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districts have no connection with the supreme court. Moreover, the districts themselves are one of three kinds of districts in the Texas judicial system; the others are "judicial districts," which are the geographical unit for the district courts, and "administrative districts," which are nine regions each with a presiding (district) judge who has limited power to transfer judges and cases between district courts in his district. (Tex. Rev. Civ. Stat. Ann. art. 200a.) Since there is no correlation between "administrative districts" and "Supreme judicial districts," a district court may be in one district for administrative purposes and another for appellate purposes. The system could be simplified somewhat merely by making administrative districts correspond to the districts of the civil appeals courts.

In any revision of Section 6, the last two paragraphs should be deleted because they are no longer operative. Consideration should also be given to the possibility of eliminating the two troublesome phrases relating to the territorial limits of the courts' jurisdiction and the conclusiveness of their decisions on questions of fact. (In any event, the latter should be moved to the supreme court section because it is really a limitation on that court's power.) The legislature's power (or lack thereof) to reduce the number of courts and to take away the courts' jurisdiction by means of "restrictions and regulations" should also be clarified.

**Sec. 7. JUDICIAL DISTRICTS; DISTRICT JUDGES; TERMS OR SESSIONS; ABSENCE, DISABILITY OR DISQUALIFICATION OF JUDGE.** The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a General Election, a Judge, who shall be a citizen of the United States and of this State, who shall be licensed to practice law in this State and shall have been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who shall have resided in the district in which he was elected for two (2) years next preceding his election, who shall reside in his district during his term of office, who shall hold his office for the period of four (4) years, and shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district at least twice in each year in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding.

The District Judges who may be in office when this Amendment takes effect shall hold their offices until their respective terms shall expire under their present election or appointment.

### History

District courts have been the trial courts of general jurisdiction in Texas since the Republic. The Constitution of the Republic provided for "convenient judicial districts, not less than three, nor more than eight," with judges chosen by the congress to serve in each district. (Art. IV, Sec. 2.)

Under the Constitutions of 1845 and 1861, district judges were appointed by the governor with the advice and consent of the senate. (Art. IV, Sec. 5.) The 1866 Constitution provided for popular election of district judges (Art. IV, Sec. 5), but in 1869 the method of selection was changed back to gubernatorial appointment. (Art. V, Sec. 6.) From 1866 to 1876, the term of a district judge was eight years; before that the term was six years, and since 1876 it has been four years.

The 1876 Constitution provided for 26 districts, and an accompanying ordinance

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defined those districts. (See Sec. 14 of Art. V.) The legislature was permitted to increase or diminish the number of districts, however, and the number has been growing ever since. As of the end of 1973, there were 227 district (including criminal district) courts. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), p. viii.)

There have been several attempts to make the district court system more flexible. In 1913 the legislature proposed to amend Section 7 to authorize more than one judge per district and give the legislature greater freedom to fix the courts' sessions. This amendment also would have increased the length-of-practice requirement for a judge from four to six years. The proposal was soundly defeated. (*Seven Decades*, p. 218.)

In 1927 the legislature proposed to amend Sections 2 through 7 to permit the supreme court to transfer judges, including district judges, to courts other than their own. This amendment also was defeated.

The latest change in Section 7 was made in 1949. The amendment of that year added the requirement that a district judge be licensed to practice law in Texas, permitted the combining of judicial experience and law practice to meet the four-year minimum, allowed the legislature to fix district judges' salaries, added the requirement that the court sit at the county seat, and authorized the legislature to provide for terms and sessions of the district courts.

### Explanation

The district courts are the foundation of the entire Texas judicial system. They handle most of the important litigation, both civil and criminal, at the trial court level.

The constitution does not expressly prohibit the creation of more than one court per district, but since the days of the Republic the pattern has been one district, one court, and one judge. In all populous areas of the state, however, there is more than one district court, because the districts overlap. There are two kinds of overlapping districts. Each of the major metropolitan counties have several district courts, each comprising only that county. Dallas County, for example, has 13 district courts (and 5 criminal district courts); each of these courts technically has a distinct district, since the only way to create a district court under this section is to create a district. But in fact the district served by each of these courts is Dallas County.

The other type of overlapping districts usually occurs in areas of moderate population. These are districts that share one or more common counties but are not coterminous. For example, the 119th district includes Tom Green and Runnels counties. The 51st district also includes Tom Green County, but the other counties in that district are Coke, Irion, Schleicher, and Sterling. (Tex. Rev. Civ. Stat. Ann. arts. 199-51, 199-119.) The existence of overlapping districts makes the compilation of statistics on district courts very difficult. If they are reported by court, the task of appraising the overall docket situation in the metropolitan counties is made more difficult. If they are reported by county, the figures for each court get lost in the county total, making the appraisal of an individual judge's work virtually impossible. The Texas Civil Judicial Council at present publishes district court statistics by county. (See *Forty-Fifth Annual Report*, pp. 34-179.)

The methods by which the district courts divide the work in multicourt counties vary widely from county to county. (Procedures in the four most populous counties are described with admirable clarity and detail in Comment, "Local Procedure and Judicial Efficiency: A Comparative Empirical Study of Texas Metropolitan District Courts," 49 *Texas L. Rev.* 677 (1971).) In Dallas County, for example, cases are randomly assigned to one of the district courts by a collating machine in the clerk's

office, but after that, each judge uses his own method of docketing cases. In most respects, each district court in Dallas operates independently of the others. In San Antonio, on the other hand, a presiding judge monitors all the district courts and supervises the assignment of cases and the adjustment of caseloads. In Dallas, once a case is filed in a certain court, the judge of that court normally handles all proceedings in that case. In San Antonio, a single case is likely to be handled by several judges at various stages of the litigation.

The requirement that district courts sit "at the county seat of the county in which the case is pending, except as otherwise provided by law," is the source of some rigidity. A court of civil appeals has held that this prevents district judge A, sitting in his own county, from acting on behalf of district judge B, who sits in another county, even though judge B has disqualified himself and requested judge A to replace him, and even though the case is not one that is required by statute to be tried in the county where filed. (*Ex parte Lowery*, 518 S.W.2d 897 (Tex. Civ. App.—Beaumont 1975 *no writ*.)

The language prescribing the term of the district courts has caused some difficulty. The requirement that each court hold two terms per year in each county undoubtedly was included for the convenience of litigants and lawyers. It was probably important when districts were very large and transportation was difficult. In recent years, however, the requirement has served primarily to complicate the matter of creating new courts. A statute changing the terms of court in a county is unconstitutional if its effect would be to give the county only one term in any given year. (*E.g.*, *Bowden v. Crawford*, 103 Tex. 181, 125 S.W.5 (1910).) The courts have minimized the impact of this rule, however, by holding that such a statute is not completely void; its implementation is simply delayed until it can be given effect without depriving any county of two terms per year. (*E.g.*, *Ex parte Curry*, 156 Tex. Crim. 499, 244 S.W.2d 204 (1951).) The 1949 amendment giving the legislature power to provide for the terms or sessions of the district courts "as it may deem necessary" probably was intended to resolve this problem. Unfortunately, however, it did not delete the language requiring two terms per county per year.

The legislature has solved most of the problems by requiring continuous terms in all district courts. (Tex. Rev. Civ. Stat. Ann. art. 1919.) Moreover, most of the statutes creating courts now provide for what amounts to continuous terms but describe them as two separate terms: *e.g.*, from the first Monday in January through the last Saturday in June, and from the first Monday in July through the last Saturday in December. (See, *e.g.*, Tex. Rev. Civ. Stat. Ann. arts. 199-58, 199-60.)

The legislature's power to provide for a special judge to hold court when a district judge is absent, disabled, or disqualified is quite limited. The courts have held that such a special judge may act only to complete an unfinished term of court in a particular county and does not have the full authority of the regular judge. (*Wynn v. R. E. Edmonson Land & Cattle Co.*, 150 S.W. 310 (Tex. Civ. App.—Amarillo 1912, *writ ref'd*.) The legislature has provided three methods for the selection of a special judge. If the regular judge certifies to the governor that he is disqualified in a particular case, the parties may by agreement select a lawyer to try the case; if they cannot agree, the governor is to appoint a person to try the case. (Tex. Rev. Civ. Stat. Ann. art. 1885.) If the regular district judge fails or refuses to hold court, "the practicing lawyers of the court present may elect from among their number a special judge. . . ." (Tex. Rev. Civ. Stat. Ann. art. 1887.)

In practice, the primary method of providing a substitute for the regular district judge is none of these, but rather assignment of a "visiting" district judge. By statute, the state is divided into nine "Administrative Judicial Districts," and in each an active or retired district judge is appointed by the governor to serve as presiding judge. The presiding judge has power to assign active and retired district

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judges temporarily to other district courts within the administrative district. (Tex. Rev. Civ. Stat. Ann. art. 200a.) The use of this method of reallocating judicial manpower is rather limited, in part because the metropolitan areas where additional judges are needed do not have the extra courtrooms and other facilities needed to accommodate them, and perhaps in part because of the reluctance of presiding judges to assign other judges against their will. (See Comment, 49 *Texas L. Rev.* 693-95 (1971).)

These presiding judges of administrative districts are one of two quite different types of presiding judges in the district court system. The other type consists of the presiding judges in several of the metropolitan counties. These are active district judges chosen by majority vote of their colleagues, rather than by the governor, and their effectiveness depends primarily on voluntary cooperation from other judges in the county. (See Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 463 (1967).)

