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LOCAL AND SPECIAL LEGISLATION IN MISSOURI UNDER THE CONSTITUTION OF 1875

(Continued from last issue)

Chapter V. A Study of the Cases Involving an Application of the Constitutional Limitations.

It was indicated in the preceding chapter that a general law relates to persons or things as a class; that this class is determined by a "distinguishing peculiarity" which bears a reasonable relation to the purpose for which the statute was enacted; and that this class includes all things which may come within it at any future time. It now remains to examine the cases in which this test has been applied.

In section fifty-three of article four of the constitution, as has been noted before, there are thirty-three subdivisions. Thirty-two of these subdivisions enumerate classes of subjects concerning which no local or special law shall be passed. In the thirty-second subdivision is found the general provision that "in all other cases where a general law can be made applicable, no local or special law shall be enacted." The effect of the enumeration of classes of subjects is to prohibit absolutely any local or special laws upon those matters. The effect of the general provision is to prohibit local and special laws in all cases where a general law, as determined in the last instance by the courts, can be made applicable; and to permit the enactment of local and special laws upon subjects other than those set out in the thirty-two subdivisions whenever a general law can not be made applicable, provided the formalities of section fifty-four of article four are complied with. The problem of classification, then, is the same under the enumerated list of subjects as under the general provision; and in the discussion of the cases arising under

section fifty-three, no classification of the decisions will be made. The enactment of local and special laws where a general law cannot be made applicable is taken up in connection with section fifty-four of article four of the constitution.

A. THE PROBLEM OF CLASSIFICATION.

The principle upon which a classification may be made depends upon the nature of the persons or things upon which the contemplated statute is intended to operate, and upon the purpose or object of the proposed statute for which the classification is made. The basis of classification may be made upon differences in population, geographical location,[1] magnitude, occupation, business, profession, sex, age, color and upon many other things, depending upon the purpose of the statute.

(1) *Classification by Population.*

Counties,[2] cities,[3] and sometimes small units of local government,[4] are classified by population for the purpose of leg-

1. A "geographical location" may be made a principle of classification so long as more than one unit may come within the class. For example, a law which applies "to all cities on the Mississippi River within ten miles of the Missouri River which have a population of over five hundred thousand inhabitants," is special because only one city could ever come within that classification. See *post* note 17.

2. *State ex rel Dickason v. County Court* (1895) 128 Mo. 427, 442, 30 S. W. 103 (an act disposing of the revenue from dramshop licenses in counties having a population less than fifty thousand inhabitants); *Ex Parte Loving* (1903) 178 Mo. 194, 207, 77 S. W. 508 (an act authorizing circuit courts in counties having a population of over 150,000 inhabitants to act as a juvenile court); *State ex rel Harvey v. Sheehan* (1916) 269 Mo. 421, 190 S. W. 864 (an act regulating the fees and duties of prosecuting and circuit attorneys in cities (construed as counties), which have a population of over five hundred thousand inhabitants). *State ex rel Cave v. Tincher* (1914) 258 Mo. 1, 166 S. W. 1028.

3. The classification of cities by population is discussed separately in Chapter VI, p. 17.

4. *State ex inf. Wright v. Morgan* (1916) 268 Mo. 265, 187 S. W. 54 (an act authorizing the consolidation of school districts having less than two hundred children of school age).

islation. There must always be "some distinguishing peculiarity which gives rise to a necessity for the law as to the designated class." [5]

The classification by population need not be based upon the total population of the unit of local government in question. In *State ex. inf. Wright v. Morgan*[6] an act was upheld which authorized the consolidation of school districts having less than two hundred children of school age. Counties are sometimes classified according to the population of cities they may adjoin[7] or contain.[8] Such classification is valid so long as the principle upon which the classification is made bears a reasonable relation to the purpose of the statute.

Classification by population must have a prospective operation.[9] The class should include in the future all units of local

5. *Ex Parte Loving* (1903) 178 Mo. 194, 209, 77 S. W. 508 (juvenile court law).

In Dunne v. K. C. Cable Ry. (1895) 131 Mo. 1, 5, 32 S. W. 641, MacFarlane, J., in upholding a jury law applicable to counties containing over fifty thousand and less than three hundred thousand population said (loc. cit. 5, 6); "There must be some distinguishing peculiarity which gives rise to a necessity for the law as to the designated class.....

"There also appears a reasonable necessity for the classification. The selection of juries under the general law, in counties containing large cities, is liable to much abuse. Complaint of the character of juries selected was common. The law was intended to correct this evil, and to do so the classification was deemed necessary."

6. (1916) 268 Mo. 265, 187 S. W. 54.

7. *State ex rel Barker v. Wurdeman* (1914) 254 Mo. 561, 163 S. W. 849 (an act creating an excise commission in counties having over seventy five thousand inhabitants which adjoin cities of five hundred thousand inhabitants or more).

8. *Dunne v. K. C. Cable Ry. Co.* (1895) 131 Mo. 1, 32 S. W. 641 (an act providing for the selection of petit jurors in counties containing cities over fifty thousand and less than three hundred thousand inhabitants).

9. *State ex rel Board v. County Court of Jackson County* (1886) 89 Mo. 237, 1 S. W. 307 (an act which provided that "in all counties of this state *in which is* located a city of over fifty thousand inhabitants..... .....is hereby established a reform school" was held invalid because it was "designed to operate in the present and on an *existing state of facts*"); *State ex rel Wiles v. Williams* (1910) 232 Mo. 56, 72, 133 S. W. 1 (an act was held invalid which regulated the salary of prosecuting attorneys "in all counties whose population, as ascertained by the United States census of 1900, is 32,000 inhabitants or over, and less than 50,000 inhabitants").

government of which the classification is made which attain the prescribed population; and it should exclude all former members of the class which so increase or decrease in population as to be no longer within the limits of the class.[10] The classification is usually based upon the federal census taken every ten years,[11] but a special enumeration may be authorized during the intervening period.[12]

Some cases apply to a limited class of counties of a given population. In *State ex rel. Barker v. Wordeman*[13] the class was composed of those counties of a given classification which adjoin a city of five hundred thousand inhabitants. The statute in that case created a board of excise commissioners and defined their duties in counties of the prescribed class. This classification can be justified only upon the ground that there is a reasonable necessity for such legislation with reference to counties having a population of seventy-five thousand inhabitants or more

10. *State ex rel Major v. Ryan* (1910) 232 Mo. 77, 133 S. W. 8 (an act regulating selection of petit jurors in counties having cities of over one and less than four hundred thousand inhabitants was held not to apply to Buchanan County after St. Joseph fell below one hundred thousand inhabitants in population in 1910).

11. *Dunne v. K. C. Cable Ry.* (1895) 131 Mo. 1, 7, 8, 32 S. W. 641. In this case it was contended that a jury law applying to counties having cities over fifty and less than three hundred thousand population "according to the last preceding national census" could not "apply to all counties of the designated class for the reason that it does not include such counties as may become entitled to its benefits between one census and another." The answer of the court to this was: "There must necessarily be in every case a period of more or less duration in which a county may in fact be entitled to the benefits of the law before they can enjoy them.....The census as a basis possesses the advantages of certainty in time and accuracy in manner, which are both difficult to secure when the work is committed to the local authorities of counties which are dominated by large cities."

12. *In Ex Parte Renfrew* (1892) 112 Mo. 591, 20 S. W. 682, the court upheld an act establishing a criminal court in Green county in 1889 under article six, section thirty-one which provided that "the General Assembly shall have no power to establish criminal courts, except in counties having a population exceeding fifty thousand," altho the federal census of 1890 as well as the one of 1880 showed a population less than fifteen thousand in Green county. The court said that the legislature having determined that there were over fifty thousand inhabitants in Green County when the law was enacted, this was sufficient.

13. (1913) 254 Mo. 561, 163 S. W. 849.

which adjoin cities of five hundred thousand population or more, that does not exist in counties having a population of seventy-five thousand inhabitants or more which do not adjoin cities of five hundred thousand inhabitants or over, or in counties having a population of less than seventy-five thousand inhabitants which may or may not adjoin a large city.

In *State ex. inf. Barker v. Southern,*[14] an act which regulated the duties of highway engineer in counties containing more than fifty thousand inhabitants, whose taxable wealth exceeds forty-five million dollars or which adjoin or contain a city of more than one hundred thousand inhabitants, was upheld "for the reason that the counties which should fall within such a class would naturally have different or greater needs, corresponding to the differences between their condition and other counties of less population and less wealth." In all cases where more than one principle of classification is used the resultant classification must be justified under a reasonable necessity to avoid being objectionable as special legislation.

A classification is valid even tho there be only one member of the class provided that it includes all those units which may come into the class in the future, and is based upon a difference which bears a reasonable relation to the object of the act. In *State ex. rel. Barker v. Wordeman*[15] an act was approved by two judges which applied to all counties of seventy-five thousand inhabitants or more adjoining a city of five hundred thousand in-

14. (1914) 265 Mo. 275, 177 S. W. 640.

