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that such a policy would encourage frauds on spouses or creditors. The answer to that argument lies in the experience of the other seven community property states. They have taken steps to protect spouses by requiring a clear showing that the agreement was entered into willingly and knowingly. (See, *e.g.*, *Estate of Brimhall*, 62 Cal. App.2d 30, 143 P.2d 981 (1943).) They have given protection to creditors by such methods as providing that agreements between spouses cannot prejudice preexisting creditors and requiring recordation of agreements in order to give notice to subsequent creditors.

Section 15 does not readily lend itself to shortening by partial deletion. Removal of the definition portion makes retention of the rest of the section unnecessary. Retention of the definition without retaining the rest of the section would raise the possibility of restoring the law on partition agreements to its pre-1948 state.

If the portion of the section defining separate property is to be retained, it should be reworded to make it applicable to husbands as well as wives. The 1970 California amendment, quoted above, accomplishes this with commendable clarity and brevity.

None of these possible methods of revision, however, accomplishes what the section apparently is intended to do: require the legislature to retain the community property system in Texas. The legislature probably can be trusted to retain the system, without constitutional compulsion, as long as the system serves satisfactorily; if it ceases to do so, the legislature should be free to change it. Although the community property system may be intrinsically satisfactory, there is always the possibility that extrinsic events, such as federal legislation, might suddenly make it unsatisfactory, just as federal tax laws suddenly made the community property system attractive to several common law states in the late 1930s and early 1940s—and just as suddenly made it unattractive to those same states after the tax advantage was terminated in 1948.

If the intent is not to leave the choice of a marital property system to the legislature, Section 15 should be replaced with a new section clearly requiring continuation of the community property system. Such a provision might read: "Marital property is governed by community property law." A less forthright, and therefore perhaps less desirable, alternative would be: "The legislature by general law shall provide for a system of community property."

Sec. 16. CORPORATIONS WITH BANKING AND DISCOUNTING PRIVILEGES. The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter.

No foreign corporation, other than the national banks of the United States, shall be permitted to exercise banking or discounting privileges in this State.

History

In the Constitutions of 1845, 1861, and 1866 this section read: "No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges." (Art. VII, Sec. 30.) There was no similar provision in the Constitution of 1869, but the provision was restored in 1876. Commentators have attributed this to a depression, beginning in 1873 and lasting until 1880. "Unable to sell cotton or cattle for any price at the time of the constitutional conclave, Texans were not disposed to relax their typical distrust of financial organizations. As a result, the

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constitution prohibited the incorporation of banks by the state.” (Thomas and Thomas, *The Texas Constitution of 1876*, 35 *Texas L. Rev.* 907, 911 (1957).)

The Constitution of 1876 did not prohibit all state banks; it only prohibited banking corporations. This permitted the operation of private banks and state-chartered noncorporate banks. Also, under the historic United States Supreme Court decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a state could not prohibit or tax the operation of national banks, so the section could not prevent corporations from doing banking business in Texas under federal charters. By the turn of the century, the number of national banks in Texas was reported to have reached 440. (See 3 *Interpretive Commentary*, p. 172.) This led to the decision in 1904 to permit incorporation of state banks in Texas under a comprehensive state regulatory system. The 1904 amendment was identical to the language of present Section 16, except that it contained an additional paragraph making bank shareholders liable for the bank’s debts up to the par value of their shares. The legislature provided the first comprehensive state bank regulatory system in 1905. (Tex. Laws 1905, ch. 10, *Gammel’s Laws* p. 489.) The paragraph imposing liability on bank stockholders was removed from Section 16 in 1937, apparently because the creation of the Federal Deposit Insurance Corporation by the federal government in 1933 enabled bank stockholders to persuade the voters that it was no longer necessary.

Explanation

This section contains four distinct provisions. The first permits state-chartered banks to operate in Texas and directs the legislature to regulate them. The legislature has complied by enacting the Texas Banking Code of 1943 (Tex. Rev. Civ. Stat. Ann. arts. 342-101 *et seq.*). This system of regulation is administered by a nine-member finance commission appointed by the governor, a banking commissioner chosen by the Finance Commission, and a state banking board composed of the banking commissioner, the state treasurer, and a citizen appointed by the governor. (Tex. Rev. Civ. Stat. Ann. arts. 342-103, 342-115, 342-201.)

The second provision prohibits the granting of a state bank charter until all authorized capital stock has been sold. This has been supplemented by statutes prescribing additional procedures and requirements for chartering a new bank. (Tex. Rev. Civ. Stat. Ann. arts. 342-301, 342-305.) Where the capital stock of a bank has not been fully paid up as required by Section 16, the courts treat the bank as if it had never been legally incorporated. (See, e.g., *Shaw v. Kopecky*, 27 S.W.2d 275 (Tex. Civ. App.—Galveston 1930, *writ ref’d*.)

The third provision prohibits branch banking in Texas. This ban applies to national banks as well as state banks, and the United States Supreme Court has held that the states have power to enforce such a prohibition against national banks. (*First Nat’l Bank v. Missouri*, 263 U.S. 640 (1924).) But when federal law permits national banks to open facilities on military installations in Texas, a state cannot place limitations on these facilities under prohibitions on branch banking. (*Texas ex. rel. Faulkner v. National Bank of Commerce*, 290 F.2d 229 (5th Cir.), *cert. denied*, 368 U.S. 832 (1961).) Such a facility on a military base is not a branch bank, but an arm of the federal government. (*United States v. Papworth*, 156 F. Supp. 842 (N.D. Tex.), *aff’d*, 256 F.2d 125 (5th Cir. 1957), *cert. denied*, 358 U.S. 854 (1958).) A drive-in teller window across the street from the main banking building and connected by a tunnel and pneumatic tubes is not a branch bank. (*Great Plains Life Ins. Co. v. First Nat’l Bank*, 316 S.W.2d 98 (Tex. Civ. App.—Amarillo 1958, *writ ref’d n.r.e.*.)

The attorney general has ruled that use of automated machines to dispense cash

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on the premises of a bank would not violate Section 16. (Tex. Att’y Gen. Op. No. M-915 (1971).) Another attorney general’s opinion held that a check-cashing service operated by a retail store for participating banks did not violate the branch banking prohibition. (Tex. Att’y Gen. Op. No. H-277 (1974).)

Notwithstanding Section 16, there is much interconnection between Texas banks. In *Bank of North America v. State Banking Bd.*, 468 S.W.2d 529 (Tex. Civ. App. – Austin 1971, *no writ*), an injunction was sought to prevent issuance of a new state bank charter in Houston. Plaintiffs alleged that the new bank was in reality a branch of a much larger bank. Almost half of the shares in the new bank were subscribed by the larger bank’s law firm and its officers and employees; an officer of the larger bank was to be president of the new bank; a member of the law firm who was a director of the larger bank was active in soliciting subscribers for the new bank; some of the larger bank’s officers assisted in collecting economic data for the new bank’s charter application; and the larger bank was expected to be the main correspondent of the new bank. Nevertheless, the court found no violation of Section 16. Relying primarily on a 1952 study by the attorney general, the court said:

Section 16, more than just prohibiting a single banking corporation from directly engaging in business at more than one place, was intended to effectuate a State policy requiring that each banking corporation operate as an independent unit. Section 16 was construed (by the attorney general) to prohibit one bank from organizing separate banks and then dominating and controlling them to the extent of indirectly engaging in the banking business through the ostensibly independent banks. (468 S.W.2d, at 531.)

