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Is it not therefore desirable to extend the rule in the *Briscoe* case by the addition of the provision that where the danger upon the premises is extreme, the landowner will be required to provide reasonable safeguards, *wherever there is a reasonable probability* that trespassers will enter the premises and be injured because of their inability to protect themselves by even the highest care. Such a rule applied in the *Britt* case would make the company liable not only for the deaths of the boys who swam in the pool, but for the illness of the adults who went to their rescue, and this without necessarily introducing new principles. But what if the case does call for the conversion of a hitherto moral duty into a full fledged legal one? There is no reason why such a step should not be taken whenever the risk of injury becomes sufficiently great to warrant such a restriction in the use of property.

LEGISLATIVE POWER IN NORTH CAROLINA

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IN A RAPIDLY developing state, legislation regulating social and economic conditions and extending the activities of government tends to increase both in volume and in complexity. Those adversely affected frequently seek relief by a plea of unconstitutionality. In the solution of the resulting problems of state constitutional construction, something may depend upon the judicial conception of the source and scope of state legislative power and of the function of the Constitution in connection with the legislature. This note traces the development of these matters in North Carolina and indicates the more important considerations involved.

In the North Carolina Constitution of 1776¹ a theretofore sovereign people erected a state government and granted to each of the several branches thereof a specified portion of the sovereignty. Unlike the executive and judicial departments, however, whose powers, like those later awarded to the federal Congress, were specifically defined and enumerated, the state legislature was granted a broad power to make laws, "the legislative authority."² Experience under the British colonial administration had led to popular distrust of governors and judges. It was felt that only with a substantially all-powerful representative assembly, made responsive to the people by frequent elections, could civic happiness be attained.

¹ For the history of the first state Constitution, see Frank Nash, *The North Carolina Constitution of 1776 and Its Makers*, James Sprunt Historical Publications, Vol. 11, No. 2, p. 9; Connor and Cheshire, *The Constitution of North Carolina, Annotated*, Raleigh, 1910, Introduction, XIX-XXIV; R. D. W. Connor, *History of North Carolina, The Revolutionary Period*, Chicago, 1919, ch. 23.

² "That the legislative authority shall be vested in two distinct branches, both dependent on the people, to wit, a senate and a house of commons." Sec. 1. "That the senate and house of commons, when met, shall each have power to . . . prepare bills to be passed into laws." Sec. 10. Some of the other constitutions of the time were more elaborately phrased in this regard. Thus Art. 7 of the Georgia Constitution of 1777 provided that the House of Assembly "shall have power to make such laws and regulations as may be conducive to the good order and well being of the state." See W. F. Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201.

In addition, however, to carrying the general grant of the legislature's authority, the Constitution made legislative action in certain fields imperative,³ required the General Assembly to appoint the principal officers of the government,⁴ prescribed the procedure to be followed in the passage of laws,⁵ and, in a Declaration of Rights, laid down a number of vaguely defined limitations upon the exercise of all governmental authority. The Constitution thus had many of the characteristics of a political power of attorney.⁶

This conception of the source and scope of state legislative power was consistently emphasized by the Supreme Court of North Carolina for nearly a century. Especially notable were the opinions of Chief Justice Ruffin in *Hoke v. Henderson*⁷ and in *Railroad v. Davis*,⁸ of Gaston, J., in *State v. Manuel*,⁹ and of Chief Justice Pearson, in *Railroad v. Reid*.¹⁰ (These well considered opinions were entirely lost sight of in later discussions of the subject.) Not only was legislative power conceived of as derived from the people by constitutional grant. Its scope was defined as substantially co-extensive with the residuum of sovereignty after the grants to the executive and to the judiciary, and to the federal government, except as restricted by the express and implied limitations in the constitutional texts, and by the sovereign right of the people to abolish or alter the government.

But with the reconstruction Constitution of 1868 came confusion. The Declaration of Rights in that instrument concluded as follows: "This enumeration of rights [presumably those mentioned in the Declaration] shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."¹¹ This clause, a new one in the constitutional history of North Carolina, seems to have been adapted from the Tenth Amendment to the Constitution of the United States.¹² Just what its framers hoped it would accomplish is not clear.¹³ Read in connection with labored elaborations of the original version of certain other clauses affirming political power to be derived from the people, one gathers that the provision in question was inserted in an excess of caution to emphasize the principle of granted powers. Certainly the

³ *E.g.*, "That the future legislature of this state shall regulate entails, in such a manner as to prevent perpetuities." Sec. 43.

