

Art. III, § 52

have been avoided. The attorney general could have taken the broad approach. The purpose of Section 50 was "to put an end to the use of the credit of the State in fostering private business, a practice which prevailed in the early days of the history of most states." (Tex. Att'y Gen. Op. No. V-1198 (1951).) It makes no sense to distort Section 50 from this purpose by ruling that it prohibits the state from entering into an agreement with the United States whereby state and local employees participate in the social security system.

The attorney general could have taken a technical approach. Nobody is lending his credit to anybody. The state agrees with the United States to pay over the appropriate amount of social security taxes. The legislature requires local governments to collect the tax from employees, add the appropriate amount for the employer, and remit to the state. If a local government fails to remit, the state can bring suit and obtain a judgment. (This is particularly true in the case of proprietary activities.) Only if the local government is judgment proof does the state end up paying the United States more than was collected. There is no credit transaction here anywhere.

The attorney general could have taken a theoretical approach. He could have pointed out that the events just described could arise only if local officials failed to carry out the duties legally imposed upon them. It is not good constitutional theory to say that a statute is unconstitutional because a government official acts unconstitutionally by violating the statute. By the same token the legislature would not violate Section 50 by authorizing an agreement with the United States whereunder the state might be left holding the bag because some local official failed to remit what the law commanded him to remit.

Section 51g is just one of many examples of two Texas legal habits, proclivities, customs, call them what you will. One is the tendency to read constitutional provisions literally rather than practically in the light of their purpose. True, the literal-minded drafters of 1875 make it hard not to continue in their footsteps, but this is simply to call for more imagination and creativity. The other habit is to rush to the constitutional amendment drawing board. True, easy amendment facilitates this approach, but the end result is abominable constitutional clutter.

It has already been suggested that the sensible way to avoid sections like 51g is to get rid of the basic cause—Sections 50, 51, and 52.

Sec. 52. COUNTIES, CITIES, TOWNS OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS; LENDING CREDIT; GRANTS. (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

(b) Under Legislative provision, any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes to wit:

Art. III, § 52

(1) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof or in aid of such purposes.

(2) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(3) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

(c) Notwithstanding the provisions of Subsection (b) of this Section, bonds may be issued by any county in an amount not to exceed one-fourth of the assessed valuation of the real property in the county, for the construction, maintenance, and operation of macadamized, graveled, or paved roads and turnpikes, or in aid thereof, upon a vote of a majority of the resident property taxpayers voting thereon who are qualified electors of the county, and without the necessity of further or amendatory legislation. The county may levy and collect taxes to pay the interest on the bonds as it becomes due and to provide a sinking fund for redemption of the bonds.

History

This section dates from 1876. The original section was the current Subsection (a) without the words "except as otherwise provided by this section." Since 1876 the section has been amended, directly or indirectly, nine times. Three submissions have failed.

The first amendment was adopted by 1904. This, in substance, was what is now Subsection (b). In 1913 an amendment was proposed which would have changed the required voter approval from two thirds to a majority and would have added a fourth purpose, to wit: "The construction, maintenance and operation of public warehouses or in aid thereof." The amendment was defeated. The amendment as submitted also contained a drastic amendment of Section 49, which was undoubtedly the principal reason for the failure of the amendment. The vote was 19,745 for and 120,734 against. The same legislature proposed another amendment much like the Section 52 part of the defeated amendment, but the governor failed to issue the required proclamation in time and no vote was taken.

In 1915, there was another effort to amend Section 52. This proposal would have authorized the legislature to permit water reclamation districts to incur indebtedness up to 50 percent instead of 25 percent of assessed value of the real property within the district. The amendment was defeated by a vote of 32,772 for and 97,546 against. Two years later, Section 59 of Article XVI was adopted by a vote of 49,116 to 36,827. Section 59 was indirectly an amendment of Section 52 and, considering the greater fiscal freedom in Section 59 compared with that in Section 52 and the minor amendment that went down to defeat in 1915, one wonders what produced such a turnaround in only two years. (The special election in 1915 called for votes on four amendments, including Section 52, and all were defeated. At the special election in 1917, Section 59 was the only amendment on the ballot.)

The next "amendment" was the curious Section 52d, adopted in 1937. Then followed Sections 60 and one of the 61s of Article III, adopted in 1948 and 1952, respectively. In 1962, Section 60 was amended in a manner that further "amended" Section 52.

In 1967, a Section 52e was adopted and in 1968 another Section 52e was added. Both sections numbered 52e are "amendments" of Section 52. In 1968, the voters rejected another "amendment" of Section 52, this one denominated Section 52a. The rejected section would have authorized the legislature to authorize counties, cities, and towns "to issue revenue bonds for industrial and development purposes." (Note that the first addition to Section 52 in 1937 was called "52d." Presumably, this was because Section 52 then had an "(a)," a "(b)," and a "(c)"—what are now "(1)," "(2)," and "(3)" of Subsection (b). This sounds silly, but is

Art. III, § 52

probably the reason for the "d." For that matter, it is absurd not to have and never to have had a Section 52a or 52c, but to have two Sections 52e. (Note also that Section 52b, if it means anything at all, is *not* an amendment of Section 52 but of Sections 50 and 51.)

In 1970, Section 52 itself was amended. The substantive change was the addition of Subsection (c). This bit of sloppy drafting is discussed below.

Explanation

Section 52 started out as a flat prohibition on grants and loans by local governments, thus serving as a complement to Sections 50 and 51. In one respect Section 52 is more prohibitive than Section 51, for the latter prohibits grants of "public money" whereas the former prohibits grants of "public money or thing of value." (The omission of "thing of value" in Section 51 was probably intentional because in 1875 the state still had public domain land to distribute.)

In a different respect, Section 52 would appear to be less restrictive than Section 50, for Section 50 prohibits loans to a "corporation, whether municipal or other" and prohibits grants to "municipal or other corporations," respectively, whereas Section 52 prohibits grants and loans to "corporations." (Of course, Sec. 52 says "corporations whatsoever;" but "whatsoever" also appears in Secs. 50 and 51, and good mathematics permits one to cancel out all "whatsoevers.") Moreover, Section 52 prohibits local governments from becoming stockholders in "such corporation," and municipal corporations do not have stockholders. (Unfortunately, close analysis of the wording of a Texas constitutional provision tends to collapse under the weight of poor drafting. The full phrase is "such corporation, association or company." Associations have "members," not "stockholders." And where did "such" company come from? There is no antecedent—except, of course, "corporation whatsoever.")

From the foregoing, one would like to conclude that although the state may grant no public money to cities and towns, the cities and towns may grant each other public money and things of value. (Whether a county is a municipal corporation is an interesting question. See the *Explanation* of Sec. 1 of Art. XI for a discussion concerning the confused local government terminology used throughout the constitution and the equally confused judicial gloss on "municipal corporations.")

No such conclusion is permissible if one is to believe the court of civil appeals in *San Antonio I.S.D. v. Board of Trustees*:

A city cannot donate its funds to an independent municipal corporation such as an independent school district. Sections 51 and 52, art. 3, Constitution of the State of Texas; *City of El Paso v. Carroll*, Tex. Civ. App., 108 S.W.2d 251 (*writ ref'd*). (204 S.W.2d 22, 25 (Tex. Civ. App.—El Paso 1947, *writ ref'd n.r.e.*)).

This statement is definite enough, but how the court got there is a good question. Section 51 is irrelevant, and Section 52, as the foregoing discussion shows, does not specifically cover municipal corporations. The *Carroll* case does not mention Section 52 but does say "the city has been granted no power to lend money." (*City of El Paso v. Carroll*, 108 S.W.2d 251, 259 (Tex. Civ. App.—El Paso 1937, *writ ref'd*)).

The *San Antonio* case is a little complicated but for present purposes can be described as an arrangement whereby the city proposed to pay the school district about \$130,000 each year for 30 years because the city had bought a private public utility and perforce removed the utility's property from the tax rolls. The court upheld the city's repudiation of the arrangement. (Note that Sec. 16 (1930) of Art.

Art. III, § 52

VII gives counties a property tax equivalent on University of Texas lands.)

The *Carroll* case supports the *San Antonio* conclusion, if not the quoted sentence. In *Carroll*, the city proposed to lend \$54,000 from the surplus in its waterworks' account to the school district to tide the school district over until it could collect some delinquent taxes. The court's line of reasoning was in the field of limitations on the power to tax rather than on the prohibition against giving or lending money. The court took as its starting point *City of Fort Worth v. Davis* (57 Tex. 229 (1882)), discussed in the *History of Section 3 of Article VII*, reviewed subsequent cases, and concluded that the rigid constitutional property tax structure would be violated if local governments were permitted to shift funds around among themselves.

This line of cases helps demonstrate the reason for the 1904 amendment: it was a device for increasing the power to tax property. What is not clear is why this grant of taxing power was tacked on to Section 52. Prior to the 1904 amendment there had been two unsuccessful proposed amendments authorizing irrigation districts. These had been in the form of a new section to be added to Article VIII. (See *Marburger*, p. 11.) Logic would dictate the same placement of the 1904 amendment, but logic has not always prevailed in the amending process. Rather than speculate on the reason for the present anomaly, it seems appropriate simply to state that Subsection (a) has nothing to do with Subsections (b) and (c).

The foregoing flat statement appears to be inconsistent with the supreme court's discussion of the section in *Collingsworth County v. Allred* (120 Tex. 473, 40 S.W.2d 13 (1931)). That case was an original mandamus action in the supreme court to require the attorney general to approve a bond issue for the construction of a county courthouse. The attorney general had refused because a United States Court of Appeals had just handed down an opinion in which it said that Section 52 prohibited local governments from issuing bonds for any purpose except that set forth in what is now Subsection (b). (The case is *Shelby County v. Provident Savings Bank & Trust Co.*, 54 F.2d 602 (5th Cir. 1932). The Texas Supreme Court noted that the United States court had withdrawn its opinion; the opinion as printed contains no such statement and presumably is a revision of the withdrawn opinion.)

