in partisan offices, 1956-58, p 69; validity of county charter provisions regarding term of sheriff, 1960-62, p 403.

Section 10

NOTES OF DECISIONS

A judge's term may not be reduced by the adoption of a home rule charter. Higgins v. Hood River County, (1966) 245 Or 135, 420 P2d 634.

Whether state legislation is binding upon a home-rule county depends on whether the subject is one of paramount statewide concern. Department of Rev. v. Multnomah County, (1970) 4 OTR 133.

Oregon Laws 1969, ch. 45, §8 prohibiting public assistance levy for three years was a matter of statewide concern. Id.

FURTHER CITATIONS: Fischer v. Miller, (1961) 228 Or 54, 363 P2d 1109; Civin v. Frye, (1963) 236 Or 233, 388 P2d 112; White v. Umatilla County, (1965) 247 F Supp 918.

ATTY. GEN. OPINIONS: Limited nature of home rule, 1958-60, p 136; residual power of legislature over county government once home rule is adopted, 1958-60, p 183; bonding under county home rule, 1958-60, p 183; financing local improvements, 1958-60, p 183; construing "any" legally called election, 1958-60, p 390; constitutional authority to make Public Employes' Retirement Act mandatory for political subdivisions, 1960-62, p 145; authority under county home rule to create county offices, 1960-62, p 388; validity of county charter provision regarding budget procedure, term of sheriff and judicial duties, 1960-62, p 403; alternative methods of placing charter on ballot, 1960-62, p 407; abolishing office of incumbent county judge divested of judicial authority, 1964-66, p 11; county charter transferring nonjudicial functions of county judge to other officials, 1964-66, p 25; extent of legislative authority to change boundaries, 1964-66, p 143; authority of board of county commissioners to make library board advisory, 1964-66, p 287; construing proposed constitutional tax limit, 1964-66, p 429.

Proper election for submission of county charter amendment or repeal, 1966-68, p 33; authority for tri-county stadium, 1966-68, p 47; authority of home rule counties to enact ordinances regulating pinball machines; application of ordinances within cities, 1966-68, p 174; power to levy sales or income tax, 1966-68, p 238; procedure to repeal charter, 1966-68, p 242; authority of home rule county to regulate dogs, 1966-68, p 260; authority to regulate noise of railroads, 1966-68, p 457; state and county authority in program on aging, 1966-68, p 479; county zoning procedure by initiative, 1966-68, p 481; authority to consolidate a city and a county, 1966-68, p 518; effect of county ordinance enacted under home rule charter upon city having power under its own charter to enact similar measures, 1966-68, p 596; construing proposal for city-county consolidation, 1966-68, p 638; operation of sanitary authority ordinances within a city, (1968) Vol 34, p 183; proposed constitutional tax limit, (1968) Vol 34, p 203; legislative authority to consolidate counties or make changes in county boundaries, (1968) Vol 34, p 356; county authority to develop industrial sites, (1970) Vol 34, p 1000; financing public welfare as a matter of state concern, (1970) Vol 34, p 1043; accounting for road funds,

(1970) Vol 35, p 1; authority to establish policy for retention and destruction of county records, (1971) Vol 35, p 530.

LAW REVIEW CITATIONS: 46 OLR 251-285; 49 OLR 155; 4 WLJ 462, 467, 537, 540, 546; 5 WLJ 197.

Article VII (Amended)

Judicial Department

Article VII (Amended)

NOTES OF DECISIONS

This Article has supplanted the original Article VII, the latter Article being continued in effect only until otherwise provided by legislative enactment. Yeaton v. Barnhart, (1915) 78 Or 249, 150 P 742, 152 P 1192; Starr v. Laundry & Dry Cleaning Workers' Local Union 101, (1937) 155 Or 634, 63 P2d 1104; State v. Anderson, (1956) 207 Or 675, 298 P2d 195; State v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784.

This Article operates prospectively. Darling v. Miles, (1911) 57 Or 593, 111 P 702, 112 P 1084.

Ore. Const. Art. IV, §23, prohibiting the legislature from passing any special or local laws, regulating the practice in courts, was not superseded by the 1910 amendment. In re McCormick's Estate, (1914) 72 Or 608, 614, 143 P 915, 144 P 425.

The 1910 amendment did not repeal this Article as originally adopted, except so far as its provisions were inconsistent with Article VII prior to amendment. Phy v. Wright, (1915) 75 Or 428, 146 P 138, 147 P 381.

As of 1917, the changes authorized by the adoption of this amendment had not been made. Stadelman v. Miner, (1917) 83 Or 348, 392, 155 P 708, 163 P 585, 983.

Other sections of the Constitution were not repealed or amended by the new form of Article VII. State v. Tazwell, (1941) 166 Or 349, 111 P2d 1021.

Although the 1910 amendment authorized legislative enlargement of probate jurisdiction, it did not of itself enlarge by construction the statutes which had been enacted prior thereto. In re Stroman's Estate, (1946) 178 Or 100, 165 P2d 576.

FURTHER CITATIONS: Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749; State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174; State ex rel. Venn v. Reid, (1956) 207 Or 617, 298 P2d 990; Jackson v. United States Nat. Bank, (1957) 153 F Supp 104; State ex rel. Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918.

ATTY. GEN. OPINIONS: County judge as member of school board, 1952-54, p 185; courts in which judicial power is vested, 1952-54, p 217; removal of sheriff from office upon judgment being obtained against his official bond, 1954-56, p 173; judicial functions of county judge, 1960-62, p 403; county charter abolishing office of county judge prior to expiration of his term, 1964-66, p 25; term of office of county judge with no judicial functions, 1964-66, p 327; expenses of district court judge in purchasing supplies for court, 1964-66, p 409.

LAW REVIEW CITATIONS: 35 OLR 2; 41 OLR 124; 44 OLR 46; 46 OLR 281.

Section 1

NOTES OF DECISIONS

1. In general
2. Jurisdiction of courts
3. Terms of judges

1. In general

Since the amendment of Ore. Const. Art. VII, the county court has not been a constitutional court, and a county court judge has not been the incumbent of a so-called constitutional office, though his tenure and the immunity of his salary from reduction during his term of office are protected by Ore. Const. Art. VII, §1. Fehl v. Jackson County, (1945) 177 Or 200, 161 P2d 782; State ex rel. Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918.

In establishing new courts under this section, the legislature must proceed by general laws, and not by special laws. In re McCormick's Estate, (1914) 72 Or 608, 618, 143 P 915, 144 P 425.

An Act creating the State Water Board, with power to determine water rights, subject to review by the courts, did not encroach upon the jurisdiction of the judicial department. In re Willow Creek, (1915) 74 Or 592, 144 P 505, 146 P 475.

Under this section, as amended, the legislature was authorized to confer judicial powers upon the State Industrial Accident Commission. Evanhoff v. State Ind. Acc. Comm., (1915) 78 Or 503, 515, 154 P 106.

This section preserved the courts which were organized under the original provisions of the Constitution. Webster v. Boyer, (1916) 81 Or 485, 159 P 1166, Ann Cas 1918D, 988.

The court of domestic relations was created by virtue of the authority hereby conferred. State v. Harvey, (1917) 117 Or 466, 242 P 440.

The Supreme Court is a creature of the Constitution. Warren Constr. Co. v. Grant, (1931) 137 Or 410, 426, 299 P 686, 2 P2d 1118.

The State Industrial Accident Commission is not a court within the meaning of this section. Roles Shingle Co. v. Bergerson, (1933) 142 Or 131, 19 P2d 94.

Circuit courts do not exercise all the inherent powers of the common law courts. State ex rel. Ricco v. Biggs, (1953) 198 Or 413, 446, 255 P2d 1055.

A statute authorizing a circuit judge in a judicial district having a population of 200,000 or more to reside outside of the district did not violate this section. Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749.

An Act authorizing Supreme Court to appoint circuit judge or judges to sit temporarily as a member or as members of the Supreme Court was unconstitutional. State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174. **Distinguished in** State ex rel. Mullican v. Parsons, (1971) 257 Or 468, 479 P2d 734.

Judges are public officers whose duty it is to exercise judicial functions as a part of the judicial department of the government.Id.

If a new court or judgeship is created for a particular district of the state, the judge of such court must be elected by the legal voters of that district or, if for the state at large, by the legal voters of the state, except that until the next general election following the effective date of the Act

creating the office, the Governor shall fill the office by appointment. Id.

New courts and additional judgeships created by the legislature immediately become subject to other constitutional provisions. Id.

Although requirements of payment of fees for appeal bond, transcript and notice of appeal are an unconstitutional requirement barring the appeal of an impoverished applicant on a state writ of habeas corpus, an applicant cannot apply for habeas corpus in the federal courts until he has exhausted all of his state remedies, including an original proceeding of habeas corpus in forma pauperis in the State Supreme Court. Daugharty v. Gladden, (1957) 150 F Supp 887.

Legislature can take all judicial power from county court. State v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784. **Distinguished in** State ex rel. Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918.

When office of county judge has been stripped by law of its judicial functions, the county court is not a court within the meaning of this section. Id.

This section, when considered with Ore. Const. Art. IX, §2, is not intended to include judges of municipal courts of cities. State ex rel. Mullican v. Parsons, (1971) 257 Or 468, 479 P2d 734.

2. Jurisdiction of courts

As incident to its appellate jurisdiction, the Supreme Court has such inherent powers as are necessary to the effectual exercise of its jurisdiction, and for that purpose it may issue a restraining order. Livesley v. Krebs Hop Co., (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1; Kellaher v. Portland, (1911) 57 Or 575, 110 P 492, 112 P 1076.

County courts may be abolished, or their jurisdiction may be altered, by virtue of the authority conferred by this and the succeeding section. In re Will of Pittock, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; City of Astoria v. Cornelius, (1926) 119 Or 264, 240 P 233; Jacobson v. Holt, (1927) 121 Or 462, 255 P 901.

The Supreme Court will take jurisdiction of a collateral attack on the constitutionality of the offices of certain of its members. State v. Cochran, (1909) 55 Or 157, 170, 104 P 419, 105 P 884.

An injunction will not be issued by the Supreme Court to enjoin a proceeding at law in which a cross-bill has been filed, until final hearing upon appeal after dismissal of the cross-bill. Brice v. Younger, (1912) 63 Or 4, 123 P 905.

The Justices' Code does not change the nature of the constitutional rule that justices' courts are of limited jurisdiction, nor does it affect the principle that their judgments must be sustained affirmatively by positive proof that they had jurisdiction of the cases they attempt to decide. Evans v. Marvin, (1915) 76 Or 540, 148 P 1119.

A municipal judge may act as ex-officio justice of the peace notwithstanding the fact that he has not been elected for a term of six years as provided in this section. Re Application of Boalt, (1927) 123 Or 1, 260 P 1004.

The writ of prohibition is available in this state as a means whereby a superior court may confine inferior tribunals to the powers which they actually possess. Southern Pac. Co. v. Heltzel, (1954) 201 Or 1, 268 P2d 605.

3. Terms of judges

The term of a justice of the peace is six years. Webster v. Boyer, (1916) 81 Or 485, 159 P 1166, Ann Cas 1918D, 988; State v. Beveridge, (1918) 88 Or 334, 171 P 1173.

The term of a county judge elected for six years does not reduce by reason of the legislative transfer of his judicial functions. State ex rel. Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918; Higgins v. Hood River County, (1966) 245 Or 135, 420 P2d 634.

The term of office of a county judge is now six years, as provided by this section, section 11 of the Article specifying a term of four years having been repealed by implication. State v. Holman, (1914) 73 Or 18, 144 P 429.

The statute providing for the election of an additional judge for the fourth judicial district, the incumbent to hold office for six years and until his successor is elected and qualified, did not violate this section. Gantenbein v. West, (1915) 74 Or 334, 144 P 1171.

The length of term of circuit judges was not changed by the amendment of Article VII. State ex rel. Smith v. Tazwell, (1941) 166 Or 349, 111 P2d 1021.

If a new court or judgeship is created, the term of the judge must be six years. State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174.

When office of county judge has been stripped by law of its judicial functions, the term of the county judge is four years. State v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784. **Distinguished in** State ex rel. Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918.

FURTHER CITATIONS: State ex rel. Bushman v. Vandenberg, (1955) 203 Or 326, 276 P2d 432, 280 P2d 344; Waldorf v. Elliott, (1958) 214 Or 437, 330 P2d 355; State ex rel. McCormick v. Appling, (1964) 236 Or 485, 389 P2d 677; City of Woodburn v. Domogalla, (1964) 238 Or 401, 395 P2d 150, rev'g 1 OTR 292; State ex rel. Oregon State Bar v. Lenske, (1965) 243 Or 477, 405 P2d 510, 407 P2d 250.

ATTY. GEN. OPINIONS: Length of term of persons appointed to fill vacancies as judge, 1920-22, p 531, 1928-30, p 593; appointment of justice of the peace, 1926-28, pp 245, 432, 1934-36, p 525, 1946-48, p 443; salary of judges and their replacements, 1930-32, pp 603, 693, 1932-34, pp 332, 583, 1934-36, pp 212, 426, 1946-48, p 489; power of county court to effect office of justice of the peace, 1930-32, p 772; county court's jurisdiction in criminal prosecutions, 1934-36, p 572; residence requirements of circuit judge, 1936-38, p 613; validity of bill relating to appointment of circuit judges pro tempore, 1940-42, p 208; status of county judge after his judicial duties are transferred to the circuit court, 1940-42, p 570; changing boundaries of justice of the peace districts, 1946-48, p 413; justice of the peace as district judge when the district court is created after his election but before he takes office, 1950-52, p 81; judge's contribution from current salary to retirement plan, 1952-54, p 164; legislative power to grant or deny jurisdiction of courts, 1952-54, p 166; circuit court jurisdiction in criminal matters, 1952-54, p 240.

Validity of legislation calling for the appointment of pro tempore judges by the Chief Justice of the Supreme Court, 1954-56, p 68; authority of judge pro tempore to complete unfinished judicial business after taking office as legislator, 1954-56, p 80; appointment of municipal court judge, 1956-58, p 28; term of county judge, 1956-58, p 198; term of county judge appointed to fill vacancy, 1956-58, p 232; county judge as school director, 1956-58, p 296; county judge as lucrative office, 1958-60, p 308; nominating petitions for district judges, 1958-60, p 329; constitutionality of mandatory Public Employes' Retirement Act with regard to judges serving term when Act becomes operative, 1960-62, p 4; constitutionality of Workmen's Compensation Act as to judges of state courts, 1960-62, p 7; this section as grant of power, 1960-62, p 45; creation of district court and termination of justice court when justice of the peace appointed, 1960-62, p 74; compensation during temporary appointment as justice of the peace, 1960-62, p 228; retirement age of county judge, 1960-62, p 356; validity of county charter provisions regarding judicial duties, 1960-62, p 403; compensation of county judge whose office was abolished by charter, 1964-66, p 11; duties of county judge after adoption of charter, 1964-66, p 25; judge as member of Juvenile Services Advisory Committee, 1964-66, p 267; term of county judge having no judicial functions, 1964-66, p 327; reimbursing district

judge for travel outside county to purchase supplies, 1964-66, p 409; effect of establishing district judge upon office of justice of the peace, 1966-68, p 181; abolishing justice district after election of a successor, 1966-68 p 277; procedure for implementing new district court judgeship, (1968) Vol 34, p 175; proposed constitutional tax limit, (1968) Vol 34, p 203; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977.

LAW REVIEW CITATIONS: 44 OLR 46; 46 OLR 281.

Section 1a

NOTES OF DECISIONS

A declaration of candidacy for a judicial office, offered for the election preceding the biennium in which the office would possibly become vacant by mandatory retirement, was properly refused. State ex rel. McCormick v. Appling, (1964) 236 Or 485, 389 P2d 677.

ATTY. GEN. OPINIONS: Applicability to county judges without judicial functions, 1960-62, p 356.

Section 2

NOTES OF DECISIONS

1. Effect of amendment
2. Supreme Court jurisdiction

1. Effect of amendment

The legislature is empowered to change the jurisdiction of the county courts. In re Will of Pittock, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; City of Astoria v. Cornelius, (1925) 119 Or 264, 272, 240 P 233; Woodburn Lodge v. Wilson, (1934) 148 Or 150, 34 P2d 611.

Pre-existing constitutional provisions have, by the amendment of 1910, been continued in force until changed by legislative enactment. State v. Farnham, (1925) 114 Or 32, 234 P 806; Holman v. Lutz, (1930) 132 Or 185, 282 P 241, 284 P 825.

The existing courts were continued in existence by this section, justices' courts, as well as others being within the purview of the amendment. Webster v. Boyer, (1916) 81 Or 485, 159 P 1166, Ann Cas 1918D, 988.

Pre-existing procedure is to be followed. State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927.

The whole judicial system may be changed by the legislature in virtue of the language of this section of the Constitution. City of La Grande v. Municipal Court, (1926) 120 Or 109, 115, 251 P 308.

Since the amendment of Ore. Const. Art. VII, the county court has not been a constitutional court, and a county court judge has not been the incumbent of a so-called constitutional office, but his tenure and the immunity of his salary from reduction during his term of office are protected by Ore. Const. Art. VII, §1. Fehl v. Jackson County, (1945) 177 Or 200, 161 P2d 728.

The 1910 amendment to Ore. Const. Art. VII authorized legislative enlargement of probate jurisdiction, but did not of itself enlarge by construction the statutes which had been enacted prior thereto. Industrial Hosp. Assn. v. Ege, (1946) 178 Or 100, 165 P2d 576.

Circuit courts do not exercise all the inherent powers of the common law courts. State ex rel. Ricco v. Biggs, (1953) 198 Or 413, 446, 255 P2d 1055.

2. Supreme Court jurisdiction

The Supreme Court can issue a restraining order to preserve the subject matter of an appeal. Livesley v. Krebs Hop Co., (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1; Helmes Groover & Dubber Co. v. Copenhagen, (1919) 93 Or 410, 177 P 935.

When the Supreme Court chooses to exercise its original jurisdiction in mandamus proceedings, the court must adopt and be governed by the procedure laid down by the legislature for the circuit court. Phy v. Wright, (1915) 75 Or 428, 146 P 138, 147 P 381; State v. Hodgin, (1915) 76 Or 480, 146 P 86, 149 P 530.

Only in proceedings of mandamus, quo warranto and habeas corpus has the Supreme Court original jurisdiction. State v. Kozer, (1926) 118 Or 556, 247 P 806; McIntosh Livestock Co. v. Buffington, (1923) 108 Or 358, 363, 217 P 635; In re Winters' Estate, (1938) 159 Or 637, 80 P2d 714, 81 P2d 140.

Discretion being vested in the court with respect to the exercise of jurisdiction of specific proceedings, a petition for a writ of habeas corpus will be denied in a case where the petitioner can secure a speedy determination of his rights in the inferior courts. Ex parte Jerman, (1910) 57 Or 387, 112 P 416, Ann Cas 1913A, 149.

The Supreme Court has no original jurisdiction to grant suit money or an allowance for maintenance pending an appeal in a suit to avoid a marriage. Taylor v. Taylor, (1914) 70 Or 510, 134 P 1183, 140 P 999.

The Supreme Court had no jurisdiction of an original proceeding to secure a writ of prohibition. Central Ore. Irr. Co. v. Pub. Serv. Comm., (1916) 80 Or 607, 157 P 1070.

An original motion to set aside a judgment substantially identical with one denied by the circuit court but not appealed from, cannot be entertained. Wallace v. Portland Ry., Light & Power Co., (1918) 88 Or 219, 159 P 974, 170 P 283.

The court refused to make material modifications and amplifications of the decree of the circuit court as asked for by a motion supported by an ex parte affidavit filed by a party who has not appealed from the decree. In re Umatilla R., (1918) 88 Or 376, 168 P 922, 172 P 97.

The Supreme Court had original jurisdiction to consider a petition to compel an inspector of buildings to issue a permit for the erection of a building. State v. Plummer, (1920) 97 Or 518, 189 P 405, 505, 191 P 883.

An original proceeding by way of writ of review is not within the jurisdiction of the Supreme Court. State v. Kozer, (1926) 118 Or 556, 247 P 806.

A question which is raised on appeal for the first time will not be passed upon by the court. State v. Masters, (1926) 120 Or 177, 249 P 831.

The Supreme Court refused to take jurisdiction in a habeas corpus proceeding when the prisoner had previously filed a petition for habeas corpus in the circuit court which was dismissed. Wix v. Gladden, (1955) 204 Or 597, 284 P2d 356, cert. denied, 350 US 865, 76 S Ct 109, 100 L Ed 767.

The Supreme Court denied a petition for a writ of mandamus where the identical matter and issues presented by the petition had been presented in circuit court and the remedy by appeal from circuit court was still available to the petitioner. State v. Portland Traction Co., (1955) 205 Or 220, 287 P2d 202.

The Supreme Court is a court of limited jurisdiction, circumscribed in its powers by Constitution and statute. State ex rel. Venn v. Reid, (1956) 207 Or 617, 298 P2d 990.

Although requirements of payment of fees for appeal bond, transcript and notice of appeal are an unconstitutional requirement barring the appeal of an impoverished applicant on a state writ of habeas corpus, an applicant cannot apply for habeas corpus in the federal courts until he has exhausted all of his state remedies, including an original proceeding of habeas corpus in forma pauperis in the State Supreme Court. Daugharty v. Gladden, (1957) 150 F Supp 887.

If a defendant in state criminal proceedings loses, on the merits, an appeal to the State Supreme Court and certiorari is denied, he is not required to seek collateral relief through state habeas corpus proceedings in order to establish exhaustion of remedies so he may file a petition in the federal

courts for habeas corpus. Daugharty v. Gladden, (1957) 257 F2d 750.

Proceeding in mandamus was instituted in Supreme Court to determine length of term of county judge. State v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784.

The Supreme Court had no jurisdiction in an action denominated "in the nature of quo warranto" to determine which of two candidates for district judge was nominated at the primary election. State ex rel. Reeder v. Danielson, (1958) 215 Or 5, 328 P2d 868.

FURTHER CITATIONS: Semler v. Cook-Waite Laboratories, Inc., (1955) 203 Or 139, 278 P2d 150; State ex rel. Bushman v. Vandenberg, (1955) 203 Or 326, 276 P2d 432, 280 P2d 344; State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174; State ex rel. Medford Pear Co. v. Fowler, (1956) 207 Or 182, 295 P2d 167; State v. Endsley, (1958) 214 Or 537, 331 P2d 338; Daugharty v. Gladden, (1959) 179 F Supp 151; State ex rel. O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482; State ex rel. Southern Pac. Co. v. Duncan, (1962) 230 Or 179, 368 P2d 733, 98 ALR2d 617; State ex rel. Pearcy v. Long, (1963) 234 Or 630, 383 P2d 377; Holmes v. Appling, (1964) 237 Or 546, 392 P2d 636; City of Woodburn v. Domogalla, (1964) 238 Or 401, 395 P2d 150; International Trans. Equip. Lessors, Inc. v. Bohannon, (1969) 252 Or 356, 449 P2d 847; State ex rel. Mullican v. Parsons, (1971) 257 Or 468, 479 P2d 734.

ATTY. GEN. OPINIONS: District attorney representing persons before state boards and commissions, 1952-54, p 151; legislative power to grant or deny jurisdiction of courts, 1952-54, p 166; term of county judge, 1956-58, p 198; force and effect of juvenile court order, 1958-60, p 320; general duty of district attorneys, (1971) Vol 35, p 448.

LAW REVIEW CITATIONS: 38 OLR 173; 39 OLR 343, 347, 363; 44 OLR 46; 4 WLJ 57.

Section 2a

CASE CITATIONS: State ex rel. Mullican v. Parsons, (1971) 257 Or 468, 479 P2d 734.

ATTY. GEN. OPINIONS: Jurisdiction of municipal judges, 1956-58, p 28.

Section 3

NOTES OF DECISIONS

1. In general

The amendment of 1910 had a prospective operation, and it did not apply to cases which had been appealed prior to its adoption. Darling v. Miles, (1911) 57 Or 593, 111 P 702, 112 P 1084; Harrison v. Birrell, (1911) 58 Or 410, 423, 115 P 141; State v. McDonald, (1911) 59 Or 520, 117 P 281; Hall v. Shank, (1912) 61 Or 410, 121 P 965.

The purposes of this section are the facilitation of disposal of causes on appeal, and the prevention of costs and disbursements which result from a second trial. Knight v. Byers, (1914) 70 Or 413, 134 P 787; Wright v. Wimberly, (1919) 94 Or 1, 16, 184 P 740.

A case under a federal Act was not within the purview of the provisions of this section. Christie v. Great Northern Ry., (1933) 142 Or 321, 20 P2d 377; Fitze v. Am.-Hawaiian S.S. Co., (1941) 167 Or 439, 117 P2d 825; McCauley v. Pac. Atlantic S.S. Co., (1941) 167 Or 80, 115 P2d 307.

This section is applicable to criminal cases. State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214; City of Oakland v. Moore, (1969) 1 Or App 80, 457 P2d 659, Sup Ct **review denied.**

The guaranty by Ore. Const. Art. I, §11, of a statement of the facts constituting the commission of a crime is not abrogated or modified by this section. State v. Townsend, (1911) 60 Or 223, 118 P 1020.

A repeal of Ore. Const. Art. I, §17, was not effected by this section. Johnson v. Ladd, (1933) 144 Or 268, 293, 14 P2d 280, 24 P2d 17.

This section was enacted by the people for the purpose of preventing numerous appeals in a case. Rugenstein v. Ottenheimer, (1915) 78 Or 371, 152 P 215.

The design of this section was to take from the trial court the authority to set aside a verdict on the ground that the preponderance of evidence was against the decision of the jury. State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927.

The circuit courts are not given authority to retry a case. Gillilan v. Portland Crematorium Assn., (1927) 120 Or 286, 249 P 627.

This section does not deprive the trial courts of their common-law power to order a new trial because of misconduct of a party or juror even if the injured party does not make an objection or move for a mistrial when the error occurs. Strandholm v. Gen. Constr. Co., (1963) 235 Or 145, 382 P2d 843.

Equity cases are considered de novo on appeal. Lieuallen Land & Livestock Corp. v. Heindenrich, (1971) 259 Or 333, 485 P2d 1230.

2. Jury trial

The nature of the particular issue in a proceeding determines whether the issue is to be tried with a jury. Cornelison v. Seabold, (1969) 254 Or 401, 460 P2d 1009; Williams v. Joyce, (1971) 4 Or App 482, 479 P2d 513, Sup Ct **review denied.**

The silence of a party does not create a presumption that he waives the right of trial by jury. Wicks v. Sanborn, (1914) 72 Or 321, 143 P 1007.

A trial by jury is guaranteed by this provision. Willetts v. Scudder, (1914) 72 Or 535, 548, 144 P 87.

On an appeal to the circuit court from the district court, the defendant is entitled to a jury trial though the controversy involves only $37.50. Schnitzer v. Stein, (1920) 96 Or 343, 189 P 984.

An issue of fact having been presented for the determination of the jury, reversible error is committed in directing the verdict. Fennell v. Hauser, (1932) 141 Or 71, 14 P2d 998.

This section does not require that the issue of necessity *in a condemnation proceeding be determined by the jury.* Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

The right to a jury trial does not extend to the issue of whether the Workmen's Compensation Act provides the sole remedy. Cornelison v. Seabold, (1969) 254 Or 401, 460 P2d 1009.

Award of compensation by an administrative body for damages suffered as an effect of racial discrimination does not violate this section. Williams v. Joyce, (1971) 4 Or App 482, 479 P2d 513, Sup Ct **review denied.**

In a tort action to recover $3,500 damages for an injury, failure to instruct the jury that in no event should it return

a verdict in excess of $350 was not error. Keller v. Coca Cola Bottling Co., (1958) 214 Or 654, 330 P2d 346.

3. Re-examination of issues

The weight of evidence will not be considered by the Supreme Court. Gleason v. Denson, (1913) 65 Or 199, 132 P 530; State v. McPherson, (1914) 69 Or 381, 138 P 1076; State v. Carothers, (1914) 69 Or 382, 138 P 1077; Pennock v. Sharp, (1919) 94 Or 520, 185 P 911; Derrick v. Portland Eye Hosp., (1922) 105 Or 90, 209 P 344; Sather v. Giaconi, (1924) 110 Or 433, 220 P 740; Uhler v. Harbaugh, (1924) 110 Or 609, 224 P 89; Hamilton v. Kelsey, (1928) 126 Or 26, 268 P 750; Wood v. Young, (1928) 127 Or 235, 271 P 734; Quillen v. Schimpf, (1930) 133 Or 581, 599, 291 P 1009; Richter v. Derby, (1931) 135 Or 400, 295 P 457; Arthur v. Parish, (1935) 150 Or 582, 47 P2d 682.

The Supreme Court will examine the evidence only to ascertain whether there is any competent evidence to support the findings. Sun Dial Ranch v. May Land Co., (1912) 61 Or 205, 119 P 758; Walker v. Warring, (1913) 65 Or 149, 130 P 629.

Where the testimony is conflicting, the issues which have been determined by the jury will not be re-examined. Zobrist v. Estes, (1913) 65 Or 573, 133 P 644; Marks v. First Nat. Bank, (1917) 84 Or 601, 165 P 673; Ask v. Wood, (1925) 113 Or 498, 233 P 253; State v. Elliott, (1925) 113 Or 632, 233 P 867; Pitts v. Crane, (1925) 114 Or 593, 236 P 475; Linebaugh v. Portland Mtg. Co., (1925) 116 Or 1, 239 P 196; State v. Glasburn, (1925) 116 Or 451, 241 P 846; Rosetto v. Miller, (1927) 120 Or 490, 252 P 707; Pierce v. No. Pac. Ry., (1913) 67 Or 285, 135 P 866; Richardson v. Portland Trackless Car Co., (1925) 113 Or 544, 233 P 540; Burrowes (1954) 201 Or 426, 271 P2d 1059.

Jury's assessment of damages, supported by evidence, cannot be disturbed by Supreme Court. Sigel v. Portland Ry., (1913) 67 Or 285; 135 P 866; Richardson v. Portland Trackless Car Co., (1925) 113 Or 544, 233 P 540; Burrowes v. Skibbe, (1934) 146 Or 123, 29 P2d 552.

On a trial to the court without a jury, findings have the effect of a verdict by a jury, and cannot be set aside, unless the appellate court can affirmatively say that there is no evidence to support them. Fields v. W. Union Tel. Co., (1914) 68 Or 209, 212, 137 P 200; Bank of Kenton v. Sun Dial Ranch, (1914) 69 Or 128, 131, 138 P 455; Merrill v. Missouri Bridge Co., (1914) 69 Or 585, 593, 140 P 439; Warren v. Dinwoodie, (1918) 88 Or 342, 171 P 1175; Tracy v. Thum, (1928) 125 Or 323, 267 P 398; Leonard v. King, (1929) 128 Or 216, 274 P 116; Wakefield, Fries & Co. v. Sherman, Clay & Co., (1932) 141 Or 270, 17 P2d 319; Tully v. Tully, (1958) 213 Or 124, 322 P2d 1085.

The question as to whether a presumption has been overcome by evidence will not be considered. Richardson v. Portland Trackless Car Co., (1925) 113 Or 544, 233 P 540; Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944.

Admitting illegal evidence, and instructing the jury that it may be considered as an element of damage, prevents application of this section. Oregon R. & Nav. v. Taffe, (1913) 67 Or 102, 116, 134 P 1024, 135 P 332, 515.

Disputes as to different conclusions of fact which might reasonably be drawn from the circumstances of the case by the triers of the facts are set at rest by the verdict. Bessler v. Powder River Gold Dredging Co., (1920) 95 Or 271, 185 P 753, 187 P 621.

Jurisdiction to cancel a judgment which has been obtained by fraud was not affected by the adoption of this section. Paulson v. Kenney, (1924) 110 Or 688, 224 P 634.

Instructions as to the jury's function in weighing evidence are not affected by this section. Bonnett v. Keiffer, (1925) 115 Or 244, 237 P 1.

The court may reject evidence which is utterly unreasonable and contrary to all human experience. Morser v. So. Pac. Co., (1928) 124 Or 384, 262 P 252.

If the evidence sustains the verdict, the Supreme Court is inhibited from re-examining it. State v. Edison, (1951) 191 Or 588, 233 P2d 73.

Where the testimony is conflicting, the issues which have been determined by the jury will not be reexamined. Fischer v. Howard, (1954) 201 Or 426, 271 P2d 1059.

Whether an article is a fixture is by nature a mixed question of law and fact, and as such is susceptible to review by the Supreme Court. Waldorf v. Elliott, (1958) 214 Or 437, 330 P2d 355.

The Constitution prohibits the reexamination by any court of a fact tried by a jury. Foxton v. Woodmansee, (1964) 236 Or 271, 388 P2d 275.

4. Evidence required to support verdict

A verdict which is supported by competent and substantial evidence is beyond interference with by the reviewing court under this Article. Purdy v. Van Keuren, (1911) 60 Or 263, 119 P 149; Johnson v. Meyers, (1919) 91 Or 179, 177 P 631; Dolph v. Speckart, (1920) 94 Or 550, 179 P 657, 186 P 32; Masters v. Walker, (1921) 99 Or 299, 195 P 381; Mitchell v. So. Pac. Co., (1922) 105 Or 310, 209 P 718; Carty v. McMenamin & Ward, (1923) 108 Or 489, 216 P 228; Veazie v. Columbia & Nehalem R. R.R., (1924) 111 Or 1, 224 P 1094; First Nat. Bank v. Anderson, (1924) 112 Or 167, 228 P 929; Mayer & Co. v. Smith, (1924) 112 Or 559, 230 P 355; Fenlason v. Pac. Fruit Package Co., (1924) 112 Or 633, 230 P 547; State v. Quartier, (1925) 114 Or 657, 659, 236 P 746; Everson v. Phelps, (1925) 115 Or 523, 239 P 102; Cooper v. No. Coast Power Co., (1926) 117 Or 652, 244 P 665, 245 P 317; Obermeier v. Mtg. Co. Holland-Am., (1928) 123 Or 469, 259 P 1064, 260 P 1099, 262 P 261; Red Top Taxi Co. v. Cooper, (1928) 123 Or 610, 263 P 64; Grammer v. Wiggins-Meyer S.S. Co., (1928) 126 Or 694, 270 P 759; Nickson v. Ore.-Am. Lbr. Co., (1928) 127 Or 326, 266 P 254, 271 P 986; Abraham v. Mack, (1929) 130 Or 32, 273 P 711, 278 P 972; State v. Silverman, (1934) 148 Or 296, 36 P2d 342.

