

Art. V, § 15

The convention appended several ordinances to the 1876 Constitution. One divided the state into judicial districts. (*Journal*, pp. 727-29, 766.) Another designated specific times for district court to be held in each county. (*Journal*, pp. 754-67). Still another provided that no ordinance passed by the convention was operative unless the constitution was ratified. (*Journal*, pp. 768, 769.) These are the ordinances referred to in Section 14.

There was a proposal during the 1875 Convention to delete this section, but it was defeated. (*Journal*, p. 731.)

One of the ordinances adopted pursuant to this section created 26 judicial districts. (8 *Gammel's Laws*, p. 751.) The legislature soon began creating additional districts, and in 1975 there were 220 numbered districts (plus ten criminal district courts), all provided for by statute. (Tex. Rev. Civ. Stat. Ann. art. 199.)

Explanation

Section 14 is a transitional provision, but it is also something more. A true transitional provision merely provides for the continuation of the existing system until a new one is created. This provision, however, does not continue the existing system. Section 14 and the ordinances it refers to created new districts different from those in existence previously. It thus represents an attempt by the 1875 Convention to act as a legislature as well as a constitutional convention; each ordinance is in effect a statute that changes existing districts and remains in effect until the legislature acts. *Bass v. Albright*, 59 S.W.2d 891 (Tex. Civ. App. — Texarkana 1933, *writ ref'd*), suggests that this section makes the ordinances referred to therein a part of the fundamental law, although they cannot supersede provisions appearing in the constitution itself and are valid only until changed by statute law.

Section 14 has been cited, along with Sections 1, 7, 8, and 11, for the proposition that the framers intended to give the legislature exclusive authority to determine the number and territorial jurisdiction of the district courts. (*Pierson v. State*, 147 Tex. Crim. 15, 177 S.W.2d 975 (1944).) By virtue of Sections 7 and 14, the legislature may fix the terms of district courts. (*Citizens State Bank of Frost v. Miller*, 115 S.W.2d 1183 (Tex. Civ. App. — Waco 1938, *no writ*).)

Comparative Analysis

Any new constitution obviously must provide some method of achieving a transition from the previous court system to the new one. It appears, however, that no other state has a permanent constitutional provision stating that judicial districts are fixed by ordinance until otherwise provided by law.

Author's Comment

If a constitutional provision by its own terms can be superseded by ordinary legislative enactment, it almost inevitably becomes "deadwood." (Dishman, *State Constitutions: The Shape of the Document*, rev. ed. (New York: National Municipal League, 1968), p. 40.) Section 14 is such a provision; since judicial districts and times of holding court long ago were fixed by statute, the section has no effect. (Tex. Rev. Civ. Stat. Ann. arts. 199, 1919.)

For a general discussion of the methods for handling transition problems, see the annotation of Article XVI, Section 48.

Sec. 15. COUNTY COURT; COUNTY JUDGE. There shall be established in each county in this State a County Court, which shall be a court of record; and there

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shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State; shall be a conservator of the peace, and shall hold his office for four years, and until his successor shall be elected and qualified. He shall receive as compensation for his services such fees and perquisites as may be prescribed by law.

History

The Constitution of 1836 provided simply that each county was to have a county court. (Art. IV, Sec. 10.) A statute apparently provided for election by the congress of a chief justice of each county court. The chief justice also served as probate judge. Two justices of the peace in each county served as associate justices of the county court. (See Townes, "Sketch of the Development of the Judicial System of Texas," 2 *Southwestern Historical Quarterly* 29, 46-47 (1898).) The 1845 and 1861 Constitutions provided for the establishment in each county of "inferior tribunals" very similar to county courts but did not give them a name. (Art. IV, Sec. 15.) The 1866 Constitution named this inferior tribunal the "county court" and provided for the election of a judge who was to be conservator of the peace and elected for a four-year term.

The Constitution of 1869 is the only one that did not provide for the equivalent of the county court. It contained provisions calling for the justices of the peace of the county to sit as a county court, but they were to exercise the jurisdiction of the former county commissioners and police courts, rather than that of a county court. (Art. V, Secs. 20, 21, 23; see also *Daniel v. Hutcheson* (22 S.W. 278 (Tex. Civ. App.)), *rev'd on other grounds*, 86 Tex. 51, 22 S.W. 933 (Tex. 1893).) This abolition of the county court probably is attributable to the 1868 Convention's strong tendency toward centralization and strengthening of the executive power. (For example, the convention gave district judges eight-year terms, gave the governor power to appoint them, and even considered making all county officials appointive. See *Seven Decades*, p. 21.)

In the 1875 Convention, reestablishment of county courts was proposed as a way to facilitate the speedy trial of criminals. (*Debates*, p. 380.) It was also argued that the county court system was the only way to relieve the burden of the district courts. (*Debates*, p. 422.) The economy-conscious 1875 Convention reduced the number of district courts from 35 to 26. (*Seven Decades*, p. 122.) Some argued against creating county courts on the ground they were merely additional district courts whose main consequence would be to make the judiciary more expensive. (*Debates*, p. 421.) The convention heard suggestions that the county courts be optional (*Debates*, p. 431), and also that the legislature be authorized to strip them of any or all of their jurisdiction. (*Journal*, p. 667.) There was some opposition to payment of county judges by "fees and perquisites" on the grounds it caused judges to "subsist and become bloated on the misfortunes of the people." (*Debates*, p. 433.) The mandatory county court system was approved by the convention, however, by a strong 52-11 margin. (*Debates*, p. 422.) The language adopted was identical with the present Section 15, except that the judge's term was two years. The 1954 amendment changing the term to four years was the only attempt since 1876 to change Section 15.

A 1953 state bar committee proposal for a new judiciary article would have retained a county court in each county but would have given the supreme court power to merge the county courts of several counties if thought desirable. It provided further that the county judge was to exercise only judicial powers and was to be a lawyer. ("Proposed Judiciary Article," 16 *Texas Bar Journal* 12 (1953).) The committee strongly criticized the existence of judges with no legal training sitting in the lower courts. The proposal to allow the supreme court to merge

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county courts was severely criticized, however, (see, e.g., Holloway, "Judiciary Amendment Should be Defeated," 17 *Texas Bar Journal* 695 (1954)), and a subsequent referendum of bar association members killed the entire proposal. (18 *Texas Bar Journal* 65 (1955).)

Explanation

This section, together with Section 16, created 254 constitutional courts of limited jurisdiction below the district courts. It follows the one-district, one-court, one-judge pattern established for the district courts by providing that "there shall be elected in each county . . . a County Judge . . ." This pattern long ago proved too rigid, and many counties now have what amounts to more than one county court. Although there can be only one constitutional county court per county, there are also 70 statutory county courts in Texas, usually called "county courts at law." (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), p. x.) These courts have at least six different names: (1) county courts at law, (2) county civil courts at law, (3) county courts for criminal cases, (4) county criminal courts, (5) county courts for criminal appeals, and (6) county probate courts. (Herring, "Streamlining the Trial Courts," 35 *Texas Bar Journal* 1008 (1972).) The statutes establishing county courts generally authorize judges of courts of like jurisdiction in the same county to transfer cases, exchange benches, and sit for each other, but the courts remain distinct tribunals. (Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 477 (1967).) Also, articles 1969a-1, 1969a-2, and 1969a-3 of the civil statutes provide for exchanges among county court judges. The statutes, however, authorize the county judge to sit for the judge of a county court at law only if he is a "duly licensed attorney."

In the 29 counties that have county courts at law, the constitutional county judge often performs few, if any, judicial functions; he devotes all or most of his time to his administrative responsibilities as head of the commissioners court. Some of these judges continue to perform some judicial functions, such as hearing probate matters and mental incompetency questions. (Guittard, 21 *Sw. L. J.*, at 451, 477.)

The major reason for creation of the county courts at law, in addition to the need for more than one county-level judge in populous counties, is the fact that the county judge need not be a lawyer. Section 15 requires that the judge be "well informed in the law of the State," but the courts have held that this does not require him to be a lawyer; indeed, it does not even authorize any inquiry into his knowledge of the law. "The requirement that the county judge should be well informed in the law was intended as a direction to the voters, and . . . a majority of the ballots settles the question." (*Little v. State*, 75 Tex. 616, 12 S.W. 965 (1890).) One case seems to imply that legal training could be required if the legislature decided to "make more specific the meaning of that phrase." (Ex parte *Craig*, 150 Tex. Crim. 598, 193 S.W.2d 178 (1946), *rev'd on other grounds sub nom. Craig v. Harney*, 331 U.S. 367 (1947).) The legislature has not done so, however, and according to 1965 estimate, only about 77 of the 254 county judges were lawyers. (Smith, "Court Administration in Texas: Business Without Management," 44 *Texas L. Rev.* 1142, 1150, n. 61 (1966).) A more recent survey of 102 county judges showed that 37 percent were licensed attorneys, another 16 percent had attended some type of graduate school, and 30 percent had attended a court seminar. (Texas Office of Information Services, *Analysis: The Lower Courts of the State of Texas* (Austin, 1972), section III, introduction.)

