

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

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penalty or fine to be imposed by law may not be more than for two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the District or County Courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law; and appeals to the County Courts shall be allowed in all cases decided in Justices' Courts where the judgment is for more than twenty dollars exclusive of costs; and in all criminal cases under such regulations as may be prescribed by law. And the justices of the peace shall be ex officio notaries public. And they shall hold their courts at such times and places as may be provided by law.

History

The justice of the peace originated in England, where he was the king's local conservator of the peace and judicial officer. When transportation and communication were slow and lawyers were scarce, the judgment of a respected layman in the local community was the accepted method of dispensing local justice, both in England and on the American frontier. (See Vanlandingham, "The Decline of the Justice of the Peace," 12 *Kansas L. Rev.* 389 (1964).)

The justice of the peace has been an institution in Texas since the earliest days of the colony. In the Mexican judicial system, the local judges were *alcaldes* rather than justices of the peace. (See the *History* of Sec. 1.) But Stephen F. Austin introduced the justice of the peace to the colony in 1824 when he appointed a "provisional justice of the peace" for the settlers on the Brazos. The Congress of the Mexican State of Coahuila and Texas also provided for a justice of the peace, but it seems to have used the term more or less interchangeably with "*alcalde*." (Decree No. 39, promulgated by the Congress of Coahuila and Texas on June 15, 1827, contained the judicial code for the state. It is incomplete in Gammel's compilation of the acts of that congress. A copy of it has been found, however, and is described in Wharton, "Early Judicial History of Texas," 12 *Texas L. Rev.* 315, 317-18 (1934).)

The jurisdiction of the *alcalde* created by Austin's Code of 1824 was remarkably similar to that of the justice of the peace in Texas today. The *alcalde* had jurisdiction of all criminal cases and all civil cases up to \$200, and in civil cases involving less than \$25 his decision was final. (See "Civil Regulations," reproduced in Gracy, *Establishing Austin's Colony* (1970), pp. 72-82; see also Wharton, *supra*, at 315-16.)

The Constitution of the Republic provided for "such justice courts as the Congress may, from time to time, establish." (Art. IV, Sec. 10.) The justice of the peace has appeared in every subsequent Texas constitution. (Art. IV, Sec. 19, of the Constitutions of 1845, 1861, and 1866; Art. V, Sec. 20, of the Constitution of 1869.) The 1866 amendment imposed the first constitutional limit (\$100) on the civil jurisdiction of the justice of the peace. The figure was raised to \$200 in the 1876 Constitution.

Section 19 has been unchanged since 1876, despite several attempts to abolish the justice of the peace. In 1965 the State Bar of Texas proposed legislation permitting abolition of justices of the peace by local option election. (Randolph, "Local Option Abolition of Justice Courts," 25 *Texas Bar Journal* 1021 (1962); "Suggested Legislation for Local Abolition of Justice Courts," 25 *Texas Bar Journal* 16 (1962).) Despite strong support from members of the bar, the proposal was defeated in the legislature. Its failure was attributed to a strong lobbying effort by justices of the peace. (See Randolph, "Improving Justice Court Justice," 26 *Texas Bar Journal* 522 (1963).)

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Explanation

Section 18 of Article V provides the method of selecting justices of the peace. The commissioners court of each county is directed to divide the county "from time to time, for the convenience of the people, into precincts, not less than four nor more than eight. . . . In each such precinct there shall be elected one Justice of the Peace and one Constable . . . 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."

This provision permits a county to have anywhere from four to 16 justices of the peace. Although the election of a second justice in any precinct containing a city of 8,000 seems to be mandatory, the courts have held that the commissioners court cannot be compelled to create the office of the second justice even when the population requirement is met. (*Meredith v. Sharp*, 256 S.W.2d 870 (Tex. Civ. App.—Texarkana) writ *ref'd n.r.e. per curiam*, 152 Tex. 437, 259 S.W.2d 172 (1953).) Moreover, the commissioners court has power to reduce the number of precincts (to not less than four) without regard to population. (See *Telles v. Sample*, 500 S.W.2d 677 (Tex. Civ. App.—El Paso 1973, *no writ*).) Thus, both the number of precincts (four to eight) and the number of justices in each precinct (one or two) are left to the discretion of the commissioners court, except that there can be only one justice per precinct unless the 8,000 population minimum is met. That requirement is met if there is a city of 8,000 wholly within one justice precinct. (*Grant v. Ammerman*, 451 S.W.2d 777 (Tex. Civ. App.—Texarkana 1970, writ *ref'd n.r.e.*.) It is not clear whether the requirement also is met if the precinct contains only part of a city containing 8,000 inhabitants or if the precinct contains 8,000 inhabitants but no part of a city. There is dictum in *Grant v. Ammerman*, *supra*, suggesting that a second justice court is not authorized in either of these situations.

The territorial extent of the justice of the peace's jurisdiction is not described in the constitution. Three attorneys general have ruled that the justice of the peace's jurisdiction is countywide and that the legislature may not reduce it. The courts have not ruled on this question, however, and the reasoning of the opinions is questionable. Countywide justice of the peace jurisdiction may be desirable as a policy matter; it undoubtedly forestalls much quibbling over jurisdictional questions. It does not follow, however, that the constitution therefore must compel countywide jurisdiction.

Normally, the Texas courts are given jurisdiction in the geographical area from which the judge is elected. (The supreme court, for example, whose judges are elected statewide, has statewide jurisdiction; district judges have jurisdiction in the same counties from which they are elected.) This does not mean, of course, that as a matter of constitutional law the justice of the peace's jurisdiction must be limited to the justice precinct. However, it does suggest that if a territorial limit is to be read into the constitution the justice precinct, rather than the county, would be the interpretation most consistent with the pattern established elsewhere in the court system.

A more logical conclusion, however, is simply that the constitution leaves the legislature free to define the territorial scope of the justice of the peace's jurisdiction. This is consistent with the general rule that matters not provided for in the constitution are left to the legislature.

The case relied upon by the series of attorneys general's opinions is *Ex parte Von Koenneritz*, (105 Tex. Crim. 135, 286 S.W. 987 (1926).) *Von Koenneritz* was convicted by the justice court of Precinct 6 of speeding. He contended that his offense, if any, took place in Precinct 3, and that the Precinct 6 justice of the peace

therefore was without jurisdiction. The court of criminal appeals rejected that argument, noting that the statute then in effect (art. 60 of the 1925 Code of Criminal Procedure) did not limit the justice of the peace's jurisdiction to the precinct. That did not necessarily mean, of course, that the legislature could not limit the justice of the peace's jurisdiction to the precinct if it chose to do so. The first attorney general's opinion, however, seems to have erroneously interpreted this decision as a constitutional prohibition against legislative limits on justice of the peace jurisdiction. (Tex. Att'y Gen. Op. No. O-6940 (1945).) Succeeding opinions relied on the first opinion without reexamining its mistaken reliance on the *Von Koenneritz* case. (Tex. Att'y Gen. Op. No. V-496 (1948); Tex. Att'y Gen. Op. No. C-602 (1966).)

The scope of the justice of the peace's territorial jurisdiction may be important in determining whether the "one-man, one-vote" requirement applies to justice precincts. In *Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972), plaintiffs contended that the requirement does apply. Their argument was that since the justice of the peace exercises countywide jurisdiction, it is unconstitutional to permit wide population disparities among the precincts from which justice of the peace are chosen. The court held that federal courts should abstain because Texas courts have not decided whether justices of the peace do indeed have countywide jurisdiction. The courts thus did not reach the main issue in the case but suggested that there might be no "one-man, one-vote" problem if justice of the peace jurisdiction were limited to the justice of the peace precinct. (Cf. *Wells v. Edwards*, 347 F. Supp. 453 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973), and *Kaplan v. Milliken*, (W.D.Ky. 1973), *aff'd*, 409 U.S. 1002 (1972) (both holding the one-man, one-vote principle inapplicable to the judiciary).)

The constitution prescribes no qualifications for justices of the peace. The legislature, however, has required justices of the peace who are not attorneys to attend a 40-hour training course. Justices of the peace who had served two terms before the effective date of the statute are excepted from the requirement. (Tex. Rev. Civ. Stat. Ann. art. 5972(b).) As of 1973, only about 6 percent of the more than 900 justices of the peace in Texas were lawyers. (Texas Civil Judicial Council *Interim Report* (1973), p. 17.)

Section 14 of Article XVI requires all county and district officers to reside within their districts or counties. Whether justices of the peace are "county officers" for purposes of this section has not been decided. The question was raised, but not resolved, in two cases that arose when several justices of the peace and constables were redistricted out of their precincts in Harris County. (See *Commissioners Court of Harris County v. Moore*, 525 S.W.2d 926 (Tex. Civ. App.—Houston [14th Dist.] 1975, *no writ*), and *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975).)

Justices of the peace, like other local officials in Texas, originally were compensated from the fees they collected, and until 1973 the fee system was still a permissible method of compensating justices of the peace. But an amendment approved by the voters in 1972 required all counties to compensate justices of the peace on a salary basis effective January 1, 1973. (Art. XVI, Sec. 61.)

Section 19 gives the justice of the peace both civil and criminal jurisdiction. He has jurisdiction of civil cases in which the amount in controversy does not exceed \$200. When the relief sought is not a fixed amount of money, but some nonmonetary form of relief such as an injunction, the justice court is generally held to be without jurisdiction. (E.g., *Lamesa Rural High School Dist. v. Speck*, 253 S.W.2d 315 (Tex. Civ. App.—Eastland 1952, *writ ref'd n.r.e.*.) Even when the relief sought is a monetary award under \$200, the justice court has no jurisdiction

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if the subject matter is one assigned to another court, such as probate, divorce, or slander.

The justice of the peace's criminal jurisdiction is limited to cases in which the maximum penalty or fine permitted by law does not exceed \$200. The courts have held that this clause deprives the justice court of jurisdiction whenever the offense charged is punishable by a jail term. (*Billingsly v. State*, 3 Tex. Ct. App. 686 (1878).) It also deprives the justice court of jurisdiction in cases in which conviction is punishable by a \$200 fine and some other penalty, such as forfeiture of a hunting license. (Ex parte *Howard*, 171 Tex. Crim. 278, 347 S.W.2d 721 (1961).) The courts have held that neither the civil nor criminal jurisdiction of the justice court is exclusive; the legislature therefore is free to grant other courts concurrent jurisdiction of these matters. (E.g., *Turnbow v. J. E. Bryant Co.*, 107 Tex. 563, 181 S.W. 686 (1916); *Patterson v. State*, 122 Tex. Crim. 502, 56 S.W.2d 458 (1933).)

