

Art. VIII, § 1-a

Sec. 1-a. NO STATE AD VALOREM TAX LEVY; COUNTY LEVY FOR ROADS AND FLOOD CONTROL; TAX DONATIONS. From and after January 1, 1951, no State ad valorem tax shall be levied upon any property within this State for general revenue purposes. From and after January 1, 1951, the several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundaries for county purposes, except the first Three Thousand Dollars (\$3,000) value of residential homesteads of married or unmarried adults, male or female, including those living alone, not to exceed thirty cents (30¢) on each One Hundred Dollars (\$100) valuation, in addition to all other ad valorem taxes authorized by the Constitution of this State, provided the revenue derived therefrom shall be used for construction and maintenance of Farm to Market Roads or for Flood Control, except as herein otherwise provided.

Provided that in those counties or political subdivision or areas of the State from which tax donations have heretofore been granted, the State Automatic Tax Board shall continue to levy the full amount of the State ad valorem tax for the duration of such donation, or until all legal obligations heretofore authorized by the law granting such donation or donations shall have been fully discharged, whichever shall first occur; provided that if such donation to any such county or political subdivision is for less than the full amount of State ad valorem taxes so levied, the portion of such taxes remaining over and above such donation shall be retained by said county or subdivision.

History

This section was originally added in 1932. It then simply granted a \$3,000 exemption from the state property tax—the same words now appearing as Subsection (a) of Section 1-b—but provided that the exemption was not operative in any county or other political subdivision so long as the subdivision received a remission of the state property tax. Less than a year later the section was amended to provide that a political subdivision could certify to the “State Comptroller” that it no longer needed the remitted taxes, in which case the exemption became operative.

In 1948 the section was used as a vehicle to kill off that portion of the state property tax that was levied for general revenue purposes. At that time the state property tax was 72¢ on the \$100, consisting of 30¢ for general revenue (Sec. 9 of this article as amended by Sec. 17 of Art. VII), 35¢ for public schools (Sec. 3 of Art. VII), 5¢ for university and college buildings (Sec. 17 of Art. VII), and 2¢ for Confederate pensions (same section). Thus, 30¢ of the 72¢ was removed. In its place counties were given the 30¢ for farm-to-market roads and flood control. In the drafting of the section the \$3,000 exemption was tied to the new 30¢ county tax. This removed the exemption from the remaining state tax of 42¢, thus requiring Section 1-b. (See *History* of that section.) The 1948 amendment also substituted the second paragraph of the current section for the 1932/1933 version of remitted taxes.

In 1973 the section was amended by adding the words “of married or unmarried adults, male or female, including those living alone” after “homesteads.”

Explanation

There is little to explain about this section. The principal homestead exemption is now in Section 1-b and will be discussed in the *Explanation* of that section. There is no reason to believe that the words there and in this section have different meanings. The homestead exemption remaining in Section 1-a is, so to speak, an aberration. There was nothing particularly logical about creating the county exemption in 1948. The original 1932 exemption had applied to the state tax and not to the county tax. But since the amendment “gave” the counties a 30¢ state tax, it made political sense to carry along with the “gift” to the counties the reduced amount of the gift represented by the exemption. Moreover, people like tax exemptions; they might

Art. VIII, § 1-a

have preferred keeping the state tax with the exemption to giving the counties the tax without the exemption. In other words, preserving the exemption may have been politically necessary to secure a favorable vote. The exemption is applicable, of course, only to the county tax levied under this section and not to any other county tax. (See Tex. Att'y Gen. Op. No. V-1144 (1951).)

Several problems have arisen out of the implementing statute governing the 30¢ county tax (Tex. Rev. Civ. Stat. Ann. art. 7048a). This raises the threshold question of whether Section 1-a is self-executing. On the one hand, the section states that counties "are authorized to levy ad valorem taxes . . . not to exceed thirty cents"; on the other hand, counties can act only in the manner provided by law. (Note, for example, that Sec. 9 of this article gives direct authority to the commissioners court to levy the regular county tax. See the *Explanation* of that section.) In one supreme court case it was argued that Article 7048a is unconstitutional because Section 1-a is self-executing, but the court found it unnecessary to pass upon the question.

The case was *San Antonio River Authority v. Shepperd* (157 Tex. 73, 299 S.W.2d 920 (1957)). The authority is a conservation and reclamation district created under Section 59 of Article XVI. The district includes all of Bexar County and "the natural bed and banks of the San Antonio River from its source to its junction with the Guadalupe River." (The opinion does not indicate whether there are any voters in the district outside of Bexar County, but Wilson, Karnes and Goliad counties elect directors of the authority.) The authority has no power to tax but does have the power to issue revenue bonds if approved by the voters in the district. Under Article 7048a, the voters of Bexar County voted for a 15¢ tax for flood control. The commissioners court entered into a contract with the authority whereby the authority would carry out a flood control program using the proceeds of the flood control tax for a period of 30 years, or, if the authority issued revenue bonds, until they were fully paid off. The attorney general refused to approve the bonds because the taxpaying voters of Bexar County had not approved the bond issue. (He relied in large measure on the *San Saba County* case discussed in the *Explanation* of Sec. 9 of this article.) Although Article 7048a requires voter approval of bonds issued against the Section 1-a tax, the court held that these were not such bonds, which was true, and that Article 7048a clearly gave the commissioners court the power to use Section 1-a funds "in connection with the plans and programs of . . . Conservation and Reclamation Districts," which was all that the commissioners court had done. This is the reason that the supreme court found it unnecessary to decide whether Section 1-a is self-executing; Article 7048a authorized what was done. The court did imply that a construction of Article 7048a that would prohibit an agreement of the kind in litigation might be an unconstitutional interference with the taxing power granted by Section 1-a (157 Tex., at 91; 299 S.W.2d, at 926).

In an earlier case, Article 7048a was attacked on the ground that bonds for farm-to-market roads could be issued only under the power granted under Section 52 of Article III. At that time Section 52 required a two-thirds vote for bonds whereas Article 7048a requires only a majority vote. The court of civil appeals rejected the attack in an opinion that gave the argument more attention than it deserved. (See *Burke v. Thomas*, 285 S.W.2d 315 (Tex. Civ. App. - Austin 1955, writ *ref'd n.r.e.*.) The only other problem that appears to have arisen involves "lateral roads." Section 10a speaks of "Farm to Market Roads," whereas Article 7048a keeps talking about "Farm-to-Market and Lateral Roads." Not long after Section 1-a became effective, a county attorney asked the attorney general just what roads are included in the term "Lateral Roads." The attorney general replied, in effect, that the term "lateral roads" means nothing, for if it did the statute would be unconstitutional. (See Tex. Att'y Gen. Op. No. V-1169 (1951).) Obviously, a constitutional grant to levy a tax for farm-to-market roads cannot be extended by

Art. VIII, § 1-b

statute to cover roads that are not farm-to-market roads. No significant questions have arisen concerning the second paragraph of Section 1-a. In any event, the paragraph is now obsolete. The last donated tax expired in 1968. (Information received from the office of the comptroller of public accounts.)

Comparative Analysis

For tax rates see *Comparative Analysis* of Section 9; for homestead exemptions see *Comparative Analysis* of Section 1-b. No other state appears to have a provision comparable to the second paragraph of Section 1-a.

Author's Comment

This section is just one of the many examples of the confusion that drifts into a constitution if there are too many tax rigidities in it. One can only hope that a revised constitution will deal with taxing power in a manner that obviates the necessity for amendments like this one.

For the benefit of grammarians it may be noted that the second paragraph of this section may be used as an example of an entire paragraph that is not even a sentence with a subject and a predicate. A grammarian might also wish to point out that the 14th word in the paragraph is wrong. Either "to" or "for" will fit; "from" makes no sense.

Sec. 1-b. RESIDENCE HOMESTEAD EXEMPTION. (a) Three Thousand Dollars (\$3,000) of the assessed taxable value of all residence homesteads of married or unmarried adults, male or female, including those living alone, shall be exempt from all taxation for all State purposes.

(b) From and after January 1, 1973, the governing body of any county, city, town, school district, or other political subdivision of the State may exempt by its own action not less than Three Thousand Dollars (\$3,000) of the assessed value of residence homesteads of married or unmarried persons sixty-five (65) years of age or older, including those living alone, from all ad valorem taxes thereafter levied by the political subdivision. As an alternative, upon receipt of a petition signed by twenty percent (20%) of the voters who voted in the last preceding election held by the political subdivision, the governing body of the subdivision shall call an election to determine by majority vote whether an amount not less than Three Thousand Dollars (\$3,000) as provided in the petition, of the assessed value of residence homesteads of persons sixty-five (65) years of age or over shall be exempt from ad valorem taxes thereafter levied by the political subdivision. Where any ad valorem tax has theretofore been pledged for the payment of any debt, the taxing officers of the political subdivision shall have authority to continue to levy and collect the tax against the homestead property at the same rate as the tax so pledged until the debt is discharged, if the cessation of the levy would impair the obligation of the contract by which the debt was created.

History

In 1947 the legislature proposed an amendment to Section 1-a. (See *History* of that section.) Through a drafting error the \$3,000 homestead exemption was destroyed except for the new farm-to-market-road county property tax provided for in the amendment. The error was discovered too late to doctor up Section 1-a. Hence, another resolution was prepared continuing the homestead exemption for state property taxes. Included in the resolution was Section 1-c, which was designed to make Section 1-b effective only if the voters approved the amendment of Section 1-a. (See discussion of Sec. 1-c.) In November 1948 the voters approved all three amendments.

Section 1-b, as adopted, consisted of what is now Subsection (a) except for the 1973 change noted below. In 1972 the section was amended by the addition of

Art. VIII, § 1-b

Subsection (b) except for the 1973 change.

In 1973 both subsections were amended to the present wording. In Subsection (a) the words “as now defined by law” followed the word “homesteads”; in place of those words the amendment substituted the words “of married or unmarried adults, male or female, including those living alone.” (Note that the same words were added to Sec. 1-a but that section had not contained the words “as now defined by law.” Note also that Secs. 1-a and 1-b were voted upon together, thus obviating another Sec. 1-c.) Subsection (b) was amended by inserting the words “married or unmarried” in front of “persons” and the words “including those living alone” a little later in the sentence. (Secs. 50 and 51 of Art. XVI were amended at the same time to extend the regular homestead exemption to single adults. There was no “Section 1-c” conditioning either change upon adoption of the other.)

Explanation

Subsection (a). With the adoption of the 1973 amendment of this subsection and Section 1-a, the judicial gloss on “residence homesteads” has become obsolete. Presumably any adult who owns a residence gets an exemption. (One can have a homestead on leased land and obtain the protection afforded by Sec. 50 of Art. XVI, but there does not appear to be any way to transfer this concept to a real property ad valorem tax.) Of course, an adult who owns two residences can get an exemption on only one of them. One can dream up complications, such as a case of a married couple with a residence in the city owned as separate property by one spouse and a summer home on the Gulf owned separately by the other spouse, but these complications will be rare and not constitutionally significant.

