

## Art. XVI, § 27, 28

The law of torts, recovery for wrongful death, entitlement to exemplary damages, etc., should be left to the legislature and courts to develop. The inclusion of narrow rules on these topics in the constitution too frequently results in the imposition of unintended limitations on the power of the legislature and courts to do justice.

Sec. 27. VACANCIES FILLED FOR UNEXPIRED TERM. In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only.

### History

This section first appeared in the Constitution of 1876 and apparently was included without significant debate.

### Explanation

The purpose of this section is to keep the beginning and end of office terms uniform. At common law, one elected to fill a vacancy is entitled to serve the full term prescribed for the office. (*Banton v. Wilson*, 4 Tex. 400 (1849).) Obviously, under such a system the expiration of terms of various offices eventually would be scattered randomly throughout the year, making it virtually impossible to hold a general election. This section operates together with Section 12 of Article IV, which authorizes the governor to fill vacancies in state and district offices by appointment. Such appointments are effective only until the next general election; then this section comes into play to provide that those so elected serve only the unexpired term.

When a vacancy occurs in either house of the legislature, the governor is not authorized to fill it by appointment; rather, he must call a special election. (Sec. 13 of Art. III.) Again, Section 27 then comes into play to limit the term of the person so elected.

### Comparative Analysis

Eight other states have provisions similar to Section 27.

### Author's Comment

This provision should be combined with Section 13 of Article III and Section 12 of Article IV. A properly drafted combination of these provisions would permit deletion of many vacancy provisions that are scattered throughout the constitution. (See, e.g., Secs. 2, 4, 7, 11, and 29 of Art. V, each containing provisions for filling vacancies on various courts.)

Sec. 28. WAGES NOT SUBJECT TO GARNISHMENT. No current wages for personal service shall ever be subject to garnishment.

### History

Garnishment of wages is a creditor's remedy that evolved in the 19th century. It did not exist in early common law. The common-law writ of attachment permitted a defendant's property to be seized, but only to compel his appearance after he had failed to respond to a summons. If the defendant still failed to respond, the goods went to the state rather than to the creditor. If the defendant responded to the summons, his goods were promptly returned to him. There was no method by which a creditor could reach a debtor's future earnings. The American colonies

made some inroads into this immunity in the 17th and 18th centuries by passing statutes that allowed a creditor to reach a debtor's property if he had reason to believe that the debtor was about to abscond from the jurisdiction. (See Comment, "Some Implications of Sniadach," 70 *Columbia L. Rev.* 942, 945-46 (1970).)

During the early 19th century, ". . . there was a consolidation of creditor's remedies into the all-purpose writ of execution. Concurrently, there was a vast judicial as well as legislative expansion of the type and character of debtors' properties that could be reached by the new writ, going beyond vested estates in realty and corporeal assets in personalty to reach future interests, choses in action, and intangible assets. Wage garnishment followed as a logical extension of this trend." (Sweeney, "Abolition of Wage Garnishment," 38 *Fordham L. Rev.* 197, 201, (1969).) The Texas prohibition against garnishment, which first appeared in the 1876 Constitution and has been unchanged since, apparently was a reaction to this expansion of creditors' remedies.

#### Explanation

Garnishment is a legal procedure by which an employer is ordered not to deliver some or all of an employee's wages to the employee, but to hold them for the benefit of a creditor. The effect of Section 28 is quite simple: It flatly prohibits the practice in Texas. Once the money reaches the employee, however, it is no longer "current wages" and therefore not protected by this section. Not surprisingly, there has been considerable litigation to define "current wages." The term has been defined as compensation to be paid periodically or from time to time for personal services, as the services are rendered or the work performed. (*Miller v. White*, 264 S.W. 176 (Tex. Civ. App.—Austin 1924, *no writ*); *First Nat'l Bank of Cleburne v. Graham*, 22 S.W. 1101 (Tex. Ct. App. 1889).) Section 28 and the statutes enacted thereunder have been construed as necessarily implying a relationship of master and servant, or employer and employee, and therefore compensation due to an independent contractor is not exempt. (*Brasher v. Carnation Co. of Texas*, 92 S.W.2d 573 (Tex. Civ. App.—Austin 1936, *writ dismissed*.) Thus, money due a physician under a contract with the city is exempt from garnishment (*Sydnor v. City of Galveston*, 15 S.W. 202 (Tex. Ct. App. 1890)), but money due an attorney for legal services is not exempt because the attorney is not the client's employee. (*First Nat'l Bank of Cleburne v. Graham*.) Sales commissions are considered wages (*Alemite Co. v. Magnolia Petroleum Co.*, 50 S.W.2d 369 (Tex. Civ. App.—Fort Worth 1932, *no writ*) (gas station operator); (*J.M. Radford Grocery Co. v. McKean*, 41 S.W.2d 263 (Tex. Civ. App.—Fort Worth 1931, *no writ*) (salesman)), but proceeds of a claim for loss of wages under an accident insurance policy are not exempt, even though the premiums were paid with exempt wages. (*Mitchell v. Western Casualty & Guaranty Ins. Co.*, 163 S.W. 630 (Tex. Civ. App.—Galveston 1914, *no writ*.) However, all compensation received under the workmen's compensation law is exempt. (Tex. Rev. Civ. Stat. Ann. art. 8306 (3).)

Past-due wages left with the employer because they cannot be collected are exempt, but past wages voluntarily left with the employer are not "current wages" and thus are not exempt. (*Davidson v. F. H. Logeman Chair Co.*, 41 S.W. 824 (Tex. Civ. App. 1897, *no writ*.) The courts have held that the purpose of Section 28 is to exempt the wage until it is due and in possession of the earner; if he is unable to collect it when due, the exemption continues until he can collect, in the exercise of ordinary diligence. (*Lee v. Emerson-Brantingham Implement Co.*, 222 S.W. 283 (Tex. Civ. App.—Dallas 1920, *no writ*.)

As early as 1889 it was determined that Section 28 was not limited to residents

## Art. XVI, § 30

of the state but also applied to nonresidents who earn wages in Texas. (*Bell v. Indian Live-Stock Co.*, 11 S.W. 344 (Tex. 1889).)

### Comparative Analysis

All 50 states and the District of Columbia have statutes concerning garnishment of wages. (See *Sweeney*, p. 203.) Nearly all of these permit some form of garnishment; in fact, Texas is the only state with an absolute statutory or constitutional prohibition against garnishment. At least one other state, however, has a statutory policy disfavoring garnishment. (See Pa. Stat. Tit. 42, sec. 886.)

### Author's Comment

This section may be one instance in which the Texas Constitution of 1876 was ahead of its time. In 1969 the United States Supreme Court said state laws that permit garnishment of wages before a court has entered a judgment against the debtor are unconstitutional. The court said this amounts to a taking of property without due process of law. (*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).) This decision is not as sweeping as the Texas prohibition against garnishment, however, because the decision still permits garnishment of wages pursuant to a court judgment. But since *Sniadach*, all forms of wage garnishment have come under attack. One of the major arguments is the apparent connection between such garnishment and a high incidence of bankruptcy; the debtor files for bankruptcy to terminate the garnishment of his wages. (See Brunn, "Wage Garnishment in California," 53 *California L. Rev.* 1214, 1234-38 (1965).) Texas is said to have the second lowest per capita personal bankruptcy rate in the nation. (*Id.*, at 1236.) Other arguments against garnishment are that it encourages overextension of credit by marginal high-risk lenders, creates an undesirable adversary relationship between employer and employee, is unnecessary because creditors can use other devices to secure payment, and is used mostly against the poor and ignorant. (See *Sweeney*, 38 *Fordham L. Rev.*, at 222-23.)

On the other hand, if a debtor has no assets that can be attached (and because of the homestead and personal property exemptions created by Secs. 49-53 of Art. XVI a person can have significant assets and still be "judgment-proof"), the only effective method of collection may be garnishment of his wages. Moreover, since *Sniadach* there is less possibility of abuse, because there can be no garnishment until after judgment.

If the decision is to continue the flat ban against garnishment, there is no reason to change the language of present Section 28; it is brief and clear. One possible alternative to the present absolute ban would be a provision permitting garnishment of wages only for specified purposes, such as to collect child-support payments.

**Sec. 30. DURATION OF OFFICES; RAILROAD COMMISSION.** The duration of all offices not fixed by this Constitution shall never exceed two years; provided, that when a Railroad Commission is created by law it shall be composed of three Commissioners who shall be elected by the people at a general election for State officers, and their terms of office shall be six years; provided, Railroad Commissioners first elected after this amendment goes into effect shall hold office as follows: One shall serve two years, and one four years, and one six years; their terms to be decided by lot immediately after they shall have qualified. And one Railroad Commissioner shall be elected every two years thereafter. In case of vacancy in said office the Governor of the State shall fill said vacancy by appointment until the next general election.

