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NONPROPERTY TAXES UNDER THE ILLINOIS CONSTITUTION

JO DESHA LUCAS†

IN NOVEMBER of 1956 the voters of Illinois rejected a proposal to rewrite the revenue provision of their state constitution.¹ This vote marked the eighth unsuccessful effort to amend Article IX since the adoption of the Constitution in 1870.² The impetus for these recurring efforts stems from the dissatisfaction of civic organizations with the provisions of Sections one and two. These sections read as follows:

§ 1. The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn keepers, grocery keepers, liquor dealers, toll bridges, ferries, insur-

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¹ Amendment to the constitution of Illinois (Revenue Amendment), submitted to the voters November 6, 1956. The 1956 amendment rewrote Sections 1 and 2 to read:

Sec. 1. The general assembly may define and classify property for taxation, but all such definitions and classifications shall be reasonable and be based solely on the nature and characteristics of the property and not on the nature, characteristics, residence or business of the owner or the amount or number owned. All real estate shall constitute one class, except that lands used for forestry purposes and mineral rights in land may be classified separately. If any class of property is taxed by valuation, such tax shall be uniform as to the class.

Sec. 2. The general assembly may levy or authorize the levy of such other kinds of taxes as it may deem necessary, which shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, but shall not levy or authorize the levy of a graduated income tax.

Other changes were: (1) revision of Section 3 to require ownership as well as use as a condition to tax exemption; (2) in Section 9 of the substitution of the phrase, "subject to the restrictions of Sections 1 and 2 of this article," for the phrase, "such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same;" (3) in Section 10 the deletion of the phrase, "such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." See Cushman, *The Proposed Revision of Article IX* (1956).

² In what was referred to as a "partial list," the Citizens Blue Ballot Information Committee claimed the following as endorsing organizations: Chicago Association of Commerce and Industry; Chicago Bar Association; Chicago Retail Merchants Association; Citizens of Greater Chicago; Citizens School Committee; City Club of Chicago; Illinois Agricultural Association; Illinois Association of School Boards; Illinois Federation of Retail Associations; Illinois Home Bureau Federation; Illinois League of Women Voters; Illinois Municipal League; Illinois Region, Parent-Teacher Association; Illinois State Bar Association; Illinois State Federation of Labor; Illinois State Federation of Teachers; Illinois Township Officials Association; Polish-American Congress, Illinois Division; and the Retired Teachers Ass'n.

ance, telegraph and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

§ 2. The specification of the objects and subjects of taxation shall not deprive the General Assembly of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this Constitution.³

The dissatisfaction with these provisions derives from two chief sources. The first is the requirement that all property taxes be levied *ad valorem*, a requirement which has been interpreted to prohibit any and all classification of property for taxation.⁴ The second, and the problem with which this article is pri-

³ Previous unsuccessful efforts to amend Article IX were: (1) a public policy question (advisory) submitted to the voters in 1912; (2) a proposed amendment submitted to the people in 1916, providing for the classification of property and substituting for the uniformity provision a requirement that taxes on personal property must be uniform within the class; (3) the proposed new constitution of 1922 which included a completely rewritten revenue article providing for uniform income taxes in lieu of taxes on intangible personal property; (4) a proposed amendment submitted in 1926, permitting classification of property providing that all real property must be in one class; (5) a similar amendment proposed in 1930, containing the proviso mineral lands and lands used for reforestation purposes might be classified into separate classes; (6) the proposed amendment of 1942, restricted to the purpose of permitting exemptions from the coverage of the Retailers' Occupation Tax; and (7) the proposed amendment of 1952, identical with the 1956 proposal. In all cases except those of 1930 and 1956, the proposal received a majority of the votes cast upon the proposition. Until 1950, however, the constitution required a majority of the votes cast in the election. See Ill. Const. Art. IX, § 2, and amendment ratified Nov. 7, 1950, and proclaimed Nov. 29, 1950. See also *People v. Stevenson*, 281 Ill. 17, 117 N.E. 747 (1917).

⁴ Ill. Const. Art. IX, §§ 1-2 (1870). Other sections of the same article provide:

§ 3. The property of the State, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. In the assessment of real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property.

§ 4. The General Assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes of special assessments, for State, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having authority to receive State and county taxes; and there shall be no sale of said property for any of said taxes or assessments but by said officer, upon the order of judgment of some court of record.

§ 5. The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate for a period of not less than two years from such sales thereof. And the General Assembly shall provide, by law, for reasonable notice to be given to the owners or parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: *Provided*, that occupants shall in all cases be served with personal notice before the time of redemption expires.

§ 6. The General Assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever.

§ 7. All taxes levied for State purposes shall be paid into the State treasury.

§ 8. County authorities shall never assess taxes the aggregate of which shall exceed seventy-

marily concerned, is the interpretation placed upon the first two sections in regard to the power of the General Assembly to lay and collect nonproperty taxes. It will be observed that the language employed in these sections is replete with ambiguities. For example, the phrase "and not otherwise," appearing at the end of the first sentence of Section 1, follows four parentheticals. The primary problem in the interpretation of the section is to determine whether the phrase "shall provide such revenue as may be needful" means that the method stated ("by levying a tax, by valuation") limits the general assembly to that source of revenue, subject to the specific exceptions stated following the word "but," or whether the phrase should be read, "Shall provide such revenue as may be needful [from property tax sources] by levying a tax, by valuation . . .," limiting the general assembly only in regard to the mode of levying property taxes. If the former construction is put upon the section, the categories listed after "but" must be read as the sole nonproperty sources available to the general assembly, unless broadened by Section 2. If the latter, the list of categories following "but" may be read as exempting the General Assembly from the *ad valorem* principle in taxing the property of persons in the enumerated categories.

five cents per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by vote of the people of the county.

§ 9. The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with the authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same.

§ 10. The General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation.

§ 11. No person who is in default, as a collector or custodian of money or property belonging to a municipal corporation, shall be eligible to any office in or under such corporation. The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office shall be increased or diminished during such term.

§ 12. No county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation incurring any indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district or other municipal corporation, from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution in pursuance of any law providing therefor.

Section 13, added by the Fifth Amendment to the Constitution, proposed and ratified in 1890, provided that the city of Chicago might issue bonds to finance the World's Columbian Exposition. Since it became a dead letter after the Exposition was held, it was not set out in full.

The construction placed upon Sections 1 and 2 by the Illinois Supreme Court has waived over the years but the present-day interpretation appears to compromise the extremes suggested above. The first sentence of Section 1 is construed to limit the General Assembly to one source of taxation, the general property tax,⁵ and the second sentence to exempt from this limitation two classes of nonproperty tax subjects, persons engaged in occupations and persons owning or using franchises and privileges. Section 2 is construed to provide that the enumeration of occupations in Section 1 is not to be taken as exclusive of other occupations. On the strength of this interpretation it is said that the General Assembly is limited to three kinds of taxes, property taxes, occupation taxes, and franchise and privilege taxes (generally referred to simply as privilege taxes).⁶

As the state's need for revenue has pressed it into nonproperty sources of taxation this stricture has led the General Assembly to look for tax tags which will meet the property-occupation-privilege formula. The limits of the term "privilege" being a matter of some doubt, the General Assembly first attempted to frame its excises in the form of occupation taxes, except where precedents existed for calling the incident of the tax a privilege. Thus, the first motor fuel tax was a tax upon persons engaged in the business of selling motor fuel,⁷ the first cigarette tax a tax upon persons engaged in the business of distributing cigarettes,⁸ and the sales tax, or Retailer's Occupation Tax, as it is called, was levied upon persons engaged in the business of selling personal property at

⁵ In the area of state revenue, the general property tax provision is no longer of any direct importance, since the state now derives all of its revenues from nonproperty sources. It remains, however, an important deterrent to the development of equitable patterns of local taxation in Illinois counties and municipalities where property still accounts for the overwhelming percentage of tax revenue. In *Reif v. Barrett*, 355 Ill. 104, 188 N.E. 889 (1933), the Illinois court rejected the contention that Article IX prohibits the General Assembly from raising all needed revenue through permissible nonproperty taxes and simply making no levy. The evils of the general property tax have been thoroughly explored. See Haig, *A History of the General Property Tax in Illinois* (1914). It seems perfectly clear, however, that this principle of taxation of property by value only, regardless of kind and number, was intentionally incorporated into the constitution and any departure from it will have to await a constitutional amendment.

⁶ See *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932).

⁷ The motor fuel tax, Ill. L. (1927) 758, provided for a refund of the tax to purchasers of gasoline for use in purposes other than driving upon the highways and the court nullified the statute on the grounds that a refund to the customer of taxes levied not upon him but upon the seller constituted an illegal payment from the state treasury. *Chicago Motor Club v. Kinney*, 329 Ill. 120, 160 N.E. 163 (1928). The motor fuel tax was re-enacted, this time as a tax upon the privilege of using the highways and levied upon the buyer, though collected and paid over by the seller. Ill. L. (1929) 625, upheld in *People v. Deep Rock Oil Corporation*, 343 Ill. 388, 175 N.E. 572 (1931). With the advent of the Retailer's Occupation Tax, the General Assembly exempted motor fuel subject to the motor fuel tax and the exemption was struck down by the court on the grounds that the motor fuel tax, now a tax upon the buyer, could not be the basis for exempting sellers of motor fuel from a tax upon sellers. *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (1933).

⁸ 1 Ill. L. (1941) 1043.

retail.⁹ The difficulties of administering all taxes as occupational taxes soon forced the General Assembly into the expandable term of the *Bachrach* formula, "privilege."¹⁰ The legislative transition from occupational taxes to "privilege" taxes has resulted in a cumbersome and almost unintelligible method of administering a relatively simple system of sales taxes.

The Illinois Supreme Court seems reluctant to come to grips with the problem. In its most recent pronouncement on the subject, it sustained the Use Tax¹¹ as a supplement to the Retailer's Occupation Tax but on the question of the interpretation of Sections 1 and 2, said merely, "It has been authoritatively said that 'many years of litigation has not resolved the uncertainties and ambiguities in the nonproperty provisions of Sections 1 and 2' of Article IX of the Constitution. . . . But the uncertainty that has persisted as to the precise scope of Section 2 of Article IX need not trouble us in this case."¹² Since clarification of the meaning of Sections 1 and 2 apparently is not immediately forthcoming either through amendment or through the courts, the problem falls by default to teachers of law, a breed of ample wind and a low threshold for trouble.

THE SOURCE OF SECTIONS ONE AND TWO

Whatever responsibility the delegates to the 1869-70 convention may have for fabricating the present Illinois Constitution, the revenue article, at least, was very little of their original design.¹³ They made almost no change in the sections dealing with the powers of the General Assembly.¹⁴ It is to the Constitution of 1848 that we must go, then, to understand the phraseology of the provisions of

⁹ Ill. L. (1933) 938, declared invalid in *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (1933), re-enacted Ill. L. (1933) 924 and upheld in *Reif v. Barrett*, 355 Ill. 104, 188 N.E. 889 (1933).

¹⁰ See *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932).

¹¹ Ill. Rev. Stat. (1955) c. 120, § 439.1 et seq.

¹² *Turner v. Wright*, 11 Ill.2d 161, —, 142 N.E.2d 84, 87 (1957).

¹³ The General Assembly did add municipal and county debt limitations, Ill. Const. Art. IX, § 12 (1870); and a county tax rate limitation, id., § 8; a provision that taxes levied for state revenue purposes must be paid into the state treasury, id., § 7; and it rewrote the provision governing the sale of property for taxes, id., §§ 4, 5. It also omitted the poll tax provision and the two mill tax, Ill. Const. Art. IX, § 1 (1848).

¹⁴ In a public address to the people, issued by the delegates to the convention, this is said of the changes wrought in the revenue amendment:

We have retained the valuable features of the revenue article in the Constitution of 1848, and have provided in addition that before sales of real estate for taxes are made, a return of unpaid taxes shall be made to some general officer of the county, for collection, with authority to sell for default on order of a court of record, the object being to secure uniformity of sales, prevent abuses, and to provide a general and convenient mode by which persons interested may obtain information and pay assessments or taxes, or redeem from tax sales. We have forbidden the General Assembly from discharging any county, city, township or district from its proportionate share of State taxes, and prohibited all commutations for such taxes; thus securing, in State taxation, equality of burdens for common benefits, and we have repealed the two-mill tax. 2 *Debates and Proceedings of the Constitutional Convention of the State of Illinois, 1869-1870*, at 1864. (Cited hereafter as *Debates*, 1870).

Sections 1 and 2 of Article IX. The pertinent provisions of that instrument are as follows:

§ 1. The General Assembly may, whenever they shall deem it necessary, cause to be collected from all-ablebodied free white male inhabitants of this State over the age of twenty-one years and under the age of sixty years, who are entitled to the right of suffrage, a capitation tax of not less than fifty cents nor more than one dollar each.

§ 2. The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, toll-bridges and ferries, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct.

§ 6. The specification of the objects and subjects of taxation shall not deprive the General Assembly of the power to require other objects or subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution.¹⁵

BACKGROUND OF THE CONSTITUTIONAL CONVENTION OF 1847

Illinois became a state in 1818 and began its statehood under the constitution of that year. This first of the Illinois constitutions was made up largely of provisions taken from the constitutions of Indiana, Ohio, and Kentucky.¹⁶ There was no separate article on revenue but in the Bill of Rights, Article VIII of the document, Section 20 provided:

that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession.¹⁷

This provision came before the court first in the case of *Sawyer v. The City of Alton*.¹⁸ The *Sawyer* case was an action on behalf of the city of Alton to recover from Sawyer, the defendant, the sum of \$3.00 penalty for Sawyer's failure or refusal to perform three days labor on the city streets as provided in the act incorporating the city.¹⁹ Sawyer argued that under any theory, the exaction of service on the roads, commutable at one dollar per day, was a tax, and that as a

¹⁵ Ill. Const. Art. IX, § 1 (1848).

¹⁶ See Anthony, *Constitutional History of Illinois* 39 (1891).

¹⁷ Ill. Const. Art. VIII, § 20 (1818).

¹⁸ 4 Ill. 126 (1841). Section 20 of Article VIII had been mentioned by the court only once since its adoption in 1818. In *Nance, a girl of color, v. Howard*, 1 Ill. 242 (1828), the court had had occasion to rule on the question of whether or not indentured servants could be levied upon and sold at execution. In the course of the opinion, Justice Lockwood said, referring to Section 20, "A poll tax would seem by this feature of the constitution to be inhibited." *Id.*, at 244. He added that this question did not arise under the facts of the case since the legislature had taxed such servants on the basis of value, rather than by the poll. Taken in this context, the *Nance* case can hardly be construed as interpreting Section 20 as a limitation upon the power of the General Assembly to levy taxes upon nonproperty subjects and objects of taxation.