The important point to note about the exemption is that it applies only to the state tax and to a county tax for farm-to-market roads. This seems obvious, but Wichita Falls, a home-rule city, tried to grant a \$3,000 exemption on the authority of the pre-1948 Section 1-a. The exemption was struck down. (See *City of Wichita Falls v. Cooper*, 170 S.W.2d 777 (Tex. Civ. App. – Fort Worth 1943, writ *ref'd*).)

Subsection (b). This subsection is too new to have acquired a judicial gloss. The attorney general has received a number of inquiries and has rendered three opinions which, in combination, answer many of the questions that occur to the reader of the subsection. The first of these opinions preceded the 1973 amendment of Subsection (b) and answered homestead questions that are now obsolete. The opinion is still relevant, however, in ruling that someone 65 or older must have a taxable interest in the residence and that he or she must be 65 on January 1 to get an exemption for that taxable year. Thus, for example, if a spouse over 65 died after January 1, the exemption would cover that year but would be lost the following year if the surviving spouse did not reach 65 by the next January 1. A person who became 65 on January 2 would not be entitled to an exemption until the following year. Perhaps the most important point of the opinion is that the constitutional classification of property owners into those below 65 and those 65 and older is a reasonable classification under the Equal Protection Clause of the Fourteenth Amendment. (There can be no question of reasonableness under the Texas Constitution since the classification is in the constitution.) (See Tex. Att’y Gen. Op. No. H-9 (1973).)

A second opinion held that a county exemption for those 65 and older would be in place of the farm-to-market-road tax exemption of Section 1-a. In other words, whatever the amount of the Subsection (b) exemption—\$3,000 or more—the farm-to-market exemption could not be added to create, as to that tax, an exemption of \$6,000 or more. (See Tex. Att’y Gen. Op. No. H-36 (1973).) There is no basis for reaching this conclusion from the wording of the two provisions. The attorney general relied upon the traditional rule that exemptions from taxation are not

Art. VIII, § 1-b

favoured. The reasoning of the attorney general would also mean that a disabled veteran 65 or over could not receive a Subsection (b) exemption and an exemption under Subsection (b) of Section 2. It seems likely that this issue of double exemptions will eventually reach the supreme court.

The third opinion answered questions about the amount of an exemption granted under Subsection (b). The attorney general ruled that the exemption of \$3,000 or more referred to assessed value and not to market value. This would mean that in a political unit that assessed property at 25 percent of market value, the exemption would be worth twice as much as in a neighboring unit that assessed at 50 percent market value. The attorney general also ruled that the exemption could be in any amount above \$3,000 so long as the last sentence of the subsection did not come into play. (See the further discussion below.) Finally, he ruled that "future Boards or electorates may alter or discontinue future exemptions." That is, the word "thereafter" in "ad valorem taxes thereafter levied by the political subdivision" means only that the exemption may not be retroactive, not that once granted the exemption cannot be taken away. (See Tex. Att'y Gen. Op. No. H-162 (1973).)

The quotation from the opinion is ambiguous concerning one question that is not clearly answered by Subsection (b). Assume that a governing body refused to grant an exemption, following which a petition was filed and a favorable vote obtained granting an exemption of \$4,000. It seems reasonable to conclude that, on general principles of democratic rule, the governing board could not remove the exemption. But could a new petition be filed and a new election held reducing an exemption or rescinding it? The second sentence speaks only to voting on obtaining an exemption but again, on the same general principles, the procedure seems reasonable. But assume that the governing body grants an exemption. Could a petition be filed and an election held rescinding the governing board's action? Although this is analogous to the case of a governing body trying to rescind an exemption voted at an election, Subsection (b) does not seem to permit an election to take away an exemption granted by a governing body. The key is the phrase "As an alternative." This is certainly a strange phrase, pregnant with some hidden meaning. A good guess is that what the drafter meant by the phrase was: "If the governing body refuses to grant an exemption (or a high enough exemption), then the proponents of an exemption may try the following procedure." It does not seem possible to read the phrase to mean: "In addition, any action by the governing body is subject to the following procedure."

It was noted that the attorney general called attention to the final sentence of the subsection. Although he made no point of it, it seems obvious that the sentence is aimed principally at an exemption obtained by petition. It seems most unlikely that a governing body would grant an exemption where a tax had been pledged to service debt. (Consider the flood control tax of Bexar County discussed in the *Explanation* of Sec. 1-a. If the attorney general is correct that there can be no double exemption, there is no problem. But if he is wrong, would the last sentence come into play if Bexar County granted a Subsection (b) exemption? The flood control tax is not literally pledged to service the debt of the San Antonio River Authority; as a practical matter the tax is so pledged.) The real thrust of the final sentence is that it gives the "taxing officer" the power to act without waiting for bondholders or their trustee to obtain an injunction against granting the exemption. In the case of a governing body of a political subdivision that levies ad valorem taxes for more than one purpose, the final sentence enables the body to grant the exemption from "all ad valorem taxes" and then to instruct the taxing officer to ignore the action to the extent necessary. In short, the final sentence is not a necessary protection for bondholders; it is an administrative device for their protection.

Art. VIII, § 1-c

Comparative Analysis

Homestead. Approximately five states have a mandatory exemption for the homestead. Each state differs in the details of the exemption. The same number of states permit the legislature to grant a homestead exemption, several with no limit on size of the exemption.

The Elderly. Georgia mandates an exemption of \$4,000 for those over 65 whose income is less than \$3,000. New Jersey permits the legislature to exempt such property in an amount not exceeding \$800, but only if income does not exceed \$5,000. Washington simply authorizes exemptions for residences of retired persons.

The foregoing is probably not complete. The *Index Digest* to the state constitutions covers only changes through December 31, 1967. It is likely that there have been further amendments recently in those states that constitutionally prohibit exemptions. For exemptions generally see the *Comparative Analysis* of Section 2.

Author's Comment

The extended *Explanation* of Subsection (b) is another example of the difficulties that arise when a self-executing "statute" goes into the constitution. If a provision simply said that exemptions for those 65 and over are not prohibited, the legislature could work out all the fine points that are unclear in Subsection (b). See also the *Author's Comment* on Section 2.

Sec. 1-c. EFFECTIVENESS OF RESOLUTION. Provided, however, the terms of this Resolution shall not be effective unless House Joint Resolution No. 24 is adopted by the people and in no event shall this Resolution go into effect until January 1, 1951.

History

This section was added by amendment in 1948.

Explanation

Prior to 1948, Section 1-a contained the \$3,000 exemption now contained in Section 1-b. The 1948 amendment of Section 1-a dropped that exemption. Section 1-c provides that the 1948 amendment adding Section 1-b does not go into effect unless the 1948 amendment of Section 1-a is adopted. Section 1-c also provides that all this shifting around is to be effective on January 1, 1951.

Comparative Analysis

There may be a comparable provision in some constitution somewhere. One hopes not.

Author's Comment

Lawyers get used to arcane references in statutes. The lawyer's understanding is facilitated by industrious footnoting by publishers. In *Vernon's Constitution of the State of Texas Annotated* there are footnotes to "this Resolution" and "Resolution No. 24." The footnotes tell the reader what the second sentence of the *Explanation* sets out.

A constitution is, or certainly should be, the people's document. It should tell them about the government they have created—what it can and cannot do, how it is organized, and who can do whatever the government is permitted to do. One

Art. VIII, § 1-d

would hope that school children can learn about their state government by reading their state constitution. There is, of course, a lot of detail in the Texas Constitution, much of which would tell a school child more than he wants to know about airport authorities, the veterans' land program, and the like. But it would surely take a precocious logician to understand Section 1-c if his copy of the constitution had no footnotes. The most that one can say for Section 1-c is that a teacher could use it to explain why sentences require subjects and predicates.

The Texas practice is to draft constitutional amendments as if Section 36 of Article III applied—that is, the Joint Resolution states: “Section so-and-so is amended to read as follows:” A second section of the resolution sets forth the procedure for voting on the amendment. There is no apparent reason that a third section of a resolution may not provide details concerning the effective date. Section 1-c could have been a separate section of the resolution instead of a separate amendment.

Sec. 1-d. ASSESSMENT OF LANDS DESIGNATED FOR AGRICULTURAL USE. (a) All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. “Agricultural use” means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

(b) For each assessment year the owner wishes to qualify his land under provisions of this Section as designated for agricultural use he shall file with the local tax assessor a sworn statement in writing describing the use to which the land is devoted.

(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultural use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies.

(e) No land may qualify for the designation provided for in this Act unless for at least three (3) successive years immediately preceding the assessment date the land has been devoted exclusively for agricultural use, or unless the land has been continuously developed for agriculture during such time.

(f) Each year during which the land is designated for agricultural use, the local tax assessor shall note on his records the valuation which would have been made had the land not qualified for such designation under this Section. If designated land is subsequently diverted to a purpose other than that of agricultural use, or is sold, the land shall be subject to an additional tax. The additional tax shall equal the difference between taxes paid or payable, hereunder, and the amount of tax payable for the preceding three years had the land been otherwise assessed. Until paid there shall be a lien for additional taxes and interest on land assessed under the provisions of this Section.

(g) The valuation and assessment of any minerals or subsurface rights to minerals shall not come within the provisions of this Section.

History

This section was added by amendment in 1966. Within three years a new version was proposed. It provided:

Section 1-d. The Legislature shall have the power to provide by law for the establishment of a uniform method of assessment of ranch, farm and forest lands, which shall be based upon the capability of such lands to support the raising of livestock and/or

Art. VIII, § 1-d

to produce farm and forest crops rather than upon the value of such lands and the crop growing thereon.

The new version was turned down on November 3, 1970.

Explanation

The problem that lies behind this section is one of general concern across the nation. The solution adopted in Texas found its way into the constitution because of one of two sets of five words in Section 1—"shall be equal and uniform" or "in proportion to its value"—depending on how one reads the section. (See the *Explanation* of Sec. 1.)

The problem is that of agricultural land suitable for urban development. It is obvious that the "value" of a tract of land usable only for farming is directly related to and substantially controlled by the income that can be gained from farming it. If that tract of land is close to an expanding metropolis, the "value" of that tract is at least the amount of any equivalent farming tract anywhere else, but to any land developer the tract may be worth a great deal more. This creates a number of social problems. For one thing, a tax assessor must ask himself what that tract is really worth. It is worth what it can be sold for, a sum perhaps many times the value of the tract as a farm. He may also suspect that the farmer is plowing away, but with one eye on whether he should sell this year or wait until next year or the year after. If the market value keeps rising the farmer increases his eventual profit but has not paid his fair share of property taxes while plowing away. For another thing, if the property assessment is based on market value, the farmer who is keeping both eyes on his plow must give serious thought to selling. Yet there may be social gains in preserving agricultural pursuits in the vicinity of the metropolis. A tax system that encourages continued farming may be socially desirable. Finally, a speculator may buy a farm and continue to farm it while waiting for a better profit. If he can use the tax system to keep his costs down, the tax assessor will view him as no different from the farmer who is suspected of hanging onto farming only to get a better price for his land.

