Legislation—General and Special Laws in Texas. *Devon v. City of San Antonio,* **443 S.W.2d 598 (Tex. Civ. App.—Waco 1969, writ ref'd).**

Article 6243f, Texas Revised Civil Statutes Annotated, provides for the operation and funding of pension plans for firemen and policemen in cities of 550,000 to 650,000 population. At the time the law was passed the only city which came within the population limits was the city of San Antonio. Devon, employed as a policeman in that city, terminated his employment before he became eligible for retirement and under the act could not demand a return of monies which he had paid to the pension fund. Devon brought suit alleging that the law, due to its character as *special legislation,* was in contravention of the Texas Constitution. He claimed that the legislation applied only to the city of San Antonio. The court of appeals *held* that it was not local or special legislation because the act provided that it would apply to all cities which were reasonably within the population bracket or to those which would at a later time come into the bracket.

Special legislation is expressly forbidden in the Texas Constitution, as provided by article III, section 56:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, . . .
>
> . . .
>
> Regulating the affairs of counties, cities, towns, wards or school districts;
>
> . . .
>
> Locating or changing county seats;
>
> Incorporating cities, towns or villages, or changing their charters;
>
> . . .
>
> Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;
>
> . . .
>
> And in all other cases where a general law can be made applicable, no local or special law shall be enacted; . . .[1]

With this provision the framers of the 1876 Constitution intended to end the abuses flowing from the indiscriminate passage of *local* and *special bills.* In particular, this amendment was designed to prevent the granting of special privileges, to secure uniformity of law throughout the

1. TEX. CONST. art. III, § 56. There are twenty-nine subdivisions of this section of which only the most applicable are listed.

state, to decrease the passage of couresy bills, and to encourage the legislature to devote its time to the interests of the state at large.[2]

The importance of this constitutional mandate cannot be overemphasized. A large number of bills passed by the Texas Legislature are population bills,[3] which apply to cities in the state that fall into certain specified population brackets. To be valid, each of these bills must pass the test of article III, section 56 of the Texas Constitution, that is, they must not be local or special laws. It is virtually impossible to define accurately and comprehensively the terms "local" laws, "special" laws, and "general" laws, as they are used in Texas. The terms "local" and "special" are used interchangeably to refer to bills which apply to particular persons, places, or things in a designated class.[4] All other bills are general[5] and act uniformly upon all persons, places, or things in the class.[6] The task of deciding what constitutes a general act as opposed to one that is local or special has been the source of much difficulty in Texas jurisprudence.[7]

The first case involving a decision as to whether a bill was general or special was that of *Clark v. Finley*[8] in 1899. Clark was a county sheriff whose income had been lowered by the county in compliance with a bill which reduced the compensation of certain county officials.[9] He challenged the constitutionality of the act because it applied only to counties which had less than 3000 voters. The supreme court, in upholding the act, said that the legislature could not pass a bill that applied to a class so restricted that it was, in effect, no class at all. However, the court went on to say that if there was any reasonable ground for the classification chosen by the legislature, then it would be presumed that this reasonable ground was the intention of the legislature

2. Thomas, *Interpretative Commentary*, 1 TEX. CONST. art. III, § 56 (1955); *see* Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959).

3. *See, e.g.*, TEX. REV. CIV. STAT. ANN. arts. 961-967-c (Supp. 1970-1971). Over one-half of these articles contain population brackets.

4. *See* Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959); Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084 (1941); Rios v. State, 162 Tex. Crim. 609, 288 S.W.2d 77 (1955).

5. Comment, *Population Bills in Texas*, 28 TEXAS L. REV. 829 (1950).

6. Smith v. Davis, 426 S.W.2d 827 (Tex. 1968); Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959); Rodriguez v. Gonzales, 148 Tex. 537, 227 S.W.2d 791 (1950); Bexar v. Tynan, 128 Tex. 223, 97 S.W.2d 467 (1936); Fort Worth v. Bobbitt, 121 Tex. 14, 36 S.W.2d 470 (1931); Clark v. Finley, 93 Tex. 171, 54 S.W. 343 (1899); Rios v. State, 162 Tex. Crim. 609, 288 S.W.2d 77 (1955).

7. For a more complete discussion of the history of art. III, § 56 of the Texas Constitution see J. KEITH, CITY AND COUNTY HOME RULE IN TEXAS 45 (1951); comment, *Population Bills in Texas*, 28 TEXAS L. REV. 829 (1950).

8. 93 Tex. 171, 54 S.W. 343 (1899).