But the court said the main issue in determining whether such domination exists is “whether the stockholders in one bank (own) a majority or a controlling amount of stock in another bank.” (*Id.*, at 532.) Finding no evidence of this, the court denied the injunction. The attorney general subsequently ruled that even where a bank holding company owns the majority of the stock in several banks, there is no violation of the branch banking prohibition. (Tex. Att’y Gen. Op. No. H-606 (1975).)

A number of reasons have been offered to explain the distrust of branch banking, especially in the late 19th century, which was not limited to Texas. These include: difficulties in communication and supervision, concern for stability and the possibility of cumulative failure, competency of management, desire to control the influence of “big money,” and fear of monopoly. (See Comment, “Branch Banking in Colorado,” 48 *Denver Law Journal* 575 (1972).)

Comparative Analysis

At least ten other states flatly prohibit branch banking. (*Id.*, at 576, n. 7.) An earlier article puts the number at 15. (Gup, “A Review of State Laws on Branch Banking,” 88 *Banking Law Journal* 675 (1971).) It appears, however, that Texas is the only state that has made this prohibition constitutional. The *Model State Constitution* does not mention banking.

Author’s Comment

In part because of the prohibition against branch banking, Texas has more banks than any other state. (See Skillern, “Closing and Liquidation of Banks in Texas,” 26 *Sw. L. J.* 830 (1972).) Prohibitions against branch banking have been attacked as unsound, and commentators have asserted that “branching means a more competitive market structure and improved bank performance.” (See, *e.g.*, Horwitz and Khull, “Branch Banking, Independent Banks and Geographic Price Discrimina-

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tion,” 14 *Antitrust Bulletin* 827 (1969).) These critics recognize the danger that branch banking may lead to geographic price discrimination but they propose legislation requiring “price” uniformity by branch banks at all offices as a possible solution. James Saxon, the former comptroller of the currency, asserted that restrictive branch banking laws “show little regard for the public interest [and] are designed to protect the selfish interests of the less energetic or competent segments of the industry which cannot abide the prospect of competition. It is unfortunate that such laws do not meet the economic needs of the people and of the industries, but serve instead the determined opposition of parochial interest.” (*100th Annual Report of Comptroller of the Currency* (Washington, D.C.: Government Printing Office, 1962), pp. 147, 150, quoted in *Denver Law Journal*, p. 583 (1972).)

Professor Leon Lebowitz has suggested that the decision in *Bank of North America v. State Banking Board* ignores the reality of interconnection among Texas banks through such devices as the correspondent banking system, chain banking, and one-bank and multibank holding companies. He concludes that the growth of holding companies and recent bank scandals may “prove that [*Bank of North America*] marked the end of the lull before the storm, both legislatively and judicially.” (Lebowitz, “Annual Survey of Texas Law: Corporations,” 26 *Sw. L. J.* 876, 150-52 (1972).)

Whatever the merits of branch banking, the fact that no other state constitution prohibits branch banking seems to indicate that the decision can be left to the legislature.

Sec. 17. OFFICERS TO SERVE UNTIL SUCCESSORS QUALIFIED. All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.

History

The Constitution of 1845 contained a section stating: “The Legislature shall provide in what cases officers shall continue to perform the duties of their offices, until their successors shall be duly qualified.” (Art. VII, Sec. 23.) This provision was retained unchanged in the next three constitutions. The section was adopted in its present form in 1876, removing the matter from the legislature’s discretion and making the requirement mandatory for “all officers within this State.”

Explanation

A court of civil appeals said the purpose of Section 17 is “to prevent a break in the public service and to insure continuity by requiring all officers, after their respective terms of office had expired, to ‘continue to perform the duties of their offices until their successors shall be duly qualified.’ ” (*Underwood v. Childress I.S.D.*, 149 S.W. 773, 774 (Tex. Civ. App.—Amarillo 1912, writ *dism’d*.) The section is self-executing and mandatory. (*Plains Common Consol. School Dist. v. Hayhurst*, 122 S.W.2d 322 (Tex. Civ. App.—Amarillo 1938, no writ).)

Even if an officer resigns and his resignation is accepted, under this section the law operates to continue him in office, for an officer cannot arbitrarily divest himself of the obligation to perform his duties until his successor qualifies. (*Keen v. Featherston*, 69 S.W. 983 (Tex. Civ. App. 1902, writ *ref’d*.) However, “an officer may divest himself of an office before his successor has qualified by himself qualifying for and entering upon the duties of another office which he cannot lawfully hold at the same time.” (Tex. Att’y Gen. Op. No. M-627 (1970).) Thus, when an official loses his office under one of the prohibitions against dual officeholding (*e.g.*, Secs. 12 and 40 of Art. XVI), his duties terminate immediately,

without awaiting the qualification of a successor. The same is true of a judge removed from office under Section 1-a of Article V. Section 17 does not apply to nonelected officers of municipal corporations. (*Stubbs v. City of Galveston*, 3 White & W. 143 (Tex. Ct. App. 1883).)

Section 17 does prevail, however, over a constitutional provision (e.g., Sec. 28 of Art. V), stating that one appointed to fill a vacancy serves only until the next general election; if no successor has qualified by that time, the appointee still continues to serve. (Ex parte *Sanders*, 147 Tex. 248, 215 S.W.2d 325 (1948).)

Comparative Analysis

Seventeen states have provisions similar to Section 17. A few states except legislators from these provisions. The *Model State Constitution* contains nothing comparable.

Author's Comment

This provision is useful, but it should be incorporated into a single general provision on terms of office.

Sec. 18. EXISTING RIGHTS OF PROPERTY AND OF ACTION; RIGHTS OR ACTIONS NOT REVIVED. The rights of property and of action, which have been acquired under the Constitution and laws of the Republic and State, shall not be divested; nor shall any rights or actions which have been divested, barred or declared null and void by the Constitution of the Republic and State, be re-invested, renewed, or re-instated by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution, unless otherwise herein provided; and provided further, that no cause of action heretofore barred shall be revived.

History

This section is substantially the same as Article VII, Section 20, of the Constitutions of 1845, 1861 and 1866.

At the Constitutional Convention of 1866, this provision took on a new significance because of the question of the validity of actions taken during secession. "The chief point at issue was whether the secession ordinance was null and void from the beginning, or became null and void as a result of the war. The first view was based upon the principle that there never was such a thing as a 'right of secession'; the second view implied that the right of secession had been at least an open legal question until the war had settled it." (C. Ramsdell, *Reconstruction in Texas* (Austin: University of Texas Press, 1970), p. 94.) The former view was known as the *ab initio* position, and it was advocated primarily by the Radicals. The 1866 Convention adopted an ordinance declaring the secession ordinance and all "ordinances, resolutions, . . . proceedings . . . (and) amendments" of the 1861 Convention null and void without settling the question of their validity during secession. (*Reconstruction in Texas*, p. 96.)