These are social problems that normally can be solved by statute. Unfortunately, the words quoted earlier do not allow the Texas legislature to change the rules of assessment to solve the problems. Section 1 requires all property to be valued by the same measuring stick. Hence, Section 1-d was adopted—a statutory exception to the general rules.

The section endeavors to cover all the significant social problems. Subsection (a) protects the real farmer from higher taxes just because his farm is capable of assessment at a higher, nonfarm value. The exclusion of corporations is in part a device to exclude the land developer and in part a nod to the historic man-of-the-soil. Subsections (b), (c), (d), and (e) are typical statutory devices to keep everybody honest. Subsection (f) is a device by which the government can share in the windfall which accrues to the farmer if he succumbs to the siren call of the land developer. The subsection picks up the additional taxes based on market value that could have been collected for the three years preceding sale. Subsection (g) recognizes, probably unnecessarily, that mineral rights are irrelevant under these circumstances.

Although this section has been in the constitution only seven years, considerable litigation has ensued. The first reported case involved a charitable foundation which, among other properties, "owned" a great deal of ranch and farmland. The farm, located in Nueces County, was operated under a sharecrop lease. The property taxes levied on the farm exceeded \$25,000 but the net income before

Art. VIII, § 1-d

property taxes from farming rarely exceeded \$10,000. There were oil and gas royalties from the farm but even when they were added to farm income, the net before property taxes rarely exceeded \$25,000. From this one can deduce that the market value of the farm greatly exceeded the agricultural use value plus the mineral rights value.

The tax assessors rejected the foundation's effort to use Section 1-d. (There is no indication whether the same effort was made for the ranches.) It was stated that the taxpayer was not a natural person, not in the business of agriculture, not primarily occupied in farming, and not primarily obtaining income from farming. For some undisclosed reason, the case was heard by the court of civil appeals in Beaumont. It decided that the trustees of the foundation qualified as a "natural person" and that the trustees were in the business of agriculture notwithstanding their passive role of landlord to a farmer tenant and the failure of the farm to yield much profit. The trustees lost their argument that they were primarily engaged in farming or obtaining their income primarily from farming. The controlling fact was that oil and gas royalties from the farm and the ranch land apparently exceeded the net income from the farm and the ranches. (*Driscoll Foundation v. Nueces County*, 445 S.W.2d 1 (Tex. Civ. App.—Beaumont 1969, writ *dism'd*.) One judge concurred specially, stating that he did not consider the foundation or the trustees a "natural person." In dismissing the writ of error the supreme court specifically reserved opinion on the natural person issue. (450 S.W.2d 320 (Tex. 1969).)

A second case fairly well settled the mechanics of valuation. In this instance the parties quarreled only over the way in which the agricultural use value was ascertained. The initial valuation by the school district involved was an average of \$40 an acre for any and all agricultural land. Several land owners objected, arguing that Section 1-d did not permit a simplistic average valuation. The school district engaged an expert appraiser who arrived at valuations per acre for each tract, some of which were lower than, others higher than, \$40 an acre. Again the owners objected. Their principal argument was that the agricultural value should be computed principally by capitalization of their own income, an argument rejected by the court of civil appeals in observing that that method "makes no differentiation between the fact that one operator may be an efficient operator, and the other may not; nor does it consider speculative matters such as weather conditions or other factors, varying from year to year. Such method ignores that it is the land that is to be valued for agricultural use, and not the particular operator, or the particular operator's business." (*King v. Real*, 466 S.W.2d 1, 7 (Tex. Civ. App.—San Antonio 1971, writ *ref'd n.r.e.*.) The court also ruled that a residence on an agricultural tract should not be valued under the agricultural use standard.

Two other cases arising under Section 1-d settled lesser issues. One case noted that the taxpayer has the burden of proof in establishing eligibility under Section 1-d. (*Stein v. Lewisville I.S.D.*, 481 S.W.2d 436 (Tex. Civ. App.—Fort Worth 1972), *cert. denied*, 414 U.S. 948 (1974).) The other case held that a farmer could still rely upon Section 1-d even if he obtained a great deal of money from the sale of portions of his tract. (*Klitgaard v. Gaines*, 479 S.W.2d 765 (Tex. Civ. App.—Austin 1972, writ *ref'd n.r.e.*.) This case demonstrates the practicalities of Section 1-d. As agricultural land the tract was assessed at \$88,560; at market value the assessment would have been \$549,440. The court noted that the taxpayer testified that without a Section 1-d assessment "he would be forced to sell the ranch 'pretty fast.'" (*Id.*, at 768.)

In 1976 the supreme court for the first time addressed itself to Section 1-d. In *Gragg v. Cayuga I.S.D.* (539 S.W.2d. 861), the court was faced with a problem far removed from the social concerns that led to adoption of the section; rather it was a problem arising out of the way in which the wording attempted to solve one of the

Art. VIII, § 1-d

social concerns. It was noted above that Subsection (a) is designed to protect the "real" farmer's or rancher's business. The key limiting words are "which business is the primary occupation and source of income of the owner." The question in the *Gragg* case was whether Mr. Gragg was a "real" rancher. In the years in question, 1970-1972, Mr. Gragg had an average annual *net* income of almost \$600,000 of which a little over an average of \$100,000 was attributable to his agricultural operations. During the same period he averaged in excess of \$800,000 in *gross* income of which the average agricultural annual gross was \$300,000. He argued that ranching was his primary occupation and source of income. "Mr. Gragg testified that he spent ten hours a day, seven days a week, in the ranching business. This was not disputed." (*Id.*, at p. 863.) The difficulty, of course, was that such a large part of both his gross and net incomes came from other sources, described as "eight or twelve other businesses." (*Ibid.*) Is agriculture one's primary source of income if it is only one-sixth of net income or three-eighths of gross?

The majority opinion approached this question as principally a matter of definition of "primary" and "income." The majority concluded that "income" means "gross income" and that "primary" means not 50 percent or more, but more gross income from one occupation than from any other single occupation. Thus, Mr. Gragg could qualify if his gross income from ranching exceeded the amount received from any one of his other "eight or twelve" businesses. Mr. Gragg lost, however, because he had not sustained his burden of proof to establish this. For this reason, what would otherwise have been a dissent was filed as a concurring opinion. The three concurring justices argued that "income" meant "net income" and that "primary" referred to the primacy of agricultural income over the aggregate income from the other businesses. The most interesting thing about the concurring opinion is that its focus is directed at the overall purpose of Section 1-d whereas the majority opinion leaves the reader with the impression that technical definitions were the principal determinants. And yet, when all is said and done, it is not at all clear which set of definitions in the long run would serve better in preserving land for agricultural uses. If there is a significant difference in effect between the two opinions, it is that the gentleman farmer, the wealthy entrepreneur who farms as a hobby, and the seeker for a tax shelter may be able to get relief under the majority ruling but probably not under the dissenting view. Whether this is good or bad so far as preserving agricultural land is concerned is another question.

Comparative Analysis

As of the end of 1967 there were three other states that had a comparable provision, but all were in the nature of authorizations to the legislature to give a break to the landowner. A few states have even more limited special exceptions. Two states provide that plowing of land is not to be considered as adding to the value. One state authorizes the legislature to provide that increased land value due to shade or ornamental trees planted along the highway is not to be considered in making an assessment. Another state specifies that large tracts of land are not to be assessed at a lower value than equivalent land held in small tracts.

The 1970 Illinois Constitution contains a mystifying provision that is said to have been requested by the Farm Bureau: "Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county." (Art. IX, Sec. 4(b).) Superficially this seems to imply that farmland can be more valuable as such than as a potential subdivision. Or one might say that the provision forbids assessing large tracts of land at a higher rate than small tracts.

Art. VIII, § 1-e**Author's Comment**

Given the rule in Texas that all property must be taxed "equally and uniformly," meaning that property cannot be classified for different treatment, it was necessary to amend the constitution to permit a special rule for valuing agricultural land. It was not necessary, however, to draft a self-executing statute. (Justice Daniel, the author of the majority opinion in the *Gragg* case discussed in the *Explanation*, made a revealing slip when he wrote: "The Alaska statute, enacted in 1974, follows many provisions of the Texas statute, but it is less cumbersome." (539 S.W.2d, at 865).) The proposed 1975 Constitution, using the version worked out by the 1974 Convention, simply said:

The legislature by general law shall establish separate formulas for appraising land to promote the preservation of open-space land devoted to farm or ranch purposes and by general law may establish separate formulas for appraising land to promote the preservation of forest land devoted to timber production. The legislature by general law may provide limitations and impose sanctions in furtherance of the appraisal policy of this subsection. (Art. VIII, Sec. 3(a).)

Note that this version took the road of but did not go so far as the unsuccessful amendment discussed in the *History* to this section. Under the 1975 version agricultural valuation was mandatory and forest valuation permissive whereas in the 1969 proposal special valuation was mandatory for both.

The advantage of the 1974-1975 approach is demonstrated by the confusion of the *Gragg* case discussed earlier. In that case the court found itself in a public policy thicket and was unable to agree on the correct way out. This is normal, of course, in cases involving constitutional public policies. Here the problem was not the basic policy—all agreed on that; the problem was a matter of "statutory interpretation" of a detail. Unfortunately, this "statutory" detail is now a part of the judicial gloss; if the effect of the decision is unacceptable, the constitution must be amended. The obvious moral is to keep statutes out of the constitution.

Sec. 1-e. ABOLITION OF AD VALOREM PROPERTY TAXES. 1. From and after December 31, 1978, no State ad valorem taxes shall be levied upon any property within this State for State purposes except the tax levied by Article VII, Section 17, for certain institutions of higher learning.

2. The State ad valorem tax authorized by Article VII, Section 3, of this Constitution shall be imposed at the following rates on each One Hundred Dollars (\$100.00) valuation for the years 1968 through 1974: On January 1, 1968, Thirty-five Cents (\$.35); on January 1, 1969, Thirty Cents (\$.30); on January 1, 1970, Twenty-five Cents (\$.25); on January 1, 1971, Twenty Cents (\$.20); on January 1, 1972, Fifteen Cents (\$.15); on January 1, 1973, Ten Cents (\$.10); on January 1, 1974, Five Cents (\$.05); and thereafter no such tax for school purposes shall be levied and collected. An amount sufficient to provide free textbooks for the use of children attending the public free schools of this State shall be set aside from any revenues deposited in the Available School Fund, provided, however, that should such funds be insufficient, the deficit may be met by appropriation from the general funds of the State.

3. The State ad valorem tax of Two Cents (\$.02) on the One Hundred Dollars valuation levied by Article VII, Section 17, of this Constitution shall not be levied after December 31, 1976. At any time prior to December 31, 1976, the Legislature may establish a trust fund solely for the benefit of the widows of Confederate veterans and such Texas Rangers and their widows as are eligible for retirement or disability pensions under the provisions of Article XVI, Section 66, of this Constitution, and after such fund is established the ad valorem tax levied by Article VII, Section 17, shall not thereafter be levied.

