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THE PROPOSED CONSTITUTION AND SPECIAL, PRIVATE, AND LOCAL LEGISLATION IN NORTH CAROLINA

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Prior to 1917 the North Carolina Constitution prohibited special, private, and local legislation granting divorces in individual cases,[1] altering the names of persons not born in lawful wedlock, and restoring the rights of citizenship to persons convicted of an infamous crime;[2] with the further provision that no private law should be passed unless it be made to appear that thirty days' notice of application to pass such law had been given.[3] In 1917 there was added the present section 29 of Article II, consisting of a prohibition of local, private, or special laws in fourteen enumerated cases, with a supplementary mandate that the General Assembly should not enact such laws by the partial repeal of a general law. The result of the 1917 Amendment has been a decrease in the number of special and private laws in the face of a corresponding increase in the number of general laws. Thus, in 1915 there were passed 287 Public laws, 814 Public-Local laws, and 395 Private laws. In 1931 these proportions had changed to 455 Public laws, 497 Public-Local laws, and 191 Private laws.

That the 1917 Amendment has not more completely cut down the amount of special legislation may be due to several factors. The list of topics may be incomplete. For example, there is no ban on local laws relating to fish and game, a prolific source of this type of legislation. Because of a lack of any systematic check on the validity of proposed or actually enacted local laws, and because the Supreme Court of the State has had to pass on only a small number of the clauses in Article II, section 29, a considerable number of unconstitutional statutes may now be on the books. Nevertheless, a brief glance at the judicial construction of these clauses may serve as a basis for evaluating the changes proposed by the Constitutional Commission.

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[1] N. C. Const., Art. II, §10.
[2] N. C. Const., Art. II, §11.
[3] N. C. Const., Art. II, §12.

Authorizing the laying out of highways. This clause has been construed strictly, and an act will not fall under its prohibition unless it directly authorizes the laying out of a particular road or highway.[4] An act which authorizes a county to issue bonds for the purpose of grading and constructing public roads is constitutional because the main purpose of the act, the "direct legislation," is the bond issue, and the fact that the bonds are to be issued for road purposes is incidental.[5] Nor is the clause offended by an act which creates or incorporates a board of road commissioners in a designated county with power to issue bonds and construct roads, for such an act contains no provision for the laying out of any given road or highway; it merely sets up governmental machinery for that purpose.[6] As to this clause no specific constitutional change is proposed.

Relating to ferries and bridges. Because of the scope of the term "relating to," it would seem that the efficacy of this prohibition would have been assured. But the clause has received the same strict construction as has the highway clause, and does not prohibit an act which creates in one county a commission for the building of bridges,[7] or an act which authorizes a single county to issue bonds for the purpose of building bridges over a designated river in conjunction with an adjoining county.[8] The act, to be condemned as special legislation under the Constitution, must direct in detail the construction of a particular bridge at a specified spot.[9] No constitutional change is proposed here.

[4] It is significant that no case has been found in which the court condemned an act involving the construction of roads.

[5] Brown v. Road Commissioners of North Cove Township, 173 N. C. 598, 92 S. E. 502 (1917); Commissioners of Wilkes County v. Pruden, 178 N. C. 394, 100 S. E. 695 (1919). In the Brown case, which was apparently the first adjudication of this question by the Court, Justice Allen dissented with the contention that the act was in violation of the constitutional prohibition.

[6] Commissioners of Surry County v. Wachovia Bank & Trust Co., 178 N. C. 170, 100 S. E. 421 (1919); Huneycutt v. Commissioners of Stanly County, 182 N. C. 319, 109 S. E. 4 (1921); Road Commissioners of Ashe County v. Bank of Ashe, 181 N. C. 347, 107 S. E. 245 (1921).

[7] Huneycutt v. Commissioners of Stanly County, *supra* note 6.

[8] Mills v. Commissioners of Iredell County, 175 N. C. 215, 95 S. E. 481 (1918).