Such a narrow reading of Section 52 requires parsing the sentence as if it read, "no power to lend its credit; and no power to grant money in aid of or to any individual. . . ." In *Collingsworth*, the supreme court seemed to accept this parsing of the sentence but to argue that one must read the constitution as a whole, and since Section 2 of Article XI authorized the construction of courthouses, the legislature can authorize bonds to pay for the courthouses. The court noted that such was the interpretation of that section prior to the 1904 amendment of Section 52 and that there was no reason to assume that the 1904 amendment was intended to destroy any preexisting power to issue bonds.

The normal way to read the original Section 52 is that there is no power to grant money in aid of or to any individual, etc., and no power to lend credit in aid of or to any individual, etc. Such a normal reading is consistent with Sections 50 and 51, which clearly are limited to *who* gets money or credit. Moreover, the original Section 52 was telescoping into one section the prohibitions contained in Sections 50 and 51. In this telescoping the words are "to lend its credit or to grant public money . . . in aid of or to." Note that "in aid of" is found only in Section 50, thus indicating that the lending prohibition in Section 52 parallels the prohibition in Section 50. Why the supreme court fell into a grammatical trap is a mystery. It may be simply because the 1904 amendment was an amendment of Section 52, thus giving rise to the inference that somebody must have thought that there was a connection between the borrowing power authorized thereby and the borrowing

Art. III, § 52

prohibition in the original section. Be all this as it may, the effect of the *Collingsworth* opinion is to make the earlier flat statement true in fact. For *Collingsworth* concludes (a) that the original Section 52 did not prohibit issuing bonds for purposes for which counties and other local governments could spend money and (b) that the 1904 amendment broadened rather than restricted that preexisting power. Thus, *Collingsworth* leaves the lending prohibition with only its natural grammatical meaning.

Subsection (a). Although this subsection is the “local” version of Sections 50 and 51, the *Explanation* of Section 51 covers both “grants” and “loans” as such, whether the government involved is the state or a local unit. Thus, that explanation covers this subsection.

Subsection (b). This subsection is part of the constitutional tax structure and can be understood only after a review of the tax sections, particularly Section 9 of Article VIII. (See *History* and *Explanation* of that section.) The primary original purpose of the subsection was to provide additional means for raising capital funds for water and for roads. With the adoption of Section 59 of Article XVI in 1917, the water power of Subsection (b) became almost but not quite obsolete; there are still some Section 52 water districts around.

To avoid duplication of coverage, the constitutional problems of water districts will be discussed under Section 59 of Article XVI.

Road districts are a different matter. They still exist and will continue even though the state long ago took over many county roads for the state highway system. (There is a long story concerning the takeover of county roads but the problems involved do not arise from Section 52. The leading cases are *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915 (1925), and *Jefferson County v. Board of County and District Road Indebtedness*, 143 Tex. 99, 182 S.W.2d 908 (1944).) Road districts are not “special districts” in the technical sense of an independent unit of government with fiscal and administrative power to provide particular services. A road district is a “body corporate” that can sue and be sued (*Horn v. Matagorda County*, 213 S.W. 934 (Tex. Comm’n App. 1919, *judgment adopted*)), but it exists solely as a geographical unit for the purpose of determining who is to vote and to be taxed for a bond issue for road construction. The issuing of the bonds, the levying of the tax, and the construction of roads are handled by the county commissioners court. Subsection (b) authorizes a road district covering more than one county, but the legislature has authorized only whole counties so to combine to form a road district. (Tex. Rev. Civ. Stat. Ann. art. 778a (1964). See Tex. Att’y Gen. Op. No. O-4214 (1941).)

Since the road district exists in practice only as a money-raising unit, the judicial gloss on Subsection (b) is limited substantially to questions concerning bond issues. For example, the proceeds of a bond issue must be used for the roads that the election specified would be built. (*Fletcher v. Howard*, 120 Tex. 298, 39 S.W.2d 32 (1931).) Although the section speaks of “macadamized, graveled or paved roads,” “paved” has been interpreted loosely to cover almost anything that makes a road reasonably permanent. (*Aransas County v. Coleman-Fulton Pasture Co.*, 108 Tex. 223, 191 S.W. 556 (1917); Tex. Att’y Gen. Op. No. O-3652 (1941).) Bond money of a road district that includes a city may be spent on city streets that are part of a highway system (see *City of Breckenridge v. Stephens County*, 120 Tex. 318, 40 S.W.2d 43 (1931)); but a city may issue its own bonds for city streets that are part of the highway system. Such bonds are not subject to the limitations of Subsection (b). (See *Lucchese v. Mauerman*, 195 S.W.2d 422 (Tex. Civ. App.—San Antonio 1946, *writ refused n.r.e.*), *cert. denied*, 329 U.S. 812 (1947).)

It must be kept in mind at all times that Section 9 of Article VIII and

Art. III, § 52

Subsection (b) both involve taxation for roads. Since Section 9 covers road maintenance, it appears that, notwithstanding the word "maintenance" in Subsection (b), no tax for maintaining roads built by a road district can be levied against the taxpayers of the road district. Road maintenance must be on a countywide basis and paid for from the county tax authorized by Section 9. (See *Commissioners' Court of Navarro County v. Pinkston*, 295 S.W. 271 (Tex. Civ. App.—Dallas 1927, writ *ref'd*.) The attorney general has said, however, that where a county proposes to use its own road crew to build a road for a road district, bond funds may be used to buy road machinery. (Tex. Att'y Gen. Op. No. O-2916 (1941).) The attorney general also has ruled that bond funds may be used to construct a building to house road machinery. (Tex. Att'y Gen. Op. No. O-298 (1939).)

It must also be remembered that the legislature can authorize counties to issue bonds to build roads without regard to the limitations contained in Subsection (b). The county would have to pay for the bonds—interest and sinking fund—out of the regular county tax levy authorized by Section 9 of Article VIII. All of this flows from the argument set forth earlier in the discussion of the *Collingsworth* case. (See also *Burke v. Thomas*, 285 S.W.2d 315 (Tex. Civ. App.—Austin 1955, writ *ref'd n.r.e.*.) Interestingly enough, the court of civil appeals in the *Burke* case repeated the strange interpretation of Subsection (a) discussed earlier:

Section 52, art 3 as originally adopted in 1876, simply forbade the Legislature from authorizing any political subdivision to lend its credit. (p. 318.)

Subsection (c). It is not at all clear what this new subsection means. Obviously, it is designed to lower the majority required to get a bond issue through. Presumably, the subsection is also designed to permit a larger indebtedness than Subsection (b) permits, but the language is so fuzzy that it is not clear how much additional borrowing is permitted. It has been said that Subsection (c) would "grant any county the same authority to issue road bonds as that granted to Dallas County under Article III, Section 52e. . . ." (Texas Legislative Council, 7 *Proposed Constitutional Amendments Analyzed* (Austin, 1970), p. 21.) This is fine except that the wording of the two provisions differs. Moreover, it is not clear what that Section 52e means.

At least three things are clear. First, Subsection (c) is a direct grant of power rather than an authorization to the legislature to grant power to issue bonds. For example, under "legislative provision" pursuant to Subsection (b) a county could be required to set up a sinking fund of 3 or 4 percent or more for bond retirement whereas under Subsection (c) a county would appear to have to set aside no more than the 2 percent required by Section 7 of Article XI. But there are questions even on this score, for the subsection grants the power "without the necessity of further or amendatory legislation." Does this mean that existing restrictions on bond issues remain in effect except to the extent that such restrictions conflict with the grant of power? But then does the final sentence of the subsection in effect repeal all legislative restrictions on interest rates and sinking funds?

Second, it is clear that only a county has whatever power is granted by the subsection. Road districts are still subject to Subsection (b). Third, it is clear that Subsection (c) permits a county to issue bonds in an amount equal to 25 percent of the assessed value of the real property of the county no matter what bonded indebtedness is outstanding.

What is not clear is whether Subsections (b) and (c) combined permit road bonds in an amount equal to 50 percent of assessed valuation, assuming that all water districts operate under Section 59 of Article XVI. Or does Subsection (c)

Art. III, § 52

mean that a county may forthwith incur debt to the 25 percent limit but that no further bonds may be issued by subsidiary units? This question arises because Subsection (b) does not say "notwithstanding Subsection (c)." But then Subsection (b) has the words "in addition to all other debts," which might cover Subsection (c) debts. (See the *Author's Comment* following.)

The foregoing problem can be demonstrated by analogy to a problem that used to arise under Subsection (b). Assume that the assessed value of the real property of an entire county is \$1,000,000 and that there are outstanding county road bonds of \$100,000, which use up 10 percent of the 25 percent allowed by Subsection (b). If one area of the county proposed to establish a road district and if the assessed valuation of the real property within that area were \$200,000, the maximum allowable bond issue would be 15 percent of \$200,000, or \$30,000, since the countywide 10 percent of the assessed valuation would have to be factored in. (See Tex. Att'y Gen. Op. No. O-486 (1939).) The unanswered question today is how a subsidiary road district—or a Section 52 water district, for that matter—determines what bonds it may issue. Does it have to count Subsection (c) bonds?

It should also be noted that Subsection (c) authorizes "bonds" whereas Subsection (b) authorizes a unit to issue "bonds or otherwise lend its credit." Under Subsection (b) a road district can issue time warrants to pay for roads provided that the referendum procedure is followed. (See Tex. Att'y Gen. Op. No. O-763 (1939).) Presumably, a county can issue time warrants payable out of its normal Article VIII, Section 9, tax levy but not under Subsection (c).