The Texas court system includes one hybrid variety of court which may or may not be a district court within the meaning of this section. These are called "criminal district courts." The first one was created to handle a high volume of criminal cases attributed to the presence of ships' crews on liberty in the Houston and Galveston areas. (*Debates*, p. 423.) The constitution still contains a specific authorization for that court in Section 1 of Article V. The modern criminal district courts were created as "legislative courts," *i.e.*, courts whose powers were established by statute rather than by the constitution. They had whatever jurisdiction their creating statutes provided. Usually they were not given district numbers in the statewide system of district courts but were named, for example, "Criminal District Court No. 2 of Dallas County." A number of the criminal district courts still fit this description. There is no clear line, however, between a criminal district court and a regular district court. Since the legislature has general power to create new "constitutional" district courts, it presumably can transform any "statutory" criminal district court into a regular district court within the meaning of this section simply by amending the court's creating statute. The legislature has purported to do this with a number of courts in Harris and Dallas counties that formerly were called "criminal district courts"; it has simply changed the name, for example, to "174th Judicial District," (*e.g.*, Tex. Rev. Civ. Stat. Ann. art. 199-174). This may not be enough to make such a court a "constitutional" district court under Section 7, however. Presumably, the court also must be given full district court jurisdiction. In the case of the former criminal district courts of Dallas and Harris counties, this has been done. An attempt to convert a criminal district court into a regular district court without giving it civil jurisdiction probably would run afoul of the general rule that the legislature cannot reduce the constitutional jurisdiction of a regular district court. (*Lord v. Clayton*, 163 Tex. 62, 352 S.W.2d 718 (1961).) It is not clear whether this rule applies to the former criminal district courts, and if it does, it is not clear whether it means that they therefore are not "constitutional" district courts, or that they are "constitutional" district courts and therefore the statutes limiting their jurisdiction are unconstitutional.

One solution that avoids this entire problem is the creation of regular district courts with the full scope of jurisdiction, but with a direction that they give "preference to criminal cases." (*E.g.*, Tex. Rev. Civ. Stat. Ann. art. 199a-182.)

Judges of the criminal district courts are treated as regular district judges for compensation purposes. Unlike the judges of other statutory courts, they receive state salaries and are eligible for benefits under the state judicial retirement system.

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### Comparative Analysis

Virtually every state has a functional equivalent of the Texas district court. About 41 states are divided into districts or circuits for purposes of allocating trial courts of general jurisdiction. Several states have "unified trial courts," *i.e.*, a single statewide court of general jurisdiction, subdivisions of which handle all the trial court litigation in the state. (See, *e.g.*, Ill. Const. Art. VI, Secs. 8, 9.)

In about one-third of the states, the judges of the trial courts of general jurisdiction are chosen by partisan election. About one-third more are chosen by nonpartisan election. In the remaining one-third, the judges are chosen by gubernatorial appointment (usually through some form of merit selection plan), or in a few cases, by appointment by the legislature.

The length of terms of judges of trial courts of general jurisdiction ranges from four years to 15 years in Maryland and life in Massachusetts. The most common length of term is six years.

The *Model State Constitution* provides no specific provisions relating to trial courts. It simply vests judicial power in a supreme court, an appellate court, a general court, and such inferior courts of limited jurisdiction as provided by law. The federal constitution provides only for "such inferior courts as the Congress may from time to time ordain and establish."

### Author's Comment

The organization and shortcomings of the present district court system are well described in Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451 (1967).

The most frequent complaint is that the district system is too rigid to permit efficient court administration. The inflexibility stems from two main sources: (1) the autonomy of each court and (2) the legislature's reluctance to redistrict the state.

Each judge has a distinct court which he considers his own. Generally he has his own docket and considers himself answerable to no one but the voters. While this independence in many respects may be admirable, it is also inefficient. For example, in most multijudge counties, a judge is responsible only for his own docket. If a last-minute postponement gives him a free day or two, he may remain idle even though there are many cases waiting to be heard on the dockets of other district courts in the county. As pointed out in the *Explanation*, this inefficiency has been greatly reduced in some of the metropolitan counties by use of a presiding judge, central docketing, and other administrative devices. But the pattern generally is still individual autonomy.

The failure to redistrict judicial districts results in malapportionment of judicial resources. The legislature has created nearly 200 new district courts over the past 95 years, but never has it passed a comprehensive judicial redistricting bill. New courts are created in the metropolitan areas at nearly every session of the legislature, but old courts are virtually never abolished. (For a detailed history of the creation of new courts from 1953-1972, see Texas House Judiciary Committee, *Streamlining the Texas Judiciary: Continuity with Change* (Austin, 1972), pp. 99-110.) As a result, some of the urban district courts have caseloads several times greater than those of their rural counterparts.

The malapportionment of judicial districts is all the more serious because of the lack of any really effective mechanism for transferring judges and cases among courts. The presiding judges of the administrative districts are authorized to assign "visiting judges," but for the reasons pointed out in the *Explanation*, this has not produced widespread transfer of judges.

Another substitute for judicial redistricting has been creation of statutory courts with limited jurisdiction. This may be even more undesirable than piecemeal

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creation of new district courts. "The gimmick is that those courts are financed entirely from county funds; thus the legislation is essentially local in nature and no opposition is encountered from legislators from other districts." (Guittard, 21 *Sw. L. J.*, at 471.) Thus, when the dockets of the district courts of a county become too crowded, the legislature often is tempted to attack the problem by creating a special court, such as a court of domestic relations, to relieve the regular district courts of those types of cases. This adds even more rigidity to the system. The special court does not have general jurisdiction; a few years after its creation, the problem may be too many criminal cases rather than too many divorce cases, but the domestic relations court cannot help because it has no jurisdiction of criminal cases.

The most frequently advocated method of increasing administrative flexibility in trial courts is to abandon the one-judge, one-court, one-district pattern and adopt multijudge districts. This can take the form of a single statewide trial court with as many judges and courtrooms as necessary. (See, e.g., American Bar Association, *Model State Judiciary Article*, sec. 4 (Chicago, 1972).)

Much the same result can also be accomplished simply by expanding districts; for example, the present supreme judicial districts (court of civil appeals districts) or administrative judicial districts could become the basic judicial districts, and all district judges within each of those districts could either have jurisdiction anywhere in the larger district or sit in divisions within the larger district. Either of these methods would help to remove artificial barriers that inhibit the free movement of judges and cases.

Alternative methods of selecting judges, such as nonpartisan election, executive appointment, and "merit" selection, are discussed in the annotation of Section 2. It should be noted, however, that the method chosen for selection of trial judges need not be the same as that for appellate judges. For example, it is sometimes suggested that election is a more appropriate method for selecting trial judges because they are essentially local officers about whom the voters are more likely to be informed and interested. Some states therefore provide for appointment of appellate judges but continue to elect trial judges. (E.g., Kan. Const. Art. III, Sec. 2.)

The provisions in Section 7 relating to terms of the district courts probably should be removed. As pointed out in the *Explanation*, they have created confusion. In any event, the matter of terms of court is not of constitutional importance and in practice is governed by the continuous terms statute, Tex. Rev. Civ. Stat. Ann. art. 1919.

Consideration also should be given to removing the requirement that the district court sit at the county seat of the county in which the case is pending. The requirement causes considerable waste of judicial time. For example, if a judge schedules a jury trial in one county, he must set aside several days to be spent in that county. If the trial is unexpectedly terminated or postponed, the judge cannot proceed with another jury trial in some other county because preparations, such as the summoning of prospective jurors, will not have been made. (See Murray and Hooper, "A Proposal for Modern Courts," 33 *Texas Bar Journal* 199 (1970).) Removal of the requirement would not, of course, necessarily end the general practice of sitting in each county in the district; it would simply permit the legislature to define circumstances in which the district courts might sit elsewhere. (See Tex. Rev. Civ. Stat. Ann. art. 1919 which allows a district judge some flexibility in transacting business outside the county.)

The provisions of this section relating to judicial selection, terms, qualifications, compensation, and vacancies should be consolidated. (See the *Author's Comment* on Sec. 2.)

The last paragraph of this section is transitional and should be removed. The

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penultimate paragraph probably could also be deleted because the legislature has done what that paragraph directs it to do.

Sec. 8. JURISDICTION OF DISTRICT COURT. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law.

The district court, concurrently with the county court, shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law. In any proceeding involving the general jurisdiction of a probate court, including such specified proceedings, the district court shall also have all other jurisdiction conferred upon the district court by law. The legislature, however, shall have the power, by local or general law, Section 16 of Article V of this Constitution notwithstanding, to increase, diminish or eliminate the jurisdiction of either the district court or the county court in probate matters, and in cases of any such change of jurisdiction, the legislature shall also conform the jurisdiction of the other courts to such change. The legislature shall have power to adopt rules governing the filing, distribution and transfer of all such cases and proceedings as between district courts, county courts, and other courts having jurisdiction thereof, and may provide that all appeals in such matters shall be to the courts of (civil) appeals.

**History**

Under the Constitution of the Republic, the district court had exclusive original jurisdiction of admiralty matters, cases involving ambassadors, and capital cases; and original jurisdiction of all other cases where the amount in controversy was \$100 or more. (Art. IV, Sec. 3.) The 1845 Constitution made things more specific. There was no county court system under the 1845 and 1861 Constitutions, so the district court had general jurisdiction over all criminal cases, some specific classes of civil cases, and all other suits where the amount in controversy was \$100 or more. (Art. IV, Sec. 10.)

The 1866 Constitution created a county court system, and apparently its

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framers thought that it was necessary to spell out in the constitution the division of jurisdiction between the district and county courts. Most of the detailed language of present Section 8 is derived from Section 6 of Article IV of the 1866 Constitution. For example, all of the language about suits for trial of title to land and suits involving enforcement of liens first appeared in 1866. Likewise, the language defining the district court's supervision of the county court in probate matters comes from the 1866 Constitution.