15. (1913) 254 Mo. 561, 163 S. W. 849, Walker, J., (loc. cit. 575), "The fact that St. Louis county was at the time of said enactment the only county having a population of 75,000 or more, adjacent to a city (St. Louis) of 500,000 inhabitants, or more, and that said city was the only one in the state then having the designated population does not render the act obnoxious to the State Constitution in regard to special legislation. The act under its terms will apply with equal force in the future to other counties or cities which by increase in their populations may come within the purview of the statute."

Accord: *State ex rel Harvey v. Sheehan* (1916) 269 Mo. 421, 190 S. W. 864 (an act regulating the duties of prosecuting or circuit attornies in cities which have a population of five hundred thousand or more, the court construing city to mean county.)

habitants or more although it applied only to one county at the time of its enactment.

Wherever there are two or more principles of classification, each distinction upon which the classification is based must bear a reasonable relation to the purpose of the statute for which the composite classification is made. The use of two or more principles of classification is susceptible to abuse unless each principle is scrutinized carefully, since it is possible to reduce any class to a few members if enough principles are used to eliminate the largest part of the class. In *Hays v. Milling Co.*[16] is found a good example of this evil. In that case an act was held invalid which regulated the fees of the clerk of circuit courts in all counties which "constitute a separate judicial circuit with two judges of the circuit court and having no criminal court." This description applied to only one county in the state.

(2) *Other Principles of Classification.*

Any principle or combination of principles of classification is valid under the constitutional prohibition on special legislation so long as the distinction or distinctions upon which the classification is determined bears a reasonable relation to the purpose for which the classification is made. Classifications which are valid for one statute may be invalid as to others.

Counties, and other units of local government, may be classified by geographical location,[17] assessed wealth,[18] miles of

16. (1909) 227 Mo. 288, 126 S. W. 1051.

17. *State ex rel Barker v. Wurdeman* (1913) 254 Mo. 561, 163 S. W. 849 (an act creating an excise commission in all counties having a population of over seventy-five thousand inhabitants, adjoining a city of five hundred thousand inhabitants); *State ex rel Kinsey v. Messerly* (1906) 198 Mo. 351, 355, 95 S. W. 913 (an act held invalid which regulated fees of justices of the peace in cities having a population of fifteen thousand and under thirty-five thousand inhabitants, lying wholly within one township, Sedalia being the only city.) A good example of classification by geographical location would be: "all cities on a river or seashore." A law based upon a geographical classification which could never apply to more than one locality does not because of such classification lose its special and local character. See note 1, page 4.

18. *State ex inf Barker v. Southern* (1915) 265 Mo. 275, 177 S. W. 640 (an act regulating duties of highway engineer in counties contain-

macadamized and graveled roads,[19] or upon any other distinction that bears a reasonable relation to the purpose of the act.

The question of the validity of a classification frequently arises in connection with the exercise of the police power. Laws promoting the general welfare, convenience, health, safety and comfort of the state or community are frequently attacked upon the ground of special legislation. Laws applying to corporations,[20] railroads,[21] insurance companies,[22] industries,[23] hours

ing over fifty thousand inhabitants, whose taxable wealth exceeds forty-five million dollars or which adjoin or contain a city of more than one hundred thousand inhabitants.)

19. *State ex rel Garrett v. Arnold* (1896) 136 Mo. 446, 38 S. W. 640 (an act authorizing a higher rate of taxation for road improvements in "all counties wherein the assessed valuation of property is fifteen million dollars or more, and wherein there are more than one hundred and fifty miles of macadamized and graveled roads.")

20. *Julian v. K. C. Star* (1908) 209 Mo. 35, 107 S. W. 496 (upholding an act which authorized suits for libel against a newspaper corporation in any county of the state where the paper circulates in which neither plaintiff nor defendant resided.) This case was subsequently overruled in *McClung v. Pulitzer Pub. Co.* (1919) 214 S. W. 193 in which McBaine, Special Judge, said (loc. cit. 196): "So, then, we conclude that since the decision in *Houston v. Pulitzer Publishing Co.*, 249 Mo. 332, 155 S. W. 1068, decided April 8, 1913, this court has been of the opinion that the legislature has not the authority under the state and federal constitutions to provide that the venue in libel suits shall be that the individual charged with libel may only be sued in the county where he resides, or where the plaintiff resides if the individual is there found, but that in the case of a corporation charged with libel the corporation defendant may be sued in a county in this state where neither the action accrued nor the corporation has its domicile or agent for the transaction of business, and that the legislature may not provide that a citizen of the state, who is plaintiff in a libel suit, can sue a corporate defendant charged with libel in the county where the citizen resides, while a citizen, as plaintiff, who charges an individual defendant with committing a libel, cannot sue the defendant in the county in which the plaintiff resides, unless the individual defendant shall be found in the county where the plaintiff resides."

21. See *post* p. 11.

22. *Daggs v. Ins. Co.* (1896) 136 Mo. 382, 38 S. W. 85 (an act upheld which denied the right to fire insurance companies of showing that the property insured was worth less at the time of issuing the policy than the full amount insured); *State ex inf. Crow v. Aetna Ins. Co.* (1899) 150 Mo. 113, 51 S. W. 413 (holding an act valid prohibiting combinations fixing rates of fire insurance in the state except in cities having a population of over one hundred thousand inhabitants); *Jenkins v. Ins. Co.* (1902) 171 Mo. 375, 71 S. W. 688 (upholding an act depriving

and conditions of labor,[24] occupations,[25] and other classes of persons, things, or acts,[26] in the state are upheld if there is a reasonable relation between the distinction upon which the classification is based and the object of the statute.

old line insurance companies of defense of misrepresentation unless the matter misrepresented contributed to the event on which the policy was payable); *Claudy v. Royal League* (1914) 259 Mo. 92, 168 S. W. 593, (upholding an act excepting fraternal beneficiary associations from the provisions of the insurance laws including the act denying defense of suicide to insurance companies.)

23. *Hamman v. Coke Co.* (1900) 156 Mo. 232, 56 S. W. 1091, Burgess, J., upholding an act authorizing the recovery by the wife of ten thousand dollars for the death of her husband, a miner, caused by the negligence of defendant mine operator in the course of his employment, altho the statute allowed the recovery of a maximum of five thousand dollars in all other cases, said (loc. cit. 241): "It is common knowledge that no class of laborers are so much exposed to dangers as miners, and that none in proportion to the number engaged meet with so many fatal disasters, and the legislature doubtless for that reason, in order to protect human life, and to prevent such occurences so far as possible, thought that the necessity for increasing the maximum amount of damages over that fixed by law in other cases existed, in order to stimulate operators of such mines to all needful and proper precaution for their protection."

24. *State v. Whitaker* (1900) 160 Mo. 59, 70, 60 S. W. 1068 (upholding an act requiring screens for the protection of motormen on street electric railways and not applying to tramways propelled by other means); *State v. Cantwell* (1903) 179 Mo. 245, 78 S. W. 569 (holding valid an eight hour law for miners); *Hawkins v. Smith* (1912) 242 Mo. 688, 147 S. W. 1042 (holding valid a law abolishing the defence of negligence of a fellow servant in an action against a mine operator for personal injury to a miner); *State v. Miksicek* (1909) 225 Mo. 561, 125 S. W. 507 (holding invalid an act prohibiting work in bakeries over six days per week and regulating the construction of bakeries so as to obtain light and air.)

25. *Ex Parte Lucas* (1900) 160 Mo. 218, 61 S. W. 218 (an act regulating the occupation of barbering in cities having a population of over fifty thousand inhabitants); *State v. Weber* (1908) 214 Mo. 272, 113 S. W. 1054 (upholding an act requiring peddlers of certain goods to have a license.)

26. *State v. Bockstruck* (1896) 136 Mo. 335, 354, 38 S. W. 317 (an act prohibiting the sale of imitation butter); *State v. Gritzner* (1896) 134 Mo. 512, 528, 36 S. W. 39 (an act forbidding "dealing in options"); *Ex Parte Berger* (1905) 193 Mo. 16, 90 S. W. 759 (upheld an act which punished the receiving of interest in excess of two per cent per month, the legal rate of interest being eight per cent); *Spithover v. Bldg. & Loan Ass'n.* (1909) 225 Mo. 660, 125 S. W. 766 (upholding an act permitting building and loan associations to collect from members the equivalent of a rate of interest above the legal rate, thru premiums, fines, and interest); *White v. Railroad* (1910) 230 Mo. 387, 130 S. W. 325 (an act held

Laws applying to railroads have long been upheld as proper altho such laws do not apply to all corporations or all common carriers. In *Humes v. Mo. Pac. Ry.*[27] an act was upheld which allowed double damages to be recovered against a railroad for the killing of stock in consequence of a failure to fence the right of way.[28] This was a valid exercise of the police power.[29]

The constitutionality of acts making classifications is frequently attacked under the provisions in the state constitution

valid which prohibited a garnishment of the wages of employees of railroads in actions for sums less than two hundred dollars before final judgment had been recovered against the employee); *Bank v. Clark* (1913) 252 Mo. 20, 158 S. W. 597 (upholding an act restricting the right of protest for street improvements to resident owners of abutting property); *State v. Iron & Steel Co.* (1916) 268 Mo. 178, 186 S. W. 1007 (upholding an act regulating the sanitary conditions of foundries employing more than ten men.)