Section 19 authorizes the legislature to give the justice court additional jurisdiction and the legislature has done so. In addition to the civil jurisdiction described in the constitution, a statute (Tex. Rev. Civ. Stat. Ann. art. 2385) gives the justice court jurisdiction "of cases of forcible entry and detainer, and to foreclose mortgages and enforce liens on personal property, where the amount in controversy is within their jurisdiction." Because the action of forcible entry and detainer is a common method for resolving disputes over leases, the justice of the peace plays an important role in landlord-tenant law, even though he usually is not a lawyer.

Another statute (Tex. Rev. Civ. Stat. Ann. art. 2386) gives the justice court power to punish contempt and issue writs of attachment, garnishment, and sequestration.

Every justice of the peace in Texas also wears three other hats simply by virtue of being a justice of the peace. The constitution makes him an *ex officio* notary public, and the statutes make him a judge of the small claims court and a magistrate.

Each county has a small claims court of which each justice of the peace in the county is a judge. This court has civil jurisdiction up to \$150 (\$200 in claims for wages) and operates under simplified rules of pleadings and procedure designed to eliminate the need for a lawyer. (Tex. Rev. Civ. Stat. Ann. art. 2460a.)

A justice of the peace performs some of his most important and time-consuming duties not as a justice of the peace, but as a magistrate. The justice of the peace along with judges of the higher courts, is a magistrate. (Code of Criminal Procedure art. 2.09.) In practice, magisterial duties are performed primarily by justices of the peace and municipal judges. The magistrate is the judge who handles most of the preliminary matters in a felony case. He has power to issue arrest and search warrants, accept a felony complaint, advise the defendant of his constitutional rights, fix bail, and conduct an examining trial to determine whether the defendant should be held, discharged, or released on bail. (Code of Criminal Procedure arts. 15.04, 15.05, 15.17, 17.05, 16.01 *et seq.*)

Justices of the peace also issue peace bonds, perform marriages, conduct inquests (except in counties that have a medical examiner), and perform many informal counseling and mediating services. (See Code of Criminal Procedure arts. 7.01 *et seq.* and 49.01 *et seq.*, Tex. Rev. Civ. Stat. Ann. art. 4602.)

The justice court would seem to be a court of record in the sense in which that term historically has been used, because it is a court whose proceedings are perpetuated in writing. (See *Tourtlot v. Booker*, 160 S.W. 293 (Tex. Civ. App.—El Paso 1913, *writ ref'd.*.) The Texas courts have stated several times, however, that the justice court is not a court of record. (E.g., Ex parte *Quong Lee*, 34 Tex.

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Crim. 511, 31 S.W. 391 (1895); *Hutcherson v. Blewett*, 58 S.W. 150 (Tex. Civ. App. 1900, *no writ*); *Warren v. Barron Bros. Millinery Co.*, 118 Tex. 659, 23 S.W.2d 686 (1930).) As a result, a statute applicable to "courts of record" does not apply to justice courts (Ex parte *Hayden*, 152 Tex. Crim. 517, 215 S.W.2d 620 (1948)), and a search warrant issued by a justice of the peace does not comply with a federal rule applicable to state courts of record (*United States v. Hanson*, 469 F.2d 1375 (5th Cir. 1972)). These cases do not explain why the justice court is not a court of record, nor do they suggest what attributes it would have to be given to become a court of record.

Section 19 guarantees a right of appeal to county court from all criminal convictions in justice court and from all civil judgments "for more than twenty dollars exclusive of costs." A literal reading of the quoted phrase would deny an appeal to unsuccessful plaintiffs because any judgment for the defendant is not "more than twenty dollars." The courts, however, have construed this section as if it read "judgment or amount in controversy," (e.g., *Brazoria County v. Calhoun*, 61 Tex. 223 (1884)), and the implementing statute permits appeals "where such judgment, or the amount in controversy, shall exceed twenty dollars exclusive of costs." (Tex. Rev. Civ. Stat. Ann. art. 2454.)

Although this provision suggests that all appeals from the justice court go to the county court, that is not the case. Such appeals go to the district court in counties in which the civil jurisdiction of the county courts has been transferred to the district courts. (Tex. Rev. Civ. Stat. Ann. arts. 2455, 2455-1.) If the county has a criminal district court, appeals from the justice of the peace court in criminal cases must go there rather than to the county court. (See Art. V, Sec. 16.) Finally, in most metropolitan counties, appeals from justice courts go to statutory county courts at law rather than the constitutional county court. Indeed, some counties have special "appellate" county courts at law that do nothing except try cases appealed from justice of the peace and municipal courts. (See, e.g., Tex. Rev. Civ. Stat. Ann. art. 1970-31.20, creating the Dallas County Criminal Court of Appeals.)

Comparative Analysis

As late as 1928 no state had completely done away with justices of the peace. Today, they have been abolished in about one-third of the states. About 15 states retain the justice of the peace as a constitutional office. Within the last decade, 10 states have removed the justice of the peace from their constitutions. Two states have adopted new constitutions retaining the justice of the peace. Other states, while retaining the constitutional provision, have reduced the role of the justice courts. For example, in 1972 Montana reduced their number and Kansas in 1964 effectively abolished their civil jurisdiction by reducing it to suits involving \$1 or less.

Counting the special statutory courts and the justice courts, Texas has more than 2,000 courts of limited and special jurisdiction—substantially more than any other state.

All decisions concerning the creation, nature, and jurisdiction of lower courts, and the qualifications of their judges, are left to the legislature under both the United States Constitution and the *Model State Constitution*.

In most of the states, the justice of the peace apparently is not required to be a lawyer. (See Institute of Judicial Administration, *The Justice of the Peace Today* (1965), table II.)

Author's Comment

The justice of the peace is probably the most criticized office in the judicial

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system. The following comment is not atypical:

It is doubtful if a more striking example of cultural lag can be found in the political field than the attempt which is made in most of our forty-eight states to serve the ends of justice in the twentieth century by a medieval English instrument. . . . The only persons actively desiring its continuation are those who profit from its operation in some way. (Howard, "The Justice of the Peace System in Tennessee," 13 *Tenn. L. Rev.* 19 (1934).)

The critics point out that the justice of the peace often has little or no legal training, conducts his proceedings in a nonjudicial manner and atmosphere, and lacks the supporting personnel (*e.g.*, clerks and court reporters) needed to operate as a full-fledged court. Some Texas justices of the peace apparently have purported to delegate some of their judicial duties to secretaries, clerks, or spouses, permitting these persons to accept guilty pleas, levy fines, and set bonds. A recent attorney general's opinion has stated the obvious: these practices are illegal (Tex. Att'y Gen. Op. No. H-386 (1974)).

The workloads of different justice courts are often widely disparate, even within the same county or precinct. The justice of the peace's jurisdiction to some extent overlaps that of the municipal and county courts. Justice court judgments are nullified when appealed. This means that such cases must be tried over again ("de novo") in the county court or county court at law, resulting in inefficient use of judicial resources.

The major factors cited in favor of retaining the office are its closeness to the people, its convenience, and its utility in freeing other, more highly trained (and therefore more expensive) judges from the many time-consuming chores performed by justices of the peace. It is undeniable that abolition of the justice of the peace would require designation of some other official to perform his many duties. (See the preceding *Explanation* for a description of those duties.)

As the *Comparative Analysis* indicates, the trend has been toward abolition of the justice of the peace, or at least a sharp reduction in his numbers and powers. Many students of court reform favor a unified trial court in which the justice of the peace's functions are performed by magistrates—officials who are supervised by the judges of the general trial court. Unified trial court systems have been successfully established in a number of states, often incorporating present justices of the peace into the new system as magistrates. (See, *e.g.*, Underwood, "The Illinois Judicial System," 47 *Notre Dame Lawyer* 247, 251 (1971).)

There are several alternatives short of outright abolition of the justice of the peace. One is reduction of the number of justices of the peace, or at least better allocation of their numbers. Since each county in Texas has at least four justice courts, and no county may have more than 16, population of justice precincts and workloads of the justice courts vary widely. The experience of other states indicates that the number of justice courts can be drastically reduced without losing the advantages of the justice of the peace system.

Another alternative is to retain the justice of the peace and continue his role as a magistrate, peace keeper, and informal mediator but transfer his formal judicial functions to a court whose judge is a lawyer.

The practice of requiring trial de novo of appeals from justice courts could be ended without abolishing justices of the peace. The practice gives a person charged with a misdemeanor the right to two trials, while a person charged with a more serious crime gets only one trial. More importantly, since county court dockets often are clogged with de novo appeals, it provides a means by which justice can be deliberately delayed or thwarted. (See Truax, "Courts of Limited Jurisdiction are

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Passé," in *Current Issues on the Judiciary* (1971), p. 95.)

From a constitutional perspective, however, the question is not necessarily whether the justice of the peace should be abolished. Rather, it is whether he should be preserved *constitutionally*. Removal of the justice of the peace from the constitution need not lead to abolition of the office of a single justice of the peace. If justices of the peace are as useful as their defenders assert, they should have little trouble persuading the legislature to preserve them. On the other hand, if their utility is so questionable that they are in danger of abolition by the legislature, it is difficult to justify their retention in the constitution. Removal from the Texas Constitution of all mention of justices of the peace and justice courts would not significantly alter their operations, because the statutes provide for their election, terms, duties, and jurisdiction. (Tex. Rev. Civ. Stat. Ann. arts. 2373-2387.)

In any event, the provision in Section 19 making justices of the peace *ex officio* notaries public is not a matter of constitutional moment and should be removed. (The matter is covered by Tex. Rev. Civ. Stat. Ann. art. 2376.) The jurisdictional limits of the justice court also are covered by statute (Tex. Rev. Civ. Stat. Ann. art. 2385; Code of Criminal Procedure art. 4.11) and probably should not be constitutionally fixed. The provision for appeals from justice court to county court is no longer descriptive of actual practice. (See the preceding *Explanation*.) Again, the matter is covered by statute (Tex. Rev. Civ. Stat. Ann. arts. 2454, 2455, 2455-1; Code of Criminal Procedure arts. 44.07, 44.13, 44.17) and therefore could be removed from the constitution without affecting present practice.

If the provisions of Section 18 relating to election of justices of the peace are to be retained, the language should be rewritten to make clear when one precinct may elect two justices. (See the preceding *Explanation*.) The second justice probably should be authorized whenever the precinct reaches the prescribed population minimum, without regard to whether the population resides in a city located entirely within the precinct or in any city at all; a provision giving 8,000 city dwellers two justices of the peace but limiting 8,000 rural residents to one may create legal problems under the equal protection clause of the federal constitution. (Cf. *Avery v. Midland County*, 390 U.S. 474 (1968).)