These jurisdictional provisions were carried forward in the 1869 and 1876 Constitutions, except that in 1876 the minimum jurisdictional amount was raised from \$100 to \$500 and criminal jurisdiction was limited to felonies.

The latter two provisions were not suggested by the majority report on the judiciary in the 1875 Constitutional Convention. (*Journal*, p. 408.) The Convention, however, apparently felt that numerous petty cases in the district courts were causing unjust and unnecessary delay in trying more important cases. It was argued that it did no good to create county courts if the district courts had concurrent jurisdiction of misdemeanors and of all civil cases between \$100 and \$500. (*Journal*, pp. 413-15.)

The 1891 amendment added to the district court's jurisdiction contested elections, appellate jurisdiction for "probating wills," and appellate jurisdiction and supervisory control over the county commissioners court. The provision for general original jurisdiction over causes not provided for elsewhere and the authorization for the legislature to provide additional jurisdiction also were new with the 1891 amendment.

An amendment approved in 1973 expanded the district court's probate jurisdiction. The purpose of the amendment was to eliminate the wasteful practice of having two trials of contested probate matters, one in the county court (or a statutory court) and a second trial *de novo* in the district court on appeal. The amendment is described more fully in the *Explanation* following.

(See also the *History* of Sec. 7, Art. V.)

### Explanation

Although the details of district court jurisdiction are quite complex, its essence can be described quite simply: it is the trial court of general jurisdiction. It has original jurisdiction of all matters not within the jurisdiction of some other court. Its jurisdiction is criminal as well as civil; all felonies are within the jurisdiction of the district court. Its civil jurisdiction includes virtually all of the most important types of litigation and is described in detail in 1 McDonald, *Texas Civil Practice* (St. Paul: West Publishing Co., 1965), pp. 56-88.

The original civil jurisdiction of the district courts generally falls into one of four categories. First, certain kinds of cases are specifically named in Section 8. For example, divorce cases and suits for "slander or defamation of character" are within the jurisdiction of the district court. (*E.g.*, *Clare v. Clare*, 138 S.W.2d 220 (Tex. Civ. App.—Amarillo 1940, *no writ*.) In cases in which the district court's jurisdiction attaches because of the subject matter of the suit the amount in controversy is usually immaterial. The only exception is in suits "for the trial of the right of property levied upon by virtue of any writ of execution, sequestration, or attachment . . ." This rather clumsily worded phrase refers to a special kind of suit in which a third party asserts a claim to property that is the subject of a dispute between two other parties in another proceeding. In these cases, by the terms of Section 8 itself, the district court has jurisdiction only "when the property levied on shall be equal to or exceed in value five hundred dollars."

Second, the district court has original jurisdiction of other civil cases, regard-



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less of subject matter, if the matter in controversy "shall be valued at or amount to" \$500. When the amount in controversy is between \$500.01 and \$1,000, the district court's jurisdiction is concurrent with that of the county court, because Section 16 of Article V gives the latter jurisdiction of suits involving \$200 to \$1,000.

When the amount in controversy is exactly \$500 an interesting problem develops because Section 8 places such a case within the jurisdiction of the district court while Section 16 places it in the county court. The resolution of this problem is somewhat curious: the courts have held that the county court has exclusive jurisdiction of a \$500 suit under the general amount-in-controversy clause (*Gulf, Colo. & Santa Fe Ry. Co. v. Rainbolt*, 67 Tex. 654, 4 S.W.356 (1887)), but the district court has exclusive jurisdiction of a suit involving exactly \$500 under the right-to-title-of-property clause discussed above. (*Erwin v. Blanks*, 60 Tex. 583 (1884).)

In cases in which the amount in controversy is between \$500 and \$5,000, the district court's jurisdiction is also concurrent with that of the county courts at law. (Tex. Rev. Civ. Stat. Ann. art. 1970a-1.) (For a discussion of the rather intricate rules for determining amount in controversy, see McDonald, *supra*, at 43-56.)

The third major source of civil jurisdiction of the district courts is the "residuary" clause of Section 8 — *i.e.*, the clause giving those courts jurisdiction of "All causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution . . ." Perhaps the most notable example of this jurisdiction is the district court's general jurisdiction to issue injunctions. When an injunction proceeding involves an ascertainable amount in controversy, it is within the jurisdiction of whatever court has jurisdiction of suits of that amount; but when no amount can be determined, the district court has jurisdiction. (*E.g.*, *Repka v. American Nat'l Ins. Co.*, 143 Tex. 542, 186 S.W.2d 977 (1945).)

The fourth major source of the district court's civil jurisdiction is the phrase permitting the legislature to give the district courts "such other jurisdiction, original and appellate, as may be provided by law." An example of this is the 1971 law giving district courts (in counties where there is no county court at law) jurisdiction of eminent domain proceedings, which previously had been in the county courts. (Tex. Rev. Civ. Stat. Ann. arts. 1960, 3266a.)

The jurisdiction of the district court is generally held to be exclusive, at least vis-à-vis the other constitutional courts, even when the constitution does not expressly make it exclusive. (*Meyers v. State*, 105 S.W. 48 (Tex. Civ. App. 1907, *no writ*.) For example, Section 8 gives the district court jurisdiction of suits to try title to land; Section 16 specifically denies the county court power to try such a suit, but nothing in the constitution specifically denies the justice court that power if the amount in controversy does not exceed \$200. Nevertheless, the courts have held that justice courts cannot consider suits to try title to land because they are within the exclusive jurisdiction of the district courts. (See *Fry v. Ahrens*, 256 S.W.2d 115 (Tex. Civ. App. — Galveston 1953, *no writ*.)

In the case of statutory courts, the courts have been somewhat more receptive to the notion of concurrent jurisdiction. Originally the courts refused to permit creation of statutory courts on the ground that the court system created by the 1876 Constitution was complete. (Ex parte *Towles*, 48 Tex. 413 (1877).) The 1891 amendment, however, specifically authorized statutory courts and provided further that the legislature "may conform the jurisdiction of the district and other inferior courts thereto." (Sec. 1, Art. V.) The courts have held that this permits the legislature to create statutory courts and give them jurisdiction concurrent with that of the district and county courts but does not permit the legislature to take

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jurisdiction away from the constitutional courts. (*Reasonover v. Reasonover*, 122 Tex. 512, 58 S.W.2d 817 (1933); *Jordan v. Crudgington*, 149 Tex. 237, 231 S.W.2d 641 (1950).) As a result, in counties that have statutory courts such as domestic relations courts, the constitutional district courts retain their jurisdiction over those cases, but share it with the statutory courts. Presumably, the same rule applies in the case of criminal district courts, despite language in some statutes purporting to give criminal district courts exclusive jurisdiction of criminal cases. (See, e.g., Tex. Rev. Civ. Stat. Ann. art. 199-174.)

Section 8 gives the district court jurisdiction of all felonies and of misdemeanors involving official misconduct. The latter phrase has been interpreted to mean willful illegal behavior in relation to the official's public duties. (*Robinson v. State*, 470 S.W.2d 697 (Tex. Crim. App. 1971).) Questions concerning the district court's jurisdiction sometimes arise when a pending felony case becomes a misdemeanor, either because the legislature reduces the penalty for the offense or because the prosecutor reduces the charge. If the legislature reduces the penalty for an offense to less than two years' imprisonment, the offense becomes a misdemeanor and the district court loses its jurisdiction. (*Donald v. State*, 171 Tex. Crim. 60, 345 S.W.2d 538 (1961).) But if the prosecutor merely reduces the charge to a misdemeanor, the district court retains jurisdiction. (*Bruce v. State*, 419 S.W.2d 646 (Tex. Crim. App. 1967).)

A 1973 amendment to Section 8 gave the district court general probate jurisdiction concurrent with that of the county court. The amendment also gave the legislature power to increase, diminish, or eliminate the probate jurisdiction of either the district or county court, however; and the legislature exercised this power in an anticipatory statute. The statute gives the district court concurrent jurisdiction with the county court in probate matters in counties in which there is no statutory court with probate jurisdiction (e.g., county court at law). But in counties that have such statutory courts, probate jurisdiction is shared by the constitutional county court and the statutory courts, and the district court has no probate jurisdiction. (*General and Special Laws of the State of Texas*, 63rd Legislature, Reg. Sess., 1973, ch. 610, at 1684.) The legislature is free to modify this scheme by local law, however, so probate jurisdiction may vary from county to county.

The 1973 amendment was simply tacked on to the end of Section 8 and made no attempt to state how much of the previous language is still operative. Since the county court still has concurrent probate jurisdiction, the clause giving the district court "appellate jurisdiction and general control in probate matters, over the County Court established in each county . . ." presumably is still at least potentially effective with respect to probate matters tried initially in the county court. The statute, however, provides that appeals "in such matters" go to the courts of civil appeals, rather than to the district court. The supreme court has interpreted this to mean that all appeals in probate cases, including those initially tried in county courts, go to courts of appeals rather than district courts. But the court distinguished between appeals and review by certiorari and held (as a matter of statutory construction) that county court judgments in probate matters are still reviewable by the district court upon a writ of certiorari. (*Cluck v. Hester*, 521 S.W.2d 845 (Tex. 1975).)