[9] Day v. Commissioners of Yadkin and Surry Counties, 191 N. C. 780, 133 S. E. 164 (1926). This was the "direct legislation" referred to by the Court in the Mills case, *supra* note 8: "Our General Assembly was constantly called on by direct legislation to authorize a particular highway or street, or to establish a bridge or ferry at some specified place. The Legislature was called on to usurp functions more usually and properly performed by local authorities,

Establishing or changing the lines of school districts. Where the manifest purpose of the act is to establish or change the lines of a particular school district, the constitutional prohibition is obviously applicable, and the fact that the act contains a provision for a bond issue does not purge it of its objectionable character.[10] However, the clause does not prevent the legislature from enacting a law which enlarges particular city limits for the purpose of including a school district,[11] or which creates a special taxing district for school purposes.[12] Under the proposed Constitution there is created a new State Board of Education in which is vested the general supervision of the public school system, including the power to divide the State into a convenient number of school districts without regard to township or county lines.[13] This provision strikes at the root of the evil by substituting administrative regulation for special legislation on this topic.

Relating to the establishment of courts inferior to the Superior Courts. The weakness of this clause lies in the fact that, due to the limits of the term "establishment," it does not prohibit special legislation abolishing[14] or increasing the jurisdiction of [15] a court already

and it was in reference to local and special and private measures of this character that the amendments were adopted."

[10] Trustees of School District v. Mutual Loan & Trust Co., 181 N. C. 306, 107 S. E. 130 (1921); Sechrist v. Commissioners of Guilford County, 181 N. C. 511, 107 S. E. 503 (1921); Robinson v. Commissioners of Brunswick County, 182 N. C. 590, 109 S. E. 855 (1921). It should be noted that the prohibition against "establishing or changing the lines of school districts" does not prevent the enactment of a special or local law which incorporates an existing school district and does not establish or change the lines thereof. Such a law is valid under Art. VII, §14 of the Constitution which, by judicial construction, allows the enactment of special laws in regard to municipal corporations. Dickson v. Brewer, 180 N. C. 403, 104 S. E. 887 (1920). To the effect that the act need not be general, Tyrrell County v. Holloway, 182 N. C. 64, 108 S. E. 337 (1921).

[11] Duffy v. Greensboro, 186 N. C. 470, 120 S. E. 53 (1923); Hailey v. Winston-Salem, 196 N. C. 17, 144 S. E. 377 (1928). In the language of the Court the acts "only recognized and retained the district as it then existed and had existed for a number of years."

[12] Coble v. Commissioners of Guilford County, 184 N. C. 342, 114 S. E. 487 (1922). "Since the general power of the Legislature to create a taxing district and fix its boundaries is neither denied nor impaired by the constitutional amendment Art. II, §29; since the school districts are retained with their former boundaries; and since the powers of the school committee in each district are unchanged and the organization of the school is not affected," the act is not in conflict with the Constitution.

[13] Proposed Const. for N. C., Art. VII, §6, *Report of the Constitutional Commission*, 11 N. C. L. REV. 5, at 33.

[14] Queen v. Commissioners of Haywood County, 193 N. C. 821, 138 S. E. 310 (1927).

[15] State v. Horne, 191 N. C. 375, 131 S. E. 753 (1926).

in existence. The proposed Constitution remedies this defect by stipulating in the new Article on the Judiciary that "the General Assembly shall provide by general laws for the creation and jurisdiction of courts inferior to the Superior Courts; but shall pass no special or local law *with relation to* (author's italics) such courts."[16] But even this provision fails to affect the ruling of our Court that a law which establishes these courts only in some of the counties in the State can in no sense be regarded as a local or special law within the ordinary meaning of these terms.[17]

Relating to health, sanitation, and the abatement of nuisances. This clause prohibits a law which authorizes an election for the purpose of voting bonds for the erection of a tuberculosis hospital in one county,[18] or a law which creates a sanitary district in a specified locality.[19] But it does not prohibit a law which creates a system of sanitary districts in one county.[20] For this the Court ascribes two reasons: (1) it applies generally to the entire county and is thus not special or local, and (2) when taken as a whole it does not relate to health, sanitation, and the abatement of nuisances, the only purpose being "to provide districts wherein sanitary measures may be provided in rural districts." The proposed Constitution would change this prohibition to read "health, sanitation, *or* the abatement of nuisances."[21] The reason for the change from "and" to "or" is

[16] Proposed Const. for N. C., Art. IV, §9, 11 N. C. L. REV., *supra* note 13, at 27.