## History

The 1845, 1861, 1866, and 1869 Constitutions each provided: "The duration of all offices fixed by this Constitution shall never exceed four years." (The 1866 Constitution added two exceptions—one providing that superintendents of the lunatic and other asylums established by law held office "during good behavior" and another permitting the governor to remove his appointees from office for "good cause." The 1869 Constitution omitted the two exceptions. See Art. VII, Sec. 10 (1845 and 1861) and Sec. 13 (1866); Art. XII, Sec. 38 (1869).) As adopted in 1876, this section retained the language of the prior constitutions, but since the 1875 Convention insisted on short terms for all offices, it reduced the maximum term from four to two years.

An 1894 amendment added the remainder of the section relating to the election, membership, and terms of office of the Railroad Commission. The Railroad Commission had been created in 1891, following adoption in 1890 of an amendment to Section 2 of Article X that dispelled doubts about the legislature's power to create a commission to regulate railroads. (See the *History* of that section.) Initially, the railroad commissioners were appointed by the governor and, as this section then required, held office for terms of two years. (See *Tex. Laws 1891, Ch. 51, sec. 10, 10 Gammel's Laws, pp. 57-58.*) During the next gubernatorial campaign, in 1892, one candidate, who was the attorney for all but two of the railroads in the state, contended that the commissioners should be elected. His opponent, Jim Hogg, the incumbent governor, opposed election of the commissioners unless this section was amended so that all three commissioners would not be elected every two years. Hogg won the election. The next session of the legislature submitted and the people adopted the current version of Section 30, making the commission elective with six-year staggered terms.

## Explanation

*Terms.* With the exception of senators, district and appellate judges, and notaries public, the 1876 Constitution originally fixed the terms of all constitutional officers at two years. (Senators and district judges were given four-year terms, appellate judges were given six-year terms, and the terms of notaries public were not fixed.) This section maintained consistency by limiting the terms of offices created by statute (and of notaries public) to two years as well. Through the years, however, amendments have increased the terms of all "short-term" constitutional officers except members of the house of representatives and today the only other officers who are limited by the constitution to two-year terms are those covered by this section.

Periodic amendments have eroded the coverages of this section, however, and now it is more an exception than a rule. In addition to the longer terms required for railroad commissioners by the 1894 amendment to this section, other specific exceptions are scattered throughout the constitution. Section 30a of this article authorizes terms of six years for members of state—but not district or local—boards if the terms are staggered and one-third of them expire every two years. (See *San Antonio I.S.D. v. State ex rel. Dechman*, 173 S.W. 525 (Tex. Civ. App.—San Antonio 1915, writ *ref'd*); *Lower Colorado River Authority v. McCraw*, 125 Tex. 268, 83 S.W.2d 629 (1935).) Section 30b excludes appointive municipal officers governed by a civil service system. Sections 64 and 65 of this article require four-year terms for some elective local offices created by statute and Section 30 of Article V requires four-year terms for county-level courts and criminal district attorneys created by statute. Section 11 of Article XI authorizes municipalities to provide terms of office of up to four years. Sections 8 and 16 of

## Art. XVI, § 30

Article VII authorize terms of up to six years for offices in the public school and higher education systems. Section 23 of Article IV requires four-year terms for statutory officers who are elected statewide.

In the absence of an exception elsewhere in the constitution, however, this section limits the term for any office, including not only a state office but also a county, city, school district, and special district office. (See, for example, *Jordan v. Crudington*, 149 Tex. 237, 231 S.W.2d 641 (1950) (judge of statutory, county-level court); *Kimbrough v. Barnett*, 93 Tex. 301, 55 S.W. 120 (1900) (school district board of trustees); *Donges v. Beall*, 41 S.W.2d 531 (Tex. Civ. App.—Fort Worth 1931, writ *ref'd*) (deputy county clerk); *White v. Fahring*, 212 S.W. 193 (Tex. Civ. App.—Galveston 1919, writ *ref'd*) (irrigation district board of directors); *Cawthon v. City of Houston*, 71 S.W. 329 (Tex. Civ. App. 1902, writ *ref'd*) (city police officers); Tex. Att'y Gen. Letter Advisory No. 91 (1975) (state auditor).) Section 30 applies only to civil officers, however, and does not restrict the term of a military officer (*Texas Nat'l Guard Armory Bd. v. McCraw*, 132 Tex. 613, 126 S.W.2d 627 (1939)). In *San Antonio I.S.D. v. Water Works Bd. of Trustees* (120 S.W.2d 861 (Tex. Civ. App.—Beaumont 1938, writ *ref'd*)), the court intimated that this section does not apply to city officers responsible for management of proprietary, as opposed to governmental, operations. Finally, the attorney general has ruled that this section does not apply to state members of a commission created pursuant to an interstate compact, reasoning that they are interstate, not state, officers. (See Tex. Att'y Gen. Op. No. M-814 (1971); but see Tex. Att'y Gen. Op. No. H-165 (1973).)

This section only imposes a maximum term, and a term may be fixed at less than two years. If the law creating an office does not prescribe its term, the courts have read this section to impose a two-year term. (See, for example, *Donges v. Beall*, *supra*.) If the law creating the office prescribes a term of more than two years in violation of this section, the longer term is invalid. The courts usually will reform the term to two years and preserve the office and its powers and duties and uphold the actions of the officer if the issue reaches final decision before the end of the first two years of the term. (See *Jordan v. Crudington*, *supra*; *White v. Fahring*, *supra*.) However, in *Lower Colorado River Authority v. McCraw*, cited above, the court stated that if the terms of board members for the special district involved violated this section “the entire act must fall, because the district would be left without a governing body.” (125 Tex., at 276; 83 S.W.2d, at 634.) The reported cases have not considered the validity of an officer’s official acts that occur after the first two years of a term fixed at more than two years in violation of this section.

Not every public servant holds an “office” as opposed to a position or employment. A position filled by public election clearly is an office, and one filled by executive appointment subject to senate confirmation is probably an office. Whether a position filled by some other kind of appointment is an office or an employment is not so readily discernible. The distinction is important, however, because an employee may be discharged at any time while an officer may be removed only by impeachment or some other trial. (See Art. XV, particularly Sec. 7, and Art. V, Sec. 24. But see *Bonner v. Belsterling*, 104 Tex. 432, 138 S.W. 571 (1911) (removal of city officers by recall during term is permissible; the cited sections do not apply to city officials).) After expiration of his term an officer may be ousted at any time by the selection and qualification of a successor, and civil service or other legal restrictions on discharging employees can provide a holdover officer no protection.

Initially, the courts defined “officer” broadly as one whose governmental position is created by law and who “is invested with some portion of the sovereign

## Art. XVI, § 30

functions of government, to be exercised by him for the benefit of the public.” (See *Kimbrough v. Barnett*, 93 Tex. 301, 310, 55 S.W. 120, 123 (1900).) Under that definition, the courts have held that any one who performed official duties, whether by virtue of his position or pursuant to a legal delegation of authority by a superior, was an officer. (See, e.g., *Donges v. Beall*, 41 S.W.2d 531 (Tex. Civ. App.—Fort Worth 1931, writ *ref'd*) (deputy county clerk); *Cawthon v. City of Houston*, 71 S.W. 329 (Tex. Civ. App. 1902, writ *ref'd*) (peace officers).)

In 1937, however, the supreme court narrowed the application of the definition of “officer” and, thus, the application of this section by ruling that policemen appointed by a city manager under a charter provision authorizing him to determine how many officers and patrolmen in the police department were necessary were not “officers.” To be an officer, a law (*i.e.*, charter or ordinance in the case of a city) must establish the specific position or a specific number of positions, and a law authorizing an executive to hire whatever number is necessary does not *create* an indefinite number of offices. (*City of Dallas v. McDonald*, 130 Tex. 299, 103 S.W.2d 725.) Although the *McDonald* opinion is ambiguous and could be interpreted to mean that Dallas police officers had not been legally acting as peace officers, the court, in denying a motion for rehearing (130 Tex. 299, 107 S.W.2d 987 (1937)), ruled that the policemen had been discharged in compliance with the city’s civil service provisions, assuming that they had been legally employed and had rights under the civil service law. Clearly, the position of the policeman was legal; it just was not an “office.”)

Subsequent to the *McDonald* decision the supreme court also narrowed the second part of the test distinguishing offices from other public positions. The “sovereign functions of government” vested in a position must be exercised by the occupant of the position “in his own right” or “largely independent of others” if he is to be an officer instead of an employee. (See *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974); *Aldine I.S.D. v. Standley*, 154 Tex. 547, 280 S.W.2d 578 (1955); *Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex. Civ. App.—Galveston 1949, writ *ref'd*.) Thus, a subordinate apparently is not an officer unless duties separate and different from those of his superior are conferred by law on his specific position with no ultimate responsibility in his superior.