4. Unless otherwise provided by the Legislature, after December 31, 1976 all delinquent State ad valorem taxes together with penalties and interest thereon, less

Art. VIII, § 1-e

lawful costs of collection, shall be used to secure bonds issued for permanent improvements at institutions of higher learning, as authorized by Article VII, Section 17, of this Constitution.

5. The fees paid by the State for both assessing and collecting State ad valorem taxes shall not exceed two per cent (2%) of the State taxes collected. This subsection shall be self-executing.

History

This section was added in 1968.

Explanation

In one sense this section needs no explanation; it simply tidies up the state property tax. In another sense, the section requires explanation unless one wishes to grub around in the constitution and elsewhere to find out what the section really does.

As of January 1, 1951, the state property tax was reduced from 72¢ to 42¢ on the \$100. (See *History* of Sec. 1-a.) In 1965 the tax went up to 47¢ through an amendment of Section 17 of Article VII which increased the 5¢ property tax for university and college buildings to 10¢. Subsection 1 of Section 1-e kills off all state property taxes as of December 31, 1978, except the 10¢ tax levied by Section 17. Subsection 2 disposed of 35¢ of the 37¢ in a phased withdrawal of 5¢ each year until it disappeared at the end of 1974. Since the income from the 35¢ tax was added to the available school fund under Section 3 of Article VII, somebody must have felt that it was essential to say something about all this, for Subsection 2 continues the constitutional mandate to provide free textbooks and the unnecessary permission to the legislature to appropriate general funds for that purpose.

Subsection 3 disposes of the remaining 2¢ tax. It is to be levied through 1976 unless the legislature sooner establishes a trust fund to cover Confederate pensions and the limited pensions for certain Texas Rangers and their widows authorized by Section 66 of Article XVI. (It is to be noted that the subsection recognizes that there are no living Confederate veterans; the reference is to "widows of Confederate veterans.") The legislature has not created the trust fund.

One mystifying feature about Section 1-e is that the last state tax of 2¢ expires on December 31, 1976, but Subsection 1 states that no state tax may be levied after December 31, 1978, except the 10¢ university and college building fund tax which continues indefinitely. What taxing power exists in 1977 and 1978? This is probably a nonquestion. Whatever the reason for the error, it is unlikely that any court would approve a new state property tax for those two years. Nobody seems to have an explanation for the two-year gap. The best assumption is that the 1978 figure in Subsection 1 is a typographical error.

Subsection 4 is one of those insignificant constitutional provisions that show up from time to time. The drafter of Section 1-e, thinking ahead, may have decided to alert everybody that some disposition would have to be made of delinquent taxes collected after the tax had been abolished; or he may have thought that, since the only continuing state ad valorem property tax would be the university and college building fund tax, any money collected after the cut-off date of all other property taxes might as well go into the same fund. But whatever his reason, he created nothing more than a "default" subsection. That is, he said, so to speak: "If the legislature forgets to pass a bill disposing of delinquent taxes collected after December 31, 1976, the comptroller of public accounts is hereby told what to do with the money."

Subsection 5 is a "constitutional" statute "repealing" in part Articles 3937 and

Art. VIII, § 2

3939 of the *Texas Revised Civil Statutes Annotated*. Article 3937 provides a fee for assessing property; article 3939 provides a fee for collecting taxes. Since the statutory fee to be paid by the state to the county is 2 percent of all taxes over \$20,000, all fees for assessment and three-fifths of the 5 percent fee for collecting the first \$20,000 are "repealed." (See *Tex. Att'y Gen. Op. No. M-509 (1969)*.) One can only speculate why the drafter of Subsection 5 considered the constitutional route preferable to amending articles 3937 and 3939. The attorney general has also ruled that Subsection 5 does not affect articles 7335 and 7335a, which permit hiring lawyers to collect delinquent taxes. "Thus, the compensation allowed the attorney is in the nature of legal fees for enforcement services and does not smack of the fees for assessment and collection contemplated by the amendment in question." (*Tex. Att'y Gen. Op. No. M-318 (1968)*.)

Comparative Analysis

See *Comparative Analysis* of Section 9 for state property tax limits. At least four states prohibit a property tax for state purposes. Florida prohibits a state ad valorem property tax on real and tangible personal property but not on intangible property. California prohibits raising more than 25 percent of funds for state appropriations from ad valorem property taxes. The 1970 Illinois Constitution has a provision prohibiting an ad valorem personal property tax after December 31, 1979. This tax is levied only locally. The constitution requires that revenue lost because of the prohibition is to be replaced by statewide taxes levied only on those who paid the ad valorem personal property tax. No other state appears to limit the fee that the state may pay a local government for assessing and collecting state taxes.

Author's Comment

See *Comment* on Section 1-a of this article.

Sec. 2. OCCUPATION TAXES; EQUALITY AND UNIFORMITY; EXEMPTIONS FROM TAXATION. (a) All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places or (of) religious worship, also any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society, and which yields no revenue whatever to such church or religious society; provided that such exemption shall not extend to more property than is reasonably necessary for a dwelling place and in no event more than one acre of land; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools and property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit; and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void.

(b) The Legislature may, by general law, exempt property owned by a disabled veteran or by the surviving spouse and surviving minor children of a disabled veteran. A disabled veteran is a veteran of the armed services of the United States who is classified as disabled by the Veterans' Administration or by a successor to that agency; or the military service in which he served. A veteran who is certified as having a disability of

Art. VIII, § 2

less than 10 percent is not entitled to an exemption. A veteran having a disability rating of not less than 10 percent nor more than 30 percent may be granted an exemption from taxation for property valued at up to \$1,500. A veteran having a disability rating of more than 30 percent but not more than 50 percent may be granted an exemption from taxation for property valued at up to \$2,000. A veteran having a disability rating of more than 50 percent but not more than 70 percent may be granted an exemption from taxation for property valued at up to \$2,500. A veteran who has a disability rating of more than 70 percent, or a veteran who has a disability rating of not less than 10 percent and has attained the age of 65, or a disabled veteran whose disability consists of the loss or loss of use of one or more limbs, total blindness in one or both eyes, or paraplegia, may be granted an exemption from taxation for property valued at up to \$3,000. The spouse and children of any member of the United States Armed Forces who loses his life while on active duty will be granted an exemption from taxation for property valued at up to \$2,500. A deceased disabled veteran's surviving spouse and children may be granted an exemption which in the aggregate is equal to the exemption to which the decedent was entitled at the time he died.

History

As noted in the *History* of Section 1, earlier constitutions authorized the legislature by a two-thirds vote to exempt property from taxation. The 1875 Convention began debate with a proposal before it that contained the same legislative power. As the debate developed, one of the first changes was to delete the power of the legislature to exempt property from taxation. (*Journal*, p. 467.) The delegate who proposed that deletion then offered a section reading:

All taxes shall be uniform and upon the same class of subjects within the limits of the authority levying the tax. But the Legislature may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity, and all laws exempting property from taxation other than the property above enumerated shall be void. (*Ibid.*)

Immediately after this section was offered, the proviso now in Section 1 concerning household furniture was offered. (*Id.*, at 468.) As noted in the *History* of Section 1, the *Journal* is garbled at this point, for there is only one entry of a vote. The normal reading would tie the vote to the household exemption, but if this is correct the proposed section was never acted upon. It is clear, however, that when the delegates took up Article VIII on October 30, this proposed section on exemptions was before them. (The *Journal* does not reveal how "uniform and upon" became "equal and uniform upon" or how two sentences became one. This latter change was particularly ill-advised once "occupation" was inserted in front of "taxes." Presumably all this was the work of the Committee on Style and Arrangement.)

When the convention took up Section 2 on October 30 the first change was the insertion of "occupation" discussed in the *History* of Section 1. Then followed a series of maneuvers concerning exemption of school property, ending with the insertion of the following between cemeteries and charitable institutions: ". . . all buildings used exclusively and owned by persons, or associations of persons, for school purposes, and the necessary furniture of all schools." (*Ibid.*) This ended floor action on Section 2.

After the convention finished with Section 2, it still consisted of two sentences, the second of which began with "But" and had no semicolons. Presumably, the Committee on Style and Arrangement changed it, for the section as finally adopted read:

All occupation taxes shall be equal and uniform upon the same class of subjects

Art. VIII, § 2

within the limits of the authority levying the tax; but the Legislature, may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned, shall be void.

The original Section 2 held for 30 years. Beginning in 1906, it has been subjected to eight amendments, three direct and five indirect. There have also been five proposed amendments that were rejected. Eight amendments were on the ballot in the ten years preceding 1974.

The first direct amendment, adopted in 1906, added the words concerning endowment funds in Subsection (a) beginning after the sixth semicolon and ending with the comma before the eighth and last semicolon. The 1906 amendment also drove an unnecessary nail in the exemption coffin by providing that all other exemptions shall be not just void but *null* and void. This extra nail is still there.

The second direct amendment, adopted in 1928, made two changes. One added the words exempting rectories and parsonages in Subsection (a) beginning after the first comma following the second semicolon and ending with the fourth semicolon. The other was the addition of the words beginning "and property used" following the words "of all schools" in the portion of Subsection (a) after the fifth semicolon and continuing to the sixth semicolon. (It would appear that the mysterious man who sprinkles commas and semicolons into constitutional amendments found his sprinkling can jammed; thus, neither a comma nor a semicolon was dropped in at the beginning of these additional words.) This part of the 1928 amendment was for the benefit of the YMCA and the YWCA. The third direct amendment, adopted in 1972, added Subsection (b).

The five indirect amendments of Section 2 were adopted in 1932, 1933, 1948, 1972, and 1973. These are Sections 1-a, 1-b, 1-c, and amendments of them. (One may ask why the amendments were not made direct amendments of Sec. 2. Presumably, the drafter of the 1932 amendment analogized the \$3,000 homestead exemption to the \$250 household goods exemption in Section 1. But since the "null and void" provision is in Section 2, Section 1-a and successive progeny are really amendments of Section 2. But then again, as noted in the *History* of Section 1, Section 2 is an exception to the command to tax all property thus making all amendments of Section 2 indirect amendments of Section 1.)

Four of the defeated amendments were direct amendments in the sense that three of them used "2" as a section number and the fourth was an amendment of Section 2 in the traditional manner of dumping more words into the overgrown sentence. This amendment, defeated in 1969, was essentially the same as the amendment, styled "Section 2C," which was defeated on November 6, 1973. Both would have authorized ad valorem tax exemption for nonprofit suppliers of water. (The 1969 version covered corporations; the 1973 version covered corporations and cooperatives. See the *Author's Comment* on this section.) Another defeated amendment, styled "Section 2-A," would have directly exempted charitable hospitals from all ad valorem taxes except the state tax. The exemption was subject to a host of "provided thats." This one failed in 1965. The fourth defeated amendment, styled "Section 2-a," would have authorized ad valorem tax exemption for antipollution capital equipment. It failed in 1968.