⁴ *E.g.*, "That the senate and house of commons, jointly, at their first meeting after each annual election, shall, by ballot, elect a governor for one year." Sec. 15.

⁵ *E.g.*, "That all bills shall be read three times in each house, before they pass into laws, and be signed by the speakers of both houses." Sec. 11.

⁶ The North Carolina Constitution of 1776 is summarized as typical of the the first state constitutions, in W. F. Dodd, *State Government*, New York, 1922, ch. 5.

⁷ (1833) 15 N. C. 1, 7-9, 25 Am. Dec. 677. Overruled on its holding that there is a property right in a public office, in *Mial v. Ellington* (1903) 134 N. C. 165, 46 S. E. 961, 65 L. R. A. 697.

⁸ (1837) 19 N. C. 451, 457-458. See also *Pullen v. Commrs.* (1872) 66 N. C. 361, 362.

⁹ (1838) 20 N. C. 144, 159.

¹⁰ (1870) 64 N. C. 155, 160. Reversed on its impairment of contract phase in 13 Wall. (U. S.) 269, 20 L. ed. 570.

¹¹ Art. 1, sec. 37. This clause may be found in other state constitutions; *e.g.*, Kansas, 1859, Bill of Rights, sec. 20; Ohio, 1912, Art. 1, sec. 20; Nebraska, 1875, Art. 1, sec. 26. See Stimson, *Federal and State Constitutions*, 125.

¹² "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

¹³ It will be noted that the Tenth Amendment had an entirely different setting. Only a relatively few specific powers were granted to the federal government and denied to the States. The vast residuum of governmental power remained with the grantors.

clause could not operate, in and of itself, as a limitation upon legislative power. It did not purport to detract from the contents of powers delegated. Rather, it sought to suggest that the Declaration of Rights was not an exhaustive catalog of powers not granted. But it is difficult to lay one's finger on any specific power which the people were to have as of sovereign right, in addition to those expressly reserved in the new Constitution, such as the power to revise the Constitution in convention and to participate in the election of public officers and in the ratification or rejection of various referendum measures. Perhaps the clause was to serve as a canon of political policy, carrying a counsel of caution in deciding whether a given statute is really within or without the net scope of legislative power in North Carolina.¹⁴ As indicating the confusion in political thought which has resulted, it was said,¹⁵ as late as 1910, that: "It was held by the Supreme Court in *Nichols v. McKee*¹⁶ . . . that by virtue of this section the legislative department, as the others, acted under a grant of power, thereby changing the character of our state government." On the other hand, it was said¹⁷ in 1915, that Chief Justice Clark, in *State v. Lewis*,¹⁸ decided in 1906, in effect overruled *Nichols v. McKee*, and held that legislative power is an inherent and not a granted power, when he said: "That the federal government is one of granted powers solely, and the state government is one of granted powers as to the executive and judicial departments, but of full legislative power except where it is restricted by the state and federal constitutions, is elementary law." Both statements seem to be erroneous. Perhaps it would be well to examine somewhat in detail the cases that have discussed this matter.

*Nichols v. McKee*¹⁹ was decided in 1873. The question was whether the legislature had the power to appoint the trustees of certain state institutions. The new Constitution made many of the officers of the government popularly elective, and provided: "The Governor shall nominate, and by and with the advice and consent of the majority of the senators elect, appoint all officers whose offices are established by this Constitution, or, which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly."²⁰ It seems to have been contended that this prohibition upon legislative appointments did not apply in the instant case, for the reason that the appointment of these particular officers was otherwise provided for by implication, in that the legislature had all powers except those prohibited by the Constitution. But the court held the legislative appointments void, saying:

" . . . It is not true, as contended for upon the argument, that the legislature is supreme except in so far as it is expressly restrained. However that may be in other governments, or however it may have heretofore been in this state, it is plain, that since the adoption of our present Constitution, the legislative, just like the other departments, acts under a grant

¹⁴ See Thomas Reed Powell, *Child Labor, Congress, and the Constitution*, 1 N. C. L. Rev. 61.