The phrase "and general control" apparently adds nothing to this provision; the district court's jurisdiction under this clause is treated as purely appellate. Thus the district court has no jurisdiction under this clause if the county court had none (*Schoenhals v. Schoenhals*, 366 S.W.2d 594 (Tex. Civ. App.—Amarillo 1963, writ *ref'd n.r.e.*)) or if the county court has not reached a final decision. (*Fischer v. Williams*, 160 Tex. 342, 331 S.W.2d 210 (1960).) Such appeals, however, are tried

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de novo (*i.e.*, as if there had been no previous trial) in the district court. The requirement of trial de novo stems from the Rules of Civil Procedure, Rules 334 and 350, however, rather than from the phrase “general control” and undoubtedly is based at least in part on the knowledge that county judges are not required to be—and often are not—lawyers. That this clause does not give the district court “general control” in probate proceedings is further emphasized by the fact that the district court in its appellate capacity can only consider issues that were presented to and acted upon by the county court. (*E.g.*, *Hunnicut v. Moorman*, 290 S.W.2d 278 (Tex. Civ. App.—Austin 1956, *writ ref'd n.r.e.*.)

Before the 1973 amendment, Section 8 contained a second source of probate-related jurisdiction. The district court has “original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law.” At least in the absence of contrary legislation, this grant of jurisdiction presumably is still effective. It is not clear whether the language in the 1973 amendment allowing the legislature to increase, diminish, or eliminate the jurisdiction of the district court in probate matters would permit the legislature to change the district court’s jurisdiction over executors, administrators, guardians, and minors. While these are undoubtedly “probate matters” in a general sense, it might be argued that the language authorizing a change in jurisdiction refers only to the types of probate matters not previously within the district court’s jurisdiction. Without mentioning the 1973 amendment, a court of civil appeals held that a statute giving a domestic relations court concurrent jurisdiction of dependent and neglected child cases was not inconsistent with the constitutional grant to the district court of original jurisdiction over minors. (*Clark v. Tarrant County Child Welfare Unit*, 509 S.W.2d 378 (Tex. Civ. App.—Fort Worth 1974, *no writ*.) This of course does not necessarily mean that the legislature could take such jurisdiction away from the district court.

Once again, the phrase “and general control” adds little. Except where the district court has general probate jurisdiction, it is the county court, rather than the district court, that in fact exercises general control over executors and administrators. (See, *e.g.*, Probate Code, sec. 4.) With regard to minors, however, at least one court has relied in part on the “general control” language in holding that a district court has implied power to make an *ex parte* order relating to custody of children, at least in an emergency situation. (*Gray v. State*, 508 S.W.2d 454 (Tex. Civ. App.—Texarkana 1974, *no writ*.)

One important consequence of this grant of original jurisdiction to the district court is that it gives that court the exclusive power to call independent executors to account. For example, suits to remove an independent executor for mismanagement, or to compel him to account, must be brought in the district, rather than county, court. (*E.g.*, *Bell v. Still*, 403 S.W.2d 353 (Tex. 1966); *Carter v. Brady*, 423 S.W.2d 946 (Tex. Civ. App.—San Antonio 1967, *writ ref'd n.r.e.*.) Another important result is that it gives the district court exclusive jurisdiction to determine custody of minors; although the county court has the power to appoint a guardian for a minor, only the district court can award custody. (*Ex parte Reeves*, 100 Tex. 617, 103 S.W. 478 (1907).)

The relationship between the district and county courts in probate matters has been complicated by the provision in Section 16 denying the county court jurisdiction of suits to try title to land. Obviously, many probate matters involve title to land, and there would be little probate jurisdiction left in the county court if all of these matters were held to be within the exclusive jurisdiction of the district court, so many of them are not. The courts developed an intricate set of rules to determine when a probate matter becomes a suit to try title to land, based

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generally on the principle that the county court had jurisdiction unless its probate jurisdiction was inadequate to grant the relief sought. (*Griggs v. Brewster*, 122 Tex. 588, 62 S.W.2d 980 (1933).) Specifically, the county court had jurisdiction, even if a claim to land was involved, if the dispute was between heirs and no outsiders were involved, but the district court had jurisdiction if a third party (e.g., a creditor) asserted a claim to the land. (E.g., *Hartely v. Langdon & Co.*, 347 S.W.2d 749 (Tex. Civ. App.—Houston 1961, *no writ*); *Jones v. Sun Oil Co.*, 137 Tex. 353, 153 S.W.2d 571 (1941).) A proceeding whose only purpose was to secure construction of a will was exclusively within the equity jurisdiction of the district court, but a county court could construe a will when that action was merely incidental to a general probate proceeding. (E.g., *Rust v. Rust*, 211 S.W.2d 262 (Tex. Civ. App.—Austin), *aff'd per curiam*, 147 Tex. 181, 214 S.W.2d 462 (1948); *McCarty v. Duncan*, 330 S.W.2d 899 (Tex. Civ. App.—Waco 1959, *no writ*); *Ragland v. Wagener*, 142 Tex. 651, 180 S.W.2d 435 (1944).)

These problems probably have been solved by the statute passed pursuant to the 1973 amendment. The statute gives all courts with original probate jurisdiction, including the county court, power to hear all matters incident to an estate, including questions involving title to land. (*General and Special Laws of the State of Texas*, 63rd Legislature, Reg. Sess., 1973, ch. 610, at 1684.) The attorney general rejected an argument that this statute was unconstitutional because of the provision in Section 16 denying the county court jurisdiction over suits for the recovery of land. (Tex. Att'y Gen. Op. No. H-434 (1974).)

In addition to the provisions mentioned above, the 1973 amendment provided (1) that in probate proceedings the district court “shall have all other jurisdiction conferred upon the district court by law”; (2) that if the legislature changes the probate jurisdiction of the district and county courts, it “shall also conform the jurisdiction of the other courts to such change”; (3) that the legislature “shall have the power to adopt rules governing the filing, distribution and transfer of all [probate] cases as between district courts, county courts, and other courts having jurisdiction thereof”; and (4) that the legislature may provide for appeals in probate cases to the courts of civil appeals. All of these provisions appear to be unnecessary. The district courts need no constitutional authorization to exercise the jurisdiction otherwise conferred on them by law. The amendment specially authorizes legislative changes in jurisdiction of the district and county courts and the courts of civil appeals, and the legislature needs no constitutional authorization to change jurisdiction of statutory courts, so the language referring to conforming jurisdiction is unnecessary. The legislature has general rule-making power, so there is no need to specifically authorize legislative rules governing the filing and transfer of probate cases. The specific authorization for legislation permitting appeals to the courts of civil appeals in probate cases also is unnecessary because Section 6 of Article V gives the legislature general power to define the appellate jurisdiction of the courts of civil appeals. It might be argued that even if the appeal language is unnecessary to confer jurisdiction upon the courts of civil appeals, it is nevertheless necessary to permit the legislature to remove appellate jurisdiction from the district court. (*Cf. Vail v. Vail*, 438 S.W.2d 115 (Tex. Civ. App.—Waco 1969, *no writ*.) The language also is unnecessary for that purpose, however, because the amendment specifically authorizes the legislature to increase, diminish, or eliminate district court jurisdiction in probate matters.

Section 8 gives the district court “appellate jurisdiction and general supervisory control” over the commissioners court. Here, as in the provisions relating to probate, the “control” phrase adds nothing. Indeed, in this provision the phrase “general supervisory control” is demonstrably inaccurate because the district court does not have any kind of general control over commissioners courts; the courts

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have held that the district court may exercise its jurisdiction over commissioners courts only if a commissioners court has acted without legal authority or abused its discretion, and even then it may not review actions of the commissioners court unless a statute provides for such review or unless an independent equitable action is brought in the district court. (See *Garcia v. State*, 290 S.W.2d 555 (Tex. Civ. App.—San Antonio 1956, writ *ref'd n.r.e.*.) This principle was reaffirmed recently in *Atlantic Richfield Co. v. Liberty-Danville Fresh Water Supply Dist. No. 1* (506 S.W.2d 931 (Tex. Civ. App.—Tyler 1974, no writ)).

The provision giving the district court and the judges thereof “power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction” appears to be an outright grant of constitutional jurisdiction, which the district courts could exercise even if there were no statutory authorization. The question has not arisen because since 1846 there has been a statute authorizing the district courts “to hear and determine any cause which is recognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts . . .” (Tex. Rev. Civ. Stat. Ann. art. 1913.) Another statute specifically authorizing issuance of writs also has been on the books since 1846. (Tex. Rev. Civ. Stat. Ann. art. 1914.) Any attempt to take away the district court’s writ jurisdiction arguably would be unconstitutional under the general rule that the legislature cannot take away jurisdiction conferred by the constitution. (See *Ex parte Richards*, 137 Tex. 520, 155 S.W.2d 597 (1941).)

In one rather narrow category of cases, however, the courts have permitted the legislature to deny the district courts jurisdiction to issue injunctions. Article 1735 of the civil statutes gives the supreme court exclusive power to issue writs of mandamus or injunction against officers of the executive department and certain other named officers. The argument was made that this statute was unconstitutional because it deprived the district courts of writ jurisdiction conferred on them by the constitution. The courts, however, held the statute constitutional. They relied on language in Section 3 permitting the legislature to give the supreme court power to issue writs of mandamus and quo warranto. They reasoned that the relief sought by a mandatory injunction is analogous to a writ of mandamus and, therefore, is within the Section 3 power of the supreme court. (*E.g.*, *American National Bank v. Sheppard*, 175 S.W.2d 626 (Tex. Civ. App.—Austin 1943, writ *ref'd w.o.m.*); *Herring v. Houston National Exchange Bank*, 113 Tex. 264, 253 S.W. 813 (1923).)

The phrase “necessary to enforce their jurisdiction” applies only to “other writs” and does not limit the district court’s general writ power; it may issue all writs known at common law or in equity, whether or not the purpose is to enforce its jurisdiction. (*Thorne v. Moore*, 101 Tex. 205, 105 S.W. 985 (1907).) One civil appeals case states that “Art. V, Sec. 8, Texas Constitution, . . . limits the jurisdiction of the district courts to issuing injunctions which are necessary to enforce their jurisdiction.” (*Holmes v. Delhi-Taylor Oil Corp.*, 337 S.W.2d 479 (Tex. Civ. App. — San Antonio 1960).) The statement is clearly erroneous, however; the cases cited do not support the proposition, and the case was reversed by the supreme court. (162 Tex. 39, 344 S.W.2d 420 (1961).)

