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## Special Legislation in West Virginia

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## LEGISLATION

## SPECIAL LEGISLATION IN WEST VIRGINIA

A special or private act is one that is applicable only to particular persons or things.<sup>1</sup> A local act is confined in its operation to the property or persons of a limited portion of the state.<sup>2</sup> A general law, as distinguished from a special law, is one that operates throughout the entire state on all alike of a certain class or upon all the people.<sup>3</sup> Special and local legislation became, at an early period in many of the states, an efficient means for the easy enactment of laws for the advancement of personal rather than public interests.<sup>4</sup> It encouraged the reprehensible practice of trading and log-rolling.<sup>5</sup> These legislative practices developed to such a wide extent that they occasioned the adoption in most of the states of constitutional provisions limiting the power of the legislature to enact special or local laws.<sup>6</sup>

Many of these provisions begin by enumerating a list of subjects on which there shall be no special legislation and usually end by forbidding a special act in any situation where a general act might be made applicable.<sup>7</sup> In other states the only limitation is the catch-all clause requiring a general act whenever applicable.<sup>8</sup>

The courts in the various states have uniformly decided that local or special legislation on any of the subjects as to which such

<sup>1</sup> *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239 (1898); *In re Cope's Estate*, 191 Pa. St. 1, 43 Atl. 79 (1899); *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483 (1907); *Conlin v. San Francisco*, 114 Cal. 404, 46 Pac. 279 (1896); *State v. Des Moines*, 96 Ia. 521, 65 N. W. 818 (1896).

<sup>2</sup> *Ellis v. Frazier*, 38 Ore. 462, 63 Pac. 642 (1901); *Evans v. Phillippi*, 117 Pa. St. 226, 11 Atl. 630 (1887).

<sup>3</sup> *McEldowney v. Wyatt*, *supra* n. 1; *In re Henneberger*, 155 N. Y. 420, 50 N. E. 61 (1898).

<sup>4</sup> *State v. Brown*, 97 Minn. 402, 106 N. W. 477 (1906); *Ayar's Appeal*, 122 Pa. St. 266, 16 Atl. 356 (1889).

<sup>5</sup> *State v. Brown*, *supra* n. 4.

<sup>6</sup> *Armstrong v. State*, 170 Ind. 188, 84 N. E. 3 (1908); *Wanser v. Hoos*, 60 N. J. L. 482, 38 Atl. 449 (1887); *In re Henneberger*, *supra* n. 3.

<sup>7</sup> N. Y. Const., art. 3 § 18; Va. Const., art. 3, §§ 63, 64; W. Va. Const., art. 6, § 39; Pa. Const., art. 3 § 7; Ariz. Const., art. 4, § 19; N. D. Const., art. 2, §§ 69, 70; Ind. Const., art. 4, §§ 22, 23; Del. Const., art. 2, § 19; N. M. Const., art. 4, § 24; Mo. Const., art. 4, § 53; Wyo. Const., art. 3, § 27; Utah Const., art. 4, § 26; Wash. Const., art. 2, § 28; N. J. Const., art. 4, § 11; La. Const., art. 4, §§ 4, 5, 6; Ky. Const., §§ 59, 60; Ill. Const., art. 4, § 22; Idaho Const., art. 3, § 19; Fla. Const., art. 3, §§ 20, 21; Md. Const., art. 3, § 33; Minn. Const., art. 4, § 33.

<sup>8</sup> Ga. Const., art. 1, § 4; Mich. Const., art. 5, § 30; Miss. Const., § 87; Me. Const., art. 4, § 13; Kan. Const., art. 2, § 17; Ohio Const., art. 2, § 26; Tenn. Const., art. 11, § 8; Cal. Const., art. 1, § 11.

legislation is expressly prohibited is void.<sup>9</sup> The decisions are uniform, also, to the effect that the courts, and not the legislature, are to judge when one of these subjects has been violated.<sup>10</sup>

