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

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

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

History

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

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

Explanation

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

Comparative Analysis

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

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provide that the convicted person is either partially or totally ineligible to hold legislative office. A half dozen states also call for some form of ineligibility for future officeholding and several others contain provisions stating merely that bribery is a felony or that it is punishable by fine or imprisonment. The *Model State Constitution* is silent on the subject.

Author's Comment

Bribery has always been a felony under Texas penal law and the new Penal Code even expands the concept to cover various forms of corrupt influence-peddling. (See Penal Code Ch. 36 (1974).) Obviously there is no need to define bribery in the constitution.

The removal-from-office provision of Section 41 duplicates Section 2 of Article XVI, so it too is unnecessary.

Sec. 43. EXEMPTIONS FROM PUBLIC DUTY OR SERVICE. No man, or set of men, shall ever be exempted, relieved or discharged, from the performance of any public duty or service imposed by general law, by any special law. Exemptions from the performance of such public duty or service shall only be made by general law.

History

Apparently this provision first made its appearance in the Constitution of 1875. A resolution, very similar in language to the section as finally adopted, was introduced early in the convention. (*Journal*, p. 124.) It was proposed as Section 42 of the article on general provisions and adopted without change except to renumber it "43." (*Id.*, p. 559.)

Explanation

The section seems to have gone unnoticed since 1876. It is absolute in its prohibition, but it is difficult in specific situations to distinguish special from general laws. The courts have never determined what "special law" means for purposes of this section. Presumably the term means the same here as in Section 56 of Article III. If so, the prohibition is much less strict than it sounds, because Section 56 has been construed to authorize many varieties of local or special legislation. (See the *Explanation* of that section.)

Section 43 does not apply to offices created by special law. (See *Bonner v. Belsterling*, 137 S.W. 1154 (Tex. Civ. App.) *aff'd*, 104 Tex. 432, 138 S.W. 571 (1911).) A statute requiring a city to assume a water district's bonded indebtedness and flat rates on the district's territory annexed to the city did not violate Section 43. (*Wheeler v. City of Brownsville*, 148 Tex. 61, 220 S.W.2d 457 (1949).)

Comparative Analysis

No other state has a provision like Section 43, though most have some prohibition against enactment of special or local laws.

Author's Comment

This section should be deleted because it duplicates Section 56 of Article III.

Sec. 44. COUNTY TREASURER AND COUNTY SURVEYOR. The Legislature shall prescribe the duties and provide for the election by the qualified voters of each county in this State, of a County Treasurer and a County Surveyor, who shall have an office at the county seat, and hold their office for four years, and until their

successors are qualified; and shall have such compensation as may be provided by law.

History

Neither of these offices appeared in any earlier constitution, although both are traditional county offices in Texas. The surveyor's office was part of the General Land Office in each county under the Republic, and the office of county treasurer was created by statute in 1840, the county clerk having performed the duties of treasurer before that enactment. Although originally appointive, both offices were soon made elective and the present constitution of course preserves this feature.

Section 44 has been amended only once, in 1954, as part of the omnibus amendment extending the terms of all district, county, and precinct offices from two to four years. (See the annotation of Sec. 65 of Art. XVI.)

Explanation

There has been no significant interpretation of this section.

Comparative Analysis

Seventeen states mention county treasurers in their constitutions, and 13 mention county surveyors. Only Virginia appoints its county surveyor, with all the other states electing that officer and the county treasurer as well. Both officers serve two-year terms in about half these states and four-year terms in the other half.

Of the states adopting new constitutions since 1960, only two, Michigan (1964) and Illinois (1971), preserved the constitutional office of county treasurer; none preserved the county surveyor. The *Model State Constitution* does not mention either.

Author's Comment

Despite the change to four-year terms in 1954, the two Texas statutes implementing Section 44 still provide for two-year terms for county treasurer and county surveyor. (See Tex. Rev. Civ. Stat. Ann. arts. 1703, 5283.) The real issue, however, is whether these offices ought to be frozen in the constitution.