Sec. 20. COUNTY CLERK. There shall be elected for each county, by the qualified voters, a County Clerk, who shall hold his office for four years, who shall be clerk of the County and Commissioners Courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the Legislature, and a vacancy in whose office shall be filled by the Commissioners Court, until the next general election; provided, that in counties having a population of less than 8,000 persons there may be an election of a single Clerk, who shall perform the duties of District and County Clerks.

History

The county clerk first appeared as a constitutional officer in the Constitution of 1866. (Art. IV, Sec. 18.) Under the Republic, the office was statutory. (See Davis and Oden, *Municipal and County Government* (Arnold Foundation Monograph No. VIII, 1961), p. 120.) This practice continued under the Constitutions of 1845 and 1861. Under the Constitution of 1869 the county clerk was dropped, but his traditional duties were assigned to the clerk of the district court. (Art. V, Sec. 9.)

The 1875 Convention reverted to the 1866 scheme of things, but with a nod to the 1869 arrangement. The proviso recognized that in counties with a relatively small population, one person could serve as both district and county clerk. The

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source of the magic number 8,000 is not clear. Efforts were made on the convention floor to increase the figure to 12,000 and to 10,000. Both changes were defeated. (*Journal*, p. 672.) At that time there were 140 counties of which only 46 had a population of 8,000 and over. Nineteen of these had a population between 8,000 and 10,000 and another six had between 10,000 and 12,000. Today there are 85 counties with a population under 8,000.

In 1887, the voters turned down an amendment proposing a new judicial article. It would have dropped the county clerk as a constitutional officer. The only other amendment affecting Section 20 was the 1954 omnibus amendment increasing the length of county and district terms of office to four years.

Explanation

Section 20 refers to "perquisites and fees of office." Since 1935, clerks in counties with a population of 20,000 or more have had to be paid a salary in lieu of fees and in the other counties could be paid a salary at the option of the commissioners court. (See Sec. 61, Art. XVI.) Although the "perquisites and fees" are to be "prescribed by the Legislature," the practice in the case of salaries has been to provide upper and lower limits within which the commissioners courts can set the salaries of county officers. (See *Tex. Rev. Civ. Stat. Ann. art. 3883 et seq.* (1966). These are mostly population-bracket laws which are, or ought to be, recognized as unconstitutional under Sec. 56 of Art. III.)

Section 20 also states that the legislature shall "prescribe" the duties of the county clerk. (For a discussion of "duties," see the *Author's Comment* on Sec. 14, Art. VIII.) These can be found in Articles 1935 through 1948 of the Revised Civil Statutes. Presumably, these duties could be redistributed. (See *Explanation* of Sec. 64, Art. III.)

Section 20 permits but does not mandate a single county and district court clerk for counties with a population of less than 8,000. Until 1962, a single clerk was mandatory in such counties. Since that date the applicable statute has provided that:

[i]n counties having a population of less than eight thousand (8,000), according to the last preceding Federal Census, there shall be elected a single clerk . . . , unless a majority of the qualified voters of the county who participate in a special election, called by the Commissioners Court for that purpose, vote to keep the offices of county and district clerk separate. (*Tex. Rev. Civ. Stat. Ann. art. 1903* (1964).)

The section goes on to state that the commissioners court "may" submit the question not less than 30 days before a regular primary election preceding the expiration of the clerk's term of office and again "immediately prior to the expiration of each subsequent constitutional term of office of the separate clerk."

What was once clear is now ambiguous. If the quoted sentence means what it says, it is applicable only to counties whose population fell below 8,000 according to the last preceding census because those are the only counties that would have had separate clerks to "keep." It is not clear whether "may" means "shall" submit the question to the voters. Presumably, "immediately prior" to each subsequent term means at least 30 days before each subsequent appropriate primary election. It also appears that the subsequent submissions can be made only if the first vote is against a single clerk. Thus, assuming that the statute means that the commissioners court must act, the voters in any county with separate clerks may choose to have a single clerk provided that the census shows a population of less than 8,000. But it is a one-way street. Any county with a single clerk or which votes for a single clerk is stuck until the population rises above 8,000 at which time there must be

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separate clerks. This may be characterized as “teensy-weensy home rule.”

Any person serving as both county clerk and district clerk has two seals of office. He must be careful that he uses the seal that matches the hat he is wearing when he seals a document. A district court document with a county court seal is void. (*Hardy Oil Co. v. Markham State Bank*, 131 S.W. 440 (Tex. Civ. App. 1910, *no writ*.)

Comparative Analysis

The county clerk is an elected constitutional officer in about 12 states. All constitutional clerks are elected for terms varying from two years to eight years. Two of those states, Illinois and Montana, have adopted new constitutions which retain the offices subject to abolition by the voters. (See *Comparative Analysis* of Sec. 18.)

Author's Comment

It is not uncommon for inconsistencies and ambiguities to appear in any long document, particularly if more than one “author” is involved. The Texas Constitution is most unusual in the almost complete lack of consistency in drafting. A good example is pay for county officers.

There are six provisions dating from 1876 dealing with county officers' compensation, all worded differently:

- (1) County Judge
 . . . shall receive as compensation for his services such fees and perquisites as may be prescribed by law. (Art. V, Sec. 15)
- (2) County Clerk
 . . . whose duties, perquisites and fees of office shall be prescribed by the Legislature, (Art. V, Sec. 20)
- (3) County and District Attorneys
 The Legislature may . . . make provision for the compensation of District Attorneys and County Attorneys. (Art. V, Sec. 21)
- (4) Sheriffs
 . . . whose duties and perquisites, and fees of office, shall be prescribed by the Legislature, (Art. V, Sec. 23)
- (5) County Treasurer and County Surveyor
 . . . who . . . shall have such compensation as may be provided by law. (Art. XVI, Sec. 44)
- (6) Public Officers
 The Legislature shall provide by law for the compensation of all officers, . . . , not provided for in this Constitution, (Art. III, Sec. 44)

One must assume that these provisions all mean the same thing. If they do not, there is chaos. One would have to try to make sense out of the differences and might conclude that “legislature” was used in order to by-pass the governor's power of veto, or that judges, sheriffs, and clerks cannot be paid salaries and that attorneys, treasurers, and surveyors can be paid only by salary. This may all seem to be a tempest in an inkwell, but if all inconsistencies in language are written off, how does one know when differences in wording are supposed to mean something?

In any event, there is no need to say anything about compensation except to the extent of a limitation, such as “shall not fix the salary . . . at a sum less than” (See Art. III, Sec. 61 (1954).) And, of course, there is no constitutional need to mention a county clerk anyway. However, there may be a practical political necessity for mentioning the county clerk. (See *Author's Comment* on Sec. 18.)

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Sec. 21. COUNTY ATTORNEYS; DISTRICT ATTORNEYS. A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. The Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary and make provision for the compensation of District Attorneys and County Attorneys. District Attorneys shall hold office for a term of four years, and until their successors have qualified.

History

The Constitution of the Republic provided for appointed district attorneys "whose duties, salaries, perquisites and term of service shall be fixed by law." (Art. III, Sec. 5.) Appointments were made by the president with the advice and consent of the senate. In the Constitution of 1845, district attorneys were elected by joint vote of the two houses of the legislature for terms of two years. (Art. IV, Sec. 12.) An omnibus amendment of 1850 made the office elective. The term of office was not specified, but another section of the 1845 Constitution (Art. VII, Sec. 10) provided that no term of office not otherwise specified could exceed four years.

The Constitution of 1861 left the wording of Section 12 unchanged but by vote of the convention "chairman of committee" continued in effect the amendment of 1850. The 1866 Constitution continued the office as elective but specified a four-year term. There was no reference to "duties," "perquisites" were to be prescribed by law, and annual salary was "one thousand dollars, which shall not be increased or decreased during his term of office." (Art. IV, Sec. 14. No effort will be made to explain *that* "which" clause.) The Constitution of 1869 made no change except to get rid of the stated salary and to provide that "duties, salaries, and perquisites" were to be prescribed by law.

The office of county attorney first appeared in the Constitution of 1866 in the form of permission to the legislature to provide for an appointed one to represent the state and county in the county court. Term of office, duties, and compensation were to be as prescribed by law. (Art. IV, Sec. 16.) This was omitted from the Constitution of 1869.

Section 21 as it appeared in 1876 differed from the current version in three respects: (1) the term of county attorney was set at two years; (2) there was no concluding sentence concerning the term of office of district attorneys; and (3) the section concluded with the words:

provided, District Attorneys shall receive an annual salary of \$500, to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County Attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law.

In 1887, the voters were presented an amendment consisting of an entirely new Judiciary Article. The counterpart of Section 21 was short and sweet: "The Legislature shall provide for the election of district and county attorneys, and such other officers as may be deemed necessary to the due administration of justice, define their duties, and fix their compensation." (There was a second, transitional sentence covering attorneys then in office.) The amendment was defeated.

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In November 1954 the current version of Section 21 was adopted.

Explanation

This section has caused the courts a lot of trouble. This should come as no surprise to anyone who reads the section. The first thing to hit the reader is the dangling "resident Criminal District Attorney." He is a negative personality. Until 1954 he did not appear elsewhere in the constitution; his duties, his pay, and his term of office are not mentioned. (Sec. 30, added in 1954, states that "all Criminal District Attorneys now or hereafter authorized by the laws of this State" shall be elected for four-year terms.)

This is all understandable if one looks to the wording of Section 1 of Article V as it appeared in 1876. At that time the legislature was authorized to "establish criminal district courts," but only if the district contained a city of at least 30,000 people. The section also contained the sentence concerning "Harris and Galveston Counties" now appearing as the second paragraph of the section. (The section was amended in 1891. See *History* of Sec. 1.) Obviously, then, the drafters of the 1876 Constitution were saying that, in the case of "Harris and Galveston Counties," there should be no county attorney in the county in which the criminal district attorney lived and that, if another criminal district court were created, there should be no county attorney in the county in which the criminal district attorney lived. But it is equally obvious that the drafters were assuming that everybody knew that there was a criminal district attorney if there was a criminal district court. Unfortunately, the drafters failed to spell this out. Thus, the poor resident criminal district attorney remained an assumed figure.