*Railroad Commission.* As the *History* of this section notes, the amendment to this section authorized longer terms for the commissioners than this section would have permitted without the amendment, required the terms to be staggered, and made the offices elective. In authorizing the governor to appoint to vacancies on the commission without senate confirmation, the amendment established an exception to Section 12 of Article IV.

In an early case, one of the parties contended that this section and Section 2 of Article X, together, created the commission as a constitutional agency, that it could exercise only the powers enumerated in Section 2, and that the legislature lacked authority to confer the additional powers it had conferred, *i.e.*, regulation of natural gas rates. In rejecting that contention, the court stated that the legislature may abolish the commission and either discontinue the services it performs or distribute them among other agencies (*City of Denison v. Municipal Gas Co.*, 117 Tex. 291, 3 S.W.2d 794 (1928)).

### Comparative Analysis

*Terms.* Three state constitutions prohibit terms for life or during good behavior, and a handful limit terms not fixed by the constitution to a specified number of years—usually four. Apparently only one other state limits the terms to as short a period as two years. The majority of states either provide that terms shall

## Art. XVI, § 30a

be fixed by law or do not mention terms for nonconstitutional offices, although a few provide that an officeholder's term may not be extended after he is selected. The *Model State Constitution* provides that the heads of administrative departments are appointed and removed by the governor and that other officers in the administrative service are appointed and removed as provided by law. Local governmental organization is left to the legislature and home-rule charters. Thus, mention of terms is unnecessary.

*Railroad Commission.* A number of state constitutions create or authorize creation of a commission with the power to regulate railroads, common carriers, or public utilities generally, but no other constitution contains a provision comparable to the portions of this section relating to the Railroad Commission. The *Model State Constitution* mentions regulatory commissions only to authorize the legislature to exclude them from the limitation of executive departments to 20 (Sec. 5.06).

### Author's Comment

The gradual accretion of constitutional exceptions to the term limitations originally prescribed by this section, which are enumerated in the *Explanation*, suggests that a constitutional limitation on the duration of terms of statutory offices is unwise, particularly if the duration fixed is short. It is unlikely that a legislative body would authorize terms of substantially greater duration than those provided in the constitution for elective, constitutional officers without a compelling reason for doing so. Because of the unforeseeability of the development of a compelling reason, however, the legislature should have the flexibility, should it arise. Of course, the duration of a term of office would be of less importance if the constitutional restrictions on removal in Article XV and Section 24 of Article V were eliminated for appointive officers.

Sec. 30a. MEMBERS OF BOARDS; TERMS OF OFFICE. The Legislature may provide by law that the members of the Board of Regents of the State University and boards of trustees or managers of the educational, eleemosynary, and penal institutions of the State, and such boards as have been, or may hereafter be established by law, may hold their respective offices for the term of six (6) years, one-third of the members of such boards to be elected or appointed every two (2) years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law, and the Legislature shall enact suitable laws to give effect to this section.

### History

This section was added in 1912.

### Explanation

This is an exception to the preceding section. During the first quarter century under this constitution the legislature frequently forgot about the two-year limit on terms in the preceding section and occasionally authorized terms of up to eight years on some governmental boards. (See *Cowell v. Ayers*, 110 Tex. 348, 220 S.W. 764 (1920).) Finally, the courts pointed out that provision and, in the process, invalidated the acts creating the offices. (See *Kimbrough v. Barnett*, 93 Tex. 301, 55 S.W. 120 (1900); *Rowan v. King*, 94 Tex. 650, 55 S.W. 123 (1900).) Subsequently, the legislature proposed and the people adopted this amendment to provide more flexibility.

## Art. XVI, § 30b

Soon after adoption of this section the legislature provided for six-year terms for trustees of school districts, which had been the subject of the *Kimbrough* and *Rowan* cases. The courts quickly concluded that the terms of this section apply only to state boards and not to local or district boards (*San Antonio I.S.D. v. State ex rel. Dechman*, 173 S.W. 525 (Tex. Civ. App.—San Antonio 1915, writ *ref'd*)). A state board is distinguished from a local board by the extent of its jurisdiction—that is, at least some of its powers are statewide—and by the geographical limitations on residence of its members—that is, at least some members of a state board may be chosen from all parts of the state (*Lower Colorado River Authority v. McCraw*, 125 Tex. 268, 83 S.W.2d 629 (1935)). One unusual application of this section is that it requires the membership of a board, to be eligible for the longer terms, to be divisible by three. A seven-member board does not qualify (*Lower Neches Valley Authority v. Mann*, 140 Tex. 294, 167 S.W.2d 1011 (1943)). Whether the subsequent adoption in 1928 of Section 16 of Article VII, authorizing terms up to six years for “State institutions of higher education,” replaces the requirement in this section that terms of “members of the Board of Regents of the State University” be staggered and that the number of members be divisible by three has not been decided. That amendment obviously supplanted this section for other state institutions of higher education and, thus, probably did for *the* state university as well.

In one case a party contended that this section gave constitutional status to the “boards of trustees or managers of the educational, eleemosynary, and penal institutions” existing at the time of adoption of this section and, therefore, that the legislature could not abolish them. The court had little difficulty rejecting the argument. (*Cowell v. Ayers*, 110 Tex. 348, 220 S.W. 764 (1920).)

### Comparative Analysis

See the *Comparative Analysis* of Section 30 of this article.

### Author’s Comment

See the *Author’s Comment* on Section 30 of this article.

Sec. 30b. CIVIL SERVICE OFFICES; DURATION. Wherever by virtue of Statute or charter provisions appointive offices of any municipality are placed under the terms and provisions of Civil Service and rules are set up governing appointment to and removal from such offices, the provisions of Article 16, Section 30, of the Texas Constitution limiting the duration of all offices not fixed by the Constitution to two (2) years shall not apply, but the duration of such offices shall be governed by the provisions of the Civil Service law or charter provisions applicable thereto.

### History

This section was added in 1940.

### Explanation

As the *Explanation* of Section 30 of this article points out, under this constitution an “officer” has a term of office during which he may be removed only by a “trial.” After his term expires, however, he may be ousted at any time by selection and qualification of a successor. Thus, the procedures for discharging employees prescribed by a merit or civil service system of public employment cannot apply to an officer.

Prior to the adoption of this section in 1940, the courts had applied an overly

## Art. XVI, § 31

inclusive definition of “officer” and, as a consequence, had frustrated the implementation of civil service systems. (See the *Explanation* of Sec. 30 for a discussion of the definition of “officer.”) Adoption of this section removed the obstacles to proper functioning of civil service for a “municipality.” Presumably, this means only an incorporated city. Section 3 of Article XI, However, indicates that counties and other political subdivisions may be municipal corporations—“county, city, or other municipal corporation”—and the courts have described counties as “quasi-municipal corporations.” (See *Stratton v. Commissioners Court of Kinney County*, 137 S.W. 1170, 1177 (Tex. Civ. App.—San Antonio 1911, *writ ref’d*); see also the *Explanation* of Sec. 1 of Art. XI.) The supreme court did not mention that possibility when it decided a challenge of a county civil service system. (See *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974).)

By the time this section was adopted, the courts had changed course and narrowed the definition of “officer” to the extent that this section probably was no longer necessary. (See the discussion of *City of Dallas v. McDonald* in the *Explanation* of Sec. 30.) A recent supreme court decision upholding the application of a county civil service system makes it clear that this section is unnecessary for the implementation of a civil service system. (See the *Stewart* case cited earlier.)

It should be noted that the section of the constitution that authorizes cities to provide for four-year terms for city officials also excepts employees governed by civil service from the term requirement. (See Sec. 11 of Art. XI.)

### Comparative Analysis

Approximately 15 states have a constitutional provision mentioning civil service or a merit system for public employees. No other state, however, appears to have a provision similar to this one. The provisions in other state constitutions are designed to abolish a “spoils system” of public employment rather than to create an exception to term requirements. Most of the states simply authorize or require the legislature to establish a merit system for employment and promotion; some of them establish a commission to administer the system and impose some enforcement provisions. The *Model State Constitution* provides:

MERIT SYSTEM. The legislature shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by other evidence of competence. (Sec. 10.01)

### Author's Comment

As the *Explanation* notes, this section was adopted to remove judicially erected obstacles to the operations of local civil service systems that apparently had already been lowered by judicial decision when the section was adopted. Nine years later, the courts lowered the obstacles even further, and it is now clear that a constitutional provision excepting “officers” subject to civil service from constitutional term requirements is unnecessary. (See *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974); *Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex. Civ. App.—Galveston 1949, *writ ref’d*.)

