

THE INDIANA BILL OF RIGHTS

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The first Bill of Rights for Indiana was created when the constitutional convention of the Territory of Indiana met at the Harrison County Court House at Corydon on June 10, 1816. The convention had met for the purpose of drafting a constitution for a state government, a necessary condition to becoming admitted into the Union as a state. There was apparently no question but that a bill of rights should constitute a part of this constitution.

Since there seemed to be a general desire to achieve statehood by fall election time, the delegates wasted no time in accomplishing the purpose for which they had come. The convention itself was in session just twenty days, including two Sundays, finishing its labors on Saturday, June 29. The Bill of Rights was handled with like speed and dispatch. On Wednesday afternoon, June 12, the convention president, Jonathan Jennings, who was shortly thereafter to become the first governor of the state, appointed the committee on the preamble and bill of rights. Two days later, the chairman of the committee, John Badollet, reported to the convention a proposed bill of rights consisting of twenty four sections. Although no record of the debates of this convention was kept, it would appear from the convention journal that these sections received little discussion, and were approved by the convention with only slight changes being made.¹

A glance at the members of the committee on the bill of rights might explain to some extent why the proposed bill of rights passed with so little change. They were for the

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1. The amendment of section five was the main change made by the convention to the bill of rights suggested by the committee. The suggested section read: "That the right of trial by jury shall remain inviolate." As finally adopted it read: "That in all civil cases, where the value in controversy shall exceed the sum of twenty dollars, and in all criminal cases, except in petit misdemeanors, which shall be punishable by fine only, not exceeding three dollars, in such manner as the legislature may prescribe by law, the right of trial by jury shall remain inviolate." It is interesting to note that the two provisions on this subject in the constitution of 1851 sections 19 and 20 of Article I, reverted in substance back to the section as proposed by the Committee in 1816.

most part able men, some of whom were experienced in public service. The chairman, John Badollet, a member of a prominent French family, was born in Geneva, Switzerland. He came to Indiana Territory in 1800, became a lawyer in Knox county, and in 1805 was appointed judge of the Court of Chancery. At one time he was land officer at Vincennes. Solomon Manwaring, a native of Delaware, was also a lawyer. He was appointed judge of the court of Common Pleas in 1810, served in the Territorial Council from 1810 to 1816, and starting in 1817 was associate judge in the Dearborn Circuit Court for two consecutive seven year periods. Dennis Pennington was a very influential politician of Harrison county. Though a man of little culture, he was said to be "honest, firm, direct, open, frank. His mind was of fair order, well stored with facts. As a speaker he was strong without any pretense of eloquence."² He was several times member of the Territorial legislature and was speaker of the House in 1811 and 1815. James Smith, a lawyer from Gibson county, had at different times filled offices of Mayor, School Commissioner, and County Surveyor. He was also at one time Justice of the Peace in Knox county, and captain of the militia. John K. Graham, of Clarke county, came from Pennsylvania. Upon the Territory becoming the State of Indiana, Graham served in the legislature in 1816. And Daniel C. Lane, a lawyer from Harrison, was also active in politics. He became at various times an associate judge of a circuit, State Treasurer for seven years, and Representative in the State Legislature.

A comparison of the Indiana bill of rights of 1816 with that of the Kentucky constitution of 1792, and that of the Ohio constitution of 1803 indicates that little or no creative thinking was spent in its formulation. The committeemen saw their function as assembling the well settled principles of government in the best form possible to fit the peculiar needs of the state. Apparently the process was to pick and choose among the various existing constitutions for the most suitable provisions. Thus it is that an identical or almost identical counterpart for nearly every provision in the Indiana bill of rights of 1816 can be found in either the Ohio or the Kentucky constitutions above, and marked points of

2. Dunn, History of Indiana.

similarity can be found in the early constitutions of Tennessee, and Pennsylvania as well.

While this bill of rights was in existence, it served the state satisfactorily, for although, as was inevitable, as the years went by, a number of defects were found in the constitution of 1816, the bill of rights was seldom the subject of criticism. Finally, however, in the annual election of August, 1849 the growing demand for certain constitutional revisions produced a majority vote favoring a constitutional convention. At the convention, meeting pursuant to this election, a committee on the preamble and bill of rights was appointed with the able Robert Dale Owen named as chairman.³ Eventually, the bill of rights in its present form was drafted and adopted.

This convention was not so prone to accept without question the labors of the committee on the preamble and bill of rights, and so, from time to time certain portions of the proposed new bill of rights were subject to much discussion. Thus, in the first section of the bill of rights of 1851, as submitted by the Committee, that provision of the Declaration of Independence which also had appeared in substance in the Indiana bill of rights of 1816, declaring that all men are created equal, etc., had been omitted. Mr. Owen explained the omission on the grounds that the convention had not yet acted finally upon the proposed provisions establishing the rights of married women, and denying certain rights to negroes and mulattoes, and that the defeat of the former or the passage of the latter provision would be a direct contradiction to the words of the Declaration of Independence demanded by some of the delegates. After much debate, the submitted provision was amended to include the words of the Declaration of Independence but omitting the words describing the inalienable rights of all men as including the right "of acquiring, possessing, and protecting property."⁴

Section 21 of the Bill of Rights, providing for the manner of taking property for public use raised a hot debate

3. Other members of the committee on the preamble and bill of rights included: John B. Niles, John A. Graham, William R. Haddon, Hiram Prather, Joseph Coats, Elias Murray, Jacob P. Chapman, and George Berry.

4. Debates and Proceedings of the Indiana Constitutional Convention of 1850, Vol. I, pp. 952-964, 966-874.

between two conflicting interests, the rural land owners on one side, and the urban corporate interests on the other. The provision submitted by the committee provided for assessment of compensation for property taken by a jury of freeholders, and a requirement that the party taking the property must first tender compensation to the owner before taking the property. The rural interests desired further a provision prohibiting the enhancement of the value to the remaining property caused by the proposed improvement from being deducted from the damages assessed. The opposite side, of course, opposed all of these proposed changes from the existing system of taking property for public use. After several days' discussion, a provision was finally passed, similar to the section originally submitted, with the exception that the provision for a jury of freeholders was omitted.⁵

Section 22, the provision on homestead exemption also caused considerable discussion, with one faction desiring a detailed provision setting forth the system of exemption to be followed, the other faction opposing the principle of debtor's exemption altogether. In the end the opinion of Robert Owen prevailed—that although the principle of homestead exemption was good, the public was not ready for a detailed provision in this constitution—and the provision passed merely set out the principle and left the details to be cared for by the legislature. In keeping with the tendency to relieve the plight of the unfortunate debtor the last clause of section 21, providing that “there shall be no imprisonment for debt, except in the case of fraud,” was passed.⁶

Another important modification was made with respect to the grand jury system. Under section 12 of the Bill of Rights of 1816, the grand jury system was imperative. The expense and inconvenience of this system when used when only minor offenses were involved subjected it to criticism. But since after much discussion of the subject the delegates were unable to agree on a suitable substitute, a compromise was effected by which the provision was omitted from the Bill of Rights, and a provision that “The General Assembly may modify or abolish the Grand Jury System” was carried.

5. *Id.*, pp. 363-375, 382-394, 396-405, 406-420, 422-433, 436-438.

6. *Id.*, 718-721, 746-775, 776-796, 802-805.

Ind. 536, 187 N.E. 337 (1933). With respect to the geographical N.E. (2d) 977 (1936); *Gerlot v. Swartz*, 212 *Ind.* 292, 7 N.E. (2d)

This became section 17 of Article VII of the Constitution of 1851.⁷

Certain other changes were made without provoking such discussion, such as the addition of such sections as section 14, protecting against double jeopardy, section 23, guaranteeing to citizens equal privileges and immunities; and section 25, prohibiting laws the taking effect of which depends upon any authority except as provided in the constitution.

Likewise, certain changes in form were made by expanding certain provisions of the earlier constitution and contracting others.⁸

Also, certain sections which appeared in articles other than the bill of rights in the constitution of 1816, were incorporated in the Bill of Rights in the constitution of 1851⁹

The new Bill of Rights which was finally approved by the convention was a much longer Bill of Rights, consisting of thirty-seven sections. Some of the sections were common sections, practically copied from the old Bill of Rights and found in various other state constitutions as well as the Federal Constitution. Others were new, and rather unusual. Some of the sections were apparently clear in meaning; others rather obscure. Some of the sections have come up before the courts for construction and application time after time; others have had little occasion to be judicially construed. The form and content of these sections have re-

7. *Id.*, at pp. 135-160, 161-171, 173-199, 200-215. For debates on other provisions of the Indiana Bill of Rights see *Id.*, at 135, 161, 173, 200 (imprisonment for debt provision); Vol. II 1368 et seq.

8. For example section 3 of Article I of sections 2, 3, 4, and 5 of Article I of the Constitution of 1851, and section 6, providing that "No money shall be drawn from the treasury for the benefit of any religious or theological institution," and section 7, providing that "No person shall be rendered incompetent as a witness, in consequence of his opinions in matters of religion," were added. On the other hand, sections 9 and 10 of the Bill of Rights of 1816, guaranteeing freedom of speech and of the press, were set out more briefly in somewhat broader terms in sections 9 and 10 of the Bill of Rights of 1851.

9. Thus section 18 in the constitution of 1851, providing that "The penal code shall be founded on the principles of reformation, and not of vindictive justice was section 4 of Article IX in the Constitution of 1816. Likewise the treason provisions and the slavery provision in the Bill of Rights of 1851, sections 28, 29, and 37, were sections 23 and 7 of Article XI of the Constitution of 1816.

mained unchanged since the time they were approved by the convention.

But through constant court interpretation and occasional legislation these sections have been given life and meaning. We now turn to a section by section examination of the effect which these forces have had upon the guarantees of the Indiana Bill of Rights.

Section I. We Declare, That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

This section consists of a rather contradictory combination of phrases taken from the Declaration of Independence and section 2 of the Constitution of 1816, setting out two separate theories of government in the same paragraph. In the first part the theory that all people are equally endowed with certain inalienable natural rights is stated. But the latter part states that all power is inherent in the people, and that to advance their peace, safety and well being, the people have the indefeasible right to alter and reform their government. The question may arise as to whether, under the latter part, the people may alter and reform their government—searching for peace, safety, and well being of the people—to such an extent as to impair the natural rights enumerated in the first part. If so, the second part would seem to be the dominating part. If not, the idea of natural rights of the individual would be given supremacy and the statement in the second part can not be given its face value.

The discussions in the constitutional convention of 1851 on this section throw some light on the question. The provision submitted to the convention by the committee on the Bill of Rights as section 1 consisted only of the principles set out in the latter part of the present section—that “All power is inherent in the people,” etc. But this was amended by the Convention so as to include the words taken directly from the Declaration of Independence setting out the natural rights theory, and constituting the first part of the present

section. It would seem that this provision was inserted by the Convention for the purpose of further protecting the rights of the individual and of qualifying the provision submitted by the committee.

However this may be, it still would appear that neither the committee on the Bill of Rights nor the convention accredited this first part of section 1 with its face value, as setting down unchanging, fundamental principles of government protecting the rights of the individual. If such had been the feeling, the same respect would have been given to section 1 of the Bill of Rights of the Constitution of 1816, which also enumerated certain natural, inherent and inalienable rights. Yet the permanence and unchangeability of the inalienable rights set out in the Constitution of 1816 was not recognized by the majority of the convention. For although much of the substance of section 1 of the Bill of Rights of 1816 was adopted in the present section, still, the statement of the inalienable right to acquire, possess and protect property was omitted. It would seem that if this one provision for inalienable rights could be done away with by vote of the delegates of the people, coupled with ratification by the people, the rest of the inalienable rights could go the same way. It would follow that the provision that "all power is inherent in the people" is the dominating part of section 1.

The question as to which of the two parts of section 1 dominate the other has not directly arisen in the cases. But in a number of cases it has been contended that the first part of section 1 of the Bill of Rights has been violated. These decisions, though probably made without the above question in mind, seem to indicate either that the first part is not the dominating part of section 1, or else that the words "life, liberty and pursuit of happiness," are to be construed so narrowly as to give no individual protection other than is provided by the other sections of the constitution.

For example, statutes denying the right to carry on certain businesses, which have been attacked as conflicting with section I, article I of the constitution, apparently with the theory that the right to carry on a particular business is essential to "liberty or pursuit of happiness," have generally been upheld as not violating section 1 of the Bill of Rights. Thus a statute designed for the protection of the consuming public as well as for the established local merchants, pro-

hibiting transient merchants from transacting business without a license was upheld. *Levy v. State*, 161 Ind. 251, 68 N.E. 172 (1903). Likewise a more questionable statute requiring the payment of a prohibitive license fee for carrying on the business of selling to merchants coupons, tickets, or trading stamps to be given along with merchandise bought by consumers and to be redeemed for money or goods was held not in conflict with this section. *Sperry and Hutchinson Co. v. State*, 188 Ind. 173, 122 N.E. 584 (1918). (But the statute was held to violate section 23 of Article 1 of the Indiana Constitution; see *Infra*.) And in *Farmers and Merchants Co-operative Telephone Co. v. Boswell Telephone Co.* 187 Ind. 371, 119 N.E. 513 (1917) a statute requiring a certificate of public convenience and necessity from a public service commission before granting a license to public utilities for duplication of service was held to be a proper exercise of the state's supervisory power.