### Comparative Analysis

Section 8 is far more detailed than comparable provisions in virtually every other state constitution. Only about half a dozen states mention any minimum amount in controversy in their constitutions. Four states specifically give jurisdiction over felonies, and eight states give the general trial court supervisory control over lower courts. About half of the state constitutions specifically permit some

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exercise of appellate jurisdiction by the general trial court, but since 1966 seven states have removed all appellate jurisdiction from the general trial court.

Of the 16 states that have adopted new or revised judiciary articles since 1965, about six leave all trial court jurisdiction entirely to the legislature. Eight give the general trial court all original jurisdiction, subject to restriction by the legislature.

California and Florida have added provisions authorizing the appointment of a commissioner to aid the general trial court.

The *Model State Constitution* provides simply that all courts other than the supreme court are to have original and appellate jurisdiction as provided by law, and that the jurisdiction of all similar courts is to be uniform.

### Author's Comment

Section 8 is far too detailed. The residuary clause (giving the district court jurisdiction over "all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution") is all the constitutional language needed to make the district court the trial court of general jurisdiction. This clause, furthermore, describes with reasonable accuracy the present jurisdiction of the district court; the court *does* have all jurisdiction not given to some other court. (See *Dean v. State*, 88 Tex. 290, 30 S.W. 1047 (1895); see also Tex. Rev. Civ. Stat. Ann. arts. 1909, 1913.)

The only additional statement that might be considered necessary is a clause defining the legislature's power to change the jurisdiction of the district court. The present language gives the district court original jurisdiction of all causes of action for which jurisdiction is not otherwise specified and then adds "and such other jurisdiction, original and appellate, as may be provided by law." With respect to original jurisdiction, this is somewhat nonsensical; if the district court has all original jurisdiction not otherwise given, there can hardly be any "other jurisdiction" left for the legislature to confer. A better statement would be one giving the district court original jurisdiction of all cases except as provided by law and such appellate jurisdiction as provided by law.

All of present Section 8 except the clauses mentioned above is superfluous. Most of the categories of cases specified as being within the district court's jurisdiction would be within that jurisdiction under the residuary clause, and in any event all are covered by the "as may be provided by law" clause. (See Tex. Rev. Civ. Stat. Ann. arts. 1906-1909, 1913-1914; Code of Criminal Procedure art. 4.05.)

It might be argued that the naming of specific types of cases is important because it makes the district court's jurisdiction exclusive in those matters. There are several answers to that argument. First, Section 8 does not by its terms make any of the district court's jurisdiction exclusive, in the named categories or any other. The rule that jurisdiction specifically conferred on the district courts is exclusive is entirely a gloss supplied by the courts. (See, e.g., *Meyers v. State*, 105 S.W. 48 (Tex. Civ. App. 1907, *no writ*.) Second, even when this rule applies, the district court's jurisdiction is "exclusive" only in a narrow sense; it is exclusive in the sense that it cannot be exercised by another constitutional court, such as the county court, but it is not exclusive with respect to statutory courts. For example, because divorce cases are specifically designated as within the district court's jurisdiction, they are beyond the power of the county court, but they are nevertheless within the jurisdiction of the statutory domestic relations courts. (*Jordan v. Crudginton*, 149 Tex. 237, 231 S.W.2d 641 (1950).) Finally, matters specifically enumerated in this section are not always within the exclusive jurisdiction of the district court, even vis-à-vis another constitutional court. For

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example, as noted above, the legislature has been permitted to give the supreme court exclusive original jurisdiction to issue certain injunctions, despite the specific grant of injunction jurisdiction to the district court. And this statute not only makes the district court's jurisdiction nonexclusive, it takes it away entirely by making the supreme court's jurisdiction exclusive. (See *Tex. Rev. Civ. Stat. Ann.* art. 1735; *American National Bank v. Sheppard*, 175 S.W.2d 626 (Tex. Civ. App. – Austin 1943, *writ ref'd w.o.m.*.)

In short, the enumeration of specific categories in Section 8 does not expressly make the district court's jurisdiction exclusive; it never makes that jurisdiction exclusive vis-a-vis statutory courts; and sometimes it is not even effective to make it exclusive vis-à-vis other constitutional courts. Retention of the long list therefore can hardly be justified on the ground that it defines what jurisdiction is exclusive and what is concurrent.

The list serves only one real function: in most cases, it prevents the legislature from completely withdrawing the specified types of cases from the district court. (*Reasonover v. Reasonover*, 122 Tex. 512, 58 S.W.2d 817 (1933).) This barrier is more apparent than real, however. The legislature is not prohibited from giving statutory courts jurisdiction concurrent with the district courts, and the creation of special courts for certain types of cases usually has the practical effect of removing virtually all of those cases from the district courts. Moreover, as pointed out above, a specific mention in Section 8 is not always enough to prevent the legislature from taking the jurisdiction away from the district court altogether.

If for some reason it is still thought desirable to enumerate certain categories of trial court jurisdiction in the constitution, it should be done in the sections relating to the trial courts of limited jurisdiction. It is confusing and inefficient to define the district court as the court of general jurisdiction and then also list categories of cases that are within its jurisdiction. It requires a double inquiry to determine jurisdiction in any case; one must first determine that the matter is within the district court's jurisdiction, then determine that it is not within the jurisdiction of another court. It also enhances the possibility of conflicting jurisdictional provisions. Matters that are to be excluded from the jurisdiction of one or more other courts should simply be listed as exceptions to the jurisdiction conferred on those courts.

The language added to Section 8 by the 1973 amendment is a good example of the haphazard amendment process that has made the Texas Constitution so convoluted. The amendment first grants probate jurisdiction to the district courts, then authorizes the legislature to take it away. It permits probate jurisdiction to be assigned by local law—a decision that surely should lead one to ask whether the subject needs to be included in the constitution at all. The amendment affects Sections 16 and 22 also, but the language of those sections was not changed to reflect that fact. The amendment supersedes, and perhaps negates, some of the previous language in Section 8, but no attempt was made to accommodate new language with old, and the new language repeats the archaic and offensive language of Section 16 in referring to “idiots,” “lunatics,” and “common drunkards.” It contains unnecessary language relating to appeals, confirming jurisdiction of other courts, and transferring cases between various probate courts. It fails to make clear whether the legislature can place probate jurisdiction exclusively in the statutory courts. It fails to indicate whether the district court retains any appellate probate jurisdiction, and it fails to state whether the district court retains its original jurisdiction over executors, administrators, guardians, and minors, and if so, whether the legislature can change that jurisdiction. Failures of this type breed litigation, make the constitution unnecessarily verbose and complex, and often create a demand for further amendment. At the very least, the language added by the 1973 amendment

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should be integrated with the rest of Section 8; the provisions shown to be unnecessary in the preceding *Explanation* should be deleted, and the language of Sections 16 and 22 should be revised to reflect the changes that the amendment makes in those provisions. A better solution would be to simply leave the entire matter of probate jurisdiction to the legislature; the constitutional status of the subject is mostly illusory anyway because the amendment gives the legislature virtually unlimited power to change probate jurisdiction.

Sec. 9. CLERK OF DISTRICT COURT. There shall be a Clerk for the District Court of each county, who shall be elected by the qualified voters for State and county offices, and who shall hold his office for four years, subject to removal by information, or by indictment of a grand jury, and conviction of a petit jury. In case of vacancy, the Judge of the District Court shall have the power to appoint a Clerk, who shall hold until the office can be filled by election.

### History

The office of district clerk has been included in every Texas constitution since the Republic. The present provision is virtually identical with that of the 1845 Constitution (Art. IV, Sec. 11). There have been changes in the intervening years, however. The 1869 Constitution reduced the district clerk's term from four years to two and gave the district judge power to remove the district clerk for cause. This power was taken away by the Convention of 1875, which apparently felt that Reconstruction judges had abused the power. The four-year term was not restored until 1954.

### Explanation

The term "district clerk" is something of a misnomer; the position is more accurately described as a county office. By the terms of Section 9 itself, each county has a district clerk. Thus, in rural areas where several counties are served by a single district court, each county nevertheless has its own district clerk (or joint county-district clerk; see below). On the other hand, if a county has more than one district court, it nevertheless has only one district clerk. (*Duclos v. Harris County*, 251 S.W. 569 (Tex. Civ. App. - Galveston 1923), *aff'd*, 114 Tex. 147, 263 S.W. 562 (1924).) In counties with more than one district court, the district clerk must act as clerk for all the district courts. (*Kruegel v. Daniels*, 109 S.W. 1108 (Tex. Civ. App. 1908, *writ ref'd*.) It apparently makes little difference whether the position is classified as a county or district office. The distinction between county and district offices can be important in connection with Section 12 of Article IV, which provides that vacancies in district and state offices are to be filled by the governor. Vacancies in county offices, on the other hand, are usually filled by the commissioners court. (See Secs. 20, 23, and 28 of Art. V.) In the case of the district clerk, however, this distinction is immaterial because Section 9 contains a specific provision giving the district judge power to fill a vacant district clerkship.

The constitution does not say how a vacancy in the office of district clerk is to be filled if the county has two or more district judges and they cannot agree on an appointee. A statute (the constitutionality of which apparently has not been tested) directs the governor to fill the vacancy in such a case. (Tex. Rev. Civ. Stat. Ann. art. 1895.)