Comparative Analysis

Subsection (a). See the *Comparative Analysis* of Section 51 of this article.

Subsections (b) and (c). Only a handful of states limit the public purpose for which money may be borrowed. A majority of the states have limits on the amount of local debt that may be incurred. Most limits are expressed either as a percentage of assessed valuation or as a percentage of the value of property as determined from the assessment rolls. In these latter cases it may be that the limit is measured by full value. In terms of percentage, no other state approaches 25 percent; most are below 10 percent. Many of the provisions also require approval by referendum, but only a few of those require as large an affirmative vote as two-thirds. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

The Texas Constitution is full of badly drafted provisions. It will not be worthwhile to analyze each of them in detail, but it seems important on occasion to take the time to demonstrate bad draftsmanship. Constitutional provisions above all other legal documents should be most carefully drafted, for they should be reasonably permanent and not subject to annual "perfection" as in the case of legislation. (For principles of constitution drafting, see the *Citizens' Guide*, at 6-10.) What follows is a partial dissection of Subsection (b).

(1) Why were the words "under Legislative provision" used? In the 1904 amendment, Subsection (b) was grammatically a proviso excepting the granted borrowing power from the denial of legislative power to authorize. Why not track the original wording of the section and say "provided, however, that the Legislature may authorize"? In using the words "under Legislative provision," did the drafter make a conscious determination that he was authorizing local laws? (See *Explanation* of Sec. 56 of this article.)

Art. III, § 52

(2) "Under Legislative provision" would appear to control everything that follows in the subsection. What then is added towards the end by the clause "as the Legislature may authorize, and in such manner as it may authorize the same"?

(3) The subsection uses the terms "county," "political subdivision of a county," "political subdivision of the state," "defined district," "territory," "towns, villages or municipal corporations," and "city or town." This is confusing terminology. Section 1 of Article XI states that a county is a political subdivision of the state. Section 4 of the same article states that a town may be chartered, which would make it a municipal corporation. "Political subdivision of a county" presumably refers to county precincts. With all this, one would suppose that a "defined district" would have to be some geographical area that was not a county, political subdivision of a county, or the state. And since a "defined district" "may or may not include, towns, villages or municipal corporations," it would seem to follow that "a" town, "a" village, or "a" municipal corporation could not be defined as "a" district. For an example of a court getting confused by all this, see *Browning v. Hooper* (269 U.S. 396 (1926)), which concerned a "defined district" consisting of two precincts in Archer County.

(4) In the case of purposes (1), (2), and (3), what is the significance in (1) of "or in aid of such purposes" and in (2) and (3) of "or in aid thereof"? (And why "purposes" in (1) and "thereof" in (2) and (3)?) Is there anything that can be done that could not be done if the words were omitted? Perhaps the drafter was hypnotized by the words "in aid of" in the original prohibition of Section 52.

(5) What does the phrase "in addition to all other debts" signify? Nothing. Leave it out and the subsection makes complete sense. Indeed, the only way in which the phrase could be given any meaning would be to say that the debt limitation of 25 percent applies only to the proposed bond issue and that pre-existing bond issues are not to be counted because they are "other debts." This would destroy the limitation. (Note that "all other debts" creates a problem in construing the relationship between Subsections (b) and (c). See the preceding *Explanation*.)

(6) The most incredible part of the subsection is the clause "except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of the constitution." There are no such "other provisions." There are practical limits on municipal debt derived from restrictions on municipal taxing power, but no constitutional limits. Perhaps the drafter meant: "No city or incorporated town may constitute itself a 'defined district' and thereby increase its tax rate above the constitutional limit by levying a separate 'district' tax to retire 'district' bonds." If that is what the drafter meant, why not say it? And if that is what he meant, it is all sort of silly because the whole purpose of the 1904 amendment was to permit additional taxes.

Apart from fuzzy drafting, the whole concept of the 1904 amendment—to say nothing of the 1970 patch—was fuzzy. As noted earlier, Subsections (b) and (c) have nothing to do with Subsection (a). And none of this belongs in an article on the legislature anyway. There is no reason for saying that the "Legislature shall have no power to authorize." If there is to be a prohibition against grants and loans by local government, say so directly in the appropriate article. If there is to be an exception to a limitation on taxing and borrowing power, the exception belongs in an article on taxation and revenue.

It must be conceded that, given the hopelessly confused structure of the constitution as it came out of the 1875 Convention, it is not easy to bring order out of chaos by the amending process. But it is not necessary to compound the chaos by unnecessarily putting an amendment in the wrong place.

Art. III, § 52-b, 52d

Whether there should be a grants and loans prohibition at all is discussed elsewhere. (See the *Author's Comment* on Sec. 51.)

Sec. 52-b. LOAN OF STATE'S CREDIT OR GRANT OF PUBLIC MONEY FOR TOLL ROAD PURPOSES. The Legislature shall have no power or authority to in any manner lend the credit of the State or grant any public money to, or assume any indebtedness, present or future, bonded or otherwise, of any individual, person, firm, partnership, association, corporation, public corporation, public agency, or political subdivision of the State, or anyone else, which is now or hereafter authorized to construct, maintain or operate toll roads and turnpikes within this State.

History

This section was added by amendment in 1954.

Explanation

In 1953 the legislature enacted the Texas Turnpike Act (Tex. Rev. Civ. Stat. Ann. art. 6674v), establishing the Texas Turnpike Authority and authorizing issuance of revenue bonds to finance construction of the Dallas-Fort Worth Turnpike. In the same session of the legislature this amendment to the constitution was passed to preempt any recourse against the state by holders of these revenue bonds. Apparently, opponents of the Turnpike Authority were pacified by adoption of this section, which merely repeats for would-be turnpike builders the prohibition against lending state credit found in Article III, Section 50.

In the only case discussing this section, the court comments:

This section, we think, adds nothing of substance to Section 50 of that Article except to name expressly and include any agency, public or otherwise, authorized to construct, maintain or operate toll roads and turnpikes.

(*Texas Turnpike Authority v. Shepperd*, 154 Tex. 357, 360, 279 S.W.2d 302, 305 (1955).)

Comparative Analysis

Nothing like this section is found in other state constitutions or in the *Model State Constitution*.

Author's Comment

This section was superfluous when it was adopted and is long overdue for deletion.

Sec. 52d. COUNTY OR ROAD DISTRICT TAX FOR ROAD PURPOSES. Upon the vote of a majority of the resident qualified electors owning rendered taxable property therein so authorizing, a county or road district may collect an annual tax for a period not exceeding five (5) years to create a fund for constructing lasting and permanent roads and bridges or both. No contract involving the expenditure of any of such fund shall be valid unless, when it is made, money shall be on hand in such fund.

At such election, the Commissioner's Court shall submit for adoption a road plan and designate the amount of special tax to be levied; the number of years said tax is to be levied; the location, description, and character of the roads and bridges; and the estimated cost thereof. The funds raised by such taxes shall not be used for purposes

Art. III, § 52e

other than those specified in the plan submitted to the voters. Elections may be held from time to time to extend or discontinue said plan or to increase or diminish said tax. The Legislature shall enact laws prescribing the procedure hereunder.

The provisions of this section shall apply only to Harris County and road districts therein.

History

This "local" amendment was adopted in 1937.

Explanation

At the time of adoption of the amendment everybody presumably thought of it as an exception to Section 52. Actually, the amendment is another exception to Section 9 of Article VIII. Subsection (b) of Section 52 was a device to increase the tax permitted by Section 9, but the increase could be effected only by borrowing money. The county commissioners of Harris County apparently disapproved of borrowing and sought permission to levy a higher road tax than that permitted by Section 9. Harris County does not use Section 52d at this time. (Communication from the county auditor of Harris County, dated July 27, 1972.) The section is not obsolete, but in these days of taxpayer "revolts," it seems unlikely that pay-as-you-go road-building taxes would be proposed for referendum approval.

Comparative Analysis

See *Comparative Analysis* of Section 52e (1968).

Author's Comment

See the *Author's Comment* on Section 52e (1968).

Sec. 52e. PAYMENT OF MEDICAL EXPENSES OF LAW ENFORCEMENT OFFICIALS. Each county in the State of Texas is hereby authorized to pay all medical expenses, all doctor bills and all hospital bills for Sheriffs, Deputy Sheriffs, Constables, Deputy Constables and other county and precinct law enforcement officials who are injured in the course of their official duties; providing that while said Sheriff, Deputy Sheriff, Constable, Deputy Constable or other county or precinct law enforcement official is hospitalized or incapacitated that the county shall continue to pay his maximum salary; providing, however, that said payment of salary shall cease on the expiration of the term of office to which such official was elected or appointed. Provided, however, that no provision contained herein shall be construed to amend, modify, repeal or nullify Article 16, Section 31, of the Constitution of the State of Texas.

History

This "statute" was proposed and adopted in 1967.

Explanation

This is another constitutional provision required by, or presumably believed by some people to be required by, the grants prohibition of Section 52 and, perhaps, the extra compensation prohibition of Section 53. The section is a "statute" because it is a self-executing policy decision by the State of Texas concerning an employee benefit.

The section has four elements. First, it *permits* counties to pay medical

Art. III, § 52e

expenses of county law enforcement officials injured in the course of employment. Second, it *requires* counties to continue to pay the salaries of "said" officials. Whether "said" refers to the officials of any county or only to officials of those counties that elect to pay medical expenses is not clear. Third, it *prohibits* the county from paying the salary of an injured employee after his term expires. Fourth, it denies any relationship to Section 31 of Article XVI.