Debate over this point continued during the following years and into the Convention of 1869. The Radicals split among themselves on the issue, some contending that all laws not in violation of the federal laws or constitution, nor annulled by the military commander, remained in force, though provisional in character. Other Radicals, however, insisted that the Reconstruction Acts had rendered all acts of the state government since the date of secession null and void from their inception. The question was bitterly fought in the 1869 Convention; at

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one point, a large number of *ab initio* delegates withdrew from the convention and conducted a convention of their own. The section finally adopted by the convention (Constitution of 1869, Art. XII, Sec. 33) embodied the theory advanced by the Radicals but reached the result sought by the moderates. It declared the ordinance of secession and all laws founded thereon null and void from the beginning, and stated that the legislature sitting during the Civil War and until August 6, 1866 had no constitutional authority to make binding laws. However, laws passed during this time which had been in actual force and which neither violated the constitution and laws of the United States nor aided rebellion or prejudiced loyal United States citizens were to be respected and enforced. In addition, "private rights which may have grown up under such rules and regulations" were not to be prejudicially affected. The legislature which met in August 1866 was declared to be provisional only, and its acts were to be respected only if not in violation of the federal laws and constitution, not intended to reward participants in the rebellion, and not discriminatory.

Explanation

This section serves as a saving clause to avoid uncertainty over the status of prior constitutions and laws. One of the purposes it serves is to prevent a new constitution from operating retroactively; the new constitution may affect the rights of persons to enter into contracts, acquire property, or acquire causes of action after its effective date, but it cannot alter rights that existed before that date. For example, a forced sale of property in 1877 was valid, even though the property was part of a homestead exempted from forced sale by the 1876 Constitution, because the property was not exempt prior to 1876, and the judgment ordering the sale had been entered before the new constitution took effect. (*Wright v. Straub*, 64 Tex. 64 (1885).)

Section 18 preserves only "rights of property" and "rights of action"; comparable provisions in other states usually also protect contract rights. The latter probably are preserved in Texas under the "rights of action" clause; the courts could hold that a contractual right acquired under a previous constitution could not be taken away by the new one, because to do so would deprive the contractor of a right of action. The question apparently has not arisen.

Comparative Analysis

Most state constitutions include schedules with saving provisions. Approximately 15 append the schedule at or near the end of the constitution without giving it an article or section number. Usually, however, it is contained in the body of the document and "must be regarded, therefore, as an integral part of the constitution." (R. Dishman, *State Constitutions: The Shape of the Document* (New York: National Municipal League, rev. ed. 1968), p. 39.) The *Model State Constitution* contains several schedule provisions; the one most closely resembling Section 18 is Section 13.02.

Author's Comment

This is one of several schedule or transitional provisions scattered throughout the Texas Constitution. (See, for example, Sec. 14 of Art. V and Secs. 48 and 53 of Art. XVI.) For a discussion of transition problems, see the annotation of Section 48.

It is undoubtedly desirable to retain some provision similar to this section, but it should be combined with other transitional provisions, such as those providing

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for the continuation of pending lawsuits, the continuation of present officeholders, and the validity of existing statutes.

Sec. 19. QUALIFICATIONS OF JURORS. The Legislature shall prescribe by law the qualifications of grand and petit jurors; provided that neither the right nor the duty to serve on grand and petit juries shall be denied or abridged by reason of sex. Whenever in the Constitution the term "men" is used in reference to grand or petit juries, such term shall include persons of the female as well as the male sex.

History

The subject of qualifications of jurors made its first appearance in the Constitution of 1869, which stated that "all qualified voters of each county shall also be qualified jurors of such county." (Art. III, Sec. 45.)

The 1876 version of this section provided simply that "The Legislature shall prescribe by law the qualifications of grand and petit jurors." However, since the sections prescribing the number of jurors all used (and still use) the word "men," all women were in fact disqualified from jury service because of their sex. (See the *Explanation* of Secs. 13, 17, and 29 of Art. V.) Despite the adoption of the state and federal women's suffrage amendments, the Texas courts held as late as 1938 that the state could exclude women from juries and in fact was required by the state constitution to do so. (*Glover v. Cobb*, 123 S.W.2d 794 (Tex. Civ. App.—Dallas 1938, *writ ref'd*); see also *Stroud v. State*, 90 Tex. Crim. 286, 235 S.W. 214 (1921).) Thus it was not until the amendment of this section in 1954 that women were allowed to serve on juries in Texas.

Explanation

Section 19 expressly gives women the duty, as well as the right, to serve on juries. (See *Rogers v. State*, 163 Tex. Crim. 260, 289 S.W.2d 923 (1956).) The legislature, however, has provided that women with children under the age of ten may claim an exemption from jury service. Such women are not ineligible, however, and may waive the exemption if they wish to serve. (Tex. Rev. Civ. Stat. Ann. arts. 2135, 2137.)

By the terms of this section, the qualifications of jurors are statutory, not constitutional. The statute fixes the minimum age for a juror at 21 (Tex. Rev. Civ. Stat. Ann. art. 2133), and the court of criminal appeals held that this minimum was still valid even after the Twenty-sixth Amendment to the federal constitution lowered the voting age to 18, because qualifications of voters are not necessarily the same as those of jurors. (*Shelby v. State*, 479 S.W.2d 31 (Tex. Crim. App. 1972).)

Apparently, however, the minimum age for a juror is now 18. A 1973 statute provides that all persons 18 or older have the same rights, privileges, and obligations as those 21 and over. (Tex. Rev. Civ. Stat. art. 5923b.) Since jury duty is an "obligation," and since qualifications of jurors are statutory rather than constitutional, the statute apparently has the effect of lowering the minimum age of jurors.

The United States Supreme Court recently held that a state may not systematically exclude women from jury service, nor automatically exempt women solely on the basis of their sex, if the result of such a system is virtually all-male juries. (*Taylor v. Louisiana*, 419 U.S. 522 (1975).) The court said, however, that the states are still free to grant exceptions on the basis of hardship, so the Texas practice of offering exemptions to mothers of children under age ten presumably is still valid. The decision probably does not make Section 19 superfluous, because the latter

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prohibits any denial or abridgement of women's right to serve on juries, while the federal constitution as interpreted in *Taylor v. Louisiana* only prohibits discrimination that effectively excludes virtually all women from juries.

Comparative Analysis

Women are now permitted to serve on juries in all 50 states. (Council of State Governments, *The Book of the States* (Chicago, 1972-1973), p. 406.) In about half of the states, however, women do not have a duty to serve on juries; they may decline to serve because they are women; as indicated in the *Explanation* above, in some states their names are not placed on jury lists unless they volunteer. (Rudolph, "Women on the Jury—Voluntary or Compulsory," in Glenn R. Winters, ed., *Selected Readings: The Jury*, (Chicago: American Judicature Society, 1971), p. 98.) A list (somewhat out-of-date) of all state statutes dealing with jury service by women can be found in *Hoyt v. Florida* (368 U.S. 57, at 62-63, n. 6. (1961)). Obviously, the 1975 *Taylor* case will change this "volunteer" status in many states.

