

## Art. VIII, § 5, 6

If half the states get along without a Section 4, it obviously is not indispensable to the integrity of the public fisc. But the section is a comforting thing to have. An appropriate, comprehensive formulation would be: "The power to tax may not be surrendered, suspended, or contracted away."

Sec. 5. RAILROAD PROPERTY; LIABILITY TO MUNICIPAL TAXATION. All property of railroad companies, of whatever description, lying or being within the limits of any city or incorporated town within this State, shall bear its proportionate share of municipal taxation, and if any such property shall not have been heretofore rendered, the authorities of the city or town within which it lies, shall have power to require its rendition, and collect the usual municipal tax thereon, as on other property lying within said municipality.

### History

This section dates from 1876 and has been explained thus:

This article [sic] on municipal taxation of railroad property is a direct outcome of a petition of the people of Sherman to the constitutional convention of 1875. The city of Sherman had granted municipal subsidies in the form of bonds to one railroad amounting to \$84,000, and to another of \$50,000. The citizens of the municipality were taxed to pay the interest on these subsidies, but when the railroads rendered their property for taxation, one reported only \$10,000 worth of property for municipal taxation, while the other reported none. Thus, while the city was being taxed for the benefit of the roads, the roads were not taxed for their property lying in the city. Thus, this proviso was added to make sure railroads could not escape municipal taxation. (Art. VIII, Sec. 5, *Interpretive Commentary*.)

### Explanation

This section says that railroads shall pay their property taxes just like everybody else. In other words, the section is redundant since Section 1 states that "all property . . . shall be taxed." The section has been relied upon in litigation, but always as a make-weight. (Lawyers and judges are sometimes like mountain climbers: Use it because it's *there*.)

### Comparative Analysis

No other state has a comparable section. The nearest appears to be a South Carolina provision commanding the legislature to require municipal corporations to tax all nonexempt property within their borders.

### Author's Comment

One wonders why this section was not among the provisions in the omnibus amendment to repeal "obsolete, superfluous and unnecessary sections of the Constitution." Maybe somebody was afraid that if it were repealed, railroads would claim that they no longer had to pay municipal taxes.

Sec. 6. WITHDRAWAL OF MONEY FROM TREASURY; DURATION OF APPROPRIATION. No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years, except by the first Legislature to assemble under this Constitution, which may make the necessary appropriations to carry on the government until the assemblage of the sixteenth Legislature.

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## History

The requirement that money may be spent only under an appropriation dates from the Constitution of the Republic (Art. I, Sec. 25). The Constitution of 1845 added the two-year limitation to appropriations but with an exception "for the purposes of education" (Art. VII, Sec. 8). That section remained unchanged through the Constitutions of 1861, 1866, and 1869.

In the 1875 Convention the majority report of the Committee on Revenue and Taxation included a section calling on the legislature to make appropriations sufficient to support the government for two years. The minority report used by the convention contained no section concerning appropriations. Such a section, reading as Section 6 now does down to the obsolete "except" phrase, was offered as a floor amendment and apparently accepted by voice vote without debate. (*Journal*, p. 469. Professor McKay makes no reference to the section. See *Debates*, pp. 301-10.) There is nothing to indicate why "except for purposes of education" was dropped from the earlier versions of the section. Education was, of course, a hotly debated issue in the convention (see *Seven Decades*, pp. 98-104); discretion may have led the proposer to omit a phrase that might have started a debate over education.

The "except" phrase was also added by floor amendment (*Journal*, p. 529). This is the sort of provision that belongs in a schedule since it becomes obsolete almost at once. The reason for the "except" phrase was that the 1875 Convention provided that the existing legislature should become the 15th Legislature and serve until the beginning of 1879. (See *Journal*, pp. 181-82.) The 15th Legislature necessarily would have to adopt a three-year budget.

## Explanation

A prohibition against spending government money except under an appropriation is a traditional constitutional limitation. Under the American theory of separation of powers, the legislature sets government policy and the executive carries it out. Obviously, the expenditure of money is one of the principal ways of establishing a government policy. It follows that a prohibition against spending money without an appropriation protects the policymaking legislative power. (In part. A refusal to spend appropriated funds also frustrates legislative policymaking. See the *Author's Comment* that follows.)

Even the simple proposition that moneys can be spent only under an appropriation quickly turns out to have exceptions. For example, there may be occasions when the government receives private money that may have to be paid out. In *Manion v. Lockhart* (131 Tex. 175, 114 S.W.2d 216 (1938)), the question involved the disposition of unclaimed money in a probated estate.

Under the applicable statute, upon final settlement of the estate unclaimed money was to be paid "to the State Treasurer." (Tex. Prob. Code Ann. sec. 427 (1956).) The statute provided further that claimants subsequently "may recover the portion of such funds to which he or they would have been entitled." (*Id.*, sec. 433.) Unfortunately, the treasurer deposited the money in the general fund. The supreme court ruled that the treasurer should have deposited the money in a special fund because the statute used the words "to the State Treasurer" and not the words "into the State Treasury." But the court also held that once the treasurer had deposited the money in the general fund, an appropriation was required.

Shortly after the *Manion* case, the supreme court was faced with another special fund situation. This was the unemployment insurance plan whereby a tax is levied on employers to create a fund from which unemployment compensation is to be paid. The court, relying in part on the *Manion* case, held that the "money here

involved is not the property of the state in any capacity, but is a trust fund to be held out of the State Treasury, but in the hands of the State Treasurer as trustee, for the benefit of a class of employees whose employers pay it in by virtue of a tax levied, the tax being in the nature of an excise tax." (*Friedman v. American Surety Co.*, 137 Tex. 149, 166, 151 S.W.2d 570, 580 (1941).) Although the court did not discuss the point, by-passing the appropriation process was required by the federal unemployment compensation law. (See the many references to the federal law in Tex. Rev. Civ. Stat. Ann. art. 5221b (1971).)

In both these instances there is a good reason for excepting the disbursement of funds from the appropriation process. In both instances the court had to find a gimmick to justify ignoring Section 6. In the *Manion* case, the gimmick was the wording of the instructions to pay—"to the Treasurer," not "into the State Treasury." One can speculate whether the drafter of the statute involved made the distinction with malice aforethought. This is particularly interesting because the unemployment compensation law provided that tax money should be "paid into the State Treasury" (137 Tex., at 164; 151 S.W.2d, at 574). From this one can fairly conclude that the form of words used is not crucial. What is important is whether by-passing the appropriation process is consistent with the reason for the constitutional requirement.

Section 6 also prohibits appropriations for longer than two years. "The reason usually given for [this] requirement is that, since each biennium there is a new legislature, one legislature should not be allowed to authorize expenditures of the revenues of a subsequent legislature." (Susman, "Contracting with the State of Texas: Fiscal and Constitutional Limitations," 44 *Texas L. Rev.* 106, 108 (1965). As noted in the Explanation of Sec. 44 of Art. III, this article contains an excellent analysis of the applicable cases.) There are several weaknesses in this usual reason (see the following *Author's Comment*), but the provision exists and certainly affects the appropriations process.

The principal effect is that the legislature normally does not try to appropriate for a period longer than two years. But even this is misleading. Under normal circumstance, any legislature limits appropriations for ordinary operating expenses. Obviously, accuracy in forecasting requirements decreases as the period of time covered increases. Legislatures will appropriate most funds for the shortest, not the longest, possible period. If a legislature has annual sessions, it will appropriate operating funds for only one year.