27. (1884) 82 Mo. 221, 230.

28. Accord: *Dent v. Railroad* (1884) 83 Mo. 496 (holding valid an act which conferred jurisdiction upon justice of the peace courts of cases against railroads for stock killed due to a failure to fence the right of way); *Kingsbury v. Railroad* (1900) 156 Mo. 379, 57 S. W. 547 (allowing double damage to be recovered against the railroad whose failure to maintain a good fence along the right of way caused injury to crops.)

29. *Perkins v. Railroad* (1890) 103 Mo. 52, 15 S. W. 320, Black, J., in upholding an act which allowed a reasonable attorney's fee to a successful plaintiff in an action against a railroad for the killing of live stock at places on the right of way not enclosed by a good fence, said (loc. cit. 57): "Our statute giving the owner double damages for stock killed where a railroad is not fenced as required by law, has been upheld in several cases on the ground that the law is a police regulation and designed not only to protect the owners of the stock, but also the traveling public, and that the legislature might impose a penalty for a violation of the law and give the penalty to the owner of the stock killed. *Barrett v. Railroad*, 68 Mo. 56, and cases cited; *Cummings v. Railroad*, 70 Mo. 570; *Spealman v. Railroad* 71 Mo. 434; *Humes v. Railroad, supra.* The statute in question is as much a police regulation as is the double damage section; and the attorneys' fee may be lawfully imposed as a penalty for the violation of the law. It is a penalty allowed in all cases of a class, and the objection that the law is special legislation is not well taken." Affirmed *in Briggs v. Railroad* (1892) 111 Mo. 168, 172, 20 S. W. 32. *Powell v. Sherwood* (1901) 162 Mo. 605, 617, 63 S. W. 485 (upholding an act abolishing the defense of the negligence of a ("fellow servant" in an action against a railroad by an employee for personal injuries); *Sams v. Railroad* (1902) 174 Mo. 53, 73 S. W. 686 (holding that act abolishing defense of "fellow servant" by railroads was not special because it did not apply to street railways); *State v. Railroad* (1912) 242 Mo. 339, 147 S. W. 118 (upholding an act which required corporations to pay employees at least twice each month.)

against special legislation and under the Fourteenth Amendment of the Constitution of the United States requiring equal protection of the laws. An act objectionable under the Fourteenth Amendment of the Constitution of the United State is objectionable under the State Constitution as special legislation. But the converse is not true as is pointed out in another place. The scope of this study does not permit a full discussion of all the problems of classification, especially the problems of classification arising under the exercise of the police power.[30]

It is sometimes said that the "mere form of legislation

30. In the following cases the acts were held special and unconstitutional: *State v. Julow* (1895) 129 Mo. 163, 176, 31 S. W. 781 (an act forbidding the discharge of an employee because he belongs to the union was held special because it did not protect non-union men from being discharged); *State v. Granneman* (1896) 132 Mo. 326, 33 S. W. 784 (an act forbidding the carrying on of barber business on Sunday); *In re Flukes* (1900) 157 Mo. 125, 57 S. W. 545 (prohibiting a resident creditor from garnishing the wages of a resident debtor in another state because it prevents a right of garnishment abroad that might be exercised at home); *State ex inf. Hadley v. Washburn* (1901) 167 Mo. 680, 67 S. W. 592 (holding invalid an act requiring the governor in appointing a board of three election commissioners in cities having over one hundred thousand inhabitants to select one from the leading party opposed to the governor from three candidates nominated by the party committee of the city for which the board is appointed); *Moler v. Whisman* (1912) 243 Mo. 571, 147 S. W. 985 (holding invalid an act which forbade barber colleges from displaying a barber pole and prohibited apprentices or students from charging for their services); *State v. Walsh* (1896) 136 Mo. 400, 406, 37 S. W. 1112 (an act prohibiting pool selling and book making in any place except upon the premises of a regular race course was held invalid because there was no reasonable basis for distinguishing pool selling and bookmaking off the premises from the same acts upon the premises of a regular race course). Affirmed: *State v. Thomas* (1896) 138 Mo. 95, 100, 39 S. W. 481. The decisions in these cases were later obviated by an act which required that bookmakers should be licensed at race courses by the auditor of the state. *State v. Thompson* (1900) 160 Mo. 333, 346, 60 S. W. 1077. *State v. Buchardt* (1898) 144 Mo. 83, 46 S. W. 150 (holding an act unconstitutional which punished petit larceny by a heavier penalty in St. Louis than elsewhere in the state.)

State v. Kring (1881) 74 Mo. 612, 622 (an act which regulated the selection of special judges in the criminal court of St. Louis held invalid as a special act regulating the practice and procedure in judicial proceedings); *State v. Baskowitz* (1913) 250 Mo. 82, 156 S. W. 945 (holding invalid an act requiring the written consent of the owner of certain kinds of bottles which bear a trade name to be obtained by dealers of the same).

without regard to its operation will not suffice to relieve it of its special or local character. If in its practical operation it can only apply to particular persons or things of a class then it will be a special or local law, however its character may be concealed by form of words." [31] This means that the validity of a classification with respect to a given law is determined by its operation and not by its form; and that the classification as it actually works out must be based upon a difference which bears a reasonable relation to the object of the statute. And in the same case from which the above quotation was taken, *Dunne v. K. C. Cable Ry.*, a further statement is made in support of this view: "If the classification is a proper one, the law will not be special or local, tho at the time only one object falls within the class, provided the law has such a prospective application as to include all objects that may, in the future, become entitled to the benefits or powers conferred by the law." [32]

The General Assembly cannot create a classification upon differences in counties which differences exist by reason of an act of the legislature. To uphold such laws would be to permit the legislature to enact special laws indirectly by creating or destroying the distinctions upon which the classifications are based. In *State ex. inf. Barker v. Southern*[33] an act was held invalid which regulated the duties of the county surveyor in all counties which contain two hundred and less than four hundred thousand inhabitants, and which contain one hundred and fifty miles or more of macadamized roads outside of municipal corporations, "which pay to the county surveyor a salary of three

31. *Dunne v. K. C. Cable Ry.* (1895) 131 Mo. 1, 5, 32 S. W. 641.

32. (1895) 131 Mo. 1, 6, 32 S. W. 641. In this case an act providing for the selection of the jury in counties which had a city containing more than fifty and less than three hundred thousand inhabitants was upheld altho only two counties came under the provisions of the act at the time of its enactment.

33. (1915) 265 Mo. 275, 177 S. W. 640. Accord: *Hays v. Mining and Milling Co.* (1909) 227 Mo. 288, 126 S. W. 1051. (An act regulating fees of clerk of circuit court in all counties which "constitute a separate judicial circuit with two judges of the circuit court and having no criminal court"); affirmed: *Bridges v. Holdout Mining Co.*, 252 Mo. 53, 158 S. W. 579.

thousand dollars or more annually." In this case the legislature could include or exclude a county which otherwise would come within the class changing the pay of the county surveyor. The court based its decision upon the ground that no other county or counties could come within the class as the classification is based upon an existing state of facts. A classification based upon a distinction which derives its existence from an act of the legislature is necessarily a classification based upon an existing fact.

B. ENACTMENT OF LOCAL AND SPECIAL LAWS.

(1) *In Pursuance of a Provision of the Constitution.*

A local or special act passed in pursuance of a specific constitutional provision is valid. The prohibition against local and special legislation does not apply to such acts. An act which appoints the times and places for the holding of circuit courts in a designated judicial district is not invalid,[34] altho special and local, since the constitution provides that the circuit court "shall hold its terms at such times and places in each county as may be by law directed." [35] In *Ex Parte Renfrow*[36] an act was upheld which created a criminal court in Green County under section thirty-one of article six of the constitution which provided: "The General Assembly shall have no power to establish criminal courts except in counties having a population exceeding fifty thousand." Wherever the constitution authorizes the passage of a law it is not invalid if local or special.[37]

34. *State ex rel Hughlett v. Hughes* (1891) 104 Mo. 459 (an act providing for the times and places of holding circuit courts in Audrain, Pike, Lincoln, and Montgomery counties); affirmed: *State ex rel Younger v. Stratton* (1896) 136 Mo. 423.