The fifth defeated amendment was a proposed Section 1-f, voted upon on November 5, 1968. It would have exempted goods temporarily stored in Texas pending shipment out of the state.

Art. VIII, § 2

Explanation

As indicated above, the first “sentence” of Subsection (a) of this section has nothing to do with the several “sentences” which follow. In order to keep apples separate from oranges, the first “sentence” has been covered in the *Explanation* of Section 1; by the same logic the household exemption in Section 1 is covered here.

In general. The logical steps explaining Section 2 are: (1) a legislature has plenary power to levy and to authorize the levy of ad valorem property taxes; (2) Section 1 limits that power by stating that if a property tax is levied it must be levied upon *all* property (except that of municipal corporations) in proportion to its value (the “if” was theoretical in 1876; today it is not even accurate, for Sec. 17 of Art. VII directly levies a property tax); (3) Section 2 permits the legislature to make exceptions to the limitation but only as specified; and (4) these exceptions must exempt the property from taxation—that is, the legislature is not empowered to tax the property at a lower rate than other property. This last point is not applicable to the household property exemption in Section 1, the homestead exemptions in Sections 1-a and 1-b, and the exemptions in Subsection (b) of this section. These are all related to “in proportion to its value.” In some instances the dollars of exemption might equal or exceed the value of the property; normally, these are exemptions of a part of the value of the property rather than an exemption of the property. (Note that the household property exemption in Sec. 1 and the homestead exemptions in Sec. 1-a and Subs. (a) of Sec. 1-b are direct exemptions by the constitution whereas the exemptions of Subs. (b) of Sec. 1-b and Subs. (b) of Sec. 2 are permissions to exempt. Note also that the farm products and supplies exemption in Sec. 19 is a direct exemption subject to cancellation by the legislature and that the agricultural land valuation exception in Sec. 1-d is a direct “exemption” from the requirement to treat all property equally in ascertaining value.)

Household goods. Notwithstanding the odd wording of this exemption—“household and kitchen furniture”—no questions of interpretation appear to have arisen. The legislature has expressed an opinion by listing household and kitchen furniture, “in which may be included one sewing machine.” (Tex. Rev. Civ. Stat. Ann. art. 7050, item 11.) Many years ago a sewing machine was seized for sale to satisfy delinquent poll taxes. It was held that the constitutional and statutory exemption applied only to the levy of taxes and not to seizure for failure to pay taxes. (*Ring v. Williams*, 35 S.W. 733 (Tex. Civ. App. 1896, writ *ref’d*.)

Public property. In the discussion of Section 9 of Article XI it is noted that that section plus two supreme court cases have fairly well destroyed the limited permission to exempt “public property used for public purposes.” The law today is, first, that by virtue of the words “other than municipal” in the second sentence of Section 1, *any* property owned by a municipal corporation may be exempted from taxation. (“Municipal corporation” in this context probably means any political subdivision that has been designated a body corporate with power to sue and be sued.) Second, public property “devoted exclusively to the use and benefit of the public” and owned by any political subdivision is constitutionally exempt from taxation by the terms of Section 9 of Article XI. In short, Section 1 gives the legislature more power to grant exemptions than does Section 2 but Section 9 of Article XI takes away much of the power *not* to exempt.

In 1888, Chief Justice Stayton, who had been a delegate to the 1875 Convention, said that Section 2 “seems to apply to property owned by persons or corporations in private right, but which, from the use to which it is applied, is, in a qualified sense, deemed public property.” (*Daugherty v. Thompson*, 71 Tex. 192, 199, 9 S.W. 99, 101 (1888).) Later in the same opinion he stated it more positively: “As said before,

section 2, art. 8, of the constitution, gave to the legislature the power to exempt property held in private ownership, but used for purposes which give to it a public character.” (71 Tex., at 201; 9 S.W., at 102.) This is an accurate statement of the general purpose of Subsection (a), but the chief justice did not mean to include “public property used for a public purpose” in his description of the section. Only a few years later he wrote: “It cannot be claimed that the property of appellant is public property used for public purposes, for to give it such character it is believed that the ownership should be in the state or some of its municipal subdivisions,” (See *St. Edwards College v. Morris*, 82 Tex. 1, 3, 17 S.W. 512 (1891). This case is discussed later in this *Explanation*.)

There is a possibility that what Chief Justice Stayton said in 1888 was based more on his memory of the 1875 Convention than on the wording of Section 2. In the *History* above, Section 2 as it was first proposed is quoted. It is possible to read the original as if it meant that the legislature could exempt the following “public” property used for public purposes: churches, cemeteries, and charitable institutions. After school buildings and furniture were added and after somebody dropped in several semicolons, it was not possible so to read the section. It may be that in 1891 Chief Justice Stayton was relying on the words of the constitution and not on his memory.

On one occasion the supreme court said that Chief Justice Stayton was referring specifically to “public property” as private property “deemed public property.” (See p. 910 of the *Fertitta* opinion cited and discussed in the *Explanation* of Sec. 9 of Art. XI.) In view of the many cases strictly construing the specific exemptions, it is obvious that the *Daugherty* dictum is not to be taken seriously.

Religious property. As noted in the *History* above, one of the purposes of the 1928 amendment was to include residences of ministers under this exemption. This was the direct result of a holding under the original wording that the residence of a minister could not qualify under “actual places of religious worship.” (*Trinity Methodist Episcopal Church v. City of San Antonio*, 201 S.W. 669 (Tex. Civ. App.—San Antonio 1918, *writ ref’d*.) Since the amendment, the courts have had to decide whether the exemption can extend to the residence of a minister who is not attached to an actual place of worship but superintends the ministries of several churches. The supreme court decided that supervising ministers could be housed in tax-exempt dwellings. (See *McCress v. City of San Antonio*, 454 S.W.2d 393 (Tex. 1970), reversing 448 S.W.2d 518 (Tex. Civ. App.—San Antonio 1969) and overruling *City of Houston v. South Park Baptist Church*, 393 S.W.2d 354 (Tex. Civ. App.—Houston 1965, *writ ref’d*.)

There have been other problems involving the meaning of “actual places of religious worship.” In *Radio-Bible Hour, Inc. v. Hurst-Euleiss I.S.D.* (341 S.W.2d 467 (Tex. Civ. App.—Fort Worth 1960, *writ ref’d n.r.e.*)), the court was faced with a claim for exemption of a building on 3.2 acres of land plus house trailers, a tent, electronic and office equipment, furniture and other personalty. The building was used principally for the preparation, recording, and dissemination of religious programs and sermons to radio stations. A 15-minute religious service was held five days a week. All work done in the building was actual religious work. Exemption was denied because the premises did not constitute an “actual place of worship.” The court relied on the presumption against exemption and on the *YMCA* case discussed later. (In 1967 the exemption statute was amended by the addition of a definition of “actual places of worship.” Included in the definition are the words “property owned by a church or by a strictly religious institution or organization, . . . used exclusively to support and serve the spread of a religious faith, and to effect accompanying religious, charitable, benevolent and educational purposes by

the dissemination of information on a religious faith through radio, television and similar media of communication.” (Tex. Rev. Civ. Stat. Ann. art. 7150, item 1(a).) Would this include a religious publishing house? A religious bookstore? No one appears to have passed judgment on the validity of this definition. (See the discussion of the *Daughters of St. Paul* case in this *Explanation*.)

One of the most recent cases in this field is *Davis v. Congregation Agudas Achim* (456 S.W.2d 459 (Tex. Civ. App.—San Antonio 1970, *no writ*)). The question here was whether exemption was lost because a portion of the synagogue was rented out from time to time to civic organizations, schools, and other churches. The annual income of roughly \$10,000 was about half the cost of maintenance of the portion rented out.

In an excellent opinion, Justice Cadena pointed out that prior to 1928 the constitutional language granted an exemption to “actual places of worship.” The words “and which yields no revenue whatever” came in with the 1928 amendment adding residences for the ministry. He noted that the residence amendment speaks of a “dwelling place” in the singular, that the original Section 2 spoke and still speaks of “actual places of worship” in the plural, and that the clause about revenue is in the singular. Ergo, the rules of grammar decided that issue. In the same 1928 amendment, he also noted, words of exclusivity appeared—“exclusive use as a dwelling place”—but again, this does not cover places of worship. Part of the argument by the assessor-collector was that the *YMCA* case discussed below spoke of exclusive use of a place of worship, but Justice Cadena pointed out, at that time words of exclusivity appeared in the statute granting exemption. (One must never forget that the legislature can narrow the exemption authorized by Sec. 2.) In answer to the citation of cases involving exclusive use of property for charitable purposes, Justice Cadena threaded his way through Section 2 and demonstrated again that the appropriate constitutional adjective could not relate to places of worship. (At this point in the opinion Justice Cadena figuratively lost his temper. See the quotation in the *Author’s Comment* on this section.)

Justice Cadena’s opinion indicates that he is not at all sympathetic when it comes to construing tax exemptions narrowly. One may speculate whether this is related to the fact that so many of the Section 2 cases come from San Antonio. (Seven of the 18 cases mentioned in this *Explanation* arose in San Antonio.) In the most recent supreme court pronouncement on this “actual places of worship” exemption, the court noted that “claims for tax exemptions are strictly and narrowly construed.” (See *Davies v. Meyer*, 541 S.W.2d 827, 829 (1976) (only the two acres containing a chapel and residence of a 155-acre church camp are exempt).)

YWCA and YMCA. In 1913 the legislature granted tax exemption to buildings of the YMCA and YWCA, “used exclusively for the purpose of furthering religious work.” (See Tex. Rev. Civ. Stat. Ann. art. 7150, item 2.) In 1926 the district court dismissed a suit by the city of San Antonio against the YMCA for property taxes delinquent from 1905. The court of civil appeals reversed, holding that the 1913 statute was unconstitutional because it had been conceded that the building was not used exclusively for religious worship and could not qualify as an institution “of purely public charity.” (*City of San Antonio v. Young Men’s Christian Ass’n*, 285 S.W. 844 (Tex. Civ. App.—San Antonio 1926, *writ ref’d*). The court also said that the 1913 statute was a special law prohibited by Sec. 56 of Art. III, but the case is not remembered for this point.) It was pointed out by Justice Cadena, as noted earlier, that “exclusive” use for public worship was statutory in 1926, not constitutional. Justice Cadena did not point out that use of the term “exclusive” had been irrelevant in 1926 since the exemption was based on the 1913 YMCA statute, not the places-of-worship statute, and that the validity of the 1913 statute—leaving aside the special

law argument—could not be judged by the statutory narrowing of a different constitutional exemption. Unfortunately, the 1913 statute did not speak of “actual places of worship”; the words, quoted above, were “used exclusively for the purpose of furthering religious work.” Everybody seems to have gotten mixed up in sorting out the YMCA problem. The solution was to amend Section 2 as pointed out in the *History* of this section.