Other statutes which, though not denying the right to carry on certain businesses, materially impaired or interfered with the carrying on of certain businesses have also been held not violative of section 1 of the Bill of Rights. Thus, Acts 1907, ch. 121, requiring owners and operators of coal mines to provide suitable washrooms for their employees, was upheld as being a proper exercise of the police power. *Booth v. State*, 179 Ind. 405, 100 N.E. 563 (1912). Likewise an act prohibiting the use of "shoddy" (defined by the act as old worn clothing, carpets, or other fabrics or materials previously used), upon a showing that such material was unsanitary, in the manufacture of mattresses was held constitutional. *Weisenburger v. State*, 202 Ind. 424, 175 N.E. 238 (1930). The contention that an act regulating various phases of the milk business violated section 1, article 1, the court summarily dismissed saying, "Appellants were certainly not serious in making the above contention." *Albert v. Milk Control Board of Indiana*, 210 Ind. 283, 200 N.E. 688 (1936). The fact that often the courts used the argument that there was a proper exercise of the police power to answer the contention that the statute violated section 1 of the constitution indicates the absence of any feeling that the right to life, liberty and pursuit of happiness was absolutely inalienable.¹⁰

10. Under the police power the state may tax, regulate, or prohibit the sale of liquor. *Jordan v. Evansville*, 163 Ind. 512, 72 N.E. 544 (1904); *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19 (1918). It may regulate public utilities, in some

Another type of statute, often attacked as impairing the right to life, liberty and happiness is the statute designed to protect the economic interests of certain classes of people by placing limitations on their liberty to contract, and on the liberty of contract of those dealing with them. Generally these statutes have been upheld. A statute prohibiting any assignment of wages to be earned in the future by any laborer, and making such an assignment invalid was held valid. *International Text Book Co. v. Weissinger*, 160 Ind. 349, 65 N.E. 521 (1902). Similarly, an act prohibiting

cases, by enacting measures to prevent destruction of competition by such practices as discriminating between express companies in the receipt and carriage of goods; *Adams Express Co. v. State*, 161 Ind. 328, 67 N.E. 1033 (1903); and in other cases by enacting measures to prevent competition, such as requiring new businesses entering a particular field of public service to obtain certificates of public convenience and necessity from the state. *Farmers Telephone Co. v. Boswell Telephone Co.*, 187 Ind. 371, 119 N.E. 513 (1918). The state may require a telephone company to provide such additional facilities for toll service as to enable another company to provide adequate long distance service to other towns, although the compensation allowed at the time for the additional services might be inadequate. *McCardle v. Akron Telephone Co.*, 87 Ind. App. 59, 160 N.E. 48 (1927). The state may also regulate certain legitimate businesses for the purpose of protecting the consuming public from possible fraud, such as by authorizing city ordinances regulating the businesses of transient merchants; *Levy v. State*, 161 Ind. 251, 68 N.E. 172 (1903); or regulating the auctioneering of jewelry and valuable metals. *Gordon v. Indianapolis*, 204 Ind. 79, 183 N.E. 124 (1932). For the purpose of protecting public health the state may regulate the disposal of garbage, although the effect is to ruin the businesses of private individuals collecting kitchen refuse from restaurants and cafeterias. *Indianapolis v. Ryan*, 212 Ind. 447, 7 N.E. (2d) 974 (1937). And on the same grounds it may validly enact provisions designed to eliminate unfair trade practices and to stabilize production in the milk business. *Albert v. Milk Control Board v. Crescent Creamery Inc.*, 210 Ind. 283, 14 N.E. (2d) 588 (1938). A parking meter does not deprive an adjacent lot-owner of his right of ingress and egress. *Andrews v. Marion*, 221 Ind. 422, 47 N.E. (2d) 968 (1942). As to zoning ordinances, see *South Bend v. Marckle*, 215 Ind. 74, 18 N.E. (2d) 764 (1938); as regards the taking of an electric utility by a city, see, *Public Service Co. v. Lebanon*, 221 Ind. 78, 46 N.E. (2d) 480 (1942). Thus when the legislature has passed provisions for the purpose of protecting the health, morals, and general welfare of the public under its police power, the courts will not interfere merely because certain property rights of individuals have been impaired.

Apparently, however, the Indiana court has not accepted purely aesthetic legislation as an exercise of the police power, for it has said that while the building of bill boards may be regulated by ordinance, the government cannot without providing compensation therefor, require to be removed bill boards which are not nuisances per se: i.e. bill boards which are kept clean and sightly, are properly constructed and fire proofed, and advertise accredited commodities. *General Outdoors Advertising Co. v. Indianapolis*, 202 Ind. 85, 172 N.E. 309 (1930).

the assignment of wages, earned as well as unearned, by a married man without the consent of his wife was upheld. *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Marshall*, 182 Ind. 280, 105 N.E. 570 (1914). And a statute making it a criminal offence for an Indiana creditor to assign a claim against an Indiana debtor to one outside of the state for purposes of collection, in order to avoid the Indiana debtor's exemption laws was also upheld. *Markley v. Murphy*, 180 Ind. 4, 102 N.E. 376 (1913).

Other statutes definitely limiting the liberty of contract in certain situations which have been attacked as violating the above constitutional provision include the Indiana Bulk Sales Act, the Indiana statute prohibiting contracts in restraint of trade, and the Teachers Tenure Law. These statutes, on various grounds, were held valid. *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N.E. 1 (1912); *Knight and Jillson Co. v. Miller*, 172 Ind. 27, 87 N.E. 823 (1908); *Ratcliff v. Dick Johnson School Twp.*, 204 Ind. 525, 185 N.E. 143 (1933); *Brumfield v. State ex rel. Wallace*, 206 Ind. 265, 190 N.E. 863 (1934).

The inalienable right to life, liberty and pursuit of happiness have also been interpreted by the Indiana courts as not including the right to vote, *Mosley v. Board of County Commr's.*, 200 Ind. 515, 165 N.E. 241 (1929); the right of the local government to levy local taxes, *Zoercher v. Alger*, 202 Ind. 214, 172 N.E. 186 (1930); *Dunn v. City of Indianapolis*, 208 Ind. 630, 196 N.E. 528 (1935); and the right to peacefully picket the premises of another, *Thomas v. Indianapolis*, 195 Ind. 440, 145 N.E. 550 (1924).

There have been certain statutes interfering with the freedom to make contracts, dealing with relations between employer and employee, and allegedly for the purpose of protecting the welfare of the laboring class, which have been held to violate the above constitutional provision. A statute requiring every employer to make weekly payments of the full amount due to his employees for their labor to within six days of the time of payment was held a violation of article 1, section 1 of the state constitution. *Republic Iron Co v. State*, 160 Ind., 379, 66 N.E. 1005 (1902). And in *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N.E. 895 (1903), it was stated in effect that a minimum wage law, applying to the work and affairs of private citi-

zens, would be unconstitutional. However, neither case carries much weight to show that the life, liberty and pursuit of happiness clause places definite limitations upon the power of the people, through their representatives, to legislate, since in each instance other grounds for invalidity were also stated.

In another case, which did not involve the constitutionality of a statute, but rather the right of a woman to practice law, the Indiana court indicated an extremely lax attitude towards natural or inalienable rights. In sustaining the woman's right to practice law, the court spoke of the "higher" law "which accords to every citizen the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, sciences, the professions, or other vocations." The court then followed with, "This right may not, of course, be pursued in violation of the laws, but must be held to exist as long as not forbidden by law." Apparently the "natural" right spoken of in this case was subordinate to man made law. In *re Leach*, 134 Ind. 665, 34 N.E. 641 (1893).

It would appear, from the action of the constitutional convention of 1850, with reference to the first section of the Bill of Rights of 1816, and from the various court decisions since the changed section 1 was incorporated in the Bill of Rights of 1851, that the first part of section 1 is not a potent part of the constitution in the sense that its sections must be interpreted carefully and followed strictly, but is rather a general statement of a persuasive principle which should act as a guide post for the various functions of the government.

Power of the people to alter existing government. In two cases Indiana Courts have interpreted the latter part of section 1, article 1. In *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912) it was held that this section did not authorize the legislature to draft a new constitution making various changes in the old constitution, and pass it as a law which provided therein that the proposed organic instrument be submitted to the voters at general election. And, by *Bennett v. Jackson*, 186 Ind. 553, 116 N.E. 921 (1917), the legislature can not take the initiative to call a constitutional convention for the purpose of drafting a new constitution. Since the present constitution did not describe a

method for calling a convention, custom should prevail. And according to custom, calling a constitutional convention must first have the approval of the people, before the legislature gives its assent by passing an act providing for the election of delegates to the constitutional convention.

Section II. All men shall be secured in their natural right to worship Almighty God, according to the dictates of their own consciences.

An emergency order of the Board of Health and Charities of Indianapolis excluded school children who had not been vaccinated for small pox. In effort to enjoin the carrying out of this order it was contended, among other things, that the order was invalid as violating sections 2, 3 and 4 of article 1 of the Indiana Constitution. It was not stated in the argument or brief how such religious matters were violated, but the probable basis of this contention was that the order infringed upon the rights of those who had religious objections to such medical practices. The court upheld the validity of the order, pointing out that the right to require vaccination was not in question here; merely a provision that unless a child is vaccinated he may not go to school while the emergency lasts. *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677 (1934).

Section III. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.

The Indiana Supreme Court has consistently held that laws forbidding persons from pursuing on Sunday their regular labors or businesses do not conflict with section 4 of the Bill of Rights. Thus the court has upheld the convictions under such statutes for selling liquor on Sunday; *Voglesong v. State*, 9 Ind. 112 (1857).

Section 4 obviously prohibits legislation creating an established religion, or legislation directly encouraging the people to give support to one creed or religious belief while discouraging them from giving support to another. But the above cases indicate that section 4 is not to be construed as prohibiting legislation regulating the conduct of the people for their own social good, even though the conduct encouraged is incidentally the same conduct as is favored by various religious creeds. See *Carr v. State*, 175 Ind. 241, 93

N.E. 1071 (1910); State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N.E.(2d) 256 (1940).

Section V. No religious test shall be required as a qualification for any office of trust or profit.

(No annotations.)

Section VI. No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

The Indiana Division of Public Health has questioned the Attorney General of the State: Can the Indiana Division of Public Health furnish drugs or medicine to private or denominational institutions for the treatment of inmates who are infected with communicable diseases, even though they may be accepting cases in these institutions who are public wards, some of whom are also on per diem public expense? In the opinion of the attorney general this could not be done. It is apparent from sections 2, 3, 4, 5, and 6 that there was intended to be an absolute separation of the State and Church in their respective fields. It would be a violation of Section 6 to furnish drugs to the *institution* to enable it to carry on *its* work. If the drugs be furnished at all, they would have to be furnished to the individual receiving the treatment pursuant to some law. Opinions of the Attorney General of Indiana, 1934, p. 358. From this interpretation it would seem that under section 6 the state may not give support to any religious institution to carry out certain activities even though such activities could properly be made a function of an agency of the state.

Section VII. No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion.

(No annotations.)

Section IX. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right every person shall be responsible.

The Indiana Supreme Court in its decisions involving this section has not followed a very strong policy in protecting the right of free speech. But in the light of more recent Federal Supreme Court decisions, it would appear that the Indiana decisions are no longer the law. Thus, the Indiana

Supreme Court held, under a city ordinance making it unlawful to carry, on any public street or alley or other public place, any banner, placard, advertisement or handbill for the purpose of displaying the same, held that a striker convicted under this act for walking back and forth in front of a barber shop wearing an oil cloth shirt having the inscription "Barber Shop Unfair to Organized Labor" was not denied the right of free speech. The court said the defendant may hire a hall or print a paper, but the city has authority to place such restrictions upon the use of its streets as to as nearly as possible allow all to enjoy them and to prevent possibility of disturbance. *Watters v. Indianapolis*, 191 Ind. 671, 134 N.E. 482 (1921). But the Federal Supreme Court ruling that city ordinances prohibiting the distribution of hand bills in public places were a violation of the constitutional guarantee of free speech probably overruled this case. *Schneider v. State of New Jersey*, 308 U.S. 147, 60 Sup. Ct. 146 (1939); see *Lovell v. Griffin*, 303 U.S. 444, 58 Sup. Ct. 666 (1938). In the *Schneider* case it was said that the motive of the legislation to prevent the littering of the streets was insufficient to justify an ordinance which prohibits a person from rightfully handing literature to one willing to receive it. Likewise in the *Watters* case it could be said that the motive of the ordinance to prevent crowds gathering on the streets and prevent possibility of disturbance, would not justify prohibiting a person from expressing himself by the described means without such undesired consequences following.