¹⁵ Connor and Cheshire, *The Constitution of North Carolina, Annotated*, Raleigh, 1910, Introduction, XXXIV.

¹⁶ (1873) 68 N. C. 429.

¹⁷ W. F. Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201, 203.

¹⁸ (1906) 142 N. C. 626, 630-632, 55 S. E. 600.

¹⁹ Note 16, *supra*.

²⁰ Art. 3, sec. 10.

of powers, and cannot exceed them. . . . We have already seen that there is no express grant of power to the General Assembly. No such grant is to be implied, unless it be in regard to some appointment necessary to the exercise of its legislative function, as its own officers. And, to make it plain, the power is expressly prohibited.”

The court did not hold that the new Constitution changed the character of the state government. As has been indicated, the legislature had always acted under granted powers. The opinion did suggest, however, a narrower view of the scope of legislative power than had prevailed under the old Constitution. Instead of viewing the content of the grant as being substantially co-extensive with the residuum of sovereignty after the grants to the other departments and to the Congress, the court conceived of the scope of the grant as containing only the power of lawmaking, unless other powers not legislative in character had been specifically given. But this suggestion was not due to the new clause in the Declaration of Rights. It mainly resulted from the change in constitutional policy relative to legislative appointments. Under the first state Constitution, the power to appoint the principal officers of the government had been specifically granted to the legislature. And the practice had been, aided and abetted perhaps by the extremely broad concept of legislative power then in vogue, for the legislature to exercise a general appointing power even in excess of the specific grants.²¹ The new Constitution had attempted to complete the job, begun in 1835, of reversing that policy, by placing the general appointing power in popular elections and in the Governor. The court was endeavoring to give full effect to this policy. It did not purport to lay down a restricted view of the power of the General Assembly to act in a purely legislative manner.

Some of the language used in *Ewart v. Jones*,²² decided in 1895, and in *McDonald v. Morrow*,²³ decided in 1896, however, seems to extend the scope of the grant of legislative power beyond the limits marked out in *Nichols v. McKee*. In the first of these cases, Chief Justice Faircloth said:

“Under our form of government, the sovereign power resides with the people and is exercised by their representatives in the General Assembly.”

Avery, J., concurring, stated:

“By our silence, we must not be understood as conceding the soundness of the legal proposition of counsel that section 37 of Article 1 of the Constitution was intended as a restriction upon the power of the General Assembly, as the direct representative of the people. Another construction of the same clause is based upon the idea that the representatives of the people are vested with a delegated authority restricted only to the extent of the express grants in the state constitution and to the Federal government. Under that interpretation ‘all power not delegated’ in the Constitution ‘remains with the people’ to be exercised through their representatives and is not to be considered as in abeyance, so that they cannot be exercised, however urgent their excuse for the public benefit, except when the people assemble by their delegates in convention. I do not decide this interesting question, because it is not essential that we do so.”

²¹ See *e.g.*, the statement of Avery, J., in *Ewart v. Jones* (1895) 116 N. C. 570, 580, 21 S. E. 787.

²² Note 21, *supra*.

²³ 119 N. C. 666, 670, 26 S. E. 132.

In the second case mentioned, Furches, J., said :

"Congress legislates by virtue of the powers granted in the Constitution of the United States, and can not or should not legislate outside of those granted powers. But the powers of the legislature of North Carolina are just the reverse of the powers of Congress. The powers of the legislature are inherent, being derived from the people whom it represents, and it has the power to pass any proper act of legislation that it is not prohibited from passing by the Constitution."

These utterances in *Ewart v. Jones* and in *McDonald v. Morrow* were unnecessary to the respective decisions. The first clearly went off on the ground that the Constitution, as amended²⁴ in 1875, expressly authorized the legislature to appoint the first incumbents of certain judicial offices. The appointments did not have to be justified on any such broad concept of implied legislative authority. In the second case the court held valid an act authorizing any individual justice of the Supreme Court to exercise certain supervisory powers over election officers. The only constitutional difficulty was whether the legislature was impliedly prohibited, by certain provisions in the judicial article of the Constitution,²⁵ from increasing the jurisdiction of the Supreme Court. This was avoided by holding that the implied prohibition related to the increase of the powers of the Supreme Court as an entity. The statute in question gave the new powers to the individual justices.