The only exception to the pattern of one district clerk per county is the joint clerk authorized by Section 20. That section permits election of a single clerk to serve both the county and district courts in counties with a population of fewer than 8,000. The statute implementing this section provides for a single clerk in these counties unless the voters of the county opt to retain separate county and district clerks. (Tex. Rev.



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Civ. Stat. Ann. art. 1903.) The listings of clerks in the *Texas Almanac, 1972-73* and the *Texas Legal Directory, 1971* indicate that approximately 75 counties (including a few with populations in excess of 8,000) have a joint county-district clerk. Although the statute calls these officials "joint clerks," they are sometimes listed in these directories as "district-county clerks."

Unlike the county clerk, who serves as a recorder as well as a court clerk, the district clerk's duties are all court-related. He is custodian of the district court's records, depository of funds paid into the district court, and, to a very limited extent, administrator for the district court. (See Tex. Rev. Civ. Stat. Ann. arts. 1893-1905.)

In addition to the language in Section 9 providing for removal of district clerks upon conviction, district clerks also are subject to removal under Section 24. The latter gives district judges power to remove county and district clerks (and other named officials) from office upon a jury finding of incompetence, official misconduct, habitual drunkenness, "or other causes defined by law." In practice, the latter section appears to be the more important. It is broader than the provision in Section 9, and Section 9 is unclear as to what kind of conviction will lead to removal. Most importantly, the statutory procedure for removal of district clerks clearly is based on Section 24, rather than Section 9. (See Tex. Rev. Civ. Stat. Ann. arts. 5970-5982.)

### Comparative Analysis

Approximately half of the states provide in their constitutions for a clerk of the trial court of general jurisdiction; of these, about 15 make the clerk elective, and two make the position appointive. (The others do not specify in their constitutions a method of selection.)

Most of the states that have clerks as constitutional officers provide for a term of years. About five states provide for removal of the clerk for cause, and the same number permit the judge of the general trial court to fill vacancies in the office of clerk.

The *Model State Constitution* contains no mention of clerks.

### Author's Comment

Any court system obviously must have some equivalent of the district clerk. The major questions are whether the office should be constitutional, whether it should be elective, whether it should be tied to a one-per-county pattern, and whether there should be separate clerks for other levels of trial courts.

Students of judicial administration are almost unanimous in the view that clerks are administrative appendages of the court, rather than independent policy-making officials, and therefore should be within the general control of the courts. Some contend that administrative efficiency is impossible as long as clerks are responsible primarily to the voters, rather than to the courts. (E.g., Smith, "Court Administration in Texas: Business Without Management," 44 *Texas L. Rev.* 1142, 1155 (1966).)

The number of levels of court clerks depends in part on the organization of the trial courts; a state with a unified trial court obviously has no need for more than one kind of trial court clerk. Unification of clerks' offices, however, need not await unification of the trial courts. Since each county in Texas has a district clerk (or joint district-county clerk), it would be relatively easy to consolidate the functions of the county and district clerk. The latter could take over the clerk functions for both the county and district courts (and perhaps the lower courts and statutory courts as well), permitting the county clerk to devote full time to his duties as

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county recorder and clerk of the commissioners court. Such a consolidation would eliminate much duplication in recordkeeping, accounting, and filing.

Even if the offices are not consolidated statewide, the joint-clerk provision in Section 20 probably should be expanded to permit the legislature to make that option available to all counties.

**Sec. 10. TRIAL BY JURY.** In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.

### History

The Constitution of the Republic contained only one reference to jury trial; it simply stated that “the right to jury trial shall remain inviolate.” (Declaration of Rights, Sec. 9.) The 1845 Constitution and all subsequent versions have contained two jury trial provisions, one in the Bill of Rights and another in the judiciary article. The former is now Section 15 of Article I.

In Texas and elsewhere, there is a well-established rule that a constitutional right to jury trial normally is not absolute, but only guarantees the right in cases in which jury trial would have been available when the constitution was adopted. (*Cockrill v. Cox*, 66 Tex. 669, 1 S.W. 794 (1886).) Thus, in many states, there is no right to a jury in equity cases because historically jury trial was available only in the “law” courts, not in equity. In Texas, however, law and equity were merged from the very beginning, so there has always been a right to jury trial in equity cases. To assure that the adoption of the common law would not preclude the continuation of this practice, the 1845 Constitution contained a separate provision granting the right to a jury trial in the district court in equity cases. (Art. IV, Sec. 16.) This provision was carried forward with modifications in the Constitutions of 1861 (Art. IV, Sec. 16), 1866 (Art. IV, Sec. 20), and 1869 (Art. V, Sec. 16). In the 1876 Constitution the phrase “all causes” was substituted for the previous language “all cases of law or equity.” Thus Section 10 of Article V is clearly the successor to this series of provisions guaranteeing jury trial in equity cases. (For an excellent discussion of the early history of the jury in England, see Pope, “The Jury,” 39 *Texas L. Rev.* 426 (1961).)

### Explanation

Section 15 of Article I guarantees a right to jury trial and authorizes the legislature to regulate it. That leaves no apparent role to be served by this section except that of describing the procedure by which the right is to be exercised. The section thus has the effect of abrogating the right to jury trial unless the party seeking it demands it and pays a jury fee (currently \$5) or signs an affidavit of inability to pay. (See Rules of Civil Procedure, rules 216, 217.)

### Comparative Analysis

Virtually all state constitutions contain some guarantee of a right to jury trial, but only about 14 also include language dealing with waiver of the right. None contain two separate and unrelated provisions comparable to those of the Texas Constitution.

The *Model State Constitution* guarantees the right to an impartial jury in the trial of felonies.

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## Author's Comment

This section should be deleted. As pointed out in the preceding *Explanation*, the right to jury trial is guaranteed by Section 15 of Article I. This section regulates the exercise of that right, but it is unnecessary for that purpose because Section 15 of Article I also authorized the legislature to regulate the right to jury trial.

An argument has been made that this section guarantees a right to jury trial in some cases not covered by Section 15 of Article I. The argument is that the latter preserves the right to jury trial only in cases in which that right was recognized at the time of adoption of the constitution, while Section 10 of Article V guarantees a right to jury trial in all cases in the district courts, without regard to the practice in 1876. (Harris, "Jury Trial in Civil Cases—A Problem in Constitutional Interpretation," 7 *Sw. L. J.* 1 (1953).) This distinction does not appear to have been observed consistently by the courts, however. Several decisions state that the right to jury trial is limited to the right as it existed in 1876, whether the right is asserted under Section 15 of Article I or Section 10 of Article V. (*Welch v. Welch*, 369 S.W.2d 434 (Tex. Civ. App.—Dallas 1963, *no writ*); *Hatten v. City of Houston*, 373 S.W.2d 525 (Tex. Civ. App.—Houston 1963, *writ ref'd n.r.e.*.) And although the courts have stated frequently that Section 10 of Article V is broader than Section 15 of Article I (e.g., *Tolle v. Tolle*, 101 Tex. 33, 104 S.W. 1049 (1907), they have nevertheless upheld denial of jury trial in district court cases. (E.g., *Ex parte Howell*, 488 S.W.2d 123 (Tex. Crim. App. 1972).) Thus, despite its broader language, this section is not a reliable guarantee of a right to jury trial in cases not covered by Section 15 of Article I.

The argument advanced by Professor Harris attempts to reconcile the two provisions and give some meaning to each. As long as both sections remain in the constitution, the established principles of constitutional interpretation require that such an effort be made. But the history of this section strongly indicates that the framers of the 1876 Constitution did not in fact intend to create two guarantees of jury trial, one broader than the other. Rather, in Section 10 of Article V they were simply carrying forward a provision that had been necessary in 1845 to preserve the right to jury trial to equity cases but was no longer necessary in 1876 because by then the right to a jury in equity was established and therefore was guaranteed under the Bill of Rights provision.

Sec. 11. DISQUALIFICATION OF JUDGES; EXCHANGE OF DISTRICTS; HOLDING COURT FOR OTHER JUDGES. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

## Art. V, § 11

### History

The 1836 Constitution of the Republic provided only that no supreme court judge was to sit in a case tried by him in the court below; it had no provision for replacing any disqualified judge. (Art. IV, Sec. 8.)

The present Section 11 first appeared in the 1845 Constitution (Art. IV, Sec. 14) and has not been significantly changed since.

### Explanation

This section specifies three grounds for disqualification: interest, relationship to the parties, or participation as counsel in the case. The term "interest" has a special and limited meaning; it refers only to direct pecuniary interest. (*City of Oak Cliff v. State*, 97 Tex. 391, 79 S.W. 1068 (1904).) Ideological bias or emotional prejudice is not a ground for disqualification because it does not amount to "interest" under this section. (Ex parte *Pease*, 123 Tex. Crim. 43, 57 S.W.2d 575 (1933).) On the other hand, if the judge's potential stake in the outcome is one that meets this definition of interest, the courts have stated that since the section says "may be interested" rather than "is interested," the judge should disqualify himself if there is any possibility that he might be "interested" in the outcome. (*Pahl v. Whitt*, 304 S.W.2d 250 (Tex. Civ. App.—El Paso 1957, *no writ*).) Nevertheless, the courts have held that a judge is not disqualified if his financial interest is "indirect, remote, and uncertain." Thus, a judge is not disqualified even though he is a taxpayer in a governmental unit the tax rate of which might be affected by the outcome of the litigation. (*Nueces County Drainage and Conservation Dist. No. 2 v. Bevely*, 519 S.W.2d 938 (Tex. Civ. App.—Corpus Christi 1975, *writ ref'd n.r.e.*) (supplemental opinion).)