9. Tex. Laws 1897, ch. 5, at 5, 10 H. GAMMEL, LAWS OF TEXAS 1445 (1898).

in enacting the bill. In the *Clark* case, the court reasoned that smaller counties, having a lower crime rate than larger counties, should pay their sheriffs less than the larger counties paid their sheriffs.

In 1931, the commission of appeals in *Fort Worth v. Bobbitt*[10] required that a general law must be "open-ended"—meaning that other towns can qualify under the act in the future. In the *Bobbitt* case, the act in question applied to all cities having a population between 106,000 and 110,000 inhabitants, as shown in the 1920 census. Fort Worth was the only Texas city that qualified under the act. The commission of appeals struck down this act, saying:

> It is therefore our opinion that this act is confined in its application to the city of Fort Worth only, just as clearly, and just as effectively as if the stipulation with reference to population had been omitted and the name "Fort Worth" written there in its stead.[11]

The court went on to add that:

> A classification based upon existing or past conditions or facts and which would exclude the persons, places, things or objects thereafter coming into the same situation or condition, is special and void.[12]

This language requires that a population bracket bill can no longer be restricted to cities designated by a population bracket based on a particular census, but must permit other cities to enter the class. The principle that a bill must be open-ended to be a general law is now firmly established in Texas jurisprudence.[13]

Ten years after the *Bobbitt* opinion, the Texas Supreme Court handed down its decision in the case of *Miller v. El Paso County*.[14] The statute involved permitted all counties having a population between 125,000 and 175,000 inhabitants *and* containing a city at least 90,000 inhabitants to levy a special tax and to use the proceeds thereof for county development and advertising. This act was clearly open-ended, since it applied to the last preceding federal census and thus allowed new cities to qualify under the act provided they met the population qualification in a future census. Nevertheless, the Texas Supreme Court struck down the act as a special act in violation of article III, section

10. 121 Tex. 14, 36 S.W.2d 470 (1931).
11. *Id.* at 15, 36 S.W.2d at 471.
12. *Id.* at 16, 36 S.W.2d at 472.
13. Miller v. El Paso County, 136 Tex. 370, 150 S.W.2d 1000 (1941); Womack v. Carson, 123 Tex. 260, 65 S.W.2d 485 (1933); Smith v. State, 120 Tex. Crim. 431, 49 S.W.2d 739 (1932).
14. 136 Tex. 370, 150 S.W.2d 1000 (1941).

56. In so holding, the court, speaking through Chief Justice Alexander, said:

> [S]uch legislation must be intended to apply uniformly to all who may come within the classification designated in the Act, and the classification must be broad enough to include a substantial class and must be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished by the proposed legislation.[15]

It thus became clear that classification by population was constitutional if, but only if, the bill was open-ended, contained a substantial class, and the classification was reasonably related to the purpose of the act.[16] Such was the law for some twenty-eight years.

In 1969, the courts of civil appeals handed down their decisions in the cases of *Devon v. San Antonio*[17] and *Gould v. El Paso*.[18] Both cases considered the validity of a statute that established pension funds for firemen and policemen.[19] The act in question set up several slightly different funds for cities in differing population brackets. The plaintiffs sued to recover amounts deducted from their salaries and paid into these pension funds.

The court of appeals in *Devon* said:

> [The act] is general and uniform in its application to all cities which may now or hereafter fall within its reasonably broad class. [Plaintiff] does not suggest any basis for holding that the classification in the Act is unreasonable or arbitrary, or that it was put in general form by the legislature merely to evade the Constitution, and we find none. To the contrary, considering the subject matter of the Act, we perceive, without discussing, substantial grounds for the classification made by the legislature. The Act is a general law.[20]

The plaintiff in the *Gould* case attacked an amendment of section b of the same act.[21] This section established a pension fund in all cities in Texas with populations between 275,000 and 300,000 inhabitants,

15. *Id.* at 371-72, 150 S.W.2d at 1001-02.

16. Smith v. Davis, 426 S.W.2d 827 (Tex. 1968); Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959); Smith v. Decker, 158 Tex. 416, 312 S.W.2d 632 (1958); Rodriguez v. Gonzales, 148 Tex. 537, 227 S.W.2d 791 (1950).

17. 443 S.W.2d 598 (Tex. Civ. App.—Waco 1969, writ ref'd).

18. 440 S.W.2d 696 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.).