Ten years later, Judge Connor, in the course of a dissenting opinion in *Daniels v. Homer*,²⁶ vigorously combatted such an extensive concept of legislative power. In that case the majority of the court sustained the validity of an act authorizing the seizure and sale, without a hearing, of fish nets used in violation of certain statutory regulations. The only remedy of the owner was to sue the officer, after the seizure, either in claim and delivery, or to enjoin the sale, or for damages. The court held the act to be within the police power of the state, and found nothing in the due process clause to invalidate it. Judge Connor thought the act amounted to a taking of property without due process of law. In the course of his opinion, he said :

"In a government deriving its powers from the consent of the governed, moving within and bounded by the clearly expressed grants of a written Constitution, no germ of arbitrary power is to be found or can have any existence. Each department must find its own power to act in the charter by which it is created and by which all powers, not delegated, are reserved to the people. The argument that the act is valid because no provision is found in the Constitution prohibiting its passage is, I submit with great deference, but with equal confidence, based upon a misconception of the nature of our government and the fundamental principles upon which it is founded. Reade, J., in *Nichols v. McKee*, says: 'The theory of our state government is that all political power is vested in and derived from the people. The Constitution is their grant of powers and it is the only grant which they have made. 'All powers not therein delegated remain with the people.' This last clause will not be found in the former Constitution of the state. . . It follows that it is not true, as contended for upon the argument, that the legislature is supreme except in so far as it is expressly restrained. However that may be in other governments, or however it may have been heretofore in this

²⁴ Art. 4, sec. 30.

²⁵ Art. 4, sec. 8.

²⁶ (1905) 139 N. C. 219, 237, 51 S. E. 992.

state, it is plain that since the adoption of our present Constitution, the legislature, just like each of the other departments, acts under a grant of powers, and cannot exceed them.”

Judge Connor seems to have gone farther than the import of *Nichols v. McKee*. That case excluded from the grant of the legislative authority the possibility of an implied power to appoint to office. Judge Connor excluded the possibility of power to pass arbitrary laws. The earlier case relied, first, upon the fact that the appointing power was not legislative in character, and therefore not within the broad grant, and, second, upon the fact that an express constitutional provision of no uncertain language prohibited appointments by the legislature. Judge Connor had neither of these supports. The act authorizing the officer to seize and sell the nets before trial was clearly legislative in character. And the only constitutional limitation available, namely, the due process clause, was vaguely indefinite, rather than clear. Perhaps he intended to say that the people alone could be arbitrary, or that the people, apart from the limitations of due process, had never granted to the legislature the power to pass a law authorizing arbitrary action. Possibly, within the very notion of a grant itself, he found a limitation upon arbitrariness. Such an inclination might have had some justification in the absence of a due process clause,²⁷ but North Carolina had had such a clause from the beginning, and the Fourteenth Amendment had been available for such purposes for forty years. It is believed, rather, that Judge Connor was insisting, in effect, that the broad implications of the state due process clause invalidated the act in question. In his mind, this view seems to have been somewhat influenced by the “enumeration” clause in its capacity as a counsel of caution in deciding whether the particular statute was really within or without the net scope of legislative power. Putting it another way, he thought the “enumeration” clause gave a larger significance to the meaning of due process. Apparently he did not intend to suggest that this clause cut something out of the powers actually granted.

Then came the famous case of *State v. Lewis*,²⁸ in 1906. It arose upon a motion to quash an indictment for lack of jurisdiction. The constitutional issue involved was whether the legislature could authorize the grand jury of a county adjoining that in which the alleged offense had been committed to indict a person accused of participating in a lynching. More exactly, the question was whether the state Declaration of Rights, in using the term “indictment,”²⁹ embraced by implication a common law requirement that the grand jury be recruited from the county in which the alleged crime had been perpetrated. All of the judges held that the General Assembly had the power to pass the act in question. Thus the principal discussion was over the extent to which common law principles and

²⁷ See W. F. Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201, 206-207, citing *State v. Nemaha County* (1871) 7 Kan. 542, 555, 556; *Ward v. Barnard* (Vt. 1825) 1 Aikens 121; *Bank of State v. Cooper* (Tenn. 1831) 2 Yerg. 599, 24 Am. Dec. 517; *Barbour v. Louisville Board of Trade* (1834) 82 Ky. 645, 648; *State v. Express Co.* (1830) 60 N. H. 219, 255.