Cemeteries. The words in Section 2 are “places of burial not held for private or corporate profit.” (The 1875 Convention’s dislike of corporations is manifested in the strangest ways. “Corporate” adds nothing here.) There does not appear to be any interpretation of this provision. The statutory exemption is somewhat more limited:

All lands used exclusively for graveyards or grounds for burying the dead, except such as are held by any person, company or corporation with a view to profit, or for the purposes of speculating in the sale thereof. (Tex. Rev. Civ. Stat. Ann. art. 7150, item 3.)

There is a possible ambiguity in the statutory grant. Does “lands” refer only to the ground? Are mausoleums and other buildings in a cemetery exempt? The only official pronouncement on coverage is an attorney general’s opinion holding that oil and gas royalties to a nonprofit cemetery are taxable even though the income is used for maintenance of the cemetery. (Tex. Att’y Gen. Op. No. 0-4755 (1942).)

Schools. In the confused language of Section 2, the educational exemption covers “all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools.” In other parts of the section, the references are to “places”—churches and cemeteries—and “property”—parsonages and YMCA. The principal questions, therefore, are whether land used for school purposes is exempt and what “exclusively” means. In the early case of *St. Edwards College v. Morris* (82 Tex. 1, 17 S.W. 512 (1891)), Chief Justice Stayton held that the land on which a school building and necessary out-buildings were situated would be exempt; that land necessary for educational purposes, such as land used for teaching agricultural pursuits, would be exempt; but that contiguous farmland used to provide food for a boarding school would not be exempt. In an even earlier case, the supreme court spelled out the meaning of “exclusively.” In *Red v. Morris* (72 Tex. 554, 10 S.W. 681 (1889)), the court found no exemption problem if three sisters operated a seminary for young ladies and lived on the premises. The point was driven home by the fact that tax exemption had been denied earlier when the sisters’ parents operated the same school but used the building as their home. This distinction was adhered to in the case of a lawyer who lived in a house which was used as a school and in which his wife taught. Although he and his wife owned the building and the school, the building was held not to be used exclusively for school purposes. (*Edmonds v. City of San Antonio*, 36 S.W. 495 (Tex. Civ. App. 1896, writ *ref’d.*))

The foregoing cases all involved private schools operated for profit. The constitutional permission to exempt school buildings says nothing about nonprofit education, thus differing from parsonages, cemeteries, and institutions of purely public charity. This point was specifically affirmed in *Smith v. Feather* (149 Tex. 402, 234 S.W.2d 418 (1950).) Unfortunately, the husband and wife owners of both a building and a proprietary school made a mistake in creating a partnership to run the school and included their daughter as a partner. Thus, the building was no longer both “used exclusively and owned by persons or associations of persons for school purposes.” (Presumably, the partnership was thereafter dissolved or ownership of the building was transferred to the partnership.)

“Exclusive” use for school purposes can plague a nonprofit organization in the

Art. VIII, § 2

same way that institutions of purely public charity are plagued. (See the forthcoming discussion. Churches, as already noted, do not suffer from this plague.) In *Little Theatre of Dallas, Inc. v. City of Dallas* (124 S.W.2d 863 (Tex. Civ. App.—Dallas 1939, *no writ*)), exemption was denied. On the one hand, the nonprofit corporation ran a school to which Southern Methodist University students were admitted and for which they received college credits; on the other hand, the auditorium was rented out from time to time for lectures and recitals. But the court's principal point was that the "primary purpose is to furnish pleasure and entertainment to its members and patrons; although it gave instruction in diction, acting, playwriting, fencing, the use of voice, dancing, etc., yet, however laudable and, in a general sense, educational and cultural these activities, they fall far short of showing that the property in question was used exclusively for school purposes." (p. 865.) One wonders whether the theater attorneys argued that education in acting, playwriting, and the rest requires productions before live audiences. If a farm is appropriate for teaching farming, an audience is appropriate for teaching the performing arts. But then this was one of the many cases stressing strict construction of exemptions.

Institutions of purely public charity. The first point to be made about this category is that the constitutional exemption is for "all buildings used exclusively and owned by . . . institutions of purely public charity." There are 141 words, five commas and two semicolons within the segment represented above by the ellipsis. Fortunately, the original wording in 1876 was not so bad; then there were only 16 intervening words, seven of which were in parentheses surrounded by commas. Thus, at that time, the wording was clear. Even so, the meaning produced by the clear wording is probably not what the 1875 Convention intended. Section 2 as originally proposed probably meant that the "property" of charitable institutions could be exempted. It was the insertion of the words concerning school buildings and the subsequent selective introduction of semicolons that tied charitable institutions to "buildings." (Compare the original proposal with the section as adopted. Both are set out in the preceding *History*. See also the discussion above concerning Chief Justice Stayton's opinion in the *Daugherty* case.) The 1906 and 1928 amendments added another 125 words between "buildings" and "institutions," but since neither amendment was concerned with institutions of purely public charity, the meaning remains the same.

The second point to be made is that this is the catch-all category. If the legislature purports to grant exemption to an institution that is not a school, an actual place of worship (plus parsonage), a cemetery, or something like the "Y," the only category that works is "institutions of purely public charity."

The leading case on a "purely public charity" is *River Oaks Garden Club v. City of Houston* (370 S.W.2d 851 (Tex. 1963)), where the supreme court divided five to four over the meaning of the phrase. The majority took the narrow view that the only institutions that can qualify are those that dispense "aid to the sick, the distressed and the needy, by providing for their basic needs," or that "assume, to a material extent, that which otherwise might become the obligation or duty of the community or the state." (p. 854.) The dissenters took the broad view that a purely public charity is one that is devoted to charitable purposes, which includes relief of poverty, advancement of education and religion, promotion of health, and other purposes beneficial to the community. (p. 858.)

If the supreme court adheres to the *River Oaks* definition, a great many of the items in the laundry list of statutory exemptions (Tex. Rev. Civ. Stat. Ann. art. 7150) are of doubtful constitutionality: Item 14—art galleries; Item 15—Boy Scouts (unless they qualify as a "Y"); Item 16—demonstration farms (unless they qualify as "schools"); Item 19—Federation of Women's Clubs; Item 20—American Legion

and other Veterans' Organizations or "any non-profit organization chartered . . . for the purpose of preserving historical buildings, sites and landmarks"; first Item 22—fraternal organizations; second Item 22—nonprofit corporations using their property for (1) libraries and archival institutions; (2) zoos; (3) restoration and preservation of historic houses, structures and landmarks; (4) symphony orchestras, choirs, and chorals; and (5) theaters of the dramatic arts and historical pageants; Item 22a—ecological laboratories used solely by public and private colleges and universities in Texas; first Item 24—nonprofit corporations providing housing for the elderly if managed by a board of trustees selected by a church or strictly religious society; second Item 24—organizations promoting gardening; Item 25—real property owned by Nature Conservancy of Texas, Inc.; and Item 26—all garden clubs. (Beginning in 1959 with Item 21, the legislature has denominated the items "Section.")

If the minority view in *River Oaks* prevails, all foregoing statutory exemptions would probably be valid as would the tax exemption for a great many other nonprofit organizations. It can even be argued that the first and second Items 23, nonprofit water supply corporations, would be exempt under the minority view notwithstanding the defeat of the amendments discussed in the *History*.

A relatively recent supreme court case indicates that the justices are not prepared to adopt the minority view. In *City of Waco v. Texas Retired Teacher Residence Corp.* (464 S.W.2d 346 (Tex. 1971)), a per curiam opinion denied exemption to a retired home comparable to the exemption set forth in the first Item 24 set out above. The only difference was that the teachers' residence was not controlled by a board of trustees chosen by a church. The important point, however, is that the court made no reference to Item 24, adopted by the legislature in 1969, following *Hilltop Village, Inc. v. Kerrville I.S.D.* (426 S.W.2d 943 (Tex. 1968)), involving a residence meeting the requirements of Item 24. Instead, the court referred to Item 7, the "purely public charity" exemption, cited the *Hilltop Village* and *River Oaks* opinions, and concluded that not enough had been done to dedicate the facilities to the poor. In 1973 the attorney general advised the governor to veto an amendment of Item 24 that added handicapped persons, broadened control beyond a board of trustees selected by a religious group, and tied nonprofit status to tax exemption from the federal income tax. The attorney general relied on the recent *Amarillo Lodge* case discussed below, using the narrow language of "purely public charity" of that opinion. For reasons discussed below, *Amarillo Lodge* does not belong in the "purely public charity" category, but the attorney general is undoubtedly justified in relying on what the court said in reinforcement of the narrow view of the majority in *River Oaks*. (See Tex. Att'y Gen. Letter Advisory No. 52 (1972).)

The latest judicial struggle over "purely public charity" involved an intermediate nursing home. The home was operated by the Evangelical Lutheran Good Samaritan Society, which operates some 170 institutions in 21 states. Charges were made on the basis of ability to pay, with the society assuming the loss if the set charge was not met. An effort was made to deny exemption on the authority of the *River Oaks* and *Hilltop* cases discussed earlier. The supreme court upheld the exemption. (See *City of McAllen v. Evangelical Lutheran Good Samaritan Society*, 530 S.W.2d 806 (Tex. 1976) (three justices dissenting).) In essence the court adhered to the *River Oaks* rule by taking a realistic view of the facts of modern "purely public charity." Some people admitted to the nursing home paid the full rate; those who could not were "welfare patients," most of whom were "on welfare," which meant that the state contributed to their care. (This would include the working poor who are eligible for Medicaid.) An old-fashioned view of "charity" implies that public-spirited citizens provide the money to run an institution that serves the poor; an institution receiving government money to cover the cost of treating the poor does

not fit this old-fashioned view. But if the nonprofit, charitable institution does not turn people away because of inability to pay and does absorb any loss because of the government's failure to make a welfare grant large enough to cover costs, the institution is a "purely public charity" in today's world. In this realistic sense the Good Samaritan Society qualified.

In the course of such free-wheeling opinions as those of the majority and minority in *River Oaks*, the peculiar words of Section 2 tend to be forgotten. As pointed out earlier, the institution of purely public charity can be granted an exemption only for "buildings used exclusively" for the stated purpose. In the first Item 22 the legislature purported to give a blanket exemption to fraternal organizations so long as they engaged in "charitable, benevolent, religious, and educational work" and did not provide insurance for their members or support candidates for political office. The supreme court in *City of Amarillo v. Amarillo Lodge #731, A.F. & A.M.* (488 S.W.2d 69 (Tex. 1972) (two justices dissenting)) went straight back to the leading case of *City of Houston v. Scottish Rite Benevolent Ass'n* (111 Tex. 191, 230 S.W.978 (1921)) for the proposition that the institution must be organized and operated purely for public charity. Both in Houston and Amarillo the buildings were meeting places for groups that, among other things, engaged in charitable work.