Article 1581b-1, Tex. Rev. Civ. Stat. Ann. (1973), addresses this subject by providing subrogation rights to the county. However, there have been no judicial interpretations of this section.

Comparative Analysis

No state appears to have a comparable provision. New York, in what is euphemistically denominated "Bill of Rights for Local Governments," has a provision authorizing counties to provide for the "protection, welfare and safety of its officers and employees" subject to any overriding state law. (Art. IX, Sec. 2 (c) (1).) Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

It is not easy to determine which is the most extreme provision forced into the constitution by virtue of Sections 44, 50, 51, 52 and 53 of Article III and the many restrictive judicial and attorney general interpretations thereof. In any prize competition this section would surely be among the finalists.

Then again, perhaps this section is an example of what may be called the "Judge Critz theory of amendment." (See the *Author's Comment* on Sec. 62 of Art. XVI.) In other words, perhaps the amendment was simply a device for getting a popular referendum on the subject. The analysis of the proposed amendment prepared by the Texas Legislative Council lends support to this speculation. The council called the proposal an "exception" to the grants prohibition of Section 52. The council then said that there were two arguments in favor of the amendment: (1) county law enforcement officers were not covered by workmen's compensation and (2) it was becoming difficult to recruit law enforcement officers and this benefit should make positions more attractive. The first argument was not constitutional because, under Section 60 of Article III, the officers could have been put under workmen's compensation. The second argument automatically gets around Section 52 because any employee benefit used to attract employees is by definition "compensation," not a "grant."

The legislative council set out two arguments against the proposed amendment: (1) "it is unfair to select a certain class of public employees for special treatment"; and (2) the amendment was permissive, which might result in some counties using the employee benefit to attract better personnel while some counties would not. (Texas Legislative Council, *6 Proposed Constitutional Amendments Analyzed* (Austin, 1967), pp. 13-14.) Since the pro arguments are not constitutional, it may be that the first argument against the proposed amendment is the real reason for the proposal.

Sec. 52e. DALLAS COUNTY BOND ISSUES FOR ROADS AND TURNPIKES. Bonds to be issued by Dallas County under Section 52 of Article III of this Constitution for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof, may, without the necessity of further or amendatory legislation, be issued upon a vote of a majority of the resident property taxpayers voting thereon who are qualified electors of said county, and bonds

Art. III, § 52e

heretofore or hereafter issued under Subsections (a) and (b) of said Section 52 shall not be included in determining the debt limit prescribed in said Section.

History

This "local amendment" of Section 52 was added in 1968. It may or may not have been superseded by the 1970 amendment of Section 52.

Explanation

After the adoption of Section 59 of Article XVI in 1917, it was possible for a county or its road districts to utilize the entire 25 percent maximum debt limit permitted by Section 52 for road bonds since existing water districts could transfer to Section 59 under the Canales Act (now Water Code sec. 55.053), and new districts could be organized under Section 59. It would appear that not all water districts have done this, for one of the arguments in support of the 1968 amendment was that it "would liberalize the debt limitation in Dallas County and enable the county to meet its expanding needs." (Texas Legislative Council, *14 Proposed Constitutional Amendments Analyzed* (Austin, 1968), p. 18.)

The road to "liberalization" is the final part of the compound sentence that is Section 52e (1968): "and bonds heretofore or hereafter issued under Subsections (a) and (b) of said Section 52 shall not be included in determining the debt limit prescribed in said Section." (Note that (a) and (b) are now (1) and (2) of Subs. (b) of Sec. 52.) Presumably the drafter of this amendment meant to provide that the full 25 percent of assessed valuation could be used for bonds for roads in Dallas County. But did the drafter mean that Section 52 water districts in Dallas County were no longer subject to *any* debt limit at all? That is certainly what the quoted words say.

Undoubtedly the principal reason for the 1968 amendment was to reduce the required vote from two-thirds to a majority. This was not designed to "liberalize" the debt limit but to make it easier to get approval for bonds. This part of the amendment is clear. It is also clear that only Dallas County as such could utilize the liberalized majority. Road districts in the county and all water districts, of course, would still have to get a two-thirds vote.

Thus, Section 52e (1968) and Subsection (c) of Section 52 are in agreement on who gets to use the majority vote power—the whole county. The two likewise are direct grants of power. Subsection (c) is a direct grant of power to issue road bonds up to 25 percent of assessed valuation regardless of any existing debt, but Section 52e (1968) seems to exclude only existing water district debt. If there were county or road district road bonds in existence when Section 52e(1968) was adopted, Dallas County would appear to have less leeway than it would have under Subsection (c) of Section 52. (See the *Explanation* of Subs. (c) concerning the confusion about how much borrowing power a county has under both Subs. (b) and Subs. (c).)

If the foregoing analysis is correct, then it would be to Dallas County's advantage to argue that Subsection (c) of Section 52, adopted in 1970, supersedes Section 52e(1968). But if the earlier analysis concerning the quoted portion of Section 52e(1968) is correct, it would be to the advantage of Section 52 water districts in Dallas County to argue that the 1968 amendment is not superseded. Or maybe everybody could agree that the 1968 amendment is not superseded as to water districts but that Dallas County has the option of issuing road bonds under either provision.

Art. III, § 53

Comparative Analysis

Very few states go in for "local" amendments. The principal states that do are Alabama and Georgia. Georgia, however, has a special system whereby local amendments are voted upon only by the political subdivision affected. If these local amendments are counted, Georgia has by far the longest state constitution, approximately 500,000 words. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

If local and special laws are a bad idea, (see *Author's Comment* on Sec. 56), then a fortiori, as the lawyers say, local and special constitutional provisions are a bad idea.

Sec. 53. COUNTY OR MUNICIPAL AUTHORITIES; EXTRA COMPENSATION; UNAUTHORIZED CLAIMS. The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

History

This section dates from 1876. There was no comparable provision in any earlier constitution. (But see the *History* of Sec. 44.) There do not appear to have been any efforts to amend the section.

Explanation

This is usually characterized as the local government complement to Section 44. Actually, the two sections overlap; almost everything prohibited by Section 44 is repeated in slightly different language in Section 53. Moreover, as discussed earlier, the courts do not discriminate between Section 44 and this section. (See *Explanation* of Sec. 44.)

The first part of Section 53 is straightforward and substantially self-explanatory. An employee may not be granted extra pay after services have been performed and a contractor or seller cannot be paid extra for what he agreed to do. In the case of pay, the only serious question that can arise is whether the amount to be paid can be determined after the service is rendered. In *Dallas County v. Lively*, for example, the supreme court was faced with the question whether a county judge could be paid \$75 a month for his *ex officio* services—that is, those duties for which he did not receive a fee—pursuant to statutory authority for the commissioners court to pay for *ex officio* services but where the order fixing the amount was entered nine months after the services had been performed. "The Constitution does not forbid the fixing of compensation after service rendered, but forbids increasing the agreed or prescribed sum after service rendered or work performed." (106 Tex. 364, 368, 167 S.W. 219, 220 (1914).)

In the case of contracts, there is likewise no bar to agreeing upon a contract price after work has started. (*Galveston County v. Gresham*, 220 S.W. 560 (Tex. Civ. App.—Galveston 1920, *writ ref'd*.) Nor is there any bar to compromising a dispute over what the contract price actually is. (See Tex. Att'y Gen. Op. No. O-6270 (1944).)

Art. III, § 53

Many of the apparent violations of Section 53 arise from the words "made without authority of law" in the last part of the section. These "apparent" violations occur when the question of whether payment can be made is asked in advance. The attorney general, to whom these questions are submitted, once he finds no authority in law adds that payment would be in violation of Section 53. (See *e.g.*, Tex. Att'y Gen. Op. Nos. O-1149 (1939), O-1940 (1940).) But if there is no power to act, that ends the matter. In other words, the attorney general would reach the same conclusion in the absence of a Section 53. Indeed, in many lawsuits the defense of no authority is successful. (See, for example, *Hardin County, Texas v. Trunkline Gas Co.*, 311 F.2d 882 (5th Cir. 1963).) An actual violation occurs when an attempt is made to ratify or validate an action taken "without authority of law." In the *Trunkline* case, the United States Supreme Court granted certiorari and sent the case back to the United States Court of Appeals for consideration of a validating statute. (*Trunkline Gas Co. v. Hardin County*, 375 U.S. 8 (1963).) On remand, Judge Hutcheson, in an opinion which has an undercurrent of suppressed anger, after pointing out that the original opinion had ruled that the county had no authority to act, now ruled that no validating act could be operative because Section 53 prohibits the paying of a claim if there had been no authority to create the claim. (*Hardin County v. Trunkline Gas Co.*, 330 F.2d 789 (5th Cir. 1964).) Not all validating statutes run afoul of Section 53, however. In 1926 the United States Supreme Court declared unconstitutional the method by which special districts were permitted to be established under the statute enacted pursuant to Section 52 of this article. (See *Browning v. Hooper*, 269 U.S. 396 (1926).) At a special session that year a number of statutes were enacted validating all existing Section 52 special districts. These were upheld in *Louisiana Ry. & Nav. Co. v. State*, 298 S.W. 462 (Tex. Civ. App.—Dallas 1927), *aff'd*, 7 S.W.2d 71 (Tex. Comm'n App. 1928, *holding approved*). The court noted that, unless otherwise restricted by the constitution, the legislature can validate anything which it could have done in the first instance. Obviously, Section 53 is a specific restriction that precludes validation of a claim against the government. But the litigant in the *Louisiana* case was not trying to rely on a validation of its claim against the government; it was a taxpayer trying to invalidate a tax claim by the government against it. The result is a "heads I win, tails you lose" situation.