For late cases to the same effect, see *Marrymount v. State Banking Board* (1910) 33 Nev. 33; *Mirick v. Gims* (1908) 79 Ohio St. 174. Compare opinion of Walker, J., in *State v. Lewis*, note 28, post.

²⁸ 142 N. C. 626, 630-632, 640-641, 645-646, 55 S. E. 600.

²⁹ “No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment.” Art. 1, sec. 12. This clause, under both the first and the present constitutions, has been held to require an indictment by a grand jury. For the essentials of that body, see *State v. Davis* (1841) 24 N. C. 153; *State v. Barker* (1890) 107 N. C. 913, 12 S. E. 115.

practices might be resorted to in ascertaining the precise nature of common law institutions preserved in general terms by the Constitution. In other words, the judicial debate in *State v. Lewis* really involved only the question as to how far the common law controlled the meaning of common law terms in constitutional provisions operating as implied limitations upon legislative power. The issue did not call for a discussion of the source and scope of that power itself. But the opportunity proved attractive to the Chief Justice, who delivered the principal opinion. After citing and quoting from authorities³⁰ on constitutional law, he said:

"The legislature of North Carolina has full legislative power, which the people of this state can exercise completely and as freely as the Parliament of England or any other legislative body of a free people, save only as there are restrictions imposed upon the legislature by the state and federal constitutions. In the very nature of things there is no other power that can impose restrictions. . . . It cannot be restricted and tied down by reference to the common law or statutory law of England. There is nothing in the common law or statute law of England which is not subject to repeal by our legislature, unless it has been reenacted in some constitutional provision. That the federal government is one of granted powers as to the executive and judicial departments, but of full legislative powers except where it is restricted by the state or federal Constitution, is elementary law. . . ."

Walker, J., said:

"I concur in the result reached in this case and in the opinion of the Chief Justice, except in so far as it is therein impliedly stated that the powers reserved in the Constitution by the people may be exercised by their representatives in the General Assembly. My opinion is that the legislature has only the powers granted to it by the people, and all powers not so given are reserved to the people themselves. . . . The Constitution is a grant of specific powers and not a restriction upon powers granted, which, but for that restriction, would be general and plenary in their nature. The powers granted are to be exercised only as prescribed, and those of a legislative character by the General Assembly, but all not specially granted remain with the people to be afterward granted or withheld by them as they may deem best for the public welfare. . . . The words of Art. 1, sec. 37, it seems to me, could have no force under any other construction."

It will be noted that the Chief Justice might be understood as saying: (1) that legislative power is inherent instead of granted, and (2) that its scope is as broad as either, the residuum of sovereignty, or the lawmaking function of Parliament, except as restricted by constitutional texts. As to the first proposition mentioned, it is respectfully submitted that the Chief Justice did not mean what he seemed to say. Analytically, textually, and historically that could not be true. Although an isolated sentence might serve as an indication that he so held, it is believed that the opinion as a whole belies that interpretation. He was arguing merely for a broad concept of the scope of legislative power. He seems to have meant that the federal Congress, the state executive department, and the state judiciary exercise powers specifically granted in connection with a list of enumerated subjects, but that legislative power in North Carolina, save for constitutional limitations, has been granted in the state Constitution as an organic whole, without itemization. This, moreover, is the inescapable effect of his quotations from Black and Cooley. And such was the obvious use of the term "inherent" in the

³⁰ Black, *Constitutional Law*, sec. 100, 101; Cooley, *Constitutional Limitations*, 7th ed., 126.

quotation *supra* from Furches, J., in *McDonald v. Morrow*. See also the expressions of a similar nature in the later cases of *State v. Blake*,³¹ and *Thomas v. Sanderlin*.³² What has been meant is simply that a given power inheres within the broad content of the grant; that the full legislative function has been granted.³³ Emphasis upon the notion of a granted legislative power, moreover, bobs up again in the case of *In re Applicants for Licenses*,³⁴ decided in the same years as *State v. Lewis*, and in *State v. Burnett*, decided in 1920.