Where there is no competent evidence to support the verdict, the judgment is not sustainable. Gollnick v. Marvin, (1911) 60 Or 312, 118 P 1016, Ann Cas 1914A, 243; State v. Michellod, (1912) 62 Or 271, 124 P 263, 657; Devroe v. Portland Ry., (1913) 64 Or 547, 131 P 304; Sullivan v. Wakefield, (1913) 65 Or 528, 133 P 641; Nelson v. St. Helens Tbr. Co., (1913) 66 Or 570, 133 P 1167, 135 P 169; Boatright v. Portland Ry., (1914) 68 Or 26, 135 P 771; Beaver v. Mason Ehrman & Co., (1914) 73 Or 36, 143 P 1000; Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

Unless the court can say that there is no evidence to support the verdict, the judgment will be sustained. Martini v. Ore.-Wash. R. & N. Co. (1914) 73 Or 283, 144 P 104; Ulbrand v. Smith, (1919) 91 Or 206, 178 P 597; Fuller v. Ore.-Wash. R. & N. Co., (1919) 93 Or 160, 181 P 338, 991; Joyner v. Crown Willamette Paper Co., (1919) 94 Or 207, 185 P 299; Johnson v. Homestead-Iron Dykes Mines Co., (1920) 98 Or 318, 193 P 1036; Reed v. Nat. Hosp. Assn., (1923) 106 Or 471, 212 P 537; Robertson v. State Ind. Acc. Comm., (1925) 114 Or 394, 235 P 684; Estate of Gerhardus, (1925) 116 Or 113, 239 P 829; Cooper v. No. Coast Power Co., (1926) 117 Or 652, 244 P 665, 245 P 317; Phipps v. Stancliff, (1926) 118 Or 32, 245 P 508; Eilers v. McCormick, (1927) 121 Or 309, 252 P 87; Farmers' Loan & Mtg. Co. v. Hansen, (1927) 123 Or 72, 260 P 999; State v. Burke, (1928) 126 Or 651, 269 P 869, 270 P 756; State v. Anderson, (1930) 133 Or 632, 290 P 1094; State v. Eppers, (1932) 138 Or 340, 3 P2d 989, 6 P2d 1086; Applegate v. Portland Gas & Coke Co., (1933) 142 Or 66, 18 P2d 211; State v. Caputo, (1954) 202 Or 456, 274 P2d 798; State v. Duggan, (1958) 215 Or 151, 333 P2d 907; Kuzmanich v. United Fire and Cas. Co., (1966) 242 Or 529, 410

P2d 812; State v. Smith, (1971) 92 Or App Adv Sh 1655, 487 P2d 90.

Verdicts supported by a mere scintilla of evidence will not be sustained. Schneider v. Tapfer, (1919) 92 Or 520, 180 P 107; Porter Constr. Co. v Berry, (1931) 136 Or 80, 298 P 179; Burgess v. Chas. A Wing Agency, (1932) 139 Or 614, 11 P2d 811; State Sav. & Loan Assn. v. Bryant, (1938) 159 Or 601, 626, 81 P2d 116.

While an inference is a species of evidence, it is not such evidence as will prevent setting aside a verdict under this section. Consor v. Andrew, (1912) 61 Or 483, 123 P 46.

A nonsuit cannot be granted unless there is no evidence to support the verdict. Woods v. Wikstrom, (1913) 67 Or 581, 135 P 192.

The words "evidence to support the verdict" mean some legal evidence tending to prove every material fact in issue as to which the party in whose favor the verdict was rendered has the burden of proof. Powder Valley State Bank v. Hudelson, (1915) 74 Or 191, 144 P 494.

The overruling of a motion for nonsuit or a directed verdict will be sustained on appeal unless the Supreme Court can say that there was no competent evidence to support the verdict. Taggart v. Hunter, (1915) 78 Or 139, 150 P 738, 152 P 871.

The power of the legislature to prescribe the quantum of evidence that shall be necessary to establish a particular fact was not affected by this section. Uhler v. Harbaugh, (1924) 110 Or 609, 224 P 89.

A verdict in a criminal case cannot be disturbed if there is any competent evidence to support each material allegation contained in the indictment. State v. Broom, (1931) 135 Or 641, 297 P 340.

The word "evidence" in this section means substantial evidence. Kraxberger v. Rogers, (1962) 231 Or 440, 373 P2d 647.

5. Record on appeal

The provision relating to the bill of exceptions is permissive only and not mandatory, and if the parties desire to have errors of law reviewed, they must present them by a properly arranged bill of exceptions setting out so much of the testimony only as is necessary to disclose the point of the objection, except where a review of a nonsuit or directed verdict is desired. Hahn v. Mackay, (1912) 63 Or 100, 126 P 12, 991; West v. McDonald, (1913) 67 Or 551, 136 P 650; National Council v. McGinn, (1914) 70 Or 457, 138 P 493; Johnston v. Lindsay, (1956) 206 Or 243, 292 P2d 495.

A reporter's transcript and other papers purporting to be a part of the transcript not properly authenticated as a bill of exceptions will not be examined by the court under this section. Abercrombie v. Heckard, (1914) 68 Or 103, 136 P 875.

The report of the testimony is not made a part of the bill of exceptions by this section. Smith v. Walters, (1915) 76 Or 76, 147 P 925.

If all of the testimony is appended to the bill of exceptions, this is sufficient to bring before the court the question as to whether or not error was committed in denial of a motion for a nonsuit. Camp & DuPuy v. Lauterman, (1915) 78 Or 134, 152 P 288, 289.

A writ of mandamus was ordered directing the allowances of the bill of exceptions where the trial court refused to certify the bill. Portland Gas & Coke Co. v. Campbell, (1916) 81 Or 154, 158 P 527.

6. Affirmance notwithstanding error

(1) Generally. On the ground of passion or prejudice, the verdict may not be set aside unless the court is satisfied that the defendant did not have a fair and impartial trial. Hanson v. Johnson Contract Co., (1926) 117 Or 541, 244 P 875; McCulley v. Homestead Bakery, Inc., (1933) 141 Or 460, 18 P2d 226.

Even though the trial court's theory is incorrect, the judgment will not be reversed on appeal if it is fundamentally correct. Commercial Cred. Co. v. Click, (1928) 127 Or 130, 271 P 36; Prouty Lbr. & Box Co. v. McGuirk, (1937) 156 Or 418, 66 P2d 481, 68 P2d 473.

This provision does not authorize affirmance of a conviction where the case was submitted on a wrong theory of the law. State v. Davis, (1914) 70 Or 93, 140 P 448.

The law regarding prejudicial error, in favor of an affirmance unless actual prejudicial error appears, is accentuated by this constitutional provision. State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

Where the judgment entered by the circuit court in favor of a defendant, based upon the verdict of a jury, is the judgment which should have been rendered, an order of the circuit court granting a new trial will be set aside and the cause remanded with instruction to enter judgment for the defendant. Halsan v. Johnson, (1937) 155 Or 583, 65 P2d 661.

Where a constitutional provision has been violated, the judgment will not be affirmed. State v. Estabrook, (1939) 162 Or 476, 505, 91 P2d 838.

Power to affirm judgments of conviction notwithstanding error has been and should be exercised with utmost caution. State v. Hurley, (1959) 218 Or 263, 344 P2d 773.

Judgment affirmed notwithstanding error committed during the trial. Wills v. George Palmer Lbr. Co., (1911) 58 Or 536, 115 P 417; Cloyes v. Eckern, (1912) 61 Or 181, 121 P 804; Atherton v. Walling, (1912) 61 Or 384, 121 P 796; Hall v. Shank, (1912) 61 Or 410, 121 P 965; Carpenter v. Delvin, (1912) 61 Or 534, 122 P 756; Parrazo v. Women of Woodcraft, (1912) 61 Or 590, 123 P 716; West v. Mut. Life Ins. Co., (1912) 61 Or 592, 123 P 906; State v. Friddles, (1912) 62 Or 209, 123 P 904; Rehfield v. Winters, (1912) 62 Or 299, 125 P 289; Stubrud v. Frasier, (1912) 63 Or 20, 124 P 657; McIntosh v. McNair, (1912) 63 Or 57, 126 P 9; Lewis v. Northwestern Whse. Co., (1912) 63 Or 239, 127 P 33; State v. Hardin, (1912) 63 Or 305, 127 P 789; Peters v. Queen City Ins. Co., (1912) 63 Or 382, 126 P 1005; City of Silverton v. Brown, (1912) 63 Or 418, 128 P 45; State v. Hill, (1912) 63 Or 451, 128 P 444; Vanyi v. Portland Flouring Mills Co., (1912) 63 Or 520, 534, 128 P 830; First Nat. Bank v. Rusk, (1913) 64 Or 35, 127 P 780, 129 P 121, 44 LRA(NS) 138; Morgan v. Bross, (1913) 64 Or 63, 129 P 118; Love v. Chambers Lbr. Co., (1913) 64 Or 129, 129 P 492; State v. Russell, (1913) 64 Or 247, 129 P 1051; City of Woodburn v. Aplin, (1913) 64 Or 610, 131 P 516; Kitchin v. Ore. Nursery Co., (1913) 65 Or 20, 130 P 408, 1133, 132 P 956; Foster v. Univ. Lbr. Co., (1913) 65 Or 46, 131 P 736; Stewart v. Will, (1913) 65 Or 138, 131 P 1027; Kelly v. Lewis Inv. Co., (1913) 66 Or 1, 133 P 826, Ann Cas 1915B, 568; Ashley & Rummelin v. Himmelfarb, (1913) 66 Or 38, 133 P 771; Caraduc v. Schanen-Blair Co., (1913) 66 Or 310, 133 P 636; Richardson v. Inv. Co., (1913) 66 Or 353, 133 P 773; Franck v. Blazier, (1913) 66 Or 377, 133 P 800; Thompson v. Sargent, (1913) 66 Or 384, 134 P 7; Beard v. Beard, (1913) 66 Or 526, 133 P 795; Hutcheon v. W. Coast Life Ins. Co., (1913) 67 Or 12, 135 P 179; Baker v. Seaweard, (1913) 68 Or 80, 136 P 870; Wasiljeff v. Hawley Paper Co., (1914) 68 Or 487, 501, 137 P 755; Smith v. Badura, (1914) 70 Or 58, 139 P 107; Furbeck v. I. Gevurtz & Son, (1914) 72 Or 12, 143 P 654, 922; Robertson v. Frey, (1914) 72 Or 599, 144 P 128; Smith v. Hurley, (1914) 73 Or 268, 143 P 1123; Coleman v. City of La Grande, (1914) 73 Or 521, 144 P 468; Duff v. Riggs, (1915) 75 Or 209, 146 P 827; State v. Catholic, (1915) 75 Or 367, 147 P 372, Ann Cas 1917B, 913; Adams v. Corvallis & E.R. Co., (1915) 78 Or 117, 152 P 504, 508; Kahn v. Home Tel. & Tel. Co., (1915) 78 Or 308, 152 P 240, 241; Hoy v. Gorst, (1916) 79 Or 617, 154 P 276; Hanna v. Alluvial Farm Co., (1916) 79 Or 557, 152 P 103, 156 P 265; Foreman v. Sch.

Dist. 25, (1916) 81 Or 587, 159 P 1155, 1168; Cash v. Garrison, (1916) 81 Or 135, 158 P 521; Clarke v. Ward, (1916) 81 Or 70, 158 P 277; State v. Morris, (1917) 83 Or 429, 443, 163 P 567; Watts v. Spokane P. & S. Ry., (1918) 88 Or 192, 171 P 901; Portland & O.C. Ry, v. McGrath, (1918) 88 Or 346, 171 P 1181; Montana Coal Co. v. Hoskins, (1918) 88 Or 523, 172 P 118; State v. Newlin, (1919) 92 Or 589, 182 P 133; Geary v. Prudhomme, (1926) 117 Or 165, 243 P 101; State v. Haslebacher, (1928) 125 Or 389, 408, 266 P 900; Brakebush v. Aasen, (1928) 126 Or 1, 267 P 1035; Riedel v. Royce, (1929) 130 Or 440, 279 P 631; Johnson v. Ladd, (1933) 144 Or 268, 14 P2d 280, 24 P2d 17; Compton v. Perkins, (1933) 144 Or 346, 24 P2d 670; Babcock v. Gray, (1940) 165 Or 398, 107 P2d 846; McVay v. Byers, (1943) 171 Or 449, 139 P2d 210; Lane v. Hatfield, (1943) 173 Or 79, 143 P2d 230; Zimmerman v. W. Coast Trans-Oceanic S.S. Lines, (1953) 199 Or 78, 258 P2d 1003; Lawrence Whse. Co. v. Best Lbr. Co., (1954) 202 Or 77, 271 P2d 661, 273 P2d 993; State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214.

Allegations of pleading, found to be insufficient after rendition of verdict, were not fatal. State v. Karpenter, (1926) 120 Or 90, 250 P 633, 251 P 307; L.B. Menefee Lbr. Co. v. MacDonald, (1927) 122 Or 579, 260 P 444.

Where material facts were alleged conjunctively in an answer and were not denied disjunctively in the reply, the error could not be disregarded under this section. White v. E. Side Mill Co., (1916) 81 Or 107, 118, 155 P 364, 158 P 173, 527.

(2) Erroneous rulings on evidence. The admission of incompetent evidence in a suit tried by the court without a jury will not be considered upon appeal. State v. Rader, (1912) 62 Or 37, 124 P 195; Shepherd v. Allingham, (1930) 132 Or 684, 288 P 210.

This provision does not preclude the court from reversing a judgment based on a verdict returned after the erroneous exclusion of material evidence. Forrest v. Portland Ry., (1913) 64 Or 240, 129 P 1048; Sullivan v. Wakefield, (1913) 65 Or 528, 535, 133 P 641; Poole v. Vining, (1921) 102 Or 414, 201 P 726, 202 P 724; Dolan v. Continental Cas. Co., (1929) 131 Or 327, 279 P 855, 281 P 182, 283 P 15.

Errors in rulings on evidence do not preclude an affirmance of the judgment where the judicial conscience is satisfied that justice has been done. First Nat. Bank v. Allen, (1925) 106 Or 190, 211 P 613; Boord v. Kaylor, (1925) 114 Or 62, 234 P 263; Thompson v. Larsen, (1926) 118 Or 421, 247 P 139; State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214.

Judgment was reversed where improper testimony was admitted. Salisbury v. Goddard, (1916) 79 Or 593, 156 P 261.

(3) Faulty instructions. Authority to affirm judgment notwithstanding error should be invoked only in cases that are clear and free from doubt. State Hwy. Comm. v. Vella, (1958) 213 Or 386, 323 P2d 941.

Judgment affirmed notwithstanding erroneous instructions. Schaedler v. Columbia Contract Co., (1913) 67 Or 412, 135 P 536; Doerstler v. First Nat. Bank, (1916) 82 Or 92, 161 P 386; Robinson v. Knights and Ladies of Security, (1918) 88 Or 516, 172 P 116; Paldanius v. Strauss, (1921) 100 Or 497, 198 P 253; State v. Ragan, (1928) 123 Or 521, 262 P 954; Gano v. Zidell, (1932) 140 Or 11, 10 P2d 365, 12 P2d 1118; State v. Bartlett, (1933) 141 Or 560, 18 P2d 590.

Instructions to the jury were erroneous and prejudicial and ground for reversal of the judgment. State v. Branson, (1916) 82 Or 377, 161 P 689; Dunn v. First Nat. Bank, (1935) 149 Or 97, 39 P2d 944.

Error in submission of question as to punitive damages did not require reversal where amount of damages awarded was not excessive. Holland v. Eugene Hosp., (1928) 127 Or 256, 270 P 784.

Failure of defendant to save exception to allegedly faulty instructions at the time of trial did not bar him from claiming error therefor in his motion for new trial. Correia v. Bennett, (1953) 199 Or 374, 261 P2d 851.

7. Determination of case by appellate court

(1) Generally. The record being before the court, the judgment which should have been rendered will be determined and directed to be entered. State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483; Murphy v. Panter, (1912) 62 Or 522, 125 P 292; State v. Clatsop County, (1912) 63 Or 377, 125 P 271; Wagenaar v. Beeman-Woodward Co., (1913) 65 Or 109, 131 P 1023; Noble v. Beeman-Spaulding-Woodward Co., (1913) 65 Or 93, 107, 131 P 1006, 46 LRA(NS) 162; Walker v. Warring, (1913) 65 Or 149, 160, 130 P 629; Kitchin v. Ore. Nursery Co., (1913) 65 Or 20, 130 P 408, 1133, 132 P 956; Cook v. Gordon, (1914) 68 Or 557, 137 P 782; Parker v. Wolf, (1914) 69 Or 446, 138 P 463; State v. Adler, (1914) 71 Or 70, 142 P 344; Burton v. Lithic Mfg. Co., (1914) 73 Or 605, 144 P 1149; Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756; Martin v. Fletcher, (1915) 77 Or 408, 149 P 895; Kveset v. W.R. Grace & Co., (1915) 77 Or 83, 150 P 281; McDaniels v. Harrington, (1916) 80 Or 628, 157 P 1068; Meadow Valley Land Co. v. Manerud, (1916) 81 Or 303, 159 P 559; Hayden v. City of Astoria, (1917) 84 Or 205, 224, 164 P 729; Marks v. First Nat. Bank, (1917) 84 Or 601, 165 P 673; Stillwell v. Hill, (1918) 87 Or 112, 169 P 1174; Learned v. Holbrook, (1918) 87 Or 576, 170 P 530, 171 P 222; Mount v. Welsh, (1926) 118 Or 568, 247 P 815; Martin v. Cambas, (1930) 134 Or 257, 293 P 601; In re Berger's Estate, (1933) 144 Or 631, 25 P2d 138; Lane v. Brotherhood of Locomotive Enginemen & Firemen, (1937) 157 Or 667, 73 P2d 1396; Coos Bay Log. Co. v. Barclay, (1938) 159 Or 272, 79 P2d 672; Tucker v. State Ind. Acc. Comm., (1959) 216 Or 74, 337 P2d 979; United States Nat. Bank v. Stonebrook, (1954) 200 Or 176, 265 P2d 238; Scott v. Lawrence Whse. Co., (1961) 227 Or 78, 360 P2d 610.

Where the whole record is not before the court, the case cannot be retried and disposed of finally under this provision. Diamond Roller Mills v. Moody, (1912) 63 Or 90, 125 P 284, 126 P 984; Hunter v. Harris, (1912) 63 Or 505, 127 P 786; Lacey v. Ore. R. & Nav. Co., (1912) 63 Or 596, 607, 128 P 999; Outcault Advertising Co. v. Buell, (1914) 71 Or 52, 141 P 1020; Smith v. Kinney, (1914) 72 Or 514, 143 P 901, 1126; Title & Trust Co. v. United States Fid. & Guar. Co., (1932) 138 Or 467, 1 P2d 1100, 7 P2d 805; State v. Slim, (1932) 141 Or 174, 17 P2d 314.

The provision is permissive, not mandatory, and the court is not bound to render judgment. Frederick & Nelson v. Bard, (1913) 66 Or 259, 263, 134 P 318; Sol-O-Lite Laminating Corp. v. Allen, (1960) 223 Or 80, 353 P2d 843.

There being no error in the record, the court is not authorized to retry the case. Malpica v. Cannery Supply Co., (1920) 95 Or 242, 187 P 596, 598; Noble v. Sears, (1927) 122 Or 162, 257 P 809; Emmons v. Skaggs, (1931) 138 Or 70, 4 P2d 1115; Schweiger v. Solbeck, (1951) 191 Or 454, 230 P2d 195.

The Supreme Court will endeavor to make a final disposition of a case in the interest of justice and to avoid needless litigation. State v. Mott, (1940) 163 Or 631, 97 P2d 950; State v. Braley, (1960) 224 Or 1, 355 P2d 467.

Court of Appeals has the same authority as the Supreme Court to determine, in appellate cases, the judgment that should have been entered by the trial court. State v. Zadina, (1969) 1 Or App 11, 457 P2d 670; State v. Evans, (1970) 2 Or App 441, 468 P2d 657, rev'd on other grounds, 258 Or 439, 483 P2d 1300.

The Supreme Court will not try a question of fact on appeal where the evidence is wholly circumstantial and the facts can be better determined by a jury. State v. Rader, (1912) 62 Or 37, 41, 124 P 195.

The examination of the testimony by the Supreme Court is the same as that in a suit in equity, except that in the

law action only errors properly assigned will be considered. Taffe v. Smyth, (1912) 62 Or 227, 125 P 308.

Validity of provision empowering Supreme Court to enter judgment sustained. Obenchain v. Ransome-Crummey Co., (1914) 69 Or 547, 138 P 1078, 139 P 920.

The court will not determine a criminal cause on appeal where the record shows that it will be peculiarly appropriate for a jury to pass on the issues involved. State v. Naylor, (1915) 77 Or 189, 150 P 860, 862.

The court may not add a party as judgment debtor after the judgment has been entered. Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

Rendition of judgment in accordance with a general verdict will be directed where the trial court has erroneously held such verdict inconsistent with a special verdict. Forest Prod. Co. v. Dant & Russell, (1926) 117 Or 637, 244 P 531.

Where an issue remains to be decided, the court will not make a finding thereon, but will remand the cause to the circuit court. Tallman v. Havill, (1930) 133 Or 407, 291 P 387.

This section authorized the Supreme Court to issue a judgment nunc pro tunc even though no judgment had been pronounced tunc. Gow v. Multnomah Hotel Inc., (1951) 191 Or 45, 224 P2d 552, 228 P2d 791.

Court sustained verdict by arriving at same ultimate conclusion as jury, though by a somewhat different route. Nordling v. Johnston, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420.

If a defendant in state criminal proceedings loses on the merits an appeal to the State Supreme Court and certiorari is denied, he is not required to seek collateral relief through state habeas corpus proceedings in order to establish exhaustion of remedies so he may file a petition in the federal courts for habeas corpus. Daugharty v. Gladden, (1958) 257 F2d 750.

A mandate based on an unconstitutional law is clearly erroneous and may be withdrawn after the term. Daugharty v. Gladden, (1959) 179 F Supp 151.

Appellate practice restricts appellant to the theory he pursued in the trial court. Chaney v. Fields Chevrolet Co., (1971) 258 Or 606, 484 P2d 824.

(2) Reversals and modifications. Where the proper judgment cannot be determined by reason of the state of the record, the judgment will not be affirmed. Clackamas So. R. Co. v. Vick, (1914) 72 Or 580, 144 P 84; Hayden v. City of Astoria, (1915) 74 Or 525, 145 P 1072; Clifford v. Smith Meat Co., (1917) 84 Or 1, 163 P 808; Miller v. State Ind. Acc. Comm., (1917) 84 Or 507, 159 P 1150, 165 P 576; Wentworth v. Winton Co., (1920) 95 Or 541, 550, 188 P 204; Fenlason v. Pac. Fruit Package Co., (1924) 112 Or 633, 230 P 547; Patterson v. Horsefly Irr. Dist., (1937) 157 Or 1, 69 P2d 282, 70 P2d 36.

The court may remand a cause with directions to enter a judgment of conviction of a lesser offense. State v. Braley, (1960) 224 Or 1, 355 P2d 467; State v. Branch, (1966) 244 Or 97, 415 P2d 766.

The fact reversible error was not established through proper exception does not preclude the court on appeal from considering the lack of a full instruction as a basis for reversal or modification of the judgment from which the appeal is taken. State v. Braley, (1960) 224 Or 1, 355 P2d 467; State v. Olson, (1969) 1 Or App 90, 459 P2d 445.

Though not properly preserved, an error of law apparent on the face of the record will be considered on appeal where there are exceptional circumstances. State v. Andrews, (1970) 2 Or App 595, 469 P2d 802, Sup Ct **review denied;** State v. Charles, (1970) 3 Or App 172, 469 P2d 792, Sup Ct **review denied.**

This section authorized the Supreme Court in an action at law to require the return of warrants as a condition precedent to an entry of judgment in the lower court. Dennis v. City of Willamina, (1916) 80 Or 486, 157 P 799.

Insufficiency as to the form of the judgment does not require a reversal; the court will make the necessary correction. Gellert v. Bank of Calif., Nat. Assn., (1923) 107 Or 162, 214 P 377.

Modification of judgment so as to correctly describe boundary. Winslow v. Burge, (1925) 115 Or 375, 237 P 979.

A court may not set aside a verdict on its own motion because it believes the verdict manifestly wrong despite substantial evidence in the record to support it. Bean v. Hostettler, (1948) 182 Or 510, 188 P2d 636.

Judgment reversed and case remanded with directions to enter a specified judgment. United States Fid. & Guar. Co. v. United States Nat. Bank, (1916) 80 Or 361, 157 P 155; Seaweard v. First Nat. Bank, (1917) 84 Or 678, 690, 165 P 232; Martin v. Ore. Stages, Inc., (1929) 129 Or 435, 277 P 291; Brown v. Marion Fin. Co., (1942) 168 Or 358, 123 P2d 187; Casper v. Parker, (1944) 175 Or 555, 154 P2d 554; Tucker v. State Ind. Acc. Comm., (1959) 216 Or 74, 337 P2d 979.

Reversed and judgment entered in Supreme Court. Farmers Bank v. Davis, (1919) 93 Or 655, 668, 184 P 275; Associated Oil Co. v. La Branch, (1932) 139 Or 410, 10 P2d 597; Hicks v. Hill Aeronautical School, (1930) 132 Or 545, 286 P 553; Wood v. Sprague, (1940) 165 Or 122, 106 P2d 287; Nation v. Gueffroy, (1943) 172 Or 673, 142 P2d 688, 144 P2d 796; In re Richter's Estate, (1947) 181 Or 360, 175 P2d 997, 181 P2d 133, 182 P2d 378; Shelton v. Lowell, (1952) 196 Or 430, 249 P2d 958.

(3) Damages and costs. The rule that expenses incurred by an appellant in a law case in procuring a transcript must be taxed below as costs, and cannot be so taxed on appeal, is not changed under this section. West v. McDonald, (1913) 64 Or 203, 127 P 784, 128 P 818; Delovage v. Old Ore. Creamery Co., (1915) 76 Or 430, 147 P 392, 149 P 317.

The amount of money to be awarded to the successful party may be found by the court, and judgment may be directed to be entered therefor. Creason v. Douglas County, (1917) 86 Or 159, 167 P 796; Oregon Engr. Co. v. West Linn, (1919) 94 Or 234, 185 P 750; Snyder v. Portland Ry., Light & Power Co., (1923) 107 Or 673, 215 P 887; Leach v. Helm, (1925) 114 Or 405, 235 P 687; George v. Spokane, P. & S. Ry., (1928) 124 Or 598, 609, 265 P 408; Weatherspoon v. Stackland, (1928) 127 Or 450, 271 P 741; Paget v. Cordes, (1929) 129 Or 224, 227 P 101; Lane v. Schilling, (1929) 130 Or 119, 279 P 267, 65 ALR 1042; Ebbert v. First Nat. Bank, (1929) 131 Or 57, 70, 279 P 534; Donaghy v. Ore.-Wash. R. & Nav. Co., (1930) 133 Or 663, 288 P 1003, 291 P 1017; Coos Bay Log. Co. v. Barclay, (1938) 159 Or 272, 295, 79 P2d 672; Norby v. Section Line Drainage Dist., (1938) 159 Or 80, 76 P2d 966; Lyons v. Browning, (1943) 170 Or 350, 133 P2d 599; Keegan v. Lenzie, (1943) 171 Or 194, 135 P2d 717; Cram v. Tippery, (1945) 175 Or 575, 155 P2d 558; Snyder v. Amermann, (1952) 194 Or 655, 243 P2d 1082.

Power to award or deny costs is vested in the Supreme Court by this section. Stabler v. Melvin, (1918) 89 Or 226, 173 P 896; Obermeier v. Mtg. Co. Holland-Am., (1928) 123 Or 469, 471, 259 P 1064, 260 P 1099, 262 P 261; Gowin v. Heider, (1964) 237 Or 266, 386 P2d 1, 391 P2d 630. **But see** State v. Cummins, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083.

The Supreme Court may not reduce an excessive verdict where there is no error in the record. Van Lom v. Schneiderman, (1949) 187 Or 89, 210 P2d 461; Fowler v. Courtmanche, (1954) 202 Or 413, 274 P2d 258.

The Supreme Court does not have the power, where the record is free from error, to reduce a jury verdict awarded under a federal Act because it believes the damages are excessive, and to enter judgment for a lesser sum. Epton v. Am. Mail Line, Ltd., (1970) 256 Or 532, 474 P2d 516; McMahon v. States S.S. (1970) 256 Or 544, 474 P2d 515, cert. denied, 401 US 956.

In holding the judgment erroneous in including interest, the court will deduct from the judgment the amount that

might have been allowed as interest and affirm judgment as modified subject to respondent's acceptance of such reduction. Cornely v. Campbell, (1920) 95 Or 345, 186 P 563, 187 P 1103.

The cost of the transcript will be allowed where the testimony appears to have been necessary to a presentation of the party's assignment of error. Patterson v. Horsefly Irr. Dist., (1937) 157 Or 1, 31, 69 P2d 282, 70 P2d 36.

The Supreme Court does not have the power, where the record is free from error, to reduce a jury verdict awarded under a federal Act because it believes the damages are excessive, and to enter judgment for a lesser sum. Hurst v. Moore-McCormick Lines, Inc., (1947) 180 Or 409, 177 P2d 429. Overruling Wychgel v. States Steamship Co., (1931) 135 Or 475, 296 P 863.

The court cannot speculate on the method used by the jury in arriving at its verdict. Sedello v. Portland, (1963) 234 Or 28, 380 P2d 115.

This section was not intended to confer a power to deal with the question of costs independent of the cost statutes. Gowin v. Heider, (1964) 237 Or 266, 386 P2d 1, 391 P2d 630.

FURTHER CITATIONS: State v. Folkes, (1944) 174 Or 568, 150 P2d 17; Friel v. Lewis, (1953) 197 Or 440, 253 P2d 647; Brazil v. Dupree, (1953) 197 Or 581, 250 P2d 89, 254 P2d 1041; Yurick v. State Ind. Acc. Comm., (1955) 206 Or 108, 289 P2d 683, 291 P2d 721; Fisher v. Reilly, (1956) 207 Or 7, 294 P2d 615; State v. Fong, (1957) 211 Or 1, 314 P2d 243; Noteboom v. Savin, (1958) 213 Or 583, 322 P2d 916, 326 P2d 772; Hays v. Herman, (1958) 213 Or 140, 322 P2d 119; Chrisco v. Gardener, (1958) 215 Or 195, 333 P2d 738; Kraft v. Montgomery Ward & Co., (1959) 220 Or 230, 315 P2d 558, 348 P2d 239, 92 ALR 2d 1; Gumm v. Heider, (1960) 220 Or 5, 348 P2d 455; Mullins v. Rowe, (1960) 222 Or 519, 353 P2d 861; Burghardt v. Olsen (dissenting opinion), (1960) 223 Or 155, 183, 349 P2d 792, 354 P2d 871; State v. Libbey, (1960) 224 Or 431, 356 P2d 161; Houston v. Pomeroy, (1961) 227 Or 499, 362 P2d 708; Northwestern Ice & Cold Storage Co. v. Multnomah County, (1961) 228 Or 507, 365 P2d 876; State v. Foster, (1961) 229 Or 293, 366 P2d 896; State v. Wederski, (1962) 230 Or 57, 368 P2d 393; Rogers v. Day, (1962) 230 Or 564, 370 P2d 624; State v. United States Fid. & Guar. Co., (1963) 234 Or 554, 380 P2d 795; State v. Betts, (1963) 235 Or 127, 384 P2d 198; Middleton v. Linn County Tel. Co., (1963) 234 Or 186, 380 P2d 979; Memmott v. State Ind. Acc. Comm., (1963) 235 Or 360, 385 P2d 188; State v. Herrera, (1963) 236 Or 1, 386 P2d 448; Ladd v. Gen. Ins. Co., (1964) 236 Or 260, 387 P2d 572; Watson v. Dodson, (1964) 238 Or 621, 395 P2d 866; Sternes v. Tucker, (1964) 239 Or 105, 395 P2d 881; State v. Yates, (1965) 239 Or 596, 399 P2d 161; Utley v. City of Independence, (1965) 240 Or 384, 402 P2d 91; Carolina Cas. Ins. Co. v. Ore. Auto Ins. Co., (1965) 242 Or 407, 408 P2d 198; State v. Griffin, (1965) 242 Or 284, 409 P2d 326; State v. Anderson, (1965) 242 Or 368, 409 P2d 681; Godell v. Johnson, (1966) 244 Or 587, 418 P2d 505; German v. Kienow's Food Stores, (1967) 246 Or 334, 425 P2d 523; Noe v. Kaiser Foundation Hosps., (1967) 248 Or 420, 435 P2d 306; Kinney v. Gen. Constr. Co., (1968) 248 Or 500, 435 P2d 297; Williams v. Stockman's Life Ins. Co., (1968) 250 Or 160, 441 P2d 608; State v. Atkins, (1968) 251 Or 485, 446 P2d 660; Jenks Hatchery, Inc. v. Elliott, (1968) 252 Or 25, 448 P2d 370; State v. Gibson, (1968) 252 Or 241, 448 P2d 534; Crawford v. Jackson, (1969) 252 Or 552, 451 P2d 115; Baxter v. Baker, (1969) 253 Or 376, 454 P2d 855; Bunting Tractor Co., Inc. v. Roy L. Houck Sons' Corp., (1969) 253 Or 517, 454 P2d 651; State v. McLean, (1969) 1 Or App 147, 459 P2d 559 aff'd, 255 Or 464, 468 P2d 521; Chance v. Alexander, (1970) 255 Or 13, 465 P2d 226; State v. McIntire, (1970) 2 Or App 429, 468 P2d 536, Sup Ct review denied; Van de Wiele v. Koch, (1970) 256 Or 349, 472 P2d 803; Sachs v. Precision Prod. Co., (1970) 257 Or 273, 476 P2d 199; Lloyd Corp. v. O'Connor, (1971) 258 Or 33, 479 P2d 744; State v. Dixon, (1971) 5 Or App 113, 481 P2d 629; Bailey v. Universal Underwriters Ins. Co., (1971) 258 Or 301, 482 P2d 158; Schroeder v. Schaeffer, (1971) 258 Or 444, 483 P2d 818; Saum V. Bonar, (1971) 258 Or 532, 484 P2d 294; Pearson v. Schmitt, (1971) 259 Or 439, 487 P2d 84.