Nevertheless, a two-year limit can create problems. Long-term contracts, for example, frequently provide substantial savings. Fortunately, Section 6 has not stood in the way of such contracts so long as they are carefully drafted. If the contract permits the state to decide each year how much it will buy, Section 6 is not violated. (See *Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 262 S.W. 722 (1924), discussed in the *Explanation* of Sec. 49 of Art. III.) A literal-minded lawyer might advise his businessman client that such a contract is a one-way street, but a practical lawyer would point out that the state is likely to make the contract two-way because of the financial advantages flowing from a long-term contract. Three other comparable devices can be used. One is to give the state an option to renew the contract at the end of the two years; a second is to provide that the long-term contract is subject to appropriations; the third is to prepay the full amount of the contract. In the third case, it is advisable that the legislature clearly indicate that the state is authorized to enter into such long-term prepayments. (See Susman, cited above, pp. 143-44.) It is also to be noted that appropriations in the event of a "public calamity" may exceed two years. (See *Explanation* of Sec. 51 of Art. III.)

Section 6 also refers to "specific" appropriations. Although there have been cases construing "specific" (Susman at 108-109), the rules are probably no different

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from what the courts would have said in the absence of "specific." An appropriation should be specific enough that the legislature, the executive, the courts, and the general public can tell how much money is to be spent for what. But this still requires some drawing of lines. In the case of "how much," an appropriation, like a budget, is an estimate of how much will be needed in the future. Obviously, an appropriation act cannot say "however much is needed" but can cover the estimated need by setting forth a maximum amount. Even so indefinite a statement as "the unexpended balance in the widget fund" or "all receipts from the widget tax" meets the need of providing in advance an estimate of how much will be spent. (See, for example, *Atkins v. State Highway Dept.*, 201 S.W. 226 (Tex. Civ. App.—Austin 1918, *no writ.*)

The specificity of the purpose—the "for what"—is a different matter altogether. Obviously, it would be absurd to appropriate \$5 billion "for running the government." But it is equally absurd to require such specificity as "\$300 for pencils, \$400 for ball-point pens, and \$600 for erasers." Somewhere between these extremes a line must be drawn. It is a line to be worked out by the legislature and the executive.

## Comparative Analysis

Almost every state has a provision that directly or by necessary implication prohibits expenditure of money except by appropriation. Approximately ten states limit appropriations to two years. About half a dozen states use the adjective "specific." The *Model State Constitution* provides: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. . . ." (Sec. 7.03.) The United States Constitution provides: "No money shall be drawn from the treasury, but in consequence of appropriations made by law. . . ." (Art. I, Sec. 9.) It also provides that no appropriation of money to raise and support armies may be for a longer term than two years. (Art. I, Sec. 8.) The purpose of the federal limitation was to prevent the creation of a professional standing army.

## Author's Comment

In the days beyond recall, state government was small business except when financing or underwriting internal improvements. Today, state government is big business, especially in large states with large populations. The most important tool in the management of a large enterprise is the budget because it translates every activity into a common medium—dollars. A state government as a large enterprise ought to use the budgeting process as a management tool. It follows that great care should be taken not to include in a constitution provisions that restrict the budgeting process.

At the beginning of the *Explanation* it was stated that Section 6 is an appropriate protection of the policymaking power of the legislature. The executive branch should be limited to spending money for those purposes which the legislature authorizes. Questions arise, however, if words are used that restrict flexibility in spending the money authorized. Is it a good idea to limit appropriations to two years? Is it advisable to use restrictive adjectives like "specific?"

In the interest of good money management, a constitution ought to permit a legislature to authorize the executive branch, normally the governor, to transfer funds from one program to another, to withhold funds, and the like. A ruling that the legislature cannot constitutionally condition certain expenditures upon the governor's prior approval is an unconscionable restriction on good budget management. (See Tex. Att'y Gen. Op. No. M-1141 (1972).)

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In general, there ought to be three positive constitutional positions on budgeting. First, there should be a requirement that the governor prepare the budget. Second, there should be some provision that inhibits legislative increases in the budget without corresponding increases in revenue. (See the *Author's Comment* on Sec. 49a of Art. III.) Third, there should be a restriction on the executive's power to disregard the legislature's budget determinations—other than the item veto, of course. Section 6 covers this point in part. The section does not force the executive to spend appropriated funds. This has been a lively subject in congress recently; it is not likely to be a problem in a state that gives the governor an item veto. Although the attorney general's reliance on the veto provision to forbid legislative permission not to spend seems far-fetched, reliance on the provision to require the governor to spend anything he failed to veto seems appropriate.

In addition to these positive provisions there is a negative proposition: Do not include anything that goes beyond these three provisions. For example, it is suggested later that constitutional earmarking of tax revenues is ill-advised. (See the *Author's Comment* on Sec. 7-a.) Likewise, if the legislature wishes to permit the governor to refuse to spend, nothing should stop this. For another example, there may be circumstances when long-term contracts and leases represent efficient use of available money. A legislature ought to be able to authorize this. (The argument that a legislature should not be able to commit the revenues of a subsequent legislature is not convincing. As a practical matter many legislative actions commit future legislatures. One legislature's increase in salary schedules commits subsequent legislatures to continue the schedule. One legislature's construction of a building commits subsequent legislatures to maintain the building. One legislature's proposal of a bond issue commits subsequent legislatures to pay off the bonds.)

The point of all this is not that the constitution should impose good money management on the government; rather, the constitution should not inhibit good money management.

### Sec. 7. BORROWING, WITHHOLDING OR DIVERTING SPECIAL FUNDS.

The Legislature shall not have power to borrow, or in any manner divert from its purpose, any special fund that may, or ought to, come into the Treasury; and shall make it penal for any person or persons to borrow, withhold or in any manner to divert from its purpose any special fund, or any part thereof.

### History

This section was offered as a floor amendment at the 1875 Convention. According to McKay's *Debates*, the proposing delegate explained that "he understood before the war that the school tax, university, frontier, and other funds, had been diverted by speculation, and the party speculating being prepared when the Legislature met, to make good the fund. He held that an express provision ought to be made to guard against it. The amendment was adopted." (p. 311.)

### Explanation

The statement of the proposing delegate explains why this unnecessary section was added. Wherever the constitution creates a capital fund or directs that money be spent for a particular purpose, the handlers of the money are charged with obeying the constitution. A separate statement of that duty is unnecessary.

The only question that could arise under Section 7 is whether it applies to

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special funds created by statute. In *Gulf Ins. Co. v. James*, the supreme court said that in an earlier case “this Court held that the above-quoted constitutional inhibition applies only to special funds created by the constitution, and not to special funds created by statute.” (143 Tex. 424, 433, 185 S.W.2d 966, 971 (1945).) Actually, the earlier case was not quite that definite. It held that Section 7 “has no application to the general fund of the Treasury” but explained that the purpose of the section is to prevent diversion of the special funds created by the constitution. (See *Brazos River Conservation & R. Dist. v. McCraw*, 126 Tex. 506, 522, 91 S.W.2d 665, 674 (1936). The court cited McKay’s *Debates*, quoted above.)

#### Comparative Analysis

West Virginia has a provision that no money or fund may be taken for any purpose except that for which appropriated. No other state appears to have a provision comparable to Section 7.

#### Author’s Comment

As noted above, Section 7 is unnecessary.

Sec. 7-a. REVENUES FROM MOTOR VEHICLE REGISTRATION FEES AND TAXES ON MOTOR FUELS AND LUBRICANTS: PURPOSES FOR WHICH USED. Subject to legislative appropriation, allocation and direction, all net revenues remaining after payment of all refunds allowed by law and expenses of collection derived from motor vehicle registration fees, and all taxes, except gross production and ad valorem taxes, on motor fuels and lubricants used to propel motor vehicles over public roadways, shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining, and policing such public roadways, and for the administration of such laws as may be prescribed by the Legislature pertaining to the supervision of traffic and safety on such roads; and for the payment of the principal and interest on county and road district bonds or warrants voted or issued prior to January 2, 1939, and declared eligible prior to January 2, 1945, for payment out of the County and Road District Highway Fund under existing law; provided, however, that one-fourth (1/4) of such net revenue from the motor fuel tax shall be allocated to the Available School Fund; and, provided, however, that the net revenue derived by counties from motor vehicle registration fees shall never be less than the maximum amounts allowed to be retained by each County and the percentage allowed to be retained by each County under the laws in effect on January 1, 1945. Nothing contained herein shall be construed as authorizing the pledging of the State’s credit for any purpose.