Sec. 31. PRACTITIONERS OF MEDICINE. The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish

## Art. XVI, § 31

persons for mal-practice, but no preference shall ever be given by law to any schools of medicine.

### History

This section originated in the Constitution of 1876 and has not been changed. Its adoption reflected a widespread move in the latter part of the 19th and early 20th centuries to control admission to medical practice. State medical societies concerned about the medical profession's public image sponsored regulatory legislation "as a response to the failure of the profession's efforts to control quackery, deception, and medical incompetence." (Quirin, "Physician Licensing and Educational Obsolescence," 36 *Albany L. Rev.* 503, 505 (1972).)

### Explanation

Section 31 does two things: (1) it authorizes the legislature to regulate the practice of medicine and to punish malpractice and (2) it prohibits preferential treatment of any "schools of medicine." The first portion of the section has caused no difficulty, probably because it is superfluous. Legislative regulation of the practice of medicine by whatever means necessary to protect the people (within equal protection limitations) is within the police power of the state, without reference to constitutional authorization. (See *Collins v. Texas*, 223 U.S. 288, 296 (1912); Ex parte *Halsted*, 147 Tex. Crim. 453, 182 S.W.2d 479 (1944).) This power necessarily includes the power to punish illegal practice of medicine.

The more important—and confusing—portion of Section 31 is the last clause. The term "school of medicine" as used here does not refer to an institution for the training of physicians; rather, the courts have said it means "the system, means, or method employed, or the schools of thought accepted, by the practitioner." (Ex parte *Halsted*, 147 Tex. Crim. 453, 466, 182 S.W.2d 479, 487 (1944).) This interpretation apparently was first suggested by the supreme court in 1898 (in *Dowdell v. McBride*, 92 Tex. 239, 47 S.W. 524) and has never been challenged. Thus the effect of the clause is to prohibit the legislature from discriminating against particular kinds of practitioners, and the clause has been invoked primarily in disputes between conventional medical doctors and other types of practitioners, such as chiropractors, chiroprodists, naturopaths, and osteopaths.

Section 31 contains a built-in tension. A necessary purpose of the licensing clause is to permit the legislature to determine which practitioners may be trusted to treat the public, and then to "discriminate" against the rest by barring them from practicing. But the last clause of Section 31 expressly prohibits the legislature from basing this discrimination on the school of medical thought to which the practitioner belongs.

The courts have resolved this tension primarily in two ways. First, they have held that Section 31 permits a practitioner of any school of medical thought to practice his profession as he sees fit—as long as he first obtains a conventional medical license. So long as all who wish to practice medicine are subjected to the same requirements as to education, examination, and other qualifications, the courts say there is no unconstitutional discrimination. If one is licensed to practice medicine, then he may employ "his own peculiar method of diagnosis and treatment." (See, e.g., *Schlichting v. Texas State Board of Medical Examiners*, 158 Tex. 279, 310 S.W.2d 557 (1958); *Germany v. State*, 62 Tex. Crim. 276, 137 S.W. 130 (1911).) For example, an osteopath must meet the same licensing requirements as a medical doctor; only then is he free to practice osteopathy.

The second device for accommodating practitioners other than conventional medical doctors is implemented by permitting the legislature to define medical

## Art. XVI, § 31

practice. If the activity of a particular group of practitioners is not considered the practice of medicine, then the legislature is free to “discriminate” by prescribing different licensing requirements for that profession. This is the method by which dentists and optometrists, for example, are permitted to practice without holding medical licenses. The legislature has defined a practitioner of medicine as any person:

(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall diagnose, treat or offer to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation. . . . (Tex. Rev. Civ. Stat. Ann. art. 4510.)

In addition, the legislature has specifically exempted dentists, optometrists, and chiropractors from the Medical Practice Act (Tex. Rev. Civ. Stat. Ann. art. 4504). These professions have their own less rigorous licensing laws. The supreme court has held that these exemptions are not “preferential treatment” in violation of Section 31 (*Schlichting v. Texas State Board of Medical Examiners*, 158 Tex., at 289; 310 S.W.2d, at 564).

Section 31 does, however, limit the legislature’s power to define medical practice. The legislature cannot prescribe a different and less onerous licensing scheme for a particular profession if its activity is in fact the practice of medicine. The test seems to be whether the art in question involves the whole body and all types of ailments (as in osteopathy and naturopathy) or only a limited portion of the anatomy (as in dentistry, optometry, and chiropractic); if the art involves the former, it is the practice of medicine and an attempt by the legislature to prescribe a separate licensing scheme for that profession is preferential treatment in violation of Section 31. (*Wilson v. State Board of Naturopathic Examiners*, 298 S.W.2d 946 (Tex. Civ. App.—Austin 1957, writ *ref’d n.r.e.*.)

This distinction is the result of considerable trial and error by the legislature. As early as 1909 it was determined that osteopaths came within the definition of practicing medicine and thus must obtain a license. (*Ex parte Collins*, 57 Tex. Crim. 2, 121 S.W. 501 (1909), *aff’d sub nom.*, *Collins v. Texas*, 223 U.S. 288 (1912).) The same determination regarding naturopathy was made in 1957, when the Naturopathy Act was held unconstitutional because the practice of medicine as defined in Tex. Rev. Civ. Stat. Ann. art. 4510 included the practice of naturopathy as defined in the act, and therefore the act, in prescribing different licensing requirements, constituted an unconstitutional preference in favor of naturopathy. (*Wilson v. State Board of Naturopathic Examiners*, 298 S.W.2d 946 (Tex. Civ. App.—Austin, writ *ref’d n.r.e.*), *cert. denied*, 355 U.S. 870 (1957).)

The legislature was equally unsuccessful in its first attempt to regulate chiropractic separately from traditional medical practice. An early court of criminal appeals case had held that chiropractors had to qualify for a license to practice medicine under the same requirements as any other doctor. (*Teem v. State*, 79 Tex. Crim. 285, 183 S.W. 1144 (1916).) In the first Chiropractic Act, passed in 1943, the legislature defined “chiropractic” as limited to treatment of the “spinal column and its connecting tissues.” The court of criminal appeals concluded that this definition embraced the whole body and therefore came within the definition of the practice of medicine; therefore the separate licensing procedures established by the act were unconstitutional as showing preference to chiropractic. (*Ex parte Halsted*, 147 Tex. Crim. 453, 182 S.W.2d 479 (1944).) The present law

regulating the practice of chiropractic successfully limited the definition. (Tex. Rev. Civ. Stat. Ann. art. 4512b.)

Thus to regulate the practice of any of the various fields within the broad area of health care separately from the regulation of the "practice of medicine," the practice in question must be capable of a definition which distinguishes it from the practice of medicine. "While the Constitution forbids any legislation showing preference for any school of medicine, it does not forbid the legislative definition of what does and also of what does not constitute the practice of medicine." (*Baker v. State*, 91 Tex. Crim. 521, 240 S.W. 924 (1922) (upholding Optometry Act).)

The no-preference clause of Section 31 applies only to licensing. It does not prevent discrimination in practice. Thus an osteopath may be excluded from the staff of a public hospital even though he is licensed to practice medicine. (*Hayman v. City of Galveston*, 273 U.S. 414 (1927).) This is true even though the hospital is the only one in town, and even though nonstaff physicians are excluded from the hospital entirely. (*Duson v. Poage*, 318 S.W.2d 89 (Tex. Civ. App.—Houston 1958, writ *ref'd n.r.e.*.)

A curious reference to Section 31 appears in Section 51-a of Article III. The latter section authorizes the legislature to appropriate matching funds for participation in federal programs to provide medical care for welfare recipients. The last paragraph of the section provides that for these purposes the term "medical care" includes the fitting of eyeglasses by optometrists, but does not authorize optometrists to undertake eye treatment or prescribe drugs unless they are licensed physicians. This paragraph is prefaced by the statement, "Nothing in this Section shall be construed to amend, modify or repeal Section 31 of Article XVI of this Constitution . . . ." It is difficult to see how anything in Section 51-a could affect Section 31, even in the absence of this sentence. Apparently the sentence was included merely from an abundance of caution and was intended to eliminate any possibility of inadvertently expanding the permissible scope of optometrists' activities.

#### Comparative Analysis

No other state has a provision comparable to Section 31. However, all 50 states have legislation regulating the practice of medicine. (See generally Epstein, "Limitations on the Scope of Practice of Osteopathic Physicians," 32 *Missouri L. Rev.* 354 (1967).) The *Model State Constitution* has no similar provision.

#### Author's Comment

The first clause of this section, concerning licensing and malpractice, covers matters that are within the police power of the state and therefore require no specific constitutional authorization.