Curiously, although the section disqualifies a judge if he has served previously as a lawyer in the case, it does not disqualify him for previous participation in the case as a judge. It therefore does not prevent a newly chosen appellate judge who was previously a trial judge from reviewing his own decision.

Relationship to a party is a ground for disqualification only if the affinity or consanguinity is within the third degree. (Code of Criminal Procedure art. 30.01; Tex. Rev. Civ. Stat. Ann. arts. 15, 1717, 1815, 2378.) Common-law rules for determining degree of relationship are used. (These are explained in *Tyler Tap R.R. v. Overton*, 1 White & W. 267 (Tex. Ct. App. 1878). See also 1 McDonald, *Texas Civil Practice* (St. Paul: West Publishing Co., 1965), pp. 96-101.)

In the case of trial courts, the judge himself is required to make the initial determination on the question of his disqualification and, if necessary, to conduct a hearing on the question. (*Pinchback v. Pinchback*, 341 S.W.2d 549 (Tex. Civ. App.—Fort Worth 1960, *writ ref'd n.r.e.*.) In the case of appellate courts, it is not clear who is to make the initial determination; it could be made by the judge himself, by his colleagues on the court, or by him and his colleagues together. The most common practice seems to be for the judge in question to disqualify himself temporarily pending a determination of the issue by his colleagues. (See *Galveston & Houston Investment Co. v. Grymes*, 94 Tex. 609, 63 S.W. 860 (1901); *City of Oak Cliff v. State*, 97 Tex. 391, 79 S.W. 1068 (1904); *Love v. Wilcox*, 119 Tex. 256, 28 S.W.2d 515 (1930).) However, in the recent *Bevely* case discussed earlier, the two civil appeals judges whose possible disqualification was in question themselves decided the issue.

In the appellate courts, there is no requirement for appointment of a special judge after disqualification of the regular judge, so long as a quorum remains and the required number concur in the decision. (*Long v. State*, 59 Tex. Crim. 103, 127 S.W. 551 (1910).)

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In the district court, a disqualified judge is replaced by a special judge agreed upon by the parties, or, if they are unable to agree, by another district judge from an adjoining district designated by the governor. (Tex. Rev. Civ. Stat. Ann. art. 1885.)

If a judge fails to remove himself when this section requires disqualification, his actions in the case are invalid. The disqualification cannot be waived by consent of the parties; the judgment is void and subject to collateral attack. (*Ex parte Washington*, 442 S.W.2d 391 (Tex. Crim. App. 1969).)

The provision that the district judges may change districts or hold courts for each other, and shall do so when the law requires, is the nearest thing to an authorization for court administration that appears in the Texas Constitution. It has been construed to allow judges to exchange places voluntarily without restriction. (*Johnson v. State*, 61 Tex. Crim. 104, 134 S.W. 225 (1911); *Randel v. State*, 153 Tex. Crim. 282, 219 S.W.2d 689 (1949).) It also has been used to permit several recent developments in court administration.

Judges in multidistrict counties are authorized by rule 330 of the Rules of Civil Procedure to transfer cases freely from one court to another within the county without a formal transfer. The rule's broad provisions for coordination of judges have been upheld as a valid exercise of the power given by this section. (*Currie v. Dobbs*, 10 S.W.2d 438 (Tex. Civ. App.—El Paso 1928, *no writ*.)

Article 200a of the civil statutes sets up an administrative structure for district courts with the chief justice of the supreme court at the head. The state is divided into nine administrative judicial districts, each with a presiding judge appointed by the governor; the presiding judge is authorized to assign judges of the district to other district courts within the administrative judicial district. The chief justice has authority to assign a judge of one district to the court of another district. (The system is described in Smith, "Court Administration in Texas: Business Without Management," 44 *Texas L. Rev.* 1142, 1153 (1966).) The constitutionality of this statute has been upheld. (*Haley v. State*, 151 Tex. Crim. 392, 208 S.W.2d 378 (1948); *Eucaline Medicine Co. v. Standard Inv. Co.*, 25 S.W.2d 259 (Tex. Civ. App.—Dallas 1930, *writ ref'd*.)

Section 5a of Article 200a provides that it is the duty of an assigned district judge to accept his assignment; he can be excused for good cause, however, and there is no method of enforcing the requirement. The practice of assigning judges to different districts has elicited little opposition from judges; it has been suggested that presiding judges generally do not assign judges unless they agree beforehand to the assignment. (Smith, 44 *Texas L. Rev.* at 1153, n. 79.) More important, perhaps, is the fact that judges who accept such assignments receive extra compensation. (See Tex. Rev. Civ. Stat. Ann. art. 200a, secs. 2a(4), 10a.)

### Comparative Analysis

Most states do not provide for disqualification of judges in their constitution. In those that do, the most common grounds for disqualification are "affinity and consanguinity" (in about six states), having been counsel in the case in a lower court (in about five states), having presided over the case in the lower court (in about three states), or interest in the outcome (in about five states).

Approximately 18 states provide constitutionally that judges may exchange districts or hold court for each other; about 20 states provide that judges may be assigned.

More than two-thirds of the states have created the office of court administrator, but only 11 of these mention the office in their constitutions. (Council of State Governments, *State Court Systems*, rev. ed. (Chicago, 1970), p. 70, table XI.)

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About half a dozen other states have revised their constitutions recently to give administrative authority to the supreme court or its chief justice, including power to appoint necessary administrative personnel.

The *Model State Constitution* provides that the chief justice is the administrative head of a unified court system. He has power to assign judges, appoint an administrative director, and submit a budget.

### Author's Comment

Disqualification of judges in specific cases (which is a quite different matter than removal of judges from office; see Secs. 1-a and 24 of Art. V and Secs. 2, 8, and 16 of Art. XV) is hardly a matter of constitutional importance. If the section is to be retained, however, the method of determining whether an appellate judge is disqualified should be clarified. Also, responsibility for certifying a judge's disqualification to the governor should be fixed; the present language states that it shall be done but fails to state who is to do it.

The last paragraph of the section, authorizing assignment of judges, has proven useful, but it does not go far enough. It does not cover judges of the appellate courts, for example, or the judges of the many lower courts and statutory courts. Moreover, it has not led to a comprehensive system of court administration even in the district courts; in practice, assignment is almost entirely a matter of voluntary cooperation. (See Guittard, "Court Reform, Texas Style," 21 *Sw. L. J.* 451, 465 (1967).)

The provision contains no mention at all of other important areas of administration, such as budget, nonjudicial personnel, material, intergovernmental relationships, and public relations. (See Smith, 44 *Texas L. Rev.*, at 1163.) In any event, assignment of judges should not be treated as merely an adjunct to the matter of disqualification but should be part of a separate provision dealing with court administration.

Sec. 12. JUDGES TO BE CONSERVATORS OF THE PEACE; STYLE OF WRITS AND PROCESS; PROSECUTION IN NAME OF STATE; CONCLUSION. All judges of courts of this State, by virtue of their office, be conservators of the peace throughout the State. The style of all writs and process shall be, "The State of Texas." All prosecutions shall be carried on in the name and by authority of the State of Texas, and shall conclude: "Against the peace and dignity of the State."

### History

All Texas constitutions have had this provision in very nearly the present language. The 1876 version originally listed all the courts whose judges were to be conservators of the peace; the section was amended in 1891 to read "courts of this state."

### Explanation

The phrase "conservator of the peace" apparently serves only one purpose: it has been held to classify a judge as a peace officer under a statute authorizing peace officers to carry weapons. (*Hooks v. State*, 71 *Tex. Crim.* 269, 158 *S.W.* 808 (1913).)

An indictment that does not begin with the phrase "In the name and by the authority of the state of Texas" and end with "against the peace and dignity of the state" is defective in substance as well as form. (*Wade v. State*, 52 *Tex. Crim.* 619, 108 *S.W.* 677 (1908).) The phrases must be almost letter perfect—an indictment containing "ainst" instead of "against" in the conclusion was held to be fatally

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defective. (*Bird v. State*, 37 Tex. Crim. 408, 35 S.W. 382 (1896).)

Where the prosecution is based on a properly worded indictment, the fact that the complaint did not have the required introductory clause does not require reversal. (*Vogt v. State*, 159 Tex. Crim. 211, 258 S.W.2d 795 (1953).) An indictment is fatally defective, however, unless it has the prescribed phrases. (*Etter v. State*, 164 Tex. Crim. 177, 297 S.W.2d 834 (1957).) Similarly, inclusion of the prescribed concluding phrase in one count of a multicount indictment is sufficient, even if that count is abandoned by the prosecution. (*Franks v. State*, 513 S.W.2d 584 (Tex. Crim. App. 1974).)

### Comparative Analysis

About half of the state constitutions contain some provision for the style of writs. Since 1964, half a dozen states have deleted the provision.

The number of states presently requiring introductory phrases or conclusions is about 17, a decrease of five since 1965.

The constitutions of four states make all judges conservators of the peace. About five other states make their supreme court judges conservators of the peace.

The *Model State Constitution* has no similar provision.

### Author's Comment

This entire section is one of the Texas Constitution's more egregious examples of trivia elevated to constitutional status. If it is thought that judges need authority to carry guns, they can be given that right by statute. (This section is in fact repeated virtually verbatim in the Code of Criminal Procedure, art. 1.23.)

The portion of the section specifying the style of writs serves no purpose except to freeze a specimen of 19th century procedural rigidity into the constitution. It is inconsistent with the trend toward simplification of procedural rules, including relaxation of strict rules regarding formal defects in indictments and informations. (See Stumberg, "The Accusatory Process," 35 *Texas L. Rev.* 972, 973 (1957).) This portion of the section is repeated verbatim by the statute cited above (see also Rules of Civil Procedure, rule 15) and therefore could be deleted without changing present law.