Decades later, the origins of the shadowy office obviously having been forgotten, the legislature created a regular district court, not a criminal district court, for Gregg County and simultaneously created a "criminal district attorney" for the new court who was to perform all the duties of county attorney and district attorney. Litigation followed. The issue was whether the legislature could kill off a county attorney position by calling the district attorney "criminal." The answer was yes:

It will be seen that none of these provisions in express terms prohibits the creation of the office mentioned in the first sentence, resident criminal district attorney, without its being created as part of a strictly criminal district court

. . . It is our opinion that there is no implied prohibition in the provisions of the Constitution, to which reference is made above, which limits the power of the Legislature to create the office of criminal district attorney as a part of the organization of a district court of general jurisdiction. (*Neal v. Sheppard*, 209 S.W.2d 388, 390 (Tex. Civ. App.—Texarkana 1948, *writ ref'd*.)

The provisions referred to are Section 21, Section 1, and Section 16, which limits the criminal jurisdiction of the county court if there is a criminal district court in the county. The *Neal* case is an example of the principle that a legislature has all power not denied to it by the constitution. (See *Explanation* of Sec. 1, Art. III.)

There is nothing in the *Neal* opinion indicating why the legislature took the route of a criminal district attorney rather than district attorney. In one earlier case, *Hill County v. Sheppard*, the Supreme Court refused to recognize the creation of a resident criminal district attorney because the statute included the following language:

Sec. 5-A. It is not the intention of this Act to create any office of District Attorney nor any other Constitutional office and the office of Criminal District Attorney is hereby declared to be a separate and distinct office from the Constitutional office of District

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Attorney and no Criminal District Attorney shall draw or be entitled to any salary whatsoever from the State of Texas. (142 Tex. 358, 36, 178 S.W.2d 261, 262 (1944).)

The court expressly reserved the question whether the office of criminal district attorney could be created only for a criminal district court. (142 Tex., at 362; 178 S.W.2d, at 263.) The court simply held that "the Legislature could not create a statutory office with authority to take over the duties of county attorney." (142 Tex., at 364; 178 S.W.2d, at 264. The unsuccessful criminal district attorney was Robert W. Calvert who retired recently as chief justice of the supreme court.)

Reading between the lines, one gets the impression that in the process of creating courts there was pulling and hauling over that extra \$500 that the section then required the state to pay to district attorneys, and that this, rather than any rational system of judicial administration, shaped the legislation.

The office of district attorney is only slightly less shadowy than the resident criminal district attorney. Section 21 does not require any district attorneys. It does say that if there are any, they shall be elected and shall have such duties as the legislature takes away from the county attorney. There is no way of knowing whether the 1875 Convention drafted the section in this indirect manner in order to facilitate the district court system that has grown up or whether the existing system grew up as it did because of the looseness of the section. Whatever the reason, there is only one district attorney for a county that has several district courts in it. There are approximately 20 counties that have a resident criminal district attorney without a criminal district court, as upheld in the *Neal* case. Dallas, Jefferson, and Tarrant counties have criminal district courts with criminal district attorneys. In these counties there is no county attorney and the criminal district attorney also serves as district attorney. The criminal district courts in Harris and Galveston counties have been abolished, but the office of criminal district attorney was retained in Galveston County, thus leaving it with no county attorney. (The foregoing is deduced from the tables in the 1972-1973 *Texas Almanac*, pp. 581-94. It is presumably possible to determine all this from the statutes, but they are so hopelessly confused that one can be forgiven for relying on a secondary source. In 1971, the legislature created four more criminal district attorneys, Tex. Rev. Civ. Stat. Ann. arts. 326k-64, -67, -68, -69 (1973). One of these is Eastland County, the county of Earl Conner, Jr., whose case is discussed on page 466.)

Everything about the county attorney is definite. Especially so is the statement that he "shall represent the State in all cases in the District and inferior courts." This has created problems for the attorney general. The courts have held that he cannot initiate litigation on behalf of the state in district courts except in the limited instance specified in Section 22 of Article IV or with the concurrence of the county or district attorney. (See *State v. Moore*, 57 Tex. 307 (1882); *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex. Civ. App.—San Antonio 1957, *no writ*.) The reason for this is the language "represent the State in all cases" and the complementary language in Section 22 of Article IV "represent the State in all suits and pleas in the Supreme Court."

This rigid allocation of litigating power has been loosened up by the courts. In 1959, the court of civil appeals reviewed the judicial development since the *Moore* case and concluded that the legislature could entrust to the attorney general the bringing of a suit in a district court if the cause of action upon which the suit was based was newly created by the legislature. (*State v. Walker-Texas Investment Co.*, 325 S.W.2d 209 (Tex. Civ. App.—San Antonio), *writ ref'd n.r.e. per curiam*, 160 Tex. 256, 328 S.W.2d 294 (1959).) In a way, the courts are saying that the rigid allocation of 1876 is frozen as of that date for traditional litigation but that new legal problems may be handled as the legislature may direct.

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The confused language of Section 21 concerning criminal district attorneys, county attorneys, and district attorneys has generated a great deal of litigation, but for the most part the main thrust of the litigation has been a substantive matter other than the jurisdictional question of which attorney could do what. (See, for example, *State v. Gary*, 163 Tex. 565, 359 S.W.2d 456 (1962); *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d 191 (1956).) The confusion of Section 21 is perhaps best summed up by a request from the secretary of state to the attorney general:

Should Earl Conner, Jr. be commissioned as "County Attorney," "County and District Attorney," "District Attorney," or a "Criminal District Attorney?"

The attorney general carefully reviewed Section 21, the applicable statute, and the *Hill County* case and concluded that "the said Earl Conner, Jr. should be commissioned as County Attorney." (Tex. Att'y Gen. Op. No. 0-6374 (1945).) The attorney general noted that Mr. Conner held the same opinion.

One final point should be made concerning the confusion over these various titles of attorneys. In a well-ordered system the public's attorneys on the local level usually handle either criminal or civil matters. The former are normally called "district attorneys," "prosecuting attorneys," or "state's attorneys"; the latter are normally called "county attorneys," "city attorneys," "town attorneys," or "corporation counsel." It should follow that a county attorney handles civil matters for a county and that a district attorney, with or without "criminal" added to the title, handles criminal matters for the state. Obviously, things are not that neat under Section 21. As a rough approximation of the system, it can be said that in a county that has more than a county attorney, he handles civil matters; in all other situations, the single attorney, whatever his title, handles both civil and criminal matters.

Comparative Analysis

Over three-fourths of the states provide for a prosecuting attorney. Some 25 provide for a set term of office, usually four years. About half of the provisions mention compensation, but all except three leave the amount to the legislature. Most but not all of these states specify a method of selecting the prosecuting attorney. With one exception, the method is by popular election.

The *Index Digest* notes that various terms are used for the office. Texas is listed under "county attorney" and not under "district attorney" (p. 786). There is no reference to the term "criminal district attorney." It seems unlikely that any other state uses the term. Kentucky has a provision which permits the legislature to abolish the office of commonwealth's attorney in which case his duties devolve upon the county attorney. (This is indexed under "Abolition of Office," p. 787. It may be that there are other state constitutions that create more than one prosecuting attorney. The *Index Digest* allocates only one title to each state.)

Neither the United States Constitution nor the *Model State Constitution* refers to a prosecuting attorney under any title.

Author's Comment

Section 21 is an example of two errors sometimes made in drafting a constitution. One is exposition by assumption. The 1875 drafter knew, as presumably most people did, what the court system was and building on that knowledge produced a section that assumed the existing system. This is not a good idea at the time it is done; it is disastrous if the constitution is to be around for many decades. This is not to say that no assumptions may be made. Everybody

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knows, women's liberation to the contrary notwithstanding, that "he" in a constitution means "he or she." (But see Sec. 19, Art. XVI.)

The second error is, paradoxically, one of unnecessary explicitness. The drafters assumed rightly that the county attorney would represent the state in the local courts but by spelling it out they created problems. If, for example, the drafters had left out "all" in describing the cases to be handled, the ensuing difficulties might not have been encountered. If, however, the drafters had asked themselves "Is this explicit statement really essential?" they would probably have decided that it was not.

There is a third error in the 1954 amendment brought about by a failure to follow the rule: Read the *entire* constitution before amending it. The concluding sentence, added in 1954, includes the clause "until their successors have qualified." Section 17 of Article XVI already said that.

Section 21 is undoubtedly the only constitutional provision that ever commanded a governor to commission the qualified voters.

Sec. 22. CHANGING JURISDICTION OF COUNTY COURTS. The Legislature shall have power, by local or general law, to increase, diminish or change the civil and criminal jurisdiction of County Courts; and in cases of any such change of jurisdiction, the Legislature shall also conform the jurisdiction of the other courts to such change.

History

This provision first appeared in the Constitution of 1876. It probably was a concession to delegates who opposed creation of a county court altogether and others who felt that it was given too much jurisdiction. (See the *History* of Secs. 15 and 16.) In the absence of this section, the legislature would have had no power to change county court jurisdiction under the original 1876 Constitution, because the language in present Section 1, permitting the legislature to conform the jurisdiction of existing courts to that of new ones, was not added until 1891. (See the *History* of Sec. 1.)

Explanation

This provision, unlike Section 1 of Article V, permits the legislature to take constitutionally prescribed jurisdiction away from a constitutional court. Although Section 1 permits the legislature to create additional courts "and conform the jurisdiction of the district and other inferior courts thereto," that language does not permit the legislature to *deprive* a constitutional court of its jurisdiction. It permits the legislature to give a new court jurisdiction concurrent with that of the constitutional court (*Reasonover v. Reasonover*, 122 Tex. 512, 58 S.W.2d 817 (1933)) but does not permit jurisdiction to be taken away from the constitutional court entirely. (*Lord v. Clayton*, 163 Tex. 62, 352 S.W.2d 718 (1961).)

Because of Section 22, however, the courts have been more liberal in allowing the legislature to take jurisdiction away from the county courts. The legislature can deprive the county courts of their criminal jurisdiction (*King v. State*, 158 Tex. Crim. 347, 255 S.W.2d 879 (1953)), their civil jurisdiction (*Rogers v. Graves*, 221 S.W.2d 399 (Tex. Civ. App. - Waco 1949, *writ ref'd*)), and their appellate jurisdiction (*Brazoria County v. Calhoun*, 61 Tex. 223 (1884)).