Author's Comment

The antidiscrimination provision of this section may be unnecessary since the adoption in 1972 of Section 3a of Article I, providing that "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." The language of Section 19, however, is far more specific and precludes any argument that exclusion of women from juries is not a denial or abridgement of equality. The section probably should be relocated in Article I, the Bill of Rights, however.

Since this section gives women the duty, as well as the right, to serve on juries, it arguably precludes the kind of devices described above that do not exclude women from juries but permit them to escape jury duty more easily than men. The present statutory exemption, however, is based at least in part on parenthood, rather than sex, and therefore might be valid even if Section 19 were held to prohibit the exemption of women from jury service because of their sex.

The second sentence of the section is ineffective. The only way to eliminate the verbal discrimination of Sections 13, 17, and 29 of Article V is to amend those sections to replace the word "men" with "individuals." The sentence is not necessary to prevent the actual discrimination anyway, however, because that is accomplished by the first sentence.

Sec. 20. MIXED ALCOHOLIC BEVERAGES; INTOXICATING LIQUORS; REGULATION; LOCAL OPTION. (a) The Legislature shall have the power to enact a Mixed Beverage Law regulating the sale of mixed alcoholic beverages on a local option election basis. The Legislature shall also have the power to regulate the manufacture, sale, possession and transportation of intoxicating liquors, including the power to establish a State Monopoly on the sale of distilled liquors.

Should the Legislature enact any enabling laws in anticipation of this amendment, no such law shall be void by reason of its anticipatory nature.

(b) The Legislature shall enact a law or laws whereby the qualified voters of any county, justice's precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits; and such laws shall contain provisions for voting on the sale of intoxicating liquors of various types and various alcoholic content.

(c) In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the

laws of the State of Texas and in force at the time of the taking effect of Section 20, Article XVI of the Constitution of Texas, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 per cent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale under the provisions of Chapter 116, Acts of the Regular Session of the 43rd Legislature.

History

Liquor by the drink was first regulated in Texas by an 1854 local-option statute prohibiting the sale of liquor in quantities of less than a quart unless authorized by the voters of the county. (Texas Laws 1854, ch. 88, 3 *Gammel's Laws*, 1560; see Comment, "The 'Open Saloon' Prohibition," 46 *Texas L. Rev.* 967 (1968).) Two years later the law was declared unconstitutional in *State v. Swisher*, 17 Tex. 441 (1856), on the ground that the constitution did not permit submission of legislation to the voters for ratification. The act had been repealed, however, prior to the court's decision, and the court admitted that it therefore had not given the question "elaborate investigation." (*Id.*, at 447.)

The Constitution of 1869 allowed the legislature to prohibit sale of alcoholic beverages near colleges and "seminar(ies) of learning" located elsewhere than in a county seat or the state capital. (Art. XII, Sec. 48.) The record discloses no reason for this exception; perhaps the delegates felt that the need to protect students was outweighed by some special need for libation in seats of government.

In the 1876 Constitution, Section 20 of Article XVI directed the legislature to enact a law providing for local option on the question of liquor sales by the voters of any "county, justice's precinct, town, or city" but made no reference to liquor by the drink.

The temperance movement already was gaining support, however, and in 1887 an amendment to Section 20 was proposed that would have produced statewide prohibition. The ensuing campaign attracted national interest. "The ablest orators of the state spoke to crowds of many thousands of voters, rallies were staged in all parts of the state, large campaign funds were collected and expended by both sides, torch light parades were featured, extravagant predictions of victory were made by both sides, and the voters were kept excited for many week prior to election day." (*Seven Decades*, pp. 189-90.) When the votes were in, the amendment had failed by a majority of almost two to one. (*Id.*, at 191.)

The temperance forces continued their campaign and in 1911 another statewide prohibition amendment was submitted to the electorate. This election, like the one in 1887, aroused public interest to a degree that is unusual in elections on constitutional amendments. Unlike the 1887 election, however, the vote in 1911 was very close. It was, and for at least 30 years thereafter remained, "the closest amendment contest in Texas political history which involved a representative vote of the people." (*Id.*, at 192.) The antiprohibitionists charged that prohibition would "increase taxes, would harm the schools, and would be detrimental to the principles of government." Proponents of the amendment asserted (in addition to the usual temperance arguments) that the "open saloons seek to control the politics and governments of the state, and all other important interests, including schools; . . . and that the saloons constituted the main cause of . . . 'outlawing.'" "

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(*Id.*, at 193.) Out of almost 470,000 votes cast, the amendment failed by about 6,300 votes.

In 1919, the prohibitionists finally won. After Texas had ratified the Eighteenth Amendment to the United States Constitution, the legislature enacted a statewide prohibition law. The voters subsequently approved a constitutional amendment that repealed the local-option provision to comply with the national prohibition. (See Comment, "The 'Open Saloon' Prohibition," 46 *Texas L. Rev.* 467 (1968).)

By the 1930s, disillusionment with prohibition was apparent. In 1933, Section 20 of Article XVI was again amended, this time to allow the sale, on a local-option basis, of beer and wine with an alcohol content of not more than 3.2 percent. After the repeal of federal prohibition, another amendment was passed, in 1935, which repealed statewide prohibition, prohibited the "open saloon," and provided for local-option regulation of the sale of alcoholic beverages. This amendment endured until the legalization of liquor by the drink in 1970. The 1935 amendment also authorized the legislature "to establish a State Monopoly on the sale of distilled liquors," but this was never done. Another amendment, submitted to the voters the same year, would have established (without legislative action) a state monopoly over the purchase and sale of all alcoholic beverages; the proposal also prohibited on-premises consumption and retained the local option. This proposed amendment was defeated at the polls.

By the 1960s, it was clear that the "open saloon" prohibition did not in fact prevent the sale of liquor by the drink. Perhaps the most widespread method of circumventing the law was the private club, often "private" for liquor law purposes only. In holding that a so-called private club in Houston could not qualify as a private club for purposes of the Civil Rights Act, a federal district judge said, "This Court is familiar with the hypocrisy of Texas liquor laws, and knows that often what are termed 'private clubs' under these laws are nothing more than commercial ventures. Texans are forbidden by their state constitution to operate 'open saloons.' Thus, so-called 'private clubs' have been established to dispense liquor-by-the-drink to Texans." (*Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970).)