#### History

This section was added by amendment adopted on November 5, 1946, by the impressive margin of 231,834 to 58,555.

#### Explanation

Although inserted as a companion to the special fund section, Section 7-a is more accurately characterized as a constitutional earmarking, or dedication, of particular receipts for a particular purpose. Roughly, the particular receipts are fees and taxes related to the use of motor vehicles and the particular purpose is construction and maintenance of roads.

The excessive detail in the section results in part from the protection of the various interests that had a stake in the system as it existed when the section was drafted. The principal protection is for the available school fund. (See Sec. 5 of

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Art. VII, for the origins of this fund.) Section 3 of Article VII requires one-fourth of all state occupation taxes to be used for the benefit of public schools. For reasons discussed earlier (see *Explanation* of Sec. 1), the motor fuel tax was called an "occupation" tax. The available school fund proviso in Section 7-a guaranteed the continued one-fourth allocation even if the legislature turned the "occupation" tax into what it really is—an excise tax.

A second interest protected by Section 7-a was the use of motor fuel tax receipts for payment of principal and interest on certain county road bonds. Under the laws existing at the time Section 7-a was proposed, one-fourth of the receipts went into the County and Road District Highway Fund to be used for payment of such principal and interest. Obviously, if Section 7-a stopped at the first semicolon, receipts could not be used to pay off preexisting debt.

The third interest protected was the rural counties. There is, of course, no way to know this from reading the final proviso of Section 7-a. One has to know the "laws in effect on January 1, 1945." According to the *Interpretive Commentary to Vernon's Annotated Constitution*, the laws then in effect provided that, of the motor vehicle registration fees collected, a county kept the first \$50,000, the county and the state split the next \$125,000 (fifty-fifty), and the state took all of any amount over \$175,000. "As this system of registration fees is designed to favor the smaller, rural counties, there was much agitation to obtain a different formula for dividing the receipts. Representatives from the smaller counties succeeded in defeating this agitation by obtaining the approval of the present Sec. 7a [*sic*] of Art. 8 in 1946." (Art. VIII, Sec. 7-a, *Interpretive Commentary*.) A less discreet but more accurate way to put it is that the final proviso was the price demanded to support the adoption of any amendment earmarking motor taxes.

Section 7-a "does not constitute a grant of power, but affirms existing policy." (*County of Harris v. Shepperd*, 156 Tex. 18, 21, 291 S.W.2d 721, 725 (1956).) This odd statement—odd because constitutional provisions are not normally designed to affirm existing policy—was the concluding comment by the supreme court in holding that Section 7-a is not an exception to the requirement of Section 3 that taxes are to be levied by general laws. The court should have characterized the section as not granting power but limiting power—the power to spend.

There appear to have been only two interpretations of this limitation. In one instance, the supreme court ruled that the cost of relocating utility lines as part of preparation of a right-of-way came within the uses permitted by Section 7-a. (*State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737 (1960).) The attorney general has ruled, however, that the removal of billboards and the screening of junkyards are not within the permitted uses of the earmarked funds. (Tex. Att'y Gen. Op. No. C-783 (1966).)

It has been pointed out that the same legislature that proposed Section 7-a also passed a bill authorizing any county not levying a road tax to divert its motor vehicle registration moneys to any other county fund or funds. (See Tex. Rev. Civ. Stat. Ann. art. 6675a-17 (1969).) "Yet the present amendment declares that registration fees may be used only under legislative act and only for traffic control and road purposes. Although the question has not arisen, it would appear that under the constitutional amendment this statute is invalid." (Art. VIII, Sec. 7-a, *Interpretive Commentary*, p. 514.) Under the 1967 amendment of Section 9, any county may put all tax money into one general fund, "without regard to the purpose or source of each tax." Presumably, this change in Section 9 supersedes the limitation in Section 7-a. In any event, the question still does not appear to have arisen.

The second sentence of the section is totally unnecessary. There is nothing in the first sentence which by any reasonable stretch of the imagination could ever be

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construed to authorize the pledge of the state's credit. But there is always someone who sees monsters behind every lamp post. Presumably, it is easier to humor him than to convince him that he is seeing ghosts.

### Comparative Analysis

Almost half the states have a constitutional dedication of motor vehicle and fuel taxes to highway purposes. One state, Georgia, once had a flat prohibition against earmarking funds but in 1960 excepted motor fuel taxes from the prohibition by an amendment which dedicates the net receipts to highway purposes. The amendment does permit the diversion of money in case of "invasion of this State by land, sea, or air, or in case of a major catastrophe. . . ." (Art. VII, Sec. 9, Para. IV (b).) New Jersey indirectly prohibits dedication by requiring all expenditures to be covered by an annual general appropriation law (Art. VIII, Sec. II, Para. 2). Alaska also has a prohibition against dedication but cagily permits "the continuance of any dedication for special purposes existing upon the date of ratification. . . ." (Art. IX, Sec. 7.) The *Model State Constitution* provides that "no appropriation shall allocate to any object the proceeds of any particular tax or fund or a part or percentage thereof, except when required by the federal government for participation in federal programs." (Sec. 7.03.)

### Author's Comment

Students of government finance are generally agreed that constitutional dedication of tax revenues is an undesirable restriction on government budgeting. Indeed, there is difficulty enough in nonconstitutional budgeting from year to year. This is the reason for the current effort to institute zero-based budgeting (ZBB), a system designed to require constant re-evaluation of continuing programs. Constitutional dedication of tax revenues completely negates ZBB. Whatever arguments can be made in favor of earmarking should have to be made regularly to the legislature. That is, the proponents of earmarking should have to convince the legislature to preserve the dedication notwithstanding whatever new financial or social problems arise. The uses of tax money should not be removed, even in part, from legislative policymaking. In short, the policy of Section 7-a should not be frozen in the constitution. The foregoing is a "good government" argument; practical politics may dictate preserving the policy of Section 7-a.

**Sec. 8. RAILROAD COMPANIES; ASSESSMENT AND COLLECTION OF TAXES.** All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including so much of the roadbed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located, and the county tax paid upon it, shall be apportioned by the Comptroller, in proportion to the distance such road may run through any such county, among the several counties through which the road passes, as a part of their tax assets.

### History

This section dates from 1876. The reason for including it is fairly well summarized by Professor McKay:

Mr. DEMORSE said . . . that it had been inserted in the majority report upon the earnest suggestions of the Comptroller, that it was important, that that officer had stated that under the present system of assessments he had no way of determining whether the values reported were correct, but if the property were assessed in the



counties where the road ran the State would get its just dues . . . .

Mr. KILGORE said the law of 1873 provided that every railroad in the State should render its property for assessment, and the number of miles of its road-bed in each county, their personal property to be reputed from the general office, and that to be apportioned to the several counties, but he was opposed to incorporating that law in the Constitution.

Mr. FLOURNOY said his impression was that the law had been repealed. It was not proposed by the amendment to increase the taxation of railroads . . . . It did not affect railroads in the least, was a matter in which they had no concern, but was simply a matter between the counties and the Treasury.

JUDGE REAGAN said if one thing was clear in his mind it was that they had already provided that *all* property should be assessed in the county where situated, and that saying so once was enough in one Constitution; but it might be that railroads were not considered property, and that it was necessary to mention them again to get the tax to stick. (*Debates*, pp. 318-19. Italics in original.)