The Texas Association of Surveyors estimates that fewer than half the 254 Texas counties elect a surveyor. One must stress "estimates," however, because the secretary of state does not always receive notice of surveyor elections and, according to the association, does not always pass it on. Nevertheless, it is probably a safe assumption that many counties have little need for an elective surveyor, or any surveyor at all, but that when they do they can hire a registered public surveyor for the particular job.

Each Texas county has an elected treasurer (see *Texas Almanac* (1972-73), pp. 581-86), but the questions remain (1) whether he ought to be in the constitution and (2) whether he ought to be elected. Nearly three-fourths of the other states have answered both questions in the negative, and any real commitment to local government autonomy argues strongly for leaving to each local governing body the decision about what functionary offices to create and how to fill them.

Sec. 47. CONSCIENTIOUS SCRUPLES AS TO BEARING ARMS. Any person who conscientiously scruples to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service.

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History

This provision originated in the Constitution of 1845 and was included in all subsequent constitutions except that of 1869. In the Convention of 1875 it was included in the original proposal of the Committee on General Provisions (*Journal*, p. 559) and apparently was adopted without debate. The practice of permitting a person to escape military service by sending another in his stead was, of course, fairly common in the 19th century.

Explanation

Section 47 apparently has never been construed or even cited by a court or attorney general's opinion. So far as service in the armed forces of the United States is concerned, this provision is ineffectual because federal law controls. Its only possible influence would be on the state militia.

It is possible that there might be a state draft against which this section would protect conscientious objectors. "The Texas National Guard shall consist of . . . such persons as are held to military duty under the laws of this state . . ." (Tex. Rev. Civ. Stat. Ann. art. 5780(1).) In addition, the reserve militia, which is defined to include "all able-bodied citizens, both male (between the ages of 18 and 60) and female (between 21 and 55), as well as certain resident foreigners," (Tex. Rev. Civ. Stat. Ann. art. 5765(2)) may be "called into the service of this State, in case of war, insurrection, invasion or for the prevention of invasion, the suppression of riot, tumults, and breaches of the peace, or to aid the civil officers in the execution of the laws and the service of process . . ." (Tex. Rev. Civ. Stat. Ann. art. 5766(1).) The statutes recognize the exemption created by this section; they exempt "(a)ny person who conscientiously scruples against bearing arms." (Tex. Rev. Civ. Stat. Ann. art. 5765(3) (j).) The statute also says (perhaps unconstitutionally) that this exemption is inoperative "in case of war, insurrection, invasion of imminent danger thereof." (Tex. Rev. Civ. Stat. Ann. art. 5765(3) (k).) The exemption created by Section 47 is broader than that granted under federal law, because it does not require that the objection be based on religious belief. (See 50 U.S.C.A. App. Section 456(j).)

In actual practice, however, state control over the organized militia or National Guard is virtually nonexistent. When the guard is called to active duty by the President, it is entirely under federal control. Even when it is not federalized, "the only authority which the states have over the militia that cannot be taken away from them, barring a constitutional amendment, is their power to appoint its officers." (R. Dishman, *State Constitutions: The Shape of the Document* (New York: National Municipal League, rev. ed., 1968), p. 44.) The states cannot draft anyone who is eligible for the federal draft. (Dishman, p. 45.)

Comparative Analysis

About ten other states exempt citizens from state military duty on religious and/or conscientious grounds, without requiring any payment. About ten more states provide a similar exemption but, like Texas, condition it on payment of an "equivalent" sum. At least two states—Illinois and Michigan—have omitted similar sections from recent revisions of their constitutions, but two others—Florida and Pennsylvania—have retained them.