¹⁹ Ill. L. (1837) 17.

tax it was void because contrary to the provisions of Section 20 of Article VIII in that it was levied per capita and not by valuation.

With the first contention of defendant's counsel the court did not cavil. There was some authority for the proposition that requirements of road labor were not taxes at all,²⁰ but the court was either unaware of this view or considered the matter unimportant. It conceded that the exaction was in the nature of a tax and proceeded to examine the constitution to see if any of its provisions inhibited the power of the General Assembly to lay and collect a tax of this particular nature.²¹

Justice Treat, for the court, began by considering the familiar canons of construction of constitutional provisions. "The Constitution of the State is not to be regarded as a grant of power, but rather as a restriction of the powers of the legislature; and it is competent for the legislature to exercise all powers not forbidden by the Constitution of the State, nor delegated to the general government, nor prohibited to the state by the constitution of the United States."²² He went on to say that the court was of the opinion that the framers of the constitution intended to "direct a uniform mode of taxation on property, and not to prohibit any other species of taxation. . . . They probably intended to prevent the imposition of an arbitrary tax on property, according to kind or quality, and without reference to value."²³ It was inconceivable to the Justice that they could have intended "that all public burthens should be borne by those having property in possession, wholly exempting the rest of the community who, by the same constitution, were made secure in the exercise of the rights of suffrage, and all the immunities of the citizen."²⁴

The second case in which the court was called upon to interpret Section 20 of Article VIII was *Rhinehart v. Schuyler*.²⁵ The *Rhinehart* case was an action in ejectment in which the plaintiff, Schuyler, claimed title under an auditor's deed acquired by virtue of a sale of the property for taxes assessed under the Illinois Revenue Laws of 1827.²⁶

²⁰ See Cooley, Taxation § 660 (1924).

²¹ Much later the Illinois court upheld road labor requirements commutable at fixed dollar rates on the ground ignored in the Sawyer case. See *Town of Pleasant v. Kost*, 29 Ill. 490 (1863); see also p. 71 *infra*.

²² 4 Ill. 127, 129 (1841).

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ 7 Ill. 473 (1845), argued and decided in 1843 but appearing in the official reports during the December term, 1845.

²⁶ Act of February 19, 1827, Ill. Rev. Stat. 325 et seq. (1827). Section one of this act declared that all lands held by individuals, or bodies politic or corporate, except town lots, should be subject to taxation; and for that purpose were divided into classes and valued at four dollars, and taxed at a rate of two cents per acre; lands of the second quality in the second class, valued at three dollars, and taxed at one and one half cents per acre; and lands of the third quality in the third class, valued at two dollars, and taxed at one cent per acre. The fifteenth section au-

Counsel for the defendant relied heavily upon the opinion of Justice Treat in the *Sawyer* case. Pointing out that the court had held in that case that Section 20 was not a grant but a limitation, and further that it did not limit the General Assembly in its choice of nonproperty tax objects, he suggested that were the court to hold that the section did not limit the selection of subjects and objects of property taxes and left the General Assembly free to classify and to fix arbitrary values, it would be hard to see wherein the section could be called a limitation of any sort.²⁷

Justice Young, for the court, pointed out that the court was being asked to strike down as unconstitutional laws which had been in operation since the earliest days of government in the state, and the court would not lightly do so. He proceeded to hold that though the constitutional section required that property taxes should be laid and collected on the basis of valuation, it should not be construed to prohibit the General Assembly from adopting any reasonable and practical means of determining value. He further indicated that it would be impossible or at best tremendously expensive and impractical to value land by actual inspection and refused to construe the constitution of the state as requiring so impractical a result.²⁸ The opinion also placed strong reliance upon the doctrine of contemporaneous construction, pointing to the fact that the General Assembly of 1819, and that of 1832, had enacted the legislation being called into question.²⁹

THE CONSTITUTIONAL CONVENTION OF 1847

It is with this background of judicial decisions that the delegates convened in Springfield to draft the Illinois Constitution of 1848. Despite the lamentable

thorized the county commissioners' court when the tax on land should be insufficient, to levy a tax of up to one half of one per cent upon town lots, if not taxed by the trustees of the town, and on slaves, servants, carriages, distilleries, stock in trade, horses, mules, mares, asses, and meat cattle above three years old, watches with their appendages, and "such other property as they shall order and direct." *Id.*, at §§ 1, 2, 15.

²⁷ 7 Ill. 473, 478-79 (1845).

²⁸ He pointed out that the constitutional convention met at a time when millions of acres of land in Illinois were held under patents from the United States granted to Revolutionary soldiers, and that in many cases the owners did not even know the exact location of the land, and that most of it, located in the Military Bounty Land District, was entirely unexplored by any "except the United States surveyors, a few hardy and adventurous hunters, and the aborigines of the country; many of the latter still claiming and exercising the native right of roaming, *ad libitum*, over . . . the prairies . . ." 7 Ill. 473, 512 (1845).

²⁹ After demonstrating, at least to his own satisfaction, that the arbitrary assessment was not only in accordance with the terms of the constitution but "the best system, and the only mode by which uniformity of taxation can be secured," Justice Young adds, "I now propose, in concluding my remarks on this branch of the subject, to show according to contemporaneous construction, which is laid down in our law books as one of the unerring tests of the true interpretation of a constitution or statute, that the construction given to the constitution by the Act of 1819, and afterwards in 1823, was in accordance with the true and proper interpretation of that instrument, as it was designed to be understood by its framers." 7 Ill. 473, 515 (1845).

financial condition of Illinois, matters of revenue were unimportant in the public clamor for a convention.³⁰ Once the convention was in session, however, there were revenue issues which became among the most hotly debated topics before the delegates.³¹

In patching together the meaning of the provisions of the 1848 revenue article from its wording and from the background of its adoption, several things stand out. The first concerns the issues upon which the delegates came prepared to do battle. It has been said that the convention adopted the "principle of taxation by valuation," subject only to the exceptions set out in the second sentence of the second section.³² It should be noted, however, that the principle is precisely the one embodied in Section 20 of Article VIII of the Constitution of 1818, and that when the delegates met in 1847, Section 20 had been held to apply only to property taxes,³³ and to permit classification of property and the

³⁰ Slavery, the abolition of the council of revision, reorganization of the judiciary, the bank, and matters of economy such as limitations on the salaries of state officers appear to have been the questions of most popular concern. Cole, *Constitutional Debates of 1847*, xv-xxx (1919), hereinafter cited as *Debates, 1847*; Illinois Legislative Reference Bureau, *Constitutional Conventions in Illinois 9-12* (1918); Anthony, *op. cit. supra* note 16 at 103-106.

³¹ Between June 11, and June 23, when the Committee on Revenue made its first report on a proposed revenue article, approximately a dozen resolutions were offered from the floor touching in some way upon the subject of revenue. By far the most important in terms of time consumption were the poll tax resolutions. Other resolutions offered and either tabled or referred to the Committee on Revenue or to some other committee were: "All assessments on property, whether real, personal, or mixed shall be *ad valorem*," *Journal of Illinois Constitutional Convention, 1847*, 38 (hereinafter cited as *Journal, 1847*.); "That taxes and representation shall be equal," *id.*, at 28; "That the Committee on Revenue be instructed to report to this convention an amendment to the constitution, declaring that the legislature shall never assess the value of property subject to taxation, and providing that all taxable property shall be assessed at its intrinsic value by an assessor appointed for that purpose" *id.*, at 41; "The legislature shall not exempt any person from the payment of any portion of the taxes due by them to the state, nor shall any public officer, or his sureties, be released from the full amount of their liability to the state or county" *id.*, at 74; and "That no road tax shall hereafter be, levied in this state in the form of a capitation tax." *id.*, at 52. It is significant that these resolutions deal with precisely the problems raised in the Sawyer and Rhinehart cases, the power of the General Assembly to levy poll taxes and road capitation taxes, and the power to make arbitrary valuation of property. It is also significant that only one of these resolutions is directed at limiting the choice of subjects and objects to taxation and that the resolution that no road tax be levied in the form of a direct prohibition, designed to reverse the rule in *Sawyer v. Alton*, though very likely conceived as supplementing a general poll tax.

³² Ill. Const. Art. IV, § 2 (1848). The second section, containing the provisions central to the present Article IX, read as follows:

"The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such a manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have the power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, toll-bridges, and ferrys, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct." *Journal, 1847*, 79; *Debates, 1847*, 186.

³³ *Sawyer v. Alton*, 4 Ill. 126 (1841).

fixing of arbitrary values.³⁴ Both of these issues were met directly at the convention. The problem of the *Sawyer* case was raised in a very narrow framework. One of the first revenue resolutions was to the effect that the legislature be prohibited from levying road taxes in the form of capitation taxes.³⁵ This resolution was referred to the Committee on Revenue and apparently found its way into the minority report in a compromised form, Section 5 of that report providing specific limitations upon the amount of road labor taxes.³⁶ In this compromised form the road tax limitation failed of adoption. The two issues raised in the *Rhinehart* case were also taken up directly. That of arbitrary classification was resolved against the *Rhinehart* opinion and valuation by inspection made mandatory by the addition of the words, "and not otherwise."³⁷ That of sale for taxes was treated at length in Section 4.³⁸ Had the convention chosen to limit

³⁴ *Rhinehart v. Schuyler*, 7 Ill. 473 (1845).

³⁵ See p. 71 *supra*.

³⁶ Section 5 of the minority report of the Committee on Revenue provided that if the capitation tax was fixed at one dollar, no person should be required to perform more than one day's labor on the roads, and in the event it was fixed at less than one dollar, no more than two days in the course of a year. *Journal*, 1847, 80; *Debates*, 1847, 186.

³⁷ Ill. Const. Art. IX, § 2 (1848).

³⁸ On July 6, Mr. Jenkins moved the following resolution: "Resolved, that the committee on the judiciary department be instructed to inquire into the legality, justice, and expediency of inserting in the amended constitution the following provision, to wit:

"That all titles to land acquired by any person by purchase of the same at any sale for taxes, made by authority of this state, shall be void, on condition that the person who owned the land, or his legal representatives, does, within five years from the adoption of this constitution, pay to the purchaser, his heirs or assigns, the sum paid by him for the land, with — per cent interest on the same from the time of such sale, until the time of payment, and such reasonable price for the improvement made upon such land as a jury called for the purpose may think is right, after taking into consideration the damage done to the land and timber, and deducting it from the value of said improvements.

"Resolved, that if the committee on the judiciary should think the plan proposed in the foregoing resolution, for carrying into effect the object contemplated therein, unjust or inexpedient, they will report to the convention such other plan as they deem expedient, if, in their opinion, anything can be done to relieve such as have lost their lands under the operations of said laws." *Journal*, 1847, 142; *Debates*, 1847, 315.

The same question arose later in the day in the discussion of the thirty-first section of the proposed article on the legislative department. The proposed section read as follows:

Sec. 31. The general assembly shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, immunities or exceptions, other than such as may be, by the same law, extended to any member of the community, who may be able to bring himself within the provisions of such law; nor shall the legislature pass any law, whereby any person shall be deprived of his life, liberty, property or franchises without trial and judgment." *Journal*, 1847, 84.

Speaking on a motion to delete the last sentence of this section to preserve the power of the legislature to sell land for taxes without first obtaining the judgment of a court, Mr. Williams is reported to have gone into "an elaborate discussion of the nature and propriety of selling a man's property to pay taxes thereon; thus depriving and disseizing a man of his freehold, without a trial and judgment of a court; which he said was in violation of the great fundamental principles of our government. He pointed out the great lengths the courts of Illinois had gone to in sustaining tax titles, and the unjust and unrighteous consequences thereof

the General Assembly to the subjects and objects of taxation named in the article, it could have done so. Had the members of the convention taken the general arrangement and form of the article as so limiting the General Assembly, it becomes difficult to explain the action of the minority of the revenue committee in including the road tax rate limitation.

The second thing to note has to do with the history and meaning of Section 6 of the article as finally adopted. This Section originated as the eighth and last section of the minority report.³⁹ It should be noted that in the minority report the following objects and subjects of taxation were specified: (1) land, (2) tenements, (3) hereditaments, (4) capital invested in corporations or associations, (5) franchises, (6) stock in trade, (7) money deposited or loaned at interest, (8) personal property of every description, (9) auctioneers, (10) brokers, (11) peddlers, (12) retailers of spirituous or other liquors, (13) commission merchants, and (14) male inhabitants over twenty-one and not exceeding sixty years of age. If the implication that this list was designed to be exclusive were not directly negated by the wording of Section 8 of the report, Mr. Thomas' remarks in introducing the report should put the matter at rest.⁴⁰ Mr. Thomas' remarks upon the purpose of specifying objects and subjects of taxation were made with regard to both the minority and majority proposals, the purpose being characterized as an effort to put at rest the doubts of legislators as to the taxability of the subjects and objects specifically mentioned. In comparing the two proposals it should be noted that the lists of subjects and objects other than property are not the same. The minority report includes retailers of spirituous and other liquors, while the majority report does not, and the latter includes

upon the landowner." Debates, 1847, 315. He re-emphasized this view on the following day by proposing to add to the same section the following, "or for collecting taxes by distress and sale of personal property without judgment," Journal, 1847, 144-145; Debates, 1847, 333.

On July 12, Justice Lockwood moved a resolution on sale of land for taxes which was later incorporated into the report of the revenue committee and became, without material change, Section four of the 1848 Constitution. Journal, 1847, 158; Debates, 1847, 383.

³⁹ Section eight, presently Section 2 of Article IX of the Constitution of 1870, provided:

"Sec. 8. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other objects or subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution." Journal, 1847, 81; Debates, 1847, 186.

⁴⁰ Mr. Thomas spoke briefly in support of the minority proposal, and his remarks indicate that in large measure both proposals grew out of the disputes which had been litigated in the Sawyer and Rhinehart cases. With regard to the problem of the *Sawyer* case, the power of the General Assembly to subject to taxation subjects and objects other than property, he noted that this topic had caused more disputes in legislatures than any other and that in Illinois there had been those who had argued that under Section 20 of Article VIII of the 1818 Constitution, the General Assembly had no power to levy a poll tax, adding that perhaps the doubts of the legislators on this subject explained the fact that they had never enacted one. Insofar as it is possible to do so, he concluded this matter of what could be taxed should be put beyond dispute. He indicated that both majority and minority proposals had done something along this line.

hawkers, showmen, jugglers, inn-keepers, grocery-keepers, and ferrys, and persons using and exercising franchises and privileges, none of which are mentioned in the minority proposal with the exception that franchises are included in the enumeration of property tax objects and set apart as a separate class to be valued annually. There is no indication that the convention preferred one list to the other, efforts to amend the majority list being reported as "trivial," and the majority forces accepting the minority Section 8, apparently without opposition or debate.⁴¹ Certainly had the enumeration been taken to be the total circumscription of the General Assembly's power to tax nonproperty subjects, the matter would have warranted more spirited discussion than it got.