Comparative Analysis

Approximately eight other states appear to have a comparable section aimed specifically at local governments. All of those states also have a section comparable to Section 44. Approximately 18 more states have a section comparable to Section 44. It is likely that most of these sections would be construed to cover local governments. There appear to be four states that permit the legislature to grant extra compensation by a two-thirds vote. A couple of state constitutions specifically authorize increases in pensions for retired employees. It also is likely that courts in all states would outlaw payment of claims arising out of unauthorized action by a government employee. But it does not appear likely that courts would invalidate subsequent ratification unless the state constitution had a strict "without authority of law" provision.

The United States Constitution has no comparable provision, but the courts follow the rule of requiring specific authority for a government employee to create a claim against the government. The *Model State Constitution* provides that no "obligation for the payment of money [may] be incurred except as authorized by law." (Sec. 7.03(a).) The Commentary on the *Model State Constitution* makes it clear, however, that the quoted restriction is limited to requiring authority to make

Art. III, § 54

payment. (p. 93.) Thus, ratification and validating statutes and appropriations to pay “just claims” would be permitted.

Author's Comment

With all these restrictions on giving away money—Sections 44, 50, 51, 52, 53, and 55 of this article among others—it is no surprise to find people getting mixed up. In the *Explanation* it was noted that the first part of Section 53 is “straightforward and substantially self-explanatory.” An employee may not be granted extra pay “after service has been rendered.” The attorney general recently ruled that Section 53 prohibited granting back pay following acquittal to an employee who had been suspended without pay pending trial on a felony charge. (See Tex. Att’y Gen. Op. No. H-402 (1974).) How can Section 53 be relevant if no service was rendered? Section 52 is relevant, of course, since it can be argued that the pay is a grant *because* no service was rendered. Indeed, the attorney general said that if the county commissioners court had had an announced policy to pay under these circumstances the matter would be a condition of employment like the rate of compensation or the amount of vacation to be received. But then he went on to refer to an earlier opinion in which he “decided that providing an employee with compensation not ‘previously earned by the employee’ would constitute a gift or grant of public moneys in direct violation of Section 53” That earlier opinion (Tex. Att’y Gen. Op. No. H-51 (1973)), however, relied upon Sections 51, 52, and 53. There, at least, one of the three sections—Section 52—was relevant. Here somebody apparently picked one of the three without much thought whether it was the right one. (Of course, the whole business could simply be a typographical error.)

Concerning the general policy, see the *Author's Comment* on Section 44 of this article.

Sec. 54. LIENS ON RAILROAD; RELEASE, ALIENATION OR CHANGE.

The Legislature shall have no power to release or alienate any lien held by the State upon any railroad, or in any wise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired.

History

This section was submitted to the Constitutional Convention of 1875 by the Committee on the Legislative Department and apparently adopted without floor debate. (See *Journal*, p. 165.) No amendment to this section has ever been submitted.

Explanation

Before the Civil War the state loaned money from the permanent school fund to the railroads to stimulate construction; these loans were secured by mortgage bonds. During and after the war many railroads defaulted on their interest payments.

In 1871, one railroad mortgage was foreclosed and the road sold for \$165,800 less than the amount owed the school fund. In 1870 a relief act was passed prohibiting foreclosure of these mortgages if current interest payments were being made. In 1871 a New York financial syndicate proposed to purchase a large portion of the mortgages at 60 percent to 70 percent of their face value, a proposal viewed with great suspicion. The Reconstruction Era, with its general cynicism and

Art. III, § 55

particular distrust of railroads, not surprisingly motivated the delegates of 1875 to include Section 54 to prohibit the cancellation of railroad mortgages unless paid in full. (See 1 *Interpretive Commentary*, p. 741.)

Comparative Analysis

The 1870 Illinois Constitution had a similar provision relating to the Illinois Central Railroad. The *Model State Constitution* has nothing like it.

Author's Comment

All indebtedness owed by railroads to the state and incurred before 1876 has long since been discharged. Article III, Section 50, and Article XI, Section 3, have prohibited state and local government loans to railroads since 1876, so there is nothing for Section 54 to operate on. Anyway, Section 55 forbids release of indebtedness generally, so Section 54 was not even necessary in the first place.

Sec. 55. RELEASE OR EXTINGUISHMENT OF INDEBTEDNESS TO STATE, COUNTY, SUBDIVISION OR MUNICIPAL CORPORATION. The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any county or defined subdivision thereof, or other municipal corporation therein, except delinquent taxes which have been due for a period of at least ten years.

History

This section dates from 1876. It read substantially the same as the present section up to the final phrase beginning "except delinquent taxes." This phrase was added by an amendment adopted in 1932 at the depth of the Great Depression. That amendment also added the words "or defined subdivision thereof," and corrected a typographical error—"any incorporation" in the original.

Explanation

Section 55 is another example of the effort of the 1875 Convention to kill one of the many methods by which corrupt legislatures bestowed favors, particularly on railroads. Section 55, together with Section 54 and Section 10 of Article VIII, is also another example of overkill. The delegates in 1875 kept saying the same thing several times. For reasons set forth earlier, Section 54 was unnecessary. If the drafters in 1875 had added to Section 55 the "calamity exception" of Section 10 of Article VIII, that section would have been unnecessary. To avoid duplication, taxes will be discussed under Section 10.

Although the principal purpose of Section 55 was to prevent forgiveness of delinquent taxes, its wording is as comprehensive as it can be and consequently can catch a lot of other things. For example, the legislature once repealed a statute requiring reimbursement from patients in state mental hospitals. The attorney general ruled that Section 55 preserved the obligation to reimburse for hospital care to the date of repeal. (Tex. Att'y Gen. Op. No. 0-6120 (1944).) This is a mystifying opinion. The repeal took place in 1925. Why was the chairman of the State Board of Control asking for an opinion 19 years later? Moreover, the attorney general noted that he was not following a court of civil appeals case that had denied the state recovery on the ground that the 1925 repeal eliminated a statutory cause of action

Art. III, § 56

and there was no underlying common law cause of action which the state could use. (See *Wiseman v. State*, 94 S.W.2d 265 (Tex. Civ. App.—San Antonio 1936, *writ ref'd*.) The attorney general said that Section 55 had not been relied upon and, therefore, the precedent was not binding on him. Since the case had been handled by the attorney general, the 1944 opinion says in effect that his predecessor goofed.

Another example is an effort to refinance an obligation at a lower rate of interest. This cannot be done. (*Delta County v. Blackburn*, 100 Tex. 51, 93 S.W. 419 (1906). See also Tex. Att'y Gen. Op. No. 0-5924 (1944).)

Although the state or local government may not directly release an obligation, it can do so indirectly. If a statute of limitations runs against the government, the opportunity to collect may be lost. A discharge in bankruptcy would release the obligation, but, of course, it is the Bankruptcy Act, not Texas, that effects the release. (See *Mission Independent School District v. Texas*, 116 F.2d 175 (5th Cir. 1940).)

Comparative Analysis

About half a dozen other states have comparable provisions. Neither the *Model State Constitution* nor the United States Constitution has a comparable provision.

Author's Comment

See *Author's Comment* on Section 10 of Article VIII, where doubt is expressed that there is any pressing need today for such a section. If that doubt is well expressed in the case of delinquent taxes, there is more doubt about a broadside that also covers everything else.

Sec. 56. LOCAL AND SPECIAL LAWS. The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

- (1) The creation, extension or impairing of liens;
- (2) Regulating the affairs of counties, cities, towns, wards or school districts;
- (3) Changing the names of persons or places;
- (4) Changing the venue in civil or criminal cases;
- (5) Authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys;
- (6) Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State;
- (7) Vacating roads, town plats, streets or alleys;
- (8) Relating to cemeteries, grave-yards or public grounds not of the State;
- (9) Authorizing the adoption or legitimation of children;
- (10) Locating or changing county seats;
- (11) Incorporating cities, towns or villages, or changing their charters;
- (12) For the opening and conducting of elections, or fixing or changing the places of voting;
- (13) Granting divorces;
- (14) Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;
- (15) Changing the law of descent or succession;
- (16) Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;
- (17) Regulating the fees, or extending the powers and duties of aldermen, justices of

Art. III, § 56

the peace, magistrates or constables;

(18) Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes;

(19) Fixing the rate of interest;

(20) Affecting the estates of minors, or persons under disability;

(21) Remitting fines, penalties and forfeitures, and refunding moneys legally paid in to the treasury;

(22) Exempting property from taxation;

(23) Regulating labor, trade, mining and manufacturing;

(24) Declaring any named person of age;

(25) Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or his securities from liability;

(26) Giving effect to informal or invalid wills or deeds;

(27) Summoning or empanelling grand or petit juries;

(28) For limitation of civil or criminal actions;

(29) For incorporating railroads or other works of internal improvements;

And in all other cases where a general law can be made applicable, no local or special law shall be enacted; provided, that nothing herein contained shall be construed to prohibit the Legislature from passing special laws for the preservation of the game and fish of this State in certain localities.

NOTE: For purposes of discussion, item numbers have been given to the enumerated cases. These numbers are not official.

History

The Constitution of the Republic was silent on the subject of local and special laws. (But see the *History* of Sec. 6 of Art. VIII, concerning appropriations for "private or local purposes.") The Constitution of 1845 touched the subject by prohibiting legislative divorces (Art. VII, Sec. 18) and restricting the legislature's power to create private corporations by special law. (See *History* of Sec. 1 of Art. XII.) No changes were made in the Constitutions of 1861 and 1866. The Reconstruction Constitution of 1869 preserved the legislative divorce prohibition intact (Art. XII, Sec. 37) but added a section requiring general laws for adoptions, emancipation of minors, and divorces and prohibiting special laws in these three areas. (Art. XII, Sec. 13.) Also prohibited for the first time were special laws concerning sale of real estate and the prohibitions contained in Items (5) and (7) of the present Section 56. (Art. III, Sec. 25.) An amendment added to the 1869 Constitution in 1873, which was after the Democrats regained control of the legislature, prohibited local or special laws on the subjects now covered by Items (2), (4), (10), (11), (15), (17), (18), (19), and (21) and one of the subjects included in Item (16). (Art. XII, Sec. 40. Confusion in section numbers started early in Texas. After the 1873 amendment there were two sections numbered "40" in Art. XII of the 1869 Constitution.)