Author's Comment

This section is an anachronism. In the first place, there is hardly any military service left that is not governed by federal, rather than state, law. Second,

conscription into state military service is a remote possibility at best. Third, since this section exempts only those conscientious objectors who can pay the price for a surrogate, it probably violates the Equal Protection Clause of the Fourteenth Amendment. Finally, the only time there is likely to be a state military draft is in the time of war, riot, tumult, etc., and during those times the exemption is unavailable (unless the statute so providing is unconstitutional). Section 47 can be eliminated without loss.

Sec. 48. EXISTING LAWS TO CONTINUE IN FORCE. All laws and parts of laws now in force in the State of Texas, which are not repugnant to the Constitution of the United States, or to this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation or shall be amended or repealed by the Legislature.

History

A similarly worded saving provision has appeared in all previous Texas constitutions except the 1869 Reconstruction Constitution. The purpose of a saving provision is to ensure that the business of government will continue with as little interruption as possible even though a new constitution has been adopted.

Two alternative theories are employed to explain the effect of the adoption of a new constitution by a state. One is that it is the equivalent of beginning all over again so that all existing statutory law is abolished. This theory requires that the legislature exercise the new legislative power granted by the new constitution to reenact all laws. The second is that, since adoption of a new constitution does not create a new state, it is actually an amendment of the old constitution so that existing laws continue unless they are inconsistent with some provision of the new constitution.

The framers of the 1876 Constitution included Section 48 to allay any doubt about which theory they were following.

Explanation

No significant case law on this section exists; the few cases citing it applied the section exactly as written. Two other sections in Article XVI, 18 and 53, also contain saving provisions.

Comparative Analysis

All but seven states have included the same or a similar provision in their constitutions. The *Model State Constitution's* Section 13.02 contains a consolidated saving provision that also preserves writs, judicial proceedings, land titles, contracts, claims, and rights under the old constitution.

Author's Comment

Any new constitution adopted will have its own saving provision—located, one hopes, in a comprehensive transition schedule.

A transition schedule of course deals with more than the preservation of laws, rights, etc., under the old constitution, although preservation is one of its most important functions. A transition schedule is also the appropriate place to deal with the many problems of governmental structure reorganization. For example, if an office created by the old constitution is omitted from the new, the transition schedule should provide for its continuation at least for the remainder of the incumbent's term and perhaps until the legislature by statute abolishes or reorganizes it. Likewise, changes in terms of office should be dealt with in the

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transition schedule; Article XVI, Section 65, is a good example of the kind of change that should have been but was not so dealt with.

One of the most important features of a transition schedule is that it be self-destructing. This means that, as its provisions are executed, the executed provisions are omitted from the official publication of the constitution. The new Illinois Constitution's self-destruct provision is a good example.

The following Schedule Provisions shall remain part of this Constitution until their terms have been executed. Once each year the Attorney General shall review the following provisions and certify to the Secretary of State which, if any, have been executed. Any provisions so certified shall thereafter be removed from the Schedule and no longer published as part of this Constitution. (Ill. Const. Transition Schedule, sec. 1.)

If the 1876 Constitution had contained such a provision, this and similar sections would long ago have been omitted.

A related temporary provision of most new constitutions is an adoption schedule. The usual adoption schedule contains a general effective date for the new constitution (subject, of course, to different effective dates for parts of the constitution, if any, set out in the transition schedule) and prescribes rules for submitting the new constitution to the voters. Again, because the adoption schedule is of temporary application only, it should not clutter the constitution proper.

Sec. 49. PROTECTION OF PERSONAL PROPERTY FROM FORCED SALE.

The Legislature shall have power, and it shall be its duty, to protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female.