A third indication that the convention did not look upon the specification of subjects and objects in Section 2 as being exclusive lies in the substance of a resolution offered by Justice Scates on the 9th day of August, a time at which both the majority and minority reports were before the convention. This resolution was a long list of specific powers granted to the legislature, followed by a statement that the constitution should be construed as establishing a government of limited delegated powers.⁴² It was defeated 103 to 31.⁴³ The interesting thing about it is, however, that it described the taxing authority of the legislature in these terms, "to lay and collect taxes, imposts, and excises," language obviously taken from the United States Constitution. The use of the phrase takes on significance from the fact that Justice Scates' interpretation of their meaning is set out in his dissenting opinion in the *Rhinehart* case. Here, in discussing the case of *Hyllton v. United States*,⁴⁴ he said, "Tax is a generic term, and includes under it, first, direct taxes, secondly, duties, imposts and excises; thirdly, all other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads."⁴⁵

INTERPRETATION OF THE CONSTITUTION OF 1848

In the period between the adoption of the Constitution of 1848 and the advent of the constitutional convention of 1870, there was very little litigation involving directly the power of the General Assembly to tax subjects and objects of taxation other than property, and other than those specifically enumerated in the second sentence of Section 2 of Article IX. It was a period during which

⁴¹ There were several amendments offered to add or subtract particular objects or subjects from the enumeration in the second sentence of the section. An amendment was offered to add doctors, lawyers, and clerks of the commissioners' courts, to substitute toll bridges for grocery keepers, to add toll bridges, to add merchants and hawkers. Journal, 1847, 215. The newspapers did not carry any report of these other than to note that "several trivial amendments were offered by Messrs. Campbell of McDonough, Weed, Brockman, West, and Markley, were rejected." Debates, 1847, 627. As a consequence, the debate upon this part of the section was not preserved.

⁴² Journal, 1847, 295; Debates, 1847, 720.

⁴³ Journal, 1847, 297; Debates, 1847, 720.

⁴⁴ 3 Dall. (U.S.) 171 (1796).

⁴⁵ 7 Ill. 473, 539 (1845).

most of the experimentation in taxation centered around methods of taxing corporations, especially railroads and insurance companies, and these fell so clearly within the privileges and franchises category that it was not often necessary to meet squarely the problem of the nonenumerated subject.

The first case arising after the adoption of the 1848 Constitution and raising this question was *People v. Thurber*.⁴⁶ The defendant in the *Thurber* case was an Illinois agent for a foreign insurance corporation contesting the validity of an act of 1845, imposing a tax upon agents of foreign insurance companies, measured by premiums of insurance sold and assessed at a rate of three per cent⁴⁷ and since that act was enacted under the provisions of the Constitution of 1818, it was assumed by all parties that those provisions were controlling.

Without citing any precedent, the court, per Justice Caton, said simply, "It has never been doubted that the word, 'tax,' as here used, means the tax which is imposed upon a person on account of the property he has, . . ." and went on to say that exactions from businesses and callings exercising privileges had been made ever since the adoption of the Constitution of 1818 and that the court was not disposed to make any elaborate argument to justify their legality.⁴⁸

In substance, of course, the *Thurber* decision is identical with that in the *Sawyer* case. Each holds that the meaning of the word "tax" in Section 20 of Article VIII is used to mean "property tax," and therefore the requirement that taxes be levied *ad valorem* has no applicability to other types of exactions. In the *Sawyer* case, the court found no other convenient name for the road tax. Logically this represents no obstacle, and the court considered it none. If the constitutional requirement applies only to property taxes, it is enough that the exaction in question is *not* a property tax, and it does not matter that in ordinary usage it is called a tax. In the *Thurber* case, on the other hand, the court found another name for the exaction. It called it a license.

In 1863, the road tax came back to the courts. This time no challenge was made upon the constitutionality of commutable requirements of road labor, but the application to such exactions of the uniformity requirements of the 1848 Constitution was put to test. Road taxes were levied by the town and in 1861 the court had held that exemption of residents of incorporated communities from a town road millage was a violation of Section 5 of Article IX, requiring that local taxes must be uniform within the jurisdiction of the body imposing the same.⁴⁹ In *Town of Pleasant v. Kost*,⁵⁰ the application of this holding to commutable road labor requirements was urged upon the court. The Town of Pleasant, plaintiff in the case, sought to collect from the defendant the amount

⁴⁶ 13 Ill. 554 (1852).

⁴⁷ Ill. Rev. Stat. (1845) c. 64, §§ 22, 23.

⁴⁸ 13 Ill. 554, 655 (1852).

⁴⁹ O'Kane v. Treat, 25 Ill. 458 (1861).

⁵⁰ 29 Ill. 490 (1863).

of the prescribed penalty for failure to perform road labor. The defendant pleaded exemption under a provision of the charter of the town of Ipava, an incorporated community located within the town of Pleasant. The Ipava charter provision exempted the inhabitants of the incorporated town from performing labor on the roads more than one mile from the corporate limits.⁵¹ The court held that the uniformity requirement of Section 5 of Article IX did not apply to exactions of labor on the roads, such exaction not being taxes, but rather in the nature of assessments. In noting the difference between a tax and an assessment, the court said that the former is based alone upon the value of property designated by the law imposing it, while the latter is not based upon, nor has it any reference to property or values owned by the person of whom it is required.⁵² Left at that the case could be taken as holding that in the Constitution of 1848 as well as that of 1818, "tax" means "property tax." The opinion is muddled somewhat, however, by the additional statement, "Nor is an assessment a capitation tax, as that is a sum of money levied upon each poll."⁵³

In 1868 the East St. Louis Dram Shop Tax was challenged as violative of the constitution as a tax upon a subject not included in the second sentence of Section 2 of Article IX and levied upon a base other than *ad valorem*. The court by this time was attuned to the process of classifying out by finding non-tax tags and far enough from the *Thurber* case to forget under which constitution that case arose. In a short opinion, citing only the one authority, Justice Lawrence, for a unanimous court, said that the holding in the *Thurber* case that a license is not a tax in the constitutional sense should be "the sufficient answer to this proposition."⁵⁴ He then quoted the language of Section 2 of Article IX, observing that after the requirement of uniformity by valuation, the section continues, "in the disjunctive form."⁵⁵ The truth of the matter is that the holding in the *Thurber* case that licenses are not taxes in the constitutional sense was not by any stretch of the imagination a sufficient answer. The court in that case did not make this observation as a general proposition. It held simply that the word "tax" in the 1818 provision was used to mean "property tax," and therefore, for the purposes of *that* section of *that* constitution, a license is not a tax.

While the court was avoiding the issue of the extent of the nonproperty tax power in the cases where that issue seemed squarely raised, it produced added confusion by discussing the overall meaning of Article IX in cases in which the issue was not raised. In 1855, in *Illinois Central Railroad v. County of McLean*,⁵⁶ the county challenged the validity of a provision in the railroad's charter ex-

⁵¹ Ill. Rev. Stat. (1845), c. 25.

⁵² 29 Ill. 490, 494 (1863).

⁵³ *Ibid.*

⁵⁴ *City of East St. Louis v. Wehrung*, 46 Ill. 392 (1868).

⁵⁵ *Id.*, at 393.

⁵⁶ 17 Ill. 291 (1855).

empting it from property taxes in consideration of the payment to the state of a flat percentage of its gross receipts. The issue before the court was a very narrow one. The Illinois Central Railroad is obviously within the category of a corporation owning or using a privilege or franchise and therefore taxable without reference to the *ad valorem* principle. The county contended, however, that the first sentence of Section 2 of Article IX required uniformity of taxes on property and therefore the second sentence of Section 2 should be construed to permit additional taxes upon the named subjects but not taxes in lieu of property taxes. In an opinion written by Justice Scates, the court considered the meaning of Sections 2 and 6 of Article IX. These sections were designed, suggested Justice Scates, to achieve a tax system which would distribute the public burdens roughly according to property. He pointed out that the convention rejected an amendment which would have added lawyers and clerks of the commissioners' courts to the list of subjects in the second sentence of Section 2, and suggested that this indicated an intention to include in the exceptions to the *ad valorem* principle only callings which operate with little capital on hand. He gave as an illustration the merchant who may have but little in the way of stock in trade on tax day, but a large turnover during the year. The second sentence of Section 2 in exempting merchants from the requirement that taxes be laid *ad valorem* was designed to permit the General Assembly to devise some scheme like average inventory which would accomplish the *proportional* mandate of the constitution better than a slavish adherence to the *ad valorem* principle.

The court went on to say that in those cases in which subjects and objects of taxation were excluded from the *ad valorem* requirement, the legislature had the power to pursue any course which it deemed would result in a distribution of burdens closer to the constitutional requirement of *proportion* than could be achieved by *ad valorem* taxation. In such cases, he indicated, it is not the function of the court to consider whether or not in the opinion of the court the General Assembly's scheme does in fact operate to achieve a closer approximation of proportion.

Though the *County of McLean* case has been cited as authority for a restrictive view of the power of the General Assembly under Article IX of the Constitutions of 1848 and 1870, a close reading of the opinion suggests that it permits the General Assembly a completely unlimited choice of subjects and objects of taxation. On this topic the court says, "Nor does it prevent a discrimination of the subjects and objects of taxation, (*Sawyer v. City of Alton*, 3 Scam. R. 127; Article 9, Sec. 6, New Constitution,) but only requires the objects and subjects enumerated in the constitution, and those additional ones authorized to be selected when taxed, to be made to bear their just proportion with all of like kinds within the jurisdiction."⁵⁷ When this is coupled with the language em-

⁵⁷ 17 Ill. 291, 296 (1855).

ployed earlier in the opinion, "If the power is given to discriminate, as we think clearly is the intention, we have no right to scrutinize its policy, to determine whether a greater approach to, or degree of, equalization has been attained by the mode adopted, than would have resulted from the general rule applicable to the property of persons,"⁵⁸ it becomes apparent that the only mandatory requirement the opinion places upon the General Assembly is that of proportional rate.

Another such case was *People v. Worthington*.⁵⁹ In the *Worthington* case, the court held that notes taken in payment for real estate were taxable in the hands of the seller even though the real estate is taxed in the hands of the buyer. In making this point, the court said that the meaning of the constitution was that all property, or as near to all as practicable, should be taxed. It pointed out that the 1818 Constitution had mentioned only property, "in his or her possession," and that the 1847 convention deleted these words, indicating plainly that it contemplated the taxation of intangibles. The court added that if this were open to dispute it was placed beyond cavil by the sixth section of the 1848 Constitution. It felt that the principle of taxation there referred to, was undoubtedly, the *ad valorem* principle, except in the cases specified in the last part of section two of the ninth article, where the legislature was authorized to depart from the *ad valorem* principle.

Applied to the facts of the *Worthington* case, of course, this position is perfectly sound. If notes are considered as subjects or objects of taxation, they are certainly a form of property and taxable *ad valorem*. It will be remembered that the minority proposal at the 1847 convention included money loaned at interest and "all forms of personal property" in its list of subjects and objects of taxation. Though the language is somewhat loose and subject to restrictive construction, the case can be taken as going no further than to hold that Section 6 of Article IX removes all doubt from the proposition that the legislature may tax all forms of property.

THE CONSTITUTIONAL CONVENTION OF 1870

Like the constitutional convention of 1847, that of 1869 was called primarily for reasons unconnected with revenue.⁶⁰ Moreover, the latter year found the state in vastly improved financial condition,⁶¹ and it is natural that the dele-

⁵⁸ *Id.*, at 294.

⁵⁹ 21 Ill. 170 (1859).

⁶⁰ The matters responsible for the convention call were chiefly the crippling effect of the salary restrictions which the 1847 convention was called to design, the abuse by the General Assembly of the special legislation device, and matters connected with suffrage. Legislative Reference Bureau, *op. cit. supra* note 30, at 21. See Chicago Legal News, Nov. 6, 1869, p. 44; *Id.*, Dec. 18, 1869 (p. 92); *Id.*, Jan. 15, 1870, p. 124.

⁶¹ The difference is illustrated by the statement made in the convention by Mr. Atkins when he offered a resolution to abolish the two mill levy. After reviewing the circumstances under which the levy had been made and the purpose for which it was made, he continued:

"Whereas, it now appears by the report of the state treasurer, made to the Governor in De-

gates were much less concerned over taxes and the convention devoted a substantial proportion of the time allotted to revenue matters to the discussion of problems distinctly peripheral to the question of the General Assembly's power to tax.⁶²

When the body of the proposed new revenue article was brought before the convention, it was introduced by the chairman of the Committee on Revenue with the observation that the committee felt that it could make no improvement upon the fundamental provision of the 1848 Constitution, that dealing with the mode of assessing and collecting revenues.⁶³ This statement by Mr. Hay has been cited as evidence of the intention of the delegates to the 1869-70 convention to limit the General Assembly to the property tax, save alone those exceptions made to the *ad valorem* rule in the second sentence of Section 1.⁶⁴ Actually the statement adds very little to the understanding of the section, other than to indicate that the 1870 convention accepted the 1848 provision without serious objection. There is in the debates, however, a fairly protracted discussion of the second sentence of Section 1. Because of its importance, this discussion is reproduced in full.

MR. WAIT: Mr. Chairman: I offer the following amendment:

Strike out of the sixth and seventh lines the words "brokers, merchants, commission merchants and inn-keepers."

It seems that by this section there are certain trades or businesses made subject to special taxation. For instance, that of a broker. Is there any reason that he should be subject to a tax because he is a broker? His business is a legitimate one. Why not include bankers? Is this introduced for the purpose of letting bankers have the entire control of that class of business?

Merchants, also, are made liable to special taxation. Why should a merchant be taxed because he is a merchant? Is his business not as necessary to society and the prosperity of the country as any other class of business? On account of taxing the merchant for the privilege of being a merchant, the goods he sells must be sold at a higher price, so that the man who buys has to pay the tax.

Why not make farmers as well as merchants liable to a special tax, because they assume farming as their business? No man for a moment would claim the right to tax

cember, A.D. 1869, that the entire debt of the State, on the first day of December, A.D. 1869, amounted to only the sum of five millions one hundred and twenty-four thousand, nine hundred and ninety-five dollars and sixty-four cents. . . ." 1 Debates of the Constitutional Convention of the State of Illinois 1869-70, 175.

He went on to say that with the two mill tax and the income from the seven per cent payment by the Illinois Central Railroad, that by January, 1871, the debt would be reduced to less than two million dollars.

⁶² Among the resolutions offered at the convention was one calling for a limitation on tax rates. 1 Debates 1870, 77. Another called for a \$200 exemption, *id.*, at 192; a third for a provision to abolish all forms of special assessments and assessments for benefits, *id.*, at 127. Beyond this there were lengthy discussions on the purpose of listing certain subjects and objects of taxation in the second sentence of Section 1.