ATTY. GEN. OPINIONS: Party to filiation proceedings refusing to submit to blood test, 1952-54, p 233.

LAW REVIEW CITATIONS: 6 OLR 267; 7 OLR 349; 9 OLR 35, 521; 11 OLR 350; 13 OLR 54; 15 OLR 158; 19 OLR 380; 31 OLR 287; 35 OLR 1, 143; 36 OLR 253; 39 OLR 86; 41 OLR 279; 44 OLR 95, 193, 195, 232; 46 OLR 145; 49 OLR 210; 1 WLJ 142; 1 EL 77-80.

Section 4

NOTES OF DECISIONS

The legislature has fixed the time of holding terms of the Supreme Court, leaving to the court authority to name other times which may meet the exigencies of judicial business. Moore v. Packwood, (1874) 5 Or 325.

The requirement that written statements of the decisions of the court be filed contemplates statements of the court's conclusions, not discussions of the assignments of error. Schmid v. Thorsen, (1918) 89 Or 575, 585, 170 P 930, 175 P 74.

The Supreme Court may supervise and edit any legally authorized epitome, digest, annotation or codification of written opinions it is required to render. Woodward v. Pearson, (1940) 165 Or 40, 103 P2d 737.

A mandate based on an unconstitutional law is clearly erroneous and may be withdrawn after the term. Daugharty v. Gladden, (1959) 179 F Supp 151.

ATTY. GEN. OPINIONS: Location of "seat of government," 1960-62, p 45.

LAW REVIEW CITATIONS: 35 OLR 12.

Section 5

NOTES OF DECISIONS

1. In general
2. Juries
3. Indictment; information
4. Under former section 18, original Article VII

1. In general

Section 18 of the original Article VII was not repealed by the 1910 amendment and was amended in 1927 even though this section adopted all of the provisions contained in section 18 in 1910. State v. Tollefson, (1933) 142 Or 192, 16 P2d 625.

The privilege of a grand jury indictment or presentment is not inherent in the right of a fair trial nor on that basis protected by the due process clause of the United States Constitution. Hudgens v. Clark, (1963) 218 F Supp 95.

An integrated verdict does not differ in principal from a general verdict. Munger v. State Ind. Acc. Comm., (1966) 243 Or 419, 414 P2d 328.

2. Juries

Verdict was invalid when less than nine jurors concurred in all aspects of verdict. Clark v. Strain, (1958) 212 Or 357, 319 P2d 940; Shultz v. Monterey, (1962) 232 Or 421, 375 P2d 829; Munger v. State Ind. Acc. Comm., (1966) 243 Or 419, 414 P2d 328.

Holding over grand jury from a previous term by order of circuit judge pursuant to statute was not unconstitutional. State v. McReynolds, (1957) 212 Or 325, 319 P2d 905.

A verdict concurred in by less than three-fourths of the

jury is invalid and failure to object thereto before the verdict is received and filed does not constitute a waiver of such invalidity. Shultz v. Monterey, (1962) 232 Or 421, 375 P2d 829.

Waiver of right to grand jury indictment is not a critical stage of proceeding. State v. Miller, (1969) 254 Or 244, 458 P2d 1017.

3. Indictment; information

The requirement of an indictment to charge an offense in the circuit court has reference to the accusation by which a person may be put on trial and convicted, and it does not refer to a complaint which is made with a view to holding an accused person to answer at a subsequent term of the court. Ex parte Wessens, (1918) 89 Or 587, 589, 175 P 73.

This section is not applicable to an information under the Habitual Criminal Act. State v. Hicks, (1958) 213 Or 619, 325 P2d 794, cert. denied, 359 US 917, 79 S Ct 594, 3 L Ed 2d 579.

4. Under former section 18, original Article VII

While grand jurors were required to be selected from the most competent of the permanent citizens of the county, the section did not prescribe the method of determining who citizens of that description were, and it necessarily devolved upon the legislature to define competency and the mode of its determination. State v. Carlson, (1900) 39 Or 19, 62 P 1016.

An indictment would not be set aside as a violation of the provision because the court excused a grand juror at his own request, and not because of sickness or inability to perform the duties required. State v. Bock, (1907) 49 Or 25, 88 P 318.

An amendment of an indictment for the purpose of supplying an allegation of an element of the offense was not permissible. State v. Moyer, (1915) 76 Or 396, 149 P 84.

A purported verdict concurred in by eight jurors did not constitute a verdict. Freeman v. Wentworth & Irwin, Inc., (1932) 139 Or 1, 7 P2d 796.

FURTHER CITATIONS: State v. Lawrence, (1885) 12 Or 297, 7 P 116; State v. Witt, (1899) 33 Or 594, 55 P 1053; State v. Tucker, (1899) 36 Or 291, 61 P 894, 51 LRA 246; State v. Ju Nun, (1909) 53 Or 1, 97 P 96, 98 P 513; State v. Langworthy, (1910) 55 Or 303, 104 P 424, 106 P 336; State v. Ross, (1910) 55 Or 450, 479, 104 P 596, 106 P 1022, 42 LRA(NS) 601; Zurcher v. Portland Ry., (1913) 64 Or 217, 129 P 126; Hubbard v. Brady-Hamilton Stevedores, Inc., (1929) 128 Or 165, 273 P 702; State v. Smith, (1948) 182 Or 497, 188 P2d 998; State v. Ridder, (1949) 185 Or 134, 202 P2d 482; State v. Holland, (1954) 202 Or 656, 277 P2d 386; Miller v. Gladden, (1959) 219 Or 538, 348 P2d 44; Eubanks v. Gladden, (1964) 236 F Supp 129; State v. Fox, (1968) 250 Or 83, 439 P2d 1009; State v. Johnson, (1969) 1 Or App 363, 462 P2d 687.

ATTY. GEN. OPINIONS: Use of indictment in a county court, 1944-46, p 300; verdicts in justice courts, 1946-48, p 116; investigation and finding of fact by court for sentencing, 1956-58, p 97; dismissal of information on motion of district attorney, (1970) Vol 35, p 354.

LAW REVIEW CITATIONS: 32 OLR 58; 37 OLR 239, 255; 38 OLR 303; 39 OLR 135; 47 OLR 418; 4 WLJ 171.

Section 6

NOTES OF DECISIONS

The conviction of a county judge of burglary automatically vacated his office without a proceeding or action brought for his removal. Fehl v. Jackson County, (1945) 177 Or 200, 161 P2d 782.

The section authorizes legislation for the removal of public officials from office. Id.

The court has jurisdiction in a proper proceeding to entertain proceedings for the disbarment of a judge. Jenkins v. Ore. State Bar, (1965) 241 Or 283, 405 P2d 525.

FURTHER CITATIONS: Eacret v. Holmes, (1958) 215 Or 121, 333 P2d 741.

ATTY. GEN. OPINIONS: This section as self-executing, 1924-26, p 352; collection of fees by district attorney for collecting bad checks as malfeasance, 1934-36, p 580; removal of sheriff from office upon judgment being obtained against his official bond, 1954-56, p 173; legislative power to provide other methods of removal, 1956-58, p 59.

LAW REVIEW CITATIONS: 39 OLR 138; 47 OLR 198.

Section 7

NOTES OF DECISIONS

The oath of office of circuit judges must include the declaration: "I will not accept any other office, except judicial offices during the term for which I have been elected." Ekwall v. Stadelman, (1934) 146 Or 439, 30 P2d 1037; State v. Tazwell, (1941) 166 Or 349, 111 P2d 1021.

The taking of an oath not to accept any other office except judicial offices did not prevent a circuit judge from running for Congress. Id.

FURTHER CITATIONS: Senger v. Vancouver-Portland Bus Co. (concurring opinion), (1956) 209 Or 37, 304 P2d 448, 298 P2d 835.

ATTY. GEN. OPINIONS: Circuit judge as member of board of bar governors, 1942-44, p 43; district judge as supervisor of soil conservation district, 1958-60, p 147.

Article VII (Original)

Judicial Department

Article VII (Original)

NOTES OF DECISIONS

See also cases under Article Notes of Decisions for amended Ore. Const. Art. VII.

This Article has been replaced by amended Article VII and is continued in effect only until otherwise provided by legislative enactment. State v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784.

FURTHER CITATIONS: Ramstead v. Morgan, (1959) 219 Or 383, 347 P2d 594, 77 ALR2d 481.

ATTY. GEN. OPINIONS: County judge as member of school board, 1952-54, p 185; courts in which judicial power is vested, 1952-54, p 217; legislation authorizing appointment of pro tempore judges by Chief Justice of Supreme Court, 1954-56, p 68; removal of sheriff from office upon judgment being obtained against his official bond, 1954-56, p 173.

LAW REVIEW CITATIONS: 35 OLR 1.

Section 1

NOTES OF DECISIONS

See also cases under Ore. Const. Art. VII(A), §1, Art. VII(O), §6, §9 and §12.

An Act providing that the recorder and marshal of a city shall be ex-officio justice of the peace and constable respectively, did not violate this provision. Clemmensen v. Peterson, (1899) 35 Or 47, 56 P 1015; Adams v. Kelly, (1913) 44 Or 66, 74 P 399.

The latter part of this section authorizes the legislature to invest justices of the peace with limited judicial powers without defining the limitation. The amount or value over which justices' courts have jurisdiction is left entirely to the discretion of the legislature. Noland v. Costello, (1863) 2 Or 57.

The recorder of a city may be vested by the legislature with the powers of a justice of the peace. Ryan v. Harris, (1866) 2 Or 175.

The jurisdiction of a municipal court is only that which has been clearly conferred, defined and limited by legislative enactment. Robertson v. Groves, (1871) 4 Or 210.

A register of state lands could not render an appealable decision or decree. Anderson v. Laughery, (1871) 3 Or 277.

The proceeding to try the right of property levied upon by the sheriff before a sheriff's jury is not a judicial proceeding, and the statute providing for such proceeding is not in conflict with this section. Capital Lbr. Co. v. Hall, (1881) 9 Or 93.

The right of trial by jury is not violated under this section by an ordinance permitting its enforcement by the municipal courts. Wong v. City of Astoria, (1886) 13 Or 538, 11 P 295.

Where the legislature has established a city court to try offenders against the charter and ordinances of a municipality, the jurisdiction of such court is exclusive in the first instance, and the circuit court can only review the proceedings. State v. Haines, (1899) 35 Or 379, 58 P 39.

A coroner is not invested with any judicial functions whatever under this section. Cox v. Royal Tribe, (1903) 42 Or 365, 71 P 73, 95 Am St Rep 752, 60 LRA 620.

Jurisdiction of the offense of possession of liquor, committed in any part of the county, may be vested in justices' courts. State v. Bunke, (1925) 113 Or 523, 233 P 538.

Circuit courts do not exercise all the inherent powers of the common law courts. State ex rel. Ricco v. Biggs, (1953) 198 Or 413, 446, 255 P2d 1055.

FURTHER CITATIONS: State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174; Jackson v. United States Nat. Bank, (1957) 153 F Supp 104; State ex rel. Mullican v. Parsons, (1971) 257 Or 468, 479 P2d 734.

ATTY. GEN. OPINIONS: City recorder's power to solemnize a marriage, 1952-54, p 156; circuit court jurisdiction in criminal matters, 1952-54, p 240; county judge as school director, 1956-58, p 296; county judge as lucrative office, 1958-60, p 308; justice of the peace as member of board of education, 1966-68, p 609; circuit court power to fix salaries of juvenile department personnel, (1970) Vol 34, p 977.

Section 2

NOTES OF DECISIONS

Each Judge of the Supreme Court was intended, under this section, to be ex-officio judge of the circuit court of the district in which he had been elected. Hanley v. Medford, (1910) 56 Or 171, 108 P 188.

The limitation of the number of members of the Supreme Court is, by virtue of the 1910 amendment, subject to change by the legislature. Holman v. Lutz, (1930) 132 Or 185, 282 P 241, 284 P 825.

FURTHER CITATIONS: Cline v. Greenwood, (1882) 10 Or 230; State v. Cochran, (1909) 55 Or 157, 183, 104 P 419, 105 P 884; Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749.

LAW REVIEW CITATIONS: 40 OLR 274.

Section 3

CASE CITATIONS: State v. Ware, (1909) 13 Or 380, 10 P 885; State v. Kellaher, (1919) 90 Or 538, 563, 177 P 944; State v. Kozer, (1924) 112 Or 286, 229 P 279; State ex rel. Wernmark v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784.

ATTY. GEN. OPINIONS: Term of port commissioner elected to fill vacancy, 1962-64, p 455.

LAW REVIEW CITATIONS: 46 OLR 145.

Section 4

NOTES OF DECISIONS

Prior to the 1910 amendment of Ore. Const. Art. VII, a person elected to fill a vacancy served for the remainder of the term and not for the full period of six years. State v. Ware, (1886) 13 Or 380, 10 P 885; State v. Kellaher, (1919) 90 Or 538, 563, 177 P 944.

The 1910 amendment of Ore. Const. Art. VII has changed the effect of this section, and there is no longer any necessity for an election to fill a vacancy in the Supreme Court since by section 1 of the amended Article all elected judges hold office for six years. State v. Kozer, (1924) 112 Or 286, 229 P 679.

No vacancy occurred in the Supreme Court when a circuit judge was temporarily appointed to the highest court as a substitute for a disabled judge. Holman v. Lutz, (1930) 132 Or 185, 282 P 241, 284 P 825.

Section 5

LAW REVIEW CITATIONS: 36 OLR 260.

Section 6

NOTES OF DECISIONS

1. In general
2. Final decisions

1. In general

Giving the Supreme Court jurisdiction only to revise the final decisions of the circuit court clearly implies that it has jurisdiction to revise them whenever they are final in those courts. Mitchell v. Powers, (1888) 16 Or 487, 19 P 647; Mitchell v. Powers, (1889) 17 Or 491, 21 P 451; North Pac. Presbyterian Bd. of Missions v. Ah Wan, (1890) 18 Or 339, 22 P 1105; Kesler v. Nice, (1909) 54 Or 585, 104 P 2.

The provision that the Supreme Court shall have jurisdiction to revise the final decisions of the circuit court is not self-executing, as the legislature has the power to define the cases and method in which appeals may be taken. Portland v. Gaston, (1901) 38 Or 533, 63 P 1051; State v. Endsley, (1958) 214 Or 537, 331 P2d 338; State v. Briggs, (1966) 245 Or 503, 420 P2d 71.

To protect its appellate jurisdiction, the Supreme Court may issue a restraining order. Livesley v. Krebs Hop Co., (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1; Kellaher v. Portland, (1911) 57 Or 575, 110 P 492, 112 P 1076; Kollock & Co. v. Leyde, (1915) 77 Or 569, 143 P 621, 151 P 733; Central Ore. Irr. Co. v. Pub. Serv. Comm., (1916) 80 Or 607, 157 P 1070; Helms Co. v. Copenhagen, (1919) 93 Or 410, 177 P 935.

The original jurisdiction of the Supreme Court is confined to mandamus, quo warranto and habeas corpus. Wallace v. Portland Ry., Light & Power Co., (1918) 88 Or 219, 159 P 974, 170 P 283; McCarger v. Moore, (1918) 89 Or 597, 175 P 77.

Order removing case to Federal District Court was not reviewable by state Supreme Court. Fields v. Lamb, (1868) 2 Or 340.

An attempted appeal from a decree for want of answer does not confer jurisdiction other than power to dismiss the appeal. Fassman v. Baumgartner, (1869) 3 Or 469.

The Supreme Court has no original jurisdiction in regard to prohibition. Central Ore. Irr. Co. v. Pub. Serv. Comm., (1916) 80 Or 607, 157 P 1070.

Proceeding for return of forefeited bail was not within the jurisdiction of the Supreme Court. State v. Dormitzer, (1927) 123 Or 172, 261 P 428.

A motion for additional attorney's fees and suit money, not submitted to the Supreme Court as a review of the trial court, but initiated in the former court, cannot be maintained, since the Supreme Court is strictly a court of review. LaFollett v. LaFollett, (1932) 138 Or 411, 2 P2d 1109, 6 P2d 1085, 1089.

Except as conferred by the Constitution, the Supreme Court has no jurisdiction. State v. Lawrence, (1934) 148 Or 383, 36 P2d 784.

The law authorizing the Supreme Court to enter into a contract for the publication of the codes and statutes did not violate this provision. Woodward v. Pearson, (1940) 165 Or 40, 103 P2d 737.

2. Final decisions

An order of dismissal as to part of defendants in a case is not a final order where no order of dismissal has been made as to the other defendants. Abrahamson v. Northwestern Pulp & Paper Co., (1933) 141 Or 339, 15 P2d 472, 17 P2d 1117; Dlouhy v. Simpson Tbr. Co., (1967) 247 Or 571, 431 P2d 846.

To be reviewable by the Supreme Court, an order or judgment must be one which determines the proceedings in the circuit court. State v. Ore. Cent. R. Co., (1868) 2 Or 255.

The decision of the circuit court determining the amount of costs taxable in a case, may be reviewed in the Supreme Court on appeal. Cross v. Chichester, (1871) 4 Or 114.

An interlocutory order for suit money in a divorce suit is not a "final decision" of the circuit court from which an appeal can be taken. Clay v. Clay, (1910) 56 Or 538, 108 P 119, 109 P 129.

An appeal to the Supreme Court will not lie from an order sustaining a plea in abatement, for it is not a "final" order within the meaning of this section. La Grande v. Portland Pub. Mkt., (1911) 58 Or 126, 113 P 25.

The legislature is empowered to specify what shall constitute a final decision. Blumauer-Frank Drug Co. v. Horticultural Fire Relief, (1911) 59 Or 58, 112 P 1084.

ATTY. GEN. OPINIONS: Proposed constitutional tax limit, (1968) Vol 34, p 203.

Section 7

NOTES OF DECISIONS

See also cases under Ore. Const. Art. VII(A), §4.

LAW REVIEW CITATIONS: 35 OLR 12.

Section 8

NOTES OF DECISIONS

The duty of holding a circuit court in each county devolved upon the Judges of the Supreme Court under this section. Cline v. Greenwood, (1882) 10 Or 230.

This section cannot be construed so as to permit a circuit judge to call a special term in another district. Hanley v. City of Medford, (1910) 56 Or 171, 108 P 188.

Prior to the election of Supreme Court and circuit court judges in distinct classes, each of the Judges of the Supreme Court was ex-officio judge of the circuit court of the district in which he was elected. Id.

A term of the circuit court, when convened, continues from the time appointed by law to the final adjournment or until the lapse of the term by operation of law. State v. Ryan, (1925) 114 Or 91, 234 P 811.

FURTHER CITATIONS: State v. Kuhnhausen, (1954) 201 Or 478, 266 P2d 698, 272 P2d 225; Thompson v. Dickson, (1954) 202 Or 394, 275 P2d 749.

Section 9

NOTES OF DECISIONS

1. In general

2. Jurisdiction of court generally
3. Appellate jurisdiction; supervisory control

1. In general

This section affirms the common law. Thompson v. Multnomah County, (1861) 2 Or 34.

A charter provision making the common council of a city the final judge of the election and qualification of city officials was not in conflict with this provision. Simon v. Portland Common Council, (1881) 9 Or 437.

When a charter does not make the city council the final or exclusive judge, the jurisdiction of the circuit court remains unaffected under this section. State v. Kraft, (1890) 18 Or 550, 23 P 663.

The writ of prohibition is available in this state as a means whereby a superior court may confine inferior tribunals to the powers which they actually possess. Southern Pac. Co. v. Heltzel, (1954) 201 Or 1, 268 P2d 605.

The right of any appeal from one court to another is permissible only by statute. Gibbs v. Multnomah County, (1959) 219 Or 84, 346 P2d 636.

2. Jurisdiction of court generally. Jurisdiction, if not vested in another court, belongs to the circuit court, and any suitable process or mode of proceeding may be adopted for enforcement of the court's authority. Aiken v. Aiken, (1885) 12 Or 203, 6 P 682; Verdier v. Bigne, (1888) 16 Or 208, 19 P 64.

Jurisdiction will be presumed to be vested in the circuit court, this court being clothed with all power and authority that has not been conferred upon some other tribunal. Howe v. Taylor, (1877) 6 Or 284.

Jurisdiction of a cause is vested in the court and not in any particular judge or department thereof. State v. Gardner, (1898) 33 Or 149, 54 P 809.

A circuit court has jurisdiction of every offense committed and triable within the county, in the absence of a statute depriving it of jurisdiction. In re Application of Loundagin, (1929) 129 Or 652, 278 P 950.

The circuit courts are courts of general jurisdiction. Crocker v. Russell, (1930) 133 Or 213, 287 P 224.

A circuit court has jurisdiction over a prosecution for setting up a still for the purpose of manufacturing intoxicating liquors. Capos v. Clatsop County, (1933) 144 Or 510, 25 P2d 903, 90 ALR 289.

Circuit courts do not exercise all the inherent powers of the common law courts. State ex rel. Ricco v. Biggs, (1953) 198 Or 413, 446, 255 P2d 1055.

The circuit court did not have jurisdiction over the crime of practicing medicine without a license where the statute gave justices' and municipal courts jurisdiction. State v. Amsden, (1917) 86 Or 55, 166 P 942, 167 P 1014.

3. Appellate jurisdiction; supervisory control

This provision does not guarantee a right of appeal from every finding of an inferior tribunal, and leaves the mode of proceeding and the cases to be specified by statute. Kadderly v. Portland, (1903) 44 Or 118, 156, 74 P 710, 75 P 222; Duniway v. Portland, (1905) 47 Or 103, 81 P 945; Smith Sec. Co. v. Multnomah County, (1921) 98 Or 418, 192 P 654, 194 P 428; Portland v. White, (1923) 106 Or 169, 211 P 798.

Supervisory control is exercised, ordinarily, by appeal, writ of review or writ of mandamus. Douglas County Road Co. v. Douglas County, (1875) 5 Or 373.

Supervisory control over the pilot commissioners' proceedings is vested in the court. Snow v. Reed, (1887) 14 Or 342, 12 P 636.

Attendance of a witness before a commission appointed by a court of a sister state to give his testimony to be used in such state may be compelled by the court. State v. Bourne, (1891) 21 Or 218, 227, 27 P 1048.

Inferior courts are those tribunals from which an appeal will lie to another court. Kirkwood v. Washington County, (1898) 32 Or 568, 571, 52 P 568.

The circuit court may compel an inferior court to transfer causes on appeal, and may issue a rule on a justice of the peace requiring him to correct omissions in a transcript. Yankey v. Law, (1914) 71 Or 58, 142 P 336.

A writ of review lies from the circuit court to a county court. Cole v. Marvin, (1920) 98 Or 175, 193 P 828.

Jurisdiction of the court to hear an appeal is conferred by this section. Spencer v. Portland, (1925) 114 Or 381, 235 P 279.

The provision relating to supervisory control over county courts and all other inferior courts and tribunals is not self-executing. City of La Grande v. Municipal Court, (1926) 120 Or 109, 251 P 308.

FURTHER CITATIONS: Norman v. Zieber, (1870) 3 Or 197; Wright v. Young, (1876) 6 Or 87; Ex parte Stacey, (1904) 45 Or 85, 75 P 1060; State v. Langworthy, (1910) 55 Or 303, 104 P 424, 106 P 336; Central Ore. Irr. Co. v. Pub. Serv. Comm., (1916) 80 Or 607, 157 P 1070; Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585, 163 P 983; Security Sav. & Trust Co. v. Latta, (1926) 118 Or 559, 247 P 777; Earle v. Holman, (1936) 154 Or 578, 55 P2d 1097, 61 P2d 1242; Kelly v. Kelly, (1948) 183 Or 169, 191 P2d 656; Jackson v. United States Nat. Bank, (1957) 153 F Supp 104; Holland v. Ribicoff, (1962) 219 F Supp 274; Shannon v. Gladden, (1966) 243 Or 334, 413 P2d 418.

ATTY. GEN. OPINIONS: Force and effect of juvenile court order, 1958-60, p 320; circuit court power to fix salaries of juvenile department personnel, (1970) Vol 34, p 977.

LAW REVIEW CITATIONS: 36 OLR 50; 40 OLR 40; 48 OLR 360-375.

Section 10

NOTES OF DECISIONS

An Act providing for the election of Supreme Court and circuit court judges in distinct classes, and authorizing the Governor to appoint the judges to fill the vacancies created by the Act during the interim, was not repugnant to this section. Cline v. Greenwood, (1882) 10 Or 230; Hanley v. City of Medford, (1910) 56 Or 171, 108 P 188.

The provision requiring circuit judges to take the same oath as judges of the Supreme Court is continued in full force and effect until changed by subsequent legislation, and until such time circuit court judges are required to take the oath set out in Ore. Const. Art. VII(A), §7. Ekwall v. Stadelman, (1934) 146 Or 439, 30 P2d 1037.

FURTHER CITATIONS: State v. Ware, (1886) 13 Or 380, 10 P 885; State v. Cochran, (1909) 55 Or 157, 184, 104 P 419, 105 P 884; Ivancie v. Thornton, (1968) 250 Or 550, 443 P2d 612.

ATTY. GEN. OPINIONS: Legislation concerning collective bargaining by public employes, 1958-60, p 136; district judge as supervisor of soil conservation district, 1958-60, p 147.

LAW REVIEW CITATIONS: 40 OLR 274.

Section 11

NOTES OF DECISIONS

Section 1 of Ore. Const. Art. VII, as amended, changed the terms of office of county judges. Phy v. Wright, (1915) 75 Or 428, 146 P 138, 147 P 381.

FURTHER CITATIONS: State v. Johns, (1870) 3 Or 533;

State ex rel. Wernmark v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784.

ATTY. GEN. OPINIONS: Filling vacancies in office of county judge, 1922-24, p 808; circuit judge's power to perform functions of county judge, 1934-36, p 551; coverage of county judge by workmen's compensation law, 1948-50, p 20; compared with provisions of amended Article VII relating to election of judges, 1954-56, p 68; term of county judge, 1956-58, p 198; validity of county charter provisions regarding judicial duties, 1960-62, p 403.

Section 12

NOTES OF DECISIONS
1. In general
2. Probate matters
3. County business

1. In general

Although probate proceedings are equitable in nature, the county court does not have any equitable jurisdiction. Richardson's Guardianship, (1901) 39 Or 246, 64 P 390; Rutenic v. Hamaker, (1902) 40 Or 444, 67 P 192.

County courts are courts of special and limited jurisdiction under this section. State v. Officer, (1871) 4 Or 180.

The local option law, which required county courts to declare the results of local option elections did not violate this provision. State v. Richardson, (1906) 48 Or 309, 85 P 225, 8 LRA(NS) 362.

The county court does not have the power to admeasure dower when there is a dispute among the heirs as to the widow's rights. Cole v. Marvin, (1920) 98 Or 175, 193 P 828.

This section confers no powers upon a board of county commissioners. MacVeagh v. Multnomah County, (1928) 126 Or 417, 270 P 502.

County courts, when sitting in probate, are courts of general and superior jurisdiction. Lothstein v. Fitzpatrick, (1943) 171 Or 648, 138 P2d 919.

The words "such other powers and duties . . . as may be prescribed by law," referred to the investiture of limited civil and criminal jurisdiction in county courts. Industrial Hosp. Assn. v. Ege, (1946) 178 Or 100, 165 P2d 576.

2. Probate matters

The county court is a court of general jurisdiction in respect of probate matters, and it is entitled to all the presumptions that belong to such courts. Russell v. Lewis, (1871) 3 Or 380; Tustin v. Gaunt, (1873) 4 Or 305; Lawrey v. Sterling, (1902) 41 Or 518, 69 P 460.

The county court, in appointing guardians for minors and insane persons, exercises jurisdiction pertaining to probate courts within the meaning of this provision. Monastes v. Catlin, (1876) 6 Or 119; Godfrey v. Gempler, (1937) 157 Or 251, 70 P2d 551.

Under this section and Art. VII(A), §§2 and 3, probate jurisdiction is vested in the county courts until a change is effected by legislative action. Heirs of Clark v. Ellis, (1881) 9 Or 128, 132; Wright v. Edwards, (1882) 10 Or 298; Stevens v. Meyers, (1912) 62 Or 372, 412, 121 P 434; 126 P 29; State v. Holman, (1914) 73 Or 18, 144 P 429; Yeaton v. Barnhart, (1915) 78 Or 249, 150 P 742, 152 P 1192; Jacobson v. Holt, (1927) 121 Or 462, 255 P 901.

The county court's orders in cases of probate are not subject to collateral attack. Mansfield v. Hill, (1910) 56 Or 400, 107 P 471, 108 P 1007; Sappingfield v. Sappingfield, (1913) 67 Or 156, 161, 135 P 333; Stadelman v. Miner, (1917) 83 Or 348, 393, 115 P 708, 163 P 585, 983.

If the probate courts of the territory had the power to authorize an administrator to perform a contract of his intestate for the sale of real property it will be presumed that such matter is within the jurisdiction of the county court, and a statute providing for the exercise of such power by the probate court is constitutional. Adams v. Lewis, 5 Sawy 229, Fed Cas No. 60.

This section prevented the legislature from requiring executors to account to the circuit court. Adams v. Petrain, (1884) 11 Or 304, 3 P 163.

The county court is authorized to allow a claim for more than $500 against an estate. In re Morgan's Estate, (1904) 46 Or 233, 77 P 608, 78 P 1029.

The county court may construe a will. In re Wilson's Estate, (1917) 85 Or 604, 614, 167 P 580.

Where county courts have been abolished the circuit court has jurisdiction over a proceeding to contest the validity of a will. In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218.

A claim owing a third party and presented by petition in a guardianship estate was not part of "jurisdiction pertaining to probate courts" within the meaning of the Constitution. Industrial Hosp. Assn. v. Ege, (1946) 178 Or 100, 165 P2d 576.

The 1910 amendment to Art. VII authorized legislative enlargement of probate jurisdiction, but did not of itself enlarge by construction the statutes which had been enacted prior thereto. Id.

Action of the county court in inheritance tax determination is entitled to all the presumptions of regularity and validity attendant upon any court's adjudication. Unander v. Stackpole, (1956) 208 Or 63, 299 P2d 612.

A statute which attempted to oust the county court of jurisdiction to determine heirship for the distribution of personal estate of an escheat in process of administration, violated this section. Hanner v. Silver, (1868) 2 Or 336; State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

3. County business

The transaction of county business may be committed by the legislature entirely to the county judge, or the legislature may provide for two commissioners to sit with him, or for a separate board for the transaction of such business. State v. Steele, (1901) 39 Or 419, 65 P 515; State v. Holman, (1914) 73 Or 18, 23, 144 P 429.

If the legislature, under this provision, should provide that two commissioners may be elected with the county judge in the transaction of county business, the tribunal would still be the county court and not a "board of county commissioners." Pacific Bridge Co. v. Clackamas County, (1891) 45 Fed 217.

The jurisdiction of the county commissioners under this section relates to the fiscal concerns of the county; and the management of the county's affairs as a public corporation, and the exercise of "such other powers and duties . . . as may be prescribed by law," relate to the county judge, and are vested in him. State v. Maddock, (1911) 58 Or 542, 115 P 426.

The amendment of 1910 to this Article did not deprive the county court, while engaged in the transaction of county business, of the duty of making a jury list. State v. Holman, (1914) 68 Or 546, 137 P 771.

A proceeding to create a new county out of territory of an existing county is county business. Russell v. Crook County Court, (1915) 75 Or 168, 145 P 653, 146 P 806, 807.

The organization of an irrigation district was not county business. Harney Valley Irr. Dist. v. Weittenhiller, (1921) 101 Or 1, 198 P 1093.

The organization and proceedings of a drainage district is not county business within the purview of this section. Re Scappoose Drainage Dist., (1925) 115 Or 541, 237 P 684, 1117, 1118, 239 P 193.

FURTHER CITATIONS: Rostel v. Morat, (1890) 19 Or 181, 23 P 900; Hebren's Estate, (1901) 40 Or 90, 66 P 688; State

v. MacElrath, (1907) 49 Or 294, 89 P 803; City of Astoria v. Cornelius, (1926) 119 Or 264, 240 P 233; Williams v. Florida (dissenting opinion), (1970) 399 US 78, 141, 90 S Ct 1893, 26 L Ed 2d 446, 477.