In *Thomas v. City of Indianapolis*, 195 Ind. 440, 145 N.E. 450, an ordinance prohibiting all acts of picketing was held not to violate section 9. This is no longer the law in Indiana. The United States Supreme Court, in *Thornhill v. Alabama*, 308 U.S. 88, 60 Sup. Ct. 736 (1940), has held a statute similar to the above ordinance unconstitutional as denying the freedom of speech and of the press guaranteed by the due process clause of the Fourteenth Amendment. And prior to this decision, an Indiana statute providing that no court shall issue restraining orders against persons giving publicity to a labor dispute whether by advertising, speaking, patrolling or by any method not involving fraud or violence was held to make such an ordinance invalid. *Local Union No. 26 v. Kokomo*, 211 Ind. 72, 5 N.E. (2d) 624 (1937).

Section X. In all prosecutions for libel, the truth of the matters alleged to be libelous may be given in justification.

Under this section it was held that in defense to a criminal prosecution for libel it is not necessary to show that the words spoken were both true and made in good faith. If the words published were, in fact, true, whether published in good faith or not, defendants are not guilty of the crime charged. *State v. Bush*, 122 Ind. 42, 23 N.E. 677 (1889). Similarly truth alone was held a defense to a civil action for libel. *Palmer v. Adams*, 137 Ind. 72, 36 N.E. 695 (1893).

Section XI. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Search and seizure without warrant. Under this section all searches and seizures made without a search warrant must be "reasonable" searches and seizures. And in determining what may be "reasonable" and what may be "unreasonable" searches and seizures, the court has upheld certain statutes requiring individuals and business enterprises on certain occasions to open their otherwise private books to inspection by public officials. Thus the constitutionality of a statute giving various taxing agencies the right to inspect the books of public officers, corporations, and taxpayers of the state for the purpose of properly listing and assessing property for tax purposes was upheld. *Cooperative Building and Loan Assn. v. State*, 156 Ind. 463, 60 N.E. 146 (1900); *Washington National Bank v. Daily*, 166 Ind. 631, 77 N.E. 53 (1906); *cf. Applegate v. State*, 158 Ind. 119, 63 N.E. 16 (1900). Also, a city ordinance placing upon every licensed pawn broker the duty to keep detailed records of every transaction made, including a record of the party pawning the article as well as a description of the article itself, which record shall be open to police inspection, was held no violation of the searches and seizures provision. *Schuman v. Fort Wayne*, 127 Ind. 109, 26 N.E. 560 (1890); *cf. Medias v. City of Indianapolis*, 216 Ind. 155, 23 N.E. (2d) 590 (1939).

A proper search of a person and his effects may also be made without warrant when such a person is lawfully

arrested. Thus, when the defendant was arrested and put in jail for stealing a quantity of white corn from a crib, and it was noticed that the shoes he wore bore a striking resemblance to the tracks found near the corn crib, the fact that the sheriff and several others used necessary force to take defendant's shoes off did not amount to an unlawful search and seizure. *Biggs v. State*, 201 Ind. 200, 167 N.E. 129 (1929). And it is not always necessary that the arrest be made with a warrant. Individuals may be arrested for committing a misdemeanor, such as speeding, in the presence of a peace officer or some other person. Under such circumstances the officers have the right to search their persons, and the contents of their car, and to seize any evidence found therein which might involve them in an entirely separate offence, such as the illegal transportation of liquor. *Haverstick v. State*, 196 Ind. 145, 147 N.E. 625 (1924); *Jameson v. State*, 196 Ind. 483, 149 N.E. 51 (1925); *Daffoff v. State*, 198 Ind. 701, 153 N.E. 398 (1926). Similarly, a person arrested without a warrant while in the act of committing a felony is not immune from a search of his person and effects, including the vehicle he is using to aid in its commission. *Thomas v. State*, 196 Ind. 234, 146 N.E. 850 (1924); *Pettit v. State*, 207 Ind. 478, 188 N.E. 784 (1934). Although an officer may arrest without a warrant when he has reasonable grounds to believe a felony is being or has been committed, when he makes an arrest without such reasonable grounds the search and seizure following cannot be justified even by the fact that a felony actually was being committed. *Hart v. State*, 195 Ind. 384, 145 N.E. 492 (1925); *Morgan v. State*, 197 Ind. 374, 151 N.E. 98 (1925); *Boyd v. State*, 198 Ind. 55, 152 N.E. 278 (1926).

A lawful search and seizure may also be made without warrant when permission to do so is given by the owner and possessor of the premises. *Shade v. State*, 196 Ind. 665, 149 N.E. 348 (1925). And it has been held that the constitutional inhibitions referring to "persons, homes, papers and effects" does not make a warrant necessary to search fields, woods, or land some distance from the house. *Williams v. State*, 201 Ind. 175, 166 N.E. 663 (1929).

Search and Seizure with warrant. Sometimes it is not enough to justify a search and seizure by the fact that it was made under a search warrant. For the warrant must

be properly made out and issued—by the terms of the constitution, must be issued “upon probable cause, supported by oath and affirmation” and must describe particularly “the place to be searched and the person or thing to be seized”—in order to make lawful the action taken under it. There has been some confusion in the Indiana cases as to what is necessary to meet the requirement of “probable cause.” Apparently the past practice in obtaining a search warrant had been for the issuing officer to take evidence, oral or otherwise, as to what “probable cause” there was for the issuance thereof, and then issue it to the demanding officer upon his affidavit that “he believed or had reason to believe” that the persons whose premises were to be searched were violating the law, etc. With respect to this procedure it was held that a warrant could not be validly issued on such an affidavit of information and belief alone, when there was no showing that any evidence of probable cause was taken to support it. *Wallace v. State*, 199 Ind. 317, 157 N.E. 657 (1927); *State v. Blystone*, 200 Ind. 173, 162 N.E. 233 (1928). But among the later cases a conflict arose as to whether or not the facts as to probable cause given in evidence should also be made a part of the affidavit. At first the view was that this was not necessary. *Gwinn v. State*, 201 Ind. 420, 166 N.E. 769 (1929). But later cases held that it was. *Bedenarzik v. State*, 204 Ind. 517, 185 N.E. 114 (1933); *Dranik v. State*, 204 Ind. 661, 185 N.E. 514 (1933). This confusion has been settled in favor of the later cases by an amendment to section 9-602 Burns Ind. Stat. (1933), providing that in the affidavit filed for the purpose of obtaining issuance of the search warrant there must be set forth “the facts then in knowledge of affiant constituting probable cause.” Also “If any other evidence be heard for the purpose of establishing probable cause, such evidence shall be reduced to writing and filed with the affidavit for the search warrant.” See also *Barrar v. State*, 207 Ind. 706, 193 N.E. 94 (1934).

The phrase, “particularly describing the place to be searched, and the person or thing to be seized,” has been strictly and carefully construed by the Indiana courts to prevent any warrants which might give to the officer any discretion as to the premises to be searched, or property to be seized. Any warrants containing such a description as

would cover a number of residences rather than a single one have been consistently held invalid. *Flum v. State*, 193 Ind. 585, 141 N.E. 353 (1923); *State v. Phipps*, 194 Ind. 459, 143 N.E. 287 (1923); *Le Juste v. State*, 197 Ind. 327, 150 N.E. 7951 (1925); *Muleff v. State*, 198 Ind. 686, 154 N.E. 670 (1926); see also *Bumen v. State*, 203 Ind. 237, 179 N.E. 716 (1931). On the other hand, a warrant specifically describing premises but stating that the name of the owner is unknown, *Boyd v. State*, 195 Ind. 213, 143 N.E. 355 (1924), or a warrant describing a two story building as 214 and 214½ Wabash Avenue, *Hess v. State*, 198 Ind. 1, 151 N.E. 405 (1926), is not so indefinite as to be held invalid.

Consequences of an improper search and seizure. Naturally, if a statute violated the searches and seizures provision, it would be declared unconstitutional, and if an individual such as a public officer were to violate the provision by an unlawful search or seizure, he would be individually liable. *Carey v. Sheets*, 67 Ind. 375 (1879). But there is a conflict among the various jurisdictions as to whether or not a further remedy should exist, namely, that if evidence has been obtained against an accused person in violation of his privilege against unreasonable searches and seizures, it should be suppressed and declared incompetent. Indiana has followed the Federal rule that this further remedy does exist. *Callender v. State*, 193 Ind. 91, 138 N.E. 817 (1922). And in accord with the Federal rule, the Indiana appellate court has held that when the party has notice ahead of trial that certain evidence has been obtained by illegal search and seizure he must make the motion to suppress the evidence before the actual commencement of the trial in order to avail himself of this remedy. *Goebel v. State*, 89 Ind. App. 328, 166 N.E. 466 (1928); *Boston v. State*, 89 Ind. App. 583, 166 N.E. 448 (1929); *Foster v. State*, 89 Ind. App. 586, 166 N.E. 447 (1929); *McSwain v. State*, 89 Ind. App. 592, 166 N.E. 444 (1929); *Eichoff v. State*, 89 Ind. App. 606, 166 N.E. 445 (1929); *Hantz v. State*, 92 Ind. App. 108, 166 N.E. 439 (1930).

It is well settled that the right to suppress evidence obtained by illegal searches and seizures is a personal right, *Frye v. State*, 197 Ind. 515, 151 N.E. 728 (1925), belonging only to those having a proprietary interest in the property violated. Thus, when, during prohibition, A promised X, a

19-year old farm hand, living in the tenant house on a farm, \$59 for the license to run a still in an upstairs room in the house, the fact that officers found the still under a defective search warrant could not be objected to by A, since he had no proprietary interest in the premises searched under the defective warrant. *Snedegar v. State*, 196 Ind. 254, 146 N.E. 849, 147 N.E. 918 (1925); *Earle v. State*, 194 Ind. 165, 142 N.E. 405 (1923). And the Indiana court has made an interesting extension of this rule to the effect that when the defendant on trial denies that he has any connection with the premises illegally searched and the evidence illegally seized he is thereby precluded from standing upon his right under section 11 to suppress this evidence, even though the jury by its verdict of guilty find that he has an interest in such property. *Speybroeck v. State*, 198 Ind. 683, 154 N.E. 1 (1926).

Section XII. All courts shall be open; and every man for injury done to him in his person, property or reputation shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily and without delay.

1. The phrase, "all courts shall be open" is so indefinite and general that it could be interpreted in a number of ways, including that court proceedings should be open to public observation, or that every person may have his legal differences settled in a court of competent jurisdiction of the type known to common law. The guarantee of public trial, however, is covered more specifically in section 13, and the idea of an absolute right to have all legal differences settled in a common law court is not supported by the cases. See *Lake Erie and W. R. Co. v. Watkins*, 157 Ind. 600, 62 N.E. 443 (1902); *Grant Coal Mining Co. v. Coleman*, 204 Ind. 122, 179 N.E. 778 (1932); *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 23 N.E. (2d) 472 (1939). Re, a new party's right to sue, see *Dodd v. Reese*, 216 Ind. 449, 24 N.E. (2d) 995 (1939).

The Indiana cases throw no light on the meaning of this section. An appellate court case merely held that this phrase guaranteed a litigant not only the right to institute a suit but also to prosecute it to its final judgment, unless the litigant forfeits his right by vexatious conduct. *Sellers v. Myers*, 7 Ind. App. 148, 34 N.E. 496 (1893). Concerning

application to picketing cases, see *Scofes v. Helmar*, 205 Ind. 596, 187 N.E. 662 (1933).

It is unfortunate that the framers of this section did not set out the purpose of this section in more clear terms, for at present it would seem to have little effect as a guarantee of the rights of the individual.

2. The provision that "every man for injury done to him in his person, property or reputation shall have remedy by due course of law" has apparently for its counterpart in the Federal Constitution the due process clause of the fourteenth amendment. But the federal due process provision has been extended by the Supreme Court of the United States so as to preclude any state action which impairs the obligation of contracts, denies equal protection of the laws, takes private property for public use without compensation, denies freedom of speech and of the press, religious freedom, and the right to counsel, and various other rights and privileges of the individual. See Willis, *Constitutional Law*, p. 655. Since these guaranties have been covered in the state constitution by separate provisions, the scope of the state "due course of the law" clause is much narrower.

This clause might easily have been interpreted as protecting only those fundamental principles of judicial procedure of notice, opportunity to be heard before an impartial tribunal, and under an orderly course of procedure, in determining the legal rights and liabilities of the individual. *Kizer v. Town of Winchester*, 141 Ind. 694, 40 N.E. 265 (1895); *Bowlin v. Cochran*, 161 Ind. 486, 69 N.E. 153 (1903); *Freeman v. Pierce*, 179 Ind. 445, 101 N.E. 478 (1912). However, as will be shown, the Indiana cases indicate that this clause might be considered as guaranteeing substantive rights as well.