19. TEX. REV. CIV. STAT. ANN. art. 6243 (Supp. 1969).

20. Devon v. San Antonio, 443 S.W.2d 598, 601 (Tex. Civ. App.—Waco 1969, writ ref'd).

21. TEX. REV. CIV. STAT. ANN. art. 6243b (Supp. 1969).

according to the last preciding federal census. Here too, the plaintiff claimed that the section was a special law and, as such, void.[22] In rejecting this contention and holding that the act was a general law, the court said:

> So we believe the law to be well established that when the statute is passed, even though there is only one city that could qualify, if it is possible for other cities to enter that classification, such law is constitutional and not repugnant to any constitution. It is only unconstitutional when it can never apply to any but one city in any possible event.[23]

It is interesting to note that neither court cited the *Miller* case nor mentioned the tests contained in them. Unquestionably, the *Miller* case represents the law in Texas and will remain the law until the supreme court changes its position on general laws. However, the *Gould* and *Devon* courts seem to do violence to the spirtit of the *Miller* rule. In light of these two cases, there are three possible explanations of the current status of the Texas law. The first is that the plaintiffs in the *Gould* and *Devon* cases failed to prove that the classifications were arbitrary or unreasonable.

It is a well established principle in Texas that the legislature is presumed to have passed a valid general law.[24] The courts recognize that the legislature must make some classifications. Indeed it is not possible, nor even preferable, for every bill of the legislature to apply to all Texas cities,[25] since cities do have varying problems and resources. Obviously, good legislation should be tailored accordingly. The courts do not prohibit classification by population. They have held that it is within the discretion of the legislature to decide what laws are needed for different size cities and that it is in the sole discretion of the legislature to designate the sizes of the classes to which such legislation shall apply.[26] The courts will not look at the wisdom of the legislative body in making these decisions.[27] This permits the legislature broad power to set up

22. THE WORLD ALMANAC AND BOOK OF FACTS 276 (H. Hansen ed. 1962). El Paso had a population of 276,687 inhabitants in 1960.

23. Gould v. El Paso, 440 S.W.2d 696, 700 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.).

24. Smith v. Davis, 426 S.W.2d 827 (Tex. 1968); Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959); Smith v. Decker, 158 Tex. 416, 312 S.W.2d 632 (1958); Texas Nat'l Guard Armory Bd. v. McCraw, 132 Tex. 613, 126 S.W.2d 627 (1939); Houston v. Houston I.S.D., 436 S.W.2d 568 (Tex. Civ. App.—Houston 1968), *modified on appeal*, 443 S.W.2d 49 (1969).

25. Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162, 167 (1959).

26. Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959); Clark v. Finley, 93 Tex. 171, 54 S.W. 343 (1899).

27. Smith v. Davis, 426 S.W.2d 827 (Tex. 1968); Byrd v. Dallas, 118 Tex. 28, 6 S.W.2d 738

population classes in the way it deems best for the state. In summary, a population bill is valid as long as it is not based upon an arbitrary or unreasonable classification.[28] The burden is on the plaintiff to show that an act is arbitrary or unreasonable because the presumption of validity resolves close questions in favor of the legislature.

Since only the plaintiff in the *Miller* case was able to prove that the bill had an unreasonable classification, it is important to note that the *Miller* case can be distinguished on its facts. The act considered in *Miller* differed from that considered in *Devon* and *Gould* because the *Miller* case dealt with a "double population bracket" bill. That is, two population requirements had to be met before the act applied—namely, a county of a certain population, and *then* only if it also contained a city of a certain population. The act in the *Devon* and *Gould* cases only applied to cities of a certain population. This act had only one population bracket. Obviously, a double population bracket is more likely to be arbitrary or unreasonable than is a single population bracket. The important and unanswered question is—just what is required by the courts to prove a single population bracket bill unconstitutional?

In spite of the distinction in facts, the *Devon* and *Gould* cases seem to go further than the *Miller* case. The *Gould* case required the plaintiff to show that no other city could possibly qualify under the act; nothing short of such proof would satisfy the court. The *Devon* court did not require a showing that no other city could possibly qualify, but the court seemed to require more proof that the act was arbitrary or unreasonable than was required by the *Miller* court. The plaintiff in *Devon* showed that the act applied to a restricted class; indeed, he showed that it applied only to the city of San Antonio.[29] The plaintiff, though, failed to show the classification unreasonable.[30] This case did not indicate just how much or what kind of proof of unreasonableness the plaintiff needed to introduce to overcome the presumption of validity.