⁶³ 2 Debates, 1870, 1197.

⁶⁴ See *Bachrach v. Nelson*, 349 Ill. 579, 588 (1932).

a farmer as a farmer. If a merchant's business is useful to society, why do you select it out, and tax a man for the right to carry on that kind of business?

And I find, also, included in this report, "inn keepers and grocery keepers." I do not know that I understand fully what is meant by grocery-keeper, as here used; but if it means a man who deals in groceries, West India goods,—those things are among the necessities of life, and I can see no reason for such discrimination. Why should we select these things for a special taxation, and thus array a great influence in this State against the adoption of this Constitution? May I not say justly, that the merchants, brokers, and inn keepers of this State are a great power? Let them all combine against this Constitution for the reason that their business has been made liable to a special tax, and will not they have a great influence in defeating the Constitution, and should it not be expected for such an unjust discrimination?

I would like to hear a reason for taxing them for the privilege of carrying on such a business. Why not tax lawyers because they are lawyers? Are they more useful than merchants? Why not doctors? Why not tax ministers because they are ministers? Does not the same reason apply? I cannot see why the parties selected for taxation should be so taxed, because they assume that kind of business for a livelihood.

Section three provides—

Sec. 3. The specification of the objects and subjects of taxation shall not deprive the General Assembly of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this Constitution—

Which covers the case, without going into invidious distinctions.

MR. DEMENT: Mr. Chairman: I suppose the committee took a very proper and practical view of the circumstances that occur in our cities and communities, when they incorporated these words granting the power to the Legislature to tax these particular occupations. I suppose it was something like this, that peddlers, hawkers, auctioneers and that class of merchants come into counties with their goods, after the assessment, and sell them in competition with our regular local permanent merchants. I do not regard the authority given to the Legislature to tax this class of business men, as invidious at all towards them. The peddler may come into our towns and cities with his goods that he has obtained in some city at auction, or perhaps, after there has been a large fire among the dry goods houses, set up his stand or rent some cheap room in the town and drive out of the trade, for the time being, the regular merchants, by selling his cheaply obtained goods at a rate below regular and moderate prices, and if permitted to do that at all, these persons should be taxed for this special privilege they sometimes enjoy.

I do hope that this committee may not be so invidious to our permanent business men as to strike these words out of the section.

MR. CODY: Mr. Chairman: I understand the object of this section to be, to provide that those kinds of property which are not local or permanent, so that they may be readily reached for taxation, may pay their just proportion of the revenue; and also, that certain classes of business which it has always been deemed proper to tax, by licenses, should be made to contribute to the public expenses. Its language indicates this to be its object: [here setting out the section].

"Now if this is the object, it seems to me merchants should be left out of this list. . . ."

[Here the amendment was read again.]

MR. DEMENT: Mr. Chairman: The law the gentleman speaks of might be changed, as it has no constitutional approbation. It should be so fixed in the fundamental law as not to be subject to repeal, as it might be, if the Convention, by striking this out, should indicate that such a law is unnecessary.

MR. CODY: Mr. Chairman: The Constitution should be but a limitation on the Legislature. In this clause we are making an exception in relation to particular species of property, and special kinds of business, permitting them to be taxed differently from other property, which is to be taxed uniformly.

The object of this provision is to enable the Legislature to make a special rule in reference to these particular objects and subjects of taxation. Therefore, I am opposed to including in the list people engaged in mercantile business. They pay a tax on their property as regularly as any others in the State. They are assessed for the full value of their property, and there should be no discrimination against them, as in the case of auctioneers and peddlers and other classes, which, for various reasons, might escape taxation, unless compelled to pay a special tax or license.

MR. GOODELL: Mr. Chairman: This is the provision we have had in the old Constitution. I believe the merchants have never complained under its operation.

MR. CODY: May I ask if that provision, as far as merchants are concerned, has not been a dead letter, and if any law has ever been passed under it as to merchants?

MR. GOODELL: I think there has. I will explain. Under this provision that all property shall be taxed in proportion to its valuation, a merchant, in the spring season when the assessors levy the tax, has a stock that has usually run down to half of what its average is throughout the year. That is why merchants were included in this list, that the Legislature may pass a law like this; that the merchant shall give in the average value of his stock, making his taxation like that of other people. Without this provision, his stock would be assessed when reduced to one-half or one third of its average amount.

That was the object of including merchants, and to reach transient men who come into a place and stay for a short time and interfere with the legitimate trade of the place. I think there has been no complaint under the old Constitution, and it is well to include all these occupations here.

MR. CODY: Mr. Chairman: I think the word 'merchants' should be stricken out. I wish to add a word upon what was said by the gentleman from Lee [Mr. Dement].

So far as these transient dealers are concerned, under the law as it stands at present, they are taxed, and there is no necessity of any constitutional provision on that subject. It is the duty of the county clerk to fix a valuation upon such property, and the owners are to be taxed for the number of months in the year in which they are in business in the locality; the only difference between them and other dealers being that they may be so assessed at other times in the year than when the general assessment is made.⁶⁵

It appears from the foregoing discussion that the members of the convention had vague and differing notions of the purpose of listing certain subjects and objects of taxation in the second sentence of Section 1. Mr. Wait's remarks are of special interest. He opposed the inclusion of this list of subjects and objects

⁶⁵ 2 Debates, 1870, 1262-1263.

on the grounds that the callings listed were being singled out for special taxation. Why not lawyers, he asked, or doctors? It cannot be inferred from this statement, however, that he thought that the inclusion of grocers and inn-keepers put it beyond the power of the General Assembly to tax lawyers or doctors, because Mr. Wait concluded with the observation that the third section of the revenue committee's proposal (identical with Section 6 of Article IX of the Constitution of 1848, and adopted without change as Section 2 of the present Article IX) covered the case of the categories specifically mentioned without making invidious distinctions.

There were two answers made to Mr. Wait's objection. The first apparently came from the *McClellan County* opinion. The purpose of the section, as applied to the categories specifically exempted from the *ad valorem* principle was to enable the localities to reach property easily shifted or obscured, as for instance the property of auctioneers, peddlers and hawkers, which compete with local businesses with fixed places of business and escape taxation because their goods are brought into the city and sold, leaving them without property on tax day. Merchants, under this interpretation of the section, were included to permit the continuation of the then current practice of taxing merchants on the basis of their average inventories.⁶⁶

The other was that the provision had been in the old Constitution and no one had complained about it so it was as well to leave it in the new. It is interesting to note that nowhere is it mentioned that the court had held without exception that licenses upon businesses were not taxes within the meaning of the 1848 Constitution and therefore were within the authority of the General Assembly whether or not mentioned in Article IX. Nor is there any real discussion of the impact of the sixth section of the old Article IX. There was no effort to challenge the statement that this provision would cover the enumerated classes of tax subjects in the second sentence of Section 2. There was no discussion whatever of the power of the legislature to tax subjects and objects not mentioned, nor of the methods which the constitution would require in such a case.

In summation, the constitutional convention of 1869-70 accepted the 1848 provisions with regard to the power of the General Assembly to lay and collect taxes without much question, and without much in the way of uniform understanding of the language, leaving the courts' effort to work out the meaning a continuous process since 1848. The convention added nothing to change and almost nothing to clarify.

THE COURT AND THE "NEW" CONSTITUTION

The revenue article of the new constitution was soon before the Supreme Court and since the wording of Section 1 of the new made only one change of substance in Section 2 of the old, it is not surprising that this should play an im-

⁶⁶ *Ibid.*

portant role in the arguments of the litigants. The one change was the addition of the words, “. . . by general law, uniform as to the class upon which it operates.”⁶⁷ If the legislative power to tax were to be construed as extending only to property and to those objects and subjects set out in the second sentence of Section 1, and this section provided that where these nonproperty subjects and objects are selected for taxation, they must be taxed by general law, then, it was argued, local taxes upon these occupations were void as being imposed by other than general law.

The first of these cases was *Wiggins v. City of Chicago*⁶⁸ in 1873. Here the court was asked to declare unconstitutional a municipal license tax on auctioneers. In dealing with the question of whether the subjects or objects listed in Section 1 could be taxed by municipalities under the provisions of Section 9, the court characterized the exaction as a “personal tax, imposed upon the persons exercising the calling, and has no reference whatever to his property.”⁶⁹ It then pointed out that Section 9 provides for uniformity “as to persons and property,” and reasons that the convention must have contemplated that the municipalities would be permitted to levy personal taxes as well as property taxes because property taxes cannot be uniform as to persons.⁷⁰ It called attention to the enumeration of subjects and objects in Section 1 and the absence of any enumeration in Section 9, observing that the latter section, “is broader than . . . the first [section, embracing] all persons within the corporate limits.”⁷¹

This aspect of the *Wiggins* case seems to have been ignored by the court in the cases decided in the next decade. The cases immediately following return to the reasoning of the *Wehrung* and *Ducat*⁷² cases, i.e., that licenses are not taxes in the constitutional sense, and therefore are not governed by the principles of taxation. Although this rationale of the constitutionality of local license taxes, or licenses for revenue, persisted over a great many years and appeared in a great many cases, it began to weaken and the court began to mention alternative tax grounds for upholding licenses for revenue when litigants, losing on their arguments under the tax provisions of the constitution, began to pitch their cases upon the application of the Due Process Clause to regulation and licensing. The first hint of this came in *Wiggins Ferry Co. v. City of East St. Louis*,⁷³ testing the constitutionality of a municipal license fee, so called, levied upon keepers of ferry boats and measured by the number of boats. Though the court upheld the exaction and rested its decision upon the *Thurber* and *Wehrung* cases, it also said it is the state law which confers the power of a cor-

⁶⁷ Added to § 1, formerly Ill. Const. (1870) § 2. See p. 64 supra.

⁶⁸ 68 Ill. 372 (1873).

⁶⁹ Id., at 379.

⁷⁰ Ibid.

⁷¹ Id., at 379-80.

⁷² *Ducat v. City of Chicago*, 48 Ill. 172 (1868).

⁷³ 102 Ill. 560 (1882).

poration to engage in business,⁷⁴ indicating that the power to license stems from the fact that the person licensed is exercising a privilege or franchise. Justice Dickey dissented in an opinion which marks the beginning of the doubts with regard to the usefulness of the rationale in the *Wehrung* case. He pointed out that if this exaction is conceived of as a fee for the exercise of a privilege, it should be voided since the operator of the ferry pursued his business under an irrevocable grant of authority from the General Assembly, which grant was paid for by his predecessors in interest. To charge him a license fee for the privilege of exercising his grant was not to tax a privilege which the state or city could withdraw, but to charge him for the exercise of what had become a right.⁷⁵

In 1884, the court had before it four cases challenging the constitutionality of local licenses for revenue, all arising in the city of Chicago. In *Howland v. City of Chicago*,⁷⁶ the appellant was convicted of operating carriages for hire within the city without a license as required by the city code. In *Timm v. Harrison*,⁷⁷ the appellant challenged the Chicago dram shop license ordinance which set the annual license fee for dispensers of malt liquors at \$150, and the fee for dispensers of other liquors (presumably spirits) at \$500. In *Braun v. City of Chicago*,⁷⁸ the court considered the Chicago ordinance charging brokers, including real estate agents, an annual license fee. In the fourth case, *United States Distilling Co. v. City of Chicago*,⁷⁹ the license in question was exacted from distillers. In two of these cases, it should be noted that the court was dealing with businesses traditionally subject to special police regulation (dram shops and distilleries). In a third, the business subjected to licensing, normally not considered a business subject to special regulation, as one specifically mentioned in the second sentence in Section 1 of Article IX. The fourth case involved operation of carriages for hire, a business not within the sphere of special police regulation and, unless to conduct such a business can be called the exercise of a franchise or privilege, not within the Section 1 enumeration.

In the *United States Distilling Co.* case the court relied flatly upon the proposition that the exaction was in the nature of a license, indicating that where there is a power to charge a license fee the court will not look into the amount, that being within the discretion of the General Assembly.⁸⁰ In the *Timm* case, the appellant contended that since the constitution requires that all taxes for corporate purposes must be uniform as to persons and property, the distinction between dispensers of malt liquors and dispensers of other liquors voided the ordinance. The court, after noting that this distinction would not in its opinion invalidate a tax, said that in any case the exaction being litigated was not a tax

⁷⁴ *Id.*, at 569.

⁷⁵ *Id.*, at 575.

⁷⁶ 108 Ill. 496 (1884).

⁷⁷ 109 Ill. 593 (1884).

⁷⁸ 110 Ill. 186 (1884).

⁷⁹ 112 Ill. 19 (1884).

⁸⁰ *Id.*, at 77.

but a license and therefore even if it would be invalid tested by the tax provisions of the constitution, it was not necessary to test it by those provisions.⁸¹

In the *Howland* case the court, per Justice Dickey, held that the exaction could be upheld under the first section of Article IX. With a surprising lack of understanding of the meaning given by the courts to the 1818 provision, Justice Dickey set out Section 20 of Article VIII of that instrument and proceeded to state that the Constitution of 1848 had removed "this restriction," by permitting the levy of special taxes on the categories listed in Section 2 of Article IX of the 1848 Constitution. Under Section 1 of the 1870 Constitution the court upheld the tax on keepers of carriages, "although that business is not enumerated as one of the objects or subjects of taxation without valuation."⁸² The court did not explain its holding that the enumeration in Section 1 of Article IX is not exclusive, but rather proceeded to say that in any event since the holding in the *Wiggins Ferry* case, the exaction could be fully vindicated under the power to license. Justice Dickey added that the *Wiggins Ferry* case had surprised him somewhat since he had always supposed a license fee exacted for mere purpose of revenue, where the exacter had no power to prohibit the activity for which the fee was charged, was a tax within the meaning of the constitution.⁸³

The *Braun* case, the fourth of the Chicago license tax cases before the court in 1884, was apparently argued with an eye upon the doubts expressed by Justice Dickey in the *Howland* case. Counsel for the appellants contended that a license tax upon a real estate agent could not be sustained as a license because the real estate business is one which could not be prohibited by the legislature. On this point he ignored the language in the previous cases, and pointed out that in no recorded Illinois case had the court sustained a license on a business which in fact could not be prohibited. Justice Walker, for the court, without deciding whether the exaction was a tax or not, proceeded to answer the contention that it is prohibited by Section 1 of Article IX. He did not quote from the *Wiggins* case, or so much as cite it, but picked up the argument that the city's authority derives from Section 9 of Article IX, and not from Section 1. The only inhibition placed upon the General Assembly in delegating to municipalities the power to lay and collect taxes is (1) it must be by general law, and (2) that taxes levied under Section 9 must be uniform as to persons and property. After making this point, Justice Walker called attention to the *Wiggins Ferry* case and *Howland* case, and pointed out that in the former the taxpayer enjoyed a non-revocable franchise and that in the latter the business was one of common right and could not have been prohibited, scotching counsel's contention that all previous cases had dealt with businesses subject to prohibition by the legislature.