With respect to the procedural rights guaranteed under this section several Indiana cases involve the validity of proceedings provided by statute for the assessment and levy of special assessments for local public improvements. It has been held that the fact that the same body that makes the initial assessments conducts the hearing is no valid objection. *Dawson v. Hipskind*, 173 Ind. 216, 89 N.E. 863 (1909). And it is sufficient if notice and hearing before an impartial tribunal be given before the assessment becomes final and conclusive. *Bemis v. Guirl Drainage Co.*, 182

Ind. 36, 105 N.E. 496 (1914). Another statute restricting the manner of contesting the validity of any contract for any public improvement to a suit to enjoin performance brought within ten days from the execution of the contract or prior to the commencement of work thereunder, was also held not to violate this section. *Wooley v. Indiana Asphalt Pavement Co.*, 187 Ind. 575, 120 N.E. 597 (1918). And a statute directing a circuit or superior court to render judgment in terms of an order or award of the Industrial Accident Board, without provision for any hearing between the parties on the award was held not a violation of section 12. The legislature could and did give the Industrial Accident Board authority to investigate and pass on the facts of each industrial accident case, and to determine the award, and that award was the equivalent to the finding of a court or verdict of a jury. There was no need for a hearing to precede the judgment of the court. *Grant Coal Mining Co. v. Coleman*, 204 Ind. 122, 179 N.E. 778 (1932). See also *State v. Killigrew*, 202 Ind. 397, 174 N.E. 808 (1930); *Steve v. Colosimo*, 211 Ind. 673, 7 N.E. (2d) 983 (1936); *Warren v. Indiana Telephone Co.*, 26 N.E. (2d) 399 (1940); *Bituminous Casualty Corp. v. Dowling*, 111 Ind. App., 256, 37 N.E. (2d) 684 (1941).

In the cases in which this section has been raised in effort to defend some substantive rights, the court has generally held that such impairments of rights had been validly made under the proper exercise of the police power. Thus the validity of statutes providing in certain instances for recovery of attorneys' fees along with the recovery of damages on the principal cause of action has been upheld under the state police power. *Terre Haute & L. R. Ry. Co. v. Salmond*, 161 Ind. 131, 67 N.E. 918 (1903); *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N.E. 150 (1903); *Pittsburg C. C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N.E. 741 (1906); *Pittsburg C. C. & St. L. Ry. Co. v. Schmuck*, 181 Ind. 323, 103 N.E. 325 (1913). A statute providing for the incorporation of cemeteries with boards of managers who shall have authority to levy assessments on the lots in the cemetery, not to exceed 20% of the value of these lots for the purpose of maintaining, improving and enlarging upon the grounds, was upheld as a proper delegation of the police power of the state. *Paul v. Walkerton, etc. Cemetery Ass'n.*,

204 Ind. 693, 184 N.E. 537 (1932). And in *Sherfy v. Brazil*, 213 Ind. 493, 13 N.E. (2d) 568 (1938), the sixty-day limitation period for suing a municipality, construed to apply to a nine year old child, was held to be like any other statute of limitations, founded on state policy for public welfare and a proper restriction on the right of remedy. It was also held that the legislature may abolish such civil actions as those based on alienation of a wife's affections without violating section 12, since such liability is an incident of the marriage relations and as such is under legislative control. Although it was said in the opinion that a man's right to his wife's affection was not "property" within the meaning of this section, it is clear that the real grounds for the decision was in the police power of the legislature to control the marriage status. *Pennington v. Stewart*, 212 Ind. 553, 10 N.E. (2d) 619 (1937).

The fact that the Indiana Court has justified such impairments of substantive rights under the police power of the state, rather than holding merely that the "due course" of law clause does not protect substantive rights, would indicate that the court feels that this section, like the due process clauses of the Fifth and Fourteenth Amendments, may include certain substantive rights within its protection.

3. The provision that "Justice shall be administered freely and without purchase," having its foundation in the Magna Charta, was intended as a death blow to such corrupt and disgraceful practices as requiring payment of fines for such court concessions as granting justice, having proceedings speeded, or having proceedings slowed or stopped. So far as Indiana is concerned there has been no necessity to employ the provision for such a purpose. However, one cannot expect to get the benefit of a court proceeding or court process and pay nothing. Even one defending a criminal charge as a poor man and thereby being furnished with free counsel may not demand that a copy of the evidence be furnished to him free of charge, although such a copy may be necessary in order to appeal. *Ex Parte Morgan*, 122 Ind. 428, 23 N.E. 863 (1889). Likewise, it is proper for the sheriff under statutory authorization to make charges for his services on the commission basis. *Henderson v. State*, 137 Ind. 552, 36 N.E. 257 (1893); *State v. Laramore*, 175 Ind. 478, 94 N.E. 761 (1911).

4. There are no Indiana cases interpreting the provision that "Justice shall be administered . . . completely and without denial," and hence no more force can be attributed to this phrase than to the statement that "all courts shall be open."

5. Although there are practical difficulties involved in complying with the direction that "Justice shall be administered . . . speedily and without delay," when attempts are made by legislation to relieve the congestion blocking the speedy disposal of cases, this section has been relied upon to sustain the validity of the statute. This was done in upholding a statute providing that the jurisdiction of all appeals now pending or hereafter taken in certain minor criminal cases is hereby vested in the appellate court in order to relieve congestion on the Supreme Court docket. However, the fact that speedy justice is not given, by reason of a series of prosecutions, convictions, appeals, and reversals does not justify the defendant's release on a writ of *habeas corpus*. *Kinningham v. Dickey*, 123 Ind. 180, 24 N.E. 1048 (1890).

Section XIII. In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

1. The provision for the right to public trial is probably intended to protect the individual from such secret criminal proceedings as existed in the days of the court of Star Chamber, and even exist today in those countries where the power of the government relies to a great extent upon the activities of the secret police. In this country since quite often the court room is not large enough to accommodate all members of the public interested in the trial, and since the right of the judge on certain occasions to remove spectators from the court room is well recognized, it is clear that this section is not an absolute guarantee to the public of the right to attend trial. However, from federal decisions it would seem that the right is guaranteed to the accused to have present at the trial a certain group of persons, including representatives of the press, friends of the accused,

and selected representatives of the general public. *Reagan v. U.S.*, 202 Fed. 488 (C.C.A. 9th Circ., 1913); *Davis v. U.S.*, 247 Fed. 394 (C.C.A. 8th Circ., 1917).

An Indiana case held that this section does not necessarily require that all proceedings related to the trial take place in the court room. The formal declaration of sentence given in a room other than the usual court room is proper where the court gave proper notice that it was in session and there was full opportunity for those interested to be present. *Reed v. State*, 147 Ind. 41, 46 N.E. 135 (1896).

2. Under the guarantee of trial by impartial jury a conviction may be reversed when the conviction was clearly the result of a partial jury. On the other hand, mere irregularities in selecting and maintaining the jury, which might have some remote effect on the partiality of the jury, are not reversible error, when there is no showing that the verdict was the result of a partial jury. Thus the mere fact that the trial court arbitrarily requires the defense to make its *voir dire* examination of the jury first does not of itself violate the constitutional guarantee of an impartial jury. *Hicks v. State*, 199 Ind. 401, 156 N.E. 548 (1927); see *Harding v. Minas* 206 Ind. 661, 190 N.E. 862 (1934). And, although there was a reversal when upon *voir dire* examination a jurymen untruthfully answered a question as to whether or not he knew a particular person involved in the case, it was pointed out that the evidence upon which defendant was convicted was very weak. *Foreman v. State*, 203 Ind. 324, 180 N.E. 291 (1931). But when the evidence sufficiently shows that there has been intentional and arbitrary discrimination in the selection of persons to be drawn as jurors, excluding a class of persons on account of sex, race, or color, it is grounds for reversal. *Walter v. State*, 208 Ind. 231, 195 N.E. 268 (1935); *cf.* *Swain v. State*, 215 Ind. 259, 18 N.E. (2d) 921 (1939). A person charged with a crime may waive his right to trial by jury and agree to trial by the court. *Brown v. State*, 219 Ind. 251, 37 N.E. (2d) 73, 137 A.L.R. 679 (1941).

Under the general guarantee of a right to jury trial, it has been held that there is no right to have the jury assess the amount of punishment to be inflicted. This is within the province of the legislature. It can set the punishment itself, or authorize other agencies such as the judge, the

reformatory board, or the jury to set the punishment. *Mack v. State*, 203 Ind. 355, 180 N.E. 279 (1931); *Stevens v. Anderson*, 145 Ind. 304, 44 N.E. 460 (1896); *Miller v. State*, 149 Ind. 607, 49 N.E. 894 (1897).

3. Under the provision giving the individual charged with a crime the privilege of trial in the county where the offense was committed, a defendant who commits the crime of burglary in one county, and transports the stolen goods into another county may not be prosecuted for both crimes in the latter county. *Martin v. State*, 176 Ind. 317, 95 N.E. 1001 (1911). However, this provision protects only the right to trial, and does not require that indictment be brought in the county where the offense was committed. *Welty v. Ward*, 164 Ind. 457, 73 N.E. 889 (1904). And when a crime is committed the incidents of which cover more than one county, such as a murder wherein the mortal wound is inflicted in one county and the death occurs in another, prosecution can be brought in either county involved. *Peats v. State*, 213 Ind. 560, 12 N.E. (2d) 270 (1938). As to what constitutes a criminal prosecution, see *State ex rel. Cutsinger v. Spencer*, 219 Ind. 148, 41 N.E. (2d) 601 (1941).

4. The right to be heard by counsel has been said to include not only the right to be heard by counsel at the trial, but also the right to consult with counsel at every stage of the proceeding. *Batchelor v. State*, 189 Ind. 69, 125 N.E. 773 (1919); see also *Bielich v. State*, 189 Ind. 127, 126 N.E. 220 (1919).

In an early case it was said the appointment of counsel to defend persons charged with grave crimes, who are too poor to employ counsel on their own behalf, is indispensable to the orderly administration of justice. *Hendryx v. State*, 130 Ind. 265, 29 N.E. 1131 (1891); *Lloyd v. State*, 206 Ind. 359, 189 N.E. 406 (1933). However, it was pointed out in *Houk v. Board of Commr's.*, 14 Ind. App. 662, 41 N.E. 1068 (1895) that the right of the accused to have his counsel furnished at the expense of the public was given by statute and not by the constitution, and that that right did not apply to the justice court. The court may refuse to assign to poor persons the counsel they may choose. *Burton v. State*, 75 Ind. 477 (1881), but the defendant must have counsel, *Knox County Council v. State ex rel. McCormick*, 217

Ind. 493, 29 N.E. (2d) 405 (1940); *Irwin v. State*, 220 Ind. 228, 41 N.E. 809 (1942).

Under the right of accused to be heard by himself, the accused may not of his own choice appear for himself, conduct the trial for himself, cross-examine witnesses, and give a long detailed statement of the evidence in his defense, and then demand the right to be heard by counsel. *Marovich v. State*, 202 Ind. 274, 173 N.E. 326 (1930).

5. The right to demand the nature and cause of the accusation has been interpreted as entitling the accused to have the gist of the offense or the material averments of the indictment clearly stated in direct and unmistakable terms, so as to apprise him of the nature and character of the charge against him. *Kimmel v. State*, 198 Ind. 444, 154 N.E. 16 (1926); *Kraft v. State*, 202 Ind. 44, 171 N.E. 1 (1930). In other words, every essential element of the crime charged must be set out in the indictment or declaration. For example, in the crime of blackmail the intent to extort money is one of the essential elements; and the statement that the accused did acts with the intent to extort certain pecuniary advantages, the exact nature of which were unknown was held insufficient under this provision. *McNamara v. State*, 203 Ind. 596, 181 N.E. 512 (1932); see also *Hinshaw v. State*, 188 Ind. 147, 122 N.E. 418 (1918); *Glendale Coal Co. v. Douglas*, 193 Ind. 73, 137 N.E. 615 (1922); *State v. Brown*, 208 Ind. 562, 196 N.E. 696 (1935); *Shelton v. State*, 209 Ind. 534, 199 N.E. 148 (1935); *Roby v. State*, 215 Ind. 55, 17 N.E. (2d) 800 (1938).

6. The cases decided in Indiana on the right to confrontation of witnesses are in accord with the cases of other jurisdictions. They recognize exceptions to this right, in admitting testimony given by a witness on a previous trial, as which time the defendant had the right to be confronted by the witness, upon a showing that the witness is now dead, insane, or lost and diligent search has been made to find him. *Wilson v. State*, 175 Ind. 458, 93 N.E. 609 (1910); *Levi v. State*, 182 Ind. 104 N.E. 765 (1914); *Brown v. State*, 219 Ind. 251, 37 N.E. (2d) 73, 137 A.L.R. 679 (1941).

Section XIV. No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself.