ATTY. GEN. OPINIONS: County court's jurisdiction over violations of law, 1924-26, p 589, 1928-30, p 602, 1934-36, p 572, 1944-46, p 300; filling vacancy in the office of county commissioner, 1926-28, p 612; appropriation of money for a statue by the county court, 1928-30, p 205; powers of circuit judge who is filling in for county judge, 1934-36, p 551; probate proceedings as including guardianships, 1936-38, p 148; drainage district matters as county business, 1936-38, p 194; registration of births by county court, 1938-40, p 414; validity of Act relating to election of county commissioners, 1942-44, p 115; county court or board of county commissioners as "administrative head" of county employes, 1946-48, p 189; county court's power to supplement salary of deputy district attorney, 1952-54, p 158; validity of county charter provisions regarding judicial duties, 1960-62, p 403; county court authority to improve tax foreclosed lands for resale, 1962-64, p 199; jurisdiction of adoptions in Coos County under 1967 statute, 1966-68, p 507.

LAW REVIEW CITATIONS: 44 OLR 45.

Section 13

NOTES OF DECISIONS

County courts are courts of limited and special jurisdiction under this section. State v. Officer, (1871) 4 Or 180.

The 1910 amendment of Ore. Const. Art. VII did not affect this provision, except to make it amendable by statute. Yeaton v. Barnhart, (1915) 78 Or 249, 150 P 742, 152 P 1192.

Section 15

CASE CITATIONS: Dickson v. Back, (1897) 32 Or 217, 51 P 727; Barber v. Johnson, (1917) 86 Or 390, 401, 167 P 800, 1183.

ATTY. GEN. OPINIONS: Effect of 1910 amendment, 1930-32, p 110; county clerk's duty to make record search, 1932-34, p 87; county clerk's authority to audit or allow claims, 1934-36, p 277; duties of county clerk relating to tax deeds, 1944-46, p 84; county clerk's right to traveling expenses, 1946-48, p 429; veterans' preference for office of county clerk, 1950-52, p 95.

Section 16

NOTES OF DECISIONS

The duties of the sheriff are not necessarily confined to the execution of orders, judgments and processes of the county, the service of papers in actions and the like, but may include the performance of "other duties as may be prescribed by law." Lane v. Coos County, (1882) 10 Or 123.

ATTY. GEN. OPINIONS: Duty of sheriff to serve summons for justice court, 1922-24, p 19; sheriff's authority to use radar, 1966-68, p 452.

Section 17

NOTES OF DECISIONS

The district attorney is the law officer of the state within the limits of his district, with the powers, in the absence of statutory regulation, of the Attorney General at common law. State v. Douglas County Road Co., (1882) 10 Or 198; State v. Lord, (1896) 28 Or 498, 528, 43 P 471, 31 LRA 473.

This section is preserved by Ore. Const. Art. VII(A), §2, only until otherwise provided by law, the result being that the office in question is not a constitutional office, but one which is subject to legislative control. Baskin v. Marion County, (1914) 70 Or 363, 141 P 1014; State v. Farnham, (1925) 114 Or 32, 234 P 806; State v. Farrell, (1944) 175 Or 87, 151 P2d 636.

The district attorney has power to file an information for both misdemeanors and felonies, as had the Attorney General of England at common law, but in this state such authority is derived from the statute and not from the common law. State v. Guglielmo, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466.

Prior to the 1910 amendment, the legislature did not have power to abolish the office of prosecuting attorney or to restrict the constitutional duties thereof. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173.

The declaration that district attorneys are the law officers of the state does not inhibit the legislature from clothing the Attorney General with authority to institute legal proceedings. State v. Duniway, (1912) 63 Or 555, 128 P 853.

The powers of the Attorney General at common law are by statute and the Constitution vested either in that officer or in the district attorneys. Gibson v. Kay, (1914) 68 Or 589, 137 P 864.

A trial court may appoint an attorney to perform the functions of a disqualified or incapacitated district attorney for the prosecution of a particular case. State v. Gauthier, (1925) 113 Or 297, 231 P 141.

No legislation has enlarged the territorial jurisdiction of district attorneys. State v. Farrell, (1944) 175 Or 87, 151 P2d 636. **But see** State v. Anderson, (1956) 207 Or 675, 298 P2d 195.

On change of venue to another county it is the duty of the district attorney of the county where the offense was committed to prosecute the cause in the place of change. State v. Anderson, (1956) 207 Or 675, 298 P2d 195.

FURTHER CITATIONS: Claim of Ison, (1877) 6 Or 465; Watts v. Gerking, (1924) 111 Or 641, 222 P 318, 228 P 135, 34 ALR 1489; State v. Williams, (1959) 215 Or 639, 336 P2d 68.

ATTY. GEN. OPINIONS: Powers of attorney hired by county court to assist the district attorney, 1920-22, p 664, 1924-26, p 190; authority of special prosecutors, 1922-24, p 359, 1938-40, p 302; effect of Act on length of term of district attorneys, 1922-24, p 573; qualifications of candidate for district attorney, 1922-24, p 640; district attorney's authority to charge collection fees, 1934-36, p 580; restrictions on the private practice of law by district attorneys, 1944-46, p 275; when district attorney can represent resident dependents in obtaining support money from persons outside of state, 1950-52, p 252; district attorney representing persons before state boards and commissions, 1952-54, p 151; legislation authorizing Attorney General to institute action for state, 1958-60, p 161; availability of in rem proceeding against obscene literature, 1964-66, p 132; general duty of district attorneys, (1971) Vol 35, p 448.

LAW REVIEW CITATIONS: 39 OLR 142.

Section 19

ATTY. GEN. OPINIONS: Removal of sheriff from office upon judgment being obtained against his official bond, 1954-56, p 173.

Section 21

NOTES OF DECISIONS

See also cases under Ore. Const. Art. VII(A), §7.

FURTHER CITATIONS: Ivancie v. Thornton, (1968) 250 Or 550, 443 P2d 612.

ATTY. GEN. OPINIONS: Circuit judge as consultant for United States bureau, 1960-62, p 112; judge as member of Juvenile Services Advisory Committee, 1964-66, p 267; necessity of taking oath of office, 1966-68, p 357.

Article VIII

Education and School Lands

Section 1

NOTES OF DECISIONS

This section requires the superintendent to be elected by the people. State ex rel. Musa v. Minear, (1965) 240 Or 315, 401 P2d 36.

The constitutional creation of the title of Superintendent of Public Instruction is not a limitation or prohibition on the power of the legislature to create the State Board of Education. State Bd. of Ed. v. Fasold, (1968) 251 Or 274, 445 P2d 489.

ATTY. GEN. OPINIONS: Nature of election of superintendent, 1926-28, p 57; legislator as member of district school board, 1952-54, p 185; superintendent as a constitutional office, Governor as superintendent, 1958-60, p 161; constitutionality of proposal to use fund in Boardman development, 1960-62, p 162; constitutionality of election of superintendent by State Board of Education, 1962-64, p 153; timber sale receipts as revenue, 1962-64, p 285; constitutionality of delegating supervisory educational duties to State Board of Education, 1966-68, p 197; validity of proposal changing term of Superintendent of Public Instruction, (1969) Vol 34, p 606.

Section 2

NOTES OF DECISIONS

School funds cannot be diverted by the legislature either directly or indirectly from the purpose to which they were dedicated by the Constitution. Eagle Point Irr. Dist. v. Cowden, (1931) 137 Or 121, 1 P2d 605; State Land Bd. v. Davidson, (1934) 147 Or 504, 34 P2d 608.

To give priority to irrigation district assessment liens over mortgages securing the payment of common school funds would be a violation of this provision. Eagle Point Irr. Dist. v. Cowden, (1931) 137 Or 121, 1 P2d 605; State Land Bd. v. Campbell, (1932) 140 Or 196, 13 P2d 346.

A testamentary gift of land in trust for schools is no less a charity because the state has provided a common school fund. In re John's Will, (1896) 30 Or 494, 47 P 341, 50 P 226, 36 LRA 242.

Money collected on a forfeited bail bond does not belong to the irreducible school fund, and the county is liable for the restitution of the money so collected. Metschan v. Grant County, (1899) 36 Or 117, 119, 58 P 80.

The clerk of the land board is not a trustee of the land board, but clerk of the board, whose duty is "to receive, receipt for, and make immediate payment to the State Treasurer" of such funds when collected for the sale of school lands under §2726, Hill's Ann. L. [repealed], and on his failure to pay over such funds, as required, a right of action on his bond accrued immediately for his defalcation and not at the expiration of his term of office, not being a trustee of such fund. State v. Davis, (1903) 42 Or 34, 39, 71 P 68, 72 P 317.

In lending money from the Common School Fund, the state does not act in a proprietary capacity stripped of the attributes of sovereignty, but is performing a duty enjoined upon it by law and is acting for the public. State Land Bd. v. Lee, (1917) 84 Or 431, 165 P 372.

The State Land Board is the instrumentality by which the state administers the Common School Fund. State Land Bd. v. Davidson, (1934) 147 Or 504, 34 P2d 608.

The state is the real party in interest to a suit to foreclose a mortgage given to secure a loan from the irreducible school fund. State Land Bd. v. Schroetlin, (1939) 161 Or 146, 88 P2d 316.

A statute permitting claims to escheated property was constitutional. Haley v. Sprague, (1941) 166 Or 320, 111 P2d 1031.

Persons who, claiming to be decedent's heirs, unsuccessfully resist efforts of the state to recover escheated property, will not be awarded attorney fees from such property. State Land Bd. v. Sovenko, (1954) 202 Or 571, 277 P2d 781.

This section requires all interest and other revenues of the fund to be used "exclusively" for schools. State ex rel. Sprague v. Straub, (1965) 240 Or 272, 400 P2d 229, 401 P2d 29.

An Act to provide for the loaning of common school funds was valid. Kubli v. Martin, (1875) 5 Or 436.

Appeal from a conviction for converting school fund moneys was dismissed for want of jurisdiction. Ross v. Oregon, (1912) 227 US 150, 33 S Ct 220, 57 L Ed 458.

Holding a State Land Board mortgage securing moneys of the Common School Fund inferior to the bonds of an irrigation district of prior issue was proper. State Land Bd. v. Davidson, (1934) 147 Or 504, 34 P2d 608.

FURTHER CITATIONS: Wardwell v. Paige, (1881) 9 Or 517; State v. Grover, (1881) 10 Or 66; Eugene Sch. Dist. v. Fisk, (1938) 159 Or 245, 79 P2d 262; Dickman v. Sch. Dist. 62C, (1962) 232 Or 238, 366 P2d 533; State Hwy. Comm. v. Rawson, (1957) 210 Or 593, 312 P2d 849.

ATTY. GEN. OPINIONS: Payment of expenses incurred in investigating titles to land acquired by the state, 1920-22, p 64; use of interest from the irreducible school fund, 1924-26, p 35, 1930-32, p 72, 1934-36, p 326; priority of lien of mortgages for the irreducible school fund over other liens, 1924-26, p 367, 1930-32, p 361, 1932-34, pp 43, 117, 1934-36, p 172, 1936-38, pp 304, 479, 635, 1940-42, pp 297, 335; escheat of money to the school fund, 1926-28, p 285; investment of school fund in HOLC bonds, 1932-34, p 406; acceptance of smaller sum than is due on school fund mortgage, 1934-36, p 59.

Payment of expenses out of the irreducible school fund, 1934-36, p 519, 1938-40, p 36; transfer of state lands to the Federal Government, 1934-36, p 532, 1936-38, p 238; payment of foreclosure fees for school fund mortgages, 1938-40, p 385; agricultural college fund as part of the irreducible school fund, 1938-40, p 653; power of city to assess escheated land, 1940-42, p 459; payment of taxes on land held for the irreducible school fund, 1946-48, p 400; disposition of confiscated property, 1950-52, p 207.

Disposition of proceeds from tax on parimutuel wagering levied by a city, 1952-54, p 202; use of common school fund for fire protection of state grazing lands, 1954-56, p 45;

disposition of gift of money to State of Oregon where purpose of grant not stated, 1954-56, p 147; constitutionality of proposal to use fund in Boardman development, 1960-62, p 162; timber sale receipts as revenue, 1962-64, p 285; crediting interest on invested funds, 1964-66, p 31; authority of State Land Board to sell, at a loss, low interest bonds to purchase higher yielding mortgages, 1964-66, p 164; duty to sell common stocks received in the Common School Fund by escheat or as abandoned property, 1964-66, p 206; authority regarding investment of proceeds from abandoned property sales, 1964-66, p 232; use of earnings of the fund to pay administrative, maintenance or improvement costs, 1964-66, p 307; authority to combine sale of securities and a loan, 1964-66, p 317; construing purpose of testamentary gift "in appreciation," 1964-66, p 328; use of interest earned for general purposes, 1966-68, p 419; responsibility for investment of Common School Fund, 1966-68, p 562; disposition of receipts from Elliott State Forest and Common School Forest Lands, (1970) Vol 34, p 1131.

Section 3

NOTES OF DECISIONS

A school district is the unit of a general and uniform system of schools, and the legislature has power to establish such district, to determine what officers shall administer its affairs, who and what manner of persons shall be eligible to office and how and by whom they shall be chosen. Harris v. Burr, (1898) 32 Or 348, 52 P 17, 39 LRA 768; State v. Hingley, (1898) 32 Or 440, 52 P 89; Livesley v. Litchfield, (1905) 47 Or 248, 83 P 142, 114 Am St Rep 920; Loe v. Britting, (1930) 132 Or 572, 287 P 74.

A school district's rule of existence, operation and treatment is found in the statutes enacted by the legislature in the exercise of the authority given by this section. School Dist. 35 v. Holden, (1915) 78 Or 267, 151 P 702.

The district boundary board may be given authority by the legislature to establish, change boundaries of, or abolish school districts. Evans v. Hurlburt, (1926) 117 Or 274, 243 P 553.

A uniform school government or school administration is not required by this section. Klamath County School Dist. v. Am. Sur. Co., (1929) 129 Or 248, 275 P 917.

A county unit school system did not violate this section. Id.

To establish and maintain public schools is unquestionably the function of government. Campbell v. Aldrich, (1938) 159 Or 208, 79 P2d 257.

That an educated citizenry is an indispensable essential of democracy is recognized by this provision. Eugene Sch. Dist. v. Fisk, (1938) 159 Or 245, 79 P2d 262.

Teachers are employes hired by a state agency whose function it is to serve the state in the exercise of its sovereign power and duty as mandated by this section. Monaghan v. Sch. Dist. 1, Clackamas County, (1957) 211 Or 360, 315 P2d 797.

The legislature has the constitutional power to create, abolish or alter school districts with or without a vote of the people within the area involved. Union High Sch. Dist. 1 v. Linn County Dist. Boundary Bd., (1966) 244 Or 207, 416 P2d 656.

The authority of the legislature over school districts includes the power to confirm as valid the existence of school districts operating on a de facto basis. Id.

The constitutional creation of the title of Superintendent of Public Instruction is not a limitation or prohibition on the power of the legislature to create the State Board of Education. State Bd. of Educ. v. Fasold, (1968) 251 Or 274, 445 P2d 489.

FURTHER CITATIONS: School Dist. 17 of Sherman County v. Powell, (1955) 203 Or 168, 279 P2d 492; Dilger v. Sch. Dist. 24CJ, (1960) 222 Or 108, 136, 352 P2d 564; Padberg v. Martin, (1960) 225 Or 135, 357 P2d 255; Kuzmanich v. United Fire and Cas. Co., (1966) 242 Or 529, 410 P2d 812; Grant v. School Dist. 61, (1966) 244 Or 131, 415 P2d 165.

ATTY. GEN. OPINIONS: Validity of bill requiring public school teachers to sign loyalty oaths, 1950-52, p 185; legislator as member of district school board, 1952-54, p 185; applicability of municipal building code to public school building, 1958-60, p 68; public school teacher as legislator's secretary, 1958-60, p 118; constitutionality of proposal to use fund in Boardman development, 1960-62, p 162; member of State Board of Education as classroom teacher, 1960-62, p 242; school district as state agency, 1960-62, p 268; joining of administrative school district and union high school district, 1962-64, p 57; public school teacher contributing money to political candidate, 1962-64, p 22; timber sale receipts as revenue, 1962-64, p 285; crediting interest on invested funds, 1964-66, p 31; contracting with private schools for vocational training, 1964-66, p 82; school district as subject to payment of fees of county planning commission, 1964-66, p 203; school authority for a serial levy, 1964-66, p 429; constitutionality of delegating supervisory educational duties to State Board of Education, 1966-68, p 197; constitutionality of Basic School Support Fund apportionment formula, 1966-68, p 430; school district as within administrative department of government, 1966-68, p 609; proposed constitutional tax limit, (1968) Vol 34, p 203; fees school districts may charge, (1969) Vol 34, p 833.

Section 4

NOTES OF DECISIONS

This section did not apply to the state elementary school fund. Eugene School Dist. v. Fisk, (1938) 159 Or 245, 79 P2d 262.

ATTY. GEN. OPINIONS: "Children of school age" defined, 1920-22, p 527; apportionment of high school tuition funds, 1926-28, p 418; "distribution" defined, 1930-32, p 72; constitutionality of proposal to use fund in Boardman development, 1960-62, p 162; timber sale receipts as revenue, 1962-64, p 285; interest earned on fund moneys, 1964-66, p 31; authority of State Land Board to sell, at a loss, low interest bonds to purchase higher yielding mortgages, 1964-66, p 164; use of earnings of the fund to pay administrative, maintenance or improvement costs, 1964-66, p 307; construing proposal for city-county consolidation, 1966-68, p 638; disposition of receipts from Elliott State Forest and Common School Forest Lands, (1970) Vol 34, p 1131.

Section 5

NOTES OF DECISIONS

The State Land Board is the land department of the state. Corpe v. Brooks, (1880) 8 Or 222; Robertson v. State Land Bd., (1902) 42 Or 183, 189, 70 P 614; Miller v. Wattier, (1904) 44 Or 347, 75 P 209; Warner Valley Stock Co. v. Morrow, (1906) 48 Or 258, 86 P 369; State v. Warner Valley Stock Co., (1910) 56 Or 283, 303, 106 P 780, 108 P 861; State Land Bd. v. Lee, (1917) 84 Or 431, 165 P 372; State Land Bd. v. Campbell, (1932) 140 Or 196, 13 P2d 346; De Laittre v. Bd. of Commrs., (1907) 149 Fed 800.

The whole power of management of funds arising from the sale of school and university lands is vested in the board. Hazard's Appeal, (1881) 9 Or 366; Butterfield v. State Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

The legislature cannot take control of the funds arising from the sale of school and university lands from the board and vest it in the county treasurers of the counties where

such lands lie. Fleischner v. Chadwick, (1874) 5 Or 152; Kubli v. Martin, (1875) 5 Or 436.

The board may employ counsel whenever it is necessary to foreclose mortgages, and that right is not inconsistent with the duty of the district attorney to appear in such foreclosure suits when the state is a party. Claim of Ison, (1877) 6 Or 465.

A district attorney is not entitled to fees in suits to foreclose mortgages given to the board for the sale of school and university lands, and for the investment of funds arising therefrom. Hazard's Appeal, (1881) 9 Or 366. **But see** Claim of Ison, (1877) 6 Or 465.

The legal title to funds arising from the sale of state lands by the board is in the state, and it may maintain suits and proceedings for the recovery or preservation thereof. State v. Chadwick, (1882) 10 Or 423.

Assignment of a note and mortgage given to secure a loan of the irreducible school fund may be made by the State Land Board. Lawrey v. Sterling, (1902) 41 Or 518, 69 P 460.

The right of custody of notes and mortgages taken by the State Land Board on loans on the Common School Fund, University Fund and Agricultural College Fund is in the State Treasurer rather than in the State Land Board. State v. Kay, (1915) 74 Or 268, 145 P 277.

Injunction restraining the board from selling lands was sustained. Pennoyer v. McConnaughy, (1890) 140 US 1, 11 S Ct 699, 35 L Ed 363.

In a sale of state lands it was necessary for the board to allege that it was duly constituted, or to specify its authority over state lands. State v. Jewett, (1906) 48 Or 577, 85 P 994.

ATTY. GEN. OPINIONS: Meaning of "university funds," 1922-24, p 79; power of State Land Board to regulate use of state-owned lake, 1930-32, p 277; constitutionality of proposal to use fund in Boardman development, 1960-62, p 162; responsibility for investment of Common School Fund, 1966-68, p 562.

Section 6

ATTY. GEN. OPINIONS: Necessity of registration in order to be a qualified voter and eligible for a district office, 1948-50, p 255; registration of school election voters, 1954-56, p 129; special election held by school district, 1954-56, p 189; constitutionality of special district voter qualification, (1968) Vol 34, p 263.

Article IX

Finance

Section 1

NOTES OF DECISIONS
1. In general
2. Uniformity of operation
3. Exemptions
4. Validity of specific laws

1. In general

The word "tax" means an exaction by the sovereign imposed on the individual or his property to support the general government, or for some special purpose. Pacific Livestock Co. v. Cochran, (1914) 73 Or 417, 144 P 668.

This section and Ore. Const. Art. I, §32 are to be read together. State v. Malheur County, (1949) 185 Or 392, 203 P2d 305.

The assessment of lots and blocks abutting on a street for its improvement in proportion to the benefits received is not in derogation of this provision. King v. Portland, (1865) 2 Or 146; Masters v. Portland, (1893) 24 Or 161, 33 P 540; Kadderly v. Portland, (1903) 44 Or 118, 157, 74 P 710, 75 P 222.

License fees and occupation taxes are not contemplated by this section. Ellis v. Frazier, (1901) 38 Or 462, 63 P 642, 53 LRA 454; Pacific Livestock Co. v. Cochran, (1914) 73 Or 417, 144 P 668; Hofer v. Carson, (1922) 102 Or 545, 203 P 323.

Excise taxes are not within the purview of this constitutional provision. Portland Van & Storage Co. v. Hoss, (1932) 139 Or 434, 9 P2d 122, 81 ALR 1136; General Constr. Co. v. Fisher, (1934) 149 Or 84, 39 P2d 358, 97 ALR 1252.

The apportionment of a public burden among the taxpayers of a particular section by statute is not obnoxious to this section if those of that section reap the principal benefit from the proposed expenditure. Cook v. Port of Portland, (1891) 20 Or 580, 27 P 263, 13 LRA 533.

Where all of one distinct class of property is equally assessed in proportion to its value, the fact that another class may be assessed at a different rate in proportion to its value, is not a violation of this provision. Smith v. Kelly, (1893) 24 Or 464, 470, 33 P 642.

Mere errors of assessors resulting in inequalities in the valuation of taxable property will not vitiate the tax. West Portland Park Assn. v. Kelly, (1896) 29 Or 412, 45 P 901.

To secure uniform and proportional values among all the counties in the state it is necessary that the classification of property in the several counties should be uniform. Dayton v. Bd. of Equalization, (1898) 33 Or 131, 50 P 1009.

The failure of the board of equalization properly to equalize assessments upon personal property throughout the several counties of the state does not invalidate its acts in equalizing values on real property. Dayton v. Multnomah County, (1898) 34 Or 239, 55 P 23.

This section does not apply to special assessments. Northern Pac. Ry. v. John Day Irr. Dist., (1923) 106 Or 140, 211 P 781.

This section does not restrain the taxing power of the legislature beyond the restrictions imposed by the U.S. Const., Am. 14, except that among members or objects included in classes selected by the legislature, inherent uniformity, as well as territorial uniformity, is required. Standard Lbr. Co. v. Pierce, (1924) 112 Or 314, 228 P 812.

Constitutional requirements in regard to uniformity of taxation are restricted to measures which seek to raise revenue, and have no application to burdens imposed which are not, properly speaking, taxes. Livesay v. DeArmond, (1930) 131 Or 563, 284 P 166, 68 ALR 422.

This section does not restrict the state in the exercise of its police power as distinguished from the taxing power. Sproul v. State Tax Comm., (1963) 234 Or 579, 383 P2d 754.

The uniformity exacted in the imposition of an excise tax is geographical, not intrinsic. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

2. Uniformity of operation

This section obligates the legislature to enact laws which will render taxation equal and uniform. Wingate v. Clatsop County, (1914) 71 Or 94, 98, 142 P 561; Dundee Mtg. Co. v. Charlton, (1887) 13 Sawy 25, 32 Fed 192, 194.

A tax which is equal and uniform throughout the taxing district does not violate this constitutional provision. East Portland v. Multnomah County, (1876) 6 Or 62; Multnomah County v. Sliker, (1881) 10 Or 65; Cook v. Port of Portland, (1891) 20 Or 580, 27 P 263, 13 LRA 533; Johnson v. Jackson County, (1914) 68 Or 432, 136 P 874.

Exact equality in the tax or in the classification cannot be attained, it being sufficient if the tax is made on a reasonable basis, and includes all within the class, and is not merely arbitrary. Kellaher v. Portland, (1911) 57 Or 575, 110 P 492, 112 P 1076; Portland Van & Storage Co. v. Hoss, (1932) 139 Or 434, 9 P2d 122, 81 ALR 1136.

The rate of taxation must be equal and uniform throughout the taxing district, whether state or local. Yamhill County v. Foster, (1909) 53 Or 124, 99 P 286.

A property tax on property of people's utility districts was not invalid for lack of uniformity. Northern Wasco County P.U.D v. Wasco County, (1957) 210 Or 1, 305 P2d 766.

Taxing authorities may not single out one taxpayer for discriminatory, or selective, enforcement of a tax law that should apply equally to all similarly situated taxpayers. Penn Phillips Lands, Inc. v. State Tax Comm., (1967) 247 Or 380, 430 P2d 349, aff'd as modified, 2 OTR 373.

Mere inequality in valuation does not contravene this section; arbitrary or systematic discrimination must be shown. Thomas v. State Tax Comm., (1968) 3 OTR 333.

A statute requiring foreign charitable corporations to pay personal property taxes was not invalid for lack of uniformity. Methodist Book Concern v. State Tax Comm., (1949) 186 Or 585, 208 P2d 319.

A statute which directed the counties to levy a tax to collect proceeds for the county public assistance fund did not violate this section, as the counties constituted the taxing districts and the tax was equal and uniform throughout each county. State v. Malheur County, (1949) 185 Or 392, 203 P2d 305.

This section was not violated by an assessment of plaintiff's and other similar property at true cash value, although one similar property was evaluated at a substantially lower amount. Robinson v. State Tax Comm., (1959) 216 Or 532, 339 P2d 432.

3. Exemptions

The property of charitable institutions may be exempted. Hibernian Benevolent Soc. v. Kelly, (1895) 28 Or 173, 42 P 3, 52 Am St Rep 769, 30 ALR 167; Sisters of Mercy v. Lane County, (1927) 123 Or 144, 162, 261 P 694.

The legislature may fix reasonable exemptions on the different classes of subjects. Portland v. Kozer, (1923) 108 Or 375, 217 P 833; McPherson v. Fisher, (1933) 143 Or 615, 23 P2d 913.

Exemption statutes must be strictly construed. Kappa Gamma Rho v. Marion County, (1929) 130 Or 165, 279 P 555.

Constitutional provisions such as this do not prohibit exemption of state-owned property. Security Sav. & Trust Co. v. Lane County, (1935) 152 Or 108, 53 P2d 33.

The legislature is authorized to exempt household goods from taxation. Allen v. Multnomah County, (1946) 179 Or 548, 173 P2d 475.

An Act commuting all taxes on the property of a railroad company for 20 years in consideration of its carrying without charge all troops and munitions of war which the state might require was valid. Hogg v. Mackay, (1893) 23 Or 339, 31 P 779, 37 Am St Rep 682, 19 LRA 77.

A statute allowing certain exemptions in favor of householders was invalid. Wallace v. Bd. of Equalization, (1906) 47 Or 584, 86 P 365.

A charter exempting property in the city from road taxes and assessments, except those levied by the council, did not violate this section. Johnson v. Jackson County, (1914) 68 Or 432, 136 P 874.

4. Validity of specific laws

Notes and mortgages are subject to taxation. Poppleton v. Yamhill County, (1880) 8 Or 337; Crawford v. Linn Co., (1884) 11 Or 482, 5 P 738. **But see** Dundee Mtg. & Trust Inv. Co. v. Sch. Dist. 1, (1884) 19 Fed 359, (1885) 21 Fed 151 and King v. Dundee Mtg. & Trust Inv. Co., (1886) 28 Fed 33.

The Bancroft Bonding Act, providing that the owner of property whose assessment shall exceed $25 may pay such assessments in 10 equal annual instalments, and authorizing the city to issue six percent 10-year bonds for deferred assessments to pay for such improvements did not violate this section or Ore. Const. Art. I, §32. Ladd v. Gambell, (1899) 35 Or 393, 59 P 113.

The value of bicycles not being the same, a specified tax of a certain sum levied upon each destroyed the required uniformity and was invalid. Ellis v. Frazier, (1900) 38 Or 462, 471, 63 P 642, 53 LRA 454.

A statute which provides for the assessment and taxation of certain classes of personal property at the same rate of levy as other property was invalid. Lake County v. Schroeder, (1905) 47 Or 136, 81 P 942.

A statute imposing a tax on sheep coming into the state was invalid. Reser v. Umatilla County, (1906) 48 Or 326, 86 P 595, 120 Am St Rep 815.

Statutes providing for apportionment of state taxes to be collected by the several counties based on the assessed valuation of the several counties for the five years preceding 1901, was invalid for nonuniformity. Yamhill County v. Foster, (1909) 53 Or 124, 99 P 286.

A statute authorizing the issuance of bonds by counties for interstate bridges did not violate this section. Stoppenback v. Multnomah County, (1914) 71 Or 493, 509, 142 P 832.

The issuance of bonds to aid in the construction of an armory was not in contravention of this section. Rankin v. Yoran, (1914) 72 Or 224, 143 P 894.

An inheritance tax did not violate this section. In re Heck's Estate, (1926) 120 Or 80, 250 P 735.

An income tax Act did not violate this provision. McPherson v. Fisher, (1933) 143 Or 615, 23 P2d 913.

County high school fund law was unconstitutional because of unequal burden placed upon taxpayers in high school districts. Smith v. Barnard, (1933) 142 Or 567, 21 P2d 204.

Chain store tax was valid. Safeway Stores, Inc. v. Portland, (1935) 149 Or 581, 42 P2d 162.

Statute allowing credit to residents of Oregon who paid "net" income taxes to foreign states on income also taxed in Oregon did not violate this section. Keyes v. Chambers, (1957) 209 Or 640, 307 P2d 498.

FURTHER CITATIONS: Smith v. Columbia County, (1959) 216 Or 662, 341 P2d 540; M & M Woodworking Co. v. State Tax Comm., (1959) 217 Or 161, 314 P2d 272, 317 P2d 920, 339 P2d 718; Union Pac. R.R. v. State Tax Comm., (1962) 232 Or 521, 376 P2d 80; City of Woodburn v. Domogalla, (1964) 238 Or 401, 395 P2d 150, rev'g 1 OTR 292; R.L.K. and Co. v. State Tax Comm., (1964) 1 OTR 584; Hallberg v. Housing Authority of Portland, (1966) 243 Or 204, 412 P2d 374; Columbia Motor Hotels, Inc. v. State Tax Comm., (1967) 3 OTR 48; Penn Phillips Lands, Inc. v. State Tax Comm., (1968) 251 Or 583, 446 P2d 670; Penn Phillips Lands, Inc. v. Dept. of Rev., (1970) 255 Or 488, 468 P2d 646.

ATTY. GEN. OPINIONS: Validity of tax statutes, 1920-22, p 546, 1922-24, pp 71, 126, 140, 1928-30, pp 88, 130, 1932-34, p 162, 1934-36, pp 202, 254, 1938-40, pp 185, 234, 251, 1940-42, p 210, 1950-52, pp 116, 131; validity of exemptions, 1920-22, p 74, 1926-28, p 108, 1928-30, p 135, 1930-32, p 119, 1938-40, p 670; municipalities' liability for fuel tax, 1920-22, p 629; applicability of section to special assessments, 1922-24, p 498, 1926-28, p 520; taxing of banks, 1926-28, p 575; compromising of taxes on lands conveyed to the United States, 1934-36, p 215; cancellation of taxes, 1934-36, p 244; validity of Act giving discounts of taxes based on improvements, 1942-44, p 139; extending of limitations on bonded indebtedness, 1946-48, p 227; commodity commissions used to advertise that commodity and for research pertaining to it, 1952-54, p 109; validity of commodity commission tax, 1952-54, p 109; tax rate for property omitted from tax rolls, 1954-56, p 63; requirement that tax be uniform throughout the taxing unit, 1956-58, p 104; county's authority to abate interest on taxes owed by utility district, 1956-58, p 118; current taxes on building destroyed after assessment date, 1956-58, p 276; constitutionality of classification of zoned farm land, 1960-62, p 279; validity of classification of timber lands, 1960-62, p 337; assessing farm property, 1962-64, p 221; statutory tax valuation of state-owned, leased industrial park, 1962-64, p 363; legislation requiring minimum number of appraisers be provided to county assessor at county expense, 1962-64, p 443; authority to form a district in area within a city, 1964-66, p 320; constitutionality of proposed bill to assess milk producers, 1966-68, p 203; power of city or county to levy sales or income tax, 1966-68, p 238; metropolitan service district taxing power, (1970) Vol 34, p 959; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977; district attorney prosecuting county assessor's appeal to Department of Revenue from decision of county board of equalization, (1971) Vol 35, p 448; constitutionality of classification based on services rendered, (1971) Vol 35, p 660.

LAW REVIEW CITATIONS: 11 OLR 104; 15 OLR 152; 33 OLR 181; 37 OLR 36, 38, 41; 39 OLR 158; 47 OLR 64; 49 OLR 150; 4 WLJ 474, 537, 546, 584; 5 WLJ 199.