There can be no general statement of the qualifications required for judges of the county courts at law. They must meet whatever requirements are set out in the

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statute creating the particular court. These statutes usually require them to be lawyers, however, and sometimes require several years' experience in the practice of law.

It is often unclear whether a reference elsewhere in the constitution to "county courts" should include the statutory courts, such as county courts at law. For example, the general guarantee of a right to jury trial in Section 15 of Article I has been interpreted to mean a 12-member jury, while Section 17 of Article V authorizes a 6-member jury in county courts. The courts have held that this means a statutory domestic relations court must use a 12-member jury because it is not a county court, but a county court at law has the jurisdiction and attributes of a county court and therefore may use a 6-member jury. (*Jordan v. Crudgington*, 149 Tex. 237, 231 S.W.2d 641 (1950); Ex parte *Melton*, 161 Tex. Crim. 563, 279 S.W.2d 362 (1955).) This might suggest that county courts at law whose jurisdiction is shared with the constitutional county courts are likely to be considered county courts, while other statutory courts, such as domestic relations courts, which share their jurisdiction with the district courts are not. The question is not settled, however. For example, one court of civil appeals has held that a judge of a county court at law is a "county judge" for purposes of Section 28 of Article V and therefore a vacancy in the office must be filled by appointment of the commissioners court rather than the governor, but another has held the opposite. (*State v. Valentine*, 198 S.W. 1006 (Tex. Civ. App.—Fort Worth 1917, writ *ref'd*); *contra*, *Sterrett v. Morgan*, 294 S.W.2d 201 (Tex. Civ. App.—Dallas 1956, no writ).) The supreme court has not considered the question.

Salaries of county judges are paid entirely by the county and vary widely. (Texas Civil Judicial Council, (Austin, 1973), p. xi, *Forty-Fifth Annual Report*.) One survey indicates that the salaries of a large majority (66 percent) are less than \$10,000. (*Analysis: The Lower Courts of the State*, section III, introduction.)

The provision that county judges are conservators of the peace means primarily that they may carry pistols. It makes county judges "peace officers" for purposes of a statute excepting "peace officers" from regulations concerning pistols. (*Jones v. State*, 43 Tex. Crim. 283, 65 S.W. 92 (1901).) It duplicates Section 12 of Article V and should be deleted from the county court section.

County judges are county officers subject to the residency requirement of Section 14 of Article XVI (*Jordan v. Crudgington*, 149 Tex. 237, 231 S.W.2d 641 (1950)). They are required to have been residents of the county for six months in order to run for office. (Election Code, art. 1.05.)

The intended meaning of the phrase stating that the county court "shall be a court of record" is not clear. By one definition, a court of record is simply "one the history of whose proceedings is perpetuated in writing." (*Tourtlot v. Booker*, 160 S.W. 293 (Tex. Civ. App. — El Paso 1913, writ *ref'd*.) "At common law, any jurisdiction which has the power to fine and imprison is a court of record." (*Wahrenberger v. Horan*, 18 Tex. 57 (1856).) "Courts of record" usually have a seal. (*Houston Oil Co. v. Kimball*, 103 Tex. 94, 122 S.W. 533 (1909).)

A court is a "court of record" in a meaningful sense only if its proceedings are in fact recorded. This is determined by whether or not a court reporter or some other method of recording is available, rather than by whether the constitution denominates it as a "court of record." A court can be a "court of record" without benefit of any constitutional or even statutory statement to that effect; the Texas district courts, for example, are courts of record within all of the meanings mentioned even though nothing in the constitution or statutes says so.

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Comparative Analysis

About nine states provide constitutionally for county courts; this is a decrease of two since 1964. About three-fourths of the states, however, have some form of county-level court, either in the form of statutory county courts or county-level subdivisions of other courts. (See U.S., Department of Justice, Law Enforcement Administration, *National Survey of Court Organization* (Washington, D.C.: Government Printing Office, 1972).)

The only states that have no counterpart to the Texas county courts are those with "unified" trial courts (*i.e.*, a single trial court of general jurisdiction with magistrates or other subordinate officials of that court handling matters that otherwise would be handled by inferior courts such as county courts). (See, *e.g.*, Illinois Const. Art. VI, Secs. 8, 9.) About 20 states have this plan or some variation thereof.

The *Model State Constitution* allows the legislature to establish inferior courts of limited jurisdiction and provides that the jurisdiction is to be prescribed by law.

Seven other states have constitutional provisions similar to that of Section 15 providing for election of the county judge by the voters of the county. Election is probably the most common method of selection of county-level judges in all states, however. About 40 states elect at least some of the judges of courts of limited jurisdiction. (U.S., Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (Washington, D.C.: Government Printing Office, 1972), table 18, pp. 101-02.)

Qualifications of county judges are not mentioned in the constitutions of most states. Two state constitutions fix a minimum age requirement, and two require that the county judge be a lawyer.

Author's Comment

It is easy to criticize the county court system in Texas. First, the judge is not a fulltime judge; by definition the judge is also the county's chief executive and administrative officer. This produces not only conflicts in allocation of his time but may even produce conflicts of interest in cases that involve the county or its finances.

Indeed, there is serious doubt as to whether the dual role of the county judge in Texas is permissible under the federal constitution. The United States Supreme Court has held that a defendant was denied due process of law when the judge who tried him also served as mayor of a village that received a substantial portion of its revenues from fines and fees collected in the mayor/judge's court. (*Ward v. Village of Monroeville*, 409 U.S. 57 (1972).) The county judge in Texas occupies a position somewhat analogous to that of the mayor/judge in the *Ward* case; as chief executive officer of the county, the judge has at least a potential interest in maximizing county revenues, including those he generates while wearing his judicial hat. It is not clear, however, whether these revenues are as significant in most Texas counties as they were in the village of Monroeville, where fines and fees provided about 40 percent of the village budget. The court of criminal appeals has rejected an argument based on the *Ward* case, but the case was not one squarely challenging the county judge's impartiality. (Ex parte *Ross*, 522 S.W.2d 214 (Tex. Crim. App. 1975).) The court also said:

The record in the present case was simply not developed fully enough to reveal the exact extent of the county judge's executive authority and duties. The testimony of the judge that he spends most of his time on administrative duties and is the chief administrator of the county is simply too vague to delineate the exact parameters of his executive functions. (522 S.W.2d., at 217.)

The court thus appears to have left open the possibility that a fully developed case might well produce the conclusion that the present role of the county judge in Texas is unconstitutional.

Second, the requirement that every county have one county court and the limitation that no county can have more than one obviously are not well suited to the needs of a state in which the population of counties varies widely. Most of the counties of the state probably do not generate enough county court business to keep a full-time judge busy; that is perhaps one reason for the original decision to give county judges administrative duties as well. That it is still true is indicated by the fact that 228 of the 254 counties are still able to get along without a county court at law.

Third, the county court is not integrated administratively into the rest of the judicial system. There is no effective provision for transfer of judges among counties, or for cases among judges. The lines between county and district court jurisdiction are too rigid to permit any significant transfer of judges or cases between those courts. As long as each county court has one county judge who is answerable only to the voters, effective court administration at the county court level is unlikely.

Finally, the judge of the county court, though he is a major judicial officer in the present court system, is not required to be — and usually is not — a lawyer. The county court's general civil and criminal jurisdiction is limited, but the county judge nevertheless is entrusted with some of the most difficult and sensitive legal decisions in the system. His decisions in incompetency proceedings may involve long-term losses of liberty, and his decisions in probate matters can involve huge fortunes. Much of the complexity of the present Texas court system has resulted from attempts to deal with this problem of the nonlawyer county judge.

The present Texas practice of allowing a nonlawyer judge to preside over criminal trials may be unconstitutional. The California Supreme Court has held that requiring a defendant to stand trial before a nonlawyer judge in a case that involves possible loss of liberty deprives the defendant of effective counsel and therefore denies him due process of law. (*Gordon v. Justice Court*, 12 Cal. 3d 323, 115 Cal. Rptr. 632, 525 P.2d 72 (1974).) The Texas courts have consistently rejected arguments that the county judge must be a lawyer (see, e.g., *Ex parte Ross*, 522 S.W.2d 114 (Tex. Crim. App. 1975)), but these cases will be irrelevant if the federal courts should follow California's lead and require lawyer-judges as a matter of federal constitutional law.

It is easier to criticize the county court system than to devise a satisfactory alternative. One problem is that the lower courts have received far less attention from court reformers than have the appellate courts. Another problem is a lack of detailed information on the facilities, workloads, and qualifications of the present county judges and judges of other inferior courts. (See Reavley, "Court Improvement: The Texas Scene," 4 *Tex. Tech. L. Rev.* 269, 279 (1973).) Another obstacle is the great diversity of Texas counties. Some counties probably do not generate enough litigation below the district court level to justify even one full-time judge. Some of the metropolitan counties, on the other hand, have scores of municipal, justice, and county courts and county courts at law, and their dockets are as crowded as those of the district courts.

Any reorganization of the courts below the district court level probably should have at least two goals: (1) improving the qualifications of lower court judges and (2) simplifying the lower court structure.