Concerning the general prohibition of special legislation the courts are not in accord. In most states they have held that the legislature is the sole and exclusive judge of the propriety of general or special laws and that its conclusion is not subject to judicial review.<sup>11</sup> But some courts hold that to give the legislature full and exclusive authority to say when a special or general act is needed subverts the theory of our government that the judiciary is to pass on the constitutionality of laws.<sup>12</sup> In some states where the courts had held that the legislature was the judge of the necessity for a special act, the constitutions have been amended to declare that the applicability of a general law is strictly and solely a judicial question.<sup>13</sup>

West Virginia appears to follow the orthodox view concerning special legislation. In *Woodall v. Darst*,<sup>14</sup> the court said, "Whether a special act or a general law is proper is generally a question for legislative determination; and the court will not hold a special act void unless it clearly appears that a general law would have accomplished the legislative purpose as well." Judge Brannon once went so far as to say, "The legislature can do anything not prohibited."<sup>15</sup> However, any attempt to legislate specially concerning the subjects upon which an express constitutional prohibition has been placed is void.<sup>16</sup>

Besides expressly forbidding special legislation upon seventeen enumerated subjects, the constitution of West Virginia provides that a special act shall not be passed in any instance where

<sup>9</sup> *Strong v. Digman*, 207 Ill. 385, 69 N. E. 909 (1904); *State v. Brown*, *supra* n. 4; *In re Henneberger*, *supra* n. 3; *Knopf v. People*, 185 Ill. 20, 57 N. E. 22 (1900); *Carolina Grocery Co. v. Burnett*, 61 S. C. 205, 39 S. E. 381 (1901).

<sup>10</sup> *Ayar's Appeal*, *supra* n. 4; *Knopf v. People*, *supra* n. 9.

<sup>11</sup> *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264 (1913); *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 19 S. Ct. 513 (1899); *Knopf v. People*, *supra* n. 9; *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347 (1903); *Butler v. City of Lewiston*, 11 Idaho 393, 83 Pac. 234 (1905).

<sup>12</sup> *State v. Daniel*, 87 Fla. 270, 99 So. 804 (1924).

<sup>13</sup> *Henderson v. Koenig*, 168 Mo. 356, 68 S. W. 72 (1902); *State v. Prather*, 84 Kan. 169, 112 Pac. 829 (1911); See Kan. Const., art. 2, § 17; Mich. Const., art. 5, § 30; Minn. Const., art. 4, § 33.

<sup>14</sup> 71 W. Va. 350, 77 S. E. 264 (1912); See also *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985 (1915); *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278 (1896); *State v. Harden*, 62 W. Va. 313, 392, 58 S. E. 715 (1907).

<sup>15</sup> *Hornbrook v. Elm Grove*, 40 W. Va. 543, 21 S. E. 851 (1895).

<sup>16</sup> *Staley v. Wayne County Court*, 109 W. Va. 251, 153 S. E. 589 (1930).

a general law will serve.<sup>17</sup> The Supreme Court of Appeals seems to have taken the attitude that curative, validating, and enabling legislation does not fall within this constitutional prohibition.<sup>18</sup> Consequently, our session laws are filled with special and local acts, authorizing increased levies for county and district road purposes,<sup>19</sup> for building high schools,<sup>20</sup> court houses,<sup>21</sup> jails,<sup>22</sup> and bridges,<sup>23</sup> and for grading school grounds.<sup>24</sup> There are almost countless special acts authorizing an increase in the salaries of certain officials in particular counties,<sup>25</sup> providing deputy and

<sup>17</sup> W. Va. Const., art. 6, § 39: "The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, for granting divorces; laying out, opening, altering and working roads or highways; vacating roads, town plats, streets, alleys and public grounds; locating, or changing county seats; regulating or changing county or district affairs; providing for the sale of church property, or property held for charitable uses; regulating the practice in courts of justice; incorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population of less than two thousand; summoning or impaneling grand or petit juries; the opening or conducting of any election or designating the place of voting; the sale and mortgage of real estate belonging to minors, or others under disability; chartering, licensing, or establishing ferries or toll bridges; remitting fines, penalties or forfeitures; changing the law of descent; regulating the rate of interest; authorizing deeds to be made for land sold for taxes; releasing taxes; releasing title to forfeited lands. The Legislature shall provide, by general laws, for the foregoing and all other cases for which provision can be so made; and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for."