The Section 56 laundry list provided by the 1875 Convention was undoubtedly taken from the Pennsylvania Constitution of 1873. The first 23 items are almost exact duplicates, in exact order, of the first 24 items in the 1873 Pennsylvania laundry list. The one omission was an item in Pennsylvania concerning townships and boroughs, local government units not known in Texas. Moreover, as noted earlier, the amendment of 1873 covered ten of these 23 items, but the wording in Section 56 is that of Pennsylvania, not of the 1873 amendment. Pennsylvania had a 25th item which is matched in part by Section 1 of Article XII. A final 26th Pennsylvania item forbade special laws granting special privileges or immunities or "the right to lay down a railroad track." The first half of this special law prohibition

Art. III, § 56

is more or less totally prohibited in the Texas Bill of Rights. (Art. I, Secs. 3 and 17.)

In the absence of verbatim debates of the 1875 Convention it is difficult to determine why things are as they are. Indeed, it was only the known reference to the Pennsylvania debt provision that made it seem useful to compare the two local law laundry lists. The *Journal* of the 1875 Convention shows that Section 56 as originally presented to the convention by the Committee on the Legislative Department consisted of the first 27 items plus the 28th without the words “or criminal.” (*Journal*, pp. 165-66.) The words “or criminal” were added by floor amendment on third reading. (*Id.*, at 504.) The 29th item was added by floor amendment on second reading. (*Id.*, at 267.) The only other change was the addition of the fish and game proviso at the end of the section. This was also added by floor amendment on second reading. (*Id.*, at 268.)

Explanation

This business of local and special laws is complicated at best. If the courts muddle the terminology, waffle from time to time, and dream up confusing rules, the whole business gets worse. This is the case in Texas, so much so that, in order to help the reader through the morass, the explanation that follows will hew more to a straight line of logic than to a meandering line of judicial interpretation.

To start with, one would like to think that there is a clear distinction between a “local” and a “special” law, but “local or special law” seems to be thought of as one word, so to speak, and distinctions become blurred. Indeed, the blurring dates at least from the 1875 Convention. In Section 23 of Article XVI the legislature is granted power to pass “general and special laws” concerning livestock, but “any local law thus passed” is subject to local referendum. In an early case involving this section, the court of appeals said: “We think the words *local* and *special* are used in said Section 23 as synonymous terms. . . .” (*Lastro v. State*, 3 Tex. App. 363, 374 (1878) (italics in original).) In a subsequent case involving Section 56, the supreme court acknowledged the difference between local and special laws and set forth definitions much like the ones used below. (See *Clark v. Finley*, 93 Tex. 171, 178, 54 S.W. 343, 345 (1899).) But, as one commentator has pointed out, the definitions “have hardly bothered the court in later Texas decisions, in which the words ‘local’ and ‘special’ have been used interchangeably or together to describe any act falling within the prohibition of Article III, 56.” (Comment, “Population Bills in Texas,” 28 *Texas L. Rev.* 829, 832 (1950).)

Local laws. The term “local law,” and not “special law,” should be used to describe a law that applies to the governing of a specific geographical area within the state. By analogy, Sections 52d and 52e are “local” amendments because they are applicable only to Harris and Dallas counties, respectively. A “general law,” in this context, applies to the entire area of the state. To continue the analogy, Subsection (c) of Section 52 is a “general” amendment giving all counties roughly the same authority given in Section 52e only to Dallas County.

Prohibitions against local laws were adopted originally to combat corruption, personal privileges, and meddling in local affairs—or conversely, to prevent a group from dashing to the Capitol to get something their local government would not give them. Actually, the reasons for a Section 56 are muddled because such a section always covers both local and special laws, and the reasons for prohibiting them are not always the same. Today, there is one overriding reason for prohibiting local laws: they are inconsistent with the concept of home rule.

Assuming that everyone can agree on what is a local law and why it is a good idea to prohibit the legislature from passing one, there are still two problems that will arise: one is the case where a matter of genuine state concern can be handled only by

Art. III, § 56

a local law; the other is the case where a general law treating all local governments alike would be a poor piece of legislation. The latter problem is dealt with by classification as discussed in detail later. The former problem has been solved in Texas by judicial fiat. Beginning with the *Finley* case cited earlier, the courts have said from time to time that a law that applies only to a given locality is not a local law if the subject matter is of general interest or affects the state as a whole.

Consider, for example, the problem of the county juvenile board. Beginning in 1917, the legislature provided that any county with a population of 100,000 or more should have a juvenile board consisting of the district judges and the county judge, all of whom would receive additional compensation for serving. In *Jones v. Alexander*, the supreme court adopted the opinion of the commission of appeals upholding the act. (122 Tex. 328, 59 S.W.2d 1080 (1933).) There was no reference to Section 56 or to whether the law was a local one, but the opinion did say that it was appropriate for the legislature to take into account the size, population, taxable values, and general conditions of counties in setting the compensation of judges. The opinion went on to say that the legislature could provide additional compensation for judges who had additional duties.

In 1947, the legislature added juvenile boards in certain other counties under several strange descriptions, one of which read: "In any county having a population of less than seventy thousand (70,000) inhabitants according to the last preceding Federal Census, which county is included in, and forms a part of a Judicial District of seven (7) or more counties having a combined population of more than fifty-two thousand inhabitants . . ." The attorney general ruled that this was an unreasonable classification, making the act a void local law regulating the affairs of counties. He distinguished the *Alexander* case by noting that there the population classification—all counties over 100,000 were to have boards; no counties under 100,000 were to have boards—had been held to be reasonable. (Tex. Att'y Gen. Op. No. V-386 (1947).) A member of the juvenile board who was refused extra compensation on the strength of the attorney general's opinion brought suit for the extra compensation. The court of civil appeals upheld the 1947 amendment. The court noted that if the additional duties of the board were to be performed "upon behalf of the State and not on behalf of the counties as entities distinct from the State," then the act in question was not a local law. This was followed by a sentence quoted from the *Alexander* case: "The welfare of minors has always been a deep concern to the state." The court then tied the new law to the original one upheld in *Alexander*: "Both laws provide means for promoting the welfare of minors, a matter in which the State at large is interested." (*Lamon v. Ferguson*, 213 S.W.2d 86, 88 (Tex. Civ. App.—Austin 1948, *no writ*).)

This was a neat bit of judicial legerdemain. *Alexander*, as the attorney general pointed out, was a case of reasonable classification, not of "state interest." Indeed, the sentence quoted from *Alexander* was from a part of the opinion dealing with whether the creation of juvenile boards was unconstitutional either as a matter of dual officeholding or as a violation of separation of powers because the board's duties were not judicial. In context, the word "state" meant "government," for the sentence following stated that in England welfare of minors was a branch of equity jurisprudence.

The significance of the *Lamon* case was not lost on the legislature. In 1965, for example, the attorney general upheld an act that provided: "The commissioners court of Grayson County may appoint a juvenile officer and an assistant juvenile officer." After quoting extensively from the *Lamon* case, the attorney general concluded that "the Legislature has addressed itself to a matter of statewide concern . . . and the mere fact that the operation of House Bill No. 119 . . . is restricted to a

Art. III, § 56

particular county does not make the Bill a local or special law. . . ." (Tex. Att'y Gen. Op. No. C-544 (1965).)

This juvenile board example is an extreme case of judicial winking at local laws masquerading as general laws. If juvenile boards are a matter of statewide concern, one would expect the legislature to express its concern by general legislation, not a series of local laws covering counties individually. But once the rule of "general concern" exists, it can be used to subvert Section 56. It is also available when needed to preserve a necessary local law. This can be the case with an authority that operates in a local area. In *Lower Colorado River Authority v. McCraw*, the supreme court turned away a Section 56 argument by saying that the act in question "operates upon a subject that the state at large is interested in." (125 Tex. 268, 280, 83 S.W.2d 629, 636 (1935).) The rule is also available as an additional prop to a ruling that upholds the reasonableness of a classification. (See, for example, *County of Cameron v. Wilson*, 160 Tex. 25, 326 S.W.2d 162 (1959), and *Smith v. Davis*, 426 S.W.2d 827 (Tex. 1968).) The rule also has its uses in connection with Section 57.

The acute problem in general laws regulating local government arises out of classification. The real and honest problem is in the reasonableness of the classification; an artificial and dishonest problem arises when the classification is phony. For example, the state might decide to enact a general law limiting cities to the employment of one dogcatcher for each 50,000 of population. But then it might be pointed out that Onetown differs from all other cities because it is bordered by an uninhabited area known to have packs of wild dogs that make forays into the city. It seems reasonable to make an exception in the case of Onetown—not by name, obviously, but by a description that is related to the problem faced by Onetown: "except cities bordered by uninhabited areas conducive to the harboring of packs of wild dogs which prey upon such bordering cities." Note that the exception is open-ended. As situations change, other cities could qualify.

A general law may remain general even if it does not treat all local governments alike. The crucial distinction is whether the classification is related reasonably to the differences in treatment that necessitate the classification. It would make sense to classify cities into those bordering on the sea, on lakes, and on rivers for purposes of health regulations relating to swimming, boating, sewage treatment, and the like. Such a classification would not be reasonable in setting standards for minimum wages for firemen, or limiting the number of dogcatchers.