It should be noted that Judge Reagan's concluding comment was a bit of sarcasm. Indeed, he was one of those who voted against inclusion of the section. (The vote was 56 to 24. *Journal*, p. 490.)

#### Explanation

As the quoted debates indicate, Section 8 is a straightforward statutory solution to the problem of how to tax the rolling stock of a railroad. It is also wholly unnecessary, as Judge Reagan made clear.

In 1905 the legislature passed the Intangible Assets Act. (See *Tex. Rev. Civ. Stat. Ann. art. 7098 et seq.* (1960).) This created a state board to which railroads and other common carriers had to render their property, tangible as well as intangible. Such railroad property was allocated among the several counties according to mileage. Although this would take care of the rolling-stock problem, Section 8 stands in the way. Accordingly, there remains on the books the old statute that tells railroads and the comptroller to do more or less what Section 8 says. (For "more or less," see the *Author's Comment* that follows.) The supreme court upheld the 1905 law against a many-pronged attack, including a claim that Section 8 precluded such a law. (*Missouri, K. & T. Ry. v. Shannon*, 100 Tex. 379, 100 S.W. 138 (1907).)

Not until 1973 was there a definitive and comprehensive judicial analysis of Section 8, but even that analysis is not conclusive, for the discussion, reasoning, and judgment of the court are all tied to the wording of both Section 8 and the applicable statutes (*Tex. Rev. Civ. Stat. Ann. arts. 7168 and 7169*). The case, *City of Houston v. Southern Pacific Transp. Co.* (504 S.W.2d 554 (Tex. Civ. App.—Houston [14th Dist.] 1973, *writ ref'd n.r.e.*)), involved an attempt by Houston to levy the city—and school district—property tax on the rolling stock of the Southern Pacific on the theory that, under Section 11 of this article, the rolling stock as personal property is situated in Houston, the principal office of the railroad. As the *Explanation* of Section 11 points out, the courts recognize the legislature's power to determine the situs—"where situated"—of personal property. Section 8, however, sets forth a special rule for rolling stock. Unfortunately, the rule is ambiguous in two respects. First, it states that rolling stock *may* be assessed in the county of the principal office but that the tax *shall* be apportioned among counties according to track mileage. Does this mean that the legislature may do something else and that the duty to apportion arises only if the legislature does what the sentence permits? Or does the sentence require apportionment? (Actually, the legislature has done "something else." See the *Author's Comment* that follows.) The second ambiguity arises because the sentence speaks only of the "county tax." Does this mean that the sentence limits the power of the legislature to authorize

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some method of taxation of rolling stock by cities, school districts, and other taxing jurisdictions? Or, to put it more startlingly, is the sentence an exception to the command of Section 1 that all property is to be taxed? As will be shown next, the legislature has certainly read the sentence to mean that rolling stock is exempt from all property taxes except those levied by the county and, vicariously, by the state since the county levies and collects the state tax.

Article 7168 requires railroads to render their property for taxation to each taxing jurisdiction in which the roads have property, except that in rendering personal property, they are to exclude rolling stock. Article 7169 instructs the railroads to render rolling stock to the county of the railroad's principal office. Thus, by negative inference, cities, towns, and other taxing jurisdictions through which a railroad runs may not tax rolling stock because the legislature has instructed the railroads not to list the rolling stock.

In the *Southern Pacific* case, the court of civil appeals in deciding against Houston relied particularly on the exclusion of rolling stock from article 7168. Thus, there is no question that the court's decision was correct. There is a question whether one can rely on the decision as conclusively establishing the meaning of Section 8. The questions raised earlier concerning the ambiguity of the section remain unanswered.

### Comparative Analysis

About half a dozen states have a somewhat comparable provision. Almost all of them centralize assessment at the state level. The 1972 Montana Constitution omits the comparable provision that was in the 1889 Constitution.

### Author's Comment

The excerpt from the *Debates* set out earlier shows that some of the 1875 delegates recognized the difference between a constitutional provision and a statute. Unfortunately, they were in the minority. It is also to be noted that, having made the decision to put a statute into the constitution, the delegates wrote a poor one. Section 8 lets a railroad's home office county assess all rolling stock; the sensible procedure is to have the assessment made at the state level. But as noted elsewhere, the 1875 delegates did not look favorably on centralized assessment. (See Sec. 18 of this article.)

In any event, Section 8 is unnecessary. It makes more sense to drop it than to try to fix it up. Interestingly enough, the Constitutional Revision Commission in its 1973 recommended draft constitution did drop the section. By the time the 1974 Constitutional Convention was underway, however, the *Southern Pacific* case had come down. The railroads naturally pushed for retention of Section 8. They succeeded in retaining something that is like Section 8 but nearer article 7169.

The rolling-stock sentence in Section 8, if read literally, instructs the assessing county to levy its county tax and the comptroller to apportion the tax paid. Article 7169 instructs the assessing county to determine the full value of the rolling stock and the comptroller to apportion that true value to the counties. Each county then levies its tax. The difference between these two methods could be significant. Under the literal reading of Section 8, a county that used a low assessment ratio compared to other counties or that did not levy the maximum county tax would produce less tax receipts to be apportioned than the aggregate tax receipts provided for under article 7169. Conversely, a county with a high assessment ratio would produce more tax receipts than the aggregate provided for under article 7169.

In working out the wording of the proposed provision for the 1974 Convention,

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the drafters were able to obtain acceptance of a formulation that reflected article 7169:

The legislature by general law may permit the rolling stock of railroads to be assessed for ad valorem tax purposes by the county in which the principal office of the railroad is located and require the comptroller of public accounts to apportion on the basis of track mileage the assessed value of the rolling stock among the counties through which the railroad runs. (Art. VIII, Sec. 3(b).)

In the end, then, Section 8 was “fixed up.” Nevertheless, the section remained unnecessary. As the *Explanation* of Section 11 makes clear, the legislature could so provide absent either Section 8 or the revised version. It must be conceded, however, that even under the revised wording, railroads could argue that the permissive language entailed the negative inference that rolling stock must remain free of other local property taxes. The validity of this argument must await a legislative revision of articles 7168 and 7169 that would permit some form of taxation by other local jurisdictions.

Sec. 9. MAXIMUM STATE TAX; COUNTY, CITY AND TOWN LEVIES; COUNTY FUNDS; LOCAL ROAD LAWS. The State tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools, shall never exceed Thirty-five Cents (\$.35) on the One Hundred Dollars (\$100) valuation; and no county, city or town shall levy a tax rate in excess of Eighty Cents (\$.80) on the One Hundred Dollars (\$100) valuation in any one (1) year for general fund, permanent improvement fund, road and bridge fund and jury fund purposes; provided further that at the time the Commissioners Court meets to levy the annual tax rate for each county it shall levy whatever tax rate may be needed for the four (4) constitutional purposes; namely, general fund, permanent improvement fund, road and bridge fund and jury fund so long as the Court does not impair any outstanding bonds or other obligations and so long as the total of the foregoing tax levies does not exceed Eighty Cents (\$.80) on the One Hundred Dollars (\$100) valuation in any one (1) year. Once the Court has levied the annual tax rate, the same shall remain in force and effect during that taxable year; and the Legislature may also authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified property taxpaying voters of the county voting at an election to be held for that purpose shall vote such tax, not to exceed Fifteen Cents (\$.15) on the One Hundred Dollars (\$100) valuation of the property subject to taxation in such county. Any county may put all tax money collected by the county into one general fund, without regard to the purpose or source of each tax. And the Legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws. This Section shall not be construed as a limitation of powers delegated to counties, cities or towns by any other Section or Sections of this Constitution.