Section 1a

NOTES OF DECISIONS

The entire Act is not invalidated by the inclusion therein of an emergency clause in violation of this section. Briedwell v. Henderson, (1921) 99 Or 506, 195 P 575; State v. Coos County, (1925) 115 Or 300, 237 P 678; Smith v. Patterson, (1929) 130 Or 73, 279 P 271.

Acts containing invalid emergency clauses become effective 90 days after their passage. Briedwell v. Henderson, (1921) 99 Or 506, 195 P 575.

The declaration of an emergency in other than tax laws is impliedly authorized by this section. Cameron v. Stevens, (1927) 121 Or 538, 256 P 395.

This section was not violated by an emergency clause in a statute authorizing a remission of interest, penalties and costs, accruing in connection with taxes levied for certain years. State v. Coos County, (1925) 115 Or 300, 237 P 678.

The emergency clause in a statute providing additional powers and imposing additional duties on certain tax officers with reference to assessment and equalization of property for levy and collection of taxes, was invalid. State v. Kozer, (1927) 121 Or 459, 255 P 900.

It was not unconstitutional under this section to use an emergency clause on a tax measure adopted by the legislative body of a municipality. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

FURTHER CITATIONS: Schubel v. Olcott, (1912) 60 Or 503, 120 P 375; Wieder v. Hoss, (1933) 143 Or 57, 21 P2d 227; Zimmerman v. Hoss, (1933) 144 Or 55, 23 P2d 897.

ATTY. GEN. OPINIONS: Laws regulating taxation or exemption, 1924-26, p 191, 1932-34, p 239, 1936-38, p 260, 1938-40, p 247, 1942-44, p 372, 1946-48, p 230, 1950-52, p 153; emergency clause in measures imposing fees, 1952-54, p 78; emergency clause in bill amending a tax law, 1954-56, p 87; legality of emergency clause on bill amending Workmen's Compensation Law, 1964-66, p 141; adjournment to start 90 days running, 1966-68, p 396; county zoning procedure by initiative, 1966-68, p 481; setting out measures referred to in proposed amendment, (1969) Vol 34, p 594; applicability of initiative and referendum powers to erection of county buildings, (1971) Vol 35, p 500; emergency clause in bill amending cigarette tax law, (1971) Vol 35, p 556; effect upon a tax measure retrospective in application, (1971) Vol 35, p 735.

LAW REVIEW CITATIONS: 19 OLR 73; 46 OLR 253.

Section 1b

NOTES OF DECISIONS

This section did not inhibit the legislature from making further exemptions. Sisters of Mercy v. Lane County, (1927) 123 Or 144, 261 P 694; McPherson v. Fisher, (1933) 143 Or 615, 23 P2d 913.

ATTY. GEN. OPINIONS: Taxing of barges, 1922-24, p 637; taxing of dredges, 1926-28, p 536.

Section 2

NOTES OF DECISIONS

The authority of the Secretary of State to draw warrants upon the State Treasurer depends upon the condition that an appropriation has been made by the legislature for their payment. Brown v. Fleischner, (1871) 4 Or 132.

Where a claim is authorized by law, the want of funds will not justify the Secretary of State in refusing to draw his warrant therefor. Shattuck v. Kincaid, (1879) 31 Or 379, 394, 49 P 758.

This section does not prohibit a continuing appropriation or a levy of a tax in favor of school districts. Eugene Sch. Dist. v. Fisk, (1938) 159 Or 245, 79 P2d 262.

ATTY. GEN. OPINIONS: Applicability to school districts, 1956-58, p 112; effect of proposed revision of section 7 of this Article, 1962-64, p 18; interest payments on highway bonds, 1962-64, p 180; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977.

LAW REVIEW CITATIONS: 37 OLR 276.

Section 3

NOTES OF DECISIONS

This provision promulgates a public policy rendering it unlawful for public officials to use money exacted by tax laws for a specific purpose, for any other purpose. Northup v. Hoyt, (1897) 31 Or 524, 49 P 754; Tuttle v. Beem, (1933) 144 Or 145, 24 P2d 12.

The board of directors of a school district could lawfully pay to a new district the new district's pro rata of tax moneys which had been levied and collected for building purposes. School Dist. 61 v. Sch. Dist. 32, (1908) 53 Or 33, 98 P 523.

Local taxes for local purposes are not affected by this provision. Miller v. Henry, (1912) 62 Or 4, 124 P 197, 41 LRA(NS) 97.

Money appropriated for county market roads may not be used for state highways. Calkins v. Lane County, (1922) 105 Or 127, 208 P 744.

This section did not apply to a penalty imposed by a statute on timberland owners who failed to supply adequate fire protection. Starker v. Scott, (1948) 183 Or 10, 190 P2d 532.

An ordinance imposing a license fee on persons carrying on a business within the city from a motor vehicle does not violate this section even though the revenue derived from the license is not used for road purposes. Wittenberg v. Mutton, (1955) 203 Or 438, 280 P2d 359.

Interest becomes part of the fund and the limitation on the use of the fund prohibits the legislature from divesting it. State ex rel. Sprague v. Straub, (1965) 240 Or 272, 400 P2d 229, 401 P2d 29.

FURTHER CITATIONS: Shattuck v. Kincaid, (1897) 31 Or 379, 394, 49 P 758; Carriker v. Lake County, (1918) 89 Or 240, 171 P 407, 173 P 573; Astoria v. Kozer, (1928) 124 Or 261, 264 P 445; Smith v. Patterson, (1929) 130 Or 73, 279 P 271; Sprague v. Fisher, (1948) 184 Or 1, 203 P2d 274; State Hwy. Comm. v. Rawson, (1957) 210 Or 593, 613, 312 P2d 849.

ATTY. GEN. OPINIONS: Restrictions on use of funds derived from taxes, 1920-22, p 476, 1924-26, pp 41, 124, 1926-28, p 96, 1928-30, p 26, 1930-32, pp 348, 433, 463, 598, 711, 761, 1932-34, pp 71, 145, 304, 1934-36, p 267, 1936-38, p 196, 1940-42, p 405, 1942-44, p 21, 1946-48, p 93, 1950-52, pp 108, 131, 153.

Use of funds received by racing commission, 1952-54, p 90; transfer of moneys in special tax fund, 1952-54, p 99; use of revenue received under "property tax relief" Act, 1952-54, p 107; paying some of expenses of rural fire protection district organizational elections from county treasury, 1952-54, p 250; authority of board of directors of school district to exceed school district budget, 1952-54, p 255; requirement that funds received pursuant to serial levy be kept separate and distinct from other funds, 1958-60, p 231; expenses of members of committee created under statute

which failed to effect appropriation, 1958-60, p 306; authority of school district to purchase land on contract, 1962-64, p 93; diversion of moneys after original purpose ceases to exist, 1962-64, p 127; expenditure of funds for other than budgeted purpose, 1962-64, p 264; submitting several district tax levies at one election, (1970) Vol 34, p 1034.

Effect of 1942 amendment, 1942-44, p 101; effect of proposed legislation creating separate parks commission, 1952-54, p 241; validity of additional fine for traffic violations to use for driver training, 1954-56, p 94; disposition of receipts from a general sales and use tax on automobiles, 1956-58, p 20; personal property tax on motor fuel, 1956-58, p 192; restriction on use of funds, 1956-58, p 201; powers of interim committee to study use of highway funds, 1958-60, p 76; limitation on authority to lease county road, 1960-62, p 172; crediting interest on invested funds, 1964-66, p 31; charging administrative expenses against aircraft fuel tax collections or against fee for Motor Vehicle Accident Fund, 1964-66, p 295; separability of amendment to Motor Vehicle Accident Fund law, 1964-66, p 326; authority of State Highway Commission to comply with Highway Beautification Act, 1964-66, p 336; use of State Highway Fund money except on county roads, 1966-68, p 571; use of gas tax funds under proposed ballot measure, (1968) Vol 34, p 318; advancing State Highway Fund to county for roads, (1969) Vol 34, p 476; revenue from tax on retail sale of motor vehicles and on retail sale of materials to contractor for use in highway or park construction, (1969) Vol 34, p 424; transfer of revenue from motor vehicle registration fees to Department of Forestry, (1969) Vol 34, p 464; authority to donate state park to federal agency for a monument, (1970) Vol 35, p 56; use of vehicle registration fee, sales tax on vehicle fuels for mass transit, (1970) Vol 35, p 198.

Use of highway funds: For student-driver training, 1956-58, p 101; for driver training in nonpublic high schools, 1958-60, p 166; for compensation in lieu of assessments of irrigation districts, 1960-62, p 201; to reimburse for relocating utility facilities, 1960-62, p 366; for recreational boating facilities, 1962-64, p 116; for interest payments on highway bonds, 1962-64, p 180; use of unclaimed motor boat fuel tax refunds, 1962-64, p 67; to acquire property to exchange for utility property needed for right of way, 1964-66, p 202; for snow removal on public or private access roads and parking places, 1966-68, p 73; for expenses of collecting fees for the Student Driver Training Fund and Motor Vehicle Accident Fund, 1966-68, p 222; use of interest earned for general purposes, 1966-68, p 419; to pay part of county's dues to Association of Oregon Counties, (1968) Vol 34, p 191; for Department of Forestry forest fire protection and development of recreational facilities, (1968) Vol 34, p 191; for mass transit, (1969) Vol 34, p 509; grants to support private museum, (1970) Vol 34, p 1108; for anti-pollution campaign publicity, (1970) Vol 35, p 70; for purchase, operation or maintenance of mass transit, private or publicly-owned, or for right of way acquisition for transit system, (1970) Vol 35, p 198; to clean litter from beaches and parks, (1970) Vol 35, p 235; for retirement fund for police officers, (1970) Vol 35, p 367; to pay employer contributions to a State Fire-fighters Retirement Fund, (1971) Vol 35, p 575; for publicly-owned parking facilities used in conjunction with public transportation facilities, (1971) Vol 35, p 686.

LAW REVIEW CITATIONS: 4 WLJ 537, 546.

Section 4

NOTES OF DECISIONS

An appropriation of money may be defined as the setting aside of particular funds for the payment of specified objects or demands against the state. Shattuck v. Kincaid, (1897) 31 Or 379, 49 P 758; Croasman v. Kincaid, (1897) 31 Or 445, 49 P 764.

The purpose of this requirement of the Constitution is to secure to the legislative department the exclusive power of determining how, when and for what purpose the public funds shall be applied. Boyd v. Dunbar, (1904) 44 Or 380, 75 P 695.

A statute providing that moneys paid into the treasury shall be considered as an appropriation is in the nature of a continuing appropriation of the amounts paid in and is an appropriation made by law within the meaning of this section. Holmes v. Olcott, (1920) 96 Or 33, 198 P 202.

An administrative agency or an individual has not power to extend the public moneys without a legislative appropriation therefor. Id.

The power to appropriate public funds is no greater than the authority to tax. Kinney v. City of Astoria, (1923) 108 Or 514, 217 P 840.

A statute providing for an auditing of accounts by the Secretary of State and the issuance of warrants on the State Treasurer did not make an appropriation of funds. Croasman v. Kincaid, (1897) 31 Or 445, 49 P 764.

A statute fixing the salaries of certain officers, and the time of their payment did not constitute an appropriation within the provisions of this section. Shattuck v. Kincaid, (1897) 31 Or 379, 49 P 758.

A statute providing for defraying expenses of carrying into effect the provisions of an enactment was designed to comply with this section of the Constitution. State v. Kozer, (1925) 115 Or 638, 239 P 805.

ATTY. GEN. OPINIONS: Continuing appropriations, 1924-26, p 34; effect of appropriation in a joint resolution, 1930-32, pp 184, 484, 1932-34, p 5, 1948-50, p 201; inadequate appropriation, 1930-32, p 314; remittance of fines without an appropriation, 1930-32, p 617; payment of money by emergency board without an appropriation, 1934-36, p 133; issuance of refunds by state board, 1934-36, p 374, 1936-38, p 643, 1938-40, p 773, 1942-44, p 420; payment of claim against the state, 1942-44, p 21; borrowing from General Fund when appropriation is inadequate, 1950-52, p 286; purpose as correcting the exercise of official discretion in paying out public funds, 1952-54, p 23; use of funds to administer unconstitutional Act, 1952-54, p 199; expenses of members of committee created under statute which failed to effect appropriation, 1958-60, p 306.

Contact made by interim committee of legislature, 1954-56, p 162; funds appropriated for legislators' salaries and expenses as dedicated to interim committee by joint resolution, 1956-58, p 71; using funds appropriated for regular session to pay for special session, 1956-58, p 149; delegation of Secretary of State's duty to audit claims, 1956-58, p 277; construing "appropriations," 1958-60, p 39; compensation and expenses for attendance at National Legislative Conference as legislative expenses, 1958-60, p 45; collective bargaining contracts with unions representing public employes, 1958-60, p 136; payment from current biennium of circuit court judges' traveling expenses incurred in prior biennium, 1958-60, p 297; proceeds from leasing lands, 1958-60, p 386; limitation on expenditure of funds derived under Ore. Const. Art. XI-E, 1958-60, p 410; authority to refund fees, 1960-62, p 11; payment of authorized pension for which there is no current appropriation, 1960-62, p 49; using Northwestern Turkey show funds for county fair purposes, 1960-62, p 357; use of unclaimed motor boat fuel tax refund, 1962-64, p 67; authority of State Treasurer regarding escrowed funds paid on state-owned mortgages, 1964-66, p 274; power of Emergency Board to authorize expenditure of Highway Fund by State Board of Health and state police, 1964-66, p 277; payment from Social Security Revolving Account to United States Treasurer, 1966-68, p 123; authority of State Board of Engineering Examiners to

refund examination fees, 1966-68, p 561; advancing State Highway Fund to county for roads, (1969) Vol 34, p 476; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977.

Section 6

NOTES OF DECISIONS

The Legislative Assembly is not required to levy an additional tax to pay deficiencies if other sources of income from taxation are sufficient to pay them, as well as the current expenses of the state. Burch v. Earhart, (1879) 7 Or 58.

The legislature is obligated to provide no more than an amount of revenue sufficient to defray the necessary expenses of the state for the fiscal year, and to cover any excess over the income of the previous year. State v. Multnomah County, (1886) 13 Or 287, 10 P 635.

An Act to provide funds to defray expenses of government was not passed pursuant to this section. Simon v. Brown, (1874) 5 Or 285.

ATTY. GEN. OPINIONS: Effect of proposed revision of section 7 of this Article, 1962-64, p 18; interest payments on highway bonds, 1962-64, p 180; Governor's power to reduce or eliminate capital expenditures of agencies, (1969) Vol 34, p 788; juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977; adoption by State Department of Education or local school districts of "qualified pension plans," (1970) Vol 35, p 153.

Section 7

NOTES OF DECISIONS

A law which is within the purview of this section may embrace a specific appropriation to pay an existing deficiency for expenses incurred, since the expression "current expenses" is not restricted in meaning to expenses to be incurred after the passage of the appropriation Act. Burch v. Earhart, (1879) 7 Or 58.

An Act creating a commission and providing for the salary of the commissioners was not an appropriation law within the meaning of this section. Evanhoff v. State Ind. Acc. Comm., (1915) 78 Or 503, 154 P 106.

FURTHER CITATIONS: Holmes v. Olcott, (1920) 96 Or 33, 189 P 202.

ATTY. GEN. OPINIONS: Validity of "property tax relief" Act, 1950-52, p 153; matters allowable in appropriation bills, 1966-68, p 289; authority of legislature to change appropriations and expenditure limitations in one bill, 1966-68, p 402; construing "current expenses," 1966-68, p 417.

LAW REVIEW CITATIONS: 31 OLR 122.

Article X

The Militia and Continuity of Government

Section 3

ATTY. GEN. OPINIONS: Tenure of Adjutant General, 1922-24, p 134; authority of Governor to appoint acting adjutant general, 1958-60, p 145; appointment or election of officers, 1958-60, p 195; Adjutant General and Commanding General of Oregon National Guard as separate offices, 1958-60, p 392.

Section 6

ATTY. GEN. OPINIONS: State offices required to name successors, 1960-62, p 228.

Article XI

Corporations and Internal Improvements

Section 1

NOTES OF DECISIONS

This section does not inhibit the incorporation of banks, other than institutions with the privilege of making, issuing and putting into circulation bills, checks and promissory notes as money. State v. Hibernian Sav. & Loan Assn., (1880) 8 Or 396.

FURTHER CITATIONS: Rogers v. Myers, (1969) 252 Or 656, 452 P2d 302.

ATTY. GEN. OPINIONS: Effect of proposed revision dealing with state authority to borrow money, 1962-64, p 18; interest payments on highway bonds, 1962-64, p 180.

Section 2

NOTES OF DECISIONS

1. In general
   (1) Purpose
   (2) Construction
   (3) Definitions
   (4) Operation generally
2. Formation of corporations
3. Home rule generally
   (1) Entities entitled to exercise
   (2) Authority granted
   (3) Exercise of authority
   (4) Limitations on authority granted
   (5) Authority retained by the legislature
   (6) Limitations on legislative power
4. Home rule, particular matters
   (1) Courts and criminal laws
   (2) Intoxicating liquors
   (3) Voting qualifications
   (4) Boundary changes
   (5) Public improvements
   (6) Public streets
   (7) Taxes and finances
   (8) Miscellaneous matters

1. In general

(1) Purpose. The purpose of this section was to prevent legislative interference with purely local and municipal matters and to extend to the voters of the several municipalities full power to regulate such matters as they might see fit. Pearce v. City of Roseburg, (1915) 77 Or 195, 150 P 855; Portland v. Welch, (1936) 154 Or 286, 59 P2d 228, 106 ALR 1188.

The true intent of the 1910 amendment of this section was to enable municipal corporations to amend their charters so as to affect property and other rights within their limits only. Thurber v. City of McMinnville, (1912) 63 Or 410, 128 P 43, 53.

This section and Ore. Const. Art. IV, §1a [repealed 1968] were designed to insure to each incorporated community a full measure of home rule and to limit the power of the legislature to alter local governmental systems. Kalich v. Knapp, (1914) 73 Or 558, 142 P 594, 145 P 22, Ann Cas 1916E, 1051.

It was the intent of the people in adopting the 1906 amendment to this section to withdraw from the Legislative Assembly all its previous power to enact, amend and repeal charters. Branch v. Albee, (1914) 71 Or 188, 142 P 598.

(2) Construction. This section and Ore. Const. Art. IV, §1a [repealed 1968] having been adopted at the same time, are to be construed together. McKenna v. Portland, (1908) 52 Or 191, 96 P 552; Farrell v. Port of Portland, (1908) 52 Or 582, 98 P 145; Kiernan v. Portland, (1910) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332, app. dis., 223 US 151, 32 S Ct 231, 56 L Ed 386; Branch v. Albee, (1914) 71 Or 188, 142 P 598; Duncan v. Dryer, (1914) 71 Or 548, 143 P 644; Robertson v. Portland, (1915) 77 Or 121, 149 P 545, 547; State v. Port of Astoria, (1916) 79 Or 1, 154 P 399; Rose v. Port of Portland, (1917) 82 Or 541, 162 P 498; Carriker v. Lake County, (1918) 89 Or 240, 171 P 407, 173 P 573; Spence v. Watson, (1947) 182 Or 233, 186 P2d 785.

Grants of power to municipal corporations are to be strictly construed. Thurber v. City of McMinnville, (1912) 63 Or 410, 128 P 43; La Grande v. Municipal Court, (1926) 120 Or 109, 251 P 308.

The language of the first clause of the last sentence of this section is explained and limited by Ore. Const. Art. IV, §1a [repealed 1968]. Portland v. Pub. Serv. Comm., (1918) 89 Or 325, 173 P 1178.

(3) Definitions. A "special law" is one that is intended only to affect certain persons or to operate in a particular locality. State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483; Couch v. Marvin, (1913) 67 Or 341, 136 P 6.

The word "corporations," as used in the first sentence of this section, is employed in its broadest sense, and includes public, private and municipal corporations. Straw v. Harris, (1909) 54 Or 424, 103 P 777.

A "general law," within the meaning of this section, is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights and privileges conferred. Id.

A "special law" is one conferring on certain individuals or citizens of a particular locality rights or liabilities not conferred upon others similarly situated. Id.

The term "criminal laws" includes all criminal statutes in force in the state, whether relating to acts malum in se or malum prohibitum, or to acts constituting felonies or misdemeanors. State v. Schluer, (1911) 59 Or 18, 115 P 1057.

The word "exclusive," as used in reference to authority to regulate the liquor traffic, evidenced an intent to make cities the sole delegates of the state police power in this respect. State v. Hearn, (1911) 59 Or 227, 115 P 1066, 117 P 412.

The word "municipality" is to be interpreted in a broad and comprehensive sense, and includes such quasi-corporations as people's utility districts. Northern Wasco County P. U. D. v. Kelly, (1943) 171 Or 691, 137 P2d 295. **But see** School Dist. 17 v. Powell, (1955) 203 Or 168, 279 P2d 492.

(4) Operation generally. The 1906 amendment was not self-operating, and did not, of itself, alter a city charter

previously granted by the legislature. Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193; Kiernan v. Portland, (1910) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332, app. dis., 223 US 151, 32 S Ct 231, 56 L Ed 386.

The 1906 amendment did not operate to impose upon the state a nonrepublican form of government within the meaning of U.S. Const. Art. IV, §4. Kiernan v. Portland, (1910) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332, app. dis., 223 US 151, 32 S Ct 231, 56 L Ed 386.

The delegation of powers in respect of local self-government herein contained does not alter the relation of municipal corporations to the state. Churchill v. City of Grants Pass, (1914) 70 Or 283, 141 P 164.

The 1906 amendment did not deprive cities of the rights conferred upon them by their legislative charters. City of Grants Pass v. Rogue R. Pub. Serv. Corp., (1918) 87 Or 637, 171 P 400.

The 1906 amendment affected existing laws only to the extent that they were inconsistent with it. State v. Portland Ry., Light & Power Co., (1910) 56 Or 32, 107 P 958.

2. Formation of corporations

The only way a municipality or quasi-municipality can be formed in this state is under a general law. Farrell v. Port of Columbia, (1907) 50 Or 169, 91 P 546, 93 P 254; Petition of Bd. of Directors, (1939) 160 Or 530, 86 P2d 460.

The effect of the first sentence of this section is not to change the nature or character of a corporation, but to place all men on an equality in obtaining corporate privileges. Oregon Cascade R. Co. v. Baily, (1869) 3 Or 164.

This section imposes no restrictions upon the legislature in the enactment of general laws. Kiernan v. Portland, (1910) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332, app. dis., 223 US 151, 32 S Ct 231, 56 L Ed 386; State v. Gilbert, (1913) 66 Or 434, 134 P 1038.

An Act creating a port by special statute was not obnoxious to this section, prior to its amendment, if the port's objectives were of a municipal nature. Cook v. Port of Portland, (1891) 20 Or 580, 27 P 263, 13 LRA 533.

An Act appropriating funds in aid of a canal company was in the nature of the grant of a special franchise, and was not violative of the first sentence of this section. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 95 P 722, 98 P 160.

Prior to the 1906 amendment the only way of creating a municipal corporation was by legislative action. Portland v. Hirsch-Weis Mfg. Co., (1928) 123 Or 571, 263 P 901.

The Act permitting formation of mass transit districts was a general law and valid under this section. Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

3. Home rule generally

(1) Entities entitled to exercise. Entities authorized to exercise legislative powers by this section are restricted to cities and towns. Rose v. Port of Portland, (1917) 82 Or 541, 162 P 498; Carriker v. Lake County, (1918) 89 Or 240, 171 P 407, 173 P 573; Hansell v. Douglass, (1963) 234 Or 315, 380 P2d 977, app. dis., 375 US 396, 84 S Ct 452, 11 L Ed 2d 412.

The home rule amendments recognize a distinction between cities which are pure municipalities, and other municipalities which do not have so extensive a power. State v. Port of Astoria, (1915) 79 Or 1, 154 P 399.

This section does not authorize voters of a county to enact legislation by initiative process. Carriker v. Lake County, (1918) 89 Or 240, 171 P 407, 173 P 573.

Drainage districts are not exempted from legislative control by this section. State v. Mehaffey, (1917) 82 Or 683, 162 P 1068.

(2) Authority granted. This provision, together with Ore. Const. Art. IV, §1a [repealed 1968] gives the legal voters of cities the right to exercise such part of the intramural authority as they may choose. Curtis v. Tillamook City, (1918) 88 Or 443, 171 P 574, 172 P 122; Wilson v. City of Medford, (1923) 107 Or 624, 215 P 184.

The home rule amendment of this section and Ore. Const. Art. IV, §1a [repealed 1968] give to incorporated cities exclusive control over their own internal affairs. Couch v. Marvin, (1913) 67 Or 341, 136 P 6.

A revision of a city charter may be enacted by the voters of a city under the powers given them by this section. State v. Portland, (1913) 65 Or 273, 133 P 62.

This provision gives voters of cities and towns unlimited powers in respect of matters that are local, special and municipal. Hofer v. Carson, (1922) 102 Or 545, 203 P 323.

(3) Exercise of authority. The 1906 amendment enabled cities to provide by ordinance the procedure for submitting initiative measures for amendment of charters. Kiernan v. Portland, (1910) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332, app. dis., 223 US 151, 32 S Ct 231, 56 L Ed 386; Duncan v. Dryer, (1914) 71 Or 548, 143 P 644; Pearce v. City of Roseburg, (1915) 77 Or 195, 150 P 855.

Each section of a charter amendment need not be submitted for a separate vote. State v. Portland, (1913) 65 Or 273, 281, 133 P 62.

Power to initiate an ordinance is not conferred by this provision upon a city council. Thielke v. Albee, (1915) 76 Or 449, 150 P 854.

Adoption of a proposed charter by the city commissioners is not the method of enacting charters contemplated by this section, and the action of the commissioners amounts to nothing more than a recommendation. Birnie v. City of La Grande, (1916) 78 Or 531, 153 P 415.

A city organized under the general law can amend its charter only by complying with the requirements governing the enactment of ordinances. Provoost v. Cone, (1917) 83 Or 522, 162 P 1059.

A municipal corporation is not bound to look to its charter alone for authority to act in a given matter, but may proceed under general statutes applicable to all such entities. Portland Baseball Club v. Portland, (1933) 142 Or 13, 18 P2d 811.

(4) Limitations on authority granted. The rights conferred upon municipal corporations by this section are limited to matters of a municipal character. Straw v. Harris, (1909) 54 Or 424, 103 P 777; City of McMinnville v. Howenstine, (1910) 56 Or 451, 109 P 81, Ann Cas 1912C, 193; State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483; Riggs v. City of Grants Pass, (1913) 66 Or 266, 134 P 776; Campbell v. Eugene, (1925) 116 Or 264, 240 P 418; City of La Grande v. Municipal Court, (1926) 120 Or 109, 251 P 308.

The power granted to city and town voters by this provision does not authorize the people of a city to amend its charter so as to confer powers inconsistent with a general law of the state. Straw v. Harris, (1909) 54 Or 424, 103 P 777; Kiernan v. Portland, (1910) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332; Riggs v. City of Grants Pass, (1913) 66 Or 266, 134 P 776.

The state did not surrender its sovereignty by granting to the people of municipalities the power to enact and amend their charters, and a city is still to a certain extent a mere agency of the state. City of McMinnville v. Howenstine, (1910) 56 Or 451, 109 P 81, Ann Cas 1912C, 193; Churchill v. City of Grants Pass, (1914) 70 Or 283, 141 P 164; Coleman v. City of La Grande, (1914) 73 Or 521, 144 P 468; City of Woodburn v. Pub. Serv. Comm., (1916) 82 Or 114, 161 P 391, Ann Cas 1917E, 996, LRA 1917C, 98.

This provision does not operate to extend authority to municipal corporations over matters that are neither municipal nor germane to the purposes for which such entities are formed. City of Woodburn v. Pub. Serv. Comm., (1916)

82 Or 114, 161 P 391, Ann Cas 1917E, 996, LRA 1917C, 98; In re Application of Boalt, (1927) 123 Or 1, 260 P 1004.

Authority beyond that conferred herein upon cities and towns must come either from the legislature or the people. Riggs v. City of Grants Pass, (1913) 66 Or 266, 134 P 776; State v. Port of Astoria, (1916) 79 Or 1, 154 P 399; City of La Grande v. Municipal Court, (1926) 120 Or 109, 251 P 308.

The view that a municipal corporation can do anything it may choose that is not expressly forbidden by law has been distinctly repudiated in this state. Cole v. City of Seaside, (1919) 93 Or 65, 182 P 165; City of La Grande v. Municipal Court, (1926) 120 Or 109, 251 P 308.

Municipal charters are subject to any statute which defines and makes punishable any offense. Baxter v. State, (1907) 49 Or 353, 88 P 677, 89 P 369.

The people did not by this section give municipal corporations dominion over areas without the municipal limits except on consent of the inhabitants of such areas as expressed in an election. Couch v. Marvin, (1913) 67 Or 341, 136 P 6.

The authority of cities and towns emanates from the state. Portland v. Pub. Serv. Comm., (1918) 89 Or 325, 173 P 1178.

Those amendments did not repeal the provisions which limit the extent to which municipal legislation may go on particular subjects. Hauke v. Ten Brook, (1927) 122 Or 485, 259 P 908.

The authority of a municipal corporation to enact local, special and municipal legislation is subject to the Constitution and general state laws. Pederson v. Portland, (1933) 144 Or 437, 24 P2d 1031.

Justice of the peace power conferred by statute continues until unequivocally repealed by the legislature. Grayson v. State, (1968) 249 Or 92, 436 P2d 261.

(5) Authority retained by the legislature. The legislature is not precluded by this section from regulating cities and towns by general laws. City of McMinnville v. Howenstine, (1910) 56 Or 451, 109 P 81, Ann Cas 1912C, 193; Colby v. City of Medford, (1917) 85 Or 485, 167 P 487; Lovejoy v. Portland, (1920) 95 Or 459, 188 P 207; In re Application of Boalt, (1927) 123 Or 1, 260 P 1004.

The general laws of the state control municipal corporations in respect of matters that are not solely municipal. Coleman v. City of La Grande, (1914) 73 Or 521, 144 P 468; City of Woodburn v. Pub. Serv. Comm., (1916) 82 Or 114, 161 P 391, Ann Cas 1917E, 996, LRA 1917C, 98.

The legislature is not precluded by this section from amending laws previously passed concerning municipalities other than towns or cities. State v. Port of Astoria, (1916) 79 Or 1, 154 P 399.

The power to exercise dominion over areas outside of their boundaries is not delegated to municipalities. Couch v. Marvin, (1913) 67 Or 341, 136 P 6.

Cities and towns are amenable to general laws in respect of extramural affairs and matters of general interest. Coleman v. City of La Grande, (1914) 73 Or 521, 144 P 468.

Public matters concerning the people of the state at large in common with the inhabitants of a given community are clearly within the sovereign jurisdiction of the state. Portland v. Welch, (1936) 154 Or 286, 59 P2d 228, 106 ALR 1188.

(6) Limitations on legislative power. The prohibition against interference with municipal charters extends to and includes the charters of ports. State v. Swigert, (1911) 59 Or 132, 116 P 440.

A law general in form cannot deprive cities of the right to legislate on purely local affairs germane to the purposes for which the city was incorporated. Id.

A law operating to change the charter of a port district cannot be upheld as a general statute merely because it purports to apply to a certain class of ports, if the classification is illusory and without basis in fact. Id.

The inhibition contained in the second sentence of this section is directed solely against legislative action affecting only a single municipality. State v. Gilbert, (1913) 66 Or 434, 134 P 1038.

As to matters that are purely municipal, the legislature may not interfere by either general or special statutes. Pearce v. City of Roseburg, (1915) 77 Or 195, 150 P 855.

The legislature does not possess power to authorize a city council to either adopt or amend city charters by ordinance, as that authority belongs to the legal voters of the city. Birnie v. City of La Grande, (1916) 78 Or 531, 538, 153 P 415.

Prior to 1906 municipal corporations were under sole control of the legislative department. City of Grants Pass v. Rogue R. Pub. Serv. Corp., (1918) 87 Or 637, 171 P 400.

While a general law supersedes a municipal charter or ordinance in conflict therewith, the subject matter of a general enactment must pertain to those things of a general concern to the people of the state. Portland v. Welch, (1936) 154 Or 286, 59 P2d 228, 106 ALR 1188.

A statute authorizing exclusion from boundaries of city having population of 2,000 or less, upon showing as provided in statute by an owner of 20 or more acres included therein, was unconstitutional. Schmidt v. City of Cornelius, (1957) 211 Or 505, 316 P2d 511.

This section did not limit the power of the legislature to enact a general law providing for the creation of mass transit districts. Homer's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct **review denied** (with opinion), 256 Or 124, 471 P2d 798.

4. Home rule, particular matters

(1) Courts and criminal laws. A city ordinance defining the offense of vagrancy and providing for its punishment did not violate this section. Portland v. Parker, (1914) 69 Or 271, 138 P 852; Harlow v. Clow, (1924) 110 Or 257, 223 P 541.

The fact that the state law covers an offense does not preclude a municipal corporation from denouncing it. Wong v. City of Astoria, (1886) 13 Or 538, 11 P 295.

A charter provision which contravenes a criminal law is invalid under this section. State v. Schluer, (1911) 59 Or 18, 115 P 1057.

A city liquor license, issued under this section, cannot authorize the licensee to violate a state criminal statute relative thereto. State v. Boysen, (1915) 76 Or 48, 147 P 927.

A municipal corporation cannot, by virtue of this section, deprive a municipal judge of authority to act as a justice of the peace, duly conferred upon him by legislative enactment. In re Application of Boalt, (1927) 123 Or 1, 260 P 1004.