Sec. 13. NUMBER OF GRAND AND PETIT JURORS; NUMBER CONCURRING. Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

### History

The 1876 version was the first Texas Constitution to mention specific numbers of jurors and the first to permit nonunanimous verdicts. Nonunanimous verdicts were permitted in Texas, however, by an 1834 statute permitting 8 of the 12 jurors to render a verdict in either a civil or criminal case. (Tex. Laws 1834, 1 *Gammel's Laws*, p. 365.) The 1836 Constitution probably put an end to that practice, however, because it said "the common law shall be the rule of decision," and the

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common law at that time required unanimous verdicts.

Some delegates to the 1875 Convention apparently objected to the authorization for nonunanimous verdicts, but the substance of the debate is not reported. (See *Debates*, p. 379.) One writer suggests that those favoring nonunanimous verdicts believed it would reduce costs, minimize compromise verdicts, and prevent delay, while the opponents argued it would lead to injustices. (2 *Interpretive Commentary*, pp. 192-93.)

Some scholars believe the decision to fix the number of jurors at 12 has biblical origins.

If the twelve apostles on their thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve.

(Duncomb, *Trials per Pais* (1665), quoted in White, "Origin and Development of Trial by Jury," 29 *Tenn. L. Rev.* 8, 15 (1961).)

### Explanation

The first sentence of this section is quite straightforward; it simply fixes the number of grand and petit (trial) jurors at 12 and establishes a grand jury quorum of nine. The rest of the section, however, is rather intricate. It describes two situations in which a verdict may be returned by fewer than the full 12 members of a petit jury. (1) In all cases in the district courts, nine, ten, or 11 jurors may return a verdict if the other jurors die or are disabled, but the jurors who remain must be unanimous. (2) In civil cases and misdemeanors in the district courts, nine, ten, or 11 jurors may return a verdict, despite the dissent of the other one, two, or three, but all of those in the majority must sign the verdict. To further complicate matters, the legislature is given power to modify "the rule authorizing less than the whole number of the jury to render a verdict." This is somewhat ambiguous because there are really two such rules. The legislature has assumed it has power to modify both rules. In felony cases, both rules have been modified; no verdict may be returned over the dissent of any participating juror, and no verdict may be returned if more than one juror dies or is disabled. (Code of Criminal Procedure, art. 36.29.)

For nearly 100 years rule (2) was modified to require unanimous verdicts in civil cases. This was done first by statute (Tex. Laws 1876, ch. 76, 8 *Gammel's Laws*, p. 918), then by Rule 291 of the Rules of Civil Procedure. Thus, despite the clear authorization in this section for nonunanimous verdicts, the common-law rule of unanimity was retained. Effective in 1973, however, Rule 291 finally was amended to delete the unanimity requirement. The rules still do not go quite as far as this section; Rule 292 permits no more than two dissenting jurors. But verdicts of 11-1 or 10-2 are now permissible under rule (2) of this section. The constitutionality of Rule 292 was upheld in *Sherrill v. Estate of Plumley*, 514 S.W.2d 286 (Tex. Civ. App.—Houston [1st Dist.] 1974, *no writ*).

The courts have not decided whether a verdict can be rendered in a civil case when one of the original 12 jurors is disabled and another dissents. Under the Rules of Civil Procedure prior to 1973, such a verdict apparently was invalid. Old Rule 291 required the concurrence of "all members of the jury trying the case," and old Rule 292 permitted a verdict to be rendered in the disablement situation only if "signed by each juror rendering it." The new rules, however, contain neither of those requirements. Rule 291 now contains no unanimity requirement, and Rule 292 simply requires "the concurrence, as to each and all answers made, of the same 10 members of an original jury of 12 . . ."; apparently it does not



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matter whether the failure of the other two to concur results from disagreement or disability. The signature requirement in new Rule 292 simply states that a verdict by fewer than 12 jurors "must be signed by each juror *concurring therein*," thus apparently permitting ten jurors to return a verdict when one juror is disabled and another dissents.

There appears to be nothing in Section 13 to prevent this combination of the disablement and dissent exceptions. Indeed, Section 13 apparently goes farther and permits nine concurring jurors to render a verdict despite the nonconcurrence of any combination of three disabled or dissenting jurors. It is not clear whether the present Rules of Civil Procedure permit a verdict of 9-1 or 9-2 with one or two jurors disabled. It might be argued that such a verdict is invalid because the first sentence of the rule requires the concurrence of ten. The second sentence, permitting verdicts by nine jurors in the disablement situation, obviously operates as an exception to the concurrence-of-ten requirement, however, and it might be argued that there is no reason to permit nine jurors to return a verdict when the other three are all disabled, but not when two are disabled and one dissents. That argument, however, would apply as well to the concurrence-of-ten requirement itself; if it is illogical to prohibit a verdict by nine when some of the remaining three are dissenters rather than disabled, it is probably equally illogical to prohibit a verdict by nine when all of the remaining three are dissenters. The supreme court evidently has not considered this distinction illogical, so it probably would hold that verdicts of 9-1 or 9-2 are invalid. In any event, this is a matter of interpretation of Rules of Civil Procedure, not the constitution.

The requirement that all the concurring jurors sign a nonunanimous verdict appears to apply only to rule (2), but Article 36.29 of the Code of Criminal Procedure also applies it to the disablement rule, and Rule 292 of the Rules of Civil Procedure appears to do likewise. For a discussion of Section 13 and an argument in favor of nonunanimous verdicts, see Kronzer and O'Quinn, "Let's Return to Majority Rule in Civil Jury Cases," 8 *Hous. L. Rev.* 302 (1970).

This section deals only with district court juries. In county courts, petit juries have six members. Although there is no specific constitutional authorization for nonunanimous verdicts in county court, Rule 292 permits a six-member jury to return a 5-1 verdict. In criminal cases, county court verdicts must be unanimous. (Code of Criminal Procedure, art. 37.03.) This indicates that the supreme court believes nonunanimous verdicts may be authorized even if the constitution does not specifically permit them. If this is true, most of Section 13 is unnecessary; if no constitutional authorization is needed to permit nonunanimous verdicts in county court, presumably none is needed to permit such verdicts in district court either.

### Comparative Analysis

About half of the states have constitutional provisions dealing with the number of members on juries.

About 29 states allow nonunanimous verdicts by constitutional provision, statute, or rule. Only about four of those allow nonunanimous verdicts in criminal cases, however, and about seven others permit nonunanimity only if the parties consent. At least two states permit nonunanimous verdicts only after the jury has deliberated a specified length of time without agreeing.

Fourteen state constitutions fix the number of grand jurors, or at least a minimum number. The most common number is 12, although two states fix a minimum of seven and two others leave the number to the counties. There are two primary methods of selecting grand jurors: (1) they may be chosen at random or

(2) they may be chosen by officials who have some discretion in making their selections. Texas is one of only about eight states that use the latter method. (See Comment, "The Grand Jury, Past and Present: A Survey," 2 *American Criminal Law Quarterly* 119 (1964).)

#### Author's Comment

Since its abolition in England thirty years ago, the need for a grand jury in our modern society is frequently questioned. According to one view, safeguards have been developed over the years which eliminate the need for the grand jury. It has been suggested that a judicial preliminary examination should replace the grand jury since such would afford greater protection for the accused and would entail a less expensive procedure. But most recent and best considered legal opinion is to the contrary. (Comment, 2 *American Criminal Law Quarterly*, at 120, n. 10.)

Chief Justice Vanderbilt of New Jersey, in defense of the grand jury once stated: "What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instance of public wrongdoing." (*Ibid.*, n. 10).

The trend in some areas is toward a smaller trial jury. One federal district judge argues that reduction in the number of jurors saves both time and money, without sacrificing "the essential merits of the jury as a fact-finding institution." (Tamm, "The Five-Man Civil Jury: A Proposed Constitutional Amendment," in Winters, ed., *Selected Readings: The Jury* (Chicago: American Judicature Society, 1971), p. 35.)

Another controversial subject is the requirement of unanimity in verdicts. Judge Tamm argues that it is crucial to retain the requirement of unanimity, since that ensures full consideration in the jury room of all opposing views. (Tamm, *Selected Readings*, at 18.)

The chief objections to a requirement of unanimity are that verdicts become compromises, that excessive amounts of time and expense are required to reach a verdict, and that the irrational prejudice of a single juror can cause a hung jury and thereby require an entire new trial. (See Kronzer and O'Quinn, 8 *Hous. L. Rev.*, at 305-06.) These authors, however, find the unanimity requirement less objectionable in criminal cases. Because guilt must be proved "beyond a reasonable doubt," the authors reason that it is appropriate to require the concurrence of every juror in criminal cases. It is not constitutionally necessary to do so, however. In *Johnson v. Louisiana* (406 U.S. 356 (1972)), the United States Supreme Court upheld the constitutionality of nonunanimous verdicts in criminal cases.

Whatever one's view on the desirability of nonunanimous verdicts, the language of Section 13 leaves much to be desired. It permits certain nonunanimous verdicts, then gives the legislature power to prohibit them. It would be better simply to leave the matter to the legislature. This could be done either by omitting the entire matter of petit juries or by fixing the number of petit jurors at 12 and authorizing the legislature to fix the number required for decision.

Sec. 14. JUDICIAL DISTRICTS AND TIME OF HOLDING COURT FIXED BY ORDINANCE. The Judicial Districts in this State and the time of holding the Courts therein are fixed by ordinance forming part of this Constitution, until otherwise provided by law.

#### History

Ordinances were the 1875 Convention's answer to the problem of making the judiciary's transition to a new constitution.

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

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

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

### Explanation

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

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

### Comparative Analysis

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

### Author's Comment

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

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

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