Virtually all advocates of judicial reform believe that all judges who hear contested cases should be lawyers. (See, e.g., *State-Local Relations in the Criminal Justice System*, p. 43; McCormick, "Modernizing the Texas Judicial System," 21

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Texas L. Rev. 673, 688 (1943); Uhlenhopp, "Some Plain Talk about Courts of Special and Limited Jurisdiction," 49 *Judicature* 212 (1966).) The difficulty or importance of a case, and the degree of learning, tact, and wisdom necessary to decide it, do not necessarily depend on the amount of money involved or the severity of the penalty. Most citizens' only contact with the court system comes in the lower courts in such matters as traffic cases, small claims, and petty misdemeanors. The public's impressions of the entire legal system therefore are likely to be based on experiences in the lower courts. (See Roscoe Pound, *Organization of Courts* (Boston: Little Brown, 1940), pp. 260-79.) The chief arguments against requiring all judges to be lawyers are: (1) it is impractical because there are not enough qualified lawyers who are willing to serve as lower court judges and (2) requiring all judges to be lawyers narrows the range of social and political backgrounds from which judges are chosen. There are several answers to the first of these objections. One is that if the lower courts were reorganized into a more efficient system, fewer judges would be required and thus for the same total cost the state could provide better qualified judges. Another is that better qualified judges would reduce other costs in the court system; for example, if the county judge were required to be a lawyer, it might not have been necessary to give the district court original jurisdiction in probate cases.

The second objection is based on the undeniable fact that the legal profession is not representative of society at large; racial minorities, for example, obviously are underrepresented in the bar. But judges, unlike other elected officials, are not chosen to represent particular constituencies; on the contrary, they should be chosen at least in part for their ability to put aside personal preferences and decide cases according to the applicable law. Legal training may help a judge to control the impulse to apply personal social and political inclinations. In most instances, however, these considerations are academic; the cases decided by the lower courts usually do not turn on the judge's social or political views but rather involve the application of fairly well settled rules of law to specific fact situations.

As suggested above, the question of improving qualifications of lower court judges cannot be separated from the issue of simplifying the lower court structure; as long as every county, no matter how small, must have one county judge, at least four justices of the peace, and as many municipal judges as there are towns in the county, there is little hope of making sure all judges are qualified. Most of the states that have attacked this problem have settled on the same basic solution: unification of the trial court system. This simply means merger of all the trial courts into one—or sometimes two—court systems. If Texas were to adopt a truly unified trial court system, all of the present trial courts would be integrated into the district court system; there would continue to be judges (perhaps called "magistrates") performing the functions now performed by county judges, justices of the peace, and municipal judges, but they would do so as agents of, and under the supervision of, the district court.

A somewhat more modest unification plan would be one with two levels of trial court: (1) a trial court of general jurisdiction, corresponding to the present district court level, and (2) a trial court of limited jurisdiction. The latter would take over the functions of the county, justice, and municipal courts, just as in the more sweeping unification plan described above. For a good description of the organization and operation of a completely unified trial court system, see Underwood, "The Illinois Judicial System," 47 *Notre Dame Lawyer* 247 (1971).

Sec. 16. COUNTY COURTS; JURISDICTION; APPEALS TO COURT OF CIVIL APPEALS AND COURT OF CRIMINAL APPEALS; DISQUALIFICATION OF JUDGE. The County Court shall have original jurisdiction of all

misdemeanors of which exclusive original jurisdiction is not given to the Justices Court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed \$200, and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value \$200, and not exceed \$500, exclusive of interest, and concurrent jurisdiction with the District Court when the matter in controversy shall exceed \$500, and not exceed \$1,000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases civil and criminal of which Justices Courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed \$20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from Justices Courts there shall be a trial de novo in the County Court, and appeals may be prosecuted from the final judgment rendered in such cases by the County Court, as well as all cases civil and criminal of which the County Court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the County Court, or judge thereof, shall have power to issue writs of injunctions, mandamus and all writs necessary to the enforcement of the jurisdiction of said Court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of the County Court, or any other Court or tribunal inferior to said Court. The County Court shall not have criminal jurisdiction in any county where there is a Criminal District Court, unless expressly conferred by law, and in such counties appeals from Justices Courts and other inferior courts and tribunals in criminal cases shall be to the Criminal District Court, under such regulations as may be prescribed by law; and in all such cases an appeal shall lie from such District Court to the Court of Criminal Appeals. When the judge of the County Court is disqualified in any case pending in the County Court the parties interested may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law.

History

The county court's jurisdiction was not constitutionally defined until 1866. The Constitution of the Republic created a county court but did not mention its jurisdiction. (Art. IV, Sec. 10.) The Constitutions of 1845 and 1861 established "inferior tribunals" in each county and made them essentially probate courts. (Art. IV, Sec. 15.) Much of the present detail of Section 16 originated in the 1866 Constitution. It gave the county court jurisdiction of all misdemeanors and petty offenses, civil cases up to \$500, and numerous specified probate matters. (Art. IV, Sec. 16.)

When the county court was abolished in 1869 (see the *History* of Sec. 15), most of its jurisdiction was transferred to the district court. When the county court was revived in 1876, its jurisdiction was generally patterned after that given by the 1866 Constitution. In addition, however, it was given appellate jurisdiction over justice court cases but was denied criminal jurisdiction in counties that have criminal district courts.

There was significant opposition in the 1875 Convention to reestablishment of the county court, and even more opposition to the rather extensive jurisdiction given to it. The system was condemned for "localizing justice" thereby making it

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more susceptible to local passions and prejudices. In fact, the majority report to the convention would have placed more jurisdiction in higher courts and less jurisdiction in the lower courts. The language adopted was that of the minority report. (*Debates*, pp. 383-84.) Late in the convention, another unsuccessful attempt was made to return the county courts to the role they had as probate courts under the Constitution of 1845. (*Debates*, p. 433.)

The 1845 and 1861 Constitutions provided that problems of disqualification of judges of inferior tribunals were to be remedied by law. (Art. IV, Sec. 14.) A similar provision appeared in the 1866 Constitution (Art. IV, Sec. 12) and in Section 11 of Article V of the 1876 Constitution. Section 16, as originally adopted, added a provision that if the county judge were disqualified, the case was to be transferred to the district court for trial. The present mode of replacing a disqualified county judge was added by amendment in 1891.

The 1876 Constitution originally provided that judgments of the county court would be final in cases tried de novo in county court on appeal from a justice court if the county court's judgment or fine did not exceed \$100. The 1891 amendment removed this limitation but permitted the legislature to make exceptions.

When the present constitution was adopted, the decision to vest jurisdiction of probate matters and administration of estates in the county courts was perfectly understandable. The county court was always available and accessible, whereas the district court met only twice a year in each county for short sessions. (Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 472 (1967).) To protect litigants, however, jurisdiction had to be rather limited because the judge usually had no legal training. The provision for trial de novo (*i.e.*; as if the matter had not been tried before) on appeal was another concession to the fact that the judge was likely to be a nonlawyer.

The new Article V proposed in 1887 would have made county courts optional, with jurisdiction to be provided by the legislature, subject to the limitations that all officers were to be elected and that certain listed jurisdiction was not to be vested in any courts inferior to the district courts. (See the *History* of Sec. 15.)

A new judiciary article proposed by the Civil Judicial Council in 1946 contained no mention of county courts. ("Proposed Amendment to Article V of the State Constitution," 9 *Texas Bar Journal* 347 (1946).) This aspect of the proposal apparently was overshadowed by debate on other sections that would have changed the method of selecting judges. (See Storey, "Shall Our Texas Constitution Be Revised?" 11 *Texas Bar Journal* 621 (1948).)

A 1953 proposal by a state bar committee, eventually defeated by bar association members, provided that the jurisdiction of the county court was to be defined by the supreme court. ("Proposed Judiciary Article," 16 *Texas Bar Journal* 12, 13 (1953).)

A constitutional revision committee of the state bar recommended in 1968 that all definitions of jurisdiction of district and county courts be removed from the constitution (Brite, "Bar's Obligation," 32 *Texas Bar Journal* 145 (1969).) (See also the *History* of Sec. 15.)

Explanation

Three distinct types of jurisdiction are conferred on the county courts by Section 16: criminal, civil, and probate. Section 17 of Article V illustrates this division by providing separate terms for the three. More importantly, Section 22 of Article V, permitting the legislature to diminish the county court's civil and criminal jurisdiction, does not permit diminution of its probate jurisdiction (*State v. Gillette's Estate*, 10 S.W.2d 984 (Tex. Comm'n App. 1928, *jdgmt. adopted*)).

Reduction or even elimination of the county court's probate jurisdiction is now permitted, however, under a 1973 amendment to Section 8 of Article V.