Even under the broad language of Section 22, however, the courts' reluctance to permit withdrawal of jurisdiction from constitutional courts did not disappear entirely. The section permits the legislature to change the "civil and criminal jurisdiction" of the county courts; it does not mention their probate jurisdiction. The courts concluded that this omission was meaningful, and that probate was not

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intended to be included within the word "civil" for purposes of this section. The legislature therefore was held to have no power completely to withdraw the county court's probate jurisdiction. (*State v. Gillette's Estate*, 10 S.W.2d 984 (Tex. Comm'n App. 1928, *jdgmt adopted*.) Under the more general language of Section 1, however, the legislature could give another court concurrent jurisdiction in probate matters. (*State ex rel. Rector v. McClelland*, 148 Tex. 372, 224 S.W.2d 706 (1949).) A 1973 amendment to Section 8 of Article V appears to have eliminated this problem; it gave the legislature broad power to "increase, diminish, or eliminate" the county court's probate jurisdiction. See the *Explanation* of Sections 8 and 16.

Section 22 permits the legislature to increase, as well as diminish, county court jurisdiction. County courts thus can be given jurisdiction concurrent with that of the justice courts. (*Gulf, W.T. & P.Ry. Co. v. Fromme*, 98 Tex. 459, 84 S.W. 1054 (1905).)

Comparative Analysis

At least two other states have constitutional provisions permitting the legislature to take jurisdiction away from the county court. The West Virginia Constitution permits the legislature, upon application of a county, to modify the county court established by the constitution or, if the voters of the county approve, even replace it with a new tribunal. The New Jersey Constitution provides that the jurisdiction of the county court may be altered as the public good may require.

In the vast majority of states, changes in jurisdiction of the county court are simply treated the same as changes in jurisdiction of all other courts.

Author's Comment

There is no persuasive reason why the legislature should be given greater power to change county court jurisdiction than that of other courts. It might be argued that the distinction can be justified because the county judge often is not a lawyer, and that Section 22 is an attempt to deal with this problem by allowing the legislature to withdraw matters it is unwilling to entrust to a nonlawyer judge. The justice of the peace, however, is even more likely to be a nonlawyer, yet there is no provision permitting withdrawal of his jurisdiction. Moreover, some of the county court's toughest legal questions arise in probate matters, yet Section 22 as interpreted does not permit the legislature to take away those matters (although Sec. 8 does). Finally, even if the nonlawyer judge is the problem addressed by Section 22, withdrawal of jurisdiction is at best a crude and indirect method of dealing with the problem.

In any event, it is awkward and potentially confusing to provide for withdrawal of jurisdiction in a separate section. The subject should be addressed in the sections granting jurisdiction; the language conferring each kind of jurisdiction should make clear whether that jurisdiction may be withdrawn or regulated by the legislature. If those sections are properly drafted, inclusion of a separate provision like Section 22 is unnecessary and is likely to create conflicts.

Sec. 23. SHERIFFS. There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties and perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the Commissioners Court until he next general election.

History

The Constitution of 1836 provided for a sheriff in each county to be appointed or elected as provided by congress for a two-year term. Sheriffs were commissioned by the President of the Republic. The Constitution of 1845 followed this approach,

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changing president to governor, and added a limitation on eligibility to serve as sheriff — not more than four out of every six years. The Constitution of 1866 extended the sheriff's term to four years and limited eligibility to not more than eight out of every 12 years.

The Constitution of 1869 added new language. Sheriffs were subject to removal by the local district judge for good cause "spread upon the minutes of the court." Special provision was made for a constable to serve process against a sheriff facing removal or a lawsuit.

In the Convention of 1875 this section as reported by the Committee on the Judicial Department included a provision for constables. (*Journal*, pp. 412-13.) A floor substitute for the Judicial Article would have included the limitation on eligibility found in previous constitutions but was defeated. (*Journal*, p. 567.) In floor debate, the commissioners court rather than the county judge was given power to fill a vacancy in the office of sheriff, and the reference to constables was stricken by amendment. (*Journal*, pp. 680-81.)

The sheriff's term was increased to four years in 1954 along with that of most other county officials.

Explanation

In the ninth century the English kings appointed reeves who watched over royal interests in the towns of England. Early in the tenth century, the reeves were given jurisdiction over shires (counties) and were called shire-reeves. Soon after the Norman conquest, the power of sheriffs reached its zenith as they became the chief political officers of the shire. Over the centuries their delegated power has diminished, but by law sheriffs still act as conservators of the peace, serve writs, summon juries, execute judgments, operate jails, and enforce the law.

Court decisions involving this section have focused on the clause which provides for filling vacancies.

If a vacancy occurs in the office of sheriff, the commissioners court must appoint a successor rather than call a special election (Tex. Att'y Gen. Op. No. 0-2965 (1940)). If a sheriff-elect dies after a general election but before the beginning of the new term, the court can appoint one person to fill the unexpired term and another to fill the new term. (*Dobkins v. Reece*, 17 S.W.2d 81 (Tex. Civ. App.—Fort Worth 1929, writ *ref'd*.)

In *Poe v. State* (72 Tex. 625, 10 S.W. 737 (1889)), the court upheld a statute authorizing district judges to suspend a sheriff for good cause and appoint a temporary successor pending disposition of a suit for removal. The court reasoned that although this section does not allow the legislature to authorize district judges to fill a vacancy by appointment, it does not prohibit suspension. However, if a sheriff so suspended resigns, the commissioners court has power to fill the vacancy and its appointee takes office rather than the temporary appointee of the district judge who suspended the incumbent. (*Leonard v. Speer*, 48 S.W.2d 474 (Tex. Civ. App.—Galveston 1932), writ *dism'd as moot*, Tex. Comm'n App., 56 S.W.2d 640 (1933).)

Comparative Analysis

Thirty-four other states provide for election of a sheriff in their constitutions. In New Orleans two sheriffs are elected — one for civil matters and one for criminal matters. Washington provides for elected sheriffs unless a county with a home-rule charter provides otherwise. Eight other state constitutions provide that the powers of the sheriff are to be prescribed by law.

Methods for filling vacancies vary among gubernatorial appointment (Connecti-

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cut and Maryland), judicial appointment (Tennessee), special election (New York), and commissioners court appointment (North Carolina and Montana).

The *Model State Constitution* does not designate local government officials or their method of selection.

Author's Comment

Whether each county should have a sheriff and how the sheriff should be selected should be matters for local determination. Theoretically, incumbent sheriffs should not object to putting the continuation of their office to a vote of their constituents, but reality frequently does not accord with theory.

Sec. 24. REMOVAL OF COUNTY OFFICERS. County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

History

Article IX, Section 6, of the Constitution of 1845 required the legislature to provide for trial, punishment, and removal from office of all officers of the state not subject to impeachment. The Constitutions of 1861, 1866, and 1869 contained identical provisions, with the Constitution of 1869 adding the following section to the judicial article:

All county and district officers, whose removals are not otherwise provided for, may be removed, on conviction by a jury, after indictment, for malfeasance, nonfeasance, or misfeasance in office. (Art. V, Sec. 24.)

Section 24 as reported by committee to the Convention of 1875 included "sheriffs" in the list of officers subject to removal (*Journal*, p. 413); however, the *Journal* does not indicate at what point in the proceedings sheriffs were deleted.

The proposed but unsuccessful revision of Article V of 1887 added sheriffs as well as prosecuting attorneys to the removal authorization. No other amendment to this section has been submitted to the voters.

Explanation

Removal by district judges is a summary procedure. One convicted of a felony by a jury automatically forfeits his office (Tex. Rev. Civ. Stat. Ann. art. 5968), but the purpose of this section and its implementing statutes is both to permit a speedy removal and a removal on the grounds that may not allow criminal prosecution or impeachment. (*Trigg v. State*, 49 Tex. 645 (1878).)

Statutes authorizing the temporary suspension of a county officer without notice, hearing, or jury verdict pending trial of a petition for removal do not contravene this section. (*Griner v. Thomas*, 101 Tex. 36, 104 S.W. 1058 (1907).)

The power to remove is vested in the district judge. If the judge quashes a petition for removal without trial, his decision is final. (See Tex. Rev. Civ. Stat. Ann. art. 5979; *Smith v. Brennan*, 49 Tex. 681 (1878).) Likewise, the district judge can direct a trial verdict in favor of the accused officer or refuse to remove the officer despite a finding by a jury of facts justifying removal. (*State v. O'Meara*, 74 S.W.2d 146 (Tex. Civ. App. — San Antonio 1934, *no writ*).)

The district or county attorney, not the attorney general, represents the state in a removal suit under this section. (*State v. Harney*, 164 S.W.2d 55 (Tex. Civ. App. — San Antonio 1942, *writ ref'd w.o.m.*); *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d

191 (1955).) Private citizens may not pursue a removal suit when the district attorney who brought the suit has obtained a dismissal. (*State v. Ennis*, 195 S.W.2d 151 (Tex. Civ. App. – San Antonio 1946, writ *ref'd n.r.e.*.)

Comparative Analysis

The Alabama, Arkansas, Louisiana, and West Virginia constitutions have provisions similar to this section. Georgia provides for removal on conviction for malpractice in office. Indiana and Kansas provide for removal as prescribed by law. The Mississippi and Wisconsin constitutions authorize removal by the governor subject to regulation by the legislature.

The *Model State Constitution* provides for removal from office by impeachment but has no other removal provision.

Author's Comment

Removal of county-level officers is comprehensively provided for in the statutes (see Tex. Rev. Civ. Stat. Ann. art. 5968 *et. seq.*), and there is thus no reason to retain a section like this so long as there is some provision making it clear that impeachment is not the exclusive means of removal of constitutional officers.

Sec. 25. RULES OF COURT. The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of this State to expedite the dispatch of business therein.

History

Texas constitutions prior to 1876 gave the courts no rule-making power. Apparently, however, the supreme court even before 1876 had promulgated "a few short rules of court." (See *Texas Land Co. v. Williams*, 48 Tex. 602 (1878).) The 1876 Constitution gave the supreme court more rule-making power than it has now. It authorized the supreme court to "make rules and regulations for the government of said court, and the other courts of the State, to regulate proceedings and expedite the dispatch of business therein." The legislature was given no power to veto or supersede the court's rules.

The 1891 amendment, for reasons that are obscure, diluted the supreme court's rule-making power by adding the phrase "not inconsistent with the laws of the State." This led to the enactment of many piecemeal statutory regulations of procedure, and by the 1930s Texas practice had become highly technical. (McDonald, "The Background of the Texas Procedural Rules," 19 *Texas L. Rev.* 229 (1941).)

More than 30 years of lobbying by the state bar association and the Texas Civil Judicial Council led to passage in 1939 of the present statute conferring general rule-making power on the supreme court. (Tex. Rev. Civ. Stat. Ann. art. 1731a.) The statute states that the legislature relinquishes and confers upon the supreme court "full rule-making power in the practice and procedure in civil actions."