1. The early background of the provision protecting individuals from being put twice in jeopardy for the same offense indicates that its purpose was to prevent such oppressive occurrences as the retrial under a new government of persons who had been acquitted of the same offense under a preceding regime. *Ex Parte Bradley*, 48 Ind. 548, (1874). In the light of this purpose it would be reasonable to hold that jeopardy attaches only when the jury returns a verdict. However, Indiana is in accord with the federal view in extending the protection of this provision by ruling that jeopardy attaches whenever a person has been given in charge to a regular jury, duly impaneled and sworn, on a legal indictment. *Gillespie v. State*, 168 Ind. 298, 80 N.E. 829 (1907); see *Weinzorpflin v. State*, 7 Blackf. 186 (1844). Thus, if, after the jury is impaneled and sworn, the court allows the prosecution, over the objection of the defense, to discharge a juror without cause, the defendant's discharge is equivalent to an acquittal. The double jeopardy provision protects him against being placed on trial before a different jury for the same offense. *Gillespie v. State*, *supra*; see *State v. Wilson*, 50 Ind. 487 (1875).

To this broad rule, Indiana has recognized exceptions whereby under certain circumstances proceedings may be terminated after the jury has been sworn and defendant will still be subject to a new prosecution for the same offense. Thus, a juror may be excused on account of sickness; *Doles v. State*, 97 Ind. 555 (1884); or the jury may be discharged after due deliberation on account of inability to agree; *State v. Leach*, 120 Ind. 124, 22 N.E. 111 (1889); *State v. Larimore*, 173 Ind. 452, 90 N.E. 898 (1909); or the judge may of his own accord stop the trial when it appears that the indictment is so defective as to be unable to support a conviction, see *Joy v. State*, 14 Ind. 139 (1860), without giving the defendant an immunity from a later prosecution for the same offense.

Also, the immunity against double jeopardy may be waived by the defendant in such instances as when he moves for a new trial, or for an arrest of judgment. *Ledgerwood v. State*, 134 Ind. 81, 33 N.E. 631 (1892); *State v. Joy Ex Parte Bradley*, both *supra*. Likewise, a writ of error *coram nobis* waives the defendant's immunity against double jeopardy, if granted, even to the extent that if on the second

prosecution defendant is again convicted, the fact that he has already paid his fine or served his sentence will avail him nothing. *State v. Killgrew*, 202 Ind. 397, 174 N.E. 808 (1930).

The privilege against double jeopardy applies only when there is an attempt to prosecute a second time for the same offense. But the fact that the defendant has been prosecuted for one offence will not preclude his prosecution a second time for the same actual conduct if the offense charged is a different offense. Thus under a statute prohibiting the selling, bartering, or giving away of intoxicating liquor to a person already intoxicated, acquittal on the charge of giving away intoxicating liquor will not prevent prosecution for selling intoxicating liquor. *State v. Reed*, 168 Ind. 588, 91 N.E. 571 (1907); and see *Miller v. State* 33 Ind. App. 509, 71 N.E. 248 (1904). It is said that the second prosecution refers to the same offense whenever that which is set out in the second indictment, if proved, would have sustained a conviction under the first prosecution. Thus, a prosecution for transporting intoxicating liquor in an automobile, a felony by statute, is precluded by an earlier prosecution on the general misdemeanor of unlawfully transporting intoxicating liquor. *Arrol v. State*, 207 Ind. 321, 192 N.E. 440 (1934).

Double jeopardy applies only to bar a second prosecution for the same offense in the same jurisdiction, and not to a second prosecution for the same offense in some other jurisdiction. Thus, it is no objection to an indictment for an offense against a state statute that the defendant is liable to punishment for the same act under a federal law. *State v. Moore*, 6 Ind. 436 (1855).

2. The Indiana cases determining the extent of the privilege against self-incrimination are for the most part in accord with the federal cases construing a similar provision. Section 14 has been held to go much farther than to prevent an accused person from being compelled against his will to give testimonial evidence which might establish his guilt of the crime charged. It guarantees a person freedom from being compelled to give evidence in any proceeding whether civil or criminal which might be used against him in any criminal prosecution. *French v. Venneman*, 14 Ind. 282 (1860). Such a witness may refuse to make an answer which would tend to criminate him or furnish one link in

the chain of evidence. And although the court is authorized to determine whether the privilege to refuse to answer exists on each occasion, the court is bound by the statement of the witness as to its effect, unless it clearly appears that the witness was mistaken as to its effect, or that the witness refusal was purely contumacious. *Overman v. State*, 194 Ind. 483, 143 N.E. 607 (1924).

The privilege has been held to apply not only to examination on trial but also to pre-trial examinations by grand juries; *State v. Comer*, 157 Ind. 611, 62 N.E. 452 (1902); or by investigating officers, such as the State Fire Marshall. *Ogle v. State* 193 Ind. 187, 127 N.E. 547 (1923); see *Kokenes v. State*, 213 Ind. 476, 13 N.E. (2d) 524 (1938).

The privilege of an accused person has been extended in Indiana by decision and statute beyond the mere right to refuse to answer questions. It includes a privilege not to be called to the witness stand by court or prosecutor, and prevents the state from commenting upon the fact that the defendant has failed to testify in his defense, or has failed to produce books or papers in his possession which should have cleared him of the shadow of guilt—if he were innocent. *Cassidy v. State*, 201 Ind. 311, 168 N.E. 18 (1929); *Sprague v. State*, 203 Ind. 581, 181 N.E. 507 (1932); see also *Keifer v. State*, 204 Ind. 454, 184 N.E. 557 (1933).

In accordance with the federal ruling in *Boyd v. United States*, 116 U.S. 616, 6 Sup. Ct. 524 (1885), employing both the Fourth and the Fifth Amendments of the federal constitution in holding that papers and articles obtained by illegal searches and seizures are inadmissible in evidence, the Indiana Court has coupled section 14 with section 11 of article 1 of the Indiana Constitution to reach the same result. *Flum v. State*, 193 Ind. 585, 141 N.E. 353 (1923); see *supra*, section 11.

One limitation upon the privilege against self-incrimination has been plainly marked out by the Indiana cases. The privilege exists only as to testimonial compulsion as distinguished from compulsory submission to treatment which furnishes evidence for the purpose of identification of the accused. Thus the admission into evidence of the results of an examination of the accused's body, against his will, to find certain scars and marks thereon, was held not a violation of the privilege against self-incrimination. *O'Brien*

v. State, 125 Ind. 38, 25 N.E. 137 (1870). Nor was the use of shoes taken from the accused by force, after his arrest, for purposes of identification, a violation of the self-incrimination clause. *Briggs v. State*, 201 Ind. 200, 167 N.E. 129 (1929). Likewise, holding accused until his beard grew out and then holding a handkerchief over the lower part of his face to identify him as a bank robber was proper. *Ross v. State*, 204 Ind. 281, 182 N.E. 865 (1932); and see *Noelke v. State*, 214 Ind. 427, 15 N.E. (2d) 950 (1935).

The accused may, of course, waive his privilege against self-incrimination, and when he testifies before a grand jury without objection, he is deemed to have done so voluntarily, although he may not have been informed of his privilege against self-incrimination beforehand. *State v. Comer, supra*. The defendant by testifying as a witness in his own behalf waives his privilege against self-incrimination to the extent of the bounds of legitimate cross-examination. *State v. Schopmeter*, 207 Ind. 538, 194 N.E. 144 (1935). See also, *Schneider v. State*, 220 Ind. 28, 40 N.E. (2d) 322 (1941); *Spitler v. State*, 221 Ind. 107, 46 N.E. (2d) 591 (1942). Since the purpose of the privilege against self-incrimination is to permit an individual to refrain from so testifying as to make himself liable to be criminally prosecuted, the state may by a statute completely do away with any criminal liability that might arise from the subject matter of his testimony, and so do away with the privilege. However, it was held that a witness could not be compelled to testify under a statute which gave him immunity from prosecution only for the crime involved in the particular case, since this did not fully shield the witness. *Overman v. State, supra*.

It has also been held that the state under its police power in regulating the use of state highways may by statute impose certain conditions upon those who use the highway which might infringe upon their privilege against self-incrimination. A statute requiring every driver involved in an automobile accident to stop and leave his name, address, license number, and the certificate of registration of his auto, was held constitutional. *Ule v. State*, 208 Ind. 255, 194 N.E. 140 (1935).

Section XV. No person arrested or confined in jail shall be treated with unnecessary rigor.

This section, although it clearly sets out a policy against the mistreatment of prisoners, apparently affords little protection beyond what is afforded by other sections of the constitution. Thus, while this section plainly prohibits such methods as the "third degree" from being used to extort confessions from suspected criminals, it apparently goes no further than to make confessions so extorted inadmissible as evidence, a rule which may also be based on section 14. *Kokenes v. State*, 213 Ind. 476, 13 N.E. (2d) 524 (1938). Section 15 has also been cited to support the rule that it is reversible error to bring the accused to bar in irons or shackles unless there be evident danger of escape, but because of the prejudicial effect that such an appearance might have on the jury, section 13, guaranteeing the right to trial by an impartial jury also supports this rule. *Hall v. State*, 199 Ind. 592, 159 N.E. 420 (1928). However it may be said that section 15, in setting out a strong policy against cruelty and violence to prisoners, should give support to the civil or criminal proceedings brought against the offending officers. *Bonahoon v. State*, 203 Ind. 51, 178 N.E. 570 (1931).

Section XVI. Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offenses.

1. This section seems to set out general limitations on the severity of various criminal sanctions, but Indiana cases definitely interpreting this section are scarce. The meaning of the word "excessive" as applied to bail and fine has not been concretely defined by the cases. But with respect to bail, the general rule suggested under the similar provision in the federal constitution—that the amount is not excessive as long as, upon considering the seriousness of the offense, the probability of guilt, and the prisoner's pecuniary circumstances, no more is required than will secure the party's attendance (*Willis, Constitutional Law*, p. 559)—is probably followed in Indiana.

2. The early Indiana cases which involved the question as to whether or not a "cruel and unusual" punishment had been inflicted indicated a tendency to construe this provision very narrowly. When a sentence or fine was attacked which had been set within the limits set out by statute, the rule was stated that no matter how harsh and severe the

punishment seemed, the only remedy the accused had under this provision was to attack the constitutionality of the statute. *Shields v. State*, 149 Ind. 395, 49 N.E. 351 (1884); *Miller v. State*, 149 Ind. 607, 49 N.E. 894 (1898). And when the statute was attacked as prescribing excessive punishment, the early cases indicated that this provision was aimed at the form and character of the punishment rather than its severity in respect to term of imprisonment or amount of fine. *Hobbs v. State*, 133 Ind. 404, 32 N.E. 1019 (1892); *Kistler v. State*, 190 Ind. 149, 129 N.E. 625 (1921); *McCutcheon v. State*, 199 Ind. 247, 155 N.E. 544 (1927).

But apparently both of these rules have been reversed by the more recent case of *Cox v. State*, 203 Ind. 544, 181 N.E. 469 (1932). In this case the court declared that the fact that a statute provided punishment, the degree or amount of which was excessive or unreasonable, would be sufficient grounds for declaring it unconstitutional, and also that the court should be free to give relief against a cruel and unusual punishment inflicted under a valid statute where the courts have abused their discretion in fixing the amount of punishment. Under this case Section 16 has become a more potential force in protecting the rights of accused persons.

3. The meaning of the statement that all penalties shall be proportioned to the nature of the offenses is quite clear, but the strictness with which the phrase should be applied has not been settled by the Indiana cases. However it has been held that statutes which fail to prescribe the maximum penalty to be awarded upon perpetration of a wrongful act do not violate this provision. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N.E. 679 (1901); *Sweigart v. State*, 213 Ind. 157, 12 N.E. (2d) 134 (1938). In the latter case it was said that even where no maximum penalty is imposed by statute, the power to impose a fine is limited by the provision that "excessive fines shall not be imposed."

Section XVII. Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.

In determining when the right to bail exists in murder and treason cases, it is well settled in Indiana that upon a charge of murder the indictment stands as prima facie evidence that the defendant has no right to bail, and that the

burden is on the defendant to show that the proof of guilt is not evident or that the presumption of guilt is not strong. Ex parte Heffren, 27 Ind. 87 (1866); Ex parte Jones, 55 Ind. 176 (1876). In introducing evidence to sustain his burden of proof the accused is required to introduce the evidence of witnesses indicated by the indictment, and also of such witnesses as the State shall indicate that it relies on; but he may also introduce other witnesses, whom the state does not rely upon. State v. Hedges, 177 Ind. 589, 98 N.E. 417 (1912); McAdams v. State, 196 Ind. 184, 147 N.E. 764 (1925).

The immunity against imprisonment without bail exists only before the case has come to trial. After the trial, release on bail may be obtained pending appeal, not under the constitutional immunity, but rather, as a matter of grace afforded by the legislature under particular conditions. Ex parte Pettiford, 97 Ind. App. 703, 167 N.E. 154 (1929).

Section XVIII. The penal code shall be founded on the principles of reformation, and not of vindictive justice.