History

The origins of this section lie in the Spanish civil law, which prevented creditors from seizing personal property such as clothing, tools, and furniture. The idea found its way into the law of Texas in 1839 when the Congress of the Republic passed a statute giving each citizen or head of family an exemption from creditors for "all household and kitchen furniture (provided it does not exceed in value two hundred dollars), all implements of husbandry (provided they shall not exceed fifty dollars in value), all tools, apparatus and books belonging to the trade or profession of any citizen, five milch cows, one yoke of work oxen or one horse, twenty hogs, and one year's provisions" (2 *Gammel's Laws*, p. 125.) An exemption for the homestead was included in the constitutions of 1845, 1861, 1866, and 1869 (See the *History* of Sec. 50 of this article), but those documents did not mention personal property.

The personal property exemption reappeared in an 1870 act that obviously was modeled after the original 1839 statute. (Tex. Laws 1870, Ch. 76, 6 *Gammel's Laws*, p. 301.) The 1875 Convention probably had this statute in mind when it adopted the present constitutional language directing the legislature to "protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female."

Explanation

This section is one of the rare instances in which the 1875 Convention did not discriminate against unmarried persons or women; it made the personal property exemption available not only to heads of families, but also to "unmarried adults,

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male and female." In this respect, Section 49 differs markedly from the homestead exemption (Sec. 50), which until recently was available only to heads of families. The legislature, however, has not been so evenhanded. The statute exempts up to \$15,000 worth of personal property of "persons who are not constituents of a family" but allows up to \$30,000 for heads of families. (Tex. Rev. Civ. Stat. Ann. arts. 3832, 3835.) The appellate courts of the state apparently have never been asked to consider whether Section 49 permits the legislature to discriminate in this manner against persons who are not heads of families.

Because the statute describes exempt personal property in rather vague terms (e.g., "implements of farming or ranching"; "apparatus . . . used in any trade or profession"), there has been much difficulty in deciding exactly what items are exempt. Some of the cases seem to be in irreconcilable conflict. (See the cases cited in State Bar of Texas, *Creditors' Rights in Texas* (St. Paul: West Publishing Co., 1963), pp. 51-55.) Fortunately, however, this is one instance in which that difficulty is not a constitutional problem, because the 1875 Convention had the wisdom to leave the description of exempt property to the legislature, rather than attempt to define it constitutionally. The legislature has recently rewritten the exemption statute in an attempt to modernize it somewhat. (*General and Special Laws of the State of Texas*, 63rd Legislature, 1973, Ch. 588, at 1627, codified as Tex. Rev. Civ. Stat. Ann. art. 3836.)

The personal property exemption mentioned in Section 49 is complementary to the homestead exemption created by Sections 50 and 51. For a discussion of the history, purpose, and operation of exemptions generally, see the annotations of those two sections.

Comparative Analysis

About 11 other state constitutions provide for an exemption of personal property from forced sale. All but three of these place some monetary limit on the personal property exemption. At least two states distinguish constitutionally between heads of families and others, providing larger exemptions for the former. The *Model State Constitution* contains no comparable provision.

Author's Comment

This is one of the all-too-rare instances in which one cannot complain that the subject should have been left to the legislature; this section does that. The question here is whether the section is necessary at all. It is not needed to give the legislature power to create such an exemption. As the *History* above demonstrates, Texas had a statutory personal property exemption, under both the 1839 and 1870 statutes, long before there was any constitutional authorization for it.

As a directive to the legislature to act, this section is no more or less effective than all such directives; if the legislature simply refuses to act, there is little anyone can do about it. It might be argued that this section now prevents the legislature from abolishing the personal property exemption; the courts could hold that because of the duty imposed on the legislature by this section, any act repealing the statutes would be invalid. If that is the intended effect of the section, it should be reworded so that the section itself creates the exemption, subject only to legislative regulation.