The liquor-by-the-drink issue arose again in 1967 when Governor John Connally proposed a statute allowing sale of liquor in "minibottles." This plan was defeated by the legislature. (See 7 *Proposed Constitutional Amendments Analyzed* (Austin: Texas Legislative Council, 1970), p. 13.) Just before the vote on the Connally proposal, the mixed-beverage question was submitted to the voters in a statewide nonbinding referendum. The results showed a 40,000-vote margin in favor of liquor by the drink out of 1.4 million votes cast. (*Ibid.*)

At the time of the referendum in 1967, it was not clear whether sale of liquor by the drink could be legalized by statute or would require a constitutional amendment. Section 20, as amended in 1935, provided in part: "The open saloon shall be and is hereby prohibited. The Legislature shall have the power, and it shall be its duty to define the term 'open saloon' and enact laws against such." The legislature at that time defined "open saloon" as "any place where any alcoholic beverage whatever . . . is sold . . . for beverage purposes by the drink or in broken or unsealed containers . . ." (Penal Code art. 666-3(a).) The attorney general in 1939 ruled that "the Legislature . . . may not now define the term 'open saloon,' as being something different from what it was generally understood to be at the time the people voted on the proposition . . ." (Tex. Att'y Gen. Op. No. 0-337 (1939).) That interpretation clearly required a constitutional amendment before any change could be made in the "open saloon" prohibition. This theory has been criticized as a grant of constitution-making power to the legislature. (See Comment, "The 'Open Saloon' Prohibition," 46 *Texas L. Rev.* 967 (1968).)

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Because of this doubt about the constitutionality of statutory authorization for liquor by the drink, a proposed constitutional amendment was submitted to the voters in 1970 and was approved. This amendment is Subsection (a) of present Section 20. The section now gives the legislature authority to pass laws regulating the sale of mixed beverages; it retains the local-option aspect of previous amendments and also the power to establish a state monopoly on the sale of liquor.

Explanation

This section is largely self-explanatory, and since the 1970 amendment there have been no major cases or attorney general's opinions construing it. Those controversies which do arise generally depend on statutory rather than constitutional construction. (The Texas Liquor Control Act is compiled as article 666-1 *et seq.* of the auxiliary laws section of the Penal Code.) The court of criminal appeals held that convictions under the statutory prohibition against open saloons were invalid if they had not become final before repeal of the statute, because after its repeal there was no basis left for prosecution. (*Williams v. State*, 476 S.W.2d 307 (Tex. Crim. App. 1972).)

The requirement for local voter approval has been construed rather strictly. For example, when a "dry" area is annexed to a "wet" justice precinct, the annexed area remains "dry" until it votes to become "wet." The attorney general has ruled that permitting such an area to automatically become "wet" would violate the constitutional requirement that residents be given an opportunity to vote on the issue. (Tex. Att'y Gen. Op. No. M-865 (1971).) Likewise, redistricting of the precincts within the county has no effect on the wet-dry status of territory transferred from one precinct to another. (Tex. Att'y Gen. Op. No. H-97 (1973); see also Tex. Att'y Gen. Op. No. H-515 (1975).)

Even though a city is "wet," it may prohibit the sale of alcoholic beverages in certain locations within the city. (*Discount Liquors No. 2, Inc. v. City of Amarillo*, 420 S.W.2d 422 (Tex. Civ. App.—Amarillo 1967, *writ ref'd n.r.e.*.) A city or precinct may opt to be "wet" even though the county in which it is located is "dry" and apparently may also opt to be "dry" even though the county is "wet" *Myers v. Martinez*, 320 S.W.2d 862 (Tex. Civ. App.—San Antonio 1959, *writ ref'd n.r.e.*.)

A portion of a precinct (*e.g.*, a "dry" portion lying outside a "wet" city) cannot hold a local-option election; the election must involve a full justice precinct, city, or county. (*Patton v. Texas Liquor Control Board*, 293 S.W.2d 99 (Tex. Civ. App.—Austin 1956, *writ ref'd n.r.e.*.)

Whether the constitution permits a citywide local-option election in a city that straddles a county line is not clear. In *Ellis v. Hanks* (478 S.W.2d 172 (Tex. Civ. App.—Dallas 1972, *writ ref'd n.r.e.*)), the court held that the commissioners court of Dallas County could not call a local-option election for the city of Grand Prairie because part of that city lies in Tarrant County. That decision, however, was based on a statute (Tex. Rev. Civ. Stat. Ann. art. 66-32) rather than the constitution. The statute gives the county commissioners court power to order an election only within the county or an "incorporated city or town therein" and does not authorize the city itself to conduct the election.

Under Subsection (b) of Section 20, the legislature apparently could solve this problem by allowing the city itself to conduct the election on a citywide basis. That solution might be held unconstitutional under Subsection (c), however, because the latter requires a vote by the county "or a political subdivision thereof." The argument would be that a city may vote only as a subdivision of a county, and that a city located in two counties thus would have to vote as two separate subdivisions. A more sensible interpretation would be that a city may vote as a single entity,

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whether it is a subdivision of one county or more than one.

Comparative Analysis

About six other states have constitutional provisions authorizing local-option elections on liquor questions.

A dozen states have provisions authorizing the legislature to regulate the traffic, sale, etc., of alcoholic beverages. Apparently no other state has a constitutional provision expressly allowing mixed-beverage sales. The Oklahoma and West Virginia constitutions forbid "open saloons." The *Model State Constitution* contains no provision on liquor.

Author's Comment

There are at least two arguments in favor of retaining this section. First, state policy toward alcoholic beverages may be considered a matter of such basic importance that it should not be left entirely within the discretion of the legislature. This argument can be embellished by asserting that in Texas, the changeability of public attitudes toward liquor requires a constitutional provision to ensure some stability in state liquor policy. On the other hand, the vast majority of other states are able to deal with liquor regulation without constitutional help (see the previous *Comparative Analysis*). The local-option approach to liquor in Texas probably is now firmly entrenched, so that frequent changes in policy are unlikely. Moreover, as the history of this section shows, constitutional treatment of the liquor problem has provided little stability.

The second major argument for retaining Section 20 is based on the theory that local-option legislation is invalid unless specifically permitted by the constitution. As pointed out in the *History* above, the Texas Supreme Court in 1852 advanced this theory. The validity of that decision today is highly doubtful. First, the decision was based on the Constitution of 1845 and therefore is not binding today; the courts have not had occasion to reconsider the question since then because all subsequent local-option provisions have been specifically authorized by the constitution. Second, the 1856 decision itself is not wholly persuasive; the opinion cites no authority and its holding was shaky at the time because the statute in question had been repealed. Finally, the court's rationale is contrary to the overwhelming weight of authority. A few early cases held local-option legislation invalid (see, e.g., *Rice v. Foster*, 4 Harr. 479 (Del. 1849); *Parker v. Commonwealth*, 6 Pa. 507 (1847)), but many of those early decisions now have been overruled. (See, e.g., *Locke's Appeal*, 72 Pa. 491 (1873).) The recognized authorities on the subject agree that local-option legislation is valid and cite numerous cases in support of their view. (1 Cooley, *Constitutional Limitations* (Boston: Little, Brown, 8th ed., Carrington, 1927), pp. 244-45; 1 Sutherland, *Statutory Construction* (Chicago: Callaghan, 4th ed., Sands, 1972), pp. 87-89.)

It appears, therefore, that retention of Section 20 is not necessary to permit continuation of the local-option system. It still might be argued, however, that the section is needed to prevent the legislature from abolishing the local-option authorization. That danger probably is lessened by the political advantages that the local-option system offers to legislators; it permits them to avoid politically sensitive decisions by "passing the buck" to local voters.