### History

It was noted in the Introduction to Article VIII that property taxes had soared during Reconstruction days and that this explains the unusually stringent restrictions placed by the 1875 Convention on the power to levy property taxes. It also should be noted that no earlier constitution had any provision limiting property taxes.

The original Section 9 provided that: (a) the state tax could not exceed 50¢ on the \$100; (b) the county, city, or town tax could not exceed 25¢ plus 50¢ for the “erection of public buildings”; and (c) state and local governments could levy additional taxes for existing debts. There was an “except as in this Constitution is

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otherwise provided." In 1876 there were three such exceptions, all in Article XI. Section 5 permitted the legislature to authorize cities over 10,000 to levy a property tax of \$2.50 "for any purpose"; Section 7 authorized counties and cities bordering on the Gulf to levy taxes for seawalls, breakwaters, and sanitary purposes; and Section 10 authorized cities and towns to levy a tax for public schools. (Sec. 10 was repealed in 1969.)

The first change in property tax limits occurred in 1883. Section 9 was amended to provide that: (a) the state tax could not exceed 35¢ plus any tax to pay the public debt and a newly authorized state tax for schools and (b) the county, city, or town tax could not exceed 25¢, plus 15¢ for roads and bridges and 25¢ for the "erection of public buildings, street, sewer and other permanent improvements," and plus any tax to pay any debt incurred "prior to the adoption of this amendment." At the same time Section 3 of Article VII was amended to add a 20¢ maximum state property tax for schools. The "except as otherwise provided" clause remained.

The next change was in 1890. Only the county and city portion was affected. The amended version included the following changes: (a) it added "water works" to the list of public improvements; (b) it authorized an additional 15¢ for roads but only upon referendum approval by the "property tax paying voters" (hereafter just called "voters") of the county; and (c) it added the local law exception still in the section.

After 1890 the once-every-seven-years amending process stopped. Nothing happened until 1906, at which time "not exceeding fifteen cents to pay jurors" was added. In 1908 a proposed Section 9a was defeated. It would have authorized the voters in any county or "one or more political subdivisions thereof," to levy a road and bridge tax of 30¢ "or" issue bonds not exceeding 20 percent of "assessed value of real property in such district." (Tax or bonds? Such district?) In 1909 Sections 4 and 5 of Article XI were amended. The tax consequence was that cities of 5,000 to 10,000 moved into the \$2.50 "for any purposes" class and out from under Section 9 by virtue of "except as otherwise provided."

In 1915 a second unsuccessful attempt to increase county and small city and town taxing power was made. This amendment proposed to increase the public improvements maximum from 25¢ to a dollar. The amendment also proposed to increase the extra subject-to-referendum road tax from 15¢ to 50¢. This time the terminology used was "county, or of any political subdivision or subdivisions of the county, or of any defined district." This means that the extra road-tax part of the proposal was as much aimed at loosening up Section 52 of Article III as it was intended to loosen up Section 9, for the amendment covered special districts. (Apparently the defeated 1908 amendment just discussed also had been designed to do the same thing.)

In 1919 another try was made. This proposal increased the basic local tax from 25¢ to 35¢, the regular road tax from 15¢ to 30¢, the public improvements tax from 25¢ to 50¢, and the extra subject-to-referendum road tax from 15¢ to 60¢. This would have jumped the maximum combined rate from 80¢ plus 15¢ to \$1.30 plus 60¢. The amendment was roundly defeated. In 1920 Section 4 of Article XI was amended to increase the maximum city and town property tax "for any purpose" from 25¢ to \$1.50. From this date, then, Section 9 has not covered cities and towns.

No further attempt was made to amend Section 9 until 1944. (In 1940 there had been a proposed local amendment in the form of a Section 9-A which would have permitted Red River County to levy a 25¢ tax for not more than 15 years "to refund all the outstanding warrant indebtedness of the General Fund of such County." The voters of the entire state turned down Red River County by a vote of 167,000 for, 207,000 against.) The 1944 amendment succeeded. It was a step

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toward the current version of Section 9 in that the commissioners court was authorized to reallocate the 80¢ among county purposes, roads, jurors, and permanent improvements but the voters had to approve the reallocation. Moreover, the reallocation was binding for six years unless another referendum was held. This amendment for the first time added the sentence that still appears at the end of the section, but the words “except as in this Constitution is otherwise provided” were still in the section. (They went out in 1956.)

In 1956, the inching-along process continued. This amendment permitted the commissioners court to set the tax rates for the four purposes without the need for a referendum. The rate allocation had to remain in effect for one year. This amendment also dropped the power to levy unlimited taxes to pay off debts incurred prior to September 25, 1883. In its place, so to speak, was added a prohibition against levying the four taxes in such a manner as would impair outstanding debt. This was simply a warning to the commissioners court that it could not levy an 80¢ tax for county purposes if there were road or permanent improvement bonds to be serviced. This was also an unnecessary warning, since Section 7 of Article XI was still on the books, to say nothing of the prohibition against impairing the obligation of contracts contained in the United States Constitution.

In 1967, little more than ten years later, another inching step was taken by amendment. What happened this time was that somebody dropped a sentence into the section—“any county may put all tax money collected by the county into one general fund, without regard to the purpose or source of each tax.” This eliminated any problem of having unneeded money in Peter’s account but being unable to rob it to pay Paul’s bills. This sentence also made meaningless the 1956 prohibition against impairing debt, but nobody bothered to remove the prohibition. For that matter, nobody bothered in 1944, or 1956, or 1967 to remove “city or town” from the tax limitation even though neither had come under the limitation since 1920 and even though all three amendments covered only counties.

The first part of Section 9 is a limitation on the state property tax. Those words have remained unchanged since 1890, but since 1947 they have not meant what they say. In that year Section 17 of Article VII was added to the constitution. In the middle of a long sentence dealing with bond issues there popped up a “provided further, that” henceforth the 35¢ in Section 9 was only 30¢. In 1948 Section 1-a of Article VIII was added. It killed off the new 30¢ figure effective January 1, 1951. Why, when Section 9 was amended in 1956 and again in 1967, no one bothered to bring the words of Section 9 into line with the rest of the constitution is an interesting question. The simple and probably correct answer is that those amendments dealt with county taxes. Correcting an obsolete provision concerning a state tax would not be part of the job description of a drafter of language concerning a county tax.

### Explanation

After many amendments Section 9 remains a wordy and unreadable mishmash, but at least it is now relatively simple in its scope. The section does four things: (1) it grants counties power to levy an 80¢ property tax for any purpose; (2) it grants counties, subject to referendum approval, power to levy a 15¢ property tax for the “further” maintenance of the public roads; (3) it permits any other taxing power of counties to coexist; and (4) it permits the legislature to pass local laws “for the maintenance of the public roads and highways” notwithstanding Sections 56 and 57 of Article III. This last item, added in 1890, has nothing to do with taxation.

One can argue whether the section has anything to do with cities and towns. As

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noted in the *History* to this section, all cities and towns have a higher property tax maximum than Section 9 authorizes. Also, as noted earlier, the section has always had a phrase or a sentence that subordinates the section to any other section authorizing a higher property tax. But beginning with the 1944 amendment and continuing with the 1956 and 1967 amendments, the details have all been in terms of counties and only counties. Thus, one can argue that "city or town" is an obsolete phrase left in the section inadvertently. This assumes, of course, that the only cities and towns that have taxing power are those that are incorporated, since Sections 4 and 5 of Article XI apply only to municipal corporations. Interestingly enough, there are two statutory provisions covering the property taxing power of cities and towns of 5,000 and under. One refers to "any city or town," the other to "any incorporated city or town." But since they both use the \$1.50 maximum of Section 4 of Article XI, it would appear that both provisions apply to corporations only. (See Tex. Rev. Civ. Stat. Ann. arts. 1026 and 1027. Home-rule cities are covered by art. 1028.)