(1938); Clark v. Finley, 93 Tex. 171, 54 S.W. 343 (1899); San Antonio v. State *ex rel.* Criner, 270 S.W.2d 460 (Tex. Civ. App.—Austin 1954, writ ref'd).

28. Smith v. Davis, 426 S.W.2d 827 (Tex. 1968); Smith v. Decker, 158 Tex. 416, 312 S.W.2d 632 (1958); Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084 (1941); Miller v. El Paso County, 136 Tex. 370, 150 S.W.2d 1000 (1941); Oakley v. Kent, 181 S.W.2d 919 (Tex. Civ. App.—Eastland 1944, no writ).

29. Rios v. State, 162 Tex. Crim. 609, 288 S.W.2d 77 (1955) (rev'd on rehearing); L.E. Whitham & Co. v. Allen, 64 S.W.2d 1024 (Tex. Civ. App.—Amarillo 1933, writ dism'd); Hufstedler v. Lubbock, 40 S.W.2d 982 (Tex. Civ. App.—Amarillo 1931, no writ); Urban v. Harris County, 251 S.W. 594 (Tex.Civ. App.—Galveston 1923, writ ref'd).

30. Smith v. Decker, 158 Tex. 416, 312 S.W.2d 623 (1958); Bexar County v. Tynan, 128 Tex. 223, 97 S.W.2d 467 (1936); San Antonio v. State *ex rel.* Criner, 270 S.W.2d 460 (Tex. Civ. App.—Austin 1954, writ ref'd).

The cases following *Miller* appear to indicate that the plaintiff need only show that the act applies to a very small class and that the act applies to a very small class and that this class is also unreasonable or arbitrary.[31] Then the presumption of legislative validity seems to disappear, and the burden of going forward with the evidence shifts to the defendant. If the defendant cannot show a reasonable basis, nor can the court find one, then the act will be held unconstitutional.[32] This conclusion is supported by the three cases under consideration. In *Miller*, the plaintiff showed that there was no reason why counties of such strict population brackets needed to advertise themselves, while other counties had no such need to advertise. The plaintiff in *Devon* had a much harder burden since he attacked a single population bill that had a class spread of 100,000 inhabitants. It is much harder to prove such a bill is an unreasonable classification. The *Gould* case, with its population spread of 25,000 inhabitants, fits between the *Devon* and *Miller* cases. It appears to be a borderline case in which the presumption of validity might uphold the bill as constitutional.

It is submitted that the plaintiff should be required only to show that an act applies to a small class and that this class is *prima facie* unreasonable. The plaintiff cannot find and rebut in his proof every possible ground of validity. How does one prove a negative? The burden of proving a negative is virtually impossible and would, in effect, destroy the *Miller* requirements. Only on rare occasions could the plaintiff prove that such an act was arbitrary or unreasonable. However, if he be required only to show that *prima facie* the classification is unreasonable, then the burden of going forward with the evidence after the *prima facie* case is established should shift to the defendant. For example, the plaintiff should be able to establish a *prima facie* case in *Devon* and *Gould* by comparing the police and fire departments of the established class with like departments in cities outside the class. If he can show that these departments do not require different pension funds solely because of differences in the departments resulting from the sizes of the respective cities, then he should have his *prima facie* case, and the burden should then be upon the defendant to show some reasonable basis for the classification. After all, the city is in the best position to know of any reasonable ground for its being in the designated class and is therefore in

31. Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959); Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084 (1941); *Ex parte* Carsen, 143 Tex. Crim. 498, 159 S.W.2d 126 (1942); San Antonio v. State *ex rel.* Criner, 270 S.W.2d 460 (Tex. Civ. App.—Austin 1954, writ ref'd).

32. *Compare* Smith v. Decker, 158 Tex. 416, 312 S.W.2d 632 (1958), *with* Rodriguez v. Gonzales, 148 Tex. 537, 227 S.W.2d 791 (1950), *and* Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084 (1941).

the best position to introduce that fact. Further, it is doubtful that such knowledge would be obtainable by the plaintiff by any means other than through the city itself. For these reasons, the burden of going forward with the evidence after the plaintiff has established his *prima facie* case should shift to the defendant.

