has no recognized state government; and the powers of a convention assembled at such a time are not necessarily the same as those of a convention assembled under an existing constitution for the regular purpose of its revision or amendment.[6]

This annotation deals only with situations in which by its terms a legislative enactment purports to limit the powers of a constitutional convention, and does not include the broader question whether independently of and apart from the terms of such legislative enactment, the power of a constitutional convention is subject to other limitations, inherent or arising from the existing constitution, for instance, whether a constitutional convention has "legislative" powers.[7]

* * *

Attention is called to the fact that where the question under annotation affects the validity of a new constitution as adopted by a constitutional convention and does not arise until some time after the new constitution has been promulgated and acted upon by the people, the courts are apt to leave the question open, proceeding upon the theory that it is the duty of the court to treat the new constitution as valid, since it has been so recognized after its promulgation and great interests have already arisen under it.[8]

IN GENERAL

In the absence of express constitutional provisions specifying the powers

[6] As stated in *Ex parte* Birmingham & A. R. Co., 145 Ala. 514, 42 So. 118 (1905), due to the exigencies of the time, which required prompt and immediate action, the powers of a convention called into being at a time when Alabama had no recognized civil government may be broader than those of a convention called for revising or amending an existing constitution.

"No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a new government. Governments thus accepted and ratified by silent submission afford no precedents for the power of a convention in a time of profound tranquillity, and for a people living under self-established, safe institutions." Wood's Appeal, 75 Pa. 59 (1874).

"In one point of view, a convention may be illimitable. It is, however, then a revolutionary and not a constitutional convention. It is one which assembles to resolve society into its elements, and to which the people necessarily give all power." O'Neall, J., in State *ex rel.* M'Cready v. Hunt, 20 S.C.L. (2 Hill) 1, 222 (1834).

[7] *See* Bragg v. Tuffts, 49 Ark. 554, 6 S.W. 158 (1887); Pender v. Gray, 149 La. 184, 88 So. 786 (1921); State *ex rel.* Hoffman v. Judge of Div. B, Civil Dist. Ct., 149 La. 363, 89 So. 215 (1921); Opinion of Justices, 76 N.H. 612, 85 A. 781 (1889) (dealing, inter alia, with the question whether a constitutional convention or the legislature has the power to fix the date when amendments to the Constitution are to take effect).

In State *ex rel.* Hoffman v. Judge of Div. B, Civil Dist. Ct., 149 La. 363, 89 So. 215 (1921), the court held invalid a resolution adopted by a constitutional convention to the effect that if a member or officer of the convention be employed as attorney in any cause pending in the courts of the state he should be entitled to a stay of all proceedings in and continuance of the cause until ten days after the final adjournment of the convention. To the same effect is Pender v. Gray, 149 La. 184, 88 So. 786 (1921), where the court pointed out that under the state Constitution the legislative power of the state was vested in the general assembly, and that nowhere in the act calling the constitutional convention into existence was authority given to the convention to pass or enact laws; that is, powers to enact laws without incorporating them in the Constitution.

See also Downs v. Birmingham, 240 Ala. 177, 198 So. 231 (1940), and *Ex parte* Birmingham & A. R. Co., 145 Ala. 514, 42 So. 118 (1905), *infra*, III.

[8] *See* Miller v. Johnson, 92 Ky. 589, 18 S.W. 522, 15 L.R.A. 524 (1892), and Taylor v. Com., 101 Va. 829, 44 S.E. 754 (1903).