One important difference among local governments is population. Obviously, large cities are different from small towns. The state would be justified in requiring large cities to have land-use planning departments, but a general law requiring all cities to have such a department would impose an inordinate expense on small cities. (Land-use planners would probably disagree.) It is reasonable, therefore, to classify cities by size, but the classification can become suspect. A Texas law applying only to cities over a million population would look like a local law in view of the fact that Dallas, with a population of 844,401, is not much smaller than Houston. (The problem is different in a state like Louisiana with one city much larger than any other.) Yet a general law concerning port regulations of cities with a population in excess of a million which were also seaports might well be reasonable. (Compare *O'Brien v. Amerman*, 112 Tex. 254, 247 S.W. 270 (1922).) But when a law is applicable only to cities with a population of from 550,000 to 650,000, all eyebrows should go up. (See *Devon v. City of San Antonio*, 443 S.W.2d 598 (Tex. Civ. App.—Waco 1969, writ ref'd), noted in 2 *Texas Tech L. Rev.* 336 (1971).)

One of the difficulties in judicial monitoring of this local law business is that courts normally do not question the motives of legislators. If a law seems reasonable on its face, a heavy burden rests on those who attack it. The courts have little trouble with a law that covers a single county or city that is the only one within a population

Art. III, § 56

bracket that is closed—*i.e.*, “between 80,000 and 90,000 according to the Federal Census of 1970.” But if the bracket is open-ended—*i.e.*, according to the last preceding census—courts may uphold the law on the theory that the next census around a new entity may fall into the bracket. (See generally, Comment, “A History of the Constitutionality of Local Laws in Texas,” 13 *Baylor L. Rev.* 37 (1961); Comment, “Population Bills in Texas,” 28 *Texas L. Rev.* 829 (1950). For a recent case that utilized the reasonable classification test properly, see *Robinson v. Hill*, 507 S.W.2d 521 (Tex. 1974).)

In the case of open-ended brackets, the cases are not consistent. This should surprise no one, for eventually courts will rebel against a rule of law that can be flouted simply by using the correct rubric. Moreover, judges are no fools; they know that just before or after the next census all such laws can be amended to new open-ended classifications that would preserve the limitations to particular counties or cities. (For an example of this, see *Smith v. State*, 120 Tex. Crim. 431, 49 S.W.2d 739 (1932).) The end result is a collection of fuzzy judicial generalizations. (A number of them will be found in the “Comments” cited earlier.) Sometimes, the problem may be that the consequences of overturning a statute are too much like trying to unscramble eggs. In the *Devon* case previously cited as eyebrow-raising, a policeman who had resigned sued to get a refund of eleven years’ contributions to a pension plan. Among other things, he alleged that the statute creating the plan was a local law. Since the plan had been in operation for a long time, a grand mess would have followed from invalidation of the statute.

Presumably for the same reason, the pension system of El Paso was upheld against a Section 56 attack. (See *Gould v. City of El Paso*, 440 S.W.2d 696 (Tex. Civ. App.—El Paso 1969, writ *ref’d n.r.e.*.) The saga of the El Paso system is instructive as an example of the open-ended population bracket law that remains forever a local law. The original statute creating the El Paso system, passed in 1933, applied to all incorporated cities and towns containing more than 100,000 inhabitants and fewer than 185,000, “according to the last preceding Federal Census.” (The population of El Paso in 1930 was 102,421. At that time Fort Worth was in the same population bracket, but the *Howerton* case discussed in the *Explanation* of Sec. 52e indicates that Fort Worth did not operate under this act.) In 1959, the act was amended to provide that all cities within the population bracket “may continue to operate such fund notwithstanding the fact any future Federal Census may result in the city being above or below the population as specified in this Act.” (The population of El Paso in 1960 was 276,687.) In 1961, the foregoing was amended by changing “may continue to operate” to “shall continue to operate.” In 1963, the population bracket was changed to more than 275,000 but fewer than 300,000. At the same time the following was added:

It is further provided that the fact that any future Federal Census may result in said city being above or below the population bracket herein specified shall not affect the validity of such fund and such fund shall continue to be operated pursuant hereto.

In 1971, the population bracket was changed to more than 310,000 but less than 330,000. (The population of El Paso in 1970 was 322,261.) (See Art. 6243b and Historical Note in *Texas Revised Civil Statutes Annotated.*)

The purpose of Section 56 is to stop the legislature from meddling in local matters. Even if the courts are sympathetic to the need for enforcing the section, they can be expected to hesitate in a case that threatens to injure a lot of innocent people. By way of contrast, the attorney general is usually asked for his opinion before much concrete has been poured. It is not surprising to find that the attorney

general almost always calls a local law a spade. Give him a population bracket with only one county or city in it and he will normally rule it a local law. (In the annotations of Sec. 56, Tex. Const. Ann., over 60 attorney general opinions concerning population brackets are cited. Almost all of them rule the actual or proposed law unconstitutional.)

Special laws. The term "special law" should be used only for a law that applies to a segment of the state—its people, its institutions, its economy—in some sense other than geographical. An obvious example is a law granting John Doe a divorce from his wife Dosie or a law granting a corporate charter to Tom, Dick, and Harry to operate an employment service. Special laws are almost always easy to spot, for it is difficult to disguise them by a device comparable to the population bracket. A statute expressed in open-ended general terms would rarely be considered a special law even if it were shown that only one person or corporation came under it. For example, if the minimum residence period for obtaining a divorce is one year, a statute shortening the period to three months for a political refugee from a foreign country who had sued for divorce before fleeing to the United States would still be a general law even though the bill was introduced for the benefit of a particular refugee. (Compare *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959).) Or a law regulating manufacturers of drilling bits for oil well drilling would not be a special law just because there happened to be only one company making the bits. Such statutes are open-ended and are much more likely eventually to include others than are most open-ended narrow population-bracket statutes.

There is also the problem of classification within a general law, or the classification resulting from regulating one group but not regulating other groups. As in the case of population brackets for local laws, the crucial point is whether the classification is reasonable. Fortunately, the rule of reasonableness is, or can be, and certainly should be the same rule of reasonableness used in the case of most claims of denial of the equal protection of the laws. (See, for example, *Linen Service Corporation of Texas v. City of Abilene*, 169 S.W.2d 497 (Tex. Civ. App.—Eastland 1943, writ ref'd).) Presumably because of the availability of the equal protection argument, there appear to have been few attempts to attack legislation as "special." In most of the enumerated special law prohibitions, the legislature is unlikely to pass a special law because it is too difficult to disguise the law by using words of "generality." But even Item (23)—"regulating labor, trade, mining and manufacturing"—has not been used much as a device to attack the reasonableness of a classification. One rare case was *State v. Hall*, involving a code of fair competition in the marketing of milk. The statute applied only to counties with a population of 350,000 or more which, at that time, covered only Harris County. Since the statute had a life of only two years, the court of civil appeals deemed it not open-ended and, therefore, a local or special law regulating trade. (76 S.W.2d 880 (Tex. Civ. App.—Galveston 1934, writ dismissed).)

A particularly interesting and rare special law case is *Inman v. Railroad Commission* (478 S.W.2d 124 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.)). Under a statute authorizing specialized trucking operations, the Railroad Commission granted authority to nine truckers to transport agricultural products. Regular truckers sought to enjoin the commission's order as defective. The attack was successful. Fortunately for the specialized truckers, the legislature was in session and promptly passed a bill validating "[a]ny authorization to transport agricultural products in their natural state issued . . . prior to January 1, 1971, is validated, . . ." (*General and Special Laws of the State of Texas*, 62d Legislature, 1971, ch. 328, at 1286.) The regular truckers tried again, arguing among other things that the act was a special law prohibited by Section 56. This time the regular truckers were

Art. III, § 56

unsuccessful. The court of civil appeals upheld the act against the Section 56 attack. The argument used by the court was the one discussed earlier to the effect that a law is "general" if it deals with a subject of interest to the people at large. Obviously this is the case, for the legislature gave the Railroad Commission authority to grant special authorization to transport agricultural products.

It is equally obvious that this was not a "general" law in the ordinary sense. A validating act never is, for it speaks only to the past and normally only to specific categories of defective actions. Thus, the real question is whether this particular validating act was a "special" act because of its narrowness. In the *Inman* case, the court in dealing with the classification issue concluded that restricting the validating act to the limited class of special authorizations was reasonable because the original grant of authority to issue the special authorizations was reasonable.

The *Inman* case is probably as difficult a special/general law issue as is likely to come along. On the nonlegal level, the act involved was obviously a bit of legislative relief to a small group; in this light the act was "special." On the legal level, this was just another "general" validating act; if the class of actions to be validated was a reasonable one, the act was a "general" law. On balance the result reached by the court seems correct.

The only other significant appeal to Section 56 has been the case of legislative action concerning claims against the state. An appropriation to pay a claim or a statutory consent to sue the state must be a special act, but it normally is not a case "where a general law can be made applicable." In *Austin Nat'l Bank of Austin v. Sheppard*, the attorney general relied upon Section 56 to attack an appropriation to refund a specific filing fee paid under protest. The commission of appeals said: "That constitutional provision deals with local or special laws. Obviously this appropriation is not a local law. The terms 'special' or 'local' are used in the same sense in this constitutional provision." (123 Tex. 272, 71 S.W.2d 242, 244 (1934).) The attorney general's argument was certainly a weak one, but Judge Critz, who wrote the opinion, was a little too short in the shrift he gave the argument. A legislative divorce is obviously not a local law and by Judge Critz's logic would be valid. The normal way to get around this situation would be to say that a statute paying a just claim or authorizing a suit against the state is a matter of general interest and thus a general law, or to rely on the conclusive presumption of inapplicability discussed next, or both. (See, for example, *Handy v. Johnson*, 51 F.2d 809 (E.D. Tex. 1931).)