[17] *In re* Harris, 183 N. C. 633, 112 S. E. 425 (1922) (establishing courts inferior to the Superior Courts in 56 of the State's 100 counties). This is one of the few cases in which the North Carolina Supreme Court has resorted to classification as a basis of preserving a law from the condemnation of Art. II, §29. In most states there is a wholesale employment of this basis as a means of purging a law of its special or local character. *Infra* note 30. *Cf.* Jones v. Standard Oil Co., 202 N. C. 328, 162 S. E. 741 (1932) (amendment of previous judicially construed general act establishing courts, so as to be applicable to Buncombe County).

[18] Armstrong v. Commissioners of Gaston County, 185 N. C. 405, 117 S. E. 388 (1923).

[19] Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530 (1928).

[20] Reed v. Engineering Co., 188 N. C. 39, 123 S. E. 479 (1924); Kenilworth v. Hyder, 197 N. C. 85, 147 S. E. 736 (1929). The language of the Reed case is very unsatisfactory, and it is not clear whether the Court held that the act did not relate to sanitation; or that the act did not relate to the clause as a whole: "health, sanitation, and the abatement of nuisances"; or that the act was general in character. It was only in a later case that the Court brought out the fact that the act involved in the Reed case "applied generally to the entire County of Buncombe."

[21] Proposed Const. for N. C., Art. II, §19, 11 N. C. REV., *supra* note 13, at 19.

not clear. There seems to have been no litigation based on that point.

Acts authorizing bond issues. There is in our present Constitution no separate provision dealing with this topic. However, its extreme importance demands individual attention. Although the Supreme Court has not pointed it out clearly in cases involving special legislation, many of the decisions noted in the preceding paragraphs have been based upon Article V, section 6 of the Constitution now in force.[22] This fixes a limitation of fifteen cents on the one hundred dollars for the total of State and local taxation, "except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by *special or* (author's italics) general act. . . ." In the nature of the case, this clause not only permits, but it requires special legislation for local projects involving new taxation.

Moreover, it should be borne in mind that the constitutional provision just quoted, and most of the decisions in question, are relics of a day when matters pertaining to roads and bridges and to municipal and county finance generally, were handled as purely local problems. Today we have witnessed the development of a trend toward centralized State control in these fields. For example, the powers of the State Highway Commission now extend to the county roads, and the Local Government Commission now exercises a centralized administrative control of local finance.

This tendency the proposed new Constitution perpetuates, first, by the omission of Article V, section 6, and second, by the provision that the legislature shall by general laws provide appropriate regulations governing municipal and county budgets and tax levies, and

[22] Where the bond issue is the "direct legislation" and the construction of the roads or bridges is incidental, the act will be sustained. Brown v. Road Commissioners of North Cove Township, *supra* note 5; Commissioners of Wilkes County v. Pruden, *supra* note 5; Mills v. Commissioners of Iredell County, *supra* note 8. But where the bond issue is the incidental feature of an act which seeks to accomplish a matter within the prohibition of Art. II, §29, the Court will not sustain the act. Trustees of School District v. Mutual Loan & Trust Co.; Sechrist v. Commissioners of Guilford County; Robinson v. Commissioners of Brunswick County, all *supra* note 10; Armstrong v. Commissioners of Gaston County, *supra* note 18; Day v. Commissioners of Yadkin and Surry counties, *supra* note 9. The bond issue provided for in such an act is not only incidental to the main purpose of the act, but that purpose itself is not within the contemplation of Art. V, §6, as is the construction of roads and bridges. Norfolk Southern R. Co. v. McArtan, 185 N. C. 201, 116 S. E. 731 (1923); see Trustees of School District v. Mutual Loan & Trust Co., *supra* note 10 at 308.

shall create a state agency having general supervision over local governmental finance, whose approval for a bond issue is required unless the people of the locality vote otherwise.[23]

In the above enumerated ways the proposed Constitution attempts to meet some of the specific weaknesses in the present Constitution. More effectively to establish a curb upon special legislation, the Constitutional Commission offers three other changes.

Omission of the notice requirement in the passage of private laws. Due to the refusal of the Court to inquire into the verity of the legislative records, the existing constitutional provision requiring notice of application to pass private laws[24] has been unenforceable.[25] The proposed Constitution does not include it.