At one time Section 9 spawned much litigation and innumerable attorney general opinions. Most of this revolved around the four different county tax funds—regular, road, jury, and permanent improvements. Since the 1967 amendment, all of that lore has become obsolete. Today a county may levy an 80¢ tax and use the proceeds for anything which a county is authorized to do. Everything has been so simplified that the only answers to questions raised since 1967 seem self-evident. In one opinion the attorney general held that the commissioners court could consolidate three of the funds but retain the fourth as a separate fund (Tex. Att'y Gen. Op. No. M-207 (1968)). In a second opinion he ruled that a separate fund mandated by statute has to remain separate. This is the Officers' Salary Fund, which does not receive property tax moneys (Tex. Att'y Gen. Op. No. M-369 (1969)). Recently, the attorney general ruled that "farm-to-market road" tax money raised under Section 1-a of this article may not be commingled. (Tex. Att'y Gen. Op. No. H-530 (1975).)

One question concerning the 80¢ tax is whether it is a direct grant of taxing power to the counties or a maximum limit on the taxing power which the legislature may authorize. The section as now worded certainly seems to be a direct grant.

The special road tax of 15¢ is not a direct grant; the "Legislature may also authorize an additional" tax for the "further maintenance of the public roads." In 1906 the supreme court worried about the word "maintenance" as used in Section 9 and concluded that the word was not to be restricted literally to maintenance. Referring to the 1890 amendment, which added the special road tax, the court observed it was "for the evident purpose of conferring upon counties the power to lay out, construct and maintain better systems of public highways" than would be possible with only the regular road tax. (See *Dallas County v. Plowman*, 99 Tex. 509, 513, 91 S.W. 221, 222 (1906).) In 1891 the legislature authorized the new tax levy by a countywide election (Tex. Laws 1913, Ch. 48, 10 *Gammel's Laws*, p. 53); in 1913 the law was amended to authorize an election in any political subdivision or defined district (Tex. Laws 1913, Ch. 17, 16 *Gammel's Laws*, p. 30.) This change was presumably related to the 1904 amendment of Section 52 of Article III, which first introduced "defined districts" for road purposes. In 1927 the court of civil appeals held that the 1913 part is unconstitutional and that the only tax authorized is a countywide tax voted upon by the voters of the county. (*Commissioners' Court of Navarro County v. Pinkston*, 295 S.W. 271 (Tex. Civ. App.—Dallas 1927, writ *ref'd*). The statute is Tex. Rev. Civ. Stat. Ann. art. 6790.)

It should astonish no one that the authorization to pass local laws "for the maintenance of the public roads and highways" has generated a great deal of

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litigation. The crucial problem has been whether any given local law was limited to the purpose quoted above or went too far and ran afoul of the prohibition in Section 56 of Article III against regulating the affairs of counties. Two cases illustrate the problem. In *Austin Bros. v. Patton*, the supreme court adopted the recommendation of the commission of appeals that a local road law for Houston County be declared unconstitutional because the law created several different road funds to which the regular 15¢ road tax was to be allocated and created several advisory boards to supervise roads. (288 S.W. 182 (Tex. Comm'n App. 1926, *jdgmt. adopted*.) In the other case, the court of civil appeals was faced with a taxpayer's claim that under the local road law for Dallas County, the commissioners court had to use the county engineer to supervise road work costing \$22 million rather than engage an outside firm of engineers. As part of its defense Dallas County attacked the constitutionality of the local law. The court concluded that the part of the law in issue did not create a county office and did not prohibit the hiring of outside engineers. (*Hill v. Sterrett*, 252 S.W.2d 766 (Tex. Civ. App.—Dallas 1952, *writ ref'd n.r.e.*.) Actually, the real claim was that the engineering firm was to be paid too much. (As usual, lawyers rely on every argument they can think of.)

The most interesting thing about the *Sterrett* case is that the local law dealt, among other things, with a Section 52 road district and the proceeds of a bond issue under that section. No one seems to have speculated about whether the 1890 amendment added the sentence as a general exception to the prohibition against local laws in Section 56 and the call for general laws in Section 2 of Article XI or added it as a limited exception to the two parts of Section 9 pertaining to a road tax. One cannot complain about the court in the *Sterrett* case not considering this, for the opinion incorrectly states that the local law sentence was added in 1906 (252 S.W.2d, at 769). This would have been after Section 52 was amended to include road districts. In the *Plowman* case cited earlier, the court, in the course of struggling with "maintenance," said: "Recognizing that differences existed and would exist in the financial conditions, the character of the soil, and otherwise in the counties, which would make it necessary for the different counties to use different methods in maintaining public highways, the last clause of Section 9 was added to authorize the Legislature to meet the varying needs of the counties by local laws." (99 Tex., at 513; 91 S.W., at 222.) This may very well be true. Of course, the basic argument applies to any other area of legislation concerning many counties with different circumstances. The real answer is probably that legislators who liked local laws saw a chance to get their licks in, at least as to roads.

Interestingly enough, although the local law sentence may be broader than Section 9 road taxes, it is narrower than Section 9 taxes. San Saba County apparently spent more for roads between 1924 and 1937 than was raised by the two 15¢ taxes because, by the beginning of 1937, the county had some \$48,000 in scrip warrants outstanding. The legislature passed a local road law authorizing the San Saba County Commissioners Court to issue bonds to pay the warrants. The attorney general refused to approve the bonds and a mandamus action followed. The supreme court agreed with the attorney general. The court first noted that the local law pledged the receipts of both the regular road tax and the additional road tax and continued with the observation that Section 9 permitted the legislature to authorize the additional road tax and that the legislature's authorization (a) permitted the voters to rescind the tax after two years and (b) prohibited using the tax moneys to pay off bonds. Then, in an ellipsis that omitted pointing out that the local law came after the authorizing statute, the court concluded that the local law

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was unconstitutionally retroactive under Section 16 of Article I and unconstitutional under Section 9. Finding the local law unconstitutional under Section 9 was a rather neat maneuver. The court first noted that, by virtue of the wording of the section, the additional road tax is levied not by the county government but by the voters themselves. The court continued by pointing out that the authorizing statute was, in effect, a part of the vote of the people when the additional tax was levied. Therefore, since the voters had said that the tax could be repealed after two years and could not be used to pay off bonds, the legislature had no power under the local law sentence to pass a local law changing the ground rules for the additional tax. (See *San Saba County v. McCraw*, 130 Tex. 54, 108 S.W.2d 200 (1937).)

### Comparative Analysis

There are approximately 15 states besides Texas which have a maximum limit on the state property tax rate, ranging from a low of 2.5¢ to a high of \$1.00. Another five states have a combined state and local limit ranging from \$1.50 to \$5.00. Many of the states have exceptions to the limits, the most common excluding debt service. A few of the states with a combined limit permit a local increase when approved by the local voters. One state permits an increase in the state limit if approved by referendum.

Approximately 18 states besides Texas, including the five with combined limits, have a maximum permissible local rate. It is not fruitful to try to give the range of maximum rates, partly because many of the states have exceptions, the most common excluding debt service and education, and partly because many states have multiple limits for different purposes. Texas is one of them because of its county limit in Section 9, plus the county taxes permitted for road district, water district, hospital district, airport district, and seawall and breakwater bonds and taxes for rural fire districts and school districts. At least two states have even more complicated limitations.

The *Model State Constitution* has no limits on property tax rates.

### Author's Comment

Substantially everything said in the *Author's Comment* on Section 1 applies to Section 9, only more so. It was suggested that there is no constitutional reason for putting a limit on what or how heavily the legislature may tax. It seems even less significant constitutionally to limit the taxing power of political subdivisions. The legislature can impose limits on the taxing power of counties, cities, towns, school districts, and other special districts. Indeed, the advocates of home rule are probably more interested in restricting the power of the legislature over the taxing power of local governments than in restricting the local governments themselves. The home-rule provision of the 1970 Illinois Constitution, for example, requires a three-fifths vote of the full membership of each house to deny or limit a home-rule government's power to tax. (This provision is quoted in the *Comparative Analysis* of Sec. 5 of Art. XI.)