⁸¹ *Timm v. Harrison*, 109 Ill. 593, 601 (1884).

⁸² *Howland v. City of Chicago*, 108 Ill. 496, 500 (1884).

⁸³ *Id.*, at 501.

Justice Dickey's doubts had been sown, however, and the tax-license distinction was repeatedly brought to the attention of the court. In *Kinsley v. City of Chicago*,⁸⁴ counsel finally went to the heart of the matter. He contended that if an exaction is justified as a license fee, as distinguished from a tax, the amount of the fee would have to be reasonably connected with the cost of regulation. Conceding that the legislature may regulate that which it may not prohibit, and conceding further that where the legislature may regulate, it may require a license and charge a license fee commensurate with the cost of maintaining the regulatory scheme, counsel argued that where the amount charged is in excess of the reasonable recoupment of the cost of regulation, or where the charge is framed as a revenue measure, then the exaction must be constitutionally justifiable as a tax if at all.⁸⁵ The court conceded the authorities but added that Illinois courts had been more liberal in their rule of construction regarding license fees, and that licenses in quite large amounts and obviously levied at least in part for revenue had been upheld.

In *City of Carrollton v. Bazzette*,⁸⁶ the court reviewed an ordinance requiring itinerant merchants to take out a license and pay a license fee set at \$10 per day for merchants and auctioneers and \$2 per day for foot peddlers, soliciting agents, and cases not specifically provided for. The court, per Justice Carter, reviewed the cases on license exactions, repeated the language of the *Kinsley* case, and reiterated the "Illinois rule of liberal construction."⁸⁷ It noted that in many of the cases cited there had been discussion of whether or not the exaction questioned was a tax but found that the court had not departed from the doctrine of the earlier cases holding that licenses are not taxes and therefore not assailable as violating the requirements of general law and uniformity within the class of Section 1 of Article IX, or the requirement of uniformity as to persons and property under Section 9. Even so, said Justice Carter, there are limitations on the power to license. These limitations come from the provision in the Constitution that no person shall be deprived of life, liberty or property without due process of law.⁸⁸ Under the due process clause, the legislature may not suppress or prohibit a lawful business under guise of regulation. He went on to invalidate the license requirement because the amount of the tax, over \$3,000 per year on itinerant merchants, made the exaction a prohibition rather than a regulatory or revenue measure.

THE BANTA CASE—A JUDICIAL INADVERTENCE

Thus, though Justice Dickey's doubts had not at this point brought about a reversal of the court's position that licenses are not taxes even when they are assessed and collected plainly for revenue purposes, they had been pushing

⁸⁴ 124 Ill. 359 (1888).

⁸⁵ *Id.*, at 362.

⁸⁶ 159 Ill. 284 (1896).

⁸⁷ *Id.*, at 298.

⁸⁸ *Ibid.*

the court into a position logically ever more difficult to support, forcing it to concede that this position was against the weight of authority, and to struggle with the development of some limits upon the power to license for revenue released from the strictures of Article IX of the Constitution.

It has been pointed out earlier that the *Thurber* case, decided as it was, under the 1818 Constitution, did not apply to the Constitution of 1848 unless the court was willing to say that Section 2 of Article IX of the latter, like Section 20 of Article VIII of the former, was designed to apply only to property taxes. It is even more difficult to apply the *Thurber* case to the Constitution of 1870 without conceding that Section 1 of Article IX does not purport to limit the legislature in its choice of subjects and objects, for the 1870 Constitution does not use the language "shall provide for levying a tax,"⁸⁹ but says, instead, "shall provide such revenue as shall be needful by levying a tax."⁹⁰ If this provision is taken to limit the General Assembly to that source of revenue, subject to the exceptions set forth in the second sentence, it is not enough to say that a particular exaction is not a tax to take it from under Section 1; it is necessary to say that it is not revenue. Logically, then, the repeated holdings that licenses for revenue are not prohibited by Section 1 of Article IX of the 1870 Constitution carry with them the implication that this section is not a limitation upon the ability of the General Assembly to select tax subjects and objects other than property.

In *Banta v. City of Chicago*,⁹¹ Justice Boggs, a newcomer to the court, took a fresh look at the provisions of Article IX. Whether he was sensitive to the illogical position into which the court had been led since the *Thurber* decision, or simply ignorant of the judicial history of the provision, is difficult to say. He cited *Cooley on Taxation* for the proposition that absent constitutional restriction the state possesses as a sovereign the power to license for regulation and for revenue.⁹² He then proceeded to say that the Illinois Constitution limits the General Assembly in this regard by permitting such license taxes only where they are assessed against those businesses and callings set out in the second sentence of Section 1 of Article IX. Since the particular occupation licensed in the *Banta* case was a broker, and included in the enumeration in Section 1, he held that the exaction was within the power of the legislature and the city.⁹³ There are other strange aspects to the *Banta* opinion. In meeting the argument that the exaction is prohibited by Section 9 of Article IX, in that it is not uniform as to persons and property, Justice Boggs held that that provision applied only to property taxes and said that this was settled in *Walker v. City of Springfield*.⁹⁴ This is surprising in two respects. In the first place, though he cites the *Braun* case in support of the authority to license in cases within the enumera-

⁸⁹ Ill. Const. Art. IX, § 2 (1848).

⁹² Id., at 218.

⁹⁰ Ill. Const. Art. IX, § 1 (1870).

⁹³ Id., at 220.

⁹¹ 172 Ill. 204 (1898).

⁹⁴ 94 Ill. 364 (1880).

tion in Section 1, he ignored altogether the fact that in that case the court had held that the city's power was derived wholly from Section 9 of Article IX, and that Section 1 of that article related only to taxes for state purposes. He also over-looked the statement in the *Wiggins* case⁹⁵ that the power under Section 9 was broader than the power under Section 1. In the second place, even a hurried reading of the *Walker* case shows that it cannot be taken to stand for the proposition for which it is cited. Nowhere in that case is Section 9 mentioned. It deals wholly with Section 1, holding that that section relates to taxes and not to licenses.

Three years later, the inevitable happened. The *Banta* case came back to haunt the court in a case in which the particular occupation licensed was *not* among those listed in Section 1. In this case, *Price v. People*,⁹⁶ the court had the kindness, or the sense of humor, to assign the opinion to Justice Boggs. In upholding the exaction, a license tax levied upon employment agencies, he said that expressions that the rule, *expressio unius est exclusio alterius* applied to Section 1 of Article IX "were made inadvertently." This time he offered another interpretation which would salvage as much of the *Banta* opinion as possible. He started with the statement that the state, as a sovereign, has the power to license. This power is the police power. It is essentially the power to "enact laws for the exercise of such restraint and control over the citizen and his occupation as may be necessary to promote the health, safety, and welfare of society." He added that what occupations were subject to the police power are a matter for the court to determine.⁹⁷

Thus Justice Boggs made the test of whether the General Assembly may license occupations other than those listed in Section 1 one of determining whether or not such occupations in their nature will support regulation under the police power. Without advertence to the *City of Carrollton* case which placed the threshold of judicial interference at the point of prohibition under the guise of regulation, Justice Boggs stated for the court, "What amount the applicant for a license fee shall be required to pay . . . is plainly committed to the General Assembly for determination, and the action of that department of the State government is conclusive, except, beyond serious doubt, it is manifest the amount of the fee has been in any particular instance established, not with regard to the purpose of regulation of the occupation with the view of protecting the public welfare, but with the real purpose to raise revenue under the guise of the police power, or to subvert the proper exercise of that power to the prohibition, by means of oppressive license fees, of the right of the citizen to exercise a lawful calling, in violation of the constitutional guaranties against the destruction of the liberty and property right of a citizen."⁹⁸ In making the

⁹⁵ See *Wiggins v. City of Chicago*, 68 Ill. 372 (1873).

⁹⁶ 193 Ill. 114, 61 N.E. 844 (1901).

⁹⁷ *Id.*, at 117-118, 846.

⁹⁸ *Id.*, at 120, 846.

power to license equal to the power to regulate, and the permissible size of license fees to the cost of regulation the court finally yielded completely to the doubts of Justice Dickey in the *Howland* case, and returned to a more conventional view of the power to license. In doing so, however, it confused even further the meaning of the tax provisions in the 1870 Constitution. Under the language of the *Price* case, the General Assembly may *tax* only property and such other subjects and objects as are listed in Section 1 of Article IX, but is free to license other occupations so long as the fees charged are reasonably commensurate with the cost of regulation. Thus Justice Boggs, while backing off from his statement that the inclusion of certain occupations in Section 1 had the effect of prohibiting the licensing of others, backed off but little. The two cases stand as the most restrictive decisions rendered under Section 1 of Article IX. They represent a natural reaction against the logically indefensible position into which the court had worked itself since its erroneous interpretations of the *Thurber* case in *City of East St. Louis v. Wehrung*.

COMPLETION OF THE CYCLE—A RETURN TO SAWYER V. ALTON

The decision in the *Price* case, on its face a rejection of the "Illinois rule of liberal construction" enunciated in the *Kinsley* case, invited the resurrection of the argument made by counsel in the latter. It was made in its most naked form in *Harder's Fire Proof Storage Co. v. City of Chicago*.⁹⁹ In the *Harder* case the appellant challenged a Chicago ordinance imposing a license fee upon all vehicles carrying loads in the streets. Counsel contended that the exaction could not be sustained as a regulatory fee because appellant had been assessed and had paid a fee for a license to operate as a carter. He contended further that the exaction could not be justified as a charge for the exercise of a franchise or privilege because the use of the streets is a common right and not a privilege for which the city may charge, and therefore the tax must fall as a tax levied other than *ad valorem*.

There were a number of ways in which the court could have approached the problem in the *Harder* case. It could have said that the use of the streets is a privilege. For this holding there was authority.¹⁰⁰ It could have returned to the reasoning of the *Wiggins* and *Braun* cases and held that the city's authority was derived from Section 9 of Article IX and not from Section 1 and therefore the limitations of Section 1 did not apply. It could have said that even though use of the streets may not be a privilege, it is an activity subject to regulation under the police power and therefore may be licensed and taxed, so long as the charge is commensurate with the cost of regulation. The court took none of these ways out. It took the case on high ground. Per Justice Hand, it held that if use of the streets were to be considered a privilege, it was taxable under the second sen-

⁹⁹ 235 Ill. 58, 85 N.E. 245 (1908).

¹⁰⁰ See *Gartside v. City of East St. Louis*, 43 Ill. 47 (1867).

tence of Section 1, and if not a privilege, it was taxable in any event because Section 2 makes it plain that the enumeration in Section 1 is not exclusive of other subjects and objects of taxation. On this point the court was perfectly clear. It said, "It will be observed that section 1 of article 9 of the Constitution expressly authorizes the taxation of 'persons or corporations owning or using franchises and privileges,' and section 2 provides that the General Assembly is not deprived of power to tax other objects or subjects of taxation than those enumerated in section 1."¹⁰¹

So after sixty-seven years, the doctrine of *Sawyer v. Allon* returned, i.e., that only where there is a direct prohibition of a given kind of tax will the power to tax be inhibited. It is interesting to note that in 1875, Nebraska adopted a new constitution and copied almost verbatim the revenue provision in the Illinois Constitution of 1870.¹⁰² In the following year the provision came before the Nebraska Supreme Court in the case of *State ex rel A. & N. R. R. v. Lancaster County*.¹⁰³ Involved was the legality of the state's tax on the commencement of law suits in the courts of the state. Unless it could be argued that the right to bring law suits is a privilege within the meaning of Section 1 of Article IX,¹⁰⁴ the subject of the tax was clearly not one of the enumerated subjects. The Nebraska Court, per Gantt, J., took less than four pages to reject the argument that the Nebraska Constitution inhibited the legislative power to levy taxes other than *ad valorem* taxes. Citing *Sawyer v. City of Allon*, it said that the interpretation of the section in this way was tantamount to applying to the constitutional provision the canon of construction *expressio unius*, and that on both principle and authority this should not be done.¹⁰⁵

A REVOLUTION IN STATE REVENUE—EXPANSION OF THE PRIVILEGE CATEGORY

It may seem surprising that such a major proportion of the cases which played a role in the interpretation of the Illinois constitutional article on revenue until after the First World War were cases involving local exactions. This is not surprising, however, when it is recognized that prior to that time the state was not organized for the provision of the many services it now performs for its citizens. As late as 1908, the year during which the court completed its sixty-seven year cycle of interpretation, the state's total general revenue fund,

¹⁰¹ *Harder's Fire Proof Storage Co. v. City of Chicago*, 235 Ill. 58, 73, 85 N.E. 245, 249 (1908).

¹⁰² The only difference was the substitution of the word "and" for the word "but" at the end of the first sentence of Section 1. This might be deemed to remove the implications of limitation to the categories named and apparently the Nebraska convention thought so for they left out Section 2 altogether. This difference is not discussed by the court.

¹⁰³ 4 Neb. 537 (1876).

¹⁰⁴ Neb. Comp. Stat. (1873) c. 22, § 26.

¹⁰⁵ *State ex rel A. & N.R.R. v. Lancaster County*, 4 Neb. 537, 540 (1876).

which included property taxes, insurance fees and taxes, secretary of state fees, grants-in-aid from the United States, payments under Section 22 of the Illinois Central charter,¹⁰⁶ inheritance taxes, and departmental receipts, was only roughly fourteen and a half million dollars for the biennium, or something over seven million dollars per year.¹⁰⁷ The state's first venture into nonproperty taxation was in 1835. In that year the act chartering the State Bank provided that the bank should pay one-half of one per cent of the amount of capital stock actually paid in by individuals, in lieu of all taxes.¹⁰⁸ In 1841, the state enacted a \$200 flat fee assessed against agents of foreign insurance companies.¹⁰⁹ Two years later the \$200 fee was repealed and 3% of gross receipts substituted.¹¹⁰ In the same decade, licenses were imposed upon hawkers and peddlers,¹¹¹ and upon stock brokers.¹¹² In 1865, there was license imposed upon the business of obtaining substitutes for army service.¹¹³ The State Bank was liquidated in 1843, so the bank tax was collected only under the 1818 Constitution. By 1848, the peddlers and brokers taxes yielded almost nothing,¹¹⁴ and since insurance taxes were in terms permitted by the Constitution of 1848,¹¹⁵ it was almost fifty years before the question of the state's power to levy and collect nonproperty taxes was tested in a case involving a state tax. This occurred in *Kochersperger v. Drake*,¹¹⁶ testing the validity of the Illinois Inheritance Tax.¹¹⁷ The inheritance tax was challenged on the grounds that it was a tax on property and therefore must be levied *ad valorem*, whereas in fact it was levied on a progressive rate scale. The court upheld the tax on the grounds that leaving property by will is a privilege conferred by statute. Where the state creates a privilege by statute, said the court, it may attach to the exercise of the privilege any conditions it sees fit. The progressive rate was upheld on the grounds that the statute created not one privilege, but several, and charged for each a different amount. Later, when the statute was challenged as extending to gifts in contemplation of death and therefore not confined to privileges which could be withheld at pleasure, the court again upheld the tax, this time noting earlier decisions to the effect that a

¹⁰⁶ See Labovitz, *The Illinois Revenue System, 1818-1936*, 13 (1936).