Until 1973, the county court had original jurisdiction of matters involving probate of wills, administration of estates, and appointment of guardians and administrators. This jurisdiction was exclusive among the constitutional courts, but the statutory courts could be given concurrent probate jurisdiction. (*State ex rel. Rector v. McClelland*, 148 Tex. 372, 224 S.W.2d 706 (1949).) The 1973 amendment to Section 8 gave the district court probate jurisdiction concurrent with that of the county court; however, it also permitted the legislature "by local or general law, Section 16 of Article V of this Constitution notwithstanding, to increase, diminish, or eliminate the jurisdiction of either the district court or the county court in probate matters." The legislature exercised that power by enacting a statute denying the district courts original probate jurisdiction in counties with statutory courts that have probate jurisdiction. (*General and Special Laws of the State of Texas*, 63rd Legislature, Reg. Sess., 1973, ch. 610, at 1684.) Thus, at present, the constitutional county court has original probate jurisdiction in every county; it shares that jurisdiction with the statutory probate courts in counties that have them, and in all other counties it shares its probate jurisdiction with the district courts. In the latter counties, the statute provides for the transfer of contested probate cases from the county court to the district court and provides that all appeals in such matters go to a court of civil appeals rather than to the district court. The amendment authorizes the legislature to withdraw all probate jurisdiction and give it exclusively to the district court (or vice versa). Whether it also permits the legislature to withdraw all probate jurisdiction from the county court and give it to statutory probate courts is not clear. The amendment permits elimination of the probate jurisdiction "of either the district court or county courts." This may mean that the legislature must allow at least one of those constitutional courts to retain at least concurrent probate jurisdiction.

Until 1973, the county court's probate jurisdiction was quite limited. It had no jurisdiction to construe wills (*Langehennig v. Hohmann*, 139 Tex. 452, 163 S.W.2d 402 (1942)); to enforce a contract to make a will (*Huston v. Cole*, 139 Tex. 150, 162 S.W.2d 404 (1942)); to determine title to property claimed by an estate (*Jones v. Sun Oil Co.*, 137 Tex. 353, 153 S.W.2d 571 (1941)); or to decide a claim against an estate, after the claim had been refused by the administrator, unless the amount in controversy was within the civil jurisdiction of the court (*George v. Ryon*, 94 Tex. 317, 60 S.W. 427 (1901)). In these cases, suit had to be brought in district court; if the district court had jurisdiction, it could determine all incidental questions involved, including probate matters that otherwise would have been within the exclusive jurisdiction of the county court; if it did not have power to enforce its judgment, it certified the judgment to the county court for enforcement. (*Higginbotham v. Davis*, 221 S.W.2d 290 (Tex. Civ. App.—Dallas 1949, *no writ*); *Gregory v. Ward*, 118 Tex. 526, 18 S.W.2d 1049 (1929).) Appeals from probate decisions went to the district court where the case was tried de novo. (Guittard, 21 *Sw. L. J.*, at 472.) The district court's jurisdiction over probate matters was appellate only; a county court's judgment could be overturned only when it exceeded its powers, or where there was an error of law. (*Dunway v. Easter*, 133 Tex. 309, 129 S.W.2d 286 (1939). See also the *Explanation* of Sec. 8.)

The 1973 amendment changed all that. The amendment authorized the legislature to increase the probate jurisdiction of the county court, and the implementing statute did so. It provided that "all courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate, including but not limited to, all claims by or against an estate, all actions for trial of title to land incident to an estate and for the enforcement of liens thereon incident to an

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estate and of all actions for the trial of the right of property incident to an estate." Thus, the county court now appears to have broad power to deal with all probate-related matters.

The lengthy enumeration of specific types of probate matters in the second paragraph of Section 16 accomplishes very little. Most of the matters specifically mentioned would be included anyway under the general phrases "general jurisdiction of a probate court" and "all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons." The list apparently does not determine by omission the types of probate matters that are *not* within the county court's jurisdiction; those are determined by the specific grants of probate jurisdiction to the district court in Section 8.

The statement relating to apprenticeship of minors is anachronistic and has no practical effect because the courts have held that custody of minors is within the exclusive jurisdiction of the district courts. (Ex parte *Reeves*, 100 Tex. 617, 103 S.W. 478 (1907).) This rule also applies if the county court purports to act under the phrase giving it power to appoint guardians of minors, rather than the apprenticeship phrase; it may appoint the guardian, but it may not award custody. (*Worden v. Worden*, 148 Tex. 356, 224 S.W.2d 187 (1949).)

The county court's civil jurisdiction is quite narrow. It includes only suits in which the amount in controversy is between \$200 and \$1,000, and when that amount is between \$500 and \$1,000, the county court shares its civil jurisdiction with the district court. (If the amount is exactly \$500, the county court has exclusive jurisdiction unless the suit is one to try right to title of property under Section 8; if so, the district court's jurisdiction is exclusive.) Moreover, even within these monetary limits, the county court has no jurisdiction if the suit is one involving a subject within the exclusive jurisdiction of the district court, such as divorce or slander. (See the *Explanation* of Sec. 8.)

With two exceptions, the county court has jurisdiction of all misdemeanors punishable by imprisonment or by fine exceeding \$200. Although the language gives the county court jurisdiction "when the fine to be imposed *shall* exceed \$200," this is interpreted as if it said "may exceed"—regardless of the penalty actually assessed. If the maximum penalty for the offense exceeds \$200, the county court's jurisdiction is exclusive. (*Anderson v. State*, 18 Tex. Ct. App. 17 (1885).) If conviction entails some other penalty, such as forfeiture of a hunting or fishing license, in addition to a \$200 fine, the courts have held that the county court's jurisdiction is exclusive, because the total possible penalty exceeds \$200. (E.g., Ex parte *Howard*, 171 Tex. Crim. 278, 347 S.W.2d 721 (1961).)

One exception to the county court's criminal jurisdiction is for misdemeanors involving official misconduct. Section 8 places these within the jurisdiction of the district court, and the courts have held that this grant is exclusive. (*Simpson v. State*, 138 Tex. Crim. 622, 137 S.W.2d 1035 (1940).)

The other exception applies only when the county has a criminal district court; in those counties, the county court has no criminal jurisdiction unless the legislature specifically grants it. The intention apparently was to put all criminal jurisdiction in these counties in the criminal district court. This exception is of little consequence, however, because all counties that have criminal district courts also have county courts at law, which in practice have largely taken over the county court's criminal cases anyway. (See Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. ix-xi.) Also, some of the former criminal district courts have been converted into regular district courts, making this exception inapplicable. (See the *Explanation* of Sec. 8.)

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The county court's appellate jurisdiction is at least as important as its original jurisdiction. It is the court to which most appeals from the justice and municipal courts are taken unless the county has a county court at law; if it does, appeals from the lower courts usually go there. Section 16 permits appeals from justice courts in civil cases "only when the judgment of the court appealed from shall exceed \$20." If this were read literally, it would be quite unfair, since it would never permit an appeal by a plaintiff who suffers a "take nothing" judgment in the justice court. The legislature has avoided this result by interpreting the language as if it said "only when the amount in controversy exceeds \$20." (Tex. Rev. Civ. Stat. Ann. art. 2454.) The courts have upheld this reinterpretation of the constitutional language as a valid exercise of the power given the legislature by Section 22 of Article V to change jurisdiction of the county courts. (See *Brazoria County v. Calhoun*, 61 Tex. 223 (1884); also see the *Explanation of Sec. 22*.)

The county court has jurisdiction of all appeals from justice courts and, by statute (Code of Criminal Procedure, art. 45.10), of all appeals from municipal courts. Again, there is an exception: if the county has a criminal district court, appeals from the justice and municipal courts go there rather than to the county court.

All appeals are tried *de novo* in the county court (*i.e.*, as if there had not been a previous trial). This requirement probably is based at least in part on the fact that there usually is no record of the testimony heard in the justice or municipal court.

The county court's power to issue writs is rather limited. Before the 1891 amendment, the county court had power to issue injunctions only to enforce its jurisdiction. (*Carlisle v. Coffee & Price*, 59 Tex. 391 (1883).) In 1891, the language was changed slightly and the courts have interpreted the present language to allow the county court to issue injunctions and writs of mandamus, even if they are not necessary to enforce its jurisdiction. (*Dean v. State*, 88 Tex. 290, 31 S.W. 185 (1895).) In injunction and mandamus suits, however, the county court has jurisdiction only if the amount in controversy is between \$200 and \$1,000. (*Repka v. American Nat'l Ins. Co.*, 143 Tex. 542, 186 S.W.2d 977 (1945).) If the amount is more than \$1,000, the suit belongs in district court; if it is less than \$200, it still goes to district court, because the justice of the peace has no general power to issue writs of injunction or mandamus. (*Bowles v. Angelo*, 188 S.W.2d 691 (Tex. Civ. App.—Galveston 1945, *no writ*). See also Note, 12 *Texas L. Rev.* 457 (1933).)

The county court's habeas corpus jurisdiction is the same as its general criminal jurisdiction.