As to the second proposition mentioned, it is doubtful if the Chief Justice meant to go as far as the dicta in *Ewart v. Jones* and in *McDonald v. Morrow*, and suggest that, as Walker, J., feared, the legislature might exercise all of the powers reserved by the people. His language seems sufficiently guarded to limit his conception of legislative power to the lawmaking function proper, and to exclude the exercise of non-legislative powers unless specially granted. While one might disagree, as did Connor, J., with his ideas about the extent of common law connotations in constitutional texts, his vigorous reiteration of the view that only constitutional texts can restrict the exercise of the power to make laws at discretion is wholly orthodox. On the whole, the opinion represents merely a desire to look upon statute law making as being free from all save demonstrably clear constitutional limitations. To the same effect are the later cases of *State v. Blake*, *Thomas v. Sanderlin*, and *State v. Burnett*, *supra*.

There remains the ultimate question: what is the significance of all this? What difference does it make whether we say that the legislative authority is co-extensive with the residuum of sovereignty or is restricted to the power to make laws? Whether we say that the power is granted or inherent? Briefly, because of the bearing which the answer may have upon the conception of the function of the state Constitution as an approach to problems of state constitutional construction.³⁵

Metaphysicians might find much room for discussion in the first question. "Constitutional law," however, "is not made by a machine or by an automatic logic. Into its composition there enters not a little of instinct or emotion or judgment of a political tinge."³⁶ The answer lies, rather, in the history of our state government.³⁷ Under the first state Constitution, especially before the amendments of 1835, the legislature was in theory and in fact the direct governmental agent of the people, and, aside from the relatively meagre powers awarded to the other divisions of government and in the federal Constitution to the Congress, it undertook to do and was supposed to be empowered to do about all that the people themselves could have done. The rudimentary Constitution of the time contained little more than a Declaration of Rights and a bare framework of the machinery

³¹ (1911) 157 N. C. 608, 610, 72 S. E. 1080.

³² (1917) 173 N. C. 329, 332-333, 91 S. E. 1028.

³³ See W. F. Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201, 205.

³⁴ (1906) 143 N. C. 1, 7, 55 S. E. 635.

³⁵ For the broader aspects of this whole question, see W. F. Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201.

³⁶ Thomas Reed Powell, *Child Labor, the Congress, and the Constitution*, 1 N. C. L. Rev. 61.

³⁷ See J. Q. Dealey, *Growth of American State Constitutions*, Boston, 1915.

of government. Of the various governmental agents of the people, the legislative department was of predominating power and importance. The executive and judicial departments were substantially under its control, both as to structure, powers, and personnel. Not until 1868 did they attain their present independent and coördinate status.³⁸ But, with a growing distrust of an unbridled legislature, and with an increasing complexity of social and economic conditions calling for a more thoroughly developed constitutional treatment, the later constitutional amendments and revisions have come to control almost completely the relations between the people and their government, and have left little for theories of sovereignty to determine. The appointing power has been adequately distributed between the people, the executive, and the legislature. The method of constitutional amendment and revision, and the parts which the legislature, the people, and a convention are to play, have been expressly designated by constitutional provisions.³⁹ The point in mind is that today the people have reserved whatever powers they have, as the various governmental agencies have derived theirs, in and from the Constitution, a social compact, rather than as a result of any implications from a residuary sovereignty. The entire sovereignty has been distributed and disposed of. Thus the broad grant of the legislative authority means less today than it did in the early days of the state, primarily because of the more detailed constitutional treatment of all phases of government, and because of the modern significance of the doctrine of separation of powers in connection with what are now constitutionally coördinate government departments. We cannot, therefore, say today that the legislature is to exercise for the people the powers which they have retained. They have retained very few powers. And these are deemed so important that it is unthinkable that the legislature could usurp them. Apart from these particular reservations, the people are substantially without power, save that of revolution. It is better to say that the General Assembly has been given, in the broad grant, only legislative power.