The only significant language in Section 31 is the no-preference clause. As the *Explanation* demonstrates, this clause does *not* prevent discrimination. The legislature is free to establish less onerous licensing requirements for such practitioners as optometrists and chiropractors by excluding them from the definition of "medical practice." The only real effect of the clause is to prevent the legislature from establishing separate licensing requirements for activities that the courts consider to be medical practice, such as osteopathy and naturopathy. As pointed out in the *Comparative Analysis*, no other state has found it necessary to deal with this matter constitutionally. Texas statutes include a prohibition against discrimination "against any particular school or system of medical practice" (Tex. Rev. Civ. Stat. Ann. art. 4504), and both Section 3 of Article I of the state constitution and the Equal Protection Clause of the Fourteenth Amendment of the

## Art. XVI, § 33

federal constitution probably provide more effective protection against discrimination than does the present Section 31. Finally, this clause "has been productive of some rather specious sophistry by both the courts and the Legislature in their efforts to make reasonable distinctions in applicable law based on substantial fact differences." (3 *Constitutional Revision*, pp. 279-80.)

Sec. 33. SALARY OR COMPENSATION PAYMENTS TO AGENTS, OFFICERS OR APPOINTEES HOLDING OTHER OFFICES; EXCEPTIONS; NON-ELECTIVE OFFICERS AND EMPLOYEES. The accounting officers in this State shall neither draw nor pay a warrant or check on funds of the State of Texas, whether in the treasury or otherwise, to any person for salary or compensation who holds at the same time more than one civil office of emolument, in violation of Section 40.

## History

After four amendments in a period of almost 50 years, and two proposed amendments which were defeated by the voters, this section now reads almost as it did in the original Constitution of 1876. That version read: "The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation as agent, officer, or appointee, who holds at the same time any other office or position of honor, trust, or profit, under this State or the United States, except as prescribed in this Constitution."

Although one might guess that Section 33 was added as a reaction to "carpetbag" rule, that is not the case. Rather, it was drafted by the "carpetbaggers" themselves. The provision first appeared in the Constitution of 1869 (Art. XII, Sec. 42). The records of the Reconstruction Convention in 1868 reveal nothing about the section's purposes; the provision was adopted without discussion and without a roll call vote. (*Journal of the Reconstruction Convention of Texas, 2d Sess.* (1870), p. 477.)

Two decisions by the court of criminal appeals early in this century apparently prompted the first amendment of Section 33. In *Lowe v. State* (83 Tex. Crim. 134, 201 S.W. 986 (1918)), the court held that a district judge who became an officer in the National Guard and then went on the payroll of the federal government when called into actual military service of the United States vacated his office as judge. Four years later the same court held in *Ex parte Dailey* (93 Tex. Crim. 68, 246 S.W. 91 (1922)) that a district judge did not vacate his office by accepting the appointment of captain in the National Guard. *Lowe* was distinguishable, the court held, because in *Dailey* the judge had not been called into "actual military service of the United States." To protect officials who were members of the National Guard, Sections 33 and 40 were amended in 1926 to exclude members of the Guard and reserves from the prohibitions of both sections.

In 1932 additional amendments to both sections exempted retired armed forces officers and enlisted men. An amendment proposed but defeated in 1941 would have made Section 33 inapplicable to "officers of the United States Army or Navy who are assigned to duties in State Institutions of higher education."

The next attempted amendment of Section 33, proposed in 1961, was also defeated. It would have added retired personnel of the Air Force and Coast Guard to the list of exceptions. It also would have allowed state employees to act as consultants or as members of advisory committees with other state agencies, political subdivisions in Texas, or the federal government, or as school board members without forfeiting their state salaries provided they were not teachers. They would have been entitled to expenses for such service. Permission was made contingent upon approval by the employee's administrative head or governing board, and it was required that there be no conflict of interest.

A similar amendment in 1967 was approved. It added the Air Force, Air National Guard, and the Air National Guard Reserve to the military offices excluded from the prohibition, but for reasons that are unclear, it failed to include the Coast Guard (which had been included in the 1961 proposal). The amendment also allowed nonelective state officers and employees to hold other nonelective positions with the state or federal government without loss of salary if these other positions are "of benefit to the State of Texas or are required by State or federal law, and there is no conflict with the original office or position . . ." This provision relating to nonelective officers and employees was to be operative only until September 1, 1969, unless thereafter authorized by the legislature. The legislature did so by passing a statute in 1969. (Tex. Rev. Civ. Stat. Ann. art. 6252-9a.) The act basically tracks the language of the amendment concerning dual-officeholding by nonelective officers and employees. It provides in addition that the governmental unit by which the person is employed must make a finding that the requirements set forth in the amendment and the act (*i.e.*, beneficial to the state or required by law and compatibility) have been fulfilled.

Finally in 1972 an amendment was adopted which simplified Section 33 to its present form and enumerated in Section 40 the various exceptions to the dual-officeholding prohibition.

#### Explanation

Unlike Sections 12 and 40 of Article XVI, Section 33 does not prohibit dual-officeholding or employment. Rather, it prohibits the state from compensating a person who holds "more than one civil office of emolument" unless one of the offices is exempted under Section 40. It is not a "dual compensation" provision, because it does not merely prevent payment for the second office; it has been interpreted to mean that one who holds two offices loses *all* of his state compensation. (*E.g.*, Tex. Att'y Gen. Op. No. V-834 (1949).) The section thus may operate more severely than Sections 12 and 40, which merely cause the dual-officeholder to forfeit his first office. (*Pruitt v. Glen Rose I.S.D. No. 1*, 126 Tex. 45, 84 S.W.2d 1004 (1935).) Moreover, there is more certainty of enforcement under Section 33 than under Sections 12 and 40; the comptroller requires that every payroll voucher submitted by any state agency contain an affidavit that none of the persons listed is in violation of Section 33. (See *Comment*, "Constitutional Restraints on Dual Office-holding and Dual Employment in Texas—A Proposed Amendment," 43 *Texas L. Rev.* 943, 950 (1965).) Section 33 therefore may be a more effective deterrent to dual-officeholding than the sections that speak to the question directly.

Until the 1972 amendment, a person who was not in violation of either Section 12 or 40 could still be ineligible for compensation under Section 33. That possibility arose because Section 33 covered "positions" as well as "offices," and the former term was construed more broadly than the latter. For example, the attorney general ruled that a county attorney might lawfully serve, at the same time, as a professor at a state college (because the latter is not an "office" but was prohibited, under Section 33, from receiving any compensation from the state for his teaching. (Tex. Att'y Gen. Op. No. M-297 (1968).) This anomaly apparently has been removed by the 1972 amendment, which prohibits payments only to persons in violation of Section 40. Section 33 now covers only "civil offices of emolument," the same term used in Section 40. The possibility remains, however, that a person might be eligible to hold two offices under Section 40 and be eligible for compensation under Section 33, but still be disqualified from holding one of the offices because of Section 12. This possibility arises because Section 12 uses the

## Art. XVI, § 37

term “office of profit or trust” rather than “civil office of emolument.” The latter requires pecuniary profit, gain or advantage (see *Irwin v. State*, 147 Tex. Crim. 6, 177 S.W.2d 970 (1944)), while the former expressly includes offices of “trust” as well as offices of “profit.”

The term “salary or compensation” apparently does not include expenses. (*Trell v. King*, 118 Tex. 237, 14 S.W.2d 786 (1929).)

Although Section 33 deals with all “civil offices of emolument”—whether state, federal, or local—it prohibits only payments from the state treasury. Thus a person who holds two “civil offices of emolument” may continue to be paid for one or both of the offices if the source of his salary is private, local, or federal, even though he is in violation of Section 40.

### Comparative Analysis

Although most states have provisions comparable to Sections 12 and 40, prohibiting, to varying degrees, dual-officeholding (see the *Comparative Analysis* of Sec. 12 and Sec. 40), no other state has a provision similar to Section 33. The other states apparently feel that prohibiting dual-officeholding is sufficient, without also providing that those who violate the prohibition should not receive compensation. The *Model State Constitution* does not speak to the question.

### Author's Comment

As the numerous amendments to Section 33 indicate, an absolute ban on state compensation of persons holding more than one position has proved unduly restrictive and undesirable. There is very little case history on this section, but the large number of attorney general's opinions and the subjects dealt with therein indicate that these sections have caused widespread confusion. For example, the attorney general has been asked whether the state treasurer could lawfully employ a “part time messenger-porter,” working regularly in the afternoons, to do extra work in the mornings (Tex. Att'y Gen. Op. No. 0-3293 (1941)), and whether the principal of a small town high school could also work as driver of a school bus transferring children to and from an Indian reservation. (Tex. Att'y Gen. Op. No. 0-7446 (1946).) In both cases the dual employment was ruled lawful, but one may question this use of the attorney general's time.