35. Const. of 1875, Art. VI, Sec. 22.

36. (1892) 112 Mo. 591, 598, 20 S. W. 682; affirmed: *State ex rel Donhan v. Yancey* (1894) 123 Mo. 391, 27 S. W. 380; *State v. Etchman* (1905) 189 Mo. 648, 88 S. W. 643. But an act which imposes duties upon any judge of a criminal court not a part of that office, as an act requiring the judge of the criminal court of Buchanan county to sit, when called upon, over courts in any circuit in the state trying civil and criminal cases, is unconstitutional. *State v. Hill* (1898) 147 Mo. 63, 47 S. W. 798; *Ashbrook v. Schaub* (1900) 160 Mo. 107, 110, 160 S. W. 107.

37. In the following cases local and special acts were upheld under

(2) *Under Section Fifty-Four.*

It is provided in section fifty-four of article four that "no local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected is situated." [38] It is required that the notice shall state the substance of the contemplated law, and be published at least thirty days prior to the introduction of the bill in the legislature.

In *Todd v. Reynolds*[39] a local and special act, which pro-

a specific provision in the constitution authorizing such legislation: *Kenefick v. St. Louis* (1895) 127 Mo. 1, 29 S. W. 838 (an act limiting the compensation of the sheriff in the city of St. Louis to ten thousand dollars under Art. IX, Sec. 13, Const. of 1875, which provided that "the fees of no executive or ministerial officer of any county or municipality, ...shall exceed the sum of ten thousand dollars for any one year"); *State ex inf. Atty. Gen. v. Dobbs* (1904) 182 Mo. 359, 365, 81 S. W. 1148 (an act providing for an additional circuit judge in Jasper county); *Coffey v. Carthage* (1906) 200 Mo. 616, 98 S. W. 562 (an act in relation to the twenty-fifth judicial district dividing the court into two divisions and providing for two judges); *State ex rel Judah v. Fort* (1908) 210 Mo. 512, 109 S. W. 737 (an act creating two divisions for the Criminal Court of Jackson County). *State ex rel Lionberger v. Tolle* (1880) 71 Mo. 645 (an act requiring judges of circuit courts in cities having a population of one hundred thousand inhabitants or more to award to the newspaper which is the lowest bidder all legal notices was upheld under Art. VI, Sec. 27, of the Constitution which provided that the judges of the circuit court of St. Louis "may sit in general term----------for the transaction of such other business as may be provided by law"); *State v. Brown* (1880) 71 Mo. 454 (an act adding Cairo township to the jurisdiction of the common pleas court of Moberly upheld under section five of the schedule of the Constitution which provided that all courts of common pleas shall continue to exist and exercise their present jurisdiction until otherwise provided by law).

38. Article IV, Section 54, Const. of Mo., provides as follows:

"Sec. 54. *Local and special laws, notice of*....No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed, and the notice shall be recited in the act according to its tenor."

39. (1917) 199 S. W. 173. The same act was upheld in a previous case, *Lampel Land Co. v. Spellings* (1911) 236 Mo. 33, 139 S. W. 347.

vided that the "Chas. H. Groom Abstracts," relating to and affecting the titles of real real estate in Taney county, "shall be received as *prima facie* evidence of the matter and entries therein contained, in all courts and places in this state,"[40] was upheld under section fifty-four of article four, all of the formalties required by this section being complied with. This act was held not to be in contravention of section fifty-three of article four of the constitution. It was not in conflict with the subdivisions enumerating prohibited subjects of special legislation. Neither was it regarded as being in conflict with the provision that no local or special law shall be passed where a general law can be made applicable. The necessity for the special act in this case was the loss of all records and abstracts of the conveyance of real estate in Taney county in the destruction of the court house of Taney county in 1885, except the "Chas. H. Groom Abstracts."[41]

A local or special law upon any of the enumerated subjects in section fifty-three, concerning which local and special laws are forbidden, does not become valid by reason of enactment in pursuance of the provisions of section fifty-four;[42] and section fifty-four does not authorize the enactment of a local and special law where a general law could have been made applicable.[43] Section fifty-four merely provides a method whereby those local and special laws which are not upon subjects forbidden by section fifty-three, or upon a subject which a general law could not have been made applicable, may be enacted.

40. *Missouri Laws*, 1905, p. 148.

41. In 1907 a general law making abstract of titles competent evidence wherever the official records had been destroyed was passed. *Missouri Laws*, 1907 p. 271. The soundness of the decision in *Todd v. Reynolds*, it is submitted, depends upon whether a general law could have been made applicable. Apparently the court accepted the determination by the legislature of this question as reasonable.

42. *State v. Kring* (1881) 74 Mo. 612, 623.

43. *Todd v. Reynolds* (1917) 199 S. W. 173, Railey, C., (loc. cit. 175): "Section 54 of the above article of our Constitution clearly contemplates that a local or special law may be passed by complying with its provisions, provided it does not contravene any of the provisions of section 53, *supra*."

If a local or special act has been enacted under the provisions of section fifty-four, it can be amended only by compliance with all the formalities required in the first instance.[44] But such an act may be repealed, it seems, without complying with the requirements of section fifty-four.[45] If a local act is passed in compliance with section fifty-four, and also in pursuance of a grant of power conferred upon the legislature by the constitution, such law may be amended as any other law since the compliance with section fifty-four was unnecessary. The validity of the law depends upon the specific grant of power by the constitution, and not because of compliance with section fifty-four.[46]

Chapter VI. Classification of Cities.

A. CLASSIFICATION OF CITIES AUTHORIZED BY THE CONSTITUTION.

(1) *The Four Classes of Cities Organized Under General Laws.*

Cities may be properly classified for the purposes of regulation by general laws upon the basis of population. The justification for such classification lies in the difference of needs of

44. *Ashbrook v. Schaub* (1901) 160 Mo. 107, 110, 60 S. W. 1085.

45. In *Todd v. Reynolds* (1917) 199 S. W. 173 it was contended the subsequent general act, mentioned in note four, repealed the local and special act. It was held that the general act did not repeal the special act, but it was intimated that the Legislature could have repealed the special act.

46. *State ex rel Donhan v. Yancy* (1894) 123 Mo. 391, 27 S. W. 380. The act involved in this case was an amendment to an act creating a criminal court in Greene county. The original act complied with all the requirements of section fifty-four, but the amendment did not. The amendment was sustained, however, under section thirty-one of article six which authorized the legislature to establish criminal courts in counties having a population of fifty thousand inhabitants or over. In delivering the opinion of the court, Burgess, J., said (loc. cit. 401): "The fact that notice was given of the intended application to the legislature for the passage of a law creating the court in question and of a court similar in all respects in Buchanan county did not change the law and was in all probability done thru an abundance of caution, certainly not because it was a necessary prerequisite."

cities of different population, and in a similarity of problems in the cities of the same size. Laws applicable to the creation of an organization and of powers in a small town are unsuited to perform a similar function for the government of large cities; but cities of the same size have so much in common that general laws defining their powers and organization are recognized as adequate to their similar needs.[1]

The classification of cities is authorized and required by the Constitution of Missouri. Section seven of article nine reads: "The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The General Assembly shall also make provision, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to and be governed by the general laws relating to such corporations."

The Legislature, acting under this constitutional mandate, in the first session after adoption of the Constitution of 1875, divided the cities and towns of Missouri into four classes.[2]

1. Dillon, Mun. Corp., Secs. 147-151.

2. *Missouri Laws*, Twenty-ninth Session (1877), p. 41. All cities containing one hundred thousand inhabitants or more constituted the first class; all cities containing twenty and less than one hundred thousand, the second class; all cities and towns containing five and less than twenty thousand, the third class, and all cities and towns containing five hundred and less than five thousand inhabitants constituted the fourth class. The *Missouri Laws* of 1885, p. 50, changed the division between the second and third classes from twenty to thirty thousand inhabitants. Subsequently the dividing line between the third and fourth classes was changed from a population of five to three thousand inhabitants. R. S. 1889, Secs. 974, 975. This amended classification still holds today (R. S. 1909, Secs. 8524-8527) with the addition that all unincorporated towns containing less than five hundred are declared villages (R. S. 1909, Sec. 8528); and with the provisions that all incorporated towns under five hundred inhabitants which shall so elect shall be cities of the fourth class (R. S. 1909, Sec. 8527), and that all cities containing more than seventy-five and less than one hundred fifty thousand inhabitants may become a city of the first class upon a vote at a special election (R. S. 1909,

Laws defining the powers and organization of the cities of each class have been passed and there is no question of their constitutionality. It is with laws concerning the powers of cities which do not comply with this classification and which are not coextensive with the limits of a given class that the question of constitutionality most frequently arises.

It will be noted that the constitutional provision requiring the classification of cities provides that the general assembly shall provide for the organization and define the "power of each class" by general laws, and that all the cities "of the same class shall possess the same powers and be subject to the same restrictions."[3] The effect of this provision has been not only to produce uniformity of organization and powers within each class of cities, but also to set apart each class from the others by well defined limits. Thus a law which grants a power to any one of the four defined classes of cities is recognized as general and valid even tho there may be no reasonable distinction between the cities of the favored class from the cities in any other class with respect to the power granted.[4] On principle such a

Secs. 8535-8536). The latter provision which was applicable to St. Joseph alone at the time was upheld in *State ex rel Halsey v. Clayton* (1909) 226 Mo. 292, 126 S. W. 506, on the ground that the statute merely provided a different method by which cities having over seventy-five and less than one hundred thousand inhabitants could become members of the first class. Those over one hundred thousand inhabitants had to become members of the first class whether they so chose or not.