Sec. 50. HOMESTEAD, PROTECTION FROM FORCED SALE; MORTGAGES, TRUST DEEDS AND LIENS. The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the

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taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

History

The homestead exemption first appeared in the statutes of the Republic of Texas. (2 *Gammel's Laws*, p. 125.) It has been described as a Texas innovation created as a reaction to the Panic of 1837, in which many families lost their homes through foreclosure. It is probably more accurate, however, to describe the homestead exemption as merely an extension of well-established Spanish law. Under Spanish (and later Mexican) law, certain items of clothing, furniture and tools were exempt from seizure for payment of debts. The 1839 statute codified this list of exemptions of personal property and simply added realty ("fifty acres of land or one town lot, including his or her homestead, and improvements not exceeding five hundred dollars in value. . . .") to the list.

The 1839 statute was repealed, possibly inadvertently, in 1840 but was reenacted later the same year. Perhaps because of this legislative history of repeal and reenactment, the homestead provision was included in the Constitution of 1845 (Art. VII, Sec. 22). The constitutional section was similar to the 1839 statute, except that all mention of personal property was deleted and the maximum exemption was increased to 200 acres of rural land or city lots not exceeding \$2,000 in value. The section was repeated without change in the 1861 and 1866 constitutions (Art. VII, Sec. 22) and reworded in the 1869 Constitution to increase the exemption for city lots to \$5,000. In 1875 the section was again rewritten with the provisions defining the scope of the homestead moved to a separate section, Section 51.

The 1839 statute made the homestead exemption applicable to "every citizen or head of a family." The 1845 Constitution and all subsequent constitutions, however, limited the provision to heads of families. An amendment approved on November 6, 1973 made the provision applicable to "a single adult person" as well as to families and made other language in the section applicable to both spouses.

Explanation

The Texas Constitution creates three quite different types of homestead protection. One is an exemption from taxation, provided for by Sections 1-a and 1-b of Article VIII. The homestead exemption created by Section 50 has nothing to do with taxation but rather is an exemption from forced sale for payment of debts. The third variety of homestead provision is that contained in Section 52 of Article XVI, which preserves the homestead for the use of the surviving spouse, minor children, or unmarried daughters after the death of one of the spouses.

The homestead exemption created by Section 50 formerly was available only to "families." That term was not limited to parents and children; the exemption could be claimed by a single adult who had dependent relatives, such as siblings or grandchildren. (*American National Bank v. Cruger*, 71 S.W. 784 (Tex. Civ. App.

1902, *writ ref'd*.) The 1973 amendment eliminated the family requirement entirely, making the homestead exemption available to single adults.

Once the homestead is established, it continues to be exempt even though all of those who are dependent on the claimant for support die or cease to be dependent. (*Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929).)

The homestead exemption created by Section 50 is designed to place the family homestead beyond the reach of creditors, with three exceptions. The exceptions permit forced sale of the homestead for unpaid taxes levied against it and to pay debts incurred to obtain money used to purchase the homestead property or to improve it. The last sentence of the section provides that all mortgages, liens, and trust deeds against homestead property are invalid unless they fall within one of these three exceptions. The type of property exempt and the extent of the exemption are defined in Section 51 and discussed in the *Author's Comment* on that section. It should be noted, however, that the exemption is not strictly limited to a "homestead," since it can also include business property.

The exception "for work and material used in constructing improvements" on the homestead has caused considerable difficulty. Section 50 provides that a lien for such a purpose is valid "only when the work and material are contracted for in writing." The courts have held that this means no valid lien can be created until the improvements are completed in accordance with a written contract. (*Murphy v. Williams*, 103 Tex. 155, 124 S.W. 900 (1910).) In practice this precludes use of financing methods such as the "open-ended mortgage" that are designed to permit the homeowner to increase the amount of his home improvement loan over a period of time. Lenders are reluctant to make such loans, because they have no valid lien until the work is done.

Another difficulty arises from the "written contract" phrase. A homeowner who wants to do his own improvement work may encounter difficulty in obtaining a loan because he cannot enter into a written contract with himself, and therefore a lender who lends directly to the homeowner has no valid lien on the homestead.