¹⁰⁷ Fairlie, *A Report on the Taxation & Revenue System of Illinois* 244 (1910).

¹⁰⁸ *Id.*, at 107.

¹⁰⁹ Ill. L. (1841) 180.

¹¹⁰ Ill. L. (1843) 165.

¹¹¹ Fairlie, *op. cit.* supra note 107, at 107.

¹¹² *Ibid.*

¹¹³ Ill. Public Laws (1865) 63.

¹¹⁴ Brokers a total of \$100, peddlers, \$1,787.50. By 1870, the peddlers' license tax yielded a total of \$50. See Fairlie, *op. cit.* supra note 107, at 106, 243.

¹¹⁵ Ill. Const. Art. IX, § 2 (1848).

¹¹⁶ 167 Ill. 122, 47 N.E. 321 (1897).

¹¹⁷ Ill. L. (1895) 301.

privilege need not be an activity which the legislature can prohibit altogether and need not be created by statute.¹¹⁸

The next venture into nonproperty taxes was in the field of motor vehicle licenses and motor fuel taxes. The state had licensed the use of motor vehicles since 1907, when a registration fee of \$2, payable only once, replaced the special automobile taxes which local authorities had attempted to collect from motor vehicle owners. In 1909, this fee was made annual, and in 1911, it was replaced by a graduated registration tax. With the inauguration of the state aid program in 1913, registration fees became a relatively large item of revenue.¹¹⁹ In 1928, the first motor fuel tax act was enacted.¹²⁰ It was framed as an occupation tax, levied upon distributors of motor fuel. The fate of this act is of particular interest because it offers the first illustration of a pattern of legislation followed in Illinois ever since. Since the object of the act was to levy a tax for the construction and maintenance of highways, the General Assembly sought to exempt from its provisions users of motor fuel who did not use the highways. This was accomplished by providing that such users could file for a return of the tax. The assumption which underlay this scheme was that distributors of motor fuel would pass the tax on in the form of a higher price.

In declaring the act unconstitutional, the court said that the tax was levied upon motor fuel distributors and not upon the consumer, so that to permit refunds to purchasers was to illegally appropriate funds from the public treasury for the benefit of private persons.¹²¹ The General Assembly re-enacted the motor fuel tax the following year, this time making the use of the highways the base of the tax and purchases of motor fuel the measure. Under the refurbished statute the distributor no longer paid the tax, but collected it from the consumer and paid it over to the state.¹²² This act was upheld in *People v. Deep Rock Oil Corp.*¹²³ The court ignored the problem of definition of a privilege which had troubled its predecessors in the *Harder's Storage* case. It cited a number of cases from other jurisdictions to the effect that the tax in question was in the nature of an excise or tax upon a privilege, and not a tax upon property, indicating that it considered that matter well settled.¹²⁴

It was with the great depression that the state completely broke with the general property tax system. In 1932, as an emergency relief measure, the General Assembly enacted an act providing for a net income tax. The tax was levied upon net incomes of all residents of the state, and upon incomes earned in

¹¹⁸ In re Estate of Benton, 234 Ill. 366, 84 N.E. 1026 (1908).

¹¹⁹ See Labovitz, op. cit. supra note 106 at 24.

¹²⁰ Ill. L. (1927) 758.

¹²¹ Chicago Motor Club v. Kinney, 329 Ill. 120, 160 N.E. 163 (1928).

¹²² Ill. L. (1929) 625.

¹²³ 343 Ill. 388, 175 N.E. 572 (1931).

¹²⁴ Id., at 393, 575.

Illinois by nonresidents. After exemptions provided in the act, the rate was 1% on the first \$1,000, 2% on the next \$3,000, 3% on the next \$5,000, 4% on the next \$7,000, 5% on the next \$9,000, and 6% on net income above \$25,000.¹²⁵

THE BACHRACH CASE AND PROPERTY, OCCUPATIONS, AND PRIVILEGES

The income tax was brought into question in the case of *Bachrach v. Nelson*.¹²⁶ The state defended the tax as an excise and not a property tax, and as such within the power of the General Assembly. It was attacked on the grounds that: (1) it was a tax on property and not levied *ad valorem*, (2) if not a property tax, it was a tax not permitted the General Assembly under Section 2 of Article IX, and (3) provisions relative to nonresidents was violative of the 14th Amendment to the United States Constitution.

The court considered first the question of authority to levy taxes which are not taxes upon property. In what has since been referred to as a "scholarly historical review,"¹²⁷ Justice Orr set about to determine from its historical context the meaning of Article IX of the 1870 Constitution. He began by saying that for over a century the state had been "definitely committed to a policy of raising its needed revenue by a general property tax, with the burden apportioned according to valuation." In support of this assertion, he quoted Section 20 of Article VIII of the Constitution of 1818, without making mention of the fact that this section was held by an unanimous court to apply only to property taxes and to constitute no limitation whatever upon the power of the General Assembly to levy other and different taxes. He then proceeded to chronicle the exactions actually relied upon by the Illinois General Assembly during the early period of the state's history, showing that during the period prior to adoption of the Constitution of 1848, the state had been in very serious financial straits and even in the face of this adversity it had not departed from the principle of taxation by valuation, though Pennsylvania (1840), Maryland (1842), Virginia and Alabama (1843), Texas and Louisiana (1845), and North Carolina (1849), had all resorted to some form of income tax to pull themselves out of similar financial difficulties. Justice Orr finds it significant that even on the brink of adversity, the state in 1847 did not resort to these "unusual forms of taxation," and except for provisions for a poll tax, retained the requirement of *ad valorem* taxation.¹²⁸ Two things may be said about the conclusions drawn by Justice Orr from the failure to include in the new constitution provision for these "unusual forms of taxation." The first is that no such taxes having been levied or foiled by the courts, the delegates to the constitutional convention could not be called upon to recognize the need for their specific inclusion. The second is to re-

¹²⁵ Ill. L. (1931-32) Spec. Sess., 91.

¹²⁶ 349 Ill. 579, 182 N.E. 909 (1932).

¹²⁷ See *Johnson v. Halpin*, 413 Ill. 257, 265, 108 N.E.2d 429, 434 (1952).

¹²⁸ *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932).

emphasize the fact that seven years before the convention met, the court had held, flatly and unanimously, that the 1818 revenue provision did not inhibit new or different forms of taxation, providing that such taxes were not taxes upon property.¹²⁹ Looking at the financial history of Illinois it is very likely that the reason the General Assembly at no time during the eighteen forties resorted to income taxation has more to do with the General Assembly's estimate of revenues as against cost of collection than it does with that body's recognition of the restrictive effect of Section 20 of Article VIII of the Constitution of 1818. This attachment to property taxes as the expedient way of collecting revenues comes to the fore in several places in the debates of the constitutional convention of 1847. Justice Scates, in opposing the levy of a poll tax, said that he thought it unjust, since it had no connection with wealth, pointing out that the poll tax in the slave states was different because the tax, assessed against white and black alike, bore some connection with ability to pay. He went on to say that "It is idle to lay a tax when it cannot be collected. If you levy this tax, you must provide a means of collecting it, and that can be done only by issuing execution or by imposing the punishment of imprisonment for failure to pay it. If you do not imprison, but merely resort to the ordinary civil remedy for the collection of debts, the proceeds of your poll tax will be absorbed in paying the costs of suits against delinquents."¹³⁰ Mr. Farwell, also opposed to the poll tax, after stating that he thought the tax unjust and unequal, added that its results would be injurious to the finances of the state. "Property," he said, "was the basis of taxation, none other could be found certain. A man that had property, could be forced to pay his taxes, but how could you collect a tax from a man who had nothing?"¹³¹ It is of course true that in the eighteen forties the State of Illinois was in a state of near bankruptcy. When Governor Ford took office in 1842, he reported, "(1) that the total taxable property of the state amounted to less than seventy-million dollars; (2) that the state contained less than one-hundred and twenty-five thousand men between fifteen and fifty years of age; (3) that the tax rate was already heavy, being fifty cents for county and thirty cents for state purposes; (4) that good money was very scarce, probably not exceeding 'double the amount to be raised by taxation for a single year;' and finally (5) that Illinois was an agricultural state and not able to pay such high taxes as commercial and industrial states."¹³² There exist, then, ample reasons for the failure of the legislature to enact at that time taxes upon income, independent of any question as to their possible invalidity.

The court's treatment of the precedents is even less convincing. It began by observing that prior to the adoption of the Constitution of 1848, the legislature

¹²⁹ *Sawyer v. City of Alton*, 4 Ill. 127 (1841).

¹³⁰ *Debates*, 1847, 90.

¹³¹ *Id.*, at 624.

¹³² Haig, *A History of the General Property Tax in Illinois* 84 (1914).

had from time to time imposed specific taxes on selected occupations and privileges (citing the *Thurber* case) and that the 1848 Constitution made specific provision in Section 2 for most of those occupational and privilege taxes, and added others.¹³³ This is true, of course, but if taken in the light of the discussion of the reasons for listing subjects and objects of taxation given by Mr. Thomas of the revenue committee of the 1847 convention,¹³⁴ and read together with Section 6 which specifically negatives the inference that the convention intended the subjects and objects mentioned in the constitution to be a complete table of those which might be taxed, the fact that the categories named in the constitution were almost wholly objects and subjects already taxed by the General Assembly does not support the conclusion of the court.

He quoted from the *Price* case, the *Worthington* case, and the *County of McLean* case, all to the effect that Article IX of the 1848 Constitution limits the General Assembly to property taxes and to taxes on occupations and privileges. The citation to the *Price* case tends to prove too much. In that case the court held in effect that only the occupations named in Section 2 could be taxed, and that under the police power other occupations might be licensed and charged license fees, so long as the amount of the fee did not disclose the purpose of the General Assembly to raise revenue under the guise of regulation. The *Worthington* case, too, tends to prove too much. There it was suggested that the language of Section 6 of the 1848 Constitution used the phrase, "consistent with the principles of taxation fixed in this constitution," to mean the *ad valorem* principle except where the General Assembly is exempted from that requirement by the second sentence of Section 2. It has been pointed out that on its facts the *Worthington* decision is perfectly sound, but in its dicta relating to the meaning of Section 6, it intimates that only those occupations listed in Section 2 can be taxed, a proposition which the court in the *Bachrach* case rejects. The *County of McLean* case has been discussed at length. It does not stand for the proposition that the legislature is limited to occupations, privileges, and property, but that the spirit of the constitution enjoins upon the legislature the duty of taxing the subjects and objects set out in Section 2, and others not named, in a manner which will approximate a distribution of burdens according to property.

The court argued further that had the convention intended to permit income taxes, it would have said so specifically. To buttress this argument, it pointed out that the convention *did* include a specific section dealing with special assessments in reaction to decisions of the court on that subject.¹³⁵ This is logically faulty. The reason the convention included the provision on special assessments was the fact that the court had interpreted the Constitution of 1848 very narrowly in this regard and the convention felt the necessity to liberalize the rule.

¹³³ *Bachrach v. Nelson*, 349 Ill. 579, 586, 182 N.E. 909, 912 (1932).

¹³⁴ See note 40 *supra*.

¹³⁵ *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932).

On the other hand, the holdings of the court on matters of nonproperty taxation had been uniformly in support of such taxes. There was no reason, therefore, for the convention to act to specify this power in the constitution. In suggesting that the absence of specific language permitting the General Assembly to tax a given subject or object indicates an intention to prohibit taxes upon such subject, the court departs radically from the usual canons of construction. The state need not look to positive provisions of the constitution for its authority to act. The restriction must appear in the constitution, or the General Assembly is free to exercise an unfettered legislative power.¹³⁶

The court casually rejected the value of the cases cited by the appellants, notably the *Howland*, *Kochersberger*, *Harder's Storage*, *Metropolis Theatre*,¹³⁷ *Condon*,¹³⁸ *McGrath*,¹³⁹ and *Deep Rock Oil* cases, on the grounds that all these cases litigated the authority to tax occupations and privileges. It is true that the subjects of the taxes called into question in all these cases could be called occupations or privileges. On the other hand not all the decisions rest upon the holding that the state may tax occupations and privileges. The court went on to say that "by an unbroken chain of authorities this court has consistently interpreted the plain and unambiguous language of the constitution, by which all needful revenue shall be raised 'by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value his, her or its property,' as intended to cast the burdens of taxation equally upon all property of every description in the State."¹⁴⁰ In support of this statement, the court cited a number of cases nearly all dealing with the equality provision as applied to taxes levied directly upon property and none invalidating nonproperty taxes.¹⁴¹ After reciting these cases, the court stated that it has consistently re-

¹³⁶ *Sawyer v. City of Alton*, 4 Ill. 127 (1841); *City of Chicago v. Murphy*, 313 Ill. 98, 144 N.E. 802 (1924); *Sutter v. People's Gas Light and Coke Co.*, 284 Ill. 634, 120 N.E. 562 (1918); *People v. McCormick*, 261 Ill. 413, 103 N.E. 1053 (1914); *Harder's Storage Co. v. Chicago*, supra; *People v. Bd. of Supervisors*, 223 Ill. 187, 79 N.E. 123 (1906); *People ex rel. Dunham v. Morgan*, 90 Ill. 558 (1878); *Seelye v. People*, 40 Ill. App. 449 (1891).

¹³⁷ *Metropolis Theatre Co. v. City of Chicago*, 246 Ill. 20, 92 N.E. 597 (1910).

¹³⁸ *Condon v. Village of Forest Park*, 278 Ill. 218, 115 N.E. 825 (1917).

¹³⁹ *McGrath v. City of Chicago*, 309 Ill. 515, 141 N.E. 299 (1923).

¹⁴⁰ *Bachrach v. Nelson*, 349 Ill. 579, 591, 182 N.E. 909, 913-14 (1932).