A statute authorizing cities of over 200,000 population to appoint additional municipal judges is not repugnant to this section, though such classification applied to one city only. Id.

The power granted under this section includes the power to provide by a municipal charter that municipal judges shall be appointed by city council. State ex rel. Mullican v. Parsons, (1971) 257 Or 468, 479 P2d 734.

(2) Intoxicating liquors. The 1910 amendment permitted the voters of a city to determine its policy in respect to the sale of intoxicants. State v. Perkins, (1912) 61 Or 163, 121 P 797.

The manifest intent of the 1910 amendment of this section was to give cities and towns exclusive control of the liquor traffic within their limits. Id.

This provision gave the voters of a municipality the same power of legislation in respect of local matters as the legislature or the people of the state have in state-wide affairs. Salem Brewery Assn. v. Salem, (1914) 69 Or 120, 138 P 255.

The clause providing that a municipal corporation's con-

trol over the sale of liquor shall be subject to local option meant that it should be subject to the right of the electors to prohibit such sale. Id.

The 1910 amendment of this section operated to retain the county court as the agency authorized to put into or out of operation orders of prohibition. Wiley v. Reasoner, (1914) 69 Or 103, 138 P 250.

The 1910 amendment of this section did not nullify state criminal laws dealing with the liquor traffic. State v. Boysen, (1915) 76 Or 48, 147 P 927.

The provisions of this section relating to liquor were repealed by prohibition amendments in 1914 and 1916 and were not revived by the repeal of such amendments. City of Klamath Falls v. Ore. Liquor Control Comm., (1934) 146 Or 83, 29 P2d 564.

The Oregon Liquor Control Act has the attributes of a criminal statute, and does not contravene the home rule amendment. Id.

(3) Voting qualifications. A city charter provision which limits the right to vote at municipal elections to persons who have paid their road poll taxes for the current year is beyond the power of city voters to enact. Livesley v. Litchfield, (1905) 47 Or 248, 83 P 142, 114 Am St Rep 920.

A city may properly, under this provision, include in a new charter a provision giving every elector the right to vote in municipal elections unfettered by a property qualification. State v. Kelsey, (1913) 66 Or 70, 133 P 806.

A provision of an ordinance providing for the exercise of initiative and referendum, but restricting the signing of initiative petitions to registered voters, is invalid. State v. Dalles City, (1914) 72 Or 337, 346, 143 P 1127, Ann Cas 1916B, 855.

A statute purporting to limit the right to vote at a city election involving amendment of the charter is violative of this section. Veatch v. City of Cottage Grove, (1930) 133 Or 144, 289 P 494.

Charter provisions of a municipality limiting the right to vote upon tax matters to taxpayers only are nugatory under this provision and Ore. Const. Art. IV, §1a [repealed 1968]. Johnson v. City of Pendleton, (1929) 131 Or 46, 280 P 873.

(4) Boundary changes. A municipal corporation is not authorized by this section to extend its boundaries without the consent of the legal voters of the areas sought to be annexed. State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483; Thurber v. City of McMinnville, (1912) 63 Or 410, 128 P 43; Landess v. City of Cottage Grove, (1913) 64 Or 155, 129 P 537.

The legislature is not inhibited by this section from enacting a general statute authorizing the consolidation of contiguous municipalities. State v. Gilbert, (1913) 66 Or 434, 134 P 1038; State ex rel. Cutlip v. North Bend, (1943) 171 Or 329, 137 P2d 607.

A proceeding by a port to annex adjoining areas is not such a municipal activity as can be executed without legislative authorization. State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483.

A municipal corporation, being to an extent an arm of the state, may include within its territorial limits state property, such as a state institution for the insane, so long as its ordinances do not encroach upon the sovereign power of the state. Day v. Salem, (1913) 65 Or 114, 131 P 1028, Ann Cas 1915A, 1011.

Annexation of territory to a city involves an amendment of its charter, and an ordinance which fails to accord to the municipal electors the right to vote on such a proposal is a nullity. Cooke v. Portland, (1914) 69 Or 572, 139 P 1095.

Changing the boundaries of a school district by the district boundary board is not within the inhibitions of this section. School Dist. 35 v. Holden, (1915) 78 Or 267, 151 P 702, 703.

The electors of a city may change the corporate boundaries by excluding territory previously included within its limits. Flavel Land Co. v. Leinenweber, (1916) 81 Or 353, 158 P 945.

A statute providing procedure for annexation of outside territories by a municipality was constitutional. Spence v. Watson, (1947) 182 Or 233, 186 P2d 785.

(5) Public improvements. Authority to construct a bridge within municipal limits may be conferred by an amendment of the charter. Kiernan v. Portland, (1910) 57 Or 454, 111 P 379, 112 P 402, 37 LRA(NS) 332, app. dis., 223 US 151, 32 S Ct 231, 56 L Ed 386.

A city has no power, under this section, to impose upon the county in which it is situated the expense of maintaining a bridge it has erected. Id.

The voters of a city may amend their charter so as to appropriate water rights without the municipal boundaries in order to procure an adequate water supply. City of McMinnville v. Howenstine, (1910) 56 Or 451, 109 P 81, Ann Cas 1912C, 193. **But see** State v. Port of Astoria, (1916) 79 Or 1, 154 P 399.

The power to condemn real property without city limits cannot be conferred by mere amendment of a city charter, in the absence of legislative authority. Thurber v. City of McMinnville, (1912) 63 Or 410, 128 P 43.

Power to build a railroad without city limits cannot be given by charter amendment in the absence of proper statutory authority. Riggs v. City of Grants Pass, (1913) 66 Or 266, 134 P 776.

An Act authorizing incorporated cities and towns to build, own and operate railroads either within or without their corporate limits was valid. Churchill v. City of Grants Pass, (1914) 70 Or 283, 141 P 164.

(6) Public streets. The paramount and primary control of the highways of the state is vested in the legislature, even though they consist in part of city streets. East Portland v. Multnomah County, (1876) 6 Or 62; Platt v. Newberg, (1922) 104 Or 148, 205 P 296.

A municipal corporation has no authority over roads and highways except as delegated to it by the state. Cole v. City of Seaside, (1916) 80 Or 73, 156 P 569; City of La Grande v. Municipal Court, (1926) 120 Or 109, 251 P 308.

A statute purporting to confirm a city's grant of the right to maintain poles in certain streets, enacted after adoption of the home rule provision herein contained, is wholly insufficient to ratify the grant. California-Ore. Power Co. v. City of Medford, (1915) 226 Fed 957.

A city cannot by virtue of this section acquire jurisdiction over a county road running through its limits, for such powers are beyond those purely municipal. Cole v. City of Seaside, (1916) 80 Or 73, 86, 156 P 569.

A carrier authorized to use the streets under state law cannot be debarred from such user by city ordinance. Dent v. Oregon City, (1923) 106 Or 122, 211 P 909.

The legislature's power over public roads and highways is paramount to that of any municipal corporation through which they may pass. Dent v. Oregon City, (1923) 106 Or 122, 211 P 909.

(7) Taxes and finances. The home rule amendments were not intended to vest a power of taxation at large, so that a city might reach out and assume the power to tax without limitations or restrictions. Portland v. Portland Gas & Coke Co., (1916) 80 Or 194, 207, 150 P 273, 156 P 1070; Portland v. Portland Ry., Light & Power Co., (1916) 80 Or 271, 306, 156 P 1058.

Statutes relating to instalment payment of assessments for streets and sewers were constitutional. Colby v. City of Medford, (1917) 85 Or 485, 167 P 487; Lovejoy v. Portland, (1920) 95 Or 459, 188 P 207.

A statute relating to the refunding of bonds issued by incorporated cities was constitutional. Burton v. Gibbons, (1936) 148 Or 370, 36 P2d 786; Covey Drive Yourself & Garage v. Portland, (1937) 157 Or 117, 70 P2d 566.

A city may properly, under this section, provide by ordi-

nance for the care, investment and security of its public funds, since such matters are within its police power. Portland v. State Bank, (1923) 107 Or 267, 214 P 813.

A provision which purported to authorize the State Tax Commission to eliminate or reduce items in a city budget was invalid. Portland v. Welch, (1936) 154 Or 286, 59 P2d 228, 106 ALR 1188.

The legislature may by general law limit the levying of taxes or incurrence of indebtedness by municipalities. Id.

A statute regulating the advertisement of bonds is not violative of this provision, in so far as the statute applies to revenue bonds. City of Cascade Locks v. Carlson, (1939) 161 Or 557, 90 P2d 787.

The manner in which a taxpayer is informed of the consequences of his vote on a tax measure is a matter of predominantly general rather than local concern, regardless of whether it is a general or local taxing matter. City of Woodburn v. State Tax Comm., (1966) 243 Or 633, 413 P2d 606, aff'g 2 OTR 137.

(8) Miscellaneous matters. Powers conferred upon municipalities to regulate rates by special charter granted by the legislature became inoperative by the adoption of the public utility Act. California-Ore. Power Co. v. City of Grants Pass, (1913) 203 Fed 173; Portland Ry., Light & Power Co. v. Portland, (1914) 210 Fed 667.

Enlargement of the duties of state and county officers is beyond the legislative powers of municipal corporations. Wilson v. City of Medford, (1923) 107 Or 624, 215 P 184; City of La Grande v. Municipal Court, (1926) 120 Or 109, 251 P 308.

The establishment of a civil service system for firemen is a matter of local concern. State v. City of Milwaukie, (1962) 231 Or 473, 373 P2d 680; Boyle v. City of Bend, (1963) 234 Or 91, 380 P2d 625. Boyle v. City of Bend, supra, **distinguished in** City of Woodburn v. State Tax Comm., (1966) 243 Or 633, 413 P2d 606.

A statute providing for the incorporation of ports was valid as a general law within this section. Straw v. Harris, (1909) 54 Or 424, 103 P 777.

Statutes authorizing incorporated cities to operate railroads, waterworks and light plants, did not operate as an amendment to city charters, although such charters could be amended to take advantage of the powers granted. Riggs v. City of Grants Pass, (1913) 66 Or 266, 270, 134 P 776.

A statute that attempted to provide a police relief, health, disability and pension fund in a particular city and to set up a board to administer such fund was invalid as a legislative attempt to amend the city's charter. Branch v. Albee, (1914) 71 Or 188, 142 P 598.

A statute relating to the union of several school districts for high school purposes, did not violate this section. State v. Hall, (1914) 73 Or 231, 144 P 475.

A municipal corporation has no power, under this section, to require a county treasurer to turn over to it a portion of the moneys collected as road taxes upon property within the corporate limits. West Linn v. Tufts, (1915) 75 Or 304, 146 P 986.

A statute which attempts to restrict the power of cities and towns to levy taxes is antagonistic to this section. Pearce v. City of Roseburg, (1915) 77 Or 195, 150 P 855.

Legal voters of a city may amend their charter so as to authorize a reassessment upon a special assessment declared void by the courts. Phipps v. City of Medford, (1916) 81 Or 119, 130, 156 P 787, 158 P 666.

A city cannot amend its charter by the initiative so as to clothe itself with the sovereign police power of rate regulation to the exclusion of the legislature. City of Woodburn v. Pub. Serv. Comm., (1916) 82 Or 114, 161 P 391, Ann Cas 1917E, 996, LRA 1917C, 98.

A miller may be required by municipal charter to keep his mill race covered with a plank. Gaston v. Thompson, (1918) 89 Or 412, 174 P 717.

A statute prohibiting cities from imposing a license tax on insurance agents does not contravene the portion of this section that forbids the legislature to enter into the field of municipal legislation. Lovejoy v. Portland, (1920) 95 Or 459, 188 P 207.

A statute regulating the possession and control of dogs within cities and towns is not without the power of the legislature to enact under this section. Hofer v. Carson, (1922) 102 Or 545, 203 P 323.

City ordinances regulating the operation of motor vehicles cannot be valid in so far as they conflict with the state law on the subject. Lidfors v. Pflaum, (1925) 115 Or 142, 205 P 277, 236 P 1059.

Laws regulating dance halls did not violate the home rule amendment. State v. Kincaid, (1930) 133 Or 95, 285 P 1105, 288 P 1015.

A general law prescribing a particular overtime rate for all classes of municipal employes was valid. Pederson v. Portland, (1933) 144 Or 437, 24 P2d 1031.

A statute authorizing exclusion from boundaries of city having population of 2,000 or less, upon showing as provided in statute by an owner of 20 or more acres included therein, was unconstitutional. Schmidt v. City of Cornelius, (1957) 211 Or 505, 316 P2d 511.

Charter provision requiring vacation of office by city commissioner who seeks another lucrative office was constitutional under U.S. Const., Am. 1. Ivancie v. Thornton, (1968) 250 Or 550, 443 P2d 612, cert. denied, 393 US 1018.

FURTHER CITATIONS: District of Columbia v. John R. Thompson Co., (1952) 346 US 110, 73 S Ct 1007, 97 L Ed 1480; State ex rel. Meyer v. County Court, (1958) 213 Or 643, 326 P2d 116; Wright v. Blue Mountain Hosp. Dist., (1958) 214 Or 141, 328 P2d 314; Davidson Baking Co. v. Jenkins, (1959) 216 Or 51, 337 P2d 352; Fischer v. Miller, (1961) 228 Or 54, 363 P2d 1109; City of Woodburn v. Domogalla, (1963) 1 OTR 292, rev'd, 238 Or 401, 395 P2d 150; Department of Rev. v. Multnomah County, (1970) 4 OTR 133.

ATTY. GEN. OPINIONS: Validity of ordinances relating to motor vehicle travel, 1922-24, p 459, 1926-28, p 549; validity of tax laws, 1928-30, p 99; investments by cities, 1930-32, p 519; statutes relating to the regulation by a state agency of public utilities, 1930-32, p 647; validity of laws giving state officials control over intoxicating liquors in cities, 1932-34, p 484; creation of a rural electrification authority, 1934-36, p 231; ratification by law of refunding bonds issued by cities, 1934-36, p 537; municipality defined, 1934-36, p 754; excluding land from the limits of a city, 1938-40, p 181; employment of peace officers by cities to protect the water system, 1940-42, p 562.

Procedure in municipal elections relating to boundary changes, 1944-46, p 71; levy of tax by city on a state school, 1946-48, p 519; power of legislature to remedy defects in a municipal charter, 1948-50, p 167; law prohibiting county officers from being candidates for a city office, 1950-52, p 138; bill creating a municipal corporation for the care of the sick, 1950-52, p 106; validity of ordinance prohibiting the sale of intoxicating liquor to an Indian, 1950-52, p 258; effect of simultaneous elections on local option in county and city located therein, 1952-54, p 222.

City imposing license fee on real estate brokers and salesmen, 1956-58, p 204; state regulation of utilities within municipalities, 1956-58, p 223; municipal regulation of construction of school building by school district, 1958-60, p 68; Green River Ordinance restrictions on licensed insurance agents, city licenses for insurance agents, 1958-60, p 77; legislation concerning collective bargaining by public employes, 1958-60, p 136; constitutional authority to make

Public Employes' Retirement Act mandatory for political subdivisions, 1960-62, p 145; authority to legislate regarding city water rates to outside users, 1960-62, p 197; ownership of streets in a city, 1960-62, p 311; Eugene Water and Electric Board as public corporation, 1960-62, p 349; county home rule amendment as compared to this section, 1960-62, p 403; limitation of board authority to change boundaries, 1960-62, p 462; legislation prescribing method of initiating ordinances, 1962-64, p 212; construing "local" law, 1962-64, p 240; nomination of candidates for city offices, 1964-66, p 80; effect of statute requiring proposed levy to be stated in dollars and cents, limitations on purpose of levy, 1964-66, p 156; power of board of county commissioners to legislate concerning county library board, 1964-66, p 287; division of fines collected in Portland municipal court for violation of Motor Vehicle Code, 1964-66, p 404; construing proposed constitutional tax limit, 1964-66, p 429; applicability of city ordinances to state agencies, 1966-68, p 78; authority of a city to provide ambulance service by contract with a private person, 1966-68, p 134; authority of home rule counties to enact ordinances regulating pinball machines, application of ordinances within cities, 1966-68, p 174; legislative prohibition of city ordinances for voter registration or property qualification of city officers, 1966-68, p 186; power to levy sales or income tax, 1966-68, p 238; authority of legislature to prescribe limit of cities' taxing powers, 1966-68, p 245; relation of county home rule amendment to this section, 1966-68, p 260; creation of Tri-County Stadium District, 1966-68, p 263; application of collective bargaining statutes to home rule cities, 1966-68, p 295; disposition of interest earned on investment of Oregon War Veterans' bond funds, 1966-68, p 427; authority to regulate noise of railroads, 1966-68, p 457; county zoning procedure by initiative, 1966-68, p 481; authority to consolidate a city and a county, 1966-68, p 518; effect of ordinance requiring state to withhold city income tax from state employes' salaries, 1966-68, p 547; effect of county ordinance upon city having power under its own charter to enact similar measures, 1966-68, p 596; construing proposal for city-county consolidation, 1966-68, p 638; operation of sanitary authority ordinances within a city, (1968) Vol 34, p 183; proposed constitutional tax limit, (1968) Vol 34, p 203; legislative authority to consolidate counties, cities, districts and vote required, (1968) Vol 34, p 356; legislative enlargement of port boundaries, (1969) Vol 34, p 629; financing public welfare as a matter of state concern, (1970) Vol 34, p 1043; application of general law barring defeated primary candidate from general election, (1970) Vol 35, p 38.

LAW REVIEW CITATIONS: 1 OLR 47; 6 OLR 272; 8 OLR 343; 17 OLR 126; 22 OLR 371; 26 OLR 141; 31 OLR 115; 33 OLR 108; 39 OLR 225; 43 OLR 281-314; 45 OLR 165; 46 OLR 251-285; 1 WLJ 356-367; 4 WLJ 462, 464, 473, 538, 547; 5 WLJ 183-202, 295-310.

Section 2a

NOTES OF DECISIONS

Prior to the adoption of this section, a municipal corporation could not commit suicide by amalgamating with another such corporation, and an attempt to do so was a nullity. McKeon v. Portland, (1912) 61 Or 385, 122 P 291.

This section does not apply to school districts. School Dist. 17 v. Powell, (1955) 203 Or 168, 279 P2d 492.

ATTY. GEN. OPINIONS: Construing proposed amendment authorizing city-county consolidation, 1966-68, pp 518, 638.

LAW REVIEW CITATIONS: 22 OLR 268; 43 OLR 307.

Section 3

NOTES OF DECISIONS

1. Stockholders liability generally
2. Bank stockholders
3. Enforcement of liability

1. Stockholders liability generally

If the subscription has been paid in full, the stockholder stands discharged from further liability. Ladd v. Cartwright, (1879) 7 Or 329; Hodges v. Silver Hill Mining Co., (1881) 9 Or 200; Brundage v. Monumental G. & S. Mining Co., (1885) 12 Or 322, 7 P 314; Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691, 908; Shipman v. Portland Constr. Co., (1913) 64 Or 1, 23, 128 P 989.

Only holders of the legal title of unpaid stock may be held liable under this provision. Branson v. Oregonian Ry., (1882) 10 Or 278.

A claim for damages ex delicto, after it has been reduced to judgment, is such an indebtedness as can be enforced against an unpaid stock subscription. Powell v. Oregonian R.R., (1888) 13 Sawy 535, 36 Fed 726.

Persons securing stock at a price less than par, who expressly contract that their liability shall be limited to the price paid, are subscribers within the meaning of this section. McAllister v. Am. Hosp. Assn., (1912) 62 Or 530, 535, 125 P 286.

The stockholder is not liable directly for the debts of the corporation. Leudinghaus Bros. v. Dant & Russell, (1918) 89 Or 591, 175 P 75.

The obligation of the stockholder on unpaid subscription is liable to be applied in satisfaction of indebtedness due any creditor of an insolvent corporation after remedies against the company have been exhausted, regardless of when or in what manner the claim arose. Atwell v. Schmitt, (1924) 111 Or 96, 225 P 325.

The preservation of an old right, not the creation of a new one, is provided for by this constitutional provision. Laing v. Hutton, (1932) 138 Or 307, 6 P2d 884.

A trustee in bankruptcy is not bound by any transactions whereby a subscriber for corporate stock is permitted to secure the stock without making payment for its par value. Compton v. Perkins, (1933) 144 Or 346, 24 P2d 670.

Liability of stockholders is governed by the law of the state in which the corporation was organized. Bartholmae Oil Co. v. Booth, (1934) 146 Or 154, 28 P2d 1083.

2. Bank stockholders

Holders of stock prior to the amendment are not subject to the double liability which is imposed thereby. First Nat. Bank v. Multnomah State Bank, (1918) 87 Or 423, 170 P 534; Haberlach v. Tillamook County Bank, (1930) 134 Or 279, 293 P 927, 72 ALR 1245.

The duty of a stockholder to pay an additional assessment in the event the bank's capital becomes impaired was a contractual one, and the provisions of the banking laws concerning double liability were parts of the purchase contracts of all bank stock. Schramm v. Done, (1930) 135 Or 16, 293 P 931; Harrison v. Skinner, (1938) 160 Or 43, 83 P2d 437.

The stockholder is liable for the benefit of depositors, and his liability may not be extended to include the claims of persons who have furnished merchandise to the bank. Norris Safe & Lock Co. v. Weaver, (1916) 81 Or 670, 160 P 807.

Necessity for assessment against stockholders, and the amount of such assessment, was left to the discretion of the Superintendent of Banks. State Bank v. Gotshall, (1927) 121 Or 92, 254 P 800, 51 ALR 1200.

Expenses of liquidation must be deducted before determining whether anything remains for the stockholders. Harrison v. Skinner, (1938) 160 Or 43, 83 P2d 437.

3. Enforcement of liability

A suit in equity, not an action at law, is the proper remedy of a creditor of the corporation under this section. Patterson v. Lynde, (1883) 106 US 519, 1 S Ct 432, 27 L Ed 265.

A creditor is not required to reduce his claim to judgment at law and have an execution returned unsatisfied before suing in equity to enforce stockholder's liability for unpaid stock. Shipman v. Portland Constr. Co., (1913) 64 Or 1, 17, 128 P 989.

The liability of stockholders is individual, and a separate decree must be rendered against each for the amount of his separate liability. Shipman v. Portland Constr. Co., (1913) 64 Or 1, 23, 128 P 989.

The trustee in bankruptcy may maintain suit against stockholders of bankrupt corporation. Crocker v. Gentry, (1928) 127 Or 168, 271 P 38.

Money collected from stockholders should be held and applied by the Superintendent of Banks to meet the stockholders' additional liability imposed upon them. Skinner v. Davis, (1937) 156 Or 174, 67 P2d 176.

FURTHER CITATIONS: Holladay v. Elliott, (1879) 8 Or 84; Falco v. Kaupisch Creamery Co., (1903) 42 Or 422, 70 P 286; Macbeth v. Banfield, (1904) 45 Or 553, 78 P 693; Sargent v. Waterbury, (1917) 83 Or 159, 161 P 443, 163 P 416; Campbell v. Coin Mach. Mfg. Co., (1920) 96 Or 119, 188 P 197; Rasor v. W. Coast Dev. Co., (1921) 98 Or 581, 192 P 631; Smith v. Schmitt, (1924) 112 Or 687, 231 P 176; Skinner v. Davis, (1937) 156 Or 174, 67 P2d 176; State Hwy. Comm. v. Rawson, (1957) 210 Or 593, 312 P2d 849.

ATTY. GEN. OPINIONS: Liability of corporation owning stock in a bank, 1920-22, p 79; effect of payments by stockholders to restore impaired capital on double liability, 1922-24, p 265, 1926-28, p 546; additional assessments against bank stockholders when insolvent stockholders fail to pay original assessment, 1926-28, p 407; running of statute of limitations against stockholders, 1930-32, p 149; collection of double liability by levy on homestead, 1930-32, p 811; disposition of proposed retail sales tax on motor vehicles or highway construction material, (1968) Vol 34, p 323.

Section 4

NOTES OF DECISIONS

Compensation for property consists, first, of the actual value of the parcel appropriated, and, second, of the excess of damages, if any, to the residue of the property over the benefits therein by reason of such appropriation. Willamette Falls Canal Co. v. Kelly, (1869) 3 Or 99; Oregon Cent. R. Co. v. Wait, (1869) 3 Or 428.

This section entitled a defendant in condemnation to his whole cost up to final adjudication of his damages, so that plaintiff's costs on appeal on which it obtains a reversal are not taxable against the defendant. Oregon Ry. & Nav. Co. v. Taffe, (1913) 67 Or 102, 117, 134 P 1024, 135 P 332, 515.

An abutter has a property right in a street of which he cannot be deprived by a railroad company until he receives compensation for his damage. Tooze v. Willamette Valley So. Ry., (1915) 77 Or 157, 150 P 252.

The statute authorizing the issuance of a municipal order by the city upon its treasurer, in payment of compensation in condemnation proceedings by a city, did not violate this section. Skelton v. City of Newberg, (1915) 76 Or 126, 148 P 53.

A taking of property within the purview of this section results from interference with the natural flow of a stream to the injury of a riparian proprietor. Logan v. Spaulding Logging Co., (1921) 100 Or 731, 190 P 349.

A fixing of rates of a public utility corporation may constitute a taking of the corporation's property within the purview of this section. Pacific Tel. & Tel. Co. v. Wallace, (1938) 158 Or 210, 226, 75 P2d 942.

Prospective assessment is not an element of damages in a condemnation proceedings. Eugene v. Wiley, (1960) 225 Or 327, 358 P2d 286.

Where a railway corporation locates its road in such close proximity to the premises of an adjoining lot owner as to interfere with his right of ingress and egress to and from his premises, so as to depreciate their value, he is entitled to receive the value of such depreciation. Willamette Iron Works v. Ore. Ry. & Nav. Co., (1894) 26 Or 224, 37 P 1016, 46 Am St Rep 620, 29 LRA 88; Kurtz v. So. Pac. Co., (1916) 80 Or 213, 155 P 367, 156 P 794.

An irrigation company which without authority invaded the land of plaintiff and constructed its ditch thereon cannot in an action for damages for the trespass set up its rights to condemn and seek to defend by condemnation proceedings in the trespass suits. Williams v. Goose Lake Valley Irr. Co., (1917) 83 Or 302, 304, 163 P 81.

FURTHER CITATIONS: Oregon Ry. & Nav. Co. v. Mosier, (1887) 14 Or 519, 13 P 300, 58 Am Rep 321; McQuaid v. Portland R. Co., (1889) 18 Or 237, 249, 22 P 899; Oregon Elec. R. Co. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 334, 930; State v. Bradshaw, (1911) 59 Or 279, 117 P 284; Clark v. Portland, (1912) 62 Or 124, 123 P 708; Dowd v. Am. Sur. Co., (1914) 69 Or 418, 139 P 112; MacVeagh v. Multnomah County, (1928) 126 Or 417, 270 P 502; Salem v. Marion County, (1943) 171 Or 254, 137 P2d 977.

LAW REVIEW CITATIONS: 46 OLR 125-158.

Section 5

NOTES OF DECISIONS

A charter provision which is a restriction of the taxing power of the municipality does not conflict with this section. Lent v. Portland, (1903) 42 Or 488, 71 P 645; Kadderly v. Portland, (1903) 44 Or 118, 152, 74 P 710, 75 P 222; State v. Ayers, (1907) 49 Or 61, 88 P 653, 124 Am St Rep 1036, 10 LRA(NS) 992.

Entering into an agreement to pay sums in the future, in instalments, is "contracting debts" to the aggregate amount of payments agreed to be made, and if the amount exceed that to which the corporation is limited by its charter, the agreement is void. Salem Water Co. v. Salem, (1873) 5 Or 29.

An ordinance which provides for payment without providing means wherewith to make such payment, creates an indebtedness within the meaning of this section. Murphy v. East Portland, (1890) 42 Fed 308.

An Act fixing the rate of taxation, not to exceed a specified sum, is a limitation to protect property owners against excessive taxation, and the city cannot levy any special tax in excess of such limitations without violation of this section. Corbett v. Portland, (1897) 31 Or 407, 418, 48 P 428.

An Act providing for incorporation of ports was not invalid by reason of the absence of any specific limitation of indebtedness on municipalities to be created thereunder. Straw v. Harris, (1909) 54 Or 424, 103 P 777.

The legislature is commanded by this section not to confer upon municipalities unrestricted powers of taxation, and charter provisions will not be construed to permit a municipality to assume the power of taxation without limitation or restriction. Portland v. Portland Gas & Coke Co., (1916) 80 Or 194, 208, 150 P 273, 156 P 1070.

Notes to pay for water to be furnished it by an irrigation district payable only from water revenues did not constitute an "indebtedness" against city within meaning of this section. Butler v. City of Ashland, (1925) 113 Or 174, 232 P 655.

This provision contemplated the inclusion in legislative

charters of tax and indebtedness limitations applicable only to those financial transactions resulting from the powers granted municipalities by their legislative charters. State v. Melville, (1935) 149 Or 532, 39 P2d 1119, 41 P2d 1071.

The Bancroft Bonding Act was not in conflict with this provision. Id.

Revenue bonds issued for the establishment of a light and power system do not constitute an indebtedness against the city within the meaning of this provision. City of Cascade Locks v. Carlson, (1939) 161 Or 557, 90 P2d 787.

FURTHER CITATIONS: Brockway v. City of Roseburg, (1905) 46 Or 77, 79 P 335; Salem v. Ore.-Wash. Water Serv. Co., (1933) 144 Or 93, 23 P2d 539; State v. North Bend, (1943) 171 Or 329, 137 P2d 607; Coulson v. Portland, 1 Deady 481, Fed Cas No. 3275; Department of Rev. v. Multnomah County, (1970) 4 OTR 133.

ATTY. GEN. OPINIONS: Power to levy sales or income tax, 1966-68, p 238; proposed constitutional tax limit, (1968) Vol 34, p 203.

LAW REVIEW CITATIONS: 4 WLJ 474; 5 WLJ 199, 316.

Section 6

NOTES OF DECISIONS

This section is a general prohibition against purchase of corporate stock by the state. Sprague v. Straub, (1969) 252 Or 507, 451 P2d 49.

ATTY. GEN. OPINIONS: Purchase of insurance by state, 1942-44, p 236; temporary ownership of stock by state in order to obtain whiskey, 1942-44, pp 309, 313, 332, 344; power of state to become a member of a cooperative, 1946-48, p 129, 1948-50, p 393; acquisition of stock by State Board of Higher Education, 1952-54, p 15; duties of state as trustee of remainder, 1958-60, p 127; duty to sell common stocks received in the Common School Fund by escheat or as abandoned property, 1964-66, p 206; disposition of worthless stock held by Insurance Commissioner as liquidator, 1964-66, p 252; authority of a trustee to diversify investments held for eventual benefit of the medical school, 1964-66, p 412; qualification of mutual funds for investments, 1966-68, p 309; authority to invest in convertible bonds, 1966-68, p 464; authority to implement tax-sheltered deferred compensation plans for public employes, (1970) Vol 35, p 153; authority to invest funds in savings and loan associations, (1971) Vol 35, p 493.

Section 7

NOTES OF DECISIONS

The state being owner of the Industrial Accident Fund, a statute authorizing investment of $600,000 in construction of office building for state, and providing for use of annual sum for repayment and refund was not invalid as creating excessive debt. Eastern & W. Lbr. Co. v. Patterson, (1928) 124 Or 112, 158 P 193, 264 P 441; Pederson v. Patterson, (1928) 124 Or 105, 258 P 204, 264 P 445.

The proposed revenue bond issue and lease would not violate this section. Carruthers v. Port of Astoria, (1968) 249 Or 329, 438 P2d 725; Miles v. Eugene, (1969) 252 Or 528, 451 P2d 59.

A statute relating to irrigation and reclamation of certain lands was a provision for a state project and a public purpose, and did not contravene this section. McMahan v. Olcott, (1913) 65 Or 537, 133 P 836.

Ore. Const. Art. IV, §23(7), prohibiting special local laws for laying out, working and opening highways, was impliedly repealed by the amendment to this section. Stoppenback v. Multnomah County, (1914) 71 Or 493, 142 P 832.

University of Oregon is an administrative agency vested by the legislature with certain corporate powers, and any indebtedness authorized by statute is an "indebtedness of the state," within meaning of this section. McClain v. Regents of University, (1928) 124 Or 629, 265 P 412.

A statute providing for obligations to be paid from revenue derived from the manufacture and sale of intoxicating liquor did not violate this provision. Moses v. Meier, (1934) 148 Or 185, 35 P2d 981.

The funds obtained from the sale of revenue bonds are not public funds within the meaning of the prohibition in this section. Miles v. Eugene, (1969) 252 Or 528, 451 P2d 59.

FURTHER CITATIONS: Moore v. Olcott, (1922) 105 Or 269, 209 P 498; Faulman v. Olcott, (1922) 105 Or 452, 210 P 215; Kinney v. City of Astoria, (1923) 108 Or 514, 217 P 840.