The point is that whereas the quarrel over "charity" in *River Oaks* could be decided either way without doing violence to the English language, there are real difficulties over the word "exclusively." (Purists might argue that "charity" must be held to the same meaning held by the 1875 delegates. Many, including the majority in the *Good Samaritan* case, would disagree. A word like "exclusively" represents a value judgment that does not change with the times. What is "charity" today may differ from what was "charity" in 1875. What was "exclusive" then is still "exclusive.") In any event, the court's opinion in *Amarillo Lodge* turned on "exclusively" but, unfortunately, talked about "purely public charity" in the traditional narrow terms.

There have been other "exclusively" cases. Consider, for example, *City of Longview v. Markham McRee Memorial Hospital* (137 Tex. 178, 152 S.W.2d 1112 (1941)), where an exemption was lost because the hospital rented office space to two doctors. (Presumably, the doctors left and the hospital obtained an exemption the next year. Presumably, also, no hospital ever made that mistake after 1941.) Consider, also, the problem in *Hedgcroft v. City of Houston* (150 Tex. 654, 244 S.W.2d 632 (1951)), where a nonprofit corporation bought property on December 30, started work on converting the property into a hospital, and claimed an exemption on the succeeding January 1. In the eyes of the constitution as seen through the supreme court, the building was used "exclusively" as an institution of purely public charity on that first day of January.

In the earlier discussion of places of worship, the question was raised whether, under the amended statutory definition, a religious bookstore would qualify as an actual place of worship. It does not qualify as an institution of purely public charity. (See *Daughters of St. Paul, Inc. v. City of San Antonio*, 387 S.W.2d 709 (Tex. Civ. App. - San Antonio 1965, writ *ref'd n.r.e.*.) If the bookstore is still in business, the Daughters of St. Paul might try again using the new definition of places of worship.

All this raises the question of the extent to which assessor-collectors across the state follow the constitution, the supreme court, the legislature, or the election returns. Certainly the legislature has not paid much heed to supreme court opinions. Since 1963 when the *River Oaks* case denied exemption to a garden club engaged in preserving a historic building, there have been two enactments granting exemption for historic preservation and two enactments granting exemptions to garden clubs.

Perhaps the legislature was banking on the minority view in *River Oaks* becoming a majority.

Endowment funds. It was noted in the *History* that the endowment language first came in during 1906. Commas and semicolons were shifted around when more words were added in 1928. Neither version is intelligible. Fortunately, the supreme court, by brute force so to speak, took the words, twisted them around, and pronounced judgment on their meaning. (See *Harris v. City of Fort Worth*, 142 Tex. 600, 180 S.W.2d 131 (1944).) Except for the possible ambiguity noted below, the endowment clause means:

1. Endowment funds and the income therefrom of educational institutions and of religious institutions are tax-exempt.

2. Real property held for investment is not tax-exempt except for property acquired by foreclosure, but only for two years following the foreclosure sale. (See Tex. Att'y Gen. Op. No. 0-871 (1939).)

3. The institutions must be institutions that otherwise qualify for tax exemption under Section 2. That is, the institution would have to have a building used for school purposes or an actual place of worship.

There is one hooker in the supreme court case. The endowment fund was a trust for the benefit of Texas Christian University, characterized by the court as "admittedly an institution of learning and religion." (142 Tex., at 601; 180 S.W.2d, at 132.) This is the ambiguous language of the endowment clause. Do the words mean only a religious educational institution or do they mean institutions of learning and institutions of religion? (And since the 1928 amendment, when the YMCA and YWCA words got dropped in between school buildings and endowment funds, do their endowment funds get covered? The applicable statute purports to cover them. See Tex. Rev. Civ. Stat. Ann. art. 7150, item 2.)

Although the supreme court did not have to construe "such institutions of learning and religion," the thrust of its opinion would lead one to believe that it would have ruled the same had the trust fund been for the benefit of an educational institution not connected with a church. The court noted, for example, that from 1876 on there was a statute exempting endowment funds of institutions of learning and that the constitution was amended in 1906 "when for the first time the Legislature was authorized to exempt endowment funds." (142 Tex., at 604; 180 S.W.2d, at 133.) (Indeed, the ballot in 1906 called for a vote for or against an amendment "exempting from taxation endowment funds used exclusively for school purposes." See Tex. Laws, 29th Leg., p. 411 (1905).)

An unanswered question is whether endowment funds of "institutions of purely public charity" are tax-exempt. As noted earlier, those institutions are tied back to "all buildings used exclusively and owned by. . . ." In the statutory laundry list endowment funds are mentioned in the items on Schools and Churches, Christian Associations (the "Y"), and Demonstration farms (Tex. Rev. Civ. Stat. Ann. art. 7150, items 1, 2 and 16). In the last case, the wording is fascinating in its breadth. It refers to "demonstration farms for the purpose of teaching and demonstrating modern and scientific methods of farming," which sounds like an institution of learning, but the item ends up ". . . and when any of the income, over and above an amount sufficient to maintain and operate the same, is used and bound for the use of other institutions of public charity, . . ." which sounds as if the farms are not institutions of learning.

Absence of the term "endowment funds" does not mean that other statutory exemptions do not purport to include capital funds. Many of the statutory items refer to "all property," "the property," or "all real and personal property." These would include endowment funds. As noted earlier, the statutory "public charities"

Art. VIII, § 2

item used to refer only to “buildings,” as if tracking the constitutional language, but now it refers to “all buildings and personal property.” (Someone may argue that “personal” means “tangible personal,” which would exclude endowment funds. But this gets nowhere, for the constitutional language still covers only buildings.)

It is important to remember that the preceding discussion of the grammatical relationship between “buildings” and “institutions of purely public charity” is on the constitutional level. On the practical level the discussion is probably irrelevant. As pointed out in the *Explanation* of Section 1, most intangible property and much tangible personal property is not taxed. It makes little difference whether an institution of purely public charity omits to render property in reliance upon a statutory exemption that may be unconstitutionally broad or because most people do not render personal property anyway.

Presumptions. In the course of this *Explanation*, it has been noted from time to time that tax exemptions are to be “strictly” and “narrowly” construed. It is always a good question whether rules of construction like this one mean a great deal. A comparable rule of evidence is a rule placing the burden of proof on one side or the other—in the area of tax exemption, for example, the burden is on the taxpayer. Here the rule both governs the process of trial and affects the result. Whether a rule of construction affects the result is not clear. What is likely is that the rule of construction facilitates reaching a desired result quickly. Judges who think tax exemptions are not good find the traditional rule a handy tool; judges who approve of tax exemptions find the rule a hurdle. Presumably the former judges think that the rule governs them while the latter judges simply jump the hurdle while paying lip service to the rule. In any event, there is no known way to determine whether a particular rule of construction is actually decisive in any given situation.

Subsection (b). This subsection is in part an authorization to the legislature to exempt property and in part a command to provide an exemption; it is not a self-executing grant of an exemption as in Subsection (a) of Section 1-b. (See Tex. Att’y Gen. Op. No. H-88 (1973).) In the opinion just cited, the attorney general held that the statute carrying out the authorization and command of Subsection (b) was unconstitutional in its entirety even though he found only two relatively minor unconstitutional items in the statute. This was the result of a section that was the opposite of the traditional severability provision. The statute provided:

The provisions of this Act are declared to be non-severable, and if any provision of this Act is declared invalid by a final judgment of a court of competent jurisdiction as to any person, the Act is void.

In 1975 the legislature tried again. (See Tex. Rev. Civ. Stat. Ann. art. 7150h.) This time the legislature succeeded. Nevertheless, the attorney general had a bit of a problem with the wording of Subsection (b). The normal way to grant a partial exemption is to use the formulation found in Section 1-b: so many dollars of the assessed value of property. Subsection (b), however, refers to granting a veteran an exemption for “property valued at up to” so many dollars. Article 7150h uses the normal “assessed value” wording. This raised the argument that the enabling act was unconstitutional on the ground that the statute exempted the maximum permissible amount of assessed value instead of that amount of true value. Another argument against the constitutionality of article 7150h was based on the “up to” wording of the exemption. Since the subsection is, as to disabled veterans, simply an authorization to act, the dollar exemption figure is a limitation on the power of the legislature. This, the argument went, meant that no exemption could be granted if the value of the veteran’s property exceeded the maximum value authorized.

Art. VIII, § 2

In answering these arguments, the attorney general relied on two rules of construction, one of which is touched with irony. He quoted a supreme court opinion that stated that the policy of the courts is to construe liberally a constitutional provision directing the action of the legislature. (A tax-exemption authorization is to be construed liberally?) His second argument was more appropriate. This is the rule that courts give deference to a legislature's construction of a constitutional provision relatively contemporaneously adopted. Accordingly, the attorney general concluded that article 7150h carried out the intent of Subsection (b). (See Tex. Att'y Gen. Op. No. H-857 (1976).) What the attorney general would probably have liked to say is that everybody knows what these words of Subsection (b) mean and that nobody should let poor draftsmanship destroy the obvious purpose of the provision.

Comparative Analysis

In general. About a dozen states prohibit the granting of any exemptions not specified in the constitution. Another half dozen or so states have an "all-property-shall-be-taxed" provision which may have been construed to prohibit exemptions. A few states have provisions granting the legislature power to grant exemptions. Many of these are really limitations requiring that exemptions be granted by general law only. About half a dozen states have provisions authorizing particular exemptions but without a readily identifiable provision that would otherwise prohibit the exemption. In sum, it would appear that about half the states have no substantive restrictions on the power to grant exemptions.

For specific exemptions, there are three general categories. There are states like Texas which authorize exemptions of specific classes of property and prohibit all others. There are states that directly exempt whatever classes are to be outside the prohibition. The third category covers those states that do not restrict the power to grant exemptions but directly grant some exemptions. The second and third categories, of course, represent a restriction on the power to tax. All three categories of states total about 30. Most of them exempt or authorize the exemption of much the same classes of property—for example, cemeteries, charities, and schools. No other state appears to have a special exemption for endowment funds. The *Model State Constitution* has neither restrictions on granting exemptions nor mandatory exemptions.

Veterans. Approximately five states have a mandatory exemption for veterans, two of which are limited to disabled veterans. New Jersey had a modest veterans' exemption of \$500 but amended it to provide an annual reduction or cancellation of property taxes in the amount of \$50.00. About four states permit the legislature to grant an exemption, one of which is limited to disabled veterans and one of which is limited to disabled veterans' homes substantially paid for by the Veterans' Administration. At least two states include permission to extend the exemption to surviving widows and children of military personnel who died while on active duty.

Public property. The states generally follow the same practice with public property that is followed for other exemptions. If schools and charities are directly exempted, public property is, too; if the legislature is authorized to exempt schools and charities, the same authorization runs to public property. It is a good guess, however, that all states follow the sensible rule that one unit of government does not tax the property of another unit. There can be special exceptions, but the general theory is that governments do not tax each other since in the long run they must end up collecting the money from the same set of taxpayers.