Sec. 21. PUBLIC PRINTING AND BINDING; REPAIRS AND FURNISHINGS; CONTRACTS. All stationary, and printing, except proclamations and such printing as may be done at the Deaf and Dumb Asylum, paper, and fuel used in the

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Legislative and other departments of the government, except the Judicial Department, shall be furnished, and the printing and binding of the laws, journals, and department reports, and all other printing and binding and the repairing and furnishing the halls and rooms used for the meetings of the Legislature and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price, and under such regulations, as shall be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contracts; and all such contracts shall be subject to the approval of the Governor, Secretary of State and Comptroller.

History

This section first appeared in the Constitution of 1876 and was apparently a reaction against practices of the Reconstruction government. For example, the 12th Legislature under the leadership of Governor E. J. Davis provided for a state printer to do all printing and publishing of the government. Friends of Davis formed a newspaper, the *State Journal*, which was designated the state printer and became an official organ of the Radical Republican Administration. (See *Seven Decades*, p. 32.)

An unsuccessful amendment in 1907 would have authorized providing for all printing, publishing, stationery, etc., by law. In 1968 a proposed amendment to this section deleted the references to fuel, repairing and furnishing the halls and rooms of the legislature, and the requirement that contracts be approved by the governor, secretary of state, and comptroller. It too was defeated.

Explanation

In *State v. Steck Co.*, 236 S.W.2d 866 (Tex. Civ. App.—Austin 1951, *writ ref'd*), the court held that where officers representing the state did not require bids or the approval of the governor, secretary of state, and comptroller on a contract to manufacture cigarette tax stamps, the state could not pay for the stamps even though they had been delivered.

Comparative Analysis

Fourteen states have constitutional provisions similar to this section concerning the letting of certain contracts by the state. Eleven states require competitive bidding; most states either permit or require that the legislature establish a maximum price. Twelve states provide that state officials may not be interested in such contracts. (See also the *Explanation* of Art. III, Sec. 18.)

Illinois, Michigan, and Pennsylvania have deleted similar provisions in recent constitutional revisions. The *Model State Constitution* contains no comparable provision.

Author's Comment

The Texas State Board of Control, which was created in 1919, has purchasing responsibility for all state agencies. Detailed statutory provisions regulate the functions of the board and require, for example, competitive bidding. (See Tex. Rev. Civ. Stat. Ann. art. 601 *et seq.*) The elaborate and carefully drafted provisions of the State Purchasing Act of 1957 (Tex. Rev. Civ. Stat. Ann. art. 3205a) far better serve the objectives of Section 21, which could safely be omitted.

Sec. 22. FENCE LAWS. The Legislature shall have the power to pass such fence laws, applicable to any sub-division of the State, or counties, as may be needed to meet the wants of the people.

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History

This section first appeared in the Constitution of 1876. At the Convention of 1875 the Committee on Agriculture and Stockraising proposed a section instructing the legislature to pass general laws authorizing any county, by a two-thirds vote of its qualified electors, to adopt a fence system in the county for the protection of farmers and stockraisers. (*Journal*, p. 202.) On second reading amendments were offered to permit justice precincts to determine local fence systems, to require a three-fourths majority at the local election, and to require a simple majority vote. All of these amendments failed. Finally, the language of the present section was offered as a floor substitute and was adopted. (*Journal*, p. 700.) The section has remained unchanged since the convention.

Explanation

Prior to the Civil War, the open-range cattle industry became prominent in Texas. Ranchers claimed grazing rights over large areas, bred large herds, but had no title to the vast unsettled lands. By the end of the Reconstruction Era, homesteaders and farmers began encroaching on the open pastureland used by ranchers for many years and friction between the two groups ensued.

In 1840 the Congress of Texas enacted a fence law permitting livestock to roam at large and prescribing the kind of fence that farmers must erect to protect their crops. If livestock entered upon cropland which was adequately fenced, the owners of the livestock were liable for the damage done. If the fence was "insufficient," however, the farmer had to bear the loss. (This law is now codified as Tex. Rev. Civ. Stat. Ann. art. 3947 *et seq.*)

In 1876 the legislature passed a local-option stock law under which any county or subdivision of a county could vote to prohibit hogs, sheep, and goats from running at large, thereby forcing their owners to keep them fenced or tied (Tex. Rev. Civ. Stat. Ann. art. 6928 *et seq.*, amended in 1953 to include horses, mules, jacks, jennets, and donkeys). In 1925 certain counties were authorized to prohibit cattle from running at large (Tex. Rev. Civ. Stat. Ann. art. 6954 *et seq.*.)

The laws implementing Section 22 have followed the original proposal of the Convention's Committee on Agriculture and Stockraising; namely, to authorize fence laws by local-option election. Thus article 6954 was originally a "local" law, since it applied only to a few named counties, authorizing them to decide by election whether to prohibit cattle from running at large. However, repeated amendments have added to the list so that now 235 of Texas' 254 counties are covered by this law.

Comparative Analysis

Four other states have constitutional provisions relating to fence laws, but each *prohibits* the legislature from passing special or local laws on the subject. The *Model State Constitution* makes no reference to fence laws but of course prohibits special or local laws where a general law is or can be made applicable. (Sec. 4.11.)

Author's Comment

The only constitutional significance of this section is to authorize local laws on the subject. In fact, with the exception of article 6954 discussed above, the subject has been handled by general law authorizing local-option elections.

Presumably, the section was included as an exception to Article III, Section 56, which prohibits local or special laws on a variety of subjects and "in all other cases where a general law can be made applicable." (See the *Explanation* of that section.) As currently applied, however, Section 56 would not prohibit a local fence law, but as noted the legislature has handled the problem by general law anyway. If ever needed, therefore, Article XVI, Section 22, is superfluous today.

Sec. 23. REGULATION OF LIVE STOCK; PROTECTION OF STOCK RAISERS; INSPECTIONS; BRANDS. The Legislature may pass laws for the regulation of live stock and the protection of stock raisers in the stock raising portion of the State, and exempt from the operation of such laws other portions, sections, or counties; and shall have power to pass general and special laws for the inspection of cattle, stock and hides and for the regulation of brands; provided, that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby, and approved by them, before it shall go into effect.

History

This section first appeared in the Constitution of 1876. On second reading of the article on General Provisions, a section was added by floor amendment which consisted of the language as it now appears but without the phrase “and shall have power to pass general and special laws for inspection of cattle, stock and hides and for the regulation of brands.” (*Journal*, p. 690.) Two days later the quoted language was added by floor amendment as a separate section. (*Journal*, p. 714.) On third reading an amendment was accepted combining the two sections into present Section 23. The section has never been amended.

Explanation

The purpose of this section overlaps that of Section 22 authorizing local fence laws (see the *Explanation* of Sec. 22). The section is awkwardly drafted and has led to numerous challenges to the validity of stock regulation laws on the ground that they are local or special but fail to provide for the local-option election the section mandates. In *Lastro v. State* (3 Tex. Ct. App. 363 (1877)), this contention was rejected and the court upheld as a general law an act regulating the sale of livestock and hides that exempted 62 counties from its operation. The court reasoned that the act’s application only to stock-raising counties represented a reasonable classification, thus categorizing it as a general law, whereas Section 23’s requirement of local-option approval applied only to local laws.