¹⁴¹ *Republic Life Ins. Co. v. Pollak*, 75 Ill. 292 (1874) (suit to enjoin collection of taxes on capital as equalized and assessed by the State Board of Equalization on grounds of inequality of assessment); *Ramsey v. Hoeger*, 76 Ill. 432 (1875) (suit attacking constitutionality of Act of 1869 providing that in counties, cities, and villages which owed "railroad debts," state property taxes would be applied to such debts); *Howe v. People*, 86 Ill. 288 (1877) (case reviewing judgment and order for sale of real property for taxes on the ground that the tract was valued as part of a larger tract the remainder of which the taxpayer did not own); *Law v. People*, 87 Ill. 385 (1877) (application for judgment against lands and lots judged to be delinquent; the tax was contested on the grounds that the State Board of Equalization had reduced the valuation of railroad property to 50% of true value, thus voiding the levy, and because the city taxes involved were for the payment of a debt which the city could not legally contract because in excess of the constitutional debt limitation); *Cole v. Hall*, 103 Ill. 30 (1882) (case

fused to extend the constitutional provisions beyond the clear import where the tax imposed was not a tax upon property or did not fall within the exception in Section 9 of Article IX permitting special taxes for local improvements (citing *Kuehner v. City of Freeport*¹⁴² and *People v. Cook County Commissioners*¹⁴³) or where it was not of a supplementary character of special taxes or license fees on occupations, franchises and privileges specifically authorized by Section 2 of Article IX of the Constitution. The cases cited in no way support the statement, since they both involved uniformity of property taxes: the question of nonproperty taxes not within the enumeration of Section 1 of Article IX was left untouched.

In summary, the *Bachrach* opinion, insofar as it purports to say that the General Assembly is limited to taxes on property by valuation, taxes on occupations, and taxes on privileges and franchises, it is wrong on logic. The enumeration is one which includes the listed occupations, and privileges and franchises. Owners and users of franchises and privileges are a subject or object of taxation, as are the other subjects and objects listed. If Section 2 is to have any meaning it must mean that the General Assembly shall have power to tax subjects and objects not in the enumeration. Had the convention meant the section to read "power to tax peddlers, auctioneers, brokers, hawkers, merchants . . . and other owners or users of franchises and privileges," it could have worded the provision that way.

The court is also wrong on its history. When the convention met in 1847, it was established law in Illinois that (1) Section 20 of Article VIII of the Constitution of 1818 used the word tax in the sense of a property tax,¹⁴⁴ (2) that the power of the General Assembly over taxation was plenary absent a specific prohibition in the constitution,¹⁴⁵ and (3) that the provision did not prohibit the General Assembly from grouping property into classes for purposes of taxation, and from exempting certain classes altogether.¹⁴⁶ With the first two principles there was no real dispute. With the other, however, there was much disagreement. When the convention met, the delegates corrected evils they had ex-

testing the validity of the dog tax; the court holds that the dog tax law is a police power regulation pure and simple); *City of Chicago v. Fishburn*, 189 Ill. 367, 59 N.E. 791 (1901) (question presented here was simply whether the debt limitation should be computed on the basis of actual or assessed valuation); *People's Gas Light and Coke Co. v. Stuckart*, 286 Ill. 164, 121 N.E. 629 (1919) (contest of a property tax on the grounds of systematic underassessment of other property); *School of Domestic Arts and Science v. Carr*, 322 Ill. 562, 153 N.E. 669 (1926) (deals with authority to exempt property under Article IX, Section 3 of the Constitution of 1870); and *People v. Nelson*, 344 Ill. 46, 176 N.E. 59 (1931) (deals with the power to borrow in anticipation of taxes).

¹⁴² 143 Ill. 92, 32 N.E. 372 (1892).

¹⁴³ 221 Ill. 493, 77 N.E. 914 (1906).

¹⁴⁴ *Sawyer v. Alton*, 4 Ill. 127 (1841).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Rhinehart v. Schuyler*, 7 Ill. 473 (1845).

perienced and let alone that which had caused no trouble. They were dissatisfied with the mode of assessment under the old Constitution, so they changed the organic law to require another, requiring that all property be assessed by a person or persons elected or appointed for that purpose, thus overruling the decision in *Rhinehart v. Schuyler*. They made specific the power to treat differently certain classifications of subjects and objects of taxation, very probably to silence the possible contention that a tax on these subjects and objects was a tax on property, and to negative the implication that the list was to be treated as exclusive, they added the provision that it should not be construed to limit the legislature in its authority to select other subjects and objects.

It is wrong on the precedents. At the time that the court rendered its opinion, there was no case on the books which had invalidated any tax on the grounds that it was in its nature not a property tax, and not one of the enumerated subjects and objects relieved from the requirement of *ad valorem* taxation. On the other hand, there had been poll taxes, and taxes on rights not denominated privileges in the ordinary sense of the word, and these taxes had been regularly upheld. There was a flat holding that Section 2 of Article 9 made the enumeration in Article IX, Section 1 non-exclusive and that the provision was not a deterrent to the legislature's power to tax other subjects and objects of taxation, equal as to the class.

Having passed upon this aspect of the case, the court went on to say that the exaction was in its nature a property tax, and that as such it was invalid as being assessed on a basis other than *ad valorem*. In this aspect of the case the court relied upon *Pollock v. Farmers' Loan and Trust Co.*,¹⁴⁷ and other than current precedents for the proposition that income from property is itself property. Here, too, Justice Orr's array of precedents is somewhat thin and in stating that by the overwhelming weight of judicial authority income from property is property, the court is patently in error. Cooley, in his work on taxation, has this to say on the matter: "There is a considerable conflict of opinion as to how income taxes should be classified. Are they a property tax or are they an excise tax or are they neither the one nor the other but instead a separate class standing by themselves? If they are to be deemed a property tax, constitutional limitations applicable to property taxes must be applied, thereby limiting the power of the legislature. If they are excise taxes, such limitations are not applicable. . . . In regard to state income taxes the law is not so clear. Generally, however, it has been held that the tax is not a tax on property, or at least is not such a tax as to be included in the constitutional limitations imposed upon property taxes."¹⁴⁸

In its decision on this point, however, at least the authorities cited are real ones and in general do support the proposition they are cited to support. Even here it should be noted that the court cites in its favor at least one case in which

¹⁴⁷ 157 U.S. 429 (1895).

¹⁴⁸ Cooley, *Taxation* (4th ed., 1924), 3477-3478.

it was held that income was not property for the purposes of the constitutional limitations upon property taxes.¹⁴⁹

POST-BACHRACH DEVELOPMENTS—SALES AND USE TAXES

Though the decision in the *Bachrach* case purported to leave the General Assembly free to test its ingenuity in the design of an income tax which would operate within the strictures of Article IX, such a course presented a number of possible pitfalls. In the first place the court interdicted specifically any sort of progressive rate scale and by implication any sort of personal exemption scheme. Moreover the job of integrating income into the tax system as a species of property required a complete re-thinking of the equity problems of property taxation. The conventional property tax is based upon appraisal of an individual's wealth as of a certain date and the application to that appraisal of a uniform rate. When income is considered as property, whether or not it is consumed before tax day, it is difficult to escape the suggestion that income earned during the year which remains in the hands of the earner, either in the form of money or in the form of property, is taxed twice during the same year and in effect when compared with other property, is taxed at a discriminatory rate. In other words it could be argued that under such a system one species of property is taxed if it passes through the hands of the taxpayer during the year while another is taxable only if it is in the hands of the taxpayer on tax day.

Whether or not these problems could be resolved to the satisfaction of the court, the Illinois General Assembly forewent the challenge and decided to forage for its needed revenues in areas it thought legally safer. In March, 1933, it enacted the Retailers' Occupation Tax.¹⁵⁰ In selecting retailers of personal property as the subject of taxation, the General Assembly could feel safe on several grounds. In the first place, "merchants" was one of the categories listed by name in Section 1 of Article IX, thus relieving the statute from the possibility of successful attack under the doctrine of the *Price* case. In the second place, care was taken to label the tax an "occupation" tax and to levy it upon "persons engaged in the business of." This abundant care proved to be the statute's undoing. Since sales of gasoline were subject to the motor fuel tax, the General Assembly provided that "tangible personal property," as defined in the act should not include motor fuel. Provision was also made to exempt from the definition "farm products or farm produce sold by the producer thereof." The court in *Winter v. Barrett*¹⁵¹ voided the tax on the grounds that these exemptions constituted an arbitrary classification in violation of the requirement of equal protection of the laws and of the requirement in Section 1 of Article IX that

¹⁴⁹ *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196 (1918).

¹⁵⁰ Ill. L. (1933) 938.

¹⁵¹ 352 Ill. 441, 186 N.E. 113 (1933).

specific taxes be uniform within the class. To the argument that exemption of motor fuel under the circumstances was not arbitrary inasmuch as it represented an attempt at equalizing tax burdens, the court said that the motor fuel tax was not a tax upon occupations but rather a tax upon use of the highway and not levied upon dealers in motor fuel but upon purchasers, though collected and turned over to the state by the dealer. Therefore, it continued, the exemption of motor fuel remained a discrimination against sellers of other forms of personal property at retail.

The decision in the *Winter* case was handed down May 10, in a legislative year. By June 28, the Retailers' Occupation Tax had been re-enacted without the offending exemptions, signed by the Governor, and in operation.¹⁵² By December of that year the decision upholding the act had been filed by the Supreme Court.¹⁵³ Since that time, the state has depended almost wholly upon occupation and privilege taxes and has made no levy upon property. In upholding the second Retailers' Occupation Tax the court said simply that the tax was levied upon the privilege of engaging in the occupation of selling personal property at retail and squared it with the *Bachrach* property-occupation-privilege formula by calling it an occupation tax. After considering an Oklahoma case holding that the power to tax occupations derives from the police power and must be judged by the extent of authority to regulate,¹⁵⁴ the court, without blanching, cited the *Banta* and *Price* cases as indicating a contrary state of the law in Illinois.¹⁵⁵ When the General Assembly enacted the Cigarette Tax Act of 1941,¹⁵⁶ it followed the formula which had proved reliable in the *Reif* case and framed the tax as a levy upon the privilege of engaging in the business of cigarette distributor.

Taxes which raise prices are in their nature invitations to deal elsewhere and when the amount of the tax is sufficiently high to overcome the inconvenience of dealing outside the taxing jurisdiction, it may be expected that this erosion in the tax base will occur. In the case of the cigarette tax, the levy was in effect two cents per package, or approximately ten per cent of the selling price. It soon became apparent that an appreciable number of the state's smoking population was banding together to import tax-free cigarettes. To plug this hole in the tax-hopper, the legislature in 1943 adopted an amendment to the act providing that any person bringing into the state more than ten cartons of

¹⁵² Ill. L. (1933) 924.

¹⁵³ *Reif v. Barrett*, 355 Ill. 104, 188 N.E. 889 (1934).

¹⁵⁴ *In re Skeleton Lead & Zinc Co.'s Gross Production Tax for 1919*, 81 Okla. 134 (1921).

¹⁵⁵ The *Banta* case held that there was a sovereign power to license but that Section 2 of the Constitution of 1848 restricted this power by limiting its exercise to the occupations named in Section 2; the *Price* case retracted the statement the list prohibited other licensing but held that licensing of occupations not listed in Section 2 could be licensed only if the court would sanction it as an exercise of the police power.

¹⁵⁶ Ill. L. (1941) v. 1, 1043.

cigarettes during one year should be construed to be a distributor and subject to the tax.¹⁵⁷

This amendment was declared unconstitutional in *Johnson v. Daley*,¹⁵⁸ on the grounds that the tax was a tax upon the business of selling cigarettes and the inclusion of persons bringing cigarettes into the state for their own consumption in the definition of distributor abridged both the due process clause and the requirement in the Illinois Constitution which requires that no law may contain more than one subject and that that subject be clearly and adequately described in its title. The opinion in the *Johnson* case was filed in May of 1949, while the General Assembly was still in session, but no effort was made to undo the damage until 1951. At that time the Cigarette Use Tax Act was enacted.¹⁵⁹ The difficulty encountered by the 1943 amendment to the Cigarette Tax Act was overcome by levying a tax upon the use of cigarettes in the state equal to the levy upon the business of selling cigarettes, and providing for the enforcement of the use tax through a combination of licensing out of state distributors to affix tax stamps to each package and a requirement that persons bringing in to the state cigarettes not bearing such stamps must declare them and pay the tax. To prevent assessing both taxes upon a single transaction, the act provides that where stamps have been affixed under the Cigarette Tax Act, none need be affixed and no tax need be collected under the Cigarette Use Tax Act. In *Johnson v. Halpin*,¹⁶⁰ this act was upheld. The court pointed out that the tax was levied upon the privilege of using cigarettes and that this was a privilege which could be denied altogether or regulated by the state, thus satisfying the necessities of the *Bachrach* formula, and that it did not represent an arbitrary classification because the selection of the particular privilege was justifiable as a supplement to the Cigarette Tax Act.

Like the Cigarette Tax Act, the Retailers' Occupation Tax Act proved susceptible to leakage through purchase outside the state. The rate of the tax under the latter act was only two and a half per cent as compared to ten per cent under the former, so as might be expected the leakage was noticeable chiefly with relation to items which were expensive enough to make the tax saving a factor and which could be purchased outside the state and brought in without major inconvenience or added transportation cost. Since automobiles are normally the most expensive chattels purchased by the average family and since they are self-propelled and can be brought into the state easily and conveniently, one large source of leakage was the automobile business. At the instance, no doubt, of the automobile dealers in Chicago, the General Assembly, having learned that it could not safely provide that any person bringing an

¹⁵⁷ Ill. L. (1943) v. 1, 1063.

¹⁵⁸ 403 Ill. 338, 86 N.E.2d 350 (1949); *Babcock v. Elliott*, 403 Ill. 329, 86 N.E.2d 354 (1949).

¹⁵⁹ Ill. L. (1951) 1380.

¹⁶⁰ 413 Ill. 257, 108 N.E.2d 429 (1952), cert. denied 345 U.S. 923 (1953).

automobile into the state for use therein shall be deemed to be a seller of personal property at retail, followed the successful formula employed in the Cigarette Use Tax Act, and levied upon persons bringing automobiles into the state for use therein a use tax equal in amount to the tax levied under the Retailers' Occupation Tax, providing further that until such tax was paid no Illinois title would be issued.¹⁶¹

In declaring the automobile use tax unconstitutional, the court pointed out that the statute was independent of the Retailers' Occupational Tax, and were the latter tax to be materially amended or repealed would operate to work a discrimination upon buyers of automobiles outside the state in contravention both of the Illinois constitutional requirement of uniformity, and of the requirements of the Commerce Clause of the federal Constitution. The statute was undoubtedly complex in its drafting, depending for its definition of taxable transactions upon an amendment to the uniform automobile theft act, but in effect required payment of the tax on the class of transactions not presently covered by the Retailers' Occupation Tax. The court said that such a definition could not stand inasmuch as it operated upon two unwarranted assumptions, first that the retailer within the state would pay the Retailers' Occupation Tax at all, and second that he would pass on the burden of the tax to the purchaser through a higher selling price.¹⁶²

Thwarted in this effort to plug the leakage in the Retailers' Occupation Tax, the General Assembly enacted a comprehensive use tax, applicable to sales of personal property both outside and inside the state, with provisions that the tax shall be collected by the seller where the sale is in the state or where the out of state seller is licensed by the Department of Revenue to make such collections, and in all other instances the transaction shall be reported directly to the Department by the buyer and the tax paid by him. To prevent double taxation of the same transaction the act provided that where the seller is liable for a tax under the Retailers' Occupation Tax and required to collect the Use Tax upon the same transaction, he is relieved from turning over the use tax collected.¹⁶³

The Use Tax Act was challenged on a number of grounds, and offered the court an opportunity to take large steps in the direction of clearing up the confusion which has grown up around the interpretation of the language of Sections 1 and 2 of Article IX. For the first time the court had before it a *general tax* upon a subject normally considered a matter of common right, and not mentioned in Section 1 of Article IX. The previous use tax decisions were not controlling since in both the motor fuel use tax case and in the cigarette use tax case, the court had said that the subject of the tax, in the first case the use of

¹⁶¹ Ill. L. (1953) 1277, §§ 1-6.