ATTY. GEN. OPINIONS: Effect of this section on the auditing of claims by the Secretary of State, 1926-28, p 404; purchase of land by a state college, 1928-30, p 87; borrowing money to buy flax, 1928-30, p 314; validity and effect of certificates of indebtedness signed by Board of Control members, 1930-32, p 163, 1932-34, p 3, 1948-50, p 105; authority of state to enter into a lease agreement, 1930-32, p 325, 1934-36, p 16; transferring surplus funds to the General Fund, 1932-34, p 25; issuance of interest-bearing warrants, 1932-34, p 392; financing of a building by the state, 1936-38, p 390; issuance of bonds for the purpose of administering forest lands, 1938-40, p 203; gift of public funds to private institutions, 1952-54, p 90; temporary transfer of moneys in special tax fund, 1952-54, p 99; agreement of state board to indemnify United States for damages in constructing public works, 1956-58, p 50; advance of moneys from Federal Government without current appropriation for repayment, 1956-58, p 280; validity of proposed lease, 1958-60, p 78; validity of long-term leases, 1958-60, p 105; using highway funds to reimburse certain districts for cost of relocating facilities, 1960-62, p 366; distribution by board of notice of a nonprofit organization publication, 1960-62, p 413; effect of proposed revision of this section, 1962-64, p 18; distinguishing between State of Oregon and political subdivisions, 1962-64, p 77; interest payments on highway bonds, 1962-64, p 180; constitutionality of OL 1963 (s.s.)c. 7, 1962-64, p 355; assistance limited to available funds, 1962-64, p 409; crediting interest on invested funds, 1964-66, p 31; validity of proposal to provide loans for vocational training, 1964-66, p 73; state loans for irrigation projects by qualified individuals, 1966-68, p 235; ballot measure authorizing additional indebtedness for state acquisition of ocean beach land, (1968) Vol 34, p 318; lease-funding agreement between State Board of Higher Education and a school district, (1969) Vol 34, p 651; authority to acquire buildings when buying land for new facilities, (1969) Vol 34, p 735.

LAW REVIEW CITATIONS: 7 OLR 345; 47 OLR 62; 48 OLR 171; 4 WLJ 522.

Section 8

NOTES OF DECISIONS

A statute authorizing the state to pay interest on bonds to be issued by a county for the erection of an interstate bridge, did not violate this section. Stoppenback v. Multnomah County, (1914) 71 Or 493, 142 P 832.

An Act making an appropriation to a city partially destroyed by fire was constitutional. Kinney v. City of Astoria, (1923) 108 Or 514, 217 P 840.

An Act directing the State Highway Commission to pay sums of money to a highway district did not contravene this section. Salmon R.-Grande Ronde Hwy. Improvement Dist. v. Scott, (1933) 145 Or 121, 27 P2d 183.

A statute authorizing the reclamation commission to release any irrigation district from obligation to pay certificates of indebtedness did not violate this section. Warm Springs Irr. Dist. v. Holman, (1934) 146 Or 110, 29 P2d 825.

ATTY. GEN. OPINIONS: Leasing property from the county for state buildings, 1934-36, p 16; waiver of taxes due from a county, 1934-36, p 244; distinguishing between State of Oregon and political subdivisions, 1962-64, p 77.

Section 9

NOTES OF DECISIONS

A municipal corporation is not necessarily a "county," "city," or "town," for, were it so the added words "other municipal corporations" would be without meaning. Cook v. Port of Portland, (1891) 20 Or 580, 584, 27 P 263, 12 LRA 533; Acme Dairy Co. v. City of Astoria, (1907) 49 Or 520, 90 P 153; Schubel v. Olcott, (1912) 60 Or 503, 120 P 375; State v. Port of Astoria, (1916) 79 Or 1, 14, 154 P 399; Rose v. Port of Portland, (1917) 82 Or 541, 563, 162 P 498.

Joint ownership by a city or county and an individual is not forbidden by this provision. Municipal Sec. Co. v. Baker County, (1901) 39 Or 396, 403, 65 P 369; Miles v. Eugene, (1969) 252 Or 528, 451 P2d 59.

The purpose of this provision is to prevent investment of public funds in private enterprises and to curb speculation which, in many instances, result in pecuniary loss to taxpayers. Johnson v. Sch. Dist. 1, (1929) 128 Or 9, 270 P 764, 273 P 386; Miles v. Eugene, (1969) 252 Or 528, 451 P2d 59.

A charter providing for reassessments where the original had been adjudged invalid, was contrary to this section. Duniway v. Portland, (1905) 47 Or 103, 113, 81 P 945.

A contract by a city for the sale or lease of a railroad to be built by the city upon its completion did not contravene this section. Churchill v. City of Grants Pass, (1914) 70 Or 283, 141 P 164.

An amendment to a city's charter authorizing the council to construct a railroad violated the Constitution. Hunter v. City of Roseburg, (1916) 80 Or 588, 600, 156 P 267, 157 P 1065. **Distinguished in** Miles v. Eugene, (1969) 252 Or 528, 451 P2d 59.

A release of private corporations from pecuniary obligations, as well as pecuniary aid to them, is forbidden by this section. Hauke v. Ten Brook, (1927) 122 Or 485, 259 P 908.

By procuring a nonassessable, cash premium policy in a mutual company, a school board did not violate this section. Johnson v. Sch. Dist. 1, (1929) 128 Or 9, 270 P 764, 273 P 386.

Expenditures by a local housing authority under a statute providing for urban redevelopment did not violate this section. Foeller v. Housing Authority of Portland, (1953) 198 Or 205, 256 P2d 752.

Money from sale of revenue bonds and not from taxes does not fall within the prohibition of this section. Carruthers v. Port of Astoria, (1968) 249 Or 329, 438 P2d 725. **Distinguished in** Miles v. Eugene, (1969) 252 Or 528, 451 P2d 59.

This section is an absolute prohibition against the purchase of stock by counties and municipal corporations. Sprague v. Straub, (1969) 252 Or 507, 451 P2d 49.

FURTHER CITATIONS: School Dist. 17 v. Powell, (1955) 203 Or 168, 279 P2d 492; Stearns v. Comm. of Public Docks, (1967) 246 Or 36, 423 P2d 748.

ATTY. GEN. OPINIONS: Expenditures of county funds for livestock shows and fairs, 1920-22, p 304; purchase by city of certificates of a savings and loan association, 1924-26, p 98; authority of county to enter into an insurance contract, 1930-32, p 490, 1936-38, p 430, 1940-42, p 644; swimming pool as a joint undertaking of a school district and city, 1948-50, p 86; aiding a privately owned non-profit hospital, 1948-50, pp 132, 223; validity of Act authorizing cities to invest funds in savings and loan associations, 1948-50, p 187; power of utility district to enter into insurance contracts, 1950-52, p 196; purchase of stock of ferry company in order to liquidate it, 1950-52, p 50; statute authorizing procurement of liability insurance by school districts, 1952-54, p 42; county purchase of stock of corporation which operates ferry across Columbia River, 1952-54, p 50; limitations on authority to lease public land, 1960-62, p 172; authority to contribute to promotional and development association, 1960-62, p 314; participation in Space Age Industrial Park Development Association, 1960-62, p 314, 1962-64, p 20; use of public funds for city publicity, 1962-64, p 68; legality of county appropriation in aid of television cable company, 1964-66, p 379; authority of a city to provide ambulance service by contract with a private person, 1966-68, p 134; use of county general funds to finance sewer service facilities, 1966-68, p 445; county authority to develop industrial sites, (1970) Vol 34, p 1000; authority to invest funds in savings and loan associations, (1971) Vol 35, p 493.

LAW REVIEW CITATIONS: 6 OLR 272; 8 OLR 79; 48 OLR 171; 4 WLJ 522.

Section 10

NOTES OF DECISIONS

1. In general
2. Indebtedness
3. Roads

1. In general

Prior to the adoption of section 11 of this Article, the prohibition of this section, as to the creation of debts or liabilities by counties, applied only to those voluntarily incurred or created by counties, and not to debts and liabilities imposed upon them by the law which they were powerless to prevent. Grant County v. Lake County, (1889) 17 Or 453, 21 P 447; Wormington v. Pierce, (1892) 22 Or 606, 30 P 450; Burnett v. Markley, (1893) 23 Or 436, 31 P 1050; Municipal Sec. Co. v. Baker County, (1898) 33 Or 338, 54 P 174; Eaton v. Mimnaugh, (1903) 43 Or 465, 73 P 754; Brix v. Clatsop County, (1905) 46 Or 223, 80 P 650; Brockway v. City of Roseburg, (1905) 46 Or 77, 79 P 335; Cunningham v. Umatilla County, (1910) 57 Or 517, 112 P 437, 37 LRA(NS) 1051; Bowers v. Neil, (1913) 64 Or 104, 128 P 433; Wingate v. Clatsop County, (1914) 71 Or 94, 142 P 561; Stoppenback v. Multnomah County, (1914) 71 Or 493, 142 P 832; State v. Stannard, (1917) 84 Or 450, 471, 165 P 566, 571, LRA 1917F, 215.

The 1919 amendment, whereby the limit of indebtedness which a county may incur with approval of its electors was increased from two percent to six percent of its assessed valuation, was self-executing. Ladd & Tilton Bank v. Frawley, (1920) 98 Or 241, 193 P 916; Hawley v. Anderson, (1921) 99 Or 191, 190 P 1097, 195 P 358.

When a county is indebted over the constitutional limit *it cannot contract to construct a courthouse out of the general fund, but may create a special fund for such purpose.* Dougan Co. v. Klamath County, (1921) 99 Or 436, 193 P 645; Dougan v. Van Riper, (1923) 109 Or 254, 198 P 897.

A new power is not hereby conferred upon counties which are empowered by statute to incur obligations only in the form of county warrants. Andrews v. Neil, (1912) 61 Or 471, 120 P 383, 123 P 32.

The aggregate sum and not the particular instalment is the decisive factor in determining the amount of the debt or liability of the county. Brewster v. Deschutes County, (1931) 137 Or 100, 1 P2d 607.

Where a county proposes to incur an obligation for an

extraordinary purpose, such as that of building a courthouse, it may not treat delinquent taxes as an asset in the treasury for the purpose of determining whether or not it will thereby incur a debt or liability in excess of $5,000. State v. Davis, (1939) 161 Or 127, 85 P2d 379, 88 P2d 314.

The legislature is without power validly to enact a statute which is inconsistent with the provisions of this section. Hansen v. Malheur County, (1939) 160 Or 579, 86 P2d 964.

A county's sale of bonds for the acquisition of a bridge and ferry, as authorized by statute, did not violate this section where the bonds were to be paid wholly out of the income derived from the property acquired. Eddins v. Wasco County, (1950) 189 Or 184, 219 P2d 159.

2. Indebtedness

An indebtedness incurred for the construction of a bridge in excess of $5,000 by a county, unless to suppress insurrection or to repel invasion, is void, and will be enjoined at the suit of a taxpayer. Wormington v. Pierce, (1892) 22 Or 606, 30 P 450; Dorothy v. Pierce, (1895) 27 Or 373, 41 P 668.

The annexing of a part of one county to another, and transferring a proportional part of the indebtedness from one to the other is not creating a voluntary indebtedness within the purview of this section. Grant County v. Lake County, (1889) 17 Or 453, 460, 21 P 447.

The debt limit having been reached the county has no further capacity to make contracts of a voluntary nature which impose additional burdens or liabilities. Municipal Sec. Co. v. Baker County, (1898) 33 Or 338, 54 P 174.

Disbursements which are necessary for the peace and safety of the community are not affected by the constitutional debt limit, and hence the fact that the limit had been reached was no valid objection to the county's liability for the services of a detective employed to assist in enforcing the liquor law. Cunningham v. Umatilla County, (1910) 57 Or 517, 112 P 437, 37 LRA(NS) 1051.

A contract for the erection of a bridge where the necessary funds have been raised by special tax and appropriated therefor does not create an indebtedness in contravention of this section. Bowers v. Neil, (1913) 64 Or 104, 128 P 433.

Warrants for an overpayment of taxes do not represent debts or liabilities within the meaning of this section. Southern Pac. Co. v. Siemens, (1915) 77 Or 62, 150 P 290.

A lease of a building for a courthouse creates a voluntary debt and is within the prohibition of this provision where its terms exceed the constitutional limitation. Brewster v. Deschutes County, (1931) 137 Or 100, 1 P2d 607.

Spending unlevied taxes of the county is creating a debt and it was to prevent such expenditure in advance of anticipated revenue that this section was incorporated in the Constitution. Kneeland v. Multnomah County, (1932) 139 Or 356, 10 P2d 342.

Where the county has budgeted and made provision for a fund to meet an obligation, it would not be increasing the indebtedness by anticipating the amount to be collected. Multnomah County v. First Nat. Bank, (1935) 151 Or 342, 50 P2d 129.

Refunding of indebtedness does not constitute the incurrence or creation of debt. Coos County v. Oddy, (1937) 156 Or 546, 68 P2d 1064.

If there are revenues on hand to meet it, an appropriation or expenditure does not create a debt of the county within the meaning of the constitutional limitation. Id.

3. Roads

Under the authorization of debts for roads "within the county," the amount of bonds to be issued by a county for a boundary bridge ought to be such a reasonable part of the estimated cost of the bridge and approach as the length thereof in that county bears to the length of the continuation of like structure in the adjoining county. Stoppenback v. Multnomah County, (1914) 71 Or 493, 142 P 832.

The word "permanent" included a public bridge which was put up with the intention that it shall remain at least until rendered useless by decay or injury, or destroyed by natural causes. Id.

The word "permanent" does not mean hard surface roads. Trippeer v. Couch, (1924) 110 Or 446, 220 P 1012.

Where the amount of bonds issued for the construction of roads, either singly or in the aggregate with previous debts incurred by the county for road purposes, did not exceed two percent of the assessed valuation of the property of the county, authority existed to issue and sell such bonds. Walker v. Polk County, (1924) 110 Or 535, 223 P 741.

County warrants for the construction and maintenance of permanent roads were not invalid under this section. Coos County v. Oddy, (1937) 156 Or 546, 68 P2d 1064.

An issue of bonds for road building machinery, for use on roads not specified or described as permanent roads, was not within the purview of the provision exempting bond issues to build or maintain permanent roads from the constitutional debt limitation of $5,000. Hansen v. Malheur County, (1939) 160 Or 579, 86 P2d 964.

ATTY. GEN. OPINIONS: Surety bond as a debt within the meaning of this section, 1926-28, p 621; issuance of bonds to build a courthouse, 1938-40, p 101; spending money before tax levies are made as indebtedness, 1940-42, p 353; county's authority to construct an airport in time of emergency, 1940-42, p 596; construction of a county hospital, 1946-48, p 62; debts created by county courts in excess of budget estimates and the constitutional limitation, 1946-48, p 158; transfer of funds from the road fund to the general fund, 1948-50, p 241; issuance of warrants against revenues which are in the process of collection, 1952-54, p 33; county indebtedness exceeding $5,000, 1956-58, p 207; lease-option agreements, 1956-58, p 287; construction of courthouse requiring bond issue, 1960-62, p 358; construing "boating facilities," 1964-66, p 410; home rule city and county agreeing to enforce county ordinance, 1966-68, p 596; construing proposal for city-county consolidation, 1966-68, p 638.

LAW REVIEW CITATIONS: 4 WLJ 522; 1 EL 102.

Section 11

NOTES OF DECISIONS
1. In general
2. Under original section 11

1. In general

This section applies only to property taxes and not to revenue raised by ordinances imposing various license fees. Garbade v. Portland, (1950) 188 Or 158, 214 P2d 1000; Bernard Motors v. Portland, (1950) 188 Or 340, 215 P2d 667; Horner's Market v. Tri-County Metropolitan Transp. Dist., (1970) 2 Or App 288, 467 P2d 671, Sup Ct review denied (with opinion) 256 Or 124, 471 P2d 798.

As used in this section, the word "levy" refers to the levy manifested in the notice filed with the assessor. Department of Rev. v. Multnomah County, (1970) 4 OTR 133.

A levy utilizing a tax base voted by the people under paragraph (2) (b) becomes one of the levies which, with an addition of six percent, may be used to ascertain the tax base under paragraph (2) (a). St. Helens Rural Fire Protection Dist. v. Dept. of Rev., (1970) 4 OTR 186.

Whether a special fund should be charged to the levy of the school district within or without the six percent limitation is a matter for the discretion of the taxing district and of no concern to the court. Napier v. Lincoln County Sch. Dist., (1970) 4 OTR 221.

Oregon Laws 1969, ch. 45, §8 prohibiting county levies for public assistance for three years, was not in contravention of this provision. Department of Rev. v. Multnomah County, (1970) 4 OTR 133.

2. Under original section 11

The purpose of the section was to extend the prohibition of section 10 of this Article. State v. Stannard, (1917) 84 Or 450, 165 P 566, LRA 1917F, 215.

Expense of proposed county election was an involuntary indebtedness within the prohibition of this section. Id.

The effect of the section was to place a six percent limitation, instead of the pre-existing restriction, upon all revenues derived from taxation, and to bring all kinds of indebtedness within the constitutional limitation. School Dist. 24 v. Smith, (1920) 97 Or 1, 191 P 506.

An irrigation district assessment was not within the limitation to tax for governmental purposes imposed by the six percent limitation. Northern Pac. Ry. v. John Day Irr. Dist., (1923) 106 Or 140, 211 P 781.

None of the powers conferred by Ore. Const. Art. IV, §1 [repealed 1968] was taken away by this section. Kneeland v. Multnomah County, (1932) 139 Or 356, 10 P2d 342.

County estimates of contributions for public assistance were not exempt from the limitations of this section. Multnomah County v. Luihn, (1947) 180 Or 528, 178 P2d 159.

After the tax levy reaches the tax base established by vote, the six percent limitation applied and continued to apply until changed by the vote of the people. School Dist. 1 v. Bingham, (1955) 204 Or 601, 283 P2d 670, 284 P2d 779.

A tax base authorized by the voters of the district was used in determining the legal levy in subsequent years even though the directors of the district levied a tax following the election which was less than the authorized tax base. Id.

FURTHER CITATIONS: State v. Hawks, (1924) 110 Or 497, 222 P 1071; State v. Keeney, (1928) 123 Or 508, 262 P 943; State v. North Bend, (1943) 171 Or 329, 137 P2d 607; School Dist. v. Bingham, (1944) 174 Or 540, 149 P2d 963; Sprague v. Fisher, (1948) 184 Or 1, 197 P2d 662; Oregon Worsted Co. v. State Tax Comm., (1959) 217 Or 104, 317 P2d 924, 342 P2d 108; Mosser v. Thornton, (1965) 241 Or 482, 406 P2d 788; City of Pendleton v. State Tax Comm., (1968) 3 OTR 238; Myers v. Bd. of Directors, (1971) 5 Or App 142, 483 P2d 95.

ATTY. GEN. OPINIONS: Method of determining tax base for the constitutional limitation, 1920-22, p 146, 1924-26, p 108, 1930-32, p 476, 1932-34, pp 11, 470, 1934-36, p 573, 1936-38, pp 332, 660, 1940-42, pp 291, 544, 1946-48, p 537, 1950-52, p 25; method of computing tax levy following authorization for increase of the levy, 1950-52, p 166.

Procedure when the six percent limitation is to be exceeded, 1920-22, p 225, 1922-24, pp 472, 512, 1926-28, pp 492, 614, 1928-30, pp 263, 377, 398, 1930-32, p 482, 1944-46, p 79; the six percent limitation as affected by the statutory six mill limitation on the power to tax property, 1952-54, p 69.

Taxes included within limitation, 1920-22, pp 382, 454, 1924-26, p 144, 1926-28, pp 46, 96, 104, 318, 514, 1928-30, pp 130, 330, 1930-32, pp 81, 85, 123, 207, 1938-40, pp 111, 470, 1940-42, p 636, 1942-44, p 379, 1944-46, pp 11, 177, 1946-48, p 433; validity of bill authorizing serial levies by school districts for general fund purposes, 1950-52, p 126; effect of limitation on new taxing unit, 1922-24, p 24, 1932-34, p 487, 1938-40, pp 639, 649, 1944-46, p 91, 1946-48, p 151, 1948-50, p 427.

Nature and procedure of election required to exceed the limitation, 1922-24, pp 51, 646, 1928-30, p 263, 1942-44, p 412, 1944-46, pp 32, 181, 200, 1946-48, pp 3, 272, 546, 1948-50, p 399; effect of this limitation on the issuance of bonds, 1922-24, p 66; authority of state to levy a tax on property for any purpose other than payment of bonds, 1952-54, p 93; validity of tax base in excess of constitutional limitation where previous tax levy was erroneously computed, 1952-54, p 123.

Application of limitation to special assessments, 1922-24, p 498, 1940-42, p 425; effect and validity of proposed amendments to this section, 1926-28, p 55; validity of Act authorizing an appeal in all cases when the limitation is exceeded, 1926-28, p 117; tax base after consolidation of districts, 1942-44, p 429, 1948-50, p 50; validity of authorization of continuing levy over the constitutional limitation, 1948-50, p 395; effect of this section on the legislature's power to appropriate funds, 1948-50, p 177.

Notice requirements of intention that proposed tax levy be outside these requirements, 1952-54, p 31; this section as distinguished from six-mills statutory limitation upon state's power to tax, 1952-54, p 68; construing "tax base," 1952-54, p 93; effect of mistake as to assessed valuation of property upon tax levy which establishes a new district's base, 1952-54, p 123; restriction of clause "regular general or primary election" to state-wide elections, 1952-54, p 220; establishing a new tax base when primary nominating elections not held, 1952-54, p 226; effect of 1952 amendment, 1954-56, p 25; breaking down of items to be voted on in election to raise tax levy above limitation, 1954-56, p 70; tax base after a consolidation, 1954-56, p 103; method of determining tax base for the constitutional limitation, 1954-56, p 127; taxing unit which does not have tax base, 1956-58, p 15; tax base where territory withdrawn from school district, 1956-58, p 53; serial levy by fire protection district, 1956-58, p 68; tax levy by new district before tax base established, 1956-58, p 72; establishing tax base, 1956-58, p 89; taxing unit following annexation of territory to city, 1956-58, p 104; tax base after annexation of one district by another, 1956-58, p 152; procedures in second and third class school districts, 1956-58, p 187; county indebtedness exceeding $5,000, 1956-58, p 207; construing "new tax base," 1956-58, p 289; certification of election concerning special levy for a county historical fund, 1958-60, p 6; levy of taxes by rural school districts, 1958-60, p 12; statute authorizing establishment of special fund without vote of electorate, 1958-60, p 16; authority of district to levy taxes without holding special election to establish tax base, 1958-60, p 56; establishing city tax base at regular general election, 1958-60, p 62; use of separate ballot in establishing city tax base, 1958-60, p 62; tax levy by new district before tax base established, 1958-60, p 206; application to tax bases established by vote prior to 1952 amendment, 1958-60, p 217; application of six percent limitation for rural fire protection district when no vote under subsection (1) (b), 1958-60, p 217; tax base after consolidation of districts, 1958-60, p 246; determination of tax base of administrative school district, 1958-60, p 326; establishing tax base for consolidated fire districts, 1958-60, p 346; effect of failure to increase levy under subsection (4), 1958-60, p 402; addition to rural school board budget to cover probable delinquencies, 1960-62, p 15; statements regarding budget recommendations, 1960-62, p 203; obtaining funds for hospital care of indigents, 1960-62, p 219; usage of the term "general election" in Constitution, 1960-62, p 252; ballot title for tax base election, 1960-62, p 306; applying six percent limitation after levy below tax base, 1960-62, p 448; consolidation effective July 1, 1962-64, p 235; allocation of revenues for debt service, 1962-64, p 244; serial levies approved before formation of administrative school district, 1962-64, p 394.

Vector control districts as distinct municipal corporations, 1962-64, p 56; necessity for election to authorize city to make expenditures to advertise the community, 1962-64, p 68; tax base of consolidated school district, 1962-64, p 235; tax base of consolidated rural fire protection district, 1964-66, p 86; constitutionality of ORS 310.125, 1964-66, p 173; authority of school district to sign petition for highway

lighting district, 1964-66, p 391; authority for a serial levy for county roads, 1964-66, p 393; construing proposed substitute initiative measure, 1964-66, p 429; legislature's power to limit the type of authorization given for tax levies outside the six percent limitation of this section, 1966-68, p 269; constitutionality of proposed ballot title, 1966-68, pp 283, 364; constitutionality of tax proposal to be referred, 1966-68, p 337; effect of reorganization of intermediate education districts on tax base of districts and counties, 1966-68, p 368; construing proposed limit on tax levies, (1968) Vol 34, p 62; effect of proposed amendment on bonds previously authorized, (1968) Vol 34, p 160; proposed constitutional tax limit, (1968) Vol 34, p 203; proposed tax limit, (1968) Vol 34, p 253; levying tax in annexed territory without voter approval, (1969) Vol 34, p 629; election to increase rate but not amount of levy, (1969) Vol 34, p 783; tax base of common school district formed under automatic merger statute, (1969) Vol 34, p 879; metropolitan service district taxing power, (1970) Vol 34, p 959; legislative limit on tax base, (1970) Vol 34, p 1043; proposed amendment contingent upon binding choice of alternatives, (1970) Vol 34, p 1118; authority to levy tax prior to establishing any tax base, (1971) Vol 35, p 442; effect upon tax base of failure to levy, (1971) Vol 35, p 521; effect of removal of legislative limit on county's tax base for fiscal year 1971-1972 effective after July 1, 1971, (1971) Vol 35, p 735.

LAW REVIEW CITATIONS: 4 WLJ 475, 482, 483, 547; 5 WLJ 316.

Section 12

NOTES OF DECISIONS

The intention of the framers of provisions authorizing the creation of people's utility districts is manifestly that such districts shall be municipal corporations with wide powers to provide general benefits. Petition of Bd. of Directors, (1939) 160 Or 530, 86 P2d 460.

A utility district may be created for the purpose of acquiring an electric distribution system, a hydroelectric plant or both. Ollilo v. Clatskanie Dist., (1942) 170 Or 173, 132 P2d 416.

It is not necessary for a utility district to own or operate a hydroelectric plant in order to sell and distribute electric energy. Id.

Legislature had authority to enact law imposing property taxes on people's utility districts. Northern Wasco County P.U.D. v. Wasco County, (1957) 210 Or 1, 305 P2d 766.

This section did not explicitly exempt people's utility districts from excise taxes imposed on other corporations; therefore, an excise tax imposed on people's utility district was constitutional. Central Lincoln P.U.D. v. State Tax Comm., (1960) 221 Or 398, 351 P2d 694.

FURTHER CITATIONS: State v. Hoss, (1930) 133 Or 91, 288 P 505; Ravlin v. Hood R. P.U.D., (1940) 165 Or 490, 106 P2d 157; Central Lincoln P.U.D. v. Smith, (1943) 170 Or 356, 133 P2d 702; Northern Wasco County P.U.D. v. Kelly, (1943) 171 Or 691, 137 P2d 295; Fullerton v. Cent. Lincoln P.U.D., (1940) 185 Or 28, 201 P2d 524; Hillman v. No. Wasco County P.U.D., (1958) 213 Or 264, 323 P2d 664.

ATTY. GEN. OPINIONS: Service required by people's utility districts, 1934-36, p 778; validity of bill requiring a vote by legal voters of a city as a prerequisite to the purchase of utility property within the city by a people's utility district, 1942-44, p 154; validity of bill requiring a vote before a district can acquire facilities outside of its territory, 1944-46, p 117; tenure of district director, 1948-50, p 108; inclusion of district in the local budget law, 1948-50, p 445; procedure for special district bond election, 1954-56, p 4; constitutionality of permitting allocation of utility service areas, 1960-62, p 199; residence qualification of director from annexed area, 1962-64, p 11; construing proposed constitutional tax limit, 1964-66, p 429; authority of legislature to prescribe limit of cities' taxing powers, 1966-68, p 245; proposed constitutional tax limit, (1968) Vol 34, p 203.

LAW REVIEW CITATIONS: 20 OLR 3; 25 OLR 159; 47 OLR 18; 4 WLJ 496.

Article XI-A

Farm and Home Loans to Veterans

Section 1

CASE CITATIONS: Cross of Malta Bldg. Corp. v. Straub, (1970) 257 Or 376, 476 P2d 921.

ATTY. GEN. OPINIONS: Acceleration of maturity of loan, 1928-30, p 483; validity of service fee for loan and of provisions calling for a higher interest rate for non-veteran purchasers of property acquired by veteran through state loan, 1944-46, p 296; use of loan to improve property already owned by veteran, 1944-46, p 331; loan for the purpose of completing a house, 1946-48, p 207; "farm" defined, 1946-48, pp 348, 431; authority to transfer moneys from either the Oregon War Veterans' Fund or the Oregon War Veterans' Bond Sinking Fund to purposes other than those specified, 1952-54, p 75; effect on Article XI-A of proposed revision of Ore. Const. Art. IX §7, 1962-64, p 18; transfer of surplus to General Fund, 1962-64, p 131; authorized investments for Oregon War Veterans' Fund, 1964-66, p 119; use of bond sinking fund surplus for general governmental purposes, 1966-68, p 389; authorized uses of interest earned on investment of bond proceeds, 1966-68, p 427; use of interest earnings for general purposes, 1966-68, p 419; leasehold security for loan, (1970) Vol 35, p 348.

LAW REVIEW CITATIONS: 1 EL 94.

Section 2

CASE CITATIONS: Cross of Malta Bldg. Corp. v. Straub, (1970) 257 Or 376, 476 P2d 921.

ATTY. GEN. OPINIONS: Interest upon state bonds as exempt from taxation, 1962-64, p 77; use of bond sinking fund surplus for general governmental purposes, 1966-68, p 389.

Section 3

NOTES OF DECISIONS

Revenue from loans to veterans in the form of interest was intended to be used to liquidate the veterans' fund bonds. Cross of Malta Bldg. Corp. v. Straub, (1970) 257 Or 376, 476 P2d 921.

ATTY. GEN. OPINIONS: Persons eligible for loans: officers on terminal leave, 1944-46, p 312; persons who have already received a loan, 1944-46, p 481; veteran who has re-enlisted, 1946-48, p 385; veteran who is a minor, 1948-50, p 57; alien, 1948-50, p 94; officer of United States Coast and Geodetic Survey, 1948-50, p 369; uses for Oregon War Veterans' Fund, 1952-54, p 75; loans upon previously encumbered property, 1954-56, p 146; transfer of surplus to General Fund, 1962-64, p 131; use of bond sinking fund surplus for general governmental purposes, 1966-68, p 389; use of interest earnings for general purposes, 1966-68, p 419; authorized uses of interest earned on investment of bond proceeds, 1966-68, p 427; tacking terms of service to qualify after 1969 amendment, (1968) Vol 34, p 366.

Section 4

NOTES OF DECISIONS

The power to levy taxes was intended only as a guarantee to bondholders. Cross of Malta Bldg. Corp. v. Straub, (1970) 257 Or 376, 476 P2d 921.

ATTY. GEN. OPINIONS: Uses for Oregon War Veterans' Fund, 1952-54, p 75; transfer of surplus to General Fund, 1962-64, p 131; use of bond sinking fund surplus for general governmental purposes, 1966-68, p 389; use of interest earnings for general purposes, 1966-68, p 419; authorized uses of interest earned on investment of bond proceeds, 1966-68, p 427.

Section 6

ATTY. GEN. OPINIONS: Authority of Director of Veterans' Affairs to issue additional bonds, 1948-50, p 199.

Article XI-D

State Power Development

Article XI-D

ATTY. GEN. OPINIONS: Validity of law creating a water resources board to be appointed by the Governor, 1954-56, p 96.

Section 1

ATTY. GEN. OPINIONS: Validity of law creating a water resources board to be appointed by the Governor, 1954-56, p 96; proposed Columbia River Basin Commission, 1956-58, p 141; effect on Article XI-D of proposed revision of Ore. Const. Art. IX, §7, 1962-64, p 18.

Section 2

ATTY. GEN. OPINIONS: Validity of law creating a water resources board to be appointed by the Governor, 1954-56, p 96; proposed Columbia River Basin Commission, 1956-58, p 141.

LAW REVIEW CITATIONS: 25 OLR 159.

Section 3

ATTY. GEN. OPINIONS: Validity of bill providing for the appointment of interim commissioners, 1932-34, p 474; validity of law creating a water resources board to be appointed by the Governor, 1954-56, p 96; proposed Columbia River Basin Commission, 1956-58, p 141.

Section 4

ATTY. GEN. OPINIONS: Validity of law creating a water resources board to be appointed by the Governor, 1954-56, p 96; proposed Columbia River Basin Commission, 1956-58, p 141.

Article XI-E

State Reforestation

Section 1

ATTY. GEN. OPINIONS: Use of bond proceeds, 1956-58, p 80; agreement requiring lessee of forest lands subject to bonded indebtedness to pay for damage to area, 1958-60, p 353; lands reforested with forest rehabilitation funds subject to mining lease, 1958-60, p 353; funds from bond sales subject to allotment control, limitation on expenditure of funds, 1958-60, p 410; effect on Article XI-E of proposed revision of Ore. Const. Art. IX, §7, 1962-64, p 18; exemption of interest on state bonds from taxation, 1962-64, p 77; transfer of bond sinking fund to General Fund, (1969) Vol 34, p 464.

Article XI-F(1)

Higher Education Building Projects

Article XI-F(1)

CASE CITATIONS: State ex rel. Sprague v. Straub, (1965) 240 Or 272, 400 P2d 229, 401 P2d 29; Cross of Malta Bldg. Corp. v. Straub, (1970) 257 Or 376, 476 P2d 921.

ATTY. GEN. OPINIONS: Interim financing of new buildings, 1956-58, p 164; approval of bond issue by State Bond Commission (now State Treasurer), 1958-60, p 199; effect of proposed revision of Ore. Const. Art. IX, §7, 1962-64, p 18; exemption of interest on state bonds from taxation, 1962-64, p 77; validity of bonds for parking facilities, 1962-64, p 273; management of buildings, collection of fees, determination of sinking fund surplus, custody of investment securities, 1962-64, p 437; crediting interest on invested funds, 1964-66, p 31; constitutionality of bill to change enabling statutes to include research grants as revenue and administrative and educational type buildings as facilities authorized by this Article, 1964-66, p 142; structures constructed under this Article as self-sustaining, 1966-68, p 419; authority to construct parking facility with private retail space in Portland, (1968) Vol 34, p 163; lease-funding agreement between State Board of Higher Education and a school district, (1969) Vol 34, p 651; authority to acquire buildings when buying land for new facilities, (1969) Vol 34, p 735; disposition of dividends on State Accident Insurance Fund premiums, (1971) Vol 35, p 504.