As pointed out in the previous *Explanation*, Section 33 formerly had a purpose independent of Sections 12 and 40: It prohibited state compensation of persons holding two positions, even though they might not be in violation of either of the dual-officeholding sections. Since the 1972 amendment, however, Section 33 is nothing more than an enforcement provision for Section 40, because it prevents compensation only when there is a violation of Section 40. It is still effective as an enforcement tool, but that does not mean it needs to be retained in the constitution. If it *is* to be retained it should be incorporated in Section 40 and consideration should be given to a revision of the language to prohibit only dual compensation rather than all compensation.

Sec. 37. LIENS OF MECHANICS, ARTISANS AND MATERIAL MEN. Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

### History

The common law recognizes a lien, for the value of services rendered, in favor

of artisans who enhance the value of chattels by labor or materials. There are two prerequisites to the creation of this common-law lien: the artisan must be in possession of the chattel, and he must have added to its value. Most states have considered this lien inadequate, because it only gives the artisan a right to retain possession until payment. (See Woodward, "The Constitutional Lien on Chattels in Texas," 28 *Texas L. Rev.* 305, 305-06 (1950).)

Mechanics' and materialmen's liens, on the other hand, were unknown at common law and have never been recognized in England. They are statutory and originated in Maryland in 1791. (See Youngblood, "Mechanics' and Materialmen's Liens in Texas," 26 *Sw. L. J.* 665 (1972).) Apparently passage of this legislation was prompted by the need for development of the capital at Washington, D.C. "A commission formed for the purpose of encouraging the development of the new capitol [*sic*] city recommended to the Maryland legislature the passage of an act securing to the masterbuilders a lien on houses erected and land occupied." (Comment, "The Constitutional Mechanic's Lien in Texas," 11 *South Texas Law Journal* 101, 102 (1971).) Eventually every state passed mechanics' lien laws as an incentive to development. The first mechanics' lien law in Texas was enacted in 1839, and in 1845 lien benefits were extended to subcontractors. These laws provided only for real property liens; they did not create liens on chattels. (Youngblood, p. 665.)

The Constitution of 1869 provided for a mechanic's and artisan's lien on chattels. "Mechanics and artisans of every class, shall have a lien upon the articles manufactured or repaired by them for the value of their labor done thereon, or materials furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens." (Art. XII, Sec. 47.)

In 1874 the legislature created a statutory artisan's lien on chattels. This did not replace the common-law lien, and if the common-law lien is broader than the statutory right, it is still available. Under either the statutory or common-law lien, however, possession is still a prerequisite. (Woodward, p. 307.)

The present section, included in the Constitution of 1876 and unchanged since that time, added materialmen to the provision; provided for liens on buildings as well as articles, thus adding a real estate lien to the earlier constitutional chattel lien; and replaced the word "manufactured" with "made," a change that seems to broaden its application.

#### Explanation

A mechanic's or materialman's lien is a device designed to help the mechanic or materialman obtain payment for his work or materials. It entitles him to retain possession of a chattel (*e.g.*, an automobile, a watch, or an appliance) until the owner pays for the work done on it. This section goes even further, however. First, it creates a lien on real estate for improvements placed on the land, such as buildings or fences. Second, it gives a mechanic or materialman a lien on a chattel even though he no longer has possession of the thing. Thus, a jeweler who repairs a watch and returns it to its owner without obtaining payment for the repairs can still go to court and force sale of the watch to secure payment of the debt under this section; at common law and under the applicable statutes, he would have no lien because he surrendered possession.

The leading case construing Section 37 is *Strang v. Pray* (89 Tex. 525, 35 S.W. 1054 (1896)). That case established that the constitutional lien on buildings necessarily includes a lien on whatever interest the owner has in the land on which the building stands. Perhaps more importantly, the court determined that Section 37 is self-executing; the lien "does not depend on the statute, and the legislature

## Art. XVI, § 37

has no power to affix . . . conditions of forfeiture." Since the constitutional lien may operate independently of the statutory provisions, one who has not fulfilled the requirements for a statutory mechanic's lien may still have a constitutional lien. (*Id.*, at 1056.) Professor Woodward has stated that "the Texas decisions are unique . . . in construing the mechanic's lien provision of the constitution to be self-executing. . . ." (Woodward, p. 310.) Subcontractors generally cannot acquire a constitutional lien because they lack what lawyers call "privity of contract" with the owner. (*Horan v. Frank*, 51 Tex. 401 (1879); *First Nat'l Bank v. Lyon-Gray Lumber Co.*, 194 S.W. 1146 (Tex. Civ. App.—Texarkana 1917), *aff'd*, 110 Tex. 162, 217 S.W. 133 (1919).) If the apparent original contractor is deemed to be a "sham contractor" pursuant to statute, however, the technical subcontractor is entitled to the constitutional lien. (See Youngblood, p. 688.)

The constitutional lien on chattels is more than simply a declaration of the common law. The court held in *McBride v. Beakley* (203 S.W. 1137, 1138 (Tex. Civ. App.—Amarillo 1918, *no writ*)) that Section 37 ". . . does not seem to make the existence of the liens therein provided for in any wise dependent upon possession; . . ." In this respect, Texas again is unique. (Woodward, p. 310.) This constitutional lien is all the more durable because courts rarely find that it has been waived; "it appears that little short of a voluntary and intentional relinquishment of the claim will result in its destruction through this means." (Woodward, p. 311.)

On the other hand, courts have limited the availability of the constitutional lien on chattels by holding that such a lien exists only when the chattel is made to order for a specific customer. Thus, a supplier of ranges and refrigerators for an apartment complex has no constitutional lien on the appliances because they were made for sale to the general public rather than a specific customer. (*First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974).)

The constitutional lien, whether on realty or chattels, generally cannot be enforced against a bona fide purchaser (*i.e.*, a third party who buys—or takes a mortgage on—the property without actual or constructive notice of the lien). If two or more contractors have liens on the same property, their priorities are generally governed by statute. Article 5459, governing time of inception of mechanics' and materialmen's liens, was recently amended by the legislature in response to a Texas Supreme Court decision (subsequently withdrawn on rehearing). (See Note, "Mechanics' and Materialmen's Liens," 50 *Texas L. Rev.* 398 (1972).)

A "mechanic" is "a person skilled in the practical use of tools, a workman who shapes and applies material in the building of a house or other structure mentioned in the statutes; a person who performs manual labor"; and the term "artisan" is defined as "one skilled in some kind of mechanical craft; one who is employed in an industrial or mechanic art or trade." (*Warner Memorial University v. Ritenour*, 56 S.W.2d 236, 237 (Tex. Civ. App.—Eastland 1933, *writ ref'd*.) A "materialman" "is a person who does not follow the business of building or contracting to build houses for others, but who manufactures, purchases or keeps for sale materials which enter into buildings and who sells or furnishes such material without performing any work or labor in installing or putting them in place." (*Huddleston v. Nislar*, 72 S.W.2d 959, 962 (Tex. Civ. App.—Amarillo 1934, *writ ref'd*.)

## Comparative Analysis

Only about four other states have provisions concerning liens for laborers. California has a provision similar to Section 37. Two states instruct the legislature to provide for adequate liens. The Florida Constitution formerly contained a

## Art. XVI, § 39

similar section, but it was omitted in the recent revision. The Ohio Constitution authorizes the legislature to provide for liens. The *Model State Constitution* is silent on liens.

### Author's Comment

Because of the decisions holding that Section 37 creates a constitutional lien independent of statute, this section cannot be deleted without significantly changing existing law. In the absence of this section, artisans, mechanics, and materialmen would have only the common law and statutory liens, which are not as protective as the constitutional lien. However, as the *Comparative Analysis* indicates, the subject is not one that most states consider to be of constitutional importance. Indeed, it is difficult to see why the particular classes of creditors mentioned in this section are more deserving of constitutional assistance in collecting their accounts receivable than are many other types of creditors.

Moreover, it is anomalous to recognize both a statutory lien and a constitutional lien that is inconsistent with the statutory scheme. To give the mechanic or materialman a lien even though he has failed to meet the prerequisites established by the legislature for a statutory lien thwarts whatever purpose the legislature had in prescribing them. If the statutory lien is considered too restrictive, the solution is to amend the statutes to make it more easily available rather than to create an independent constitutional lien. The only real justification for retaining the constitutional provision would be a belief that the subject is so fundamental it cannot be entrusted to the legislature; but the courts, by permitting the legislature to prescribe a statutory scheme of mechanics' and materialmen's liens, already have entrusted a large portion of this subject to the legislature.

Sec. 39. APPROPRIATIONS FOR HISTORICAL MEMORIALS. The Legislature may, from time to time, make appropriations for preserving and perpetuating memorials of the history of Texas, by means of monuments, statutes, paintings and documents of historical value.