Section 16, despite its many detailed grants of jurisdiction to the county court, usually does not prevent the legislature from taking away any or all of that jurisdiction. This is because of Section 22 which specifically authorizes the legislature to "increase, diminish or change the civil and criminal jurisdiction of the County Courts," and the 1973 amendment to Section 8 which authorizes changes in probate jurisdiction. Section 1 contains a provision authorizing the legislature to conform the jurisdiction of the district and other inferior courts to that of any new courts that may be created. The courts have held that this permits the legislature to give statutory courts jurisdiction concurrent with that of the district and county courts but does not permit it to take that jurisdiction away entirely. (See the *Explanation of Sec. 1*.) Section 22, however, goes further. It permits the legislature to withdraw completely civil and criminal jurisdiction from the county court and give it to another court. (See, *e.g.*, *Chappell v. State*, 153 Tex. Crim. 237, 219 S.W.2d 88 (1949); *Rogers v. Graves*, 221 S.W.2d 399 (Tex. Civ. App.—Waco 1949, *writ ref'd.*) The county court's jurisdiction may also be expanded to matters formerly within the exclusive power of the justice courts. (*Commercial Inv. Trust v. Smart*, 123 Tex. 180, 69 S.W.2d 35 (1934).) The legislature may change the

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appellate, as well as the original, jurisdiction of the county court. (*Kubish v. State*, 128 Tex. Crim. 666, 84 S.W.2d 480 (1935).)

The method provided in the last sentence of this section for choosing a special judge if the county judge is disqualified is not the only method of dealing with the problem. Before 1891, this section did not provide for a special judge but required rather that any case in which the county judge was disqualified be transferred to the district court of the county. After the 1891 amendment replaced that provision with the present one, the courts held that the legislature still had power to provide for transfer of cases to the district court when the regular judge is disqualified. (*San Angelo National Bank v. Fitzpatrick*, 88 Tex. 213, 30 S.W. 1053 (1895).) Moreover, Section 11 gives the legislature general authority to provide other alternatives for dealing with the problem of disqualification of judges of the inferior courts. Section 16 does not preclude use of another method. (*Dulaney v. Walsh*, 90 Tex. 329, 38 S.W. 748 (1897).) The present statutes, however, generally follow the method outlined in Section 16; the parties may agree on a "proper person" to try the case (Tex. Rev. Civ. Stat. Ann. art. 1930), and if they fail to agree, the governor is to appoint a special judge. (Tex. Rev. Civ. Stat. Ann. arts. 1931, 1932.) In some counties the judge of the county court at law is authorized to sit for the county judge. (Tex. Rev. Civ. Stat. Ann. arts. 1969a-1, 1969a-2, 1969a-3.)

Comparative Analysis

Of the approximately nine state constitutions that mention county courts, none provide for its jurisdiction in such minute detail as does the Texas Constitution. One simply gives the county court such jurisdiction as may be provided by law, and four specify some jurisdiction but authorize the legislature to change it. Only two other states confer probate jurisdiction on the county court by constitutional provision, and two other constitutions specifically give it misdemeanor jurisdiction.

The *Model State Constitution* leaves the entire matter of inferior courts, including their jurisdiction, to the legislature.

Author's Comment

At best, there is little to be said in favor of a detailed constitutional definition of the jurisdiction of inferior courts. The only purpose such a definition can serve is to prevent the legislature from taking away that jurisdiction. Here not even that argument can be made; Section 16 does not accomplish that purpose because Sections 8 and 22 authorize the legislature to change the county court's civil, criminal, or probate jurisdiction.

If trial court jurisdiction is to be divided among two or more levels of courts, the division should be made in the definition of the jurisdiction of the inferior court, rather than in that of the court of general jurisdiction. The latter is the general court because it has all jurisdiction not assigned elsewhere. (See the *Author's Comment* on Sec. 8.) This division probably should not be made in the constitution, however. Its primary purpose is to allocate judicial business among the different levels of courts. That requires some flexibility; and the legislature must be free to change the dividing line as types of litigation change. For example, it must be able to respond to changes in the value of money. The present \$1,000 maximum on the county court's jurisdiction has been in the constitution since 1876. The real value of \$1,000 now, however, is only a fraction of what it was in 1876. Thus, even though the county court's jurisdiction technically has not been changed, it in fact has been steadily eroded so that its civil jurisdiction today is

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considerably less significant than it was a century ago.

The provisions of this section that are most effective—and most troublesome—are those giving the county court probate jurisdiction and requiring trial de novo of all appeals to the county court. In any revision, consideration should be given to removing both of these provisions.

As pointed out in the preceding *Explanation* and in the *Explanation* of Section 8, the county court's probate jurisdiction is not truly exclusive; the district court in fact has jurisdiction of many probate-related matters, and in metropolitan counties probate matters usually are handled by county courts at law rather than the county court. The division of probate responsibility between the county court, statutory courts, and district court is unnecessarily complex.

There is no easy solution to the location of probate jurisdiction. The work involves a great deal of day-to-day administrative detail, and a district judge's time may be considered too expensive to be spent signing routine probate orders. Moreover, the district judge cannot match the easy accessibility that is provided by having a probate judge in every county courthouse. On the other hand, probate matters often involve some of the most complex questions known to the law; a nonlawyer can hardly be asked to make those decisions. The difficulty is compounded by the great disparity of population in Texas counties. Some counties generate enough business to keep several full-time probate judges busy; others do not generate enough to justify even one full-time probate judge and yet still need to have someone with some probate powers available on a more or less full-time basis. (See generally Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 472-73.)

All of these factors make it exceedingly difficult to arrive at a single, permanent, constitutional assignment of probate responsibility.

The requirement in this section (repeated in Sec. 19) that all appeals from justice and municipal courts be tried de novo is one of the most inefficient provisions in the entire judiciary article. At best, such an appeal requires a full trial in the county court, in which all of the expense, time, and inconvenience of the initial trial are repeated. At worst, the case never goes to trial, and justice is thwarted. Dockets of the county courts (or county courts at law) in some counties are clogged with de novo appeals, making such an appeal an almost certain way of delaying the consequences of a judgment or conviction in the justice or municipal court. Those consequences can be avoided altogether if the court finally is forced to give up and dismiss the case.

If trial de novo in the county court is considered necessary because the quality of justice in the lower courts is not dependable or because the lower courts have no means of making a record of their trials, those problems should be attacked directly rather than by attempting to gloss over them by providing for a second trial.

The last sentence of the first paragraph of Section 16, providing for appeals from county court judgments, is both syntactically garbled and unnecessary. It makes no sense to say "exclusive or concurrent or original jurisdiction of civil appeals in civil cases. . . ." If they are appeals, they cannot be within the court's original jurisdiction. If they are within the courts' original jurisdiction, they must be within either its exclusive or concurrent jurisdiction; "original" is not a third alternative to "concurrent" or "exclusive." Presumably the sentence is intended to say that judgments of the county court, whether entered in the exercise of its original or appellate jurisdiction, are appealable to the courts of civil appeals or court of criminal appeals. The provision does not, however, guarantee a right of appeal. The courts have held that the legislature may deny any appeal from a judgment of the county court. (Ex parte *Killam*, 144 Tex. Crim. 606, 162 S.W.2d

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426, *cert. denied*, 317 U.S. 668 (1942); *Millican v. State*, 145 Tex. Crim. 195, 167 S.W.2d 188 (1942).)

Since the provision does not guarantee an appeal, its only remaining function is to give the courts of civil appeals and court of criminal appeals power to hear appeals from the county court. It is unnecessary for that purpose, however, because that power is given by the sections dealing with those courts. (See the Annotations of Secs. 5 and 6.)

Sec. 17. TERMS OF COUNTY COURT; PROSECUTIONS; JURIES. The County Court shall hold a term for civil business at least once in every two months, and shall dispose of probate business, either in term time or vacation as may be provided by law, and said court shall hold a term for criminal business once in every month as may be provided by law. Prosecutions may be commenced in said court by information filed by the county attorney, or by affidavit, as may be provided by law. Grand juries empaneled in the District Courts shall enquire into misdemeanors, and all indictments therefor returned into the District Courts shall forthwith be certified to the County Courts or other inferior courts, having jurisdiction to try them for trial; and if such indictment be quashed in the County, or other inferior court, the person charged, shall not be discharged if there is probable cause of guilt, but may be held by such court or magistrate to answer an information or affidavit. A jury in the County Court shall consist of six men; but no jury shall be empaneled to try a civil case unless demanded by one of the parties, who shall pay such jury fee therefor, in advance, as may be prescribed by law, unless he makes affidavit that he is unable to pay the same.

History

Except for the provision fixing a minimum number of terms of court for the county court, which first appeared in the 1866 Constitution (Art. IV, Sec. 16), this section was new to the 1876 Constitution. One possible explanation for the excess of detail included by the 1875 Convention on the subject of county courts (aside from that Convention's general tendency to include a great amount of detail on nearly everything) is the fact that county courts were being reestablished in 1876 after having been abolished under the 1869 Constitution. (See the *History* of Sec. 15.) Since there was no existing system of county courts, the delegates may have felt it necessary to describe in detail the system they envisioned.

Section 29 of Article V, adopted by amendment in 1883, supersedes portions of this section (*Kilgore v. State*, 52 Tex. Crim. 447, 108 S.W. 662 (1908)) and may have been intended to replace it entirely. The 1883 amendment did not contain a clause repealing Section 17, however, so both sections remain on the books, even though Section 29 duplicates most of Section 17 and is inconsistent with it in several respects. (See the annotation of Sec. 29.)