Municipal government. Article VII, section 14 of the present Constitution, as judicially construed, permits the legislature to enact special legislation for the organization of municipal and county government.[26] This provision has been displaced in the proposed Constitution by one that: "The General Assembly shall provide by general laws for the organization and government of counties, cities, towns, and other municipal corporations, but shall pass no special or local law relating thereto. Optional plans for the organization and government of counties, cities, and towns may be provided by law, to be effective when submitted to the legal voters thereof and approved by a majority of those voting thereon."[27] This change is designed to relieve the legislature of a heavy burden and is praiseworthy as a distinctly forward step. However, its success will be entirely dependent on a wise exercise of discretion by the General Assembly. For example, the legislatures in some states have grossly abused the privilege of enacting "local option" laws by so framing an act as practically to preclude its adoption in municipalities other than the one for which it was intended.[28] Though general in character, and

[23] Proposed Const. for N. C., Art. V, §4, 11 N. C. L. REV., *supra* note 13, at 29.

[24] N. C. Const., Art. II, §12.

[25] Broadnax v. Groom, 64 N. C. 244 (1870); Carolina-Tennessee Power Co. v. Hiawassee River Co., 175 N. C. 668, 96 S. E. 99 (1918).

[26] Tyrrell County v. Holloway, *supra* note 10; Smith v. School Trustees, 141 N. C. 143, 53 S. E. 524 (1906).

[27] Proposed Const. for N. C., Art. II, §18, 11 N. C. L. REV., *supra* note 13, at 19.

[28] DODD, STATE GOVERNMENT (1922) 66; *Special Legislation for Municipalities* (1905) 18 HARV. L. REV. 588, 597. Under this plan a law may be passed appropriate to the needs of only one community, but the fact that it applies to all communities that adopt it prevents it from being special or local legislation.

thus immune from attack on constitutional grounds, such an act obviously is not a practical improvement over clearly special legislation.

The executive veto. In granting this power the proposed Constitution provides an opportunity for a systematic and prompt check upon the validity of special and local legislation.[29] Under the present Constitution there is passed at each session a large amount of such legislation which is largely unconstitutional but which for various reasons never reaches the courts. A conscientious exercise of the veto power, based upon the advice of the Attorney General, can serve as a means of intercepting many of these laws at their inception by calling to the attention of a frequently indifferent and constantly harassed legislature the unconstitutional character of particular measures.

CONCLUSION

No one seriously denies that in a state with such heterogeneous conditions as exist between the coastal, Piedmont, and mountain sections of North Carolina, a high degree of flexibility in the responsiveness of the General Assembly to local needs is not only desirable, but necessary. Certainly it has been the experience of other states that when the constitutional prohibitions upon special and local legislation have been too severe or restrictive in their nature, the purpose of the constitution has been largely defeated by evasion through devices such as that of classification of municipal units on the basis of population, area, or assessed evaluation of property, so as to make wholly local the actual operation of the laws.[30] No state seems to

As a practical matter, only the one community will adopt it. A somewhat similar method of evasion is the enactment of a mass of general laws on the same subject, each law containing a clause that it shall not be construed to repeal any existing laws on that subject. 18 HARV. L. REV., *supra*, at 598.

[29] Proposed Const. for N. C., Art. II, §21, 11 N. C. L. REV., *supra* note 13, at 20. North Carolina is the only state in the Union whose Governor does not possess the veto power.

[30] LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (1904) §§203 *et seq;* I DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §§147 *et seq.* If the classification is not manifestly unreasonable and arbitrary, a law which applies to only one county in the state is general. *Ex parte* Settle, 114 Va. 715, 77 S. E. 496 (1913) (applying to all counties with population over 300 per square mile, there being only one county in that class). Besides being subject to evasion on the grounds of classification, all of the many types of special law prohibitions found in state constitutions have disclosed certain inherent weaknesses on which the courts of the respective states have based a refusal to hold particular acts unconstitutional. As was pointed out, North Carolina is an example of this mode of procedure.

have completely solved the problem.[31] It is believed, however, that the changes proposed by the Constitutional Commission go far to improve the situation. The proposed Constitution not only stops certain gaps in the purely restrictive provisions, but it seeks to relieve the General Assembly of a burden seriously disruptive of its opportunity to consider the more important state-wide measures by providing more expeditiously for the variant needs of the local communities through the medium of central administrative agencies.

[31] See DODD, STATE GOVERNMENT (1928) pp. 83-84, 176-178, 390-397; Anderson, *Special Legislation in Minnesota* (1923) 7 MINN. L. REV. 133, 187; Van Hecke, *Four Suggested Improvements in the North Carolina Legislative Process* (1930) 9 N. C. L. REV. 1, 9; (1928) 7 N. C. L. REV. 65.