### History

This section originated in the Constitution of 1876 and has remained unchanged. It has been suggested that it was included because the framers feared that, absent such a provision, expenditure of public funds for historical purposes might have been prohibited by Article III, Section 48, which limited the legislature's taxing power, and Article XVI, Section 6(a), forbidding appropriation for "private or individual purposes." (See 3 *Constitutional Revision*, p. 289.)

### Explanation

Developments since 1876 have removed any basis for apprehension about the constitutionality of appropriations for historical purposes. Article III, Section 48, was repealed in 1969. Insofar as the private purposes prohibition is concerned, "[t]he doctrine is now generally recognized that the reasonable use of public money for memorial buildings, monuments, and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals, is for a public purpose, and within the power of the state." (Annot., 30 *A.L.R.* 1035, 1036 (1924); see, e.g., *Byrd v. City of Dallas*, 118 Tex. 28, 6 S.W.2d 738 (1928); *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972).) Two other sections of Article XVI deal with the subject of state history. Section 45 commands the legislature to provide for the preservation of historical records, and Section 56

## Art. XVI, § 40

gives the legislature power to appropriate money to promote the state's historical resources for tourism purposes.

### Comparative Analysis

About half a dozen other states have provisions related to preservation of historically valuable landmarks and material. The *Model State Constitution* contains no similar provision. All states have statutes relating to historic preservation. (See generally Wilson and Winkler, "The Response of State Legislation to Historic Preservation," 36 *Law and Contemporary Problems* 329 (1971).)

### Author's Comment

The power of the legislature to provide for historic preservation is now well established. The perceived need that led to inclusion of this provision in 1876 therefore no longer exists, and the section can be removed without loss.

**SECTION 40. HOLDING MORE THAN ONE OFFICE; EXCEPTIONS; RIGHT TO VOTE.** No person shall hold or exercise at the same time, more than one civil office of emolument, except that of Justice of the Peace, County Commissioner, Notary Public and Postmaster, Officer of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States and enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, and retired officers of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and the officers and directors of soil and water conservation districts, unless otherwise specially provided herein. Provided, that nothing in this Constitution shall be construed to prohibit an officer or enlisted man of the National Guard, and the National Guard Reserve, or an officer in the Officers Reserve Corps of the United States, or an enlisted man in the Organized Reserves of the United States, or retired officers of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and officers of the State soil and water conservation districts, from holding at the same time any other office or position of honor, trust or profit, under this State or the United States, or from voting at any election, general, special or primary in this State when otherwise qualified. State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies. It is further provided that a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by the State or Federal law, and there is no conflict with the original office for which he receives salary or compensation. No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.

### History

The prohibition against dual-officeholding has its origins in the early common law. Under the common law, however, holding two public offices was not prohibited unless the two were incompatible. (*Milward v. Thatcher*, 2 T.R. 82, 100 Eng. Rep. 45 (K.B. 1787).) The Texas constitutional provision has never been limited to incompatible offices and therefore has always been stricter than the common law.

The Constitution of 1845 provided: "No person shall hold or exercise at the

## Art. XVI, § 40

same time, more than one civil office of emolument, except that of Justice of the Peace.” (Art. VII, Sec. 26.) This provision was included, unchanged, in the constitutions of 1861 and 1866. (Art. VII, Sec. 26.) The Constitution of 1869 contained a broader and more detailed prohibition: “No judge of any court of law or equity, Secretary of State, Attorney General, clerk of any court of record, sheriff or collector, or any person holding a lucrative office under the United States, or this State, or any foreign government, shall be eligible to the legislature; nor shall at the same time hold or exercise any two offices, agencies, or appointments of trust or profit under this State: Provided, that offices of militia to which there is attached no annual salary, the office of postmaster, notary public, and the office of justice of the peace, shall not be deemed lucrative; and that one person may hold two or more county offices, if so provided by the legislature.” (Art. III, Sec. 30.)

The 1876 version of Section 40, as originally adopted, returned basically to the 1845 formulation, but with the additional exceptions included in 1869: “No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster unless otherwise provided herein.” This section was amended in 1926, along with Section 33 of Article XVI, to include members of the national guard and reserves in the list of exceptions. The amendment also added a proviso that “nothing in this Constitution shall be construed to prohibit” these officers or enlisted men from holding at the same time “any other office or position of honor, trust or profit, under this State or the United States.” In 1932 Section 33 was further amended to except retired officers and enlisted men of the regular armed forces and to add to the proviso: “or from voting at any Election, General, Special, or Primary, in this State when otherwise qualified.”

A 1972 amendment to Section 40 added new exceptions and included some material previously found in Section 33. The provision was updated by the addition of the Air Force and Coast Guard to the list of exceptions, and officers of the state soil and water conservation districts were excepted from the prohibition against dual-officeholding. A new sentence was added allowing state employees and others receiving all or part of their compensation from the state to serve as “members of the governing bodies of school districts, cities, towns, or other local government districts” provided they receive no salary for such positions. Finally, the amendment added two sentences previously included in Section 33, allowing nonelective state officers to hold additional nonelective offices under certain conditions and prohibiting legislators from holding any other position. This final prohibition had previously been absolute, but the 1972 amendment added as an exception the position of notary public.

### Explanation

For a discussion of the relationship between this section and others regulating dual-officeholding, see the *Explanation* of Section 12 of this article.

Section 40 applies to “civil offices of emolument.” This includes local as well as state offices. (*E.g.*, *Brumby v. Boyd*, 66 S.W. 874 (Tex. Civ. App. 1902, *no writ*.) The legislature obviously has assumed that it also includes federal offices because exemptions of federal officers have been added to this section. Because of the phrase “of emolument,” it applies only to persons who receive pecuniary profit, gain, or advantage from their office. (*Irwin v. State*, 147 Tex. Crim. 6, 1977 S.W.2d 970 (1944).)

Generally it has been held that where an officeholder qualifies for and accepts a second office in violation of this section, he automatically vacates the first. (*Pruitt*

## Art. XVI, § 40

*v. Glen Rose I.S.D. No. 1*, 126 Tex. 45, 84 S.W.2d 1004 (1935).). A member of a city board therefore is not ineligible to run for the city council, because if he is elected to the council he will automatically relinquish his previous position. (*Centeno v. Inselmann*, 519 S.W.2d 889 (Tex. Civ. App.—San Antonio 1975, *no writ*.)

It was determined very early that a person may hold two offices if either of them is among the exceptions listed in Section 40. (*Gaal v. Townsend*, 77 Tex. 464, 14 S.W. 365 (1890).) There is, however, a provision in Section 65 of Article XVI, automatically vacating the office of a county officer who becomes a candidate for another elective office while more than one year remains in the term of his county office. The courts have said that this provision prevails over the more general language of Section 40, so that a county commissioner with more than a year remaining in his term loses his office by becoming a candidate for another office, even though county commissioners are exempted from the dual-officeholding prohibition of Section 40. (*Ramirez v. Flores*, 505 S.W.2d 406 (Tex. Civ. App.—San Antonio 1973, *writ ref'd n.r.e.*.) The federal constitutionality of prohibitions against dual-officeholding (Sec. 33 in particular) has recently been challenged and upheld. (*Boyett v. Calvert*, 467 S.W.2d 205 (Tex. Civ. App.—Austin 1971, *writ ref'd n.r.e.*), *appeal dism'd*, 405 U.S. 1035 (1972).)

The 1972 amendment, permitting state employees to serve on local governing boards, may have created more problems than it solved. The amendment was a response to a decision holding that a college professor could serve as a city councilman but could not receive his state salary as a teacher while doing so. (*Boyett v. Calvert*.) That decision, however, did not require an amendment to Section 40; a college professorship is not an “office,” and Section 40 therefore was not violated by a professor who also held the office of city councilman. The problem in that case was caused solely by Section 33, which at that time covered “positions” as well as “offices.” Since a professorship is a “position,” the professor was precluded by Section 33 from receiving a state salary while serving as a city councilman. Nevertheless, the legislature proposed, and the voters approved, an amendment to Section 40 as well as Section 33.

This may have been unfortunate, because it brought state employees, who are not “officers,” under Section 40. As a result of the 1972 amendment, the following argument can be made: Section 40 now permits state employees to hold a few specified offices (namely, local governmental offices); that implies that state employees may not hold offices other than those specified because if they could there would have been no reason to amend the section; therefore a state employee may not hold any “civil office of emolument” other than those specified in the amendment. This argument need not prevail; a court might reason that despite the implications of the amendment, there was no intention to exclude state employees from governmental jobs other than those specified. Nevertheless, the problem could have been avoided simply by confining the amendment to Section 33.