In those states where the inherent theory of legislative power prevails, there has been a marked tendency to regard substantially all of the text of the Constitution as a limitation upon the lawmaking process. Viewing the legislative power as something inherited by a sort of political intestacy from the Parliament of Great Britain, the Constitution has in those states been regarded as a cage for the restraint of some force that otherwise might escape and do damage.⁴⁰ Much legislation that otherwise might have been sustained has been annulled by judicial veto because of extreme applications of that canon of construction. On the other hand, a generation ago, and in the absence of a state due process clause, the courts

³⁸ "In the first state constitutions practically all governmental power was concentrated in the hands of the legislature, substantially without limitation, and the principle of separation of powers announced in several of these instruments meant little more than that the same persons should not be members of two departments at the same time. Not until the later establishment of co-ordinate executive and judicial departments did the principle of separation of powers to be a real restriction upon the legislature." W. F. Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201, 206, note. See to the same effect, *Herndon v. Insurance Co.* (1892) 111 N. C. 384, 385-387, 16 S. E. 465.

³⁹ Art. 13.

⁴⁰ See W. F. Dodd, *State Government*, New York, 1922, 133, *et seq.*, discussing, *inter alia*, *Scott v. Flowers* (1900) 60 Neb. 675, 84 N. W. 81. See also Mr. Dodd's article, cited note 33, *supra*, and a paper by Ernst Freund, dealing with "resulting limitations," in *Proceedings*, Academy of Political Science, vol. 5, p. 98.

of several states adopting the grant theory sometimes found within the very idea of a grant, a limitation upon the capacity of the legislative branch of the government. These courts felt able to define and limit the meaning of "legislative power." Compliance with the broad provisions of declarations of rights was regarded as a condition precedent to valid enactments. "According to this view anything which the court regarded as not a proper matter for legislative action could be annulled as not falling within the grant of 'legislative power.'"⁴¹ The dissenting opinion of Judge Connor in *Daniels v. Homer*, and the opinion of Walker, J., in *State v. Lewis, supra*, may be cited as possible examples of this attitude. But with the development of the modern notion of due process of law, much of this tendency has disappeared. It never became a vital factor in the constitutional law of North Carolina.

As a matter of fact, the function of the present North Carolina Constitution is extremely complex and diversified.⁴² (1) It establishes state and local governmental organizations and provides for their operations. (2) It embodies for the sake of permanency a number of matters of legislation.⁴³ (3) It carries a number of grants of power to the General Assembly. Among these are the delegation of the broad "legislative authority," specific grants of various powers not legislative in character,⁴⁴ and affirmations of legislative power inserted either to avoid a too extensive interpretation of various limitations upon legislative power⁴⁵ or to require legislative authority for other governmental action. (4) It renders legislative action in certain fields imperative.⁴⁶ And (5) it imposes express limitations upon the exercise of legislative power.⁴⁷

Thus, as was said of the Constitution of 1776, the present Constitution is much in the nature of a political power of attorney. It creates the agencies of government and carries the people's grants of power and their mandatory, permissive, and negative instructions, to those agencies. Each provision has its own particular significance. Under the grant theory of legislative power, a court is more likely to give due effect to the special function of each individual clause, than under the inherent theory. It will be less prone, presumably, to warp the purpose of a given provision in order to find within it a hidden restriction upon the General Assembly. Probably much of the notably liberal constitutional construction in North Carolina has resulted from such an attitude.

⁴¹ See the authorities cited in note 27, *supra*.

⁴² See W. F. Dodd, *State Government*, New York, 1922, 103 *et seq.*

⁴³ *E.g.*, Art. 10, relating to homesteads.

⁴⁴ *E.g.*, the power to remove judges from office for cause. Art. 4, sec. 31.

⁴⁵ *E.g.*, after the limitations on special legislation, "The general assembly shall have power to pass laws regulating matters set out in this section." Art. 2, sec. 29.

⁴⁶ *E.g.*, the establishment of a department of agriculture, of mechanics, of mining, and of normal instruction. Art. 9, sec. 14.

⁴⁷ See W. F. Dodd, *The Problem of State Constitutional Construction*, 20 Col. L. Rev. 635, for a classification of state constitutional limitations with reference to the opportunities afforded for judicial construction.