¹⁶² People ex rel. Schoon v. Carpentier, 2 Ill.2d 468, 118 N.E.2d 315 (1954).

¹⁶³ Ill. L. (1955) 2027.

the highways, and in the second the use of cigarettes, was a privilege in the sense that it was an activity subject to regulation by the state. In the use tax case, on the other hand, the subject of the tax was using personal property within the state and the definition of use was "the exercise by any person of any right or power over tangible personal property, incident to the ownership of that property . . . (with certain exceptions having to do with temporary use)."

A decision that the exercise of any right or power over personal property could be made a privilege and taxed as such would be tantamount to saying that the use of the word "privilege" was in the sense of "right or privilege," and that the meaning of the constitution was simply that taxes upon property should be levied on the *ad valorem* principle and taxes upon rights and privileges (excises, in the common parlance) should be uniform within the class. This construction of the section would achieve the same result but through rather less defensible logic than to follow the reasoning of the *Harder's Fireproof Storage* case and say that the tax was on a subject or object not mentioned in the constitution but not without the authority of the General Assembly by virtue of the provisions of Section 2 of Article 9. It is interesting to note that this is precisely the logical road by which the Tennessee Legislature was freed from the restrictions of similar language.¹⁶⁴

TURNER V. WRIGHT—THE BOOTSTRAP THEORY

The Illinois Use Tax Act was drafted with one eye on the *Johnson* case and the other on the *Schoon* case. To avoid the classification problems raised in the latter, the tax was levied upon use of *all* personal property purchased from retailers, whether purchased inside or outside the state, and regardless of the character of the property. The language is substantially that of the Cigarette Use Tax Act, upheld in the *Johnson* case, levying the tax upon the "privilege of using in this State. . . ." In framing the tax in this language, the draftsmen of the act were undoubtedly relying upon the court to follow the obiter in the *Johnson* case to the effect that the General Assembly could make a privilege that which was a common right prior to its legislative designation as a privilege, and over which the legislature has no power of prohibition. This would leave the provision completely square with the *Johnson* case, (1) a privilege tax, (2) the particular privilege selected to supplement a valid occupation tax, and (3) the classifications and definitions tailored to prevent multiple taxation. Thus all sellers within the state, and those out of state sellers licensed to collect the tax, were required to collect the full amount of the Use Tax but were excused from paying over such taxes where the gross receipts from the same transaction were taxable under the Retailers' Occupation Tax. Where personal property

¹⁶⁴ The Tennessee courts said simply that a privilege was whatever the legislature chose to make one. See *Mabry v. Tarver*, 20 Tenn. 94 (1839); *Brannen*, *Taxation in Tennessee*, c. 4 (1920) (*passim*).

was purchased outside the state and from a seller not licensed to collect the tax, the purchaser was required to pay the tax directly to the Department of Revenue.

Unfortunately, the General Assembly, notoriously unable to keep track of the legislation which is thrown into the hopper during the closing days of the session, managed to destroy this carefully designed complementary system. On the same day that the Use Tax was passed, it enacted an amendment to the definition section of the Retailers' Occupation Tax Act changing the definition of gross receipts to exclude any credit given for personal property taken in trade.¹⁶⁵

The *Turner* case¹⁶⁶ was heard twice by the Supreme Court. At the first hearing the court held that the subject of the tax was a privilege within the meaning of the Section 1 of Article IX but that the classifications embodied in the tax were arbitrary and that therefore the tax was void. Upon rehearing the court reversed its position. In an opinion written by Justice Schaefer, it held that since the tax was in effect designed to supplement the Retailers' Occupation Tax and prevent the erosion of the base of the latter it was unnecessary to determine whether or not the tax, if standing alone, would meet the requirements of Section 1 of Article IX, as interpreted in the *Bachrach* case, or whether "use of property purchased from a retailer" constitutes a subject or object of taxation upon which the General Assembly may constitutionally levy a tax.

The Use Tax was longer than most Illinois revenue measures in coming to the Supreme Court and longer *in gremio legis*. As a consequence, a great deal of money hung in the balance and legislation already enacted at the 1957 session of the General Assembly faced possible veto by the governor if the taxes already paid under protest, totalling some six million dollars, were to slip through the state's fingers under a decision that the tax was unconstitutional. Under these circumstances, and in view of the fact that in its application to the plaintiffs, purchasers of automobiles outside the state, the tax placed no serious burden not sustained by persons making similar purchases inside the state, the court apparently strained for a rationale which would sustain the statute, and the supplementary or prop-up argument carried a majority.

This argument runs roughly thus: where the General Assembly has the power under the constitution to enact a tax, in this case the Retailers' Occupation Tax, and such tax is subject to avoidance or evasion, in this case through purchasing out of state, Section 2 of Article IX permits the General Assembly to enact a tax which has as its purpose the protection of the base of the first tax, even though the latter is not within the enumeration of subjects and objects of taxation in Section 1 of Article IX, as interpreted in the *Bachrach* case. Taken only this far, the argument comes out at the same logical point at which the

¹⁶⁵ Ill. L. (1955) 2037; see also, Ill. L. (1955) 462; Ill. L. (1955) 2040.

¹⁶⁶ *Turner v. Wright*, 11 Ill. 2d 161, 142 N.E.2d 84 (1957).

court would find itself if it (1) held that in view of the wording of Section 2, the enumeration in Section 1 of Article IX was not intended to be exclusive, *or* (2) that the right to use personal property purchased from a retailer can be made a privilege and taxed as such. The court went on to say, however, that since a supplementary tax takes its validity from the fact that it is a supplement to its primary tax, the standard by which the court will measure the reasonableness of its classifications is whether or not they supplement the primary tax, and so long as the prop-up tax parallels the tax it props, its invalidity cannot be urged on the ground that the classification is arbitrary, such attack being pertinent only when directed against the primary tax.

This view of the standards by which prop-up taxes are judged left the court with the necessity of explaining away the difference in definition of gross receipts under the Retailers' Occupation Tax and selling price under the Use Tax. This it did by simply reading the Use Tax statute as nullifying the amendment to the Retailers' Occupation Tax adopted the same day. Section 9 of the Use Tax Act excuses the seller from paying over such tax to the Department of Revenue only to the extent that "he is required to remit, and does remit the tax imposed by the Retailers' Occupation Tax with respect to the sale of the same property." This the court held requires the seller to remit the use tax in full, or the amount required under the Retailers' Occupation Tax, plus enough of the use tax to make the total the full amount of the Use Tax. Thus, illustrates Justice Schaefer, if A purchases an automobile from an out-of-state dealer licensed to collect the tax, and the purchase price of \$3,000, the Use Tax at $2\frac{1}{2}\%$ would be \$75 and the seller would be obligated to remit this amount. If the same car were purchased inside the state, the seller would be required to collect \$75 in Use Tax. If the trade-in allowance on the sale were \$1,000, his gross receipts subject to the Retailers' Occupation Tax would be \$2,000, and his liability under that tax \$50. He would therefore be excused from remitting the Use Tax only to the extent of the \$50 actually paid under the Retailers' Tax, and would be required to remit \$25 of the \$75 collected. Whether or not a seller pays the Retailers' Tax, therefore, the total of payments under that tax and remissions under the Use Tax is the same.

In his dissenting opinion, Justice Davis pointed out that to interpret the Use Tax statute in this way is to say that the enactment of the Use Tax raised the base of the Retailers' Occupation Tax to the extent that under its provisions the value of personal property given in trade for new merchandise is now subject to the Use Tax. It is difficult to escape the force of Justice Davis' observation. Nor is the increase in the base of the tax limited to the situation in which trade-in allowances are given. Though unmentioned by either Justice Schaefer or Justice Davis, the Retailers' Occupation Tax is levied at a rate of $2\frac{1}{2}\%$ of 98% of gross receipts as defined. The Use Tax is levied upon 100% of selling price. If the differences between the definitions of "gross receipts" in the former tax

and "selling price" in the latter is ignored, the impact of the Use Tax upon the 2% of gross receipts exempted under the Retailers' Occupation Tax is equal to within the neighborhood of six million dollars in added revenue.

In several ways the decision in the *Turner* case is to be applauded as another step in the direction of a less absurd revenue system for Illinois. Both the majority and the dissenting opinions indicate that the conception of privilege in the court's interpretation of Article IX is in any case a broad one. The majority opinion quotes with approval the language of the *Johnson* case, quoting in turn the *Harder's Fireproof Storage* case, to the effect that a "privilege" need not be an activity which could be prohibited by the General Assembly, but simply an activity which is subject to "regulation" or "classification." If the term "classification" is taken at face value, the opinion means in substance that any tax upon a subject which may be termed a class without violating the requirement that classification must be reasonable is permitted under Article IX. The majority opinion also makes inroads upon the dictum of the *Bachrach* case, and brings to the front once again the meaning of Section 2 of Article IX. Justice Schaefer's opinion cannot be read without the inference that the statement in the *Bachrach* case that only tax upon property, occupations, and privileges and franchises are permissible under the terms of Article IX is incorrect, for he has added to this triumvirate taxes which in essence are designed to supplement taxes validly levied. Thus he says that a tax designed to prevent evasion or avoidance of a valid tax is "consistent with the principles of taxation fixed in of this constitution." This observation tacitly concedes that "other subjects or objects of taxation," that is, other than those set out in Section 1, are taxable when their taxation is "consistent with the principles of taxation fixed in this constitution." This in itself is a radical departure from the interpretation ingrafted upon Article IX by the dictum in the *Bachrach* case. Under that statement of the meaning, as amplified in subsequent cases, in each case two questions would have to be answered in the affirmative before the court would sustain a revenue measure: (1) is the tax imposed upon property, occupations, or privileges? and (2) is it imposed in a way consistent with the "principles of taxation fixed in the constitution?"

In two ways, then, the *Turner* case is a forward movement in freeing the Illinois General Assembly from the necessity to draft revenue legislation with an eye upon the *Bachrach* case. First, the majority opinion has conceded that Section 2 of Article IX contemplates taxes other than the three varieties specified in the dictum in the *Bachrach* case, leaving for the future the determination of the meaning of the limitation, "consistent with the principles of taxation fixed in this constitution." Second, the majority opinion has quoted with approval the language of the *Johnson* case indicating a broad interpretation of the term "privilege" in Section 1 of Article IX, leaving open the second, though perhaps less desirable logical route to an interpretation of Article IX and leaving

the General Assembly free from the confining requirements that tax measures shall be drafted to meet the formalistic requirements of the *Bachrach* dictum.

If interpreted in this way, the decision in *Turner v. Wright* may prove to be a very salutary event in the history of Illinois money raising. Under its authority the General Assembly may have the imagination to draft its next tax act in a less cumbersome and more logical pattern. On the other hand the decision has real dangers. It could well be interpreted as providing another gimmick. This interpretation is almost invited by the intimations in the majority opinion that where a tax is framed as a supplementary tax it will not be subject to constitutional challenge on the grounds of arbitrary classification so long as it is designed to supplement a tax admittedly valid, such challenge being permissible only against the primary tax. The Use Tax serves as a perfect example. Justice Schaefer indicates in the majority opinion that it may not be attacked on the grounds that the classifications are unreasonable, such attack being limited by the court to the provisions of the parent tax, the Retailers' Occupation Tax. In assessing the meaning of this statement it should be borne in mind that the latter tax is paid by the retailer and not by the purchaser while the former is paid by the purchaser and only collected and turned over by the retailer. To say that the purchaser cannot contest the Use Tax on the basis of the reasonable classification embodied in the total tax scheme is in effect to say the tax cannot be tested by anyone who is subject to its impact for no one who pays the Use Tax is subject to the Retailers' Occupation Tax.

CONCLUDING OBSERVATIONS—THE COURT AND ITS TASK

For over a century the Illinois Supreme Court has been deciding cases under the language first adopted by the constitutional convention of 1847. During this period the state has moved out of property taxes altogether and now supports itself with a series of excise taxes including a sales tax, a gasoline tax, a public utilities tax, a progressive inheritance tax, a cigarette tax, and an assortment of miscellaneous levies, a revenue system which could hardly be said to conform to the exhortation that the burden of taxation should be distributed in proportion to the ownership of property. The court has to date denied the General Assembly only one real source of income, the graduated income tax. It has, however, forced the General Assembly to frame its legislation in ever more complex and tortuous ways by requiring that certain labels be attached to each levy. In doing so the court has aided no known principle of tax equity or administration and has certainly not fostered conformity with the statement in the constitution to which it gives homage. Whatever the people meant in their constitution, they certainly did not mean that the General Assembly is free to tax on any basis it chooses so long as it does so in the way which will (1) cause the greatest confusion, (2) cost the most to collect, and (3) be immune to challenge by the very persons who pay the tax. They *may* have meant that the state

could tax *only ad valorem*, except for a few miscellaneous licenses traditional at the time. They *may* have meant that the General Assembly could tax only *ad valorem* except in cases where taxation of property on tax day does not reflect the true value of property, the view suggested by Justice Scates in the *McLean County* case. Or what is more likely they may have meant that property taxes must be levied *ad valorem* and other subjects and objects of taxation should be taxed uniformly (at proportional rates) within the class. The court said in the *Turner* case that the Illinois Retailers' Occupation Tax-Use Tax scheme may be awkward but it is not unconstitutional. Certainly the court was correct in saying that it is not its function to void a levy on the grounds of awkwardness. I suggest that it is not the court's function to compel or encourage awkwardness. The provisions of Sections 1 and 2 of Article IX of the present constitution, formerly Sections 2 and 6 of Article IX of the Constitution of 1848, should be construed to restrict the General Assembly in the levy of property taxes, requiring that such taxes be levied *ad valorem*. They should be construed to place no limitation upon the selection of subjects and objects other than property but to require that nonproperty taxes be uniform within the class and that the classifications be reasonable. This should be done because the language of Section 2 requires this result, because the history of the provisions suggests that this is probably as far as one can go in reading plain limitations into the sections, and because the court, having permitted the state to depart entirely from a property tax system, can accomplish nothing beneficial by requiring the General Assembly to force its legislation into molds which provide no protection whatsoever to the taxpayer but do make the total system awkward if not unintelligible.