This section has several times been the basis of an attack upon the validity of a criminal statute providing somewhat stringent punishment, but since on none of these occasions did the court see fit to hold this section violated, there has been no occasion requiring a judicial clarification of its rather indefinite terms. Thus, it was held that statutes providing the death penalty for the crime of murder was not vindictive punishment under this section. Rice v. State, 7 Ind. 332 (1855); Driskell v. State, 7 Ind. 338 (1855); McCutcheon v. State, 199 Ind. 247, 155 N.E. 544 (1927). Nor did the statute providing imprisonment for from one to three years and disfranchisement of three years for desertion of wife or children violate this section. Kistler v. State, 190 Ind. 149, 129 N.E. 625 (1921). Driskell v. State, *supra*, interprets this section as requiring the penal laws to be so framed as to protect society, and at the same time, as a system, to inculcate the principle of reform. Under this interpretation it is doubtful whether this section will exercise anything more than the power of persuasion over penal legislation.

Section XIX. In all criminal cases whatever, the jury shall have the right to determine the law and the facts.

Under the clear meaning of section 19 extending the function of the jury to determining both law and facts in criminal trials, the question is raised as to what part is left for the courts to play in criminal trials. It has been held that the enlarged function of the jury does not extend beyond the trial of the issues of the case. It is still within the province of the court to determine the sufficiency of an indictment; *Daily v. State*, 10 Ind. 536 (1858); and the jury does not have a constitutional right to fix the punishment of the defendant. *Skelton v. State*, 149 Ind. 641, 49 N.E. 901 (1898).

As for the relative functions of the court and jury during a criminal trial, much light is thrown by the cases involving the correctness of instructions given by the court to the jury. With respect to the right of the jury to determine questions of fact, it has been held error for the court to instruct the jury as to the inferences of fact that may be drawn from a particular set of facts, this being an invasion of the province of the jury. *Burrows v. State*, 137 Ind. 474, 37 N.E. 271 (1893); *McHargue v. State*, 193 Ind. 204, 139 N.E. 316 (1923); *McNulty v. State*, 40 Ind. App. 113, 81 N.E. 109 (1907).

With respect to the right of the jury to determine questions of law, it has been held that while the court must in criminal cases charge as to all matters of law which are necessary for their information in giving their verdict, yet these instructions are advisory only. The jury has the right under the constitution to determine the law as applicable to the case at hand. *McDonald v. State*, 63 Ind. 544 (1878). It was held error for the court to instruct the jury, "you are the exclusive judges of the evidence, and may determine the law; but it is as much your duty to believe the law to be as charged to you by the Court, as it is your sworn duty to determine the evidence." *Williams v. Steele*, 10 Ind. 503 (1858). On the other hand, to instruct the jury that it had the right to reject the court's instructions and to construe the law for itself, but notwithstanding the right to disagree with the court as to what the law is, "you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason," was held proper. *Blaker v. State*, 130 Ind. 203, 29 N.E. 1077 (1891).

It has also been held proper to instruct the jury that while they have the right to determine the law, it is their duty to administer the law as they find it to be, and that they are not at liberty to set aside the law and disregard it for any reason. *Cunacoff v. State*, 193 Ind. 62, 138 N.E. 690 (1923); see also *Hoffa v. State*, 194 Ind. 300, 142 N.E. 653 (1924); *Burris v. State*, 218 Ind. 601, 34 N.E. (2d) 928 (1941).

From these instructions it would appear that the jury in determining the law of the case must choose between following the instructions of the court or relying upon its own knowledge of the legal aspects of the case. Although it has been held error for the court to instruct the jury that before it may disregard the instructions of the court it should "reflect whether from their study and experience, they are better qualified to judge the law than the court;" *Schuster v. State*, 178 Ind. 320, 99 N.E. 422 (1912); *Redrick v. State*, 210 Ind. 259, 2 N.E. (2d) 409 (1936); it would seem that the ordinary jury would of its own accord take this into consideration in making the choice. Thus, the strong influence which the court's advisory instructions would ordinarily have on the determination of questions of law is quite evident.

Section XX. In all civil cases, the right of trial by jury shall remain inviolate.

In general the Indiana cases on this section are in accord with other jurisdictions interpreting similar sections, restricting its application to that group of civil cases in which the right to jury trial was recognized at the time this section was first adopted. Thus it has been held that no constitutional privilege of jury trial exists in chancery proceedings, nor in newly created statutory proceedings, nor in extraordinary legal proceedings in which the right to jury trial was not recognized before the adoption of section 20.

In particular, the privilege of jury trial has been held not to exist in such chancery proceedings as divorce suits; *Lewis v. Lewis*, 9 Ind. 105 (1857); suits to obtain relief from fraud; *Israel v. Jackson*, 93 Ind. 543 (1883); injunction suits; *Helm v. First National Bank*, 91 Ind. 44 (1883); suits to foreclose and suits to cancel mortgages; *Carmichael v. Adams*, 91 Ind. 526 (1883); *Johnson v. Johnson*, 115 Ind.

112, 17 N.E. 111 (1888); or proceedings to establish a lost will. *Wright v. Fultz*, 138 Ind. 594, 38 N.E. 175 (1894). Likewise this section was held not to guarantee the right to jury trial in such a statutory proceeding as an appeal from a decision of a board of public works ruling on special assessments against property for public improvements. *Crown Point v. Newcomber*, 204 Ind. 589, 185 N.E. 440 (1933).

With respect to extraordinary legal proceedings, it has been held that no privilege of jury trial exists in a writ of habeas corpus proceedings. *Baker v. Gordon*, 23 Ind. 204 (1864). But in mandamus and quo warranto proceedings the privilege of jury trial has been held to exist. *State ex rel McCalla v. Burnsville Turnpike Co.*, 97 Ind. 416 (1884); *Reynolds v. State ex rel Titus*, 61 Ind. 392 (1878). However, the holdings of both of these latter cases probably rest more upon statutes giving this right, than upon the constitutional guaranty. See also *Kelly v. Herbst*, 202 Ind. 55, 170 N.E. 853 (1930).

Since eminent domain proceedings are more similar to extraordinary legal proceedings or special statutory proceedings than to the ordinary common law legal actions it would be expected that no privilege of jury trial would exist therein. Yet the early case of *Lake Erie, W. etc. R. Co. v. Heath*, 9 Ind. 558 (1857), held that a land owner had the right to have the value of his land, taken by a railroad company as a right of way, determined by jury trial, since the past practice had been to provide jury trial on such cases. It was said that such a case was a "civil case" within the meaning of the constitution. However, shortly thereafter a statute authorizing the supervisor to enter upon land, construct ditches, remove gravel, or cut down trees for the construction or repair of a highway was upheld as constitutional, although the damages were to be assessed by three appraisers rather than by jury trial. *Droneberger v. Reed*, 11 Ind. 420 (1858). Similarly, a statute providing that questions of fact arising out of drainage ditch proceedings shall be decided by a court without a jury, was held not to conflict with the above provision. *Anderson v. Caldwell*, 91 Ind. 451 (1883). Thus, except when particular proceedings are involved in which the past policy has been to try issues of fact by jury, it would seem that eminent domain proceedings

are not among those civil cases in which the privilege of jury trial is guaranteed.

On the other hand, the privilege of jury trial has been held to exist not only in recognized common law legal proceedings, including suits to recover on a guardian's bond, and bastardy proceedings; *Galway v. State ex rel Ballow*, 93 Ind. 161 (1883); *Alley v. State* 76 Ind. 94 (1881); but also in proceedings which at common law could have been either legal or equitable, such as actions between sureties for contribution, and suits to partition real estate. *Sanders v. Weilburg*, 107 Ind. 266 (1886); *Michael v. Albright*, 126 Ind. 172, 25 N.E. 902 (1890); *Kitts v. Willson*, 106 Ind. 147, 5 N.E. 400 (1885). It was even held that a privilege of jury trial existed in a statutory proceeding to quiet title because the proceeding was not only founded upon principles of equity but was also intended as a substitute for the old action of ejectment. *Trittippo v. Morgan*, 99 Ind. 269 (1884).

The idea that the privilege of jury trial shall remain unchanged as it was at common law has affected not only the types of cases to which the provision is applied but also certain features of the jury trial itself. Thus the Indiana courts have recognized as essential such common law features as the requirements (1) that the jury be comprised of twelve men; *Millers National Insurance Co. v. American National Bank*, 206 Ind. 511, 190 N.E. 433 (1934); (2) that the jury be presided over by a judge with power to direct the conduct of the trial, advise the jury according to law, and arrest and set aside judgment; see *New York C. etc. R. Co. v. Callahan*, 40 Ind. App. 223, 81 N.E. 670 (1907); *Lyons v. New Albany*, 54 Ind. App. 416, 103 N.E. 20 (1913); (3) and that the verdict of the jury be unanimous. *W. T. Rawleigh v. Snider*, 207 Ind. 686, 194 N.E. 356 (1935); *Schembri v. Shearer*, 208 Ind. 97, 194 N.E. 615 (1935); *Ewing v. Duncan*, 209 Ind. 33, 197 N.E. 901 (1935); *Coca-Cola Bottling Works v. Harvey*, 209 Ind. 262, 198 N.E. 782 (1935).

On the other hand, with respect to the qualifications of jurors it has been held that the common law requirements need not be followed. The qualifications of the jurors are under legislative control, subject to the constitutional requirement of impartiality. Thus there is no constitutional violation in appointing under certain circumstances a special jury from bystanders, rather than from the regular panel;

Albany Land Co. v. Rickel, 162 Ind. 222, 70 N.E. 158 (1904); or in allowing women to sit on the jury; Palmer v. State, 197 Ind. 625, 150 N.E. 917 (1926); or in requiring that jurymen in a city court be qualified voters of the city. Millers National Insurance Co. v. American State Bank, *supra*. Concerning trial by jury and directed verdicts, see Mich. Cent. Ry. Co. v. Spindler, 211 Ind. 94, 5 N.E. (2d) 632 (1936); Kettner v. Jay, 107 Ind. App. 643, 26 N.E. (2d) 546 (1939).

From these cases it would appear that while the court has applied the rule that jury trial must remain as it was at common law in order to restrict the application of section 20 as much as possible, and to prevent some perhaps unwise changes towards making it easier to obtain a verdict, the court has wisely refrained from applying this rule as to the qualification of the jurors, so that the legislature will be free to take steps to improve the quality of the jury.

Section XXI. No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

1. The main problem arising under the requirement that no man's particular services shall be demanded without just compensation is to determine the meaning of "particular services." It has been held that there are certain services which an individual owes to his government for which he can demand no compensation. These services have been said to include responding to the supervisor's summons to labor on the highway, serving on the sheriff's *posse comitatis* when commanded to do so, see Washington National Bank v. Daily, 166 Ind. 631, 77 N.E. 53 (1906), and more important at the present time, acting as a witness on a criminal trial when the individual has knowledge of facts having a bearing on the issues of the case. Israel v. State, 8 Ind. 467 (1857).

On the other hand it has been held that the opinions of an "expert" witness, such as those of a physician or a surgeon may not be required as testimony at a criminal trial without payment of just compensation. Buchman v. State, 59 Ind. 1 (1877). To so testify would be to render a "particular" service, since such testimony would be based upon the witness's accomplishments, which may be valuable to

him as a source of livelihood, rather than based upon knowledge of some fact which is pertinent only to the particular case.

It has also been held that an attorney's services are "particular" services and to refuse to defend a poor man when no compensation is provided is not contempt of court. *Blythe v. State*, 4 Ind. 525 (1853). There is some question as to whether the state is under a duty to make adequate provision for compensating attorneys appointed to defend indigent persons in criminal trials, in order to carry out the guaranty of the right to be heard by counsel, provided for by section 13, *supra*. However, since no case has arisen in which a poor man has been forced to stand trial without counsel because inadequate provision has been made by the state to compensate counsel, this question has not been settled. But see, *Knight v. Board of Commissioners*, 179 Ind. 568, 101 N.E. 1010 (1913); *Webb v. Baird*, 6 Ind. 13 (1854); *Board of Commissioners v. McGregor*, 171 Ind. 634, 87 N.E. 1 (1909); *Board of Commissioners v. Moore*, 93 Ind. App. 180, 166 N.E. 779 (1931).

It has been held that the legislature may require those dealing in gasoline to make returns of the amount of gasoline sold and to collect and pay the tax levied thereon without compensation. No particular services are taken within the meaning of section 21, since it is purely optional with the gasoline dealer whether or not he carries on this particular business with its added burdens. *Gafill v. Bracken*, 195 Ind. 551, 145 N.E. 312, 146 N.E. 109 (1925). The same reasoning has been applied to sustain the changing by the legislature of the duties of public officers without also changing their compensation. *Turpen v. Board of Commissioners*, 7 Ind. 172 (1855); *Falkenburgh v. Jones*, 5 Ind. 296 (1854).

2. The Indiana cases are in confusion as to whether the provision that no man's property shall be taken without just compensation should be construed as broadly as the due process clause of the Fourteenth Amendment of the federal constitution, or whether it should be limited to prohibiting the taking of property by eminent domain without compensation. The earlier cases seem to have followed the former construction, one case holding that the section protected not only real property and tangible chattels but also intangible property, as to prevent a defense to a cause of action from

being taken away without just compensation. *Baltimore and Ohio Southwestern Ry. Co. v. Reed*, 158 Ind. 25, 62 N.E. 488 (1902); and see *Evansville and Crawfordsville Ry. Co. v. Dick*, 9 Ind. 433 (1857); *Parke County Coal Co. v. Campbell*, 140 Ind. 28, 39 N.E. 149 (1894).