3. Const. of Mo., Art. IX, Sec. 7.

4. *Copeland v. St. Joseph* (1894) 126 Mo. 417, 429, 29 S. W. 281; Dillon, *Mun. Corp.*, Sec. 151. In *Copeland v. St. Joseph* the court held an act which authorized cities of the second class to extend their limits, with the proviso that land in lots of three acres or more devoted to agricultural purposes should be exempted from municipal taxation when thus included within the extended boundaries was not objectionable because the proviso was limited in operation to cities of the second class. The words of Gantt, P. J., who delivered the opinion of the court, are as follows: (loc. cit. 429)

"In view of all this contemporaneous legislation showing conclusively that the legislature has not hesitated to confer upon cities of all grades this power of self-extension without attempting to exempt such lands, counsel for respondent argues that there is little left upon which to base a presumption that the legislature would have denied the power to cities of the second class, unless the *proviso* had been inserted in the act. We confess we can see no reason why this power should be denied

law would be valid only when based upon a classification arising out of a reasonable necessity; but laws relating to the organization and powers of a class of cities are not so tested.[5]

Those acts, however, which do not provide for the organization and powers of cities of a given class, are not necessarily general because they apply to all cities of one of the recognized classes. Such acts are general only when the class to which they apply is determined by a reasonable distinction which relates directly to the object of the statute. Neither are these acts required to follow the lines of classification of the four general classes of cities; nor are such acts invalid when they split a class in violation of the requirement that all powers of each class shall be the same.[6]

one class of cities and be conferred upon all others. In either case it subjects the property so taken in, to municipal taxation.

"On the other hand, it cannot be doubted that the legislature had the unquestioned right to withhold the power of extension altogether, and necessarily the right to annex the conditions upon which it would confer the power, and the very fact that it granted the right to all other cities, and denied it to cities of the second class refutes the presumption *that the proviso* was immaterial or inadvertent."

5. *State ex inf. Att'y. Gen. v. Fleming* (1898) 147 Mo. 1, 13, 44 S W. 758 (an election law applicable to cities of the fourth class upheld altho it virtually did away with the Australian ballot law as to elections in cities of the fourth class for extension of boundaries). See Dillon Mun. Corp. Sec. 151.

6. In *Calland v. Springfield* (1914) 264 Mo. 296, Loc. cit. 302, 174 S. W. 396, Bond, J., in upholding a tax rate in those cities having over thirty thousand inhabitants which were in the third class, at a higher rate than was permitted in cities of the third class having less than thirty thousand inhabitants, under authority of Article X, section eleven of the Constitution said:

"The other section (Art. 9, Sec. 7) after referring to the Legislature the duty of providing 'for the organization and classification of cities and towns' and limiting these to four, adds, to-wit:

"'And the powers of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.'

"This general language of the Constitution is necessarily referable to the objects had in view, that is the *organization* and division of all cities and towns into four classes. Therefore in providing that when thus classified they should have similar powers and be under similar restrictions, the Constitution plainly referred to the constituent agencies and governmental functions which necessarily composed 'the organization' of the cities and towns as a body politic under a particular class."

A law which grants powers to cities of a given class and provides that any city of the class may exercise the power upon election to do so, either by the voters or officials of the city, is general in nature.[7] It is a form of the local option acts discussed in another place. Neither is such an act invalid under the requirements that all cities of the same class shall have the same powers and be subject to the same restrictions.[8] In *Owen v. Baer,* [9] three judges of a divided court held a local option drainage and sewer act for cities of the third and fourth class unconstitutional on the ground that it created "a dissimilarity in the powers of the cities of the fourth class." It was contended that cities which accepted the provisions of the act had greater powers than those which rejected its provisions. Since this view was not the view of a majority of the court in *Owen v. Baer,* the court in *Hall v. Sedalia*[10] did not hesitate to repudiate this theory in holding that a local option sewer law for cities of the third class was constitutional.

(2) *Cities Operating Under Special Charters.*

The question arose a few years after the adoption of the Constitution of 1875 as to the validity of legislation applying to cities operating under special charters. It was held in *Rutherford v. Heddens*[11] that a law which authorized cities operat-

7. *Barnes v. Kirksville* (1915) 266 Mo. 270, 180 S. W. 545 (an act providing commission form of city government for cities of the third class selecting it).

8. *Hall v. Sedalia* (1910) 232 Mo. 344, 134 S. W. 650. Ferriss, J., in giving the opinion of the court, said (loc. cit. 352): "The act in question is complete in itself, and is uniform in its application to cities of the third class, comprehends all cities of that class. Whether the law shall come into operation in any particular city depends upon a contingency, namely, an affirmative vote of the people of such city. But this applies to each and every city of the class. The law extends the same right, the same privilege, to each city in the class, and is therefore uniform. It is, in the language of the Constitution, a 'general' law, and under it all the cities of the same class, as required by the Constitution, 'possess the same powers and are subject to the same restrictions.' "

9. (1900) 154 Mo. 434, 55 S. W. 644.

10. (1910) 232 Mo. 344, 352, 134 S. W. 650.

11. (1884) 82 Mo. 388. Affirmed in *Rutherford v. Hamilton* (1888) 97 Mo. 543, 11 S. W. 249. The act involved authorized the cities in the class designated to establish a system of sewerage.

ing under special charters that contained more than thirty and less than fifty thousand inhabitants to establish a sewer system was general and constitutional. Thus was recognized a fifth class of cities, namely, those operating under special charters. Also as a further result of *Rutherford v. Heddons,* laws which apply only to a portion of the cities operating under special charters may be held to be general.[12] It is believed that legislation for sub-classes of the general class of cities with special charters is valid only when such sub-classification rests upon a reasonable difference that relates to the object sought by the statute for which the sub-classification was made.

(3) *Cities with "Home Rule" Charters.*

Other constitutional provisions which have given rise to two separate classifications of cities are contained in article nine. Sections sixteen and seventeen provide for the adoption by cities having more than one hundred thousand inhabitants of their own charters; and section twenty and the following sections in article nine provide a method by which St. Louis alone may adopt its own charter. Under these sections acts applying to St. Louis or the other "home rule" cities are upheld on the theory that two new classes of cities are created; one class composed of all "home rule" charter cities except St. Louis, and the other class composed of St. Louis alone.[13]

Statutes which designate St. Louis directly by name, or in-

12. *Kelly v. Meeks* (1885) 87 Mo. 396 (an act authorizing cities with special charters having more than twenty and less than two hundred and fifty thousand inhabitants to extend their limits): *Elling v. Hickman* (1902) 172 Mo. 237, 72 S. W. 700 (an act authorizing the organization of special road districts of territory in which were cities of the third and fourth classes except those cities of the third class having special charters). In *Elting v. Hickman,* Burgess, J., said (loc. cit. 256): "It is therefore plain that cities which retain their special charters do not belong to either of the classes provided for by the Constitution, altho they may have the requisite number of inhabitants to become such, unless they first elect to do so."

13. *Kansas City v. Stegmiller* (1899) 151 Mo. 189, 52 S. W. 725. Gantt, C. J., in delivering the opinion of the court, said (loc. cit. 204): "Again we think it is plain that the framers of the Constitution *ex vi termini* excluded from its legislative classification the City of St. Louis,

directly by classification as "all cities having a population of over five hundred thousand inhabitants," [14] are upheld on the theory that St. Louis under the constitutional provisions constitutes a separate class. If St. Louis were not recognized as constituting a separate class to herself then such laws relating to the powers and organization of cities over five hundred thousand would be invalid under the constitutional provision that all cities of the same class should possess the same powers and be subject to the same restrictions. Such statutes, however, as define the powers and organization of the city of St. Louis, directly or indirectly, must be based upon the peculiar needs of St. Louis, as distinguished from the needs of other cities having home rule or of the first class. The "home rule" cities and St. Louis are recognized as separate classes, it is submitted, only when there is a reasonable necessity for such classification. The validity of laws concerning St. Louis alone designated directly or indirectly, are tested by the same requirement that there must be a reasonable necessity for such classification to accomplish the object of the statute.

In *Murnane v. St. Louis*[15] an act which regulated the assesment for street improvements in cities having more than three

which it expressly authorized to adopt its own scheme and charter, and all such cities as it authorized by Section 16 Article IX, to frame and adopt their own charters. These cities constitute two constitutional classes distinct from those chartered and classified by the legislature."

The cases in the Supreme Court of Missouri upon this question are reviewed in McBain, Law and Practice of Municipal Home Rule, pp. 118-171.