<sup>18</sup> *Elkins v. Harper*, 82 W. Va. 377, 95 S. E. 1033 (1918).

<sup>19</sup> W. Va. Acts, 1925, c. 47. An act permitting Tyler County to lay a special levy in three districts for the purpose of hard-surfacing roads. W. Va. Acts, 1927, c. 152. An act reimbursing citizens for money spent in improving a county road.

<sup>20</sup> W. Va. Acts, 1925, c. 101. An act authorizing Elk District to lay a special levy to build an addition to Elk View School.

<sup>21</sup> W. Va. Acts, 1925, c. 132. An act authorizing a special levy to build a jail, jailor's residence, and to improve the court house of a certain county. It further provided for a mandamus by any taxpayer to force the county court to lay the levy and make the improvements.

<sup>22</sup> W. Va. Acts, 1925, c. 129. An act authorizing a special levy in Wyoming County to build a jailor's residence and a jail.

<sup>23</sup> W. Va. Acts, 1919, c. 15. An act authorizing Wirt County to lay a special levy to build a bridge across the Kanawha River. W. Va. Acts, 1925, c. 131. An act authorizing a special levy for a bridge in Lincoln County.

<sup>24</sup> W. Va. Acts, 1915, c. 97. An act authorizing Clay County to raise funds for grading the school grounds.

<sup>25</sup> It is submitted that the salary of the prosecuting attorney should be proportional to the population of the county in which he serves. A glance at the salaries fixed by special act of the legislature for each separate county reveals the fact that no rating according to population is made in West Virginia; *e. g.* in Cabell County, with a population of 90,786, the prosecuting attorney receives \$4800.00, in Mingo County, with a population of only 38,319, the prosecuting attorney receives the same salary, \$4800.00, while in Logan County, with a population of 58,534, the prosecuting attorney receives only

clerk hire for others,<sup>25</sup> authorizing boards of education to retire certain aged teachers on a pension,<sup>27</sup> authorizing counties, districts, and municipalities to expend money in decorating cemeteries and certain historic spots.<sup>28</sup> In a few instances the legislature has gone so far as to *authorize and direct* the county court or other public body to do a stipulated act.<sup>29</sup> All this is done in the face of the express constitutional provision that the legislature shall not by special or local act regulate or control county or district affairs.

Few attempts have been made to evade the constitutional provision by putting a special act in the form of a general law.<sup>30</sup> The refusal of the courts to go behind the legislative determination makes this device unnecessary. Probably for the same reason, no one has seriously contested the right of the legislature to enact validating, curative, and enabling legislation on local matters. As a result, invalid contracts by public bodies have been validated,<sup>31</sup> invalid acts of public officials have received the stamp of legisla-

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\$1800.00. Such a wide variance could hardly be attributed to anything other than log-rolling and political pull. Innumerable other instances of unbalanced county and district official salaries exist and could easily be pointed out.

<sup>25</sup> W. Va. Acts, 1925, c. 125. An act providing a stenographer for the prosecuting attorney of Calhoun County. W. Va. Acts, 1925, c. 128. An act providing additional help for the prosecuting attorney of Kanawha County.

<sup>27</sup> W. Va. Acts, 1925, c. 96. An act permitting Grafton Independent School District to retire Amanda Abbott, after forty-seven years of faithful teaching, at a regular salary.

<sup>28</sup> W. Va. Acts, 1915, c. 6. An act authorizing the county court to spend \$300.00 to erect a monument to General Adam Stevens.