However it was stated in a later case that section 21 can be properly applied only to the taking of specific property to be devoted to a public or quasi-public use under the power of eminent domain. *Harmon v. Bolley*, 187 Ind. 511, 120 N.E. 33 (1918). This case apparently held that section 21 did not require special assessments, to pay for certain public improvements, to be determined in proportion to the benefits conferred upon land assessed. See *Norwood v. Baker*, 172 U.S. 269, 19 Sup. Ct. 187 (1898); *cf. Hutchins v. Town of Freemont*, 194 Ind. 74, 142 N.E. 3 (1923).

Since this decision section 21 has often been raised to attack actions of the state involving other than eminent domain proceedings on the grounds that property is being taken without just compensation. However since in these cases the action of the state was upheld under its police power, it was not clear whether or not section 21 would otherwise have governed such situations. See *Indian Refining Co. v. Taylor*, 195 Ind. 223, 143 N.E. 682 (1924).¹⁰

11. Included among the various types of statutory classifications which have been held valid by the Indiana courts are classifications according to occupation and classifications according to geographical distinctions. A close case upholding a classification according to occupation involved a statute making an exception to Sunday laws by allowing baseball to be played on Sunday. *Carr v. State*, 175 Ind. 241, 93 N.E. 1071 (1910). (See the dissenting opinion by Chief of Justice Myers. 175 Ind. 264, 93 N.E. 1079). See also *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N.E. 229 (1909); *Ayres v. State*, 178 Ind. 453, 99 N.E. 730 (1912); *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19 (1918); *School City of Elwood v. State ex rel*, 203 Ind. 626, 180 N.E. 471 (1932); *Ratcliff v. Dick Johnson School Twp.*, 204 Ind. 525, 185 N.E. 143 (1933); *Kostanzer v. State ex rel Ramsey*, 205 Ind. 536, 187 N.E. 337 (1933); With respect to the geographical distinction, a statute allowing a person between the ages of 14 and 16 years to obtain a permit to drive an automobile to and from school, provided he did not live in a city of the first or second class, was upheld. *Shedd v. Automobile Ins. Co.*, 208 Ind. 621, 196 N.E. 227 (1935). See also, *Klipsch v. Indiana Alcoholic Beverage Comm.*, 215 Ind. 616, 21 N.E. (2d) 701 (1939); *Bennett v. Indiana State Board etc. of Optometry*, 211 Ind. 678, 7 N.E. (2d) 977 (1936); *Geslot v. Swartz*, 212 Ind. 292, 7 N.E. (2d) 960 (1937).

For purposes of taxation various classifications of items of personal property have been upheld. Thus, classifications distinguishing intangible property from tangible property, *Lutz v.*

Sometimes the validity of a tax has been attacked under section 21. However, in such cases it has been stated that section 21 prohibits only the taking, without compensation, of specific pieces of property of an individual by virtue of the right of eminent domain. Under the taxing power private property may be taken for public use without any compensation other than the common benefit which the appropriation and expenditures of the proceeds of the tax produce. *City of Aurora v. West*, 9 Ind. 74 (1857); *Board of Commissioners v. State ex rel Brown*, 147 Ind. 476 (1897); *State ex rel v. Steinwedel*, 203 Ind. 457, 180 N.E. 865 (1932).

Although the extent to which section 21 may be applied beyond eminent domain proceedings is not clearly defined by the Indiana cases, there is no doubt that it places definite limitations on the right of the state to allow property to be taken by eminent domain. In the first place property taken under the power of eminent domain must be taken for public purpose, and not for mere private use. *Wild v. Deig*, 43 Ind. 455 (1873); *Stewart v. Hartman*, 46 Ind. 331 (1874); see *Lohan v. Stogsdale*, 123 Ind. 372, 24 N.E. 135 (1889). And whether a particular use is a public or private use is a judicial question to be determined by the courts. *Sexauer v. Star Milling Co.*, 173 Ind. 342, 90 N.E. 474 (1909).

The line between public and private use has not been clearly drawn in Indiana. In holding that a Chautauqua Company was not of such "public use" as to warrant the dele-

Arnold, 208 Ind. 480, 193 N.E. 840 (1935), large gross incomes from smaller gross incomes, *Miles v. Department of Treasury*, 209 Ind. 172, 199 N.E. 372 (1935), and trucks used for hire from trucks not used for hire, *Kelly v. Finney*, 207 Ind. 557, 194 N.E. 157 (1935), have all been upheld.

But while a "Chain Store" tax, which was graduated according to the number of stores operated under a single ownership, was upheld in the federal courts as being a proper classification for revenue purposes, *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 51 Sup. Ct. 540 (1931), its classification was sustained by the Indiana court in a later case on other grounds. It was held a proper exercise of the police power to discourage enterprises having monopolistic tendencies. *Midwestern Petroleum Corp. v. State Board of Tax Commissioners*, 206 Ind. 688, 187 N.E. 882 (1934).

The provision may not be restricted in its application to special privileges and communities growing out of the election of public officers, for its protection extends to every relationship which may be the subject of legislative enactment. *Harrell v. Sullivan*, 220 Ind. 108, 40 N.E. (2d) 115, 41 N.E. (2d) 354 (1941) overruling *Blue v. State, ex rel Brown*, 206 Ind. 98, 188 Ind. 583 (1933).

gation of the power of eminent domain, the Indiana Court stated that, "it seems to be well settled in Indiana that it is essential to constitute a public use that the general public have the right to a definite and fixed use of the property appropriated not as a mere favor or by permission of the owner, but as a matter of right." *Fountain Park Co. v. Hensler*, 199 Ind. 95, 155 N.E. 465 (1927); see *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N.E. 406 (1911). However, a more recent case seems to have taken the broader view of the meaning of "public use". It sustained the validity of a statute granting to limestone quarries the power of eminent domain to construct lateral railroads over any private lands intervening between the quarries and the main railroad lines. The facts that quarrying is vitally connected with the public policy of developing natural resources, and that its development is of great importance to the state and community in which it is located were given as reasons for the decision. *Indianapolis Oolitic Stone Co. v. King Stone Co.*, 206 Ind. 412, 190 N.E. 57 (1934).

In the second place just compensation must be given. The determination of what is "just compensation" has been left largely to the discretion of the legislature. Thus, in determining the damages caused by the condemnation of certain lands of an individual, the early Indiana cases held that the benefits actually and substantially accruing to the individual in consequence of the exercise of the right of eminent domain over his property may be properly deducted. *Rassier v. Grimmer*, 130 Ind. 219, 28 N.E. 866, 29 N.E. 918 (1891); *Forsythe v. Wilcox*, 143 Ind. 144, 41 N.E. 371 (1895); *Heath v. Sheetz*, 164 Ind. 665, 74 N.E. 505 (1905). But under a later statute the cases held that to preclude the consideration of such benefits is likewise a proper and valid method of determining "just compensation." *State v. Reid*, 204 Ind. 631, 185 N.E. 449 (1933). See also, *McNutt v. Orcutt*, 211 Ind. 523, 199 N.E. 595, 7 N.E. (2d) 779 (1936).

Lastly, it has been held that the requirement that due compensation must first be assessed and tendered before anyone other than the state may take property by eminent domain is satisfied when the condemning party pays the assessed damages into court. However, when the condemning party intends to appeal from such assessment he cannot be authorized under section 21 to have the money so paid

to the court withheld from the property owner and at the same time take possession of the property. *Consumers Gas Trust Co. v. Harless*, 131 Ind. 446, 26 N.E. 1062 (1891).

Section XXII. The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt, or liability, hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud.

1. The first part of this provision is directory only, leaving no doubt as to the constitutionality of debtors' exemption statutes enacted in accordance with its direction, but involving in and of itself no specific guaranties of individual rights. See *Green v. Aker*, 11 Ind. 223 (1858); *Moss v. Jenkins*, 146 Ind. 589, 45 N.E. 789 (1897); *Beard v. Indianapolis Fancy Grocery Co.*, 180 Ind. 536, 103 N.E. 404 (1913). By virtue of this section a number of statutes have been passed exempting from liability for debts a certain amount of a debtor's property. See *Burns Anno. Stat. (1933) Supp. sec. 2-3501*. This section has also been employed in maintaining the validity of similar statutes, such as a statute prohibiting the evasion of the Indiana debtors' exemption statute by assigning a claim against a resident of Indiana for the purpose of having the claim collected by garnishment outside of the state; *Markley v. Murphy*, 180 Ind. 4, 102 N.E. 376 (1913); and a statute prohibiting the assignment of a claim for wages by a married man without the consent of his wife. *Cleveland, C.C. etc. Ry. Co. v. Marshall*, 182 Ind. 280, 105 N.E. 570 (1914).

2. With respect to the latter part of Section 22, apparently the debts referred to are only those arising in the ordinary civil transactions. It has been held by Indiana cases that the penalty accruing from a breach of a city ordinance is not a debt within the meaning of this section. *Hardenbrook v. Ligonier*, 95 Ind. 70 (1883); see *State ex rel v. Schoonover*, 135 Ind. 526, 35 N.E. 119 (1905). Nor is it a violation of section 22 to imprison a person for contempt of court upon failing to pay a decree for the support of his wife. *Perry v. Pernet*, 165 Ind. 67, 74 N.E. 609 (1905). A statute providing for garnishment of not to exceed ten per cent of a debtor's wages was held not in conflict with this

section. *Martin v. Loula*, 208 Ind. 346, 194 N.E. 178, 195 N.E. 881 (1935).

As to the type of fraud which is referred to by this provision, it would appear that fraud in contracting as well as fraud in avoiding payment of debt would warrant imprisonment for debt. See *Clarke v. State*, 171 Ind. 104, 84 N.E. 984 (1908); *Baker v. State ex rel*, 109 Ind. 47, 9 N.E. 711 (1886); cf. *State v. Ensley*, 177 Ind. 483, 97 N.E. 113 (1911).

Section XXIII. The General Assembly shall not grant to any citizen or class of citizens, privileges and immunities which, upon the same terms, shall not equally belong to all citizens.

Although in some cases section 23 has been compared with the privileges and immunities clause of the Fourteenth Amendment of the federal constitution, *Hammer v. State*, 173 Ind. 199, 206, 89 N.E. 850 (1909), upon consideration of a number of the cases in which the question of the validity of a statute under section 23 was raised, it becomes clear that the general view of the Indiana cases is that section 23 serves much the same purpose as the equal protection clause of the Fourteenth Amendment. Thus in an Indiana case the requirements of reasonable classification under the Fourteenth Amendment were laid down as follows: The legislation making the classification, "must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class; that is, the reason for the classification must inhere in the subject-matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influences alike, under the same conditions, but it must embrace all within the class to which it is naturally related." *Bedford Quarries Co. v. Baugh*, 168 Ind. 671, 674, 80 N.E. 529 (1907). (Cited by *Chicago M. & St. P. Ry. Co. v. Westby*, (C.C.A. 8th, 1910) 178 Fed. 619, 628.) The same doctrine has since been followed in a number of Indiana cases interpreting section 23 of the Indiana Bill of Rights. *Indianapolis Traction and Terminal Co. v. Kinney*, 171 Ind. 612, 85 N.E. 954 (1908); *Carr v. State*, 175 Ind. 241, 93 N.E. 1071 (1911) dissent; *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N.E. 1 (1912); *Jordan v. City of Logansport*, 178 Ind. 629, 99 N.E. 1060 (1912);

Cleveland C.C. & St. L. Ry. Co. v. Schuler, 182 Ind. 57, 105 N.E. 567 (1914); Kelly v. Finney, 207 Ind. 557, 194 N.E. 157 (1934); Bolivar Township Board of Finance v. Hawkins, 207 Ind. 171, 191 N.E. 158 (1934); Kryder v. State, 214 Ind. 419, 15 N.E. (2d) 386 (1938); Eavey Co. v. Department of Treasury, 216 Ind. 255, 24 N.E. (2d) 268 (1939).