The six-member jury was an innovation of the 1875 Convention. It apparently was proposed primarily for economic reasons. One of the reasons for reestablishment of the county court was to reduce the number and cost of district courts, and the committee that proposed six-member county court juries predicted that because of the reduction in size "much expense, both to litigants and to the public, will be saved." (*Journal*, p. 418.)

Explanation

The provision in Section 17 prescribing terms of the county court is no longer operative; the courts have held that it is superseded by Section 29 of Article V. (*Kilgore v. State*, *supra*.) The provisions on commencement of prosecutions and number of jurors presumably also are superseded by Section 29, but those questions apparently have not arisen and are not likely to arise because the Section

29 provisions are almost the same as those in Section 17.

It is not entirely clear whether the sentence in Section 17 concerning transfer of misdemeanor indictments from the district court to the county court is still operative. Since Section 29 provides that all prosecutions are to be commenced as provided by law, it might be argued that that provision supersedes the more specific language of Section 17. On the other hand, it could be argued that the two sections are not in conflict because Section 29 speaks only to the commencement of prosecutions generally, while Section 17 deals with the peculiar problem of indictments for offenses of which the district court has no jurisdiction. One fairly recent case cites Section 17 for the proposition that a district court must transfer a misdemeanor indictment to the county court. (*Hullum v. State*, 415 S.W.2d 192 (Tex. Crim. App. 1966).) The decision is not squarely in point, however, because article 21.26 of the Code of Criminal Procedure contains the same requirement; the same decision therefore presumably would have been reached under Section 29 and the statute if Section 17 were considered superseded.

A similar uncertainty exists with respect to the language in Section 17 denying jury trial in civil cases unless one of the parties demands it and pays a fee or signs an affidavit of inability to pay. Since Section 29 contains part of the Section 17 language on juries in county court, it could be argued that Section 29 was intended to control that entire subject. The counterargument again would be that while the general jury provision of Section 17 is superseded, its more specific language on the method of exercising the right is still controlling. Again, there is no decision on the question, and none is likely because the rules prescribing the method of exercising the right to jury trial are consistent with both sections. (See Rules of Civil Procedure, rules 216, 217.)

Comparative Analysis

See the *Comparative Analysis* of Section 29.

Author's Comment

As pointed out in the *Explanation* above, most of Section 17 clearly has been superseded by Section 29. The only Section 17 provisions that arguably are still operative are those that (1) direct grand juries to inquire into misdemeanors, (2) require district courts to transfer misdemeanor indictments to county courts, (3) permit a misdemeanor defendant to be tried on an information even if his indictment is quashed, and (4) regulate the method of exercising the right to jury trial in civil cases. None of these is a matter of constitutional importance, and all are covered by existing statutes or rules. (Code of Criminal Procedure, arts. 12.05, 21.26, 28.04; Rules of Civil Procedure, rules 216, 217.) Section 17 therefore can be deleted without loss.

Sec. 18. DIVISION OF COUNTIES INTO PRECINCTS; ELECTION OF CONSTABLE AND JUSTICE OF THE PEACE; COUNTY COMMISSIONERS AND COUNTY COMMISSIONERS COURT. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the

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qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

History

The Constitution of the Republic provided that the "Republic shall be divided into a convenient number of counties" (Art. IV, Sec. 11). That constitution also provided that each county should have "a convenient number of Justices of the Peace, one Sheriff, one Coroner, and a sufficient number of Constables, who shall hold their offices for two years, to be elected by the qualified voters of the district or county, as the Legislature may direct." (Art. IV, Sec. 12.) This was carried over into the Constitution of 1845 (Art. IV, Sec. 13). No change was made in 1861.

The 1866 Constitution was the first to provide constitutionally for county government:

There shall be elected in each county in the State, by the persons qualified to vote for members of the Legislature, four County Commissioners, whose term of office shall be four years, who, with the Judge of the County Court, shall constitute, and be styled, the Police Court for the County; whose powers, duties and mode of action, in regulating, promoting, and protecting the public interest relating to the county, shall be the same as that now prescribed by law for the Commissioners Court of Roads and Revenue, until otherwise provided for and regulated by the Legislature. (Art. IV, Sec. 17.)

The concluding portion of this section refers to the existing statutory system of county government. That system was created by the congress of the Republic early in 1845. In the early days of the Republic each county had a chief justice elected by congress and two associate justices elected by the justices of the peace. "This trio acted as the governing body of the county and 'was responsible for the superintendence and control of public roads, bridges and ferries, and for the care of the indigent, lame, blind, and poor persons who were unable to support themselves.' This body was changed on February 3, 1845, to the county commissioners consisting of four commissioners and one chief justice, all elected for two year terms." (Davis and Oden, *The Constitution of Texas: Municipal and County Government, Arnold Foundation Monograph No. VIII* (Dallas: Southern Methodist University Press, 1961), pp. 106-07. The internal quotation is cited to Claunch, *The Government of Dallas County* (Dallas: Southern Methodist University Press, 1954), p. 3.)

The 1869 Constitution changed things again. As noted earlier (*History of Sec. 15*), the 1869 Constitution abolished the county court and county judge. Each county was to elect five justices of the peace, not more than one of whom could "be a resident of the same justice's precinct." (Art. V, Sec. 19.) One of the justices was to "reside, after his election, at the county seat." Section 20 provided that the five justices were to "constitute a court, having such jurisdiction, similar to that heretofore exercised by county commissioners and police courts, as may be prescribed by law. And when sitting as such court the justice who resides at the county seat shall be the presiding justice." It seems clear that the justices in 1869 and the commissioners in 1866 and 1845 were elected by the voters at large. One deduces that the 1869 precincts into which a county was divided were designed to give the different geographical areas representation without letting the voters of each precinct choose their own man. If this is true and if there were contests, then

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there was a "place" system in operation in 1869.

In the 1875 Convention the committee report included a section creating a commissioners court in substantially the form now appearing in Section 18, but justices of the peace and constables were covered by a separate section. (*Journal*, pp. 412-13.) A substitute section combining commissioners, justices, and constables was subsequently offered and accepted. (*Id.*, at 669-70.) This substitute was much the same as Section 18 except that the wording would have permitted as many as eight commissioners. This was adjusted by floor amendment. (*Id.*, at 671.)

Section 18 was amended in 1954 to change terms of office from two years to four years. The same amendment removed an obsolete provision concerning the first division of counties into precincts. It should be noted that over the years many changes in the judicial system have been proposed and many of them have been adopted. The only proposal that would have covered the commissioners court system was an entirely new judiciary article that was defeated in 1887. That article abolished the commissioners court but substituted nothing. There was a provision authorizing statutory county courts. Under that provision the legislature probably could have created something like the commissioners courts; in any event, the legislature under its general powers could have created a form of government for counties.

Explanation

Composition of Court. Section 18 sets forth four propositions concerning the composition of the commissioners court. First, the county judge is the presiding officer. Second, there are four commissioners, each elected from one of four precincts into which the county must be divided. (See *Tex. Att'y Gen. Op. No. H-32 (1973)*.) Third, the commissioners court has the power to draw the lines of the four precincts. (In the preceding *History*, it was noted that obsolete material was removed in 1954. That referred to a provision that authorized the then existing county court to make the first division. As the 1869 provision quoted in the *History* shows, counties were already divided into four precincts. Indeed, some of the county precinct divisions as of 1964 antedated the 1876 Constitution. See *Newell, County Representation and Legislative Reapportionment* (Austin: Institute of Public Affairs, The University of Texas, 1965), p. 13.) Fourth, the only guideline for precinct line drawing is "for the convenience of the people."

In 1968 the United States Supreme Court handed down *Avery v. Midland County*, one of the leading one-man, one-vote cases. (390 U.S. 474. Three justices dissented.) Obviously not by accident, the case involved the Texas county that had the greatest population variation among its precincts. The city of Midland was one precinct; the balance of the county contained the other three precincts. The estimated 1963 population for each of the precincts was: 67,906; 852; 414; and 828. (*Id.*, at 476.) The court held that the one-man, one-vote rule applied.

Redrawing precinct lines following the *Avery* case created a minor problem in one county because of the staggered terms required by Section 65 of Article XVI. In *Dollinger v. Jefferson County Commissioners Court*, a United States district judge was faced with massive shifts of people as a result of redrawing precinct lines. In the 1972 election voters in the new Precincts 1 and 3 would vote for commissioners, but voters in Precincts 2 and 4 would have to wait until 1974 to vote. In the case of Precinct 4 this created no problem for the judge; 85 percent of the people in that precinct had been there all along. But in Precinct 2, he found that less than 50 percent of the population had been in the precinct when the incumbent commissioner was elected. Accordingly, he ordered an election in Precinct 2 for a commissioner who would serve for only two years. (335 F. Supp.