14. In *State ex rel Hawes v. Mason* (1899) 153 Mo. 23, 54 S. W. 524, Gantt, C. J., in upholding an act "providing for the creation and organization in all cities having three hundred thousand inhabitants and over, of a board of police commissioners" said (loc. cit. 52): "So much of the argument indulged in to demonstrate that the act under consideration is a local and not a general law, is inapplicable to legislation of this character. St. Louis is organized directly under the Constitution. It is not in any one of the four classes of cities which have been defined by the legislature under the Constitution. It would have been entirely appropriate for the Legislature to have designated St. Louis by name instead of referring to it as a city of over three hundred thousand inhabitants."

15. (1894) 123 Mo. 479, 27 S. W. 711. The court also found that there was no distinguishing peculiarity giving rise to a necessity for

hundred thousand inhabitants was held unconstitutional because it was not a general law applying to all cities of the first class, namely, to those first class cities having one hundred thousand inhabitants or over. The court said it created a fifth class of cities in violation of the provision that the legislature should divide the cities in not to exceed four classes. This reasoning was followed in *St. Louis v. Dorr*[16] in which a boulevard act applicable to cities having more than three hundred thousand inhabitants was held unconstitutional. Sherwood, J., dissented from the decision in the latter case on several points one of which was that such act did not violate the constitutional requirement that all cities should be divided into four classes by creating a fifth class; that St. Louis under the constitution constituted a separate class concerning which valid laws might be passed.[17]

This view of Sherwood, J., later was adopted by the court in *Kansas City v. Stegmiller*[18] and in *State ex. rel. Hawes v. Mason*.[19] In the latter case a law providing for a Board of Police Commissioners in cities having more than three hundred thousand inhabitants was upheld. It is difficult to justify the decision and doctrine of the *Nurnane* case with subsequent cases and it is not believed that it is the law today. Sherwood J., distinguished these cases a few years later on the theory that

the law as to the designated class and that the classification was based upon an existing state of facts. Burgess, J., and Sherwood, J., dissented.

16. (1898) 145 Mo. 466, 46 S. W. 976. Accord: *Kansas City ex rel Dist. v. Scarritt* (1894) 127 Mo. 642, 29 S. W. 845.

17. (1898) 145 Mo. 466, 499, 46 S. W. 976. Sherwood, J., referring to section seven of article nine of Constitution authorizing the division of cities into not to exceed four classes, said (loc. cit. 499): "But it is enough to say of such section *that it has nothing whatever to do with the City of St. Louis*, since that city is by the Constitution singled out and segregated from all other cities in this State, by express mention by name, as well as by peculiar and express provisions, shared by no other city."

18. (1899) 151 Mo. 189, 52 S. W. 723.

19. (1899) 153 Mo. 23, 52, 54 S. W. 524. Accord: *Bambrick Bros. Const. Co. v. Realty Co.* (1917) 193 S. W. 543 (an act regulating enforcement of liens for street improvements in cities having more than three hundred thousand inhabitants).

legislation concerning St. Louis alone, or cities having "home rule" charters as a class, was valid only when a general law could not have been made applicable.[20] It is submitted that the City of St. Louis and the other cities operating under "home rule" charters constitute two separate classes of cities under the constitution in addition to the four classes created by the general assembly acting under the constitution and the class of cities having special charters; and that these two classes of cities are proper classifications for laws defining powers and organization of these cities only so long as there is a reasonable necessity for such classification. It will be noted that the laws concerning the four classes differ from the laws concerning the two classes of "home rule" cities in that laws defining the powers and organization of the cities of any of the four classes are always proper regardless of necessity of such classification under the doctrine of *Copeland v. St. Joseph.*

The power of the legislature operating under "home rule" charters is restricted to matters of general or public concern to the state; and the legislature cannot regulate by a general law the affairs of purely local concern of those cities having "home rule." [21] Lamm, J., made an excellent statement of the law on this point in *Brunn v. Kansas City.*[22]

20. *Henderson v. Koenig,* 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659. Sherwood, J., in delivering the opinion of the court, said (loc. cit. 376): "But the assertion is made that cases have been decided by this court where local or special legislation, that is to say, legislation applicable alone to the city of St. Louis or alone to Kansas City, has been held valid. This is true, but in the decisions in none of those cases was there any expression or ruling which impinges in the slightest degree on the Constitutional prohibition against a local or special law being enacted where a general law could have been made applicable; on the contrary, either distinct or else implied recognition is constantly given to the idea, that, owing to the circumstances and exigencies of the *particular case,* a general law could not have been made applicable, or where it could not have been made applicable by reason of the fact that the legislation questioned was the result of direct obedience to some specific command of the Constitution. This statement will be found to embrace all the cases decided on the subject."

21. *Kansas City ex rel District v. Scarritt* (1895) 127 Mo. 642, 29 S. W. 845; *Kansas City v. Stegmiller* (1899) 151 Mo. 189, 52 S. W. 723.

22. (1908) 216 Mo. 108, 117, 115 S. W. 446.

"In fine the constitutional idea was that charters under consideration should present a complete scheme of local self-government and that where their provisions conflict with the general statutes on a *merely municipal regulation* (such as condemnation proceedings are held to be) the charter provisions should control; and it has been held that the constitutional plan for amending charters (sec. 16, art. 9.), which directs that they shall be amended by a vote of the people 'and not otherwise' is mandatory and forbids the regulation and direction of purely municipal affairs by act of the legislature. (*Kansas City v. Scarritt,*[23] 127 Mo. *supra.*)"

The question frequently arises with respect to legislation concerning the cities having "home rule" charters as to what are matters of local concern as distinguished from matters of public concern to the state. A number of decisions of the Supreme Court have been handed down upon this question,[24] but the scope of this study does not include a discussion of them. An interesting study of the Missouri cases is made by Professor H. L. McBain of Columbia University in the Law and the Practice of Municipal Home Rule.

(4) *Classification of Cities for Special Purposes.*

Wherever the constitution authorizes legislation upon a given subject with reference to certain cities or class of cities then laws passed in pursuance of such provision are upheld altho they may not conform to one of the four classifications. An example of this is the section which provides that: "The General Assembly shall provide, by law, for the registration of all voters in cities and counties having a population of more than one hundred thousand inhabitants, and may provide for such registration in cities having a population exceeding twenty-five thousand

23. (1894) 127 Mo. 642, 29 S. W. 845.

24. *Kansas City ex rel District v. Scarritt* (1894) 127 Mo. 642, 29 S. W. 845; *Kansas City v. Ward* (1896) 134 Mo. 172, 35 S. W. 600; *Kansas City v. Marsh Oil Co.* (1897) 140 Mo. 458, 41 S. W. 943. McBain, Law and Practice of Municipal Home Rule, pp. 172-179.

inhabitants and not exceeding one hundred thousand, but not otherwise." [25]

This provision apparently recognizes two distinct classes of cities, *those having more and those having less than one hundred thousand and more than twenty-five thousand inhabitants,* for the purpose of legislation providing for the registration of voters. So in *Ewing v. Hoblitzelle*[26] an act was quite properly upheld which regulated the registration of voters in cities having over one hundred thousand inhabitants. The court goes further in *State ex. rel. McCaffrey v. Mason*[27] in holding a similar act valid which applied only to cities having more than three hundred thousand inhabitants. Three of the judges based their opinion on the ground that it was a proper classification, while the other three were of the opinion that St. Louis, the only city in the class, was set apart by the constitution into a class by itself and that legislation referring to St. Louis by name would have been proper. It will be noted that the registration of voters is a matter of public concern and is not a matter of local government except in so far as it has to do with city elections. It is submitted that classification other than as to the two classes impliedly provided in the constitution in respect to registration laws should be tested by the same requirements as any other law; and that any classification which is not based upon a difference which bears a reasonable relation to the end sought should be held invalid as local and special.

Another provision in the constitution which classifies cities is contained in section eleven of article ten. It limits the tax rates for city purposes at different amounts for cities of different populations. In *Calland v. Springfield*[28] it was contended that cities of the same class must have the same tax rate but the court held that the classification for purposes of taxation did

25. Art. VIII, Sec. 5, Const. of Mo. of 1875.
26. (1884) 85 Mo. 64.
27. (1900) 155 Mo. 486, 55 S. W. 636. Affirmed in *State v. Keating* (1907) 202 Mo. 197, 100 S. W. 648.
28. (1914) 264 Mo. 296, 174 S. W. 396. See p. 20 for a further discussion of this case.

not involve the classification for the purpose of defining powers and organization and that cities of the same class might have different tax rates.

B. STATUTORY CLASSIFICATION WITHOUT DIRECTION BY THE CONSTITUTION.

Under the Constitution of 1875, as interpreted by the court decisions discussed above, there are seven classes of cities in Missouri concerning which general laws may be passed providing for their powers and organization; the four classes of cities operating under general laws, the cities operating under special charters, the general class of cities having "home rule" charters, and St. Louis. Laws which conform to this classification with respect to powers and organization present no difficulty. It is with laws which do not conform to this classification, or which do not concern powers and organization, or which do neither that present the most difficulty.

