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Kemble White

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THE AMENDMENTS PROPOSED BY THE WEST VIRGINIA CONSTITUTIONAL COMMISSION

KEMBLE WHITE*

A joint resolution of the Legislature of West Virginia, Session of 1929, recited that the constitution of the state was adopted in 1872, when the state was sparsely settled, and that the expanding industrial life had made it imperative, in subsequent years, to submit a deluge of amendments thereto, and that such patchwork amendments had been given scant consideration, failing to meet the existing necessity for greater constructive changes, and thereupon authorized the appointment of a commission to study the constitution and the needs of the state and to submit such amendments as the commission deemed necessary "to remove existing barriers and restrictions to the further and greater development of the state and its diversified interests." In appointing the members thereof the governor was directed to give consideration to those interests generally known as agriculture, public utilities, labor, coal, manufacturing, oil and gas and the legal profession.

The Report of the Commission, filed with the Governor in December, 1930, discloses the personnel of the Commission, its organization, method of procedure, its general policy and, somewhat in detail, the purpose sought to be accomplished. The form of the resolution seemed to carry the thought that, if the Commission could, in part, be composed of members representing the great industrial and social groups named, substantially all interests in the state would have an opportunity to have considered, by competent representatives, all questions embracing desirable changes in the constitutional structure. This method of drafting amendments to a state constitution is an innovation in constitu-

* Member of the Bar, Fairmont, West Virginia, former president of the West Virginia Bar Association and member of Constitutional Commission.

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tion making and, in a way, implies that such work can be done adequately and efficiently by those who may be assumed to have a thorough knowledge of the problems of the particular group represented by each and a comprehensive knowledge of our economic, social and political structure; also that a Commission so composed would have a general conception of the necessity of constitutional changes which might contribute to the public welfare.

Two schools of thought prevail in America in respect to the structure of state constitutions. One school adheres rather strictly to the proposition that such an instrument should be limited to a statement of fundamental political principles which will secure to the individual what should be inalienable religious, political and civil rights, set up a frame of government through which they may be vindicated, and place such limitations upon the various departments of such government as will prevent unreasonable tampering with such rights. This school also believes that, subject to the above limitations, the legislative department should not be unduly hampered by an elaborate definition of powers already vested in it without definition, or without constitutional mandate.

The other school, prevalent in many of the states, has adopted the theory that a constitution should be a code of laws setting forth in voluminous detail the powers of governmental agencies, and the manner in which such powers shall be exercised. This school has manifested its handiwork chiefly in the article in state constitutions providing for the creation, organization and control of corporations, including public utilities. It is frequently assumed that the citizenship of a state can demonstrate its growth to full maturity of statehood and political perfection only by, as it were, wearing the same sort of political clothes which have been temporarily adopted by other communities, in more or less of a general effort to compel human nature to act differently from what it has acted since the beginning of time.

The West Virginia constitutions have belonged to the former school of thought and, insofar as any amendments thereto have departed from that school, the experiment has proved unsatisfactory. All of the constitutions of Virginia from colonial days adhered to the former school, but that state recently, by extensive amendments, has joined the left wing of the second school.

The members of the West Virginia Constitutional Commission were unanimously of the opinion to adhere to the principles of

the former school and not to undertake, by any proposed amendments, to foist upon the backs of the people a cast-iron code of constitutional law which, at the best, would be only experimental and might, and probably would, result in great harm to our political structure. The Commission, therefore, entered upon a critical examination, line by line, of the Constitution of 1872, and all amendments thereto, with the result disclosed in its report. The Commission first reached the conclusion that the constitution, instead of being reactionary and antiquated, is, in fact, one of the most liberal constitutions of any of the states of the union, with but few unnecessary restrictions placed upon any of the departments of government. While many people have casually remarked upon the necessity of a constitutional convention and the re-writing of the entire constitution, the public hearings held by the Commission demonstrated rather conclusively that the entire body of citizenship had no definite conception of what amendments should be proposed, what subjects should be included therein, or what imaginary ills might be corrected thereby.