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340 (E.D. Tex. 1971).) This problem is probably peculiar to a massive shift following overturning of a non-one-man, one-vote system. Future redrawing following a decennial census would not be likely to create massive shifts of people. This would not necessarily be true, of course, if instead of making minor adjustments to meet population changes the commissioners court decided to start from scratch.

Powers. Notwithstanding several constitutional provisions concerning powers of counties (e.g., Art. III, Sub. (c) of Sec. 52; Sec. 1-a of Art. VIII; and Sec. 7 of Art. XI), numerous statutes spelling out county powers, and a great many court cases, it is easy to explain the constitutional powers of counties: there are hardly any.

As of 1876, only Section 9 of Article VIII could even be argued to be a direct grant of power to counties. The original wording was ambiguous. It could be read as a direct grant to levy property taxes. The better reading would be as a limitation on the legislature's power to authorize county property taxes.

The grants of power now in the constitution got there by amendments. For example, the present wording of Section 9 of Article VIII does seem to give counties the power to levy the full tax of 80¢ on the \$100. (See the *Explanation* of that section.) Section 1-a of the same article clearly authorizes counties to levy 30¢ on the \$100 for farm-to-market roads and flood control. Subsection (c) of Section 52 of Article III is another direct grant of taxing power.

There are other examples of grants of power through amendments. Section 7 of Article XI, for example, originally permitted counties on the Gulf to levy taxes for seawalls "as may be authorized by law." When the section was amended in 1932 the wording became "as may now or may hereafter be authorized by law." This would seem to freeze the statutory grant as of November 1932 into a constitutional grant. Other examples of direct grants are Section 52(e) (1967) of Article III and Subsection (b) of Section 62 of Article XVI. (Sec. 62 was repealed in 1975. See Sec. 67 of Art. XVI.)

With no general constitutional grant of power, it follows that counties must look to the legislature. Here the rule is even more stringent than the Dillon Rule for municipal corporations. (See the *Author's Comment* on Sec. 5 of Art. XI.) Once a corporation is created there is an assumption that it has some inherent power. The Dillon Rule calls for strict construction of any granted powers, but under the rule a municipality possesses such powers as are essential to the accomplishment of the declared objectives and purposes of the corporation. A county does not start with this aura of power. True, Section 1 of Article XI recognizes counties "as legal subdivisions of the State." But this is a far cry from incorporation for a purpose. (In the course of time and a great many judicial opinions the terminology in this area has become frightfully muddled.) (See the *Explanation* of Sec. 1 of Art. XI.)

In essence a county is an administrative convenience for the state. In *Bexar County v. Linden*, Chief Justice Phillips, after describing the nature of a municipal corporation, described counties thusly:

They are essentially instrumentalities of the State. They are the means whereby the powers of the State are exerted through a form and agency of local government for the performance of those obligations which the State owes the people at large. They are created by the sovereign will without any special regard to the will of those who reside within their limits. Their chief purpose is to make effective the civil administration of the State government. The policy which they execute is the general policy of the State. Through them the powers of government operate upon the people and are controlled by the people. They are made use of by the State for the collection of taxes, for the diffusion of education, for the construction and maintenance of public highways, and

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for the care of the poor. All of these things are matters of State, as distinguished from municipal, concern. They intimately affect all the people. The counties are availed of as efficient and convenient means for the discharge of the State's duty in their regard to all the people. (110 Tex. 339, 346, 220 S.W. 761, 763 (1920).)

In another leading case, *Robbins v. Limestone County*, the supreme court drove this point home when it upheld the taking over of county highways for the state highway system, leaving the counties saddled with paying off bonds issued to pay for the roads. (114 Tex. 345, 268 S.W. 915 (1925). The legislature later took over responsibility for those bonds.) Limestone County argued that it had bought and was paying for the roads, and obviously, owned them. The court replied:

While the title, under the authority of law, was taken in the name of the county and under statutory authority, and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and the people thereof. (114 Tex., at 355; 268 S.W., at 918.)

Part of the problem facing the court was the pseudo-grant of power to tax and borrow for roads as provided in what is now Subsection (b) of Section 52 of Article III and Section 9 of Article VIII. (Sec. 9 was worded somewhat differently then.) The court noted that "these provisions of the Constitution are not limitations upon the legislative authority and control over the roads and the expenditure of road funds by counties or other agencies of government under provisions of law." (114 Tex., at 358; 268 S.W., at 919.)

The *Limestone County* opinion also pointed out that the grant of power in the final clause of Section 18 is of no particular significance. The court declined to list what powers are conferred by the constitution; the court simply repeated, in effect, what it had said earlier—the laying out, construction, and maintenance of public roads are powers conferred by statute. "In other words, it is only by the laws of the state, as enacted by the Legislature, that jurisdiction over public roads has ever been exercised by county commissioners' courts as a part of its 'county business.'" (114 Tex., at 360; 168 S.W., at 920.)

In sum, then, a county has only whatever powers of government are given to it by the legislature. As counties become more urban, the legislature obviously has to add to their powers. In some instances this has been started through a constitutional amendment as in the case of hospital and airport districts (Secs. 9 and 12 of Art. IX). These are only authorizations to the legislature to act, however, and they show up in the constitution only to permit additional property taxes. It is also instructive that five local amendments for hospital districts (Secs. 4-8, Art. IX) preceded the general amendment, Section 9. Once counties become urban, they are no different from cities in the need for individual treatment. In other words, many counties today are where many cities were in 1912—in need of home rule. (See the following *Author's Comment*.)

Acting as a Court. One of the minor confusions is that the commissioners court is a "court." It does not try cases. But when it acts it does so in a format not unlike that used by a court—"Now, therefore, the commissioners court orders and decrees. . . ." (See *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948), for a verbatim order of a commissioners court.)

There are a number of cases that speak of the commissioners court as a court and suggest that the designation is important. These cases fall into three broad categories.

(1) *Immunity from Civil Liability.* Judges usually are held to be absolutely immune

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from civil liability for damages resulting from acts or statements made while discharging their judicial duties. (*E.g.*, *Morris v. McCall*, 53 S.W.2d 667 (Tex. Civ. App.—Beaumont 1932, writ *dism'd.*) Local administrative officials, however, sometimes have only a “qualified” or “conditional” immunity; this means they can be held liable if it can be shown that they acted with “malice.” (See, *e.g.*, William E. Prosser, *Handbook of Torts*, 4th ed. (St. Paul: West Publishing Co., 1970), pp. 988-92.) Thus, a commissioner might have absolute immunity if considered a judge, but only qualified immunity if considered an administrative or legislative officer. The immunity of a commissioner in Texas is not always absolute, however.

A commissioner generally does have immunity when acting within his jurisdiction and in good faith. (*Wright v. Jones*, 38 S.W. 249 (Tex. Civ. App. 1896, writ *ref'd*); *Gaines v. Newbrough*, 34 S.W. 1048 (Tex. Civ. App. 1896, writ *ref'd.*) A statute (Tex. Rev. Civ. Stat. Ann. art. 2340) requires county commissioners to post bond. A court of civil appeals has stated that “this article must be strictly construed as a limitation on the immunity accorded a judge in the exercise of his judicial discretion. In voting ‘to pay out county funds,’ a county commissioner is not liable when actuated by pure motives, but only when he acts maliciously or corruptly, or under circumstances imputing malice or corrupt motives.” (*Welch v. Kent*, 153 S.W.2d 284, 286-87 (Tex. Civ. App.—Beaumont 1941, no writ).) Thus, despite the designation of the commissioners court as a “court,” its members do not have true judicial immunity. It is possible, however, that their immunity is absolute except in connection with the payment of claims, but this has not been established.

(2) *Powers of Commissioners Court.* The commissioners court has many powers that are characteristic of courts. It may issue notices, citations, writs and process and has the power to punish contempt. (Tex. Rev. Civ. Stat. Ann. art. 2351, subs. (13), (14).) Administrative bodies, however, can also be given most of these powers, including the power to punish contempt. (See, *e.g.*, Tex. Rev. Civ. Stat. Ann. art. 3184, subd. (4) (State Board of Control) and Tex. Rev. Civ. Stat. Ann. art. 5190 (Industrial Accident Board).)

Administrative agencies normally do not have power to issue writs, however; that is a true judicial function, and since the commissioners court has some limited power to issue writs, it might be argued that it must be a true court. The extent or constitutionality of this statutory writ power of the commissioners court is not clear, however; the courts apparently have never been asked to decide whether it is constitutional. Moreover, the power seems to be very rarely—if ever—used. In most instances, commissioners courts obtain compliance with their orders by suing in a regular court for an injunction or a writ of mandamus, rather than issuing their own writs. (See, *e.g.*, *Guerra v. Weatherly*, 291 S.W.2d 493 (Tex. Civ. App.—Waco 1956, no writ).)