(1) *Laws Which Do Not Concern the Organization and Powers of Cities.*

Laws which do not concern the organization and powers of cities are not general solely because they apply to all the cities of a specified class.[29] There must be peculiar conditions existing in the class designated, with reference to which the law is enacted that justifies such classification.[30] Thus a law which

29. *Helfer v. Simon* (1891) 53 N. J. L. 550; Dillon, Mun. Corp. Sec. 151. *Semble, State ex rel Harris v. Hermann* (1882) 75 Mo. 340 (law regulating notaries in cities having more than one hundred thousand population held invalid).

In *Helfer v. Simon,* Scudder, J., in holding invalid a statute which fixed term and compensation of city physician in cities of the second class, said (loc. cit. 552): "In this case there has been no reason assigned, nor is it apparent, why an officer known as city physician, in a city of the second class, should have a different appointment..... from a physician to be appointed and compensated in a city of the first class or of the third class. Population cannot have any just reference to this distinction between these classes by which the middle class is separated from the others."

30. *State ex rel Atty. Gen. v. Miller* (1890) 100 Mo. 439, 13 S. W.

applies to the City of St. Louis in its function as a county in the scheme of local government[31] is not general merely because a law applying to St. Louis as a city under a "home rule" charter is regarded as general. The validity of such a law is determined by the general test, i. e., whether a general law could have been made applicable. In *Henderson v. Koenig*[32] a law regulating fees of the probate court in cities over three hundred thousand was declared unconstitutional on the ground that there was no exigency "requiring such legislation and confining its operation, as does the act in question, to the City of St. Louis alone." [33]

(2) *Laws Which Do Not Comply with the Constitutional Classification of Cities.*

The constitution requires that the powers of each class of cities shall be the same, so that a law defining the powers of

677 (law providing for school directors in cities over three hundred thou sand population).

31. Const. of Mo. Art. IX, Sec. 23; *State ex rel Martin v. Wofford* (1893) 121 Mo. 61, 25 S. W. 851 (city was held to mean county).

32. (1902) 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659.

33. In the following cases laws were held unconstitutional because they were special: *State v. Kring* (1881) 74 Mo. 612 (an act regulating procedure in the criminal courts of St. Louis); *State v. Auslinger* (1903) 171 Mo. 600, 71 S. W. 1041 (an act prohibiting fraudulent voting in cities over three hundred thousand in population); *Wooley v. Mears* (1910) 226 Mo. 41, 125 S. W. 1112 (an act prohibiting the offer for sale of realty without written authority in cities of over three hundred thousand inhabitants); *State ex rel Garesche v. Roach* (1914) 258 Mo. 541, 167 S. W. 1008 (the non-partisan judiciary act applicable to cities over three hundred thousand in population).

In the following cases the laws were held general and constitutional: *State ex rel Monahan v. Walton* (1879) 69 Mo. 556 (an act providing for division of St. Louis into fourteen districts for election of justices of the peace); *State ex rel Manning v. Higgins* (1894) 125 Mo. 364, 28 S. W. 638 (an act authorizing judges of probate, criminal and circuit courts in cities containing more than three hundred thousand inhabitants to divide the city into districts for the purpose of electing constables and justices of the peace); *Spaulding v. Brady* (1895) 128 Mo. 653, 31 S. W. 103 (an act regulating the salary of justices of the peace in cities over three hundred thousand inhabitants); *State ex rel Lionberger v. Tolle* (1880) 71 Mo. 645 (an act regulating the duties of judges of the circuit court in cities having over one hundred thousand inhabitants); *State v. Hayes* (1885) 88 Mo. 344 (a law giving the state in criminal cases additional peremptory challenges in cities having more than one hundred

cities must conform to the constitutional classification, and such laws that do not so conform are unconstitutional.[34]

But those laws which do not define the structure and powers of cities and towns may adopt any classification that has a proper relation to the object sought. A local option dramshop law was upheld in *State ex rel Maggard v. Pond*[35] which applied to all cities having over two thousand five hundred inhabitants altho it divided cities and towns of the fourth class into two parts. Likewise in *Ex Parte Lucas*[36] an act regulating the occupation of barbers in cities having more than fifty thousand inhabitants was upheld as a valid exercise of the police power altho the act applied only to a few of the cities of the second class. It was said there was a greater possibility of the spread of disease thru barber shops of large cities than in smaller places.

thousand inhabitants); *State ex rel Martin v. Wofford* (1893) 121 Mo. 61, 25 S. W. 851 (an act regulating appointment of stenographers in criminal courts in cities having more than one hundred thousand inhabitants); *State ex rel Atty. Gen. v. Speed* (1904) 183 Mo. 186, 81 S. W. 1260 (an act regulating salary of coal oil inspectors for cities of the state with a population of three hundred thousand inhabitants); *State v. Tower* (1904) 185 Mo. 79, 84 S. W. 10 (an act making a nuisance the discharge of dense smoke in cities of over one hundred thousand inhabitants); *State ex rel Harvey v. Sheehan* (1916) 269 Mo. 421, 190 S. W. 864 (an act regulating fees and duties of circuit attorneys in cities containing over five hundred thousand inhabitants). Compare *State ex rel Harvey v. Sheehan* with *Henderson v. Koenig* (1902) 168 Mo. 167, 65 S. W. 620, 57 L. R. A. 846, in which an act regulating the fees of the probate court in cities having over three hundred thousand inhabitants was held invalid.

34. *State ex inf. Mytton v. Borden* (1901) 164 Mo. 221, 65 S. W. 172 (an act held invalid which created a board of public works in cities of over one hundred thousand and less than one hundred fifty thousand inhabitants, St. Joseph being the only city included); *State ex rel Wyatt v. Ashbrook* (1900) 154 Mo. 375, 55 S. W. 627 (an act providing for the licensing of department stores by city officials in cities containing over fifty thousand inhabitants).

35. (1887) 93 Mo. 606, 6 S. W. 469. Affirmed: *Ex Parte Handler* (1903) 176 Mo. 383, 75 S. W. 920; *State v. Handler* (1903) 178 Mo. 38, 76 S. W. 984.

36. (1901) 160 Mo. 218, 61 S. W. 218.

Chapter VII. Local Option Laws.

A law passed in the regular manner by the legislature, and made applicable to all units of any given class of units of local government, but which must be adopted by the voters or officials in a prescribed manner in any of the local units in order that that unit may avail itself of its provisions, is a local option law. The law exists from its passage by the legislature but it does not operate until the contingency happens provided for in the act which usually is adoption by the voters. These laws are confined to matters of local concern. The most common example of these laws is the local option liquor laws, but the use of this legislative device has been resorted to for the solution of many other local problems.

The constitutionality of local option laws is attacked on two grounds; first, it is a delegation of legislative power; second, it is special legislation. The two contentions are so interdependent that in order to discuss the second, it is necessary to dispose of the first.

The first constitutional objection to local option laws was raised in *State ex rel Dome v. Wilcox*[1] against the validity of a local option school law. Chapter forty seven of the General Statutes of 1865 provided a method by which towns and villages could be organized into school districts with given powers upon compliance with certain conditions, the most important of which was the adoption of the proposition by a prescribed vote in the locality concerned. It was contended that this act was not a law of its own force, enacted by the law-making power of the land, but depended for its existence upon a vote of the people of the locality where it was sought to be made operative; that it was a delegation of legislative power and therefore void.[2]

Wagner, J., gave the opinion of the court that the law in question was enacted by the legislature, that it applied to the entire state, being the law everywhere whether voted upon or

1. (1870) 45 Mo. 458.
2. (1870) 45 Mo. 458, 461.

not, and that it was constitutional, there being no delegation of the legislative power whatsoever. "In the case we are now considering," said Wagner, J., "the act took effect with the other laws contained in the statutes. It was passed according to the prescribed forms designated in the constitution. Its enactment did not depend upon any popular vote, but parties to be affected by it were at liberty to accept the privileges granted, and incur the burdens and obligations it would impose, as their interest or will should dictate. If they elected not to avail themselves of its privileges it did not in the least impair its force; it still stood a valid enactment on the statute book." [3]

The legislature itself must enact the law.[4] It cannot without constitutional authority propose a law to be adopted by the electorate,[5] or by local officials.[6] Neither can the legislature authorize the officials or voters of a locality to suspend a law.[7] But, as it is said, "the legislature may pass a law to take effect or go into operation on the happening of a future event or contingency, and that such contingency may be a vote of the people."[8]

The theory adopted in *State ex rel Dome v. Wilcox, supra,* that the law exists regardless of its adoption by the voters in any given locality and that it does not constitute a delegation of legislative power, was followed in the subsequent cases on that

3. (1870) 45 Mo. 458, 464.

4. An amendment to the Constitution of Missouri adopted in the general election held November 3, 1908, provides for the initative and referendum on legislative acts as well as constitutional amendments. This changes the law on this subject. See Section 57, Article IV, Constitution of Missouri.