This result follows almost of necessity when the constitution is considered historically. When colonial Virginia set up a sovereign state its first constitution, or form of government, was drawn very largely by George Mason, Thomas Jefferson and Chancellor Wythe, and the personnel of that constitutional convention was a guaranty that the instrument drawn would be a great charter of liberty and of government. That instrument remained effective until rewritten in 1830 by a convention whose membership included Chief Justice Marshall, James Madison, Philip Doddridge (of western Virginia) and many others having not only great ability but long experience in administering political affairs. That constitution continued in force until the convention of 1851, which assembled as the result of fundamental economic and political differences between tidewater and eastern Virginia and the most of the territory now comprising West Virginia. The western territory was represented by very able members, but the constitution adopted was a political compromise and proved unable to survive the strain of civil war. The constitution drafted by the Wheeling convention in 1862 was ratified by the new state as its charter, and was more liberal in its terms and better adapted to the economic and social condition, and the spirit, of the people of the new territory than the older constitutions. The Constitution of 1872 was the result of a shift of political power and a restoration to the Virginia form. In the main that constitution

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has proved its utility in that during a period of sixty years of marvelous growth and development it has not restrained the legislature from enacting an extensive body of progressive laws to meet the changing needs of the people.

MAJOR AMENDMENTS ADOPTED SINCE 1872

Shortly after 1872 it became evident that the important changes made in the article on the judiciary were unfortunate,—best illustrated by the original jurisdiction vested in county courts in all actions at law where the amount in controversy exceeded twenty dollars, and in all cases of *habeas corpus*, *quo warranto*, *mandamus*, prohibition, *certiorari*, and in all suits in equity and in all matters of probate. This plenary original jurisdiction was vested in what, in any county, might have been, and usually was, unlettered justices of the peace, with practically no prescribed qualifications. Attention is called to this subject in order to emphasize the point that a constitutional convention composed of an able membership may make mistakes, jeopardizing the rights and interests of an entire state. Fortunately this one was corrected by two major amendments submitted in 1879 in which the judiciary article was entirely rewritten and has since remained without important change. Amendments have enlarged the personnel of the Supreme Court and modified the number of jurors required to try appeals from justices.

Other major amendments have authorized bonds for good roads, prohibited the manufacture and sale of liquor, curtailed any further increase in the permanent school fund and adopted a budget system. Apart from the judiciary amendments, the prohibition and bonded debt amendments, practically all other subjects are legislative in character and amendments seemed to be required in order to overcome the unfortunate introduction of legislative subjects in the constitution in the first instance.

DESIRABLE CHANGES IN EXISTING CONSTITUTION

The commission, of course, entered upon its duties with these historical documents in the background, with a fair working knowledge of the effect of the constitution of 1872 upon the course of legislation, the various amendments thereto and the experimental nature thereof and the construction of the constitution and amendments by the Supreme Court of Appeals during the entire history of the state. The Commission decided, first, that it would not undertake to rewrite the entire constitution, being of

opinion that it was not authorized so to do, and also that there was no necessity therefor; secondly, that it would only recommend such major amendments as seemed to it would result in increased efficiency and economy in governmental and judicial administration. It gave particular attention to the subjects of taxation, the judiciary, the organization and government of the state, counties and cities, including the short ballot and municipal home rule.

State constitutions are mostly of one form. They contain a few articles, subdivided into sections, define the territory, contain a bill of rights, prescribe the qualifications of electors and of certain major officers, their duties and method of selection and removal. They also provide for a division of powers between the legislative, the executive and the judicial departments, necessarily set out somewhat in detail legislative procedure and limitations upon legislative power, set up an executive and judicial structure, with articles on taxation, on corporations and on education.

Most of the provisions in the West Virginia constitution, in the articles on corporations and education, are legislative in character, and are so liberal as, in the main, not to require amendments. While, since the state was formed, public education has developed from very meager beginnings into a great and highly organized system, accounting for about one-half of all public expenditures, no provision of the constitution has interfered unduly with the orderly development thereof, or for raising adequate revenues to support its program. There has also been a parallel and great development in corporate form of ownership, including essential public utility services, and no clause of the constitution has interfered unduly either with such development or with the plenary power and control which the legislature inherently possesses over corporations, their property and business. Hence, these subjects of education and corporations, which have been considered so extensively in amendments to the constitution of other states, only required minor consideration by our commission because of the extremely liberal features therein relating to these subjects.

The functions of governmental powers are so interrelated that they necessarily overlap and can not be precisely delimited. In view thereof the Commission reached the conclusion that it could best serve the purpose of its creation by reporting only a few amendments, upon major subjects, which could be classified, conveniently incorporated in the existing constitutional structure and harmonizing therewith, and which, if adopted and carried into

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effect by adequate legislation, would result in more efficient administration and have a tendency to reduce the cost of government. Speaking generally, these amendments can be discussed under the following subjects:

SUITS AGAINST THE STATE

The constitution provides "The State of West Virginia shall never be made defendant in any court of law or equity."