The statutory classifications which the Indiana courts have held invalid as being unreasonable under this doctrine include: A statute fixing minimum wages to be paid to unskilled labor employed on any public work of the state—because the skilled mechanic was excluded from the class; Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N.E. 895 (1902); a statute creating a preference in favor of “manual and mechanical” workers in recovering wages due from an insolvent employer—because there was nothing inherent in this group which should give them preference over the other types of wage earners for the same employer; McErlain v. Taylor, 207 Ind. 240, 192 N.E. 260 (1934); a statute releasing contractors from their contracts to build roads, which contracts had been authorized by a particular statute—because the contractors under contracts to build roads under other statutes were not similarly released. Davis Construction Co. v. Board of Commissioners, 192 Ind. 144, 132 N.E. 629 (1921). See also State v. Wiggam, 187 Ind. 159, 118 N.E. 684 (1918); Sperry-Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1918).¹¹

It should be noted that while the equal protection clause refers to “persons,” section 23 is confined by its terms to “citizens.” In spite of this, section 23 has often been coupled with the equal protection clause in attacking the validity of a statute on the grounds that it discriminates between corporations; Tower Vein Coal Co. v. Industrial Board of Indiana, 255 U.S. 144, (1921); Indianapolis Traction and Terminal Co. v. Kinney, 171 Ind. 612 (1908); Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Schuler, 182 Ind. 57, (1914); and it has been said that, “Railroad corporations are persons within the meaning of this provision of our bill of rights, and the equality clause of the Constitution of the United States.” Pittsburg, Cincinnati, Chicago and St. Louis Ry. Co. v. Montgomery, 152 Ind. 1, 8, 49 N.E. 582 (1898). However, it is significant to note that in the recent case of Fountain Park Co. v. Hensler,

199 Ind. 95, 155 N.E. 465 (1927), in which a narrow class of Chautauqua companies was given the power of eminent domain to the exclusion of other Chautauqua companies similarly situated, the opinion that the statute was invalid class legislation was grounded solely on the Fourteenth Amendment of the federal constitution, although it was contended that section 24 was also violated. It is difficult to see how the word "citizen" can be interpreted to include corporations.

Section XXIV. No ex post facto law, or law impairing the obligation of contract shall ever be passed.

The provision prohibiting ex post facto laws and laws impairing the obligation of contracts is a very common constitutional provision. In the federal constitution the same disability is placed on not only Congress (Article I section 9) but also the legislative body of every state (Article I section 10), so these rights of the individuals with respect to action by the legislature of Indiana are doubly protected.

1. The Indiana decisions, in defining an ex post facto law are in accord with the federal rule. Willis, Constitutional Law, p. 516. Such a law is one relating to criminal matters, *Andrews v. Russell*, 7 Blackf. 474 (1845), retroactive in operation, altering the situation of the accused to his disadvantage or depriving him of some lawful protection to which he was entitled. *In re Petition to Transfer Appeals*, 202 Ind. 365, 174 N.E. 812 (1931). Thus, a statute making unlawful an act which was lawful when committed, *cf. Schwomeyer v. State*, 193 Ind. 99, 138 N.E. 823, (1923), or adding to the punishment for an act, *Dinkerlocker v. Marsh*, 75 Ind. 548 (1881), or increasing the malignity of a crime, or changing the rules of evidence so as to render a conviction more easy would violate this section. See *Strong v. State*, 1 Blackf. 193 (1822).

On the other hand, matters of procedure or practice in criminal actions may be changed so long as they do not deprive the accused of any substantial protection; *Robinson v. State*, 84 Ind. 452 (1882); *In re Petition to Transfer Appeals*, *supra*; and it has been held that the Indeterminate Sentence Law is not invalid as being an ex post facto law, since the act as a whole mitigates the severity of the punishment rather than increasing it. *Davis v. State*, 152 Ind. 34, 51 N.E. 928 (1898); see *Strong v. State*, *supra*.

2. The Indiana cases under the impairment of contracts clause also seem to be in accord with the federal cases interpreting a similar clause in the federal constitution. See Willis, *Constitutional Law* pp. 599 et seq. It would appear that the clause applies as well to executed contracts, such as grants of land by the state, *State v. Springfield Twp.*, 6 Ind. 83 (1854), as to executory contracts. See *State Bank v. State*, 1 Blackf. 267 (1823). Also, there seems to be no question that this clause applies to both contracts between private individuals alone and contracts between private individuals and the state or agents of the state. However the section does not invalidate legislation which impairs the latter type of contract as long as the detriment is suffered only by the state or its agent. Thus, a statute releasing from liability sureties on public depository bonds securing funds raised by general taxation in the political subdivision depositing them was upheld. *Bolivar Township Board of Finance v. Hawkins*, 207 Ind. 171, 191 N.E. 158 (1934). *Cf. McClelland v. State*, 138 Ind. 321, 37 N.E. 1089 (1891); *Johnson v. Board of Commissioners*, 140 Ind. 152, 39 N.E. 311 (1895); *Miller v. Jackson Twp.*, 178 Ind. 503, 99 N.E. 102 (1912). See also *Washington v. Public Service Comm.*, 190 Ind. 105, 129 N.E. 401 (1921). *Cf. Greensburg Water Co. v. Lewis*, 189 Ind. 439, 128 N.E. 103 (1920).

It has been said that this section applies not only to statutes doing away with an obligation of contract but also statutes which substantially postpone, obstruct, or retard the enforcement of a contract or lessen its value. *Indianapolis v. Robinson*, 186 Ind. 660, 117 N.E. 861 (1917). Such a statutory change in the obligation on a public improvement bond as to allow bondholders to present them in payment of the public improvement assessments against their land, when by the initial contract each bond was to be secured by the aggregate amount of such assessments, was held an impairment of contract. *Conter v. State, ex rel.*, 211 Ind. 659, 8 N.E. (2d) 75 (1937). See also *Scobey v. Gibson*, 17 Ind. 572 (1861); *Johnson v. Gebhauer*, 159 Ind. 271, 64 N.E. 855 (1902).

On the other hand, some statutory changes in the remedy for enforcing an existing contract have been held not to be an impairment of contract, as a statute abolishing imprisonment for debt which releases persons then imprisoned

on civil process; *Fisher v. Lacky*, 6 Blackf. 373 (1843); and a statute reducing the time of notice necessary before sales for non-payment of principal or interest on certain existing loans secured by mortgage. *Webb v. Moore*, 25 Ind. 4 (1865). See also *Ralston v. Lothian*, 18 Ind. 303 (1862); *Jackson Hill Coal and Coke Co. v. Board of Commissioners*, 181 Ind. 335, 104 N.E. 497 (1914). See, *Heath v. Fennig*, 219 Ind. 629, 40 N.E. (2d) 329 (1941); *County Department of Public Welfare v. Pottoff*, 220 Ind. 574, 44 N.E. (2d) 494 (1942).

Unlike the *ex post facto* law clause but in accordance with the federal view with respect to impairment of contracts, the guaranty against impairment of contracts is not an absolute guaranty, but is subject to certain exercises of the police power of the state. See *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Chappell*, 183 Ind. 141, 106 N.E. 403 (1914); *Pittsburg, Cincinnati, Chicago and St. Louis Ry. Co. v. Home Insurance Co.*, 183 Ind. 355, 108 N.E. 525 (1915); *Indianapolis v. Ryan*, 212 Ind. 447, 7 N.E. (2d) 974 (1937); *Finerty v. State ex rel. School City of Gary*, 213 Ind. 470, 12 N.E. (2d) 941 (1937). The Gross Income Tax Act taxing interest on municipal bonds does not impair the obligation of contracts, *Storen v. J. D. Adams Mfg. Co.*, 212 Ind. 343, 7 N.E. (2d) 941, 304 U.S. 307 (1937).

Section XXV. No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution.

Although this provision is classified as a part of the Indiana Bill of Rights it is doubtful that it should be included in this discussion since it is hardly designed for the purpose of protecting the rights of the individual. Instead, its effect in preventing the delegation of legislative powers indicates a limitation on the rights of the individual insofar as the exercise of legislative powers are concerned. For this section has not only prevented the delegation of legislative powers to individuals such as the governor; *State ex rel v. Grant Superior Ct.*, 202 Ind. 197, 172 N.E. 897 (1930); but also the redelegation of legislative power back to the people themselves. *Maize v. State*, 4 Ind. 342 (1853).

Section XXVI. The operation of the laws shall never be suspended, except by the authority of the General Assembly.

There has been little occasion for the courts of Indiana to discuss the effect of this provision, and since, like section 25, it would seem to protect the powers of the legislature rather than the rights and privileges of the individual, it can well be omitted from a discussion of the Bill of Rights of Indiana.

Section XXVII. The privilege of the writ of habeas corpus shall not be suspended, except in the case of rebellion or invasion; and then, only if the public safety demand it.

There is some doubt, under sections similar to the instant section, as to whether the power to suspend the writ of habeas corpus lies in the executive or the legislature. Apparently the federal view is that Congress alone possesses this power. *Ex Parte Merriman* (161), *Taney* 246 (Fed. Cas. No. 9487). Likewise according to dicta in an Indiana case, "The suspension of the writ from our State Court must come from the State Legislature." This conclusion was based, to some extent, on section 26 of the Indiana Bill of Rights, which gives the General Assembly the exclusive power to authorize the suspension of laws. *Griffin v. Wilcox*, 21 Ind. 370 (1863). In the case just cited it was also pointed out that neither the President nor Congress has power to suspend the privilege of the writ of habeas corpus by state courts. It would follow from this that the power of the Indiana General Assembly to suspend the privilege would be confined to the writs of the state courts, and would not affect the power of the federal courts in the state to issue writs to issue writs of habeas corpus.¹²

Section XXVIII. Treason against the State shall consist only in levying war against it, and in giving aid and comfort to its enemies.

No annotation.

Section XXIX. No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or upon his confession in open court.

No annotation.

Section XXX. No conviction shall work corruption of blood, or forfeiture of estate.

12. For cases in which this section was discussed see *Booth v. State*, 179 Ind. 405, 100 N.E. 563 (1913); *Sarlls v. State*, 201 Ind. 88, 166 N.E. 270 (1929).

This section does away with the ancient common law rule whereby a conviction of felony not only caused the felon's estate to be forfeited to the crown but also barred any estate of inheritance from passing to him, through him, or from him. There has been little occasion for the Indiana cases to judicially interpret this section. However this section has several times been considered in federal cases involving the contractual rights of the assured under an insurance policy after he has murdered the name beneficiary of the policy. It was held that the provision that the beneficial interest in the policy should revert back to the assured in case the named beneficiary should predecease him, was not affected by the fact that the assured murdered the beneficiary. *Allen v. Diamond*, 13 Fed. (2d) 579 (C.C.A. 7th Circ., 1926). But it was also held that the provision in the policy which denied to the assured or his beneficiaries the right to recover under a double indemnity clause when his death resulted from a violation of the law—in this case the assured was executed upon conviction for murder—did not violate section 30. *Diamond v. New York Life Insurance Co.*, 50 Fed. (2d) 884 (C.C.A. 7th Circ. 1931).

Clearly neither of these cases are concerned with the type of forfeiture or corruption of blood referred to by section 30. In neither was there an attempt by the state to interfere with the property interests of a felon. Both cases depended entirely on the contractual agreement made between private parties, and it could hardly be expected that section 30 would impair these rights.

Section XXXI. No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.

This provision has been seldom considered by the Indiana Courts. In *Thomas v. Indianapolis*, 195 Ind. 440, 145 N.E. 550 (1924), it was contended, among other things, that the city ordinance prohibiting peaceful as well as violent picketing violated the privilege of peaceable assemblage. In upholding the ordinance the court pointed out that the ordinance was prohibiting acts, not wrong in themselves, but committed under such circumstances and in such places as may result in public disorder and cause breaches of the peace.

Although due to a later federal supreme court decision, (see discussion *supra* section IX) the holding of the Indiana case is probably no longer the law, the case stands as indicating that the privilege of assemblage is conditioned upon its being peaceful, and that a large amount of discretion lies in the government in determining whether the assemblages are peaceable or disorderly.

Section XXXII. The people shall have the right to bear arms, for the defense of themselves and the State.

This section has been considered by the Indiana courts only in relation to statutes prohibiting the carrying of concealed weapons by persons other than travelers. It has been held that this section is not violated by such statutes; *State v. Mitchell*, 3 Blackf. 229 (1833); *McIntyre v. State*, 170 Ind. 163, 83 N.E. 1005 (1908); thus indicating that although the privilege to bear arms exists, it is subject to certain regulations by the state for the purpose of crime prevention, and public safety.

Section XXXIII. The military shall be kept in strict subordination to the civil power.

In *Griffin v. Wilcox*, 21 Ind. 370 (1863), it was held that a provost marshal who, under the orders of a superior officer, arrested a private individual not connected with the army, was liable for false imprisonment. Apparently, by this case, such an arrest may be made only when martial law has been declared to exist, and martial law may be employed in the home country only when there is an existing or immediately impending force against legal authority which civil authority is incompetent to overcome. It was held that such dangers did not exist at the time of the arrest in question.

Thus, by this case it would appear that the only time when the military authority in any respect takes the place of the civil authority is when some force destroys or threatens to destroy the civil authority. And on these occasions since the military authority is employed only for the purpose of meeting force with force and reestablishing the civil authority, it can still be said that section 33 is not departed from.

Section XXXIV. No soldier shall, in time of peace be quartered in any house, without the consent of the owner; nor, in time of war, but in a manner to be prescribed by law.

No annotations.

Section XXXV. The General Assembly shall not grant any title of nobility, nor confer hereditary distinctions.

No annotations.

Section XXXVI. Emigration from the State shall not be prohibited.

No annotations.

Section XXXVII. There shall be neither slavery, nor involuntary servitude, within the State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. No indenture of any Negro or Mulatto, made and executed out of the bounds of the State, shall be valid within the State.

The provisions of this section were made obsolete by the Thirteenth Amendment of the federal constitution.