Under this statute, the supreme court appointed an advisory committee which drafted a complete set of rules. These were adopted by the court, with some modifications, in 1941 and have been modified further from time to time since then. The 822 rules promulgated through 1972 are contained in six annotated volumes of the Texas Rules of Civil Procedure.

Explanation

Although the statute relinquishes full rule-making power to the supreme court,

it is clear that the ultimate power still lies with the legislature. Since Section 25 still contains the phrase "not inconsistent with the laws of the State," conflicts between the supreme court's rules and statutes must be resolved in favor of the statute. (*Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971).) The power conferred by this section therefore is not the complete, supervisory rule-making power that court reformers have been advocating for half a century. (See Pound, "Rule-Making Power of the Courts," 10 *Journal of the American Judicature Society* 113 (1926).) Rather, it is only "supplementary" rule-making power — *i.e.*, supplementary to the ultimate power of the legislature. Since 1939, however, the legislature has generally permitted the supreme court to exercise its rule-making power without much legislative interference, and the power is now well-established and accepted. (See 1 McDonald, *Texas Civil Practice* (Chicago: Callaghan, 1965), p. 5.)

Section 25 is not by its terms limited to rules of *civil* procedure, but that is the only field in which the supreme court has exercised the power. Rules of criminal procedure are prescribed by the statutory Code of Criminal Procedure. This is at least in part a result of the segregation of civil and criminal jurisdiction in the Texas appellate court system. Since the supreme court has no criminal jurisdiction, it is understandably reluctant to exercise its rule-making powers in the criminal law field. The court of criminal appeals, which has virtually all of the appellate jurisdiction in criminal cases, would be the logical court to promulgate rules of criminal procedure, but the constitution gives it no rule-making power. If the constitution were silent on the matter of rule making by courts, it might be argued that the court of criminal appeals has inherent power to prescribe rules for criminal cases, or at least that the constitution would not prohibit the legislature from giving it that power. But since this section gives rule-making power specifically to the supreme court, it probably precludes that argument. It might still be argued, however, that the phrase "not inconsistent with the laws of the State" permits the legislature to delegate its rule-making power in criminal cases to the court of criminal appeals. This has never been attempted, and since the legislature in 1965 enacted a revision of the Code of Criminal Procedure, it is probably not likely to delegate the rule-making power in criminal cases in the near future.

Comparative Analysis

One state has a statute prohibiting the supreme court from prescribing rules of procedure. (Ore. Rev. Stat. sec. 1.002 (Supp. 1968).) In all other states the supreme court has some rule-making power either by statute, common law, or constitutional provision. In about 20 states, the supreme court's rule-making power is complete; in the remainder it is subject to some control by the legislature. In about four states, the rules are effective only if the legislature does not disapprove them; in about four others the legislature has power to modify or repeal the rules after they become effective. In about seven states, the supreme court may prescribe rules for its own procedures, but not those of the lower courts. In several states, a judicial conference or council acts as an advisory committee to aid the supreme court in prescribing rules, and in California and New York, these councils themselves hold the power to prescribe rules for appellate proceedings.

A description of the rule-making mechanism in each state is contained in American Judicature Society, *The Judicial Rule Making Power in State Court Systems* (Chicago, 1970).) Most of the information in this *Comparative Analysis* comes from that work.

Author's Comment

Advocates of court reform have long argued that state supreme courts should

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have full rule-making power, unfettered by any legislative control. (See A. Vanderbilt, *Minimum Standards of Judicial Administration* (New York, 1949), p. 92.) The argument is that "a court cannot be said to be exercising rulemaking power unless its rules override statutory rules." On the other hand, the experience of a number of states, including Texas, seems to indicate that in practice a supreme court can in fact exercise general rule-making power even though that power is technically only delegated by the legislature. (See *Judicial Rulemaking Power*, *supra*, pp. 2-3.)

In any event, the present Texas system gives the supreme court nearly as much power as it would have if the constitution reserved for the legislature no role at all in the rule-making process. Under Section 25 and article 1731a of the *Texas Revised Civil Statutes Annotated*, the initiative to propose new rules or modify old ones lies with the court; no legislative action is needed to begin the process. Moreover, once a rule is promulgated, the burden of action lies with the legislature; since the legislature's affirmative approval is not required, the rule is effective unless and until superseded by statute. Finally, the supreme court's rule-making power is firmly entrenched in tradition and practice, so that attempts by the legislature to withdraw rule-making power are infrequent.

Although there is disagreement about the proper role of the legislature in rule making, there is little doubt that the supreme court should have some rule-making power. The courts, rather than the legislature, are ultimately responsible for the efficient and just operation of the judicial system; the courts cannot discharge that responsibility without some power to regulate procedures. As one judge said soon after implementation of the Rules of Civil Procedure,

Almost overnight, the judges, from the trial court to the Supreme Court, began to realize that along with the power went the responsibility, and that through the right to prescribe their own procedure they had inherited the obligation to make the system work properly. (Alexander, "Improving Our Judicial System," 8 *Dallas Bar Speaks* 117, 121 (1943).)

One major question posed by the present rule-making system in Texas is whether court-made rules should also govern criminal procedure. The arguments in favor of giving courts the power in civil cases seem equally applicable to criminal cases. The fact that the courts already have the power in civil cases also raises the issue of uniformity; different rules for civil and criminal cases are almost inevitable as long as the rule-making power is divided. As suggested in the preceding *Explanation*, the real impediment to court-made rules of criminal procedure in Texas is the existence of separate courts of last resort. If the supreme court and court of criminal appeals are to continue as separate courts, the goal of a single set of court-made procedural rules for both civil and criminal cases will be difficult to achieve. One solution might be to give the two courts power jointly to prescribe such rules.

Sec. 26. CRIMINAL CASES; NO APPEAL BY STATE. The State shall have no right of appeal in criminal cases.

History

Section 26 probably derives from the common-law rule that the state has no right to appeal in criminal cases. (*United States v. Sanges*, 144 U.S. 310 (1892).) For a brief period, however, Texas deviated from this rule. The constitutions prior to 1869 did not mention the matter of appeals by the state, but an 1856 statute gave the state a limited right to appeal. (See Code of Criminal Procedure art. 718

(1857).) During Reconstruction, the supreme court stated that under the 1869 Constitution “[t]he state now has the same right to appeal in felony cases that is afforded to the defendant.” (*State v. Wall*, 35 Tex. 485 (1871).) This statement has generally been accepted at face value. (*E.g.*, 2 *Interpretive Commentary*, 326; Vance, “Why the State Should be Given the Limited Right of Appeal in Criminal Cases,” 8 *Hous. L. Rev.* 886 (1971).) There is nothing in the 1869 Constitution, however, to support the statement. That constitution merely provided that no criminal case was appealable to the supreme court unless a judge of that court certified his belief that the trial court had erred. Moreover, the state’s right to appeal under the 1869 Constitution clearly was *not* equal to that of the defendant, because Section 12 of Article I of that constitution contained a double jeopardy clause which would prevent the state from obtaining a new trial of a once-acquitted defendant but would not prevent a convicted defendant from winning a new trial. Furthermore, the cases in which the supreme court permitted appeals by the prosecution were simply cases in which a trial court had quashed indictments; they therefore are hardly authority for the broad proposition of a state’s right of appeal equal to that of the defendant. (*State v. Wall*, *supra*; *State v. Hedrick*, 35 Tex. 486 (1871).) Thus, the most that can be said is that from 1856 until 1876 there was a limited statutory right to appeal by the state. The subject was not addressed constitutionally until 1876.

Explanation

There is probably no clearer or more unambiguous section that this in the entire Texas Constitution. By simply prohibiting all state appeals in criminal cases, the section avoids the difficult questions that arise in attempting to determine what kind of state appeals can be permitted without violating the double jeopardy clauses of the state and federal constitutions.

It might be argued that “appeal” in this context means only an appeal from acquittal, but the courts have refused to limit its meaning. They have held that the section prevents the state from appealing a decision quashing an indictment (*State v. Wilson*, 131 Tex. Crim. 43, 95 S.W.2d 971 (1936)) or from seeking to reinstate an appeal originally brought by the defendant (*Yordy v. State*, 425 S.W.2d 352 (Tex. Crim. App. 1967)).

In one recent case the state obtained review by the United States Supreme Court despite the prohibition of Section 26. The Texas Court of Criminal Appeals had reversed a conviction on federal constitutional grounds. The district attorney applied for a writ of certiorari from the United States Supreme Court, which granted the writ and reversed the court of criminal appeals. (See *Texas v. White*, 96 S.Ct 304 (1976).) The supreme court apparently was not apprised of the Texas prohibition against appeals by the state. Counsel for the defendant raised the issue in a motion for rehearing, but the court denied the motion without addressing the question. (See 96 S.Ct. 869 (1976).)

This case might lead one to argue that the state is free to appeal to the federal courts in criminal cases. *Texas v. White* does not require that conclusion, however, because the question of the state’s right to appeal was not adequately presented. Whether Section 26 applies to federal appeals will remain unsettled until some court squarely aces the question.

Even if Section 26 were repealed, the state’s right to appeal would be limited by the double jeopardy clauses of the state and federal constitutions. The state double jeopardy clause provides that “No person, for the same offense, shall twice be put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.” (Art. I,

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Sec. 14.) This clause obviously imposes some limit on the state's ability to subject a defendant to a second trial. An argument has been made that retrying a defendant who is acquitted because the trial court makes an error of law does not place the defendant in double jeopardy since the first trial is not complete until an error-free trial is obtained. (See Vance, 8 *Hous. L. Rev.*, at 890-91.) This view of double jeopardy is not generally accepted, however, and in any event in Texas a second trial after acquittal would seem to violate the second clause of Section 14 even if it did not amount to double jeopardy because the second clause quite clearly prohibits a second trial after acquittal, irrespective of the double jeopardy question.

Any system permitting state appeals also would be limited by the federal double jeopardy clause, because that provision is now applicable to the states under the Due Process Clause of the Fourteenth Amendment. (*Benton v. Maryland*, 395 U.S. 784 (1969).)