In lieu thereof the Commission submitted the following: "The State of West Virginia shall never be made defendant in any court of law or equity without its consent, hereafter duly given by the legislature."

Government not only involves political activities and administration, but more recently includes very extensive business activities, especially in the operation of its educational, penal and charitable institutions and in the construction and maintenance of highways. Many activities of this nature which were, formerly, privately owned or managed by local political units are being taken over by the state and operated directly. County courts, municipal corporations and boards of education are made corporate bodies and may sue and be sued and are liable for breach of contract or, to a limited extent, for tort. The state, in the operation of identical agencies, through its own agents, officers and employees, may breach a valid contract and may commit acts of trespass, or be negligent, virtually with impunity. For the state to permit its duly authorized agencies to trespass upon the personal or property rights of a citizen, without redress, is to suffer the most flagrant injustice and to turn the natural loyalty of its citizens into antagonism and social unrest. The mere fact that such agencies occupy a field outside the jurisdiction of the courts makes them bold and careless in their conduct in their relation to private rights. This is a condition which should not be permitted to continue, and the legislature should have authority to enact statutes which, safeguarding the general welfare, will provide a means for judicial determination of all questions within this field of controversy, and provide compensation for such wrongs.

**ORGANIZATION AND GOVERNMENT OF THE STATE,
COUNTIES AND CITIES**

The chief complaint against all governments has been, and is, the gradual and apparently inevitable accretion in its number of officers, appointees and employees, with the emoluments and

perquisites incident thereto. Such tendency causes a progressive increase in the burden of taxation and no statesman has been able to devise a cure for this evil. At least a constitution should be drafted so as not to create useless offices and make it mandatory upon the people to elect them. The creation of constitutional offices with or without definition of duties tends to divide responsibility unduly and to produce inefficiency and waste of revenue.

The Commission recommended the principle of the short ballot, authorizing the election of three principal officers, the governor, the auditor and the attorney general, and providing that the other state officers now existing should be appointed. This policy would unify administration and responsibility, and should result in marked economy and efficiency.

The present constitution provides for too many petty county offices. The members of the constitutional convention clearly entered the field of legislation when they provided specifically in the organic law for the selection of a surveyor of lands, coroners, overseer of the poor, surveyors of roads, constables and other petty administrative officers. It is proposed that these provisions be eliminated and, after providing for the selection of a prosecuting attorney, sheriff, assessor and treasurer, that the legislature shall provide by general law for the selection of such other county and district officers as may be necessary, and prescribe their duties.

In the field of municipal government the terms of the present constitution are peculiarly unfortunate. It provides, in effect, that the charter of all cities and towns containing a population in excess of two thousand shall only be granted by special act of the legislature. This policy has resulted in an avalanche of special bills introduced at each legislative session, amending and re-amending the charters of practically every city in the state coming within that classification. The most of these charters are not carefully drawn and continually require amendment by special act by reason thereof. In any event, the legislature at every session becomes involved in local factional, municipal controversies, to the manifest detriment of the interests of the state at large. A home rule amendment has been proposed by the commission, prohibiting the granting of special charters, requiring the legislature to classify cities and towns, and to pass general laws for their government, restrict their powers in contracting debts and requiring a legislative limitation of levies and authorizing each such municipality to pass such ordinances relating to its local affairs

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as it may deem necessary, consistent with general law then in effect, or thereafter enacted. The purpose of this amendment is to compel municipal administration and local controversies to remain local and force a political unit, responsible for its own government, to discharge that responsibility.

SPECIAL ACTS

Article VI, Section 39, provides that the legislature shall not pass local or special laws in any of the enumerated cases and shall provide by general laws for such subjects, and all other cases for which provision can be made, and that in no case shall a special act be passed where a general law would be proper and can be made applicable. While this provision of the constitution would seem to be mandatory and to state a sound public policy, the terms thereof are better known in the breach than in the observance. There would seem to be no insuperable obstacle to the enactment of general laws authorizing county courts to build and maintain roads, issue bonds therefor, make provision for the poor, build or repair court houses and carry on the usual activities of such public corporations; or to authorize by general laws the erection of school buildings, the issuance of bonds therefor and the maintenance of a public school system. Apparently no responsible representative of the people in this state has ever conceived the idea that these fields of public activities could be covered by general laws. The enactment of local and special acts has been so insidious, so effective and so eminently satisfactory to those desiring to abandon the field of private enterprise and labor, and enter with confidence upon permanent political service, that the ultimate effect thereof has been entirely overlooked. It can safely be said that much of the waste, extravagance and inefficiency in these public services, with consequent petty graft, is directly responsible for the towering tax burden of which our people justly complain.