If there must be some reservation of power to the people, the reservation should be local, not statewide. A provision might read something like this: "Any general law authorizing a political subdivision to levy an ad valorem tax in excess of \_\_\_\_\_ on the \$100 must provide that the excess may be levied by a political subdivision only upon referendum approval by the voters of the subdivision." It cannot be repeated too often that a substantive limitation prevents the government from acting but not the people. If power is to be reserved, which people should have the power? It hardly seems appropriate to require the approval of the people of the entire state to permit an increase in the tax burden desired by one, two, ten,



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or fifty local governments. It should be sufficient to require the local governments to get the approval of their own voters.

This same theory should apply in the case of debt limits. At present there is no constitutional debt limit, but there is a practical limit by virtue of the constitutional restrictions on taxing power. If, in the process of revision, someone proposes that local debt limits must be imposed if constitutional limits on local taxation are lifted, the best constitutional solution would be to leave it to the legislature. But if some felt that the people should retain some control, a provision like this would be appropriate: "No general law establishing a debt limit for political subdivisions may authorize debt in excess of \_\_\_\_\_ percent of the assessed valuation of taxable property in a subdivision unless the law includes a requirement for referendum approval for the excess."

It goes without saying that the process of revising Section 9 requires throwing away the section and starting from scratch. Section 9 is beyond repair.

In the *Author's Comment* on Section 20 of Article V, it was suggested that care should be taken in using terms consistently throughout a constitution. Section 9 offers another example of drafting confusion in talking about roads. The original constitution had two provisions mentioning roads; three general amendments also mentioned roads. The result:

Section 56 of Article III—"laying out, opening, altering or maintaining of roads, highways, streets or alleys";

Section 2 of Article XI—"Laying out, construction and repairing of county roads";

Section 52(b) (1904 amendment)—"construction, maintenance and operation of macadamized, graveled or paved roads or turnpikes";

Section 9 (1883 amendment)—"roads and bridges";

Section 9 (1890 amendment)—"further maintenance of the public roads"; and

Section 1-a of Article VIII—"construction and maintenance of Farm to Market Roads."

Sec. 10. RELEASE FROM PAYMENT OF TAXES. The Legislature shall have no power to release the inhabitants of, or property in, any county, city or town from the payment of taxes levied for State or county purposes, unless in case of great public calamity in any such county, city or town, when such release may be made by a vote of two-thirds of each House of the Legislature.

### History

Forgiveness of delinquent taxes is an exemption after the fact. In the *History* of Section 2, it was pointed out that the delegates to the 1875 Convention had strong views on the prior abuse of the power to exempt people and property from taxation. There were equally strong feelings about forgiveness.

The principal prohibition against forgiveness is Section 55 of Article III. That section, as is pointed out in the *Explanation*, is more comprehensive than Section 10. This raises the question of why there is a Section 10. In the absence of a verbatim transcript of the convention proceedings, one can only speculate. In the substitute revenue and taxation article used by the convention there was a peculiar section modeled after a section in the 1870 Illinois Constitution. The proposal read:

No county, city, town or other municipal corporation, nor the inhabitants thereof, nor the property therein, shall be released or discharged 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 whatever. (*Journal*, p. 423.)

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In Illinois this section was inserted to prevent the state from aiding a local government by "donating," in effect, state taxes for a local purpose. (See Braden and Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis* (1969), pp. 454-55.) The thrust of the provision was to prevent legislative favoritism to a particular locality. The thrust was not to prevent the legislature from letting taxpayers avoid the payment of taxes.

In the course of the convention the proposal was changed several times. First, a new version was substituted. It consisted of the first part of what is now Section 10 up to "unless," but without including county purposes. (*Journal*, p. 485.) Subsequently, the "unless" clause was added. One can speculate that at that moment the delegates recognized the original purpose of the section although they had perhaps forgotten that Section 51 of Article III covered the same thing, including the "unless" clause but without the two-thirds vote. But when, still later, "county" was added in front of "purposes" (*Id.*, at 532), one's speculation becomes difficult. Why should there be a prohibition against the legislature forgiving county taxes payable to the county? That reads like a prohibition against tax relief per se. This is prohibited by Section 55 of Article III. (Just before "county" was added, a delegate moved unsuccessfully to delete the entire section. *Ibid.* Did he recognize the confusion that was developing?) One can only guess that the 1875 Convention delegates tended to concentrate on the issue before them at the moment and not to recognize duplications arising from something done on another day. (The legislative article, including Secs. 51 and 55, had long since been accepted at the time Sec. 10 was under consideration.)

## Explanation

Section 10 prohibits the legislature from forgiving state or county taxes. Section 55 of Article III does the same thing. Section 10 does not prohibit the state from forgiving city, town, or special district taxes. Section 55 does. (This is probably the reason that the amendment in 1932 permitting the forgiveness of taxes delinquent at least ten years was added to Sec. 55 and not to Sec. 10.) Most of the cases raising questions concerning forgiveness of taxes arose under Section 55 because they involved city taxes.

Most of these are cases which in effect permit the forgiveness of taxes. The most important device is a simple statute of limitations. The taxes are not "released"; there is just no way that suit can be brought to collect them. (*Texas & P. Ry. Co. v. Ward County Irr. Dist. No. 1*, 257 S.W. 333 (Tex. Civ. App.—El Paso 1923), *aff'd*, 270 S.W. 542 (Tex. Comm'n App. 1925, *judgment adopted holding approved*); *City of San Antonio v. Johnson*, 186 S.W. 866 (Tex. Civ. App.—San Antonio 1916, *no writ*.) Of course, there is no requirement that there be a statute of limitations. If there is not, liability exists forever, which explains the 1932 amendment of Section 55 of Article III.

The statute-of-limitations cases can be brought under a broader generalization: a tax can be "released" through any relevant official act or failure to act. A statute-of-limitations case arises because some official failed to file suit in time. If a statute states that a tax certificate showing payment of taxes in full is conclusive, it is irrelevant whether some employee by error issued an incorrect certificate. (See *Amerada Petroleum Corp. v. 1010.61 Acres of Land*, 146 F.2d 99 (5th Cir. 1944).) If one statute authorizes an assessor to assess property only currently and another statute forbids a suit for unpaid taxes until the tax collector has made demand for the taxes, a taxpayer is home free for taxes in prior years. This is true because if the assessor failed to make an assessment, the tax collector cannot make a demand. (See *State v. Cage*, 176 S.W. 928 (Tex. Civ. App.—Fort Worth 1915, *writ refused*.)

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The public calamity exception created no problem until the Great Depression. Obviously, a "great public calamity" refers to a fire, flood, tornado, or similar natural occurrence that destroys property values. Although as a general rule the courts would accept a legislative declaration of a calamity (*Martin v. Hidalgo County*, 271 S.W. 436 (Tex. Civ. App.—San Antonio 1925, writ *dism'd*)), the supreme court put its foot down when the legislature called the depression a calamity. (*Jones v. Williams*, 121 Tex. 94, 45 S.W.2d 130 (1931).) The statute involved in that case did not forgive delinquent taxes, only interest and penalties if the taxes were paid by January 31, 1932. The court upheld the statute. The court said that although the legislature improperly tried to get the statute under the calamity exception, the statute was still valid because there was no constitutional prohibition against forgiveness of interest and penalties.