In all other cases. Section 56 provides that "in all other cases where a general law can be made applicable, no local or special law shall be enacted." This prohibition has long since been emasculated by the courts.

In construing the provision of the Constitution quoted last above, it has been held that it is the sole province of the Legislature to determine whether or not a general law can be made applicable. (*Lamon v. Ferguson*, 213 S.W.2d 86, 88 (Tex. Civ. App.—Austin 1948, *no writ*).)

The first case cited by the court for the foregoing and presumably the first statement of the rule is *Beyman v. Black* (47 Tex. 558 (1877)). What nobody appears to have noticed is that *Beyman* arose under the 1869 Constitution and involved the 1873 amendment to that constitution. That provision read in pertinent part:

The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say, . . . ; and in all other cases where a general law can be

Art. III, § 56

made applicable, no special law shall be enacted. The Legislature shall pass general laws providing for the cases before enumerated in this section, and for all other cases which, *in its judgment*, may be provided by general laws. (Art 12, Sec. 40 (1873) (italics supplied).)

The opinion of the supreme court is addressed specifically to the foregoing wording. After quoting the provision, the court said:

Even if the law could be regarded as a local or special act, its passage would be taken *as the judgment* of the Legislature, that the case was not one which could be provided for by a general law, and their decision is conclusive of that question. (*Id.*, at 567 (italics supplied).)

As already noted, the 1875 Convention copied the Pennsylvania prohibition and not the 1873 Amendment. The current wording is significantly different from the earlier provision. One would like to conclude that the courts have relied upon the *Beyman* case without bothering to read it carefully. The difficulty is that the second case relied upon by the *Lamon* court for the quoted rule does not cite the *Beyman* case.

The second case is *Smith v. Grayson County*, decided by the court of civil appeals 20 years after *Beyman*. The opinion in this case uses the words appearing above in the quotation from the *Lamon* case: “. . . it is the sole province of the legislature to determine whether or not a general law can be made applicable.” To support this, the court cited six cases from four other states and treatises on constitutional law. (*Smith v. Grayson County*, 44 S.W. 921, 923 (Tex. Civ. App.—1897, writ *ref'd*).)

The *Lamon* opinion cited two other cases in support of the quoted sentence, one decided in 1908 and one in 1920. The first of these quoted the *Grayson County* opinion; the second one cited *Beyman v. Black and Grayson County*. (*Logan v. State*, 54 Tex. Crim. 74, 111 S.W. 1028 (1908); *Harris County v. Crooker*, 224 S.W. 792 (Tex. Civ. App.—Texarkana), *aff'd*, 112 Tex. 450, 248 S.W. 652 (1920).)

Whatever the source, the rule is as set forth in the *Lamon* quotation. Or is it? In *State Highway Department v. Gorham*, a case involving a “special” act granting Gorham permission to sue the state, the supreme court said: “It is also violative of Article III, Section 56, of our State Constitution, which provides that no local or special law shall be enacted where a general law can be made applicable.” (139 Tex. 361, 367, 162 S.W.2d 934, 937 (1942).) Since the court held the applicable part of the act invalid for two other reasons, this apparent variance from the standard *Beyman* rule is hardly to be relied upon. (But see Tex. Att’y Gen. Op. No. 0-5115 (1943).)

Except as otherwise provided. Section 56 begins: “The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law. . . .” Here is a loophole that a truckload of local laws can slip through if an “except as otherwise provided” can be found. There are a great many. One is a proviso in Section 56 itself authorizing special game and fish laws. There are several others that explicitly authorize local or special laws. (See, *e.g.*, Art. V, Secs. 7 and 22; Art. VIII, Sec. 9; and Art. XVI, Secs. 22 and 23.) Others authorize such laws by necessary implication. (See, *e.g.*, Art. III, Sec. 51, authorizing grants in aid in cases of public calamity (Tex. Att’y Gen. Op. No. O-941 (1939); Art. VIII, Sec. 10; and Art. XVI, Sec. 22).) But a great many provisions simply authorize the legislature to do something “by law” or to pass “laws.” In many instances, the context lends itself to reading “law” or “laws” to mean local laws. This is especially the case with provisions authorizing the creation of special districts. (See, *e.g.*, Art. III, Secs. 48-d and 52; Art. IX, Secs. 4, 9, and 12; and Art. XVI, Sec. 59.)

Art. III, § 56

Comparative Analysis

Approximately three-fourths of the states have a general prohibition against local and special laws. Most of those states use the laundry list approach. Pennsylvania, it was noted earlier in the *History*, had a laundry list almost identical to Section 56. In 1967, as part of a general revision of the Pennsylvania Constitution, the laundry list was cut from 26 to eight items. (Six of the eight retained are also in Section 56: (2), (7), (10), (21), (22), and (23). A seventh is the township prohibition mentioned earlier as omitted in Texas because there are no townships. The eighth is the standard corporate charter prohibition covered in Texas by Sec. 1 of Art. XII.)

Two recent constitutional conventions, those of Illinois and Montana, dropped their laundry lists in favor of a simple prohibition. The new Illinois provision (Art. III, Sec. 13) is in substance the *Model State Constitution* provision set out below. The new Montana provision (Art. V, Sec. 12) is in substance the first half of the provision set out below. An official text of the proposed Montana Constitution provided the following explanation: "No change except in grammar." Evidently somebody in Montana agrees that the laundry list adds little or nothing to a local or special law prohibition.

The *Model State Constitution* has the following recommended provision:

SPECIAL LEGISLATION. The Legislature shall pass no special or local act when a general act is or can be made applicable, and whether a general act is or can be made applicable shall be a matter for judicial determination. (Sec. 4.11.)

There is no comparable provision in the United States Constitution. Congress regularly passes special acts, referred to as "private laws." In a sense congress also enacts "local laws" for the District of Columbia and the territories and possessions.

Author's Comment

In any constitutional revision of a late 19th century state constitution something should be done about a laundry list of prohibited local and special laws. The laundry list itself is old-fashioned and really not necessary. If, as is frequently the case, the prohibition has not been effective in preventing local laws, a drastic change in the provision is advisable. This warns everybody that things are to be different. Moreover, the drafters of the revision can use the opportunity to make a record showing why the change was made and what is to be accomplished by the change.

All this assumes, of course, that people generally would prefer that the legislature attend to state matters and leave local governments to solve their own problems. This seems an eminently reasonable assumption. (Except for the fact that "local" and "special" have been used interchangeably, one could forget a prohibition on special laws. The problem is pretty much dead and in any event can be handled by the equal protection section of the Bill of Rights.) One must also hope that legislators will cooperate. A provision like the one from the *Model State Constitution* goes about as far as a constitution can in trying to keep legislatures from wasting their time on local matters.

In the light of the rule of the *Beyman* case, discussed earlier, it is essential that any revised Section 56 include words such as "and whether a general law is or can be made applicable is a matter for judicial determination." It is also essential to drop the "except as otherwise provided in this Constitution" and to avoid otherwise so providing. The way to do this is to make "general law" one word, so

Art. III, § 57

to speak, and to use it whenever there is an occasion to use the word "law." In other words, any instructions to the legislature should always be instructions to pass general laws, never just to pass laws.

Sec. 57. NOTICE OF INTENTION TO APPLY FOR LOCAL OR SPECIAL LAWS. No local or special law shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of such bill and in the manner to be provided by law. The evidence of such notice having been published, shall be exhibited in the Legislature, before such act shall be passed.

History

This section dates from 1876. The wording is substantially the wording of a comparable provision in the Pennsylvania Constitution (Art. III, Sec. 7). As noted in the *History* of Section 56, that section was undoubtedly modeled after the Pennsylvania prohibition. Presumably, the delegates in 1875 simply lifted the companion Pennsylvania notice section.

No attempts have been made to amend Section 57 directly. There were two indirect amendments—one in 1883 authorizing creation of school districts by local law without the required notice (Art. VII, Sec. 3), the other in 1890 authorizing local laws for road maintenance without notice (Art. VIII, Sec. 9). Subsection (d) of Section 59 of Article XVI is also an indirect amendment of Section 57. Somebody must have decided that nobody could depend on Section 57 and that it was easier to play with Section 59 than it was to fix up Section 57.

Explanation

The courts have destroyed Section 57. (This may explain the Sec. 59 amendment just referred to.) This was accomplished by four judicial rules which, when juggled around appropriately, can avoid the effect of Section 57 under all circumstances. Before discussing these rules, it is appropriate to look at the section on its merits, so to speak. This will show what a beautiful job of emasculation has been performed by the courts.

There are three types of local or special laws plus what may be called a general-local hybrid. First, there are the 29 enumerated items under Section 56. No local or special law may be passed covering any of these items. Therefore, Section 57 cannot come into operation. Any case that holds a law invalid under Section 56 and Section 57 is illogical. (See *Bexar County v. Tynan*, 69 S.W.2d 193 (Tex. Civ. App.—San Antonio 1934), *aff'd*, 128 Tex. 223, 97 S.W.2d 467 (1936). But see *Duclos v. Harris County*, 251 S.W. 569, 571 (Tex. Civ. App.—Galveston 1921), *aff'd*, 114 Tex. 147, 263 S.W. 562 (1924), where the court correctly said: ". . . it follows that . . . the Legislature was without authority to enact this measure with or without the notice prescribed by succeeding Section 57 of the same article. The fact that no notice was given was accordingly immaterial. . . .") Second, there is the general-local hybrid, the local law that a court says is general because of a general interest in the subject matter. Section 57 cannot come into operation since the law has been characterized as "general."

The other types are local or special laws otherwise permitted by the constitution and local or special laws not in the enumerated laundry list but "where" a