The Commission proposes to cut off this approach to public funds, prevent the creation of additional independent school districts, provide for the consolidation of counties and school districts and prohibit all special or local laws authorizing a board of education to lay a levy or to issue bonds, and requiring that all such action shall be authorized only by general laws. This, together with a strict construction of the present constitutional provision against the enactment of local or special laws, as applicable to county court activities, and the home rule amendment,

will withdraw from the field of special legislation the major part of local activities. When this field must be governed by general law it is probable that the legislature will make provision for only essential public services and agencies.

THE JUDICIARY

A recent canvass conducted by the National Economic League, among a well-informed and intelligent membership throughout the entire country, showed that ninety-five per cent of the votes cast considered the administration of justice as the most important subject before the American people, taking precedence over such popular subjects as prohibition, crime, world peace and taxation. It is unnecessary to argue the necessity of establishing and maintaining a system of courts wherein private rights may be ascertained and vindicated speedily and effectively. Government can have no higher function than to accomplish this primary purpose. While this article of our constitution may have been adequate when adopted, it has become almost a complete barrier to the removal of manifest ills. A consideration thereof proves that it prevents the creation of a unified system of courts, with jurisdiction so defined as to maintain such unity and at the same time provide for adequate expansion of the judicial structure. The prohibition against the selection of more than one circuit judge in the county, the unlimited power in the legislature to create inferior courts and the constitutional powers vested in the justice of the peace, together with a lack of administrative power in presiding judges, and the common law jury, largely account for the inordinate expense, delay and unsatisfactory results whenever the judicial process is invoked. The bench and bar are held responsible for this condition. The movement to establish judicial councils and thereby, through legislation and rules of court, improve judicial administration has been attended with some success. West Virginia is probably the only state in the union which does not have a judicial body administering matters of probate.

The Commission was of opinion that the judiciary article should be entirely rewritten, and that an orderly system of courts should be set up with original and appellate jurisdiction clearly defined, and adequate provision be made for the expansion of the system to meet all of the needs of an increasing population. The proposed article, therefore, further limits appeals to the Supreme Court in petty controversies, vests in that court supervisory control over all other courts and the exercise of inherent rule-making

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powers of courts; makes the circuit court the major court of general jurisdiction in all important matters and authorizes the selection of as many judges in any circuit as may be required to transact expeditiously its business and authorizes adequate administration of such courts, together with the assignment of such judges to other circuits, where necessary; provides for the creation of a summary court in each county, with such number of judges therein as may be necessary to transact the petty business therein, and contemplates that the justice of the peace shall have no civil jurisdiction except in the small and sparsely settled counties, and that his jurisdiction shall be confined largely to that of an examining magistracy and conservator of the peace. The report further provides that the summary court shall be presided over by judges qualified to practice law in the state, and thereby even in the most petty controversy secure to the citizen the opportunity to have it determined by a person learned in the law.

It is believed that, if the article drafted by the Commission is approved and adequate legislation enacted pursuant thereto, there will result a very marked improvement in judicial administration and the bench and bar will better merit the respect and confidence of the people. While our people may not realize it, there is no more important subject before them at this time requiring prompt and effective solution than that of improving court organization and procedure. The proposed article is submitted as one, not only practical, but adequate for the purpose desired, the notes appended thereto making full explanation of the text. The most difficult problem in administering justice is to maintain a system of courts with a personnel of sufficient technical learning and integrity of character to settle, on a basis of right, controversies between citizens of small means. The summary court could attain that end if the electorate manifests intelligence in the selection of the judges thereof.

TAXATION

In the absence of constitutional limitation the legislature has plenary power over taxation, limited only by the federal constitution. It is deemed unsound public policy to permit such great power in a popular assembly to exist without definite limitations. The imperfections in human nature and in political institutions create this necessity. Section 10, Article I of the state constitution prescribes this limitation upon the legislature. Any sound

system of taxation upon property, business or income comes to this: That all citizens should bear their share of the tax burden, and that such share should be in proportion to the real value and the income earning power of property and business. It is in the administration of the equal and uniform provision of our tax laws that the system has become disarranged, with attendant inequalities.