LAW REVIEW CITATIONS: 1 EL 94.

Section 1

ATTY. GEN. OPINIONS: Temporary loan from State Bond Commission to State Board of Higher Education, 1956-58, p 164; financing of parking structure to be used jointly, 1962-64, p 273; disposition of net revenues and fees, 1962-64, p 437; crediting interest on invested funds, 1964-66, p 31; authority to construct parking facility with private retail space in Portland, (1968) Vol 34, p 163; disposition of dividends on State Accident Insurance Fund premiums, (1971) Vol 35, p 504.

Section 2

ATTY. GEN. OPINIONS: Disposition of net revenues and fees, 1962-64, p 437; structures constructed under this Article as self-sustaining, 1966-68, p 419; authority to construct parking facility with private retail space in Portland, (1968) Vol 34, p 163; disposition of dividends on State Accident Insurance Fund premiums, (1971) Vol 35, p 504.

Section 3

ATTY. GEN. OPINIONS: Disposition of net revenues and fees, 1962-64, p 437.

Section 4

ATTY. GEN. OPINIONS: Crediting interest on invested funds, 1964-66, p 31; disposition of dividends on State Accident Insurance Fund premiums, (1971) Vol 35, p 504.

Section 5

ATTY. GEN. OPINIONS: Crediting interest on invested funds, 1964-66, p 31; authority to construct parking facility with private retail space in Portland, (1968) Vol 34, p 163.

Article XI-F(2)

Veterans' Bonus

Article XI-F(2)

ATTY. GEN. OPINIONS: This Article as self-executing, 1952-54, p 3; construing "resident," 1952-54, p 62; application for benefits after deadline, 1952-54, p 69; application of remarried widow for benefit of minor child, 1952-54, p 84; applications for compensation distinguished from applications for certificates, 1952-54, p 121; payment of World War II Veteran's bonus after cancellation of warrant, 1960-62, p 265; effect of proposed revision of Ore. Const. Art. IX, §7, 1962-64, p 18; exemption of interest on state bonds from taxation, 1962-64, p 78; as providing specific authority for issuance of bonds, 1962-64, p 180; use of interest earned for general purposes, 1966-68, p 419.

Section 1

ATTY. GEN. OPINIONS: State Bond Commission investing state trust funds or World War II Veterans' Bond Sinking Fund in Veterans' Compensation bonds, 1950-52, p 286; this section as self-executing, 1960-62, p 199.

Section 2

ATTY. GEN. OPINIONS: Meaning of "bona fide resident," 1950-52, p 212; construing "husband" and "wife," 1952-54, p 3; effect of widow's remarriage upon eligibility of children, 1952-54, p 69.

Section 4

ATTY. GEN. OPINIONS: Payment to survivors beyond three named classes, 1950-52, p 260; authority to designate on warrant the payee as the survivor of a veteran or the guardian of such survivor, 1950-52, p 377; eligibility of surviving wife who had remarried before compensation was received, 1952-54, p 3; effect of filing date deadline on various survivors of deceased veterans, 1952-54, p 69.

Section 6

ATTY. GEN. OPINIONS: **See also** opinions under Ore. Const. Art. XI-F(2), §4. Construing "husband" and "wife," 1952-54, p 3; effect of widow's remarriage upon eligibility of children, 1952-54, p 69; payment of World War II veteran's bonus after cancellation, 1960-62, p 265.

Section 7

ATTY. GEN. OPINIONS: Effect of widow's remarriage upon eligibility of children, 1952-54, p 69.

Section 8

ATTY. GEN. OPINIONS: Application for benefits after deadline, 1952-54, p 69.

Section 9

ATTY. GEN. OPINIONS: Rule permitting compensation to remarried surviving spouse, 1952-54, p 3; application for benefits after deadline, 1952-54, p 69; application of remarried widow for benefit of minor child, 1952-54, p 84; applications for compensation distinguished from applications for certificates, 1952-54, p 121.

Article XI-G

Higher Education Institutions and Activities; Community Colleges

Article XI-G

CASE CITATIONS: State ex rel. Sprague v. Straub, (1965) 240 Or 272, 400 P2d 229, 401 P2d 29.

ATTY. GEN. OPINIONS: Crediting interest on invested funds, 1964-66, p 31; disposition of interest accruing to State Board of Higher Education funds, 1966-68, p 419; lease-funding agreement between State Board of Higher Education and a school district, (1969) Vol 34, p 651; authority to acquire buildings when buying land for new facilities, (1969) Vol 34, p 735; disposition of dividends on State Accident Insurance Fund premiums, (1971) Vol 35, p 504.

Article XI-H

Pollution Control

Article XI-H

ATTY. GEN. OPINIONS: Advancement of funds from bond proceeds to a municipality for preliminary planning of waste treatment facility, (1971) Vol 35, p 727.

LAW REVIEW CITATIONS: 1 EL 92-104.

Article XII

State Printing

Section 1

NOTES OF DECISIONS

This section does not require that the legislature provide that all state printing be done by the State Printer. Woodward v. Pearson, (1940) 165 Or 40, 103 P2d 737.

FURTHER CITATIONS: State ex rel. Musa v. Minear, (1965) 240 Or 315, 401 P2d 36.

ATTY. GEN. OPINIONS: Transfer of duties from State Printing Board to Department of Finance and Administration, 1952-54, p 12.

LAW REVIEW CITATIONS: 42 OLR 26; 4 WLJ 538.

Article XIV

Seat of Government

Section 1

ATTY. GEN. OPINIONS: Inclusion in "seat of government," 1960-62, p 45; authority of Governor to require location of Public Welfare Commission in Salem, 1960-62, p 45.

Section 3

NOTES OF DECISIONS

1. Under original section 3

An insane asylum maintained by the state is a "public institution" within the meaning of this section. State v. Metschan, (1896) 32 Or 372, 46 P 791, 53 P 1071, 41 LRA 692.

An injunction to restrain the locating of an institution at a different place from that designated in this section will not issue at the instance of a private person unless he can show some personal injury. Sherman v. Bellows, (1893) 24 Or 553, 34 P 549.

Injunction against use of money to build a state institution elsewhere than at the state capital will not issue in a suit in the name of the state where it does not appear that the cost to the state will be any greater at one place than at another. State v. Pennoyer, (1894) 26 Or 205, 37 P 906, 41 P 1104, 25 LRA 862; State v. Lord, (1896) 28 Or 498, 43 P 471, 31 LRA 473.

ATTY. GEN. OPINIONS: Relocation of an institution which is located outside of Marion County, 1924-26, p 135; location of institution facilities near to place designated in the statute, 1924-26, p 266; location of capitol outside of Salem city limits, 1934-36, p 501; procedure for locating institutions outside of Marion County, 1946-48, pp 145, 381; schools for vocational education as public institutions, 1946-48, p 155; establishment of branch work camps by the MacLaren School for Boys, 1952-54, p 66; use of initiative procedure to locate an institution outside of Marion County, 1952-54, p 89; altering the type of institution described in a referred Act, 1952-54, p 105; dental school of University of Oregon as "public institution," 1952-54, p 245; establishment in Portland of Oregon Employment Institution for the Blind, 1954-56, p 157; use of Eastern Oregon Tuberculosis Hospital, 1956-58, p 77.

Delegation of power to state agency to change use of institution located outside of Marion County, 1956-58, p 274; facility for Oregon State College filbert experiments is not public institution, 1958-60, p 251; State Public Welfare Commission as "institution" or state agency, 1960-62, p 45; authority of Governor to require location of Public Welfare Commission in Salem, 1960-62, p 45; usage of the term "general election," 1960-62, p 252; establishing half-way houses outside Marion County without a vote, 1966-68, p 577; application to outpatient treatment centers of Oregon State Hospital, (1970) Vol 35, p 378.

Article XV

Miscellaneous

Article XV

CASE CITATIONS: Cudd v. Aschenbrenner,.(1963) 233 Or 272, 377 P2d 150.

ATTY. GEN. OPINIONS: Employment of public school teacher as secretary to legislator, 1958-60, p 118.

Section 1

NOTES OF DECISIONS

The word "elected" does not refer solely to an election by the people, but includes also a choice by the Legislative Assembly. State v. Simon, (1891) 20 Or 365, 376, 26 P 170; State v. Compson, (1898) 34 Or 25, 54 P 349.

The failure of the legislature to elect a successor to a railroad commissioner at the expiration of his term did not create a vacancy, and he was entitled to hold such office until his successor was duly elected. Eddy v. Kincaid, (1896) 28 Or 537, 41 P 156, 655; State v. Compson, (1898) 34 Or 25, 54 P 349.

This section was not intended to apply where an officer resigns before his term has expired but is a provision which gives an officer a right to hold over after the expiration of a fixed term. State ex rel. O'Hara v. Appling, (1959) 215 Or 303, 334 P2d 482; State ex rel. Musa v. Minear, (1965) 240 Or 315, 401 P2d 36.

This section prevents an interregnum at the expiration of a term. State v. Johns, (1870) 3 Or 533.

A law providing for the election of an additional judge to hold office for six years and until his successor was elected and qualified was valid. Gantenbein v. West, (1915) 74 Or 334, 144 P 1171.

The office of county clerk is a constitutional office. Stowe v. Ryan, (1931) 135 Or 371, 296 P 857.

All officers of the state, elective or appointive, are subject to this section. State v. Tazwell, (1941) 166 Or 349, 111 P2d 1021.

The words "until their successors are elected or qualified" required that the successor be both elected and qualified before a vacancy could occur in an office in which there was an incumbent holding over at the time. Id.

This section would not apply in the case of an officer appointed to hold office during the pleasure of the appointing power. Id.

A member of the Board of Police Commissioners was authorized to hold office until his successor was duly elected and qualified. State v. Simon, (1891) 20 Or 365, 376, 26 P 170.

A teacher did not hold an office within the meaning of this section. Alexander v. Sch. Dist. 1, (1917) 84 Or 172, 164 P 711.

FURTHER CITATIONS: State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123; State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174.

ATTY. GEN. OPINIONS: Authority of members of State Board of Engineering Examiners when no successors are appointed after their term expires, 1930-32, p 313; tenure of officer when successor has failed to qualify, 1940-42, p 141; authority of member of commission to serve after his resignation and before his successor has been elected and qualified, 1946-48, p 65; constables as constitutional officers, 1948-50, p 270; term of utility district director when no successor is elected, 1948-50, p 108; status of office of county coroner where incumbent is reelected and has failed to file his oath, 1952-54, p 65; power to fill vacancy in office of Secretary of State, 1958-60, p 98; resignation by incumbent Secretary of State as condition of qualifying for office of Governor, 1958-60, p 98; effect of resignation conditioned upon qualification for another office, 1958-60, p 103; when one elected coroner at general election qualifies for office, 1960-62, p 27; failure to elect to fill vacancy, 1960-62, p 235; effect of failure to give notice of election to fill a vacancy, 1964-66, p 96; electing a successor to an office held by a holdover after a tie vote, 1964-66, p 346; necessity of taking oath of office, 1966-68, p 357; compensation of hold-over district attorney engaged also in private practice, (1969) Vol 34, p 506; when authority to fill vacancy arises, (1969) Vol 34, p 617; publication of results of gubernatorial election in presence of unorganized Senate, (1971) Vol 35, p 515.

LAW REVIEW CITATIONS: 39 OLR 140.

Section 2

NOTES OF DECISIONS

The incumbent of an office may hold it longer than four years by reason of a failure to provide his successor. State v. Simon, (1891) 20 Or 365, 26 P 170; State v. Compson, (1898) 34 Or 25, 54 P 349.

The term of a county judge selected for six years does not reduce by reason of the legislative transfer of his judicial functions. State ex rel. Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918.

The members of a city water commission were not officers within the purview of this section. David v. Portland Water Comm., (1886) 14 Or 98, 12 P 174.

The commissioners appointed to license sailors' boarding houses were not officers whose term was prescribed by this section. White v. Mears, (1904) 44 Or 215, 74 P 931.

A city detective was not an officer within the meaning of this section. Reising v. Portland, (1910) 57 Or 295, 111 P 377, Ann. Cas. 1912D, 895.

The commissioners of incorporated ports were not officers within the meaning of this section. Bennett Trust Co. v. Sengstacken, (1911) 58 Or 333, 113 P 863.

A teacher did not hold an office. Alexander v. Sch. Dist. 1, (1917) 84 Or 172, 164 P 711.

A member of the Board of Higher Education was not an officer within the meaning of this section. Smith v. Patterson, (1929) 130 Or 73, 279 P 271.

An enforcement officer was a public officer. Morris v. Parks, (1931) 145 Or 481, 28 P2d 215.

County judge who had no judicial authority was limited by this section to a term of four years. State v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784. **Distinguished**

in State ex rel. Travis v. Imbler, (1964) 236 Or 493, 389 P2d 918.

FURTHER CITATIONS: State v. Reid, (1960) 221 Or 558, 352 P2d 466; Miller v. Gladden, (1965) 341 F2d 972; Miller v. Gladden, (1967) 248 Or 107, 432 P2d 518.

ATTY. GEN. OPINIONS: Tenure of office of: the Adjutant General, 1922-24, p 134; school directors, 1922-24, p 244, 1940-42, p 650; commissioners of Bureau of Mines and Geology, 1922-24, pp 427, 461; special prosecutors, 1922-24, p 487; health officers, 1922-24, p 528; district attorneys, 1922-24, p 573; fish commissioners, 1924-26, pp 83, 303; members of the Board of Engineering Examiners, 1930-32, p 313; state official appointed for a definite term, 1934-36, p 757; members of Board of Forestry, 1938-40, p 124; constables, 1946-48, pp 268, 270; county school superintendents, 1956-58, p 319; members of State Board of Auctioneers, 1958-60, p 83.

Effect of statutes creating boards and commissions whose members have terms longer than four years 1936-38, p 339; distinction between office and public employment, 1952-54, p 82; teacher as public officer, 1956-58, p 44; transfer of functions from county courts to circuit courts, 1956-58, p 198; failure to elect to fill vacancy, 1960-62, p 235; term of county judge having no judicial functions, 1964-66, p 327; legislative extension of terms of county officers, 1966-68, p 242; validity of proposal changing term of Superintendent of Public Instruction, (1969) Vol 34, p 606; when authority to fill vacancy arises, (1969) Vol 34, p 617.

Section 3

NOTES OF DECISIONS

The oath of office of circuit judges must include the declaration that "I will not accept any other office, except judicial offices during the term for which I have been elected." Ekwall v. Stadelman, (1934) 146 Or 439, 30 P2d 1037; State v. Tazwell, (1941) 166 Or 349, 111 P2d 1021.

No oath of office is required of a deputy district attorney in the absence of a statute requiring him to so act. State v. Guglielmo, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466.

ATTY. GEN. OPINIONS: Oath required of a supervisor of a soil conservation district, 1944-46, p 177; status of school director who has not taken an oath, 1946-48, p 317; status of office of county coroner where incumbent is re-elected and has failed to file his oath, 1952-54, p 65; necessity of taking oath of office, 1966-68, p 357.

Section 4

NOTES OF DECISIONS

A lottery is a game of hazard in which small sums are ventured for a chance of obtaining greater sums. Fleming v. Bills, (1871) 3 Or 286.

Payment of prizes in money is not essential to constitute a lottery. Id.

The word "lottery" is to be given the meaning generally accepted and in popular use at the time when the Constitution was adopted. State v. Schwemler, (1936) 154 Or 533, 60 P2d 938.

The three necessary elements of a lottery are the offering of a prize, the awarding of that prize by chance, and the giving of a consideration for an opportunity to win it. Id.

A city ordinance prohibiting coin-in-the-slot devices was valid. Terry v. Portland, (1955) 204 Or 478, 269 P2d 544, app. dis., 348 US 979, 75 S Ct 571, 99 L Ed 762.

"Lottery" contemplates a prize, tangible in nature and having a value in the market place, but does not include the "free-play" feature of a replay pinball machine. McKee v. Foster, (1959) 219 Or 322, 347 P2d 585.

The scheme must require that the participant part with a consideration and that the consideration be something of economic value to him. Cudd v. Aschenbrenner, (1962) 233 Or 272, 377 P2d 150.

A contract for awarding pianos proposed to be given away as an advertisement, which provided that each purchaser of goods of a certain value should receive a ticket which entitled him to vote, was not a lottery. Quatsoe v. Eggleston, (1903) 42 Or 315, 71 P 66.

A horse racing scheme was not a lottery. Multnomah County Fair Assn. v. Langley, (1932) 140 Or 172, 13 P2d 354.

A dart game played for money or merchandise offered as a prize in consideration of moneys paid by each player of the game constituted a lottery. State v. Schwemler, (1936) 154 Or 533, 60 P2d 938.

The operation of slot machines and similar gambling devices such as pinball games, whereby small amounts are hazarded on the chance of winning larger sums, constituted a lottery. State v. Coats, (1938) 158 Or 122, 74 P2d 1102.

ATTY. GEN. OPINIONS: Validity of law taxing devices of chance or skill, 1934-36, pp 197, 250, 652; validity of parimutuel systems, 1934-36, p 255; dart games, 1934-36, p 627; advertising schemes which permit customers to win prizes as lotteries, 1934-36, pp 739, 769; punch board, 1936-38, p 627, 1938-40, p 314; validity of a "suit club" plan, 1938-40, p 134; licensing of slot machines or punch boards by cities, 1944-46, p 486; pinball machines as gambling devices, 1946-48, p 343; "baseball game" as a gambling device, 1946-48, p 458; a "digger" as an illegal device, 1950-52, p 217; punchboards as lotteries, 1952-54, p 144; attendance at a store as consideration, 1960-62, p 240; legality of punch card scheme, 1960-62, p 415; bingo by broadcast or telecast, 1962-64, p 228; advertising scheme promoting tourist purchases, 1962-64, p 262; pony giveaway at State Fair rodeo show was a lottery, 1962-64, p 280; guessing pennies in a glass jar as a lottery, 1964-66, p 255; bingo, with prizes, in licensed premises, 1964-66, p 328; discount coupon booklets plus chance at prize as a lottery, (1970) Vol 34, p 1072.

LAW REVIEW CITATIONS: 16 OLR 164; 17 OLR 229; 48 OLR 159.

Section 5

NOTES OF DECISIONS

A wife's property remains hers until she, by her own consent, expressed or implied, parts with it. Brummet v. Weaver, (1866) 2 Or 168; Rugh v. Ottenheimer, (1877) 6 Or 231, 25 Am Rep 513; Besser v. Joyce, (1881) 9 Or 310; Velten v. Carmack, (1892) 23 Or 282, 31 P 658, 20 LRA 101.

Property owned by a woman at the time of her marriage or afterward acquired by gift, devise or inheritance is by the Constitution the separate property of the wife. Rugh v. Ottenheimer, (1877) 6 Or 231, 25 Am Rep 513; Starr v. Hamilton, (1867) 1 Deady 268, 272 Fed Cas No. 13,314; Stubblefield v. Menzies, (1882) 8 Sawy 4, 11 Fed 268.

The registration contemplated by this provision is not for the benefit of the wife, but for the protection of the public. Starr v. Hamilton, (1867) 1 Deady 268, Fed Cas No. 13,314.

The property of the wife, enumerated and described in this section ought to be considered property over which the husband acquires none of the marital rights known to the common law. Id.

In order to charge the separate property of a married woman by a judgment rendered against her upon a contract made during coverture, the record should show that the debt was contracted for the benefit of the separate estate,

or for her own benefit on the credit of the separate estate. Kennard v. Sax, (1870) 3 Or 263.

To segregate entirely the proprietary interests of husband and wife and make them to all intents and purposes two instead of one in law was not the intention of the framers of the Constitution. Frarey v. Wheeler, (1871) 4 Or 190.

Property acquired by a wife jointly with her husband is not affected by this section. Myers v. Reed, (1883) 9 Sawy 132, 17 Fed 401.

A married woman may sell her separate property and buy other property with the proceeds and hold it in the same character as the original property. Velten v. Carmack, (1892) 23 Or 282, 31 P 658, 20 LRA 101.

Under this section the legislature has established the wife's legal identity, and clothed her with power to contract as to her separate legal estate and to maintain suits and actions in her own name to the same extent as if she were unmarried. Grubbe v. Grubbe, (1894) 26 Or 363, 38 P 182.

This section did not expressly or impliedly cut off the husband's curtesy estate. Runyan v. Winstock, (1909) 55 Or 202, 104 P 417, 105 P 895.

The word "gift" includes a gift from the husband. First Nat. Bank v. Bradburn, (1913) 64 Or 567, 131 P 301.

Marriage does not give a husband a right in his wife's separate property, apart from curtesy in the wife's real estate. Cary v. Cary, (1938) 159 Or 578, 80 P2d 886, 121 ALR 1371.

A contract or covenant by a married woman to convey her real property executed during coverture was not specifically enforced. Frarey v. Wheeler, (1871) 4 Or 190.

A note given to pay a husband's debt and containing the stipulation that it was taken "on the credit of the separate estate" of the wife was sufficient to manifest her intent to charge her separate estate with its payment. Orange Nat. Bank v. Traver, (1881) 7 Sawy 210, 7 Fed 146.

This provision was not intended to control a wife's voluntary disposal of her property, and in the absence of other restrictions she could mortgage it to secure the payment of a debt owed by her husband. Barrell v. Tilton, (1887) 119 US 637, 7 S Ct 332, 30 L Ed 511.

Property purchased by a wife and others, in which she had invested her separate funds, was exempt from the claims of her husband's creditors. First Nat. Bank v. Bradburn, (1913) 64 Or 567, 131 P 301.

FURTHER CITATIONS: Pittman v. Pittman, (1872) 4 Or 298; Elfelt v. Hinch, (1874) 5 Or 255; Hass v. Sedlak, (1881) 9 Or 462; Wells v. Applegate, (1883) 10 Or 519; Cross v. Allen, (1891) 141 US 528, 12 S Ct 67, 35 L Ed 843; Smith v. Smith, (1955) 205 Or 286, 287 P2d 572.

ATTY. GEN. OPINIONS: Proposed constitutional tax limit, (1968) Vol 34, p 203.

LAW REVIEW CITATIONS: 30 OLR 38.

Section 6

NOTES OF DECISIONS

The legislature may divide counties at its pleasure, provided no county shall be reduced to an area of less than 400 square miles. Baker County v. Benson, (1901) 40 Or 207, 66 P 815.

ATTY. GEN. OPINIONS: Extent of legislative authority to change boundaries, 1964-66, p 143, (1968) Vol 34, p 356; authority to consolidate a city and a county, 1966-68, p 518.

Section 7

NOTES OF DECISIONS

A member of the Legislative Assembly may represent a workmen's compensation claimant since a claim against the State Industrial Accident Commission is not a claim against the state. Bennett v. State Ind. Acc. Comm., (1955) 203 Or 275, 279 P2d 655, 866.

ATTY. GEN. OPINIONS: State officer or member of legislature representing defendant in a condemnation proceeding, 1956-58, p 163; legislator's firm representing plaintiff in an action in an "inverse condemnation" proceedings, 1960-62, p 262; legislator-architect contracting to provide architectural services, (1970) Vol 35, p 258.

Section 8

ATTY. GEN. OPINIONS: Paying salaries to teacher-legislators, 1962-64, p 187; college professor running for office, 1962-64, p 464; legality of legislator-professor receiving two salaries, 1964-66, p 117; paying salaries to teacher-legislators, 1966-68, p 372; state employe on leave as legislator, 1966-68, p 537.

Same person as: Legislator's secretary and teacher, 1958-60, p 118; teacher as legislator, 1962-64, p 209; attorney for school board serving as legislator, 1964-66, p 122; justice of the peace and member of a board of education, 1966-68, p 609.

Section 9

LAW REVIEW CITATIONS: 39 OLR 141.

Article XVI

Boundaries

Section 1

NOTES OF DECISIONS

This section and the Act admitting Oregon into the Union gave the Federal District Court for Oregon jurisdiction over the entire Columbia River. The Annie M. Smull, (1872) 2 Sawy 226, Fed Cas No. 423.

Oregon could not undertake to punish a citizen of Washington for fishing in a portion of the Columbia River within his own state during a closed season established for that river by Oregon. In re Mattson, (1895) 69 Fed 535.

FURTHER CITATIONS: W.J. Jones & Son, Inc. v. Stocker, (1967) 271 F Supp 437.

ATTY. GEN. OPINIONS: Effective date of boundary change for assessment purposes, 1958-60, p 325.

LAW REVIEW CITATIONS: 36 OLR 122.

Article XVII

Amendments and Revisions

Section 1

NOTES OF DECISIONS

The provision relating to the submission of proposed amendments to the electors and the publishing of such amendments, is mandatory and must be strictly complied with by the legislature. Kadderly v. Portland, (1903) 44 Or 118, 74 P 710, 75 P 222; Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

The people may exercise the authority to amend the Constitution by a vote on an initiative petition. State v. Schluer, (1911) 59 Or 18, 115 P 1057.

The provision that amendments shall be in force from the Governor's proclamation includes amendments proposed by initiative petitions. Phy v. Wright, (1915) 75 Or 428, 146 P 138, 147 P 381.

The authorities of a county must hold a special election when an amendment has been proposed, even though no provision has been made in the county budget to hold such election, and the expense thereof would exceed the debt limit. State v. Stannard, (1917) 84 Or 450, 165 P 566, LRA 1917F, 215.

A special election for submission of an amendment may be called on the same day as a general primary election. State v. Rathie, (1921) 101 Or 339, 199 P 169, 200 P 790.

An identifying reference is a full compliance with the requirement that constitutional amendments be "entered in" the legislative journals. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

The authority given the legislature to propose amendments to the Constitution is not restricted to the amendment or repeal of any section or part thereof. Ex parte Kerby, (1922) 103 Or 612, 205 P 279, 36 ALR 1451.

When but one amendment is submitted at an election, the provision requiring submission so that each amendment can be voted on separately has no application. State v. Osbourne, (1936) 153 Or 484, 57 P2d 1083.

This section does not prohibit the submission of one amendment which would affect more than one Article or section by implication, but at most prohibits the submission of two amendments on different subjects so as to prevent the voters from expressing their views on each. Baum v. Newbry, (1954) 200 Or 576, 267 P2d 220.

When a Constitution specifies the manner in which it may be amended or revised, only the means specified may be used. Holmes v. Appling, (1964) 237 Or 546, 392 P2d 636.

A failure to observe the requirements of this section was fatal to a proposed amendment, even though the electors have with practical unanimity voted for it. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

FURTHER CITATIONS: State ex rel. Stadter v. Patterson, (1952) 197 Or 1, 251 P2d 123.

ATTY. GEN. OPINIONS: Number of votes required in legislature to propose an amendment, 1920-22, p 439; when vote will be taken on an amendment, 1936-38, p 673; use of initiative procedure for location of public institutions, 1952-54, p 89; necessity of a constitutional convention to submit a new Constitution to the people, 1952-54, p 162; necessity of constitutional convention to submit new Constitution, 1956-58, p 108; procedural requirements for amending Constitution as mandatory, 1958-60, p 114; effective date of boundary change amendment, 1958-60, p 325; use of the term "general election" in Constitution, 1960-62, p 252; circulation of initiative petition at polling place, 1960-62, p 448; circulation of initiative petitions by minors, 1962-64, p 381; use of initiative to call constitutional convention, 1964-66, p 447; constitutionality of proposed ballot title, 1966-68, p 283; constitutionality of tax proposal to be referred, 1966-68, pp 337, 364; required number of signatures on initiative petitions circulating when 1968 amendment to Constitution was adopted, 1966-68, p 633; constitutional amendment fixing effective date for initiative and referendum measures, (1968) Vol 34, p 203; proposed amendment contingent upon binding choice of alternatives, (1969) Vol 34, p 613; presentation of "tax package" for voter approval, (1970) Vol 34, p 1118.

Section 2

NOTES OF DECISIONS

The provision for revision in this section excludes presentation of such a measure by the initiative. Holmes v. Appling, (1964) 237 Or 546, 392 P2d 636.

ATTY. GEN. OPINIONS: Circulation of initiative petition at polling place, 1960-62, p 448.

LAW REVIEW CITATIONS: 39 OLR 141.

Article XVIII

Schedule

Section 5

ATTY. GEN. OPINIONS: Authority of legislature to change senatorial districts, 1934-36, p 224.

Section 7

NOTES OF DECISIONS

The common law of England as it existed at the time of the American Revolution has been adopted as a part of the law of the state. Peery v. Fletcher, (1919) 93 Or 43, 182 P 143; United States Fid. & Guar. v. Bramwell, (1923) 108 Or 261, 217 P 332, 32 ALR 829.

Principles of the common law of England have been adopted only so far as they are applicable to conditions and in consonance with public policy, the Constitution and statutes of the state. Re Water Rights of Hood R. (1924) 114 Or 112, 227 P 1065; Peery v. Fletcher, (1919) 93 Or 43, 182 P 143.

The organization of a state government could not take from the people the rights accruing to them as citizens under the former territorial government. Strong v. Barnhart, (1875) 5 Or 496.

The common law of England, as modified by the Statute 11 Geo. II, ch. 19, §15, is a part of the law of this state. Peery v. Fletcher, (1919) 93 Or 43, 182 P 143.

The territorial code, which became effective on May 1, 1854, continued to be the law of Oregon until the adoption of the Civil Code in 1862. Wright v. Wimberly, (1919) 94 Or 1, 184 P 740.

The Act of June 27, 1844, and this provision of the Constitution constitute a declaration that the common law of England shall constitute a part of the law of Oregon unless such common law was modified by the statutes of Iowa when the Act was passed, or subsequently modified by the statutes of Oregon, and not incompatible with the principles of our government. Lytle v. Hulen, (1929) 128 Or 483, 275 P 45, 114 ALR 587.

The right to alter all laws in force in the territory of Oregon when the Constitution was adopted, whether the same were of common law or legislative origin, was preserved to the people of the state by this provision. Perozzi v. Ganiere, (1935) 149 Or 330, 40 P2d 1009.

The enactment of a city ordinance prescribing a standard of conduct different from that allowable at common law was not invalid where the charter of the city granted to it the authority to exercise police power to the same extent as the State of Oregon has or could exercise said power within said limits. Covey Drive Yourself & Garage v. Portland, (1937) 157 Or 117, 70 P2d 566.

The territorial statute laws concerning actions against municipal corporations were not rendered immune from legislative modification or repeal by this provision. Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808.

Oregon, by its Constitution, laws and decisions has adopted the English common law of carriers. Montgomery Ward & Co., Inc. v. No. Pac. Terminal Co., (1953) 128 F Supp 475.

A statute which constitutes the legislative construction and definition of the constitutional guaranty of speedy trial and having been adopted contemporaneously with adoption of the Constitution must be read into and considered a part of the constitutional guaranty. State v. Kuhnhausen, (1954) 201 Or 478, 266 P2d 698, 272 P2d 225.

FURTHER CITATIONS: Wright v. Yount, (1876) 6 Or 87; Poppleton v. Yamhill County, (1880) 8 Or 337; Rosenblat v. Perkins, (1889) 18 Or 156, 22 P 598, 6 LRA 257; Salem Improvement Co. v. McCourt, (1894) 26 Or 93, 41 P 1105; In re Booth's Will, (1901) 40 Or 154, 61 P 1135, 66 P 710; In re Morgan's Estate, (1905) 46 Or 233, 77 P 608, 78 P 1029; Wallace v. Bd. of Equalization, (1906) 47 Or 584, 86 P 365; Stevens v. Myers, (1912) 62 Or 372, 121 P 434, 126 P 29; State v. Kay, (1915) 74 Or 268, 145 P 277; Andrews v. Andrews, (1933) 144 Or 200, 24 P2d 332; Eastland v. Clackamas County, (1887) 12 Sawy 613, 32 Fed 24; State ex rel. Gladden v. Lonergan, (1954) 201 Or 163, 269 P2d 491; Oregon v. Fed. Power Comm., (1954) 211 F2d 347; Daugharty v. Gladden, (1959) 217 Or 567, 341 P2d 1069; Multnomah Sch. of the Bible v. Multnomah County, (1959) 218 Or 19, 343 P2d 893; Smith v. Chipman, (1960) 220 Or 188, 348 P2d 441; City of Woodburn v. Domogalla, (1963) 1 OTR 292, rev'd, 238 Or 401, 395 P2d 150.

ATTY. GEN. OPINIONS: Contracts of public officers with the governmental entities of which they are officers, 1952-54, p 114; sale of county land to county commissioner who signed order of sale, 1954-56, p 27; as reserving people's right to alter all laws, 1954-56, p 74; gas and oil leases to state employes by State Land Board, 1954-56, p 113; adoption of Statute of Uses by this section, 1954-56, p 115; effect of territorial law being inconsistent with Constitution, 1954-56, p 173; interest of public officer or employe in public contract, 1954-56, p 176; common law prohibitions against certain contracts between state agencies and state employes, 1954-56, p 182; common law, the Constitution and legislation, 1956-58, p 108; legislator, acting as insurance agent, entering contract for insurance with county, 1956-58, p 142; district court judge holding additional office of supervisor of soil conservation district, 1958-60, p 147; as adopting common law prohibition against holding incompatible positions, 1958-60, p 170; circuit judge as consultant for United States bureau, 1960-62, p 112; executive assistant for State Board of Forestry performing functions of administrator for Forest Protection and Conservation Committee, 1960-62, p 296; legislator as member of metropolitan study commission, 1966-68, p 254.

LAW REVIEW CITATIONS: 1 WLJ 346.

Section 8

CASE CITATIONS: Stevens v. Carter, (1894) 27 Or 553, 40 P 1074, 31 LRA 342.