(3) *Review of Decisions of Commissioners Court.* Higher courts often say that since the commissioners court is a “court,” its orders are entitled to the same consideration as those of other courts. (*E.g.*, *Tarrant County v. Shannon*, 129 Tex. 264, 104 S.W.2d 4 (1937); *Alley v. Jones*, 311 S.W.2d 717 (Tex. Civ. App.—Beaumont 1958, writ *ref'd n.r.e.*); *Burleson Co. v. Giesenschlag*, 354 S.W.2d 418 (Tex. Civ. App.—Houston 1962, no writ).) This language usually is a predicate for holding that the order of the commissioners court is not subject to collateral attack (*i.e.*, it must be challenged by appeal or some other direct method, rather than by bringing another proceeding before a different tribunal).

Again, the same result probably would be reached even if the commissioners court were not considered a court. Orders of administrative agencies, as well as courts, usually are protected against collateral attack unless the agency is not

legally constituted or has acted outside its jurisdiction. (*Glenn v. Dallas County Bois D'Arc Island Levee Dist.*, 114 Tex. 325, 268 S.W. 452 (1925); see Hodges, "Collateral Attacks on Judgments," 41 *Texas L. Rev.* 499, 518 (1963).) This is essentially the same rule that is applied to judgments of courts.

There is one possible difference, however, in the treatment given orders that are considered administrative rather than judicial. While courts are presumed to have been acting within their jurisdiction, it is sometimes said that no such presumption (or at least a weaker presumption) attaches to orders of administrative agencies. (See, e.g., *Todd Shipyards Corp. v. Texas Employment Commission*, 153 Tex. 159, 264 S.W.2d 709 (1953).) Thus, if commissioners courts were considered administrative rather than judicial, it might be easier to attack their orders collaterally by demonstrating that the commissioners lacked jurisdiction. It is not clear, however, that the commissioners court is treated as a court for purposes of assigning this presumption; it has been suggested that since most orders of commissioners courts are not exercises of judicial functions they should be treated as administrative orders rather than judicial judgments. (See Hodges, 41 *Texas L. Rev.*, at 539.)

When an order of a commissioners court is attacked directly, e.g., on appeal, it seems to be treated no differently than judgments of administrative agencies and other local governing bodies, such as city councils, are treated. Unless a statute requires that the judgment be reviewed *de novo* (i.e., as if no previous determination had been made), orders of all these bodies generally are presumed to be valid and will not be overturned if made in good faith, are reasonably supported by substantial evidence, and are not clearly illegal, unreasonable, or arbitrary. (E.g., *Park v. Adams*, 289 S.W.2d 829 (Tex. Civ. App.—Waco 1956, *no writ*) (city governing board); *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W.2d 73 (1939) (Texas Railroad Commission); *Bexar County v. Hatley*, 136 Tex. 354, 150 S.W.2d 980 (1941) (commissioners court).)

The various contexts in which the commissioners court has been called a "court" were carefully examined over 40 years ago in Shirley, "County Commissioners' Court—A Court or An Administrative Body?" 11 *Texas L. Rev.* 518, 521 (1933). The author concluded that "there is little to be said for the holding that this body is a regular court." That conclusion remains sound today.

Geographical Limitations. It is obvious that a county government governs only in its own territory. It would seem equally obvious that this creates no problem. But there are cities that straddle county lines. If the state exercises its power by delegation to counties, how is the power to be exercised in the case of such a two-county city? This actually became an issue in a local option referendum under Section 20 of Article XVI. The implementing statute directs the commissioners court of each county upon petition to order an election in any incorporated city "therein." (Tex. Penal Code Ann., art. 666-32 (1952).) Grand Prairie is located partly in Dallas County and partly in Tarrant County. The court of civil appeals held that the Dallas County commissioners court could not order an election in Grand Prairie because no statute gives them any authority over that part of the city located in Tarrant County. (*Ellis v. Hanks*, 478 S.W.2d 172 (Tex. Civ. App.—Dallas 1972, *writ ref'd n.r.e.*.)

County Judge, Justice of the Peace, and Constable. For the county judge see the *Explanation* of Section 15, and for justices of the peace, the *Explanation* of Section 19. There is nothing constitutionally important to say about constables. They are governed by subdivision 2 of Title 120 of the Revised Civil Statutes. (Tex. Rev. Civ. Stat. Ann. arts. 6878-6889e (1960).)

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Comparative Analysis

The county as a unit of government is traditional throughout the United States, but a distinction must be made between what may be called the "Southern" county and the "New England" county. In New England states all area is covered by contiguous towns, each of which has a government. (This is an oversimplification that does not consider cities; the basic point is that any piece of land is under a local government below the county level.) A county government is superimposed on the local government. This normally makes county government not only less important in general, but less important to the individual citizen who always has a local town government to turn to. Connecticut, for example, reached the point of abolishing county government. The New England system is followed in most of the states north of the Mason-Dixon line, but the towns are frequently known as "townships." Outside of New England proper, however, county government is frequently as significant as in Southern states notwithstanding towns or townships.

The counties in the Southern states are the principal government for any portion of a geographical area that does not get set aside by incorporation as a village, town, or city. Except in a county that is so urban that all the area becomes incorporated, a county will always remain the only local government for some people.

There are also hybrid systems. Illinois, for example, has township counties, principally in the northern part of the state, and non-township counties, principally in the southern part of the state.

In township counties the traditional form of county government was to have a board of representatives, one from each township. (This system has had to be adjusted to the one-man, one-vote rule.) In the Southern-type county only about a half dozen appear to mix up county government with the county court. The normal governing body is a board of county commissioners, sometimes elected at large, sometimes by districts. More than a third of the states, New England- and Southern-type, do not freeze the form of county government in their constitutions. About a dozen states permit home rule, in some cases limited to particular urban counties, however.

The *Model State Constitution* includes counties in its home-rule provisions. (See the *Comparative Analysis* of Sec. 5, Art. XI.) The *Model* offers a self-executing alternative.

Section 8.02. Home Rule for Local Units.

(a) Any county or city may adopt or amend a charter for its government, subject to such regulations as are provided in this constitution and may be provided by general law. The legislature shall provide one or more optional procedures for nonpartisan election of five, seven or nine charter commissioners and for framing, publishing and adopting a charter or charter amendment.

Subsection (b) provides for a vote on whether to have a charter commission, Subsection (c) permits the inclusion of the names of people who will be charter commissioners if the vote is favorable, and Subsection (d) provides for a vote on a proposed charter.

(e) A charter or charter amendments shall become effective if approved by a majority vote of the qualified voters voting thereon. A charter may provide for direct submission of future charter revisions or amendments by petition or by resolution of the local legislative authority.

The 1972 Montana Constitution provides a neat combination of full home-rule power and a means of preserving traditional county government. Section 5 of

Article XI, Local Government, directs the legislature to provide for home rule but includes a self-executing subsection which took effect on July 1, 1975, if the legislature failed to act. Section 3 of the same article directs the legislature to provide optional forms of local government but specifies: "One optional form of county government includes, but is not limited to, the election of three county commissioners, a clerk and recorder, a clerk of district court, a county attorney, a sheriff, a treasurer, a surveyor, a county superintendent of schools, an assessor, a coroner, and a public administrator." Thus, the voters of any county in Montana must be allowed to choose the kind of government they want, but the old system must be one of the available choices.

The 1970 Illinois Constitution preserves the historic county offices but permits the more important ones to be eliminated or their method of selection to be changed by countywide referendum, and the lesser ones to be eliminated or their method of selection changed by law. (Art. VII, Sec. 4(c).)

The constable has constitutional status in only about ten states.

Author's Comment

The most important thing to do about county government is to provide for home rule either across the board or for counties with some minimum population. This is probably the most difficult political issue to face any reviser of the constitution. The complex, self-contradictory, overwritten so-called county home rule amendment adopted in 1933, never used and deleted in 1969, is proof enough of the difficulty. Much more important are the political interests with a stake in the status quo.

In the *Explanation* it was noted that a county is an administrative convenience for the state and that the county government depends on the legislature for power. But the structure of county government is minutely spelled out in the constitution. There are a great many elected county officials but they have to depend on the legislature for their power. This results in mixed-up democracy. The people elect their rulers, but the people have to turn to their legislators for new powers if the rulers are unable to give the people what they want. This helps to preserve the practice of passing local laws. This situation also encourages county officials to look more to the legislature than to their constituents.

There is more to home rule than having the power to make policy. Home rule also allows the voters to choose their form of government. Voters cannot do this in Texas counties. (In the case of general law cities, the legislature has authorized optional forms of city government.) Herein lies the rub. Almost all elected county officials can be expected to favor the status quo. For obvious reasons they represent a powerful political force. There is hope, however. In the *Comparative Analysis* it was pointed out that the new Montana and Illinois Constitutions preserve the traditional county offices but permit them to be abolished by the voters. This approach may not succeed but is probably the only safe one to take. Elected county officials might oppose a new constitution that permitted the voters to cut down the power of county officials, but their opposing arguments would have to be irrelevant—for example, "Why change what has been so good for you?"—since a new constitution would not as such take away anything—their jobs, the people's right to elect them, or the traditional form of county government.

Sec. 19. JUSTICES OF THE PEACE; JURISDICTION; APPEALS; EX OFFICIO NOTARIES PUBLIC; TIMES AND PLACES OF HOLDING COURT. Justices of the Peace shall have jurisdiction in criminal matters of all cases where the