In *Armstrong v. Traylor* (87 Tex. 598, 30 S.W. 440 (1895)), the supreme court construed the section to authorize general laws that may or may not except certain counties; local laws subject to local-option approval; and general laws with a statutory requirement for local option approval.

A law requiring the governor to appoint an inspector of hides in each of five named counties was declared a void local law because it failed to require a local vote of approval. (*State v. Castleberry*, 252 S.W. 221 (Tex. Civ. App.—El Paso 1923, *no writ*.) However, the section does not require that municipal ordinances prohibiting free-running stock be submitted to the voters for approval. (*Batsel v. Blaine*, 15 S.W. 283 (Tex. Ct. App. 1891).)

Comparative Analysis

Five other state constitutions prohibit the legislature from passing local or special laws relating to livestock. Four states have provisions relating to control of animal diseases. Kentucky expressly authorizes local-option laws relating to stock running at large. The *Model State Constitution* has no provisions on stock regulation but prohibits special and local legislation when general legislation is or can be made applicable. (Sec. 4.11.)

Author’s Comment

No special constitutional provision is necessary to authorize legislation regulating the livestock industry. The only constitutional significance of this section is

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its authorization of special and local laws which might otherwise violate Article III, Section 56. But general laws can be drafted that apply only to counties or other political subdivisions that share certain distinctive characteristics—for example, an infestation of hoof-and-mouth disease. Such laws are not special or local, within the constitutional ban of Section 56, if the distinctive characteristics are reasonably related to the purpose of the law, *i. e.*, if the law's classification is reasonable. (See the *Explanation of Art. III, Sec. 56.*) This has been the legislative experience under Article XVI, Section 23: general laws have been enacted to apply where needed or where approved by local voters. And since they are *general* laws, local approval is *not* required, although often permitted, and Section 23 is thus without significance.

Sec. 24. ROADS AND BRIDGES. The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures, and convict labor to all these purposes.

History

This section originated in the Constitution of 1876, and was adopted as proposed by the Committee on General Provisions, without change and apparently without debate. (*Journal*, p. 556.)

Explanation

This section has three possible functions. One is to authorize the legislature to provide for a system of public roads. For this purpose, the section is undoubtedly unnecessary, since road building is generally considered "an inherent and necessary attribute of sovereignty existing independently of constitutional provisions" (39 *C.J.S. Highways*, sec. 25, p. 946 (1944).) Section 2 of Article XI specifically directs the legislature to provide for the building of county roads, making this section redundant as an authorization for county road building.

A second possible function of the section is to permit the use of fines and convict labor in road building. Again, for this purpose the section probably is unnecessary. The Thirteenth Amendment to the federal constitution specifically exempts convict labor from the prohibition against involuntary servitude, and about half of the states by statute require convicts to work. (See S. Rubin, *The Law of Criminal Correction* (St. Paul: West Publishing Co., 1963), p. 289.)

In Texas, the Code of Criminal Procedure (art. 43.10) provides generally for manual labor by persons convicted of misdemeanors, and the civil statutes (Tex. Rev. Civ. Stat. Ann. arts. 6736, 6764) provide for the use of convict labor on roads and bridges. The labor of prisoners in the Texas Department of Corrections is generally provided for by articles 6166x *et seq.* of the Penal Code. Likewise, there appears to be no reason why a constitutional authorization is needed to permit use of fines and forfeitures to build roads and bridges.

A court of civil appeals has held that once a fine or forfeiture is received by the government it becomes the property of the government (*Flewellen v. Ft. Bend County*, 42 S.W. 775 (Tex. Civ. App. 1897, *no writ*), and the government may thus use it for any public purpose, including, of course, road and bridge building.

The third possible function of this section is less readily apparent, but it is the only one that has been mentioned in the cases. It involves the ownership of public roads. The courts have held that all public roads belong to the state, and have cited this section as support for that proposition. The leading case is *Robbins v. Limestone County* (114 Tex. 345, 268 S.W. 915 (1925)). The question was whether

ownership of the public roads of the state is in the state itself or in the counties or road districts. The court held that the state owned the roads. Even though “the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and the people thereof.” (*Id.*, at 918.) The court determined that the state, acting through the legislature, has the power to establish public highways; this right may be exercised by the legislature or delegated to an agency or political subdivision of the state; and the legislature may still possess or control the public roads. “The Legislature then has the sole and exclusive power pertaining to public roads and highways, unless and only to the extent that power may be, if at all, modified or limited by other plain provisions of the Constitution.” (*Ibid.*) This holding has been consistently followed.

Although the *Robbins* decision relied in part on Section 24, there is language in the opinion to indicate that the road-building power, though it may be limited by the constitution, is not dependent on it. The court declared that roads “in their very nature and as exercised by general sovereignty . . . belong to the state. From the beginning in our state the public roads have belonged to the state. . . .” (*Ibid.*) It is difficult to see how Section 24 contributes anything to the debate over ownership of the public roads.

Comparative Analysis

Comparable provisions in other state constitutions vary considerably in scope and detail. Eight states have rather general provisions stating that the state, the legislature, or some subdivision shall provide for the establishment of roads and bridges. About half of the states have provisions similar to Article VIII, Section 7a, earmarking certain types of revenue, usually from motor vehicle registration and gasoline taxes, for road construction. Thirteen states have constitutional provisions allowing the use of convict labor on such public projects as street and road construction and other public works. North Carolina’s constitution previously contained a similar provision, but it was omitted from the recent revision. The *Model State Constitution* contains no similar provision.

Author’s Comment

The powers necessary to provide for public roads and bridges, to pay for them with fines and forfeitures, and to use convict labor in their construction are conceded to be within the scope of governmental authority even without specific constitutional authorization to that effect. The controversy over ownership of the public roads has been resolved, and in any event, Section 24 has no bearing on that controversy.

Sec. 25. DRAWBACKS AND REBATEMENT TO CARRIERS, SHIPPERS, MERCHANTS, ETC. That all drawbacks and rebatement of insurance, freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service of, or to any cotton, grain, or any other produce or article of commerce in this State, paid or allowed or contracted for, to any common carrier, shipper, merchant, commission merchant, factor, agent, or middleman of any kind, not the true and absolute owner thereof, are forever prohibited, and it shall be the duty of the Legislature to pass effective laws punishing all persons in this State who pay, receive or contract for, or respecting the same.

Art. XVI, § 26

History

This section has no counterpart in earlier constitutions. The Committee on General Provisions reported this section with the instructions to the legislature to punish "as felons" all who violated it. (*Journal*, p. 556.) On second reading the words "as felons" were deleted. (p. 701.)