A court of civil appeals has held that the state has no right to appeal the dismissal of a juvenile delinquency action, even though such actions are considered civil rather than criminal. The court cited this section, but it is not clear whether the decision rests on this section, on the double jeopardy clause, or on the court's interpretation of a statute. (*State v. Marshall*, 503 S.W.2d 875 (Tex. Civ. App.—Houston [1st Dist.] 1973, *no writ*.) The statute applicable at the time gave a right of appeal in juvenile proceedings to "any party aggrieved," but the court did not hold the statute unconstitutional. Moreover, the court ignored at least one earlier case in which a court of civil appeals not only entertained an appeal by the state but also reversed the trial court's judgment that the accused was not delinquent. (See *State v. Ferrell*, 209 S.W.2d 642 (Tex. Civ. App.—Fort Worth 1948, *writ ref'd n.r.e.*). Since the *Marshall* case was decided, the legislature has enacted a new Family Code, which apparently gives the state no right of appeal in juvenile delinquency cases. (See Family Code sec. 56.01.)

Comparative Analysis

Texas is one of only about four states that give the state no right of appeal whatsoever. At the other extreme, two states purport to give the state (by statute) a right of appeal equal to that enjoyed by the defendant. Connecticut, for example, allows an appeal by the state (with permission of the presiding judge) "in the same manner and to the same effect as if made by the accused." (Conn. Gen. Stat. Ann. sec. 54-96 (Supp. 1972).) The Connecticut Constitution contains no double jeopardy clause, but the courts of that state have imposed a judicially created double jeopardy limitation. (See *State v. Stankevicius*, 222 A.2d 356 (Conn. App. Div. 1966).) The Connecticut statute in practice is therefore not as sweeping as it sounds.

Between these two extremes lie many different types of limited state appeals. Most states permit the prosecution to appeal from pretrial rulings quashing indictments, dismissing complaints, or sustaining pleas in bar to the prosecution; in these cases, if the state wins the appeal, it usually may continue the prosecution. (See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), p. 47.) In recent years, a few states have given the prosecution a right to appeal from pretrial orders suppressing evidence or statements of a defendant. (See Kronenberg, "Right of a State to Appeal in Criminal Cases," 49 *Journal of Criminal Law* 473, 476-79 (1959).)

About 13 states permit "moot appeals" by the prosecution. Under this procedure, the state may appeal from trial court rulings in cases in which the

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defendant is acquitted, but even if the state wins the appeal, the defendant cannot be retried. (See, *e.g.*, Ohio Rev. Code Ann. secs. 2945.68-70 (1954).) This avoids the double jeopardy problem but still permits the prosecution to obtain correction of an erroneous ruling.

Although at least 45 states have constitutional prohibitions against double jeopardy, almost none treat the question of appeal by the state in the constitution. (See Comment, "Should the State Have an Appeal in Criminal Cases?" 1 *Sw. L. J.* 152, n. 4 (1947).)

Author's Comment

The major argument against permitting appeals by the state in criminal cases is that when a defendant wins (whether by acquittal or dismissal), it is unfair to put him to the expense and tribulation of contesting the state—which usually has far greater resources—on appeal. The argument also has been made that appeals by the state are likely to be wasteful of judicial resources because even when the state wins it may be barred from retrying the defendant. Yet another argument is that there are already too many criminal appeals, and the focus should be on ways to reduce the number of appeals rather than create new ones.

The major argument in favor of permitting appeals by the state is simply that it would give the state an equal right to a fair and error-free trial. An offshoot of this argument is the contention that the present system encourages trial judges to resolve all doubtful legal questions against the state, because such a ruling cannot harm the judge's reversal ratio.

The argument in favor of some right of appeal by the state probably has been strengthened in recent years by developments in constitutional law. The United States Supreme Court has developed an extensive and intricate body of rules relating to exclusion of evidence (such as physical evidence obtained by illegal searches and seizures and confessions obtained involuntarily) that are applicable to state criminal proceedings. These rules often require trial judges to decide difficult legal questions before and during trial on admissibility of evidence. If the judge decides to exclude the evidence, conviction may be made difficult or impossible; and if that decision is legally incorrect, the present system gives the prosecution no chance to get it corrected. Moreover, police then are faced with the difficult problem of deciding whether to conform their practice to a trial court decision that they (and the prosecutor) believe to be erroneous or to continue the practice that the trial court has held unconstitutional in the hope that they will eventually be vindicated in an appeal taken by a defendant.

If the state is to be given some right of appeal, it would be unwise to attempt to describe the limits and conditions of the right in the constitution. The limits are likely to be affected by changes in rules of procedure and by changes in interpretation of constitutional principles such as double jeopardy and due process of law. The legislature should be free to condition the right upon the adoption of other measures that will protect the defendant from long delays and other abuses.

Sec. 27. TRANSFER OF CASES PENDING AT ADOPTION OF CONSTITUTION. The Legislature shall, at its first session, provide for the transfer of all business, civil and criminal, pending in District Courts, over which jurisdiction is given by this Constitution to the County Courts, or other inferior courts, to such County or inferior courts, and for the trial or disposition of all such cases by such County or other inferior courts.

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History

The Convention of 1875 apparently considered this section necessary because, under the Constitution of 1869, there were no county courts. (See the Annotations of Secs. 15 and 16 of this article.) This section was the method chosen to move cases from the district courts back to the reestablished county courts. Because this problem was unique to the 1876 situation, Section 27 has no counterpart in earlier constitutions.

Explanation

By treating the jurisdictional provisions of the 1876 Constitution as self-executing, the courts made this section unnecessary. Although Section 27 applies only to cases that the 1876 Constitution placed within county court jurisdiction, the supreme court said a constitutional change in jurisdiction from the district court to the justice court automatically deprived the district court of jurisdiction and conferred jurisdiction on the justice court; the district court had no power to do anything more than enter an order transferring the case to justice court. The legislature had passed a statute transferring such cases to the justice court, but the supreme court rested its decision on the constitution. (*Hardeman v. Morgan*, 48 Tex. 103 (1877).) Had the 1875 Convention been able to foresee this decision, it could have eliminated this section. The legislature obeyed the mandate of Section 27 and did provide for the transfer of cases from district to county courts, however. (Tex. Laws 1876, ch. 27, 3 *Gammel's Laws*, p. 855; see also *Bowser v. Williams*, 25 S.W. 453 (Tex. Civ. App. 1894, *no writ*).)

Comparative Analysis

For reasons that are apparent from the *History* of this section, other state constitutions do not contain provisions comparable to Section 27.

Author's Comment

Transition provisions like Section 27 are objectionable for at least two reasons. First, they are unenforceable; if the legislature had refused to provide for transfer of cases from the district to the county courts in 1876, there is no way it could have been compelled to do so. It is better to simply make the transitional provision self-executing, *i.e.*, provide that such cases are automatically transferred to the jurisdiction of the county courts. The county courts to which cases are transferred are given jurisdiction immediately, and if necessary the courts can then exercise that jurisdiction to order clerks to physically transfer the papers. Second, provisions like Section 27 cease to have any effect as soon as the legislature acts, yet they remain a part of the constitution until they are removed by amendment. This particular section has been superfluous since the legislature acted in 1876, yet it has been carried forward for a century. Transitional provisions can better be handled in a separate schedule that ceases to be part of the constitution once it has served its purpose. (See the Annotation of Art. XVI, Sec. 48.)

There is, of course, no need for a different transitional provision for each court; the subject can be handled in a provision relating to all courts.

Sec. 28. VACANCIES IN JUDICIAL OFFICES. Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and the District Courts shall be filled by the Governor until the next succeeding General Election; and vacancies in the office of County Judge and Justices of the Peace shall be filled by the Commissioners Court until the next succeeding General Election.

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History

The 1876 Constitution was the first to contain a general provision dealing with judicial vacancies; the previous constitutions contained various vacancy provisions relating to each level of court. The 1876 Constitution directed the governor to fill vacancies on the district and appellate benches “until the next succeeding general election” and directed commissioners courts to fill vacancies in the county and justice courts “until the next general election for such offices.” The 1891 amendment did not change this section except to delete the name “court of appeals” and add the names of the “court of criminal appeals” and “courts of civil appeals” to conform to the changes made that year in the appellate court structure. (See the Annotation of Sec. 6 of this article.)

In the 1876 and 1891 versions of the constitution, persons appointed to vacancies in the county and justice courts served until the next general election *for such offices*. A court of civil appeals said this meant that a justice of the peace appointed to a vacancy in 1955 continued to hold office through 1958, even though a general election was held in 1956, because the latter was not a general election “for such offices.” (*Rawlins v. Drake*, 291 S.W.2d 349 (Tex. Civ. App.—Dallas 1956, *no writ*.) This led to the 1958 amendment that changed the phrase to “until the next succeeding general election.” Thus all appointments to fill judicial vacancies now are good only until the next general election, without regard to the date on which an election for that office otherwise would have been held.

Explanation

The Texas Constitution suffers from a surplus of provisions for filling judicial vacancies. Section 2 of this article contains a special vacancy provision for supreme court justices. That provision is inconsistent with this section because it directs the governor to fill such vacancies “until the next general election for state officers.” With adoption in 1972 of the amendment giving state officials four-year terms, this inconsistency becomes significant, because appointees could serve up to four years under the Section 2 language, but no more than two years under the Section 28 language. Since the latter amendment was adopted more recently, it presumably would govern, but the question has not been decided. (See also the annotation of Art. IV, Sec. 12.)

Section 4 of this article also contains a specific vacancy provision relating to the court of criminal appeals, but it is not inconsistent with this section. Section 11 provides that vacancies resulting from disqualification of judges of inferior courts shall be filled as may be prescribed by law.

In addition to all of these, Section 12 of Article IV provides that “all vacancies in state or district offices” shall be filled by gubernatorial appointment unless otherwise provided by law, and that such appointments require senate confirmation. Presumably, judgeships on the district and appellate courts are “state or district offices.” An attorney general’s opinion considers them so for purposes of the senate confirmation requirement. (Tex. Att’y Gen. Op. No. O-1092 (1939).) If judicial vacancies are subject to the confirmation requirement of this Section 28, however, they presumably are also subject to the provision of Article IV, Section 12, permitting the legislature to provide some method for filling vacancies other than gubernatorial appointment. Neither of these questions has been decided by the courts, so whether Section 12 applies to judicial vacancies at all is not certain.

Section 28 names only the constitutional courts; it therefore is not clear how vacancies on the statutory courts are to be filled. One court of civil appeals held that since a statutory county court at law was essentially a county court, a statute giving the governor power to fill a vacancy on the county court at law was

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unconstitutional because it violated this section's directive that county court vacancies be filled by the commissioners court. (*State v. Valentine*, 198 S.W. 1006 (Tex. Civ. App.—Fort Worth 1917, *writ ref'd*.) Another court of civil appeals held that a county court at law judge is not a county judge within the meaning of this section, and therefore the legislature may permit the governor to make the appointment. (*Sterrett v. Morgan*, 294 S.W.2d 201 (Tex. Civ. App.—Dallas 1956, *no writ*.) The supreme court has not decided the question.

