OPINION
53-71

March 18, 1953 (OPINION)

LEGISLATION

RE: Vote Required for Initiated Measure

We have your request for an opinion as to the vote needed in the House and Senate of the Thirty-third Legislative Assembly to legally pass Senate Bill 269.

In searching the records, we find that the law establishing the Board of Administration was originally passed in 1919. Thereupon the said measure was submitted to the people of the state on a referendum petition and was approved by the people in the 1920 election.

Thereafter, we find that the 1931 legislative assembly enacted chapter 265 wherein the legislature made substantial changes in the various sections which are now dealt with by Senate Bill 269. I have checked the legislative journals and I find that this bill, being House Bill 301 of the 1931 session, passed the House and the Senate with a majority vote, was signed by the president of the Senate and the speaker of the House, and finally approved by the governor on March 11, 1931. I can find no action having been taken as to this law by our supreme court. For some unexplainable reason no one seems to have paid any attention to this amendment of the original Board of Administration law. Thereafter on several occasions certain sections of the original Board of Administration Act were amended and one section in particular repealed.

In the original Board of Administration Act, adopted in 1919, we find that the Board of Administration was given supervision and administration of all state penal, charitable, and educational institutions of the state and the general supervision of the public and common schools of the state. In short, it had supervision and control over all education in the state of North Dakota.

In 1920 there was submitted to the people of North Dakota an initiated measure amending section 1109 of the Compiled Laws of the State of North Dakota for the year 1913, which law was approved by the people on November 2, 1920. This Act gave to the State Superintendent of Public Instruction the charge and supervision of the common schools of the state of North Dakota, thereby removing from the Board of Administration a considerable portion of the duties assigned to said Board by the Act of 1919.

In the election held in 1938, there was submitted to the people of the state of North Dakota a constitutional amendment known as Article 54 which establishes a State Board of Higher Education. This Act goes into considerable detail in designating the duties of this Board and removes from the Board of Administration the supervision and control of all institutions of higher education.

From the above analysis of the history of the legislation it will be

noted that the original act creating the Board of Administration has been emasculated to such an extent that the only duties remaining are the duties of supervising the charitable and penal institutions of the state.

The question that now confronts us is as to what extent an act which has been approved by the people can be modified and changed without destroying the special provision that is provided for in section 25 of the Constitution which provides that. "No measure enacted or approved by a vote of the electors shall be repealed or amended by the legislature, except upon a yea and nay vote upon roll call of two-thirds of all the members elected to each house". The question is one of considerable doubt and it would be desirable to have this matter tested in the Supreme Court of our state. However, we find that our Supreme Court has dealt with a somewhat similar question in the case of State ex rel Strutz v. Baker, 71 N.D. 153. Three members of the Supreme Court of that date held, among other things, "It is also clear that it is the constitutional intent that such an initiated measure shall remain a law, except in so far as it may be amended by its agent in a constitutional manner. Certainly, when this agent, vested with the power to amend under certain circumstances, amends only in part, the portion that is unamended still remains as the initiated measure and before such part may be changes, it must receive the constitutional vote required of the agent, the legislature".

In the legislation referred to heretofore in this opinion there has been no direct amendment or repeal of section 1 of chapter 71 of the 1919 session laws which establishes the said Board of Administration but all the amendments have been made by specific acts removing from the Board of Administration the larger or greater portion of its duties.

We are much impressed by the concurring opinion of two members of our Supreme Court in the case heretofore referred ton in which they take exception to the reasoning of the majority of the court. In their especially concurring opinion, we find this, "Prior to the adoption of section 25 of the Constitution the legislative power of the state was vested in the legislature. Section 25 vested that power in both the legislature and the people. Except where specifically provided by the Constitution, laws enacted by either the legislature or the people are of equal rank. They are all subject to amendment or repeal by the action of either the legislature or the people".

Again, we find this, "One legislative assembly may not write into the laws a statute which a succeeding assembly may not amend or repeal by a majority vote. The majority opinion would modify that principle by making an exception of legislative amendments to popular measures and thus permit one legislature by amendment to incorporate into a popular measure provisions of laws, germane thereto, which were never thought of by the framers of the measure or the people who enacted it thereby giving to these new provisions the same sanctity as the old and tying the hands of majorities in succeeding legislative assemblies. This modification is a two-edged sword that may sever some of the sinews of popular government while seeming to shield others".

As indicated hereto, we are in serious doubt as to the legal requirements. However, we are also of the opinion that if the present question was presented to our Supreme Court that they would undoubtedly adhere to the precedent established in the case of Strutz v. Baker referred to above.

For the above reasons, it is our opinion that Senate Bill 269 would require a two-thirds vote in order to be legally enacted by the legislative assembly.

ELMO T. CHRISTIANSON

Attorney General