A Legislative Commission, in a preliminary report submitted by its chairman, Major Bennett, to the Governor in the year 1884, discussing a proposal to inaugurate a system of favoritism and partiality in taxation and to modify the uniformity and equality clause, said:

“The theory of our Constitution is, that each and every item of property shall contribute according to its value towards the expenses of government, and if this theory be abandoned with respect to farm products, it will also be abandoned with respect to those other classes of property which have far more influence in every legislative body. If this theory be enforced, the burden is necessarily so evenly distributed that neither subject of taxation feels an unequal pressure; and it is in preserving this equilibrium, this equalization of pressure, that the whole secret of fair and just taxation consists.”

It has been suggested that the remedy for the ills of excessive taxation is to take all limitations out of the constitution, under the guise of conferring the power of general classification. The Commission was unanimously of the opinion that the latter program was unsound, would not diminish the tax burden and would eventually make it more unequal. It, therefore, reported a classification amendment limited largely to intangibles, in order to bring that form of wealth within the effective reach of revenue laws. The advocates of general classification insist upon constitutional limitation of levies. The legislature now has adequate power over that subject. Persons subscribing to the general classification theory are inconsistent in that they advocate permitting the legislature to have complete power over the taxation of property and business upon the theory that the representatives of the people can always be trusted to do what is right and just, but in respect to maximum levies they will not trust these same representatives to act wisely.

The real grievance is the excessive burden of taxation and local levying bodies are responsible therefor. Many states have undertaken to supervise local levies by conferring final power

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upon a state tax commission, resident at the capital, and thereby deprive local units to that extent of the right of self-government. The Commission was opposed to vesting this supervisory power in any state bureaucracy, but recommended a new section providing for the appointment by the governor in each county of three resident freeholders to constitute a board of supervisors, who should be vested with the power and authority to reduce, but not increase, a levy made by any local body. Such supervisory boards would have no direct interest in the expenditure of local revenue and could, if so disposed, act impartially, intelligently and effectively to the manifest benefit of their several communities. The report on taxation in West Virginia by Roy G. Blakey, filed with the governor in December, 1930, should be used as a text book on that subject in this state, as it contains not only a comprehensive statement of facts, but also an illuminating and sound discussion of the principles of taxation as related to the resources and business of our state. This report has a direct bearing upon the amendments recommended by the Commission.

DISPOSITION OF THE COMMISSION'S REPORT
BY THE LEGISLATURE

It was inevitable that factional controversies and the exigencies of politics would prevent a thorough discussion by the legislature of the report of the Commission. Those having political ambitions and interests to advance discarded the entire work of the Commission and proceeded with their political propaganda. This program excluded and prevented all consideration of every feature of the Commission's report except that upon taxation. Of course, no constitutional reforms can be accomplished from such a narrow point of departure. It is submitted that every phase of the report of the Commission deserves the serious consideration of our citizens and that they will not receive any relief from manifest ills in public administration until they do give such consideration to the subjects herein discussed. One of the grave criticisms against those undertaking to administer public affairs today is, not only their indisposition, but their apparent inability, to comprehend and to discuss intelligently constitutional questions, the legislatures frequently ignoring their existence and the courts being loathe to thwart the popular will as expressed in such enactments. This attitude of mind necessarily results in a gradual breaking down of a constitutional structure which should be of sufficient soundness to be peculiarly durable.

In an essay written almost a half century ago, intended as a comment upon the constitutions of the American states, James Bryce said:

“The stability of a constitution is an object to be much desired both because it inspires a sense of security in the minds of the citizens, encouraging order, industry and thrift, and because it enables experience to be accumulated whereby the practical working of the constitution may be improved. Political institutions are under all circumstances difficult to work, and when they are frequently changed, the nation does not learn how to work them properly. Experiment is the soul of progress, but experiments must be allowed a certain measure of time. The plant will not grow if men frequently uncover the roots to see how they are striking.”

The Commission approached its work with the thought that every principle of value in our present constitution should be preserved, and that only such alterations should be made therein as would permit the adjustment of our political structure to the changed and changing needs of our times. The disposition which shall be made of that work rests with the electorate and those who have presumed and assumed leadership.