It is also probable that the 1972 amendment impliedly repealed article 6252-9a of the civil statutes, and the attorney general has recently so ruled. (Tex. Att’y Gen. Op. No. H-5 (1973).) Article 6252-9a provided a procedure for determining whether a person in a nonelective state office can hold another nonelective state or federal office without conflict of interest, and whether his doing so will benefit the state or is required by state or federal law. The statute was enacted to implement an earlier, more restrictive version of Section 33 (see the *History* of that section) and simply does not speak to either section since the 1972 amendment.

A recent opinion of the attorney general states that dual-officeholding is restricted not only by Sections 12, 33, and 40 of Article XVI, but also by the

## Art. XVI, § 40

separation of powers provision, Section 1 of Article II. The question was whether a college teacher who receives a salary from the state could also serve as a county commissioner and receive a salary for that job. The attorney general conceded that Section 40 does not prevent the teacher from doing so, because it specifically exempts the office of county commissioner from the prohibition against dual-officeholding. But the attorney general said the separation of powers provision prohibits the teacher from holding the office of county commissioner unless he renounces the salary for the latter position. The separation of powers divides the state government into executive, legislative, and judicial branches and then states that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." (Art. II, Sec. 1.) The attorney general concluded that a county commissioner is a member of the judiciary, and a college teacher is a member of the executive for purposes of the separation of powers clause and therefore decided that the teacher was barred by Section 1 of Article II from serving as county commissioner. However, he construed the 1972 amendment to Section 40 to operate also as an exception to the separation of powers clause, thus permitting the teacher to serve as county commissioner by renouncing the salary for that post. (Tex. Att'y Gen. Op. No. H-6 (1973).)

This reasoning seems questionable in several respects. First, a county commissioner is a member of the judiciary only in the most technical sense; he exercises no significant judicial powers. (See *Explanation* of Art. V, Sec. 18.) Secondly, it is difficult to see how a college teacher can realistically be considered a member of the executive branch within the meaning of the separation of powers doctrine. The purpose of that doctrine presumably is to assure that the checks and balances sought to be provided by the separation of powers will not be undermined by having one individual exercising powers of two branches. A college teacher hardly exercises any powers that might interfere with that purpose. Thirdly, Section 1 of Article II speaks only to the "powers of the Government of the State of Texas." Its concern obviously is with separation of powers among coordinate branches of government at the state level. It is true, of course, that the power exercised by the commissioners court is power delegated by the state. But the purpose of the separation of powers doctrine is not to regulate relations between state and local governments, but between coordinate branches of the state government. It is difficult to see how a college teacher's service as county commissioner could interfere with the separation of powers between the judicial and executive branches of the state government. Finally, even if the attorney general is correct in concluding that the separation of powers provision is applicable, the result he reaches seems inconsistent with that conclusion. If a college teacher's service as a county commissioner threatens the separation of powers, that would seem to be true whether or not he receives a salary as commissioner. Yet the opinion holds the dual service unconstitutional only if the teacher receives two salaries.

The result reached by the attorney general probably is sound; it would be anomalous if state employees who serve as county commissioners were allowed to receive two salaries while employees who serve on other local governing boards were not. But that result can be reached without invoking the separation of powers doctrine. The problem arises because Section 40 arguably contains two different exceptions for county commissioners: the first sentence makes them wholly exempt from the dual-office holding prohibition, and the new sentence added in 1972 allows state employees to serve as members of the governing bodies of "school districts, cities, towns, or other local governmental districts" (presumably including county commissioners courts) "provided, however, that such State

## Art. XVI, § 40

employees or other individuals shall receive no salary for serving as members of such governing bodies." The attorney general apparently assumed that this proviso does not apply to county commissioners. That assumption is consistent with the syntax of the section, but it is not inescapable. It appears that what the drafters of the 1972 amendment sought to do was permit state employees to serve on local governing boards without receiving a salary for such service. There is no reason to believe that the drafters intended to treat county commissioners differently from other local governing boards. By interpreting the proviso as applying to county commissioners, the uniformity of result sought by the attorney general can be achieved without injecting the separation of powers doctrine into a subject that already is confusing enough.

### Comparative Analysis

The Pennsylvania and Wyoming constitutions authorize the legislature to determine what offices are incompatible. Five states—Delaware, Maine, Massachusetts, New Hampshire, and Vermont—enumerate in their constitutions specific offices which are considered incompatible. Sixteen other states have more general provisions similar to Section 40 prohibiting dual-officeholding and naming certain exceptions, most frequently justice of the peace, notary public, postmaster, and members of the militia. Michigan has prohibitions directed specifically at members of the legislative apportionment commission and at public servants "carrying out agreements, financing or execution of governmental functions." The *Model State Constitution* is silent on the whole issue of dual-officeholding.

### Author's Comment

If Section 33 is to be retained at all, it should be included in this section. (See the *Author's Comment* on Section 33.) Section 12 also can be incorporated into this section. (See the *Author's Comment* on Section 12.) Thus, in any event, the constitution need not contain more than one section dealing with dual-officeholding. It is doubtful, however, that any section is necessary or desirable.

As the *History* of this section indicates, inclusion in the constitution of a flat prohibition against dual-officeholding is likely to lead to frequent amendments excepting certain kinds of offices. And as the *Explanation* indicates, the amendments have not always accomplished exactly what their drafters intended.

The legislature needs no specific authorization to enact statutes dealing with dual-officeholding, and there is no apparent reason to doubt the legislature's ability or willingness to do so in most cases. If there is a reluctance to trust the legislature with the subject of dual-officeholding by legislators, Section 40 is still unnecessary because that subject is covered by Sections 19 and 20 of Article III.

If all provisions dealing with this subject were removed from the constitution, there would still be a prohibition against holding two incompatible offices, because the courts have held that the common-law rule is still effective in Texas. (*Thomas v. Abernathy County Line School Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, *judgmt adopted*.) The numerous amendments to these sections in effect have been attempts by the legislature and the voters to grapple with this problem of incompatibility; the amendments created exceptions for offices not thought to be incompatible. By removing these provisions from the constitution, the definition of compatibility would be left to the courts and the legislature. There is a large body of case law in Texas and other jurisdictions defining incompatibility.

In the past these sections have stood in the way of many sensible arrangements by which one person could have effectively served more than one governmental

## Art. XVI, § 41

entity. They have prevented doctors employed by one local governmental unit from also serving another. (Tex. Att'y Gen. Op. Nos. 0-5525, 0-5349 (1943).) They have impeded cooperation and exchange of information between various governmental agencies and various levels of government. Some of these problems were solved by the 1972 amendments, but as the discussion above indicates, additional problems have been created.

If some constitutional provision against dual-officeholding is to be retained, consideration should be given to a brief statement authorizing or directing the legislature to prohibit the holding of incompatible offices. (See, *e.g.*, Pa. Const. art. XII, sec. 2; Wyo. Const. art. VI, sec. 19.)

Sec. 41. BRIBERY AND ACCEPTANCE OF BRIBES. Any person who shall, directly or indirectly, offer, give, or promise, any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the Legislature to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law. And any member of the Legislature or executive or judicial officer who shall solicit, demand or receive, or consent to receive, directly or indirectly, for himself, or for another, from any company, corporation or person, any money, appointment, employment, testimonial, reward, thing of value or employment, or of personal advantage or promise thereof, for his vote or official influence, or for withholding the same, or with any understanding, expressed or implied, that his vote or official action shall be in any way influenced thereby, or who shall solicit, demand and receive any such money or other advantage matter or thing aforesaid for another, as the consideration of his vote or official influence, in consideration of the payment or promise of such money, advantage, matter or thing to another, shall be held guilty of bribery, within the meaning of the Constitution, and shall incur the disabilities provided for said offenses, with a forfeiture of the office they may hold, and such other additional punishment as is or shall be provided by law.

### History

The constitutions of 1845, 1861, and 1866 each contained two provisions on the subject of bribery. One stated that no one could hold an office of trust in the government who had been convicted of giving or offering a bribe in order to be elected. The other was a more general provision instructing the legislature to enact laws imposing civil disabilities upon those convicted of bribery, perjury, forgery, or other high crimes. Both of those provisions are contained in the present constitution, the former as Section 5 and the latter as Section 2, of Article XVI. (See the *Explanation* of these two sections.)

The 1869 Constitution added a third provision stating that it was the legislature's duty to immediately expel any member who received or offered a bribe. That provision was apparently expanded and modified into present Section 41 to embrace bribes given or offered by any public servant. There is no recorded debate on the section but apparently its detail is a result both of the widespread corruption in the Reconstruction government and of the intense pressures exerted by railroad lobbyists on members of the 1875 Convention.

### Explanation

There is no significant case law construing this section, probably because it duplicates the penal law.

### Comparative Analysis

Nine other states have provisions similar to this section, all of which also