A second possible explanation of the current status of the law in this area is that the *Devon* and *Gould* cases do represent the current Texas law. If this is true, Texas has adopted the rule that the only requirement for a bill to be general is that it be open-ended. Such a position would leave the Texas cities at the mercy of the legislature. Texas has a home rule section in its constitution[33] which permits all cities that incorporate under it to have certain powers. However, none of these powers can conflict with any act of the legislature[34] since a legislative act is superior to any power of a home rule city. Hence, the result of the *Devon* and *Gould* cases would be to give the legislature a free hand to pass population bracket bills covering only one city, knowing full well that only that one city would be covered until the next federal cansus. Even then, with a mere amendment of the population bracket, the bill once again would apply to only that one city until the next census. This result would make both the home rule and the prohibition of special legislation sections of the constitution mere empty shells.

The third, and probably best, explanation is that the *Miller* case has been unaffected by the *Devon* and *Gould* cases. The *Gould* case was appealed to the Supreme Court of Texas, which approved the result of the case but not the opinion.[35] Hence, it is conceivable that the *Gould* case reached the correct result but for the wrong reason. This conclusion might have been grounded upon article III, section 51(f) of the Texas Constitution.[36] Article III, section 56 permits special legislation if such legislation is provided for in another section of the constitution. It seems that article III, section 51(f) would have permitted the legislature to provide a separate fund for any district that it selected. Thus, the legislature could have simply named the city of El Paso as a district and

33. TEX. CONST. art. XI, § 5.

34. *Id.*

35. The *Gould* case was "writ refused, no reversible error." *See* TEX. R. CIV. P. 483.

36. This section of the Texas Constitution provides that:

> The Legislature of this State shall have the authority to provide for a system of retirement and disability pensions for appointive officers and employees of cities and towns to operate Statewide or by districts under such a plan and program as the Legislature shall direct and shall provide that participation therein by cities and towns shall be voluntary; provided that the Legislature shall never make an appropriation to pay any of the cost of any system authorized by this Section.

the act would still be constitutional under this section. It is possible that the supreme court had this in mind when it found no reversible error in the *Gould* case. If this is true, then the language in *Gould* concerning general laws was not approved by the supreme court and does not represent that court's position on the requirements for a general law. The *Devon* case is more difficult to explain since the supreme court approved of both the result and the opinion of this case.[37] The case, however, does not necessarily violate the *Miller* rule. It must be remembered that this case involved a population spread to 100,000 inhabitants. It is possible that cities in this class have the need and the resources for this type of pension fund. Any doubt, of course, must be resolved in favor of the legislature.

There is yet another reason why the *Devon* and *Gould* cases are correct, but decided on the wrong basis. This is based upon the theory that pension funds for firemen and policemen are affected by the public interest. Several Texas cases have suggested that an act that is special in form may be general if the subject of the bill is affected by the public interest.[38] This theory holds that an act which deals with such a subject is a general one because a large segment of the public is interested in it. Thus, since the bill does affect a large part of the population, the bill is not a special or local one. Applying this reasoning to these pension funds, it would seem that the public is quite concerned over the policemen and firemen who protect them. Hence, these funding programs seem to be supported by public interest. Under this reasoning, both *Devon* and *Gould* are correctly decided since the act in both cases is a general law.

The same abuses which led the framers of the 1876 Constitution to include a section prohibiting special legislation still exist today. There is, in addition, another factor to be considered—the need to protect home rule cities from special legislation. In view of this, it is unwise to water down the *Miller* principles, either by changing them or by imposing a heavier burden of proof upon the plaintiff. On the one hand, it seems that a spread of 100,000 inhabitants (*Devon*) perhaps should be presumptively valid, at least in the absence of any evidence by plaintiff. On the other hand, a spread of 25,000 inhabitants (*Gould*) seems to violate both the letter and the spirit of the *Miller* case, especially when other sections of the same act have larger population spreads. The final

37. The Texas Supreme Court refused a writ in the *Devon* case. *See* TEX. R. CIV. P. 483.

38. Smith v. Davis, 426 S.W.2d 827 (Tex. 1968) (teaching hospitals); Langdeau v. Bouknight, 162 Tex. 42, 344 S.W.2d 435 (1961) (insurance industry); Travis County v. Mathews, 235 S.W.2d 691 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.) (welfare of minors is affected with the public interest); Lamon v. Ferguson, 213 S.W.2d 86 (Tex. Civ. App.—Austin 1948, no writ).

effect of these two cases upon the *Miller* case is not yet clear. However, the answer should be forthcoming. The steady stream of population bills from the Texas Legislature promises to bring forth suits to test their validity under article III, section 56.

*Ralph Belter**

*Graduating class of 1970 and member of the staff of the TEXAS TECH LAW REVIEW. Staff edit by Marvin F. Marshall.