Section 28 quite clearly does not mean what it says when it provides that appointees to fill vacancies serve "until the next succeeding general election"; read literally, that would end the term on the date of the general election, even though the successor cannot possibly take office until the votes are canvassed and he takes whatever other steps are necessary to qualify for the office. The section generally has been read to permit the appointee to serve until January 1 of the year following the next succeeding general election. (See Tex. Att'y Gen. Op. No. M-742 (1970).)

Comparative Analysis

Judicial vacancies are filled by gubernatorial appointment in most states, and such appointments generally are good only until the next state elections. Except in the states that have some form of "merit" selection, the constitution usually leaves details of the vacancy-filling procedure to the legislature. "Merit" selection plans usually are spelled out in some detail, because in those states the method of filling vacancies is in practice the method by which all judges are chosen. (See the annotation of Sec. 2 of this article.)

The Mississippi Constitution allows the legislature to determine the method of filling vacancies in state offices generally but provides that gubernatorial appointments to judicial vacancies, if made when the senate is in recess, expire at the end of the next senate session. (Art. VI, Sec. 177.) The Delaware Constitution allows the governor to fill judicial vacancies for the remainder of the unexpired term, thus permitting the governor to appoint a judge to a term of up to 12 years. (Art. IV, Sec. 3.)

The new Florida Constitution contains a provision permitting a judge to name his successor for the remainder of the term under certain circumstances. (Art. V, Sec. 14.)

Under the new Illinois Constitution, judicial vacancies are filled as provided by law, and if the legislature doesn't act, the state supreme court fills vacancies. If an appointment is made within 60 days before a primary election for judges, the appointee continues to serve until the second election. (Art. VI, Sec. 12.)

Author's Comment

Separate vacancy provisions relating to specific courts should be removed to eliminate conflicts such as the one described in the *Explanation* above. These provisions are unnecessary because Section 28 covers all the constitutional courts. The argument has been made that Section 28 also should be removed, leaving judicial vacancies to be governed by the general vacancy provisions applicable to all state, district, and local officials. This would be unwise, however, if the method of selecting judges is ever changed to the "merit" system. The latter system operates as a method of filling vacancies; under the "merit" system there is no need to select a new judge until there is a vacancy, either by death, resignation, or removal of the incumbent or because of his rejection by the voters. (See the annotation of Sec. 2.) Thus, for purposes of instituting "merit selection," it is vastly more convenient, if not essential, to have judicial vacancies addressed in a provision separate from other types of vacancies.

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In view of the confusion concerning applicability of this section to statutory courts, a provision might be added to this section authorizing the legislature to specify the method of filling vacancies in statutory courts.

If Section 28 is retained, Section 12 of Article IV should be amended to make clear that it does not cover judicial vacancies, or Section 28 should be amended to make it consistent with Section 12 of Article IV on the matters of senate confirmation and the legislature's power to provide for a different method of filling vacancies.

The language of Section 28 should be rewritten to make clear that appointees to vacancies serve not only until the date of the next general election but until some later date, such as January 1 of the following year, thus giving their successors time to qualify.

Sec. 29. COUNTY COURT; TERMS OF COURT; PROBATE BUSINESS; COMMENCEMENT OF PROSECUTIONS; JURY. The County Court shall hold at least four terms for both civil and criminal business annually, as may be provided by the Legislature, or by the Commissioners' Court of the county under authority of law, and such other terms each year as may be fixed by the Commissioners' Court; provided, the Commissioners' Court of any county having fixed the times and number of terms of the County Court, shall not change the same again until the expiration of one year. Said court shall dispose of probate business either in term time or vacation, under such regulation as may be prescribed by law. Prosecutions may be commenced in said courts in such manner as is or may be provided by law, and a jury therein shall consist of six men. Until otherwise provided, the terms of the County Court shall be held on the first Mondays in February, May, August and November, and may remain in session three weeks.

History

This entire section was added by amendment in 1883 for reasons that are somewhat obscure. For the most part, the amendment simply restated provisions contained in Section 17 of Article V, yet it did not repeal that section. The amendment's main purpose probably was to provide more local control over terms of county courts.

Trial court terms evidently were a matter of some concern during the latter part of the 19th century, probably because lawyers and citizens in some counties felt that their judges were not devoting enough time to litigation in the county. The section on district courts was amended in 1891 to allow the legislature to prescribe their terms by general or special law; this amendment probably reflected a desire to permit court terms to be adapted to local conditions. (See the annotation of Sec. 7 of this article.)

Explanation

The major effect of Section 29 has been to give the commissioners court primary control over county court terms. Section 17 prescribed one civil term every two months and one criminal term every month for all counties. Section 29 requires at least four terms annually for both civil and criminal business but authorizes the commissioners court to fix additional terms. The courts have held that Section 29 supersedes the terms provision of Section 17, so that an order of the commissioners court fixing only four terms in one year is valid. (*Kilgore v. State*, 52 Tex. Crim. 447, 108 S.W. 662 (1908).)

The courts have held that the phrase "as may be provided by the Legislature" applies only to fixing dates of the required four annual terms and therefore does not permit the legislature to limit the commissioners court's power to authorize

more than four terms. (*Farrow v. Star Ins. Co. of America*, 273 S.W. 318 (Tex. Civ. App.—Waco 1925, *no writ*.) The legislature may regulate the method by which the commissioners court fixes terms, but the court's failure to comply with the statute makes its order merely voidable, rather than void. (*Henn v. City of Amarillo*, 157 Tex. 129, 301 S.W.2d 71 (1957).)

Under Sections 17 and 29, the county court is authorized to transact probate business without regard to terms.

As pointed out in the *Explanation* of Section 17, it is not clear how much of that section is superseded by Section 29.

Comparative Analysis

Only about one-fourth of the state constitutions mention the subject of county court terms. Of these, about four simply prescribe such terms as the legislature may provide. At least two state constitutions require the county courts to hold four terms annually; about four state constitutions require two terms per year. Two more specify that county courts shall be open at all times. In one state, where a single county court may have more than one judge, the court must hold as many sessions as there are county judges.

Texas appears to be the only state whose constitution specifies that county court terms are to be fixed by the county governing body.

Author's Comment

This section deals with eight subjects. First, the section fixes a minimum of four county court terms annually. Second, it authorizes the legislature to fix dates of those four terms or to delegate that responsibility to the commissioners court. The legislature has done the latter. (Tex. Rev. Civ. Stat. Ann. art. 1961.) Third, it authorizes the commissioners court to prescribe additional terms. Fourth, the section prohibits the commissioners court from changing terms more frequently than once a year. Fifth, it authorizes county courts to transact probate business at any time. Sixth, this section provides that prosecutions "may" be commenced as provided by law. (This provision is gratuitous; presumably it means they "must" be commenced as provided by law, but even then it is unnecessary because prosecutions could hardly be commenced in any other manner.) Seventh, it fixes membership of juries in county court at "six men." (The word "men" must be read to mean "persons," because women cannot be excluded. See Sec. 19 of Art. XVI.) Eighth, it specifies four three-week terms of county court, which are effective until the commissioners court provides otherwise. The commissioners courts have had 80 years to provide otherwise, but there is no way to determine whether all have done so without examining all of the minutes in each of the 254 counties since 1893.

The first five of these subjects are covered by statute. (Tex. Rev. Civ. Stat. Ann. arts. 1961-1963.) The sixth, method of commencing prosecutions, has been provided by law. (Code of Criminal Procedure arts. 21.20-21.23, 21.26.)

The seventh subject, fixing the number of jurors at six, may be constitutionally necessary, because the courts have said that Section 15 of Article I, guaranteeing a right to jury trial, requires a jury of 12 unless another section of the constitution provides otherwise. (*Jordan v. Crudgington*, 149 Tex. 237, 231 S.W.2d 641 (1950).)

The last provision of this section, fixing dates of county court terms, is unnecessary even though there still may be some commissioners courts that have not acted. A statute (Tex. Rev. Civ. Stat. Ann. art. 1961) contains the same provision. The statute is within the legislature's power, because it merely fixes dates for the required four terms and does not attempt to exercise any power given

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exclusively to the commissioners court.

This entire section, except for the six-member jury provision, therefore could be deleted without changing existing practice. The jury provision could be relocated in Sections 13, 15, or 16 of this article.

Sec. 30. JUDGES OF COURTS OF COUNTY-WIDE JURISDICTION; CRIMINAL DISTRICT ATTORNEYS. The Judges of all Courts of county-wide jurisdiction heretofore or hereafter created by the Legislature of this State, and all Criminal District Attorneys now or hereafter authorized by the laws of this State, shall be elected for a term of four years, and shall serve until their successors have qualified.

History

This section was part of the 1954 amendment extending the terms of district, county, and precinct officials from two to four years. The amendment of Section 15 of this article gave the constitutional county judge a four-year term; Section 18 was amended to do the same for justices of the peace, and Section 21 extended the terms of regular county and district attorneys. This section was added to give the four-year term to two types of nonconstitutional officials: judges of county courts at law and other statutory courts, such as domestic relations courts, and criminal district attorneys.

Explanation

The presence of this section in the constitution is rather anomalous. None of the officials named in this section—criminal district attorneys or judges of statutory courts—is a constitutional officer. This section and Section 65 of Article XVI, which provides for transition to the four-year term prescribed by this section, are the only places in the entire constitution where these officials are mentioned. It makes little sense to prescribe constitutionally the length of term for nonconstitutional officers. This section is necessary, however, because in its absence the terms of criminal district attorneys and judges of statutory courts would be limited to two years by Section 30 of Article XVI.

Comparative Analysis

Most states do not prescribe constitutionally the length of terms of officials who otherwise are not mentioned in the constitution. Of the approximately 20 states that have county-level courts (either statutory or constitutional), half provide four-year terms. About five prescribe longer terms, including ten-year terms (in two states). (See U.S., Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (Washington, D.C.: Government Printing Office, 1971), pp. 105-06, table 19.)

About three-fourths of the states that have elected local prosecutors provide four-year terms. Only about four have longer terms, and about 10 prescribe two-year terms. (U.S., ACIR, *supra*, pp. 113-14, table 24.)

Author's Comment

Inasmuch as all other matters concerning the offices of criminal district attorney and judges of statutory courts—including their very existence—are left to the legislature, the length of their terms also should be left to the legislature. To accomplish this it would be necessary to delete not only this section but also Section 30 of Article XVI.