Explanation

The *Interpretive Commentary* explains this section as a Granger-motivated response to the rebate scheme devised by John D. Rockefeller. Under this scheme, Standard Oil Company was charged a standard price for oil shipments but received a secret rebate. At one point, rebates were paid to Rockefeller on shipments of oil by competitors. Apparently this secret rebate system became common practice among all large companies doing business with the railroads. Thus farmers and small industrialists were discriminated against by being forced to pay higher shipping costs to subsidize the large corporations. (3 *Interpretive Commentary*, p. 227.)

Several state and federal statutes have been enacted to carry out the policy of this section. For example, Tex. Rev. Civ. Stat. Ann. art. 6559i-4 prohibits unjust discrimination by railroads, and the federal Robinson-Patman Act, which is enforced by the Federal Trade Commission, generally prohibits discriminatory pricing. (See 15 U.S.C.A. sec. 13.) Few Texas cases have construed this section. The court in *Continental Fire & Gas Co., Inc. v. American Mfg. Co.* (206 S.W.2d 669 (Tex. Civ. App.—Fort Worth 1947, *no writ*)), merely noted in passing that it is not self-executing. In 1973, the Texas Railroad Commission ruled that a "brokerage fee" paid by a hauler to a feedlot where no brokerage work was performed was illegal by virtue of this section and various statutes. The San Antonio Court of Civil Appeals refused to uphold a judgment against the feedlot based upon a breach of the contract wherein a part of the consideration was the illegal rebate. (*Cox Feedlots Inc. v. Hope*, 498 S.W.2d 436 (Tex. Civ. App.—San Antonio 1973, *writ ref'd n.r.e.*).

Comparative Analysis

The Alabama, Kentucky, and Missouri constitutions forbid rebates by railroad companies. Several other states have general provisions forbidding discrimination in rate charges. Washington's constitution forbids rate discrimination by telegraph companies and express companies. The *Model State Constitution* contains nothing on the subject.

Author's Comment

Regulation of unjust price discrimination is more appropriately the subject of statutory law. The legislature certainly needs no special constitutional authorization to legislate on these matters. Since there are limitless varieties of unjust price discrimination, regulation is best achieved by administrative agencies acting under broad grants of statutory authority rather than under inflexible constitutional detail.

Sec. 26. HOMICIDE; LIABILITY IN DAMAGES. Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Art. XVI, § 26

History

Under the common law a suit for personal injuries was terminated without recovery if the injured person died. The family of the deceased had no right to sue for damages because the right was considered personal to the injured party and did not survive him. In 1846 Lord Campbell's Act in England altered the common law to permit suit and recovery of damages in such cases. Subsequently all states in the United States provided a remedy for wrongful death. Texas adopted a "wrongful death" statute in 1860.

A question arose whether wrongful death statutes authorized recovery of exemplary or punitive damages where the acts of the defendant were intentional or grossly negligent. Most state courts held that wrongful death statutes did not authorize exemplary damages, and in 1877 the Texas Supreme Court decided that the first Texas statute did not. (*March v. Walker*, 48 Tex. 372 (1877).)

The Constitution of 1869 contained a provision similar to this section but omitted "gross neglect" as a basis for recovery. In the Convention of 1875, present Section 26 was adopted without debate after a floor amendment adding the words "or gross neglect." (*Journal*, p. 701.)

Explanation

In 1879 the statutes of Texas were recodified. The wrongful death statute was amended to provide that exemplary damages could be awarded in any suit for wrongful death. (The statute is now Tex. Rev. Civ. Stat. Ann. art. 4673.) A series of cases followed in which the supreme court said in *dicta* that a parent could not recover exemplary damages for the wrongful death of a child. (See, e.g., *Houston & T.C. Ry. Co. v. Baker*, 57 Tex. 419 (1882). The decisions are analyzed and criticized in Green, "The Texas Death Act," 26 *Texas L. Rev.* 133, 143-49 (1947).) Despite Dean Green's criticism, however, a court of civil appeals emphatically upheld the denial of exemplary damages to a parent in *Scoggins v. Southwestern Electric Service Co.* (434 S.W.2d 376 (Tex. Civ. App.—Tyler 1968, writ *ref'd n.r.e.*)), reasoning that Section 26 limited the authority of the legislature to permit recovery of exemplary damages only by the classes of persons named in the section.

Despite the comma following "wilful [*sic*] act" an omission that is not willful does not justify exemplary damages (*Helmes v. Universal Atlas Cement Co.*, 202 F.2d 421 (5th Cir. 1953).

Comparative Analysis

Several states have constitutional provisions *prohibiting* the legislature from limiting the amount of recovery under a wrongful death statute. No state has a provision similar to this section, however, and the *Model State Constitution* is silent on this topic.

Author's Comment

This section is an excellent example of the danger of using the constitution as a vehicle to change judge-made law. In acting from noblest motives to provide for exemplary damages in a wrongful death suit, because damages were not allowed by the courts and the statute was ambiguous, the Convention of 1875 unintentionally limited the power of future legislatures to expand the class of those entitled to damages. The result is an anomaly. The intentional or grossly negligent killing of a parent may be punished and deterred by awarding exemplary damages to his or her surviving children, but not vice versa.

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The law of torts, recovery for wrongful death, entitlement to exemplary damages, etc., should be left to the legislature and courts to develop. The inclusion of narrow rules on these topics in the constitution too frequently results in the imposition of unintended limitations on the power of the legislature and courts to do justice.

Sec. 27. VACANCIES FILLED FOR UNEXPIRED TERM. In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only.

History

This section first appeared in the Constitution of 1876 and apparently was included without significant debate.

Explanation

The purpose of this section is to keep the beginning and end of office terms uniform. At common law, one elected to fill a vacancy is entitled to serve the full term prescribed for the office. (*Banton v. Wilson*, 4 Tex. 400 (1849).) Obviously, under such a system the expiration of terms of various offices eventually would be scattered randomly throughout the year, making it virtually impossible to hold a general election. This section operates together with Section 12 of Article IV, which authorizes the governor to fill vacancies in state and district offices by appointment. Such appointments are effective only until the next general election; then this section comes into play to provide that those so elected serve only the unexpired term.

When a vacancy occurs in either house of the legislature, the governor is not authorized to fill it by appointment; rather, he must call a special election. (Sec. 13 of Art. III.) Again, Section 27 then comes into play to limit the term of the person so elected.

Comparative Analysis

Eight other states have provisions similar to Section 27.

Author's Comment

This provision should be combined with Section 13 of Article III and Section 12 of Article IV. A properly drafted combination of these provisions would permit deletion of many vacancy provisions that are scattered throughout the constitution. (See, e.g., Secs. 2, 4, 7, 11, and 29 of Art. V, each containing provisions for filling vacancies on various courts.)

Sec. 28. WAGES NOT SUBJECT TO GARNISHMENT. No current wages for personal service shall ever be subject to garnishment.

History

Garnishment of wages is a creditor's remedy that evolved in the 19th century. It did not exist in early common law. The common-law writ of attachment permitted a defendant's property to be seized, but only to compel his appearance after he had failed to respond to a summons. If the defendant still failed to respond, the goods went to the state rather than to the creditor. If the defendant responded to the summons, his goods were promptly returned to him. There was no method by which a creditor could reach a debtor's future earnings. The American colonies