5. *State ex rel Dome v. Wilcox* (1870) 45 Mo. 458, 464; *Lammert v. Lidwell* (1876) 62 Mo. 188; *Barto v. Himrod* (1853) 4 Seld. (N. Y.) 483.

6. *Ex Parte Smith* (1910) 231 Mo. 111, 118, 132 S. W. 607.

7. *State v. Field* (1853) 17 Mo. 529.

8. *State ex rel Maggard v. Pond* (1887) 93 Mo. 606, 621, 6 S. W. 469; *St. Louis v. Alexander* (1856) 23 Mo. 483, 513.

point and it remains the law today in this state.[9] This doctrine has also been adopted in nearly all other jurisdictions.[10]

The second objection urged against local option laws was that such laws were special and local in that they operated only in those localities adopting the act. This contention was made in *State ex rel Dome v. Wilcox,* discussed in connection with the first objection. Wagner, J., after holding that the local option school law was enacted by the legislature and not by the voters and that the law existed in all parts of the state whether adopted by vote or not in any given locality, disposed of this second contention as follows: "Special statutes relate to certain individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been special; but such is not the case. It is co-extensive with the state, and its influence is felt in every county and almost every township. It is conceded that it does not include in its operation every individual nor extend to all territory, but that is not required." [11]

The theory of this decision is that the law derives its existence from the enactment by the legislature and not from adoption in any given locality, hence its existence is general thruout the state and is not confined to localities adopting the same. The school law does not of itself organize a school district and give it powers, but it provides a method by which the people of the locality may organize and upon this district, duly organized in

9. Opinion of Supreme Court Judges on Township Organization Law (1874) 55 Mo. 295; *State ex rel Maggard v. Pond* (1887) 93 Mo. 606, 5 S. W. 469 (local option dramshop law); *Ex Parte Handler* (1903) 176 Mo. 383, 75 S. W. 920 (dramshop law); *State v. Handler* (1903) 178 Mo. 38, 76 S. W. 984 (dramshop law); *Hall v. Sedalia* (1910) 232 Mo. 344, 134 S. W. 650 (local option sewer and drainage law for cities of third class); *State ex inf. Wright v. Morgan* (1916) 268 Mo. 265, 187 S. W. 54 (local option school district consolidation act).

10. Opinion of the Justices (1894) 160 Mass. 586, 36 N. E. 488; *In re O'Brien* (1904) 29 Mont. 530, 75 Pac. 196, 1 Ann. Cases 373 and note p. 378. Also see note, J. P. Hall, Cases on Constitutional Law, p. 121. Contra: *Rice v. Foster* (1847) 4 Harr. (Del.) 479.

11. (1870) 45 Mo. 458, 465.

accordance with the provision of the statute, the law operates by investing it with certain powers.

This theory was affirmed a few years later in the *Opinion of Supreme Court Judges on Township Organization Law.*[12] In reference to the Township Organization Law the court said: "It is a general law made for the whole State, and by the terms of the act itself took effect from and after its passage. Every county in the State may avail itself of the privileges offered by this law by a majority vote of its people. It is left to the option of the counties whether they will organize under it or not. If a majority vote for it, such vote does not create the law, but places the county so voting within its provisions and the organization then takes effect, and also the law, as it existed before the vote was taken."

The question was again brought up in *State ex rel Maggard v. Pond*[13] in which a local option dramshop law was held constitutional and the doctrine of the earlier cases affirmed. There was a strong dissenting opinion by Sherwood, J., in which he contended that the constitutionality of the act was to be determined by its *operation* and not by its form.[14]

The act was local in operation, hence void as a local law. It was also objectionable as a special law since it singled out those members of the class of dramshop keepers in the state which resided in places adopting the vote and prohibited them from selling liquor. It was also ineffective because it resulted in the enactment of a special and local law by the partial repeal in those counties and cities adopting the act of a general

12. (1874) 55 Mo. 297.

13. (1887) 93 Mo. 606, 6 S. W. 469.

14. (1887) 93 Mo. 606, 641. Sherwood, J., dissenting: "If the legislature by an act had designated those counties and towns *by name* which have as it is said, adopted by their votes 'local option,' it could not be doubted that such an act would be both special and local. The fact that the people, by their votes, instead of the legislature, by an act, have designated those counties, can not alter the principle or vary the result; for what the legislature cannot do directly it cannot do indirectly. In such cases, the 'constitutionality of an act is to be determined by its *operation*, and not by the form it may be made to assume,' *State ex rel. v. The Judges*, 21 Oh. St. 11."

law providing for the sale of liquor. Also it was void, he argued, as a suspension of the general law authorizing the sale of liquor. The answer of the court to these propositions was that the law was of general application, that this was sufficient, and that "the fact that one or more counties, or one or more cities or towns, may, by a majority vote, put the law in operation in said county or counties, cities or towns, and that other counties or cities and towns may not do so, does not affect the rule nor furnish a test by which to decide whether the law is local or general, and this court has never held otherwise." [15]

Sherwood, J., further contended: "If such legislation as this is valid then I confess I can see no obstacle in the way of having *murder, rape, burglary,* etc., punished in as many various ways as the voters in an equal number of localities may, by virtue of their newly-found law making function, determine." [16] And again "Under its operation, the laws respecting commercial paper, limitations of actions, the punishment of crimes, etc., may vary with different localities, and still be held general laws, and constitutional."[17] The answer to this argument is that local option laws are only valid as to local matters.[18] As to what is a

15. (1887) 93 Mo. 606, 621, 6 S. W. 469.
16. (1887) 93 Mo. 606, 647, 6 S. W. 469.
17. (1887) 93 Mo. 606, 687, 6 S. W. 469.
18. "It may be conceded as the established doctrine, that statutes creating municipal corporations or imposing liabilities upon municipalities, or authorizing municipalities to incur debts and obligations, or to make improvements, may be referred to the popular vote of the districts immediately affected———that is to say, the people of such districts may decide whether they will accept the incorporation or will assume the burdens. This is the prevailing rule in reference to local matters." Wagner, J., in *Lammert v. Lidwell* (1876) 62 Mo. 188, 191. "Thus it will be observed that both the majority and minority opinions proceed from the same premises, to-wit, that it is a delegation of legislative power for the legislature to submit to the people at large for their adoption or rejection a law which affects the whole people, but that it is not a delegation of legislative power for the Legislature to enact a complete law, conferring a power or privilege upon a locality as to a mere matter of local concern, and leave it to the will of the constituted authorities of the locality or to the people thereof, to exercise the power or privilege as they see fit."--Marshall, J., in dissenting opinion, commenting upon *State ex rel Maggard v. Pond,* 93 Mo. 606, 6 S. W. 469, in *Owen v. Baer* (1899) 154 Mo. 434, 528, 55 S. W. 644.

local matter depends upon custom and the nature and peculiar interests of local government.[19] Sherwood, J., insisted that local option liquor laws including the enforcement acts were a part of the general criminal law of the state and were not a matter for local discretion. But the court held in accordance with the weight of authority elsewhere[20] that such laws were proper as a matter of local police regulation, and this view has remained the law in this state.[21]

In conclusion it may be said that a local option law is created by act of the legislature; that it exists thruout the state regardless of adoption by the voters in any given unit of local government to which the act applies; that it must concern a subject which may properly be dealt with differently by different parts of the state, such as matters of local government and matters of local improvement, local welfare and local police regulations; and that it does not become a special or local law within the constitutional prohibition when set in operation by adoption in any locality. When adopted such laws carry with them criminal enforcement laws, and these enforcement laws are not objectionable as a denial of equal protection of the law because they make an act a crime in one locality which would not be so in another locality where the law has not been adopted. The criminal feature is incidental and necessary for enforcement of local option laws wherever they are set in operation.[22]

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19. *Opinion of the Justices* (1894) 160 Mass. 586, 36 N. E. 488; *State v. Copeland* (1896) 66 Minn. 315, 69 N. W. 27, 61 Am. St. Rep. 410.

20. *Fouts v. Hood River,* (1905) 46 Or. 492, 81 Pac. 370, 1 L .R. A. N. S. 483; *In re O'Brien* (1904) 29 Mont. 530, 75 Pac. 196, 1 Am. & Eng. Ann. Cas. 373, and note on p. 378 in which the authorities are listed. Also see J. P. Hall, Cases on Constitutional Law, pp. 116, 121.

21. *Owen v. Baer* (1899) 154 Mo. 434, 55 S. W. 644; *Ex Parte Handler* (1903) 176 Mo. 383, 75 S. W. 920; *State v. Handler* (1903) 178 Mo. 38, 76 S. W. 984; *Hall v. Sedalia* (1910) 232 Mo. 344, 134 S. W. 650; *Barnes v. Kirksville* (1915) 266 Mo. 270, 280, 180 S. W. 545.

22. *Ex Parte Swann* (1888) 96 Mo. 44, 51, 9 S. W. 10; *State v. Rawlings* (1910) 232 Mo. 544, 134 S. W. 530.