The 1932 amendment of Section 55 of Article III was not the result of the *Jones* case. The amendment was proposed by the legislature before passage of the statute involved in that case. After adoption of the amendment, the legislature by no means exercised all the power given to it. In 1935 it forgave taxes delinquent prior to December 31, 1919. In 1965, 30 years later, the legislature cautiously moved the forgiveness date up 20 years to December 31, 1939. (See Tex. Rev. Civ. Stat. Ann. art. 7336f (1960).)

#### Comparative Analysis

There are four states besides Texas that have a provision like the one quoted in the *History* above as modeled after an Illinois provision. These states probably also took the provision from Illinois or from one another since they are all post-1870 constitutions. The 1970 Illinois Constitution dropped the section. The 1972 Montana Constitution also dropped a like provision.

#### Author's Comment

Whether one reads Section 10 as a prohibition on helping a particular local government or as a general prohibition on forgiving taxes, or both, the section seems unnecessary. This is particularly true if there is a real end to local and special legislation. Under any circumstances it seems unlikely that the legislature will grant a special state tax favor to a single locality. If local laws are prohibited it cannot be done anyway. Likewise, there seems no harm in permitting the forgiveness generally of delinquent taxes. The actual legislation mentioned above shows that the legislature does not go overboard. Given the power to forgive ten-year-old taxes, the legislature opted first for a 15-year date, and not a rolling date, either. Next time around they made it a 25-year date, and still not a rolling one. Indeed, as of the end of 1973 only taxes delinquent for 34 years were forgiven. This is surely not legislative irresponsibility that must be guarded against by constitutional limitations.

Moreover, there are good arguments in favor of general forgiveness. Nothing spurs action like a deadline. Tell the tax collector and his lawyer that they can wait forever to sue and they will. Give them a deadline and they may act. In addition, clouds on land titles impair free transfer. A piece of land with delinquent taxes going back 30 years is not an enticing purchase. It seems ill-advised to throw this sort of permanent wet blanket on land out of a fear that some legislature some day might try to pull a fast one.

Sec. 11. PLACE OF ASSESSMENT; VALUE OF PROPERTY NOT RENDERED BY OWNER. All property, whether owned by persons or corporations shall be assessed for taxation, and the taxes paid in the county where situated, but the

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Legislature may, by a two-thirds vote, authorize the payment of taxes of non-residents of counties to be made at the office of the Comptroller of Public Accounts. And all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer.

### History

This section dates from 1876. The delegates to the 1875 Convention debated the section extensively on three different days. (See *Debates*, pp. 313-15, 320-22, 374-77.) The discussion was limited to the question of where a property owner could pay his taxes. Delegates who wanted taxes paid in the county where the property was located appeared to fear that if the money were paid elsewhere it might never find its way back to the proper county. Delegates who favored payment in county of residence stressed the fact that many people owned land in frontier areas and could ill afford to travel there once a year to pay their taxes or to hire an agent to take care of them. In the background was the obvious interest of large property owners in paying their taxes at one place. The issue was hardly earth-shaking, but there seems to be a Parkinson's Law of constitutional conventions: The less important the issue, the more protracted the debate. In any event, the compromise was to pass the issue to the legislature. In 1879 the legislature provided that nonresidents of counties could pay their taxes at the Office of the Comptroller. (See *Tex. Rev. Civ. Stat. Ann.* art. 7265.)

The second sentence of the section is another story. The majority and minority proposals before the convention both provided that land not rendered for assessment should be assessed by the assessor "and in no case shall be valued at less than fifty cents per acre." One can only guess at the purpose that the drafters had in mind. In the context of the discussion of frontier lands of absentee owners, it may be that the "fifty cents an acre" minimum was to be an inducement to get people to render their land. Whatever the purpose, the whole business was fuzzed up by the floor amendment which offered what is now the second sentence. (*Journal*, p. 469.)

### Explanation

As noted above, the first sentence of this section dealt with the narrow question of whether a taxpayer could pay his property tax where he lived rather than where the property was located. On this level, the section is self-explanatory and should not have spawned any litigation. (On this same level, the section is almost totally meaningless. See the *Author's Comment* that follows. Unfortunately, two words—"where situated"—have produced an abundance of litigation.

The *Interpretive Commentary* puts it thus: "This section states the general rule governing situs of property for taxation, namely in the county where situated. But it is subject to some very important exceptions. In order to accurately determine the exact situs of property for assessment it is necessary to distinguish between real, tangible personal, and intangible personal property." (*Interpretive Commentary*, Art. VIII, Sec. 11.) It seems doubtful, to say the least, that the delegates in 1875 thought they were dealing with technical legal problems of situs of property. They surely were thinking only of the problem of where to pay taxes levied on real property and on the ordinary tangible personal property located on that real property. They also obviously knew that there were problems about mobile personal property, for they included a specific tax situs for railroad rolling stock (Sec. 8).

The only significance attaching to the words "where situated" has been the attempt by litigants to use them. In *City of Dallas v. Texas Prudential Ins. Co.*, for

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example, the City of Dallas tried to levy an ad valorem tax on the office furniture and fixtures of a domestic insurance company notwithstanding a statute declaring the situs of all such personal property to be at the home office of any domestic insurance company. The supreme court brushed aside the argument that “where situated” in Section 11 fixed the situs of tangible personal property. In the court’s view, the words in Section 11 did not represent a new definition of situs. In the absence of such a constitutional definition, situs remains a matter of the common law, which in turn can almost always be changed by statute. This, the court held, was validly done when the situs of tangible personal property was placed in the home office of insurance companies rather than “where situated.” (156 Tex. 36, 291 S.W.2d 693 (1956).) See also *City of Dallas v. Overton* (363 S.W.2d 821 (Tex. Civ. App.—Dallas 1962, writ *ref’d n.r.e.*)), where it was held that an airplane should be taxed where kept rather than where its owner lived. The court so decided on the basis of the common law and explicitly did not rely upon the words “where situated.” Thus, Section 11, notwithstanding frequent mention in court opinions, is of no significance as a limitation on the legislature’s power to determine the situs of personal property for tax purposes.

As noted in the *Author’s Comment* below, the second sentence concerning unrendered property is superfluous. Courts have cited the sentence in holding that a board of equalization may not add property which the assessor has omitted from the tax rolls. (See, e.g., *San Antonio Street Ry. v. City of San Antonio*, 54 S.W. 907 (Tex. Civ. App. 1899, *no writ*).) But courts would undoubtedly have reached the same conclusion absent the second sentence of Section 11. (See *Explanation of Sec. 18.*)

#### Comparative Analysis

Only a few states have any kind of provision concerning the situs of property for purposes of assessment. No other state appears to have a provision concerning where payment must be made. Many states have a provision concerning the standard of valuation. (See *Comparative Analysis of Sec. 1.*) The *Model State Constitution* is silent on this subject.

#### Author’s Comment

The first sentence of this section evaporates unless somebody thinks it makes a difference that legislative action has to be by a two-thirds vote. Nothing seems less vital in a constitution than a provision which says that things are thus and so unless the legislature provides otherwise. Moreover, such a provision implies that today’s conditions will not remain the same for long. Delegates writing a constitution ought to think twice before saddling future generations with today’s solution to what may be a nonproblem tomorrow. In 1875 not many people paid their bills by check, which undoubtedly contributed to the argument over where taxes should be paid. But one would think that delegates to a convention could recognize that this is an ephemeral matter to be left wholly, not partially, to the legislature.

The second sentence is an example of saying the same thing over and over. Section 1 states that *all* property is to be taxed in proportion to its value. The second sentence of Section 11 does nothing except to tell the “proper officer” to do his duty as commanded by Section 1. Thus, the second sentence also evaporates.

Sec. 13. SALES OF LANDS AND OTHER PROPERTY FOR TAXES; REDEMPTION. Provision shall be made by the first Legislature for the speedy sale, without the necessity of a suit in Court, of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale in like