<sup>29</sup> W. Va. Acts, 1927, c. 151. "An act requiring the county court of Hancock County to mark by suitable monuments or markers the frontier forts and block houses occupied by the early settlers during Indian wars, also graves of pioneers and soldiers; and care and upkeep of public cemeteries or burying grounds, where no charge was or is made for burying therein, wherein are buried the remains of pioneers, early settlers, soldiers and sailors, and authorizing said court to lay a levy to carry out the purposes of this act." W. Va. Acts, 1925, c. 152. An act authorizing and directing board of dental examiners to issue a license to Alpha N. Elliott and J. P. Lockhart to practice dentistry. W. Va. Acts, 1925, c. 136. An act authorizing and directing the County Court of Fayette County to erect a bridge over the Kanawha River near Montgomery.

<sup>30</sup> W. Va. Acts, 1913, c. 55. "Be it enacted by the Legislature of West Virginia: That the county court of any county in which there was prior to the first day of January 1, 1913, a criminal court established under the provision of the constitution of this state, and which criminal court was by the legislature of 1911 abolished, is hereby authorized to pay the judge of the circuit court of such county \* \* \*". The only county this act could possibly have applied to was Mingo County. See W. Va. Acts, 1911, c. 12.

<sup>31</sup> W. Va. Acts, 1925, c. 97. An act validating an invalid contract made by the board of education of Grafton Independent District. W. Va. Acts, 1925, c. 111. An act validating the high school at Sharples in Logan County.

tive approval,<sup>32</sup> and in general the legislature has regulated county and district affairs in a more or less detailed manner.<sup>33</sup>

This great mass of local and special legislation is subject to all the vices and opportunities for political corruption that first called forth constitutional provisions against such enactments. A remedy for the evil is not easy to suggest. A few states attempt to guard against such legislation by a provision that all local or special acts must be approved by a majority vote in the districts affected.<sup>34</sup> The experience of Maryland, however, suggests that this provision does not decrease the amount of special legislation.<sup>35</sup>

Our constitutional provisions, in many cases, have been ignored or avoided. Most of this legislation is enacted notwithstanding the general provision that a special act shall not be passed where a general act can be made applicable. And of the seventeen subjects upon which special acts are expressly forbidden, at least the one against "regulating or changing county or district affairs" has been frequently violated by changing the compensation of local officers.<sup>36</sup>

But apparently the litigation arising from the violation of these constitutional provisions has not been significant. This is probably due to the unwillingness of the courts to review the legislative determination. Strength would be added to the present constitutional provision by adding the following clause: "and whether a general law is applicable is declared to be a judicial

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<sup>32</sup> W. Va. Acts, 1927, c. 150. An act to relieve the sheriff of Ohio County of an obligation he had incurred in excess of his official authority.

<sup>33</sup> The amount of local legislation enacted in West Virginia can be better appreciated when one realizes that in 1925 there were enacted ninety-five general laws and fifty-seven local or special laws; in 1927 there were seventy general and ninety-five local or special; in 1929 there were eighty-nine general and seventy-five local or special; and in 1931 there were sixty-seven general and forty local or special laws.

<sup>34</sup> Mich. Const., art. 5, § 30.

<sup>35</sup> WINSLOW, STATE LEGISLATIVE COMMITTEES, JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE (1931) 138. Mr. Winslow's statistics show that in Anne Arundel County only about ten per cent of the special acts passed by the legislature were approved in the local elections. In fact, because the legislature is relieved of the responsibility of putting the law into effect (its effectiveness depending upon popular approval), the tendency is to propose and enact any legislation that an interested group demands.

<sup>36</sup> W. Va. Const., art. 6, § 38, provides that the salary of no public official shall be increased or diminished during his term of office. The objection here is to fixing the salary of any local official by a special act, the contention being that the salaries of all local officials should be fixed by a general classification law for the entire state. See n. 25, *supra*.

question, and, as such, shall be judicially determined without regard to any legislative assertion on the subject.<sup>37</sup>

It is admitted that the suggested amendment would not eliminate all undesirable special legislation, but it is believed that it would go far toward its abolition. The efficient administration of local government will be promoted by laws generally applicable throughout the state. If adjustments in regulation are necessary because of the size or location of the local unit they should be accomplished by general classification rather than by special treatment.

—DONALD F. BLACK.

—GEORGE W. MCQUAIN.

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<sup>37</sup> *Supra* n. 13.