There does not appear to be any other state that has three constitutional

provisions inconsistently dealing with the subject of taxing public property. (See the *Explanation* of Sec. 9 of Art. XI.)

Author's Comment

As a result of various amendments which took the form of inserting additional language designed to enlarge the legislative power, with no effort being made to simplify the section by redrafting, Article 8, Sec. 2 now consists of a remarkable sentence of almost three hundred words, with the seemingly impossible task of holding this amazing structure together being assigned to ten overworked commas and eight overburdened semi-colons.

Thus Justice Cadena, in a footnote to the *Davis* opinion discussed above, characterized what is now Subsection (a) of Section 2. One can proceed from his comment on the intelligibility of the wording of Section 2 to the advisability of the policy of Section 2.

Consider the following:

1. There have been 13 proposed amendments concerning exemptions from property taxes, eight of which have been on the ballot in the ten years preceding 1974.

2. The legislature has enacted a number of statutory exemptions that do not square with the constitutional restrictions on exemptions.

3. The legislature has enacted exemptions that purport to redefine an exemption in order to "overrule" a court case that relied not on the statute but on the constitutional limitation in Section 2.

4. Section 2 originally was filled with detailed restrictions on such exemptions as were permitted. Amendments, both those adopted and those defeated, continued the practice of providing great detail in spelling out new permissible exemptions.

The time has come to look at this exemption business totally afresh. There are cogent reasons for not restricting the legislature at all. There are those who are suspicious of government and fear that if the legislature has power to make reasonable exemptions it will exempt everybody willy-nilly. But there are those who realize that the tax structure is part of the larger complex of the economics of the society. Flexibility is necessary in tailoring the tax structure to the economic and social needs of the people. (The people, incidentally, are also the taxpayers.) A prohibition on granting tax exemptions can be a serious restriction on the flexibility needed to cope with changing fiscal and social requirements.

But if total flexibility is too much to accept, then the task is to find the minimum acceptable restriction on legislative power. The Montana Constitution of 1972, for example, preserved the power to grant some of the traditional exemptions, such as public property, charitable institutions, cemeteries, and schools, but added "(c) Any other classes of property." (Art. VIII, Sec. 5(1).) This will allow additional exemptions without the necessity of constitutional amendment. Someone will point out, of course, that Montana now has no real restriction except that exemptions must be a class of property, which is not much more than requiring that exemptions be made by general law.

If this is too much flexibility, then at least use the referendum device and avoid constitutional amendment. A skeleton provision might read:

Section _____ Exemptions.

- (a) The following classes of property may be exempted in whole or in part from taxation:

- (b) No other class of property may be exempted in whole or in part unless the law granting the exemption is approved by a majority of the qualified voters voting

Art. VIII, § 3

on the question at the general election next following enactment of the law.

In filling in the details under (a), it would be essential to use broad terms for classes—for example, “public property,” “property of nonprofit charitable institutions,” “property of educational institutions”—in order to avoid hassles like the ones that arose over such limiting words as “exclusively,” “actual places of worship,” and the like. Note that “in whole or in part” is designed to preserve legislative flexibility in controlling the extent of the exemption and not just the amount. Thus, the legislature could exempt property of educational institutions used for education but not exempt commercial and residential property used to produce income for the educational institutions.

The essential point is to keep legislation out of the constitution. One way is to leave the legislature free to act. The other way is to require referendum approval of additions to legislative power. The former preserves the purity of the constitution. The latter does also, but at the cost of burdening the voter with legislative policy matters.

Sec. 3. GENERAL LAWS; PUBLIC PURPOSES. Taxes shall be levied and collected by general laws and for public purposes only.

History

This section dates from 1876. It was one of the sections in the substitute article submitted by a dissenting member of the Committee on Revenue and Taxation. (See *Introductory Comment, supra.*) This section and Section 17 are the only ones that remained unchanged after the delegates accepted the substitute article.

In 1933 the legislature proposed to amend Section 3 by the addition of a long provision limiting the amount of revenue that the state could collect during a biennium to \$22.50 multiplied by the population of the state. In November 1934 the voters rejected the amendment by a healthy margin of 268,247 against to 66,873 for. (In today’s terms this would have permitted revenue of \$252 million for the 1971-73 biennium. The actual estimated revenue for the first year of that biennium was \$3.46 billion, of which approximately \$2.5 billion came from sources that would have been governed by the defeated amendment.)

Explanation

The “public purpose” part of this section duplicates the private purpose appropriation prohibition of Section 6 of Article XVI. And if money raised by taxation were to be handed over to private groups, the grants and loans prohibitions of Sections 51 and 52 of Article III would come into play. Notwithstanding all this duplication there may be occasions when a particular “purpose” falls afoul of one provision rather than another.

For example, in the leading case of *Waples v. Marrast*, the supreme court used Section 3 to invalidate a statute requiring counties to pay for the cost of primaries. Such expenditure was held not to be for a public purpose because political parties were private associations; their method of choosing a candidate was a private matter. (108 Tex. 5, 184 S.W. 180 (1916).) Section 3 was undoubtedly relied upon because the law did not provide for the grant of money necessary to invoke Sections 51 and 52. Section 6 of Article XVI may have been of doubtful use because of an inability to point to an “appropriation.” (The *Waples* case was overruled in 1972. See *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972).) Other cases relying only upon Section 3 have usually involved direct governmental expenditures. (See, for example, *Goodknight v. City of Wellington*, 118 Tex. 207, 13 S.W. 2d 353 (1929) (maintenance of city band); *Neal v. Cain*, 247 S.W. 694 (Tex. Civ. App.—

Beaumont 1923, *no writ*) (county expenditures for livestock tick eradication.)

Distinguishing between a public and a private purpose is not always easy, for there is a strong subjective element involved. To some extent courts insulate themselves from subjective judgment by reliance upon the presumption of constitutionality of legislation. Additional help comes from a legislative recital of public purposes. (See the discussion of the *Higginbotham* case in the *Explanation of Sec. 51 of Art. III.*) It is safe to say that over the years there has been a broadening of public purpose. Many things taken for granted today would not have been accepted by the 1875 Convention as an expenditure for a public purpose. (For an illuminating discussion of public purpose, see *Bland v. City of Taylor*, 37 S.W.2d 291 (Tex. Civ. App.—Austin 1931), *aff'd sub. nom.*, *Davis v. City of Taylor*, 123 Tex. 39, 67 S.W.2d 1033 (1934).)

The general laws part of Section 3 appears to have been construed as if, like Section 56 of Article III, the words “except as otherwise provided in this Constitution” had been included in the section. For example, a local law providing an extra motor vehicle registration fee in Harris County was held to violate Section 3. (*County of Harris v. Shepperd*, 156 Tex. 18, 291 S.W.2d 721 (1956).) But a local law creating a water district under Section 59 of Article XVI was upheld against an objection that the local law provided a method of taxation different from the method provided in the general law for such water districts. The court of civil appeals made the usual bow to the concept that a local law becomes general because the people generally are interested in the subject (see *Explanation of Sec. 56*) but went on to argue that Section 59 was adopted after Section 3 and is a “particular” provision whereas Section 3 is a “general” provision. (*Brown v. Memorial Villages Water Authority*, 361 S.W.2d 453 (Tex. Civ. App.—Houston 1962, *writ ref'd n.r.e.*)).

Comparative Analysis

About a dozen states specify that taxes are to be levied only for a public purpose. Almost as many states specify that taxes are to be levied only by general law. Only four states provide that taxes are to be levied by general law *and* only for public purposes. The Vermont Constitution of 1793 has a delightful way of expressing the purpose of taxation. In Article 9 of the Declaration of Rights it is said that “previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected.” Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

It has been suggested that it is wrong to try to control the purpose for which public money is spent by specifying who may not receive it. (See the *Author's Comment* on Sec. 51 of Art. III.) It follows that the right way is to control purpose directly. This is what Section 3 does.

It has also been recommended that local and special laws ought to be forbidden effectively. (See the *Author's Comment* on Sec. 56 of Art. III.) It follows that every opportunity to stress *general law* should be utilized. Section 3 does this.

Sec. 4. SURRENDER SUSPENSION OF TAXING POWER. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature, by any contract or grant to which the State shall be a party.

History

This section dates from 1876. In the substitute revenue article accepted by the

Art. VIII, § 4

convention, the section was a straightforward sentence ending with the word "Legislature." (*Journal*, p. 423.) Subsequently, an amendment was offered and adopted adding the words "but they and their property shall be taxed as other individuals." (*Id.*, at 485.) A few days later, new wording was proposed:

The power to tax all of the property, real and personal, of corporations shall never be surrendered or suspended by act of the Legislature, but the same shall always be taxed as other property. (*Id.*, at 528.)

This appears to have produced considerable debate revolving around the problem of the city of Sherman. (*Debates*, pp. 372-73. See *History of Sec. 5.*) The new proposal was tabled, following which the present concluding phrase was offered as a substitute for the additional words added earlier. The substitution was adopted by voice vote. (*Journal*, p. 528.) There is no indication in the debates why the substitution was made. (See the *Author's Comment* on this section for a speculative answer.)

Explanation

Among other corrupt practices in state legislatures in the middle of the 19th century was the granting of tax advantages to corporations, particularly in special acts chartering corporations. If the advantage was nailed down correctly, it was possible for a corporation to rely upon the United States Constitution's prohibition against a state's impairing the obligation of contracts. Section 4 was designed to make this impossible.

There appears to have been only one case arising under this section. *Gaar, Scott & Co. v. Shannon* involved a foreign corporation which obtained a ten-year permit to do business in Texas and paid the franchise tax required by law. Subsequently, within the ten-year period, the law was changed to require additional franchise taxes. The corporation paid under protest and sued for a refund. The court of civil appeals held that there was no impairment of an obligation, relying on Section 4 but implying that without such a section the same result would obtain. (115 S.W. 361 (Tex. Civ. App. 1908), *aff'd*, 223 U.S. 468 (1911).)

Comparative Analysis

About half the states have a prohibition against surrendering the power to tax. Interestingly enough, there is a stronger prohibition than the Texas version, namely, one that is across-the-board rather than limited to corporations. Half again as many states go that route as follow the Texas route. A few states include exceptions, mostly for the purpose of permitting use of tax advantages to lure corporations to build new plants in the state.

Author's Comment

Section 4 is confused grammatically. Presumably there is supposed to be an "or" in place of the comma. One can speculate that the delegate who proposed the concluding words pointed out that the original section covered only an act of the legislature, that there was nothing to stop the state from entering into a contract with a corporation whereby for a consideration certain taxes were given up. One must also speculate that no other delegate pointed out that Section 1 requires *all* property to be taxed, that Sections 51 and 52 of Article III prohibit grants in aid of any corporation whatsoever, that Section 17 of Article I prohibits irrevocable grants of special privileges, or that by putting "or contracted away" after "suspended" and dropping the words "by act of Legislature" the loophole would disappear.

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.