Although this section permits forced sale of homestead property for payment of taxes, the attorney general has said that the provision does not require such forced sales. Thus, the legislature is free to defer foreclosure on homesteads owned by persons over age 65 even though Section 50 would permit foreclosure. (Tex. Att'y Gen. Op. No. H-364 (1974).)

The provision in Section 50 preventing either spouse from selling the homestead without the other's consent supplements the protection given the wife by the community property system; the wife's consent is required whether the homestead is separate or community property. (*Torres v. Gersdorff*, 287 S.W. 668 (Tex. Civ. App.—San Antonio 1926), *aff'd*, 293 S.W. 560 (Tex. Comm'n App. 1927, *holding approved*).)

The last clause of Section 50 makes the homestead exemption applicable not only to outright security transactions, such as mortgages, but also to "all pretended sales of the homestead involving any condition of defeasance." The courts have interpreted this provision broadly, holding that even though a conveyance is on its face an absolute deed, it is void if the effect is in fact to secure repayment of a loan. (*O'Shaughnessy v. Moore*, 73 Tex. 108, 11 S.W. 153 (1889).)

For a discussion of the possible effect of the Texas Equal Rights Amendment on homestead law, see Comment, "The ERA and Texas Marital Law," 54 *Texas L. Rev.* 590 (1976).

Comparative Analysis

About half of the states, all in the Midwest, South, or West, provide

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constitutionally for some kind of homestead exemption. Most of these states specify the same exceptions—purchase money, improvements, and taxes—as Texas does. A few specify additional exceptions. For example, Arkansas and Virginia permit forced sale of the homestead to pay judgments against persons such as guardians, attorneys, and public officers for moneys collected by them. (See Ark. Const. art. IX, sec. 3; Va. Const. art. XIV, sec. 90.)

About half of the states that have homestead exemptions also have a constitutional provision prohibiting the husband from selling or encumbering the homestead without the wife's consent. A few states—Kansas, Nevada, Tennessee, and Wyoming, for example—apply this prohibition to both spouses. The scope of the homestead protection in other states is discussed in the *Comparative Analysis* of Section 51.

Author's Comment

Inclusion of homestead provisions in the Texas Constitution has been under attack for over 50 years. (See Cole, "The Homestead Provisions in the Texas Constitution," 3 *Texas L. Rev.* 217 (1925).) Critics of the present constitutional provision point out that about half of the states apparently have found it possible to protect the family home without benefit of any constitutional provision on the subject, while half a dozen others include only a directive to the legislature to provide for such an exemption.

These critics assert that in addition to being unnecessary, the present homestead provisions are undesirable from the standpoint of both debtors and creditors. As pointed out earlier, the section inhibits a homeowner's financing options and makes it difficult for him to be his own home improvement contractor. The provision creates uncertainty for lenders, who risk losing their security if they err in determining whether the property is homestead, whether it is within one of the three exceptions, or whether both spouses have effectively consented to the encumbrance. Defining the type and extent of the homestead exemption creates additional difficulties and inequities.

It has been suggested that homestead claimants in some circumstances might be better protected without any homestead exemption at all. For example, the present provision effectively prevents mortgaging the homestead to meet a financial emergency; the only source of funds thus may be outright sale of the homestead—a result that certainly does not accomplish the goal of preserving the family home. The section's efficacy in protecting the wife from her husband's improvidence also has been questioned. (Comment, "The Wife's Illusory Homestead Rights," 22 *Baylor L. Rev.* 178 (1970).)

As noted above, some state constitutions treat the matter of homesteads by simply directing the legislature to provide for them. It has been pointed out that Texas could accomplish this merely by amending present Section 49 of Article XVI. That section gives the legislature the power and duty "to protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female." This section could be amended to speak to "personal and real property." The efficacy of such a provision may be doubted, however, since there is no sure way to enforce such a command if the legislature chooses not to comply with it.

Sec. 51. AMOUNT AND VALUE OF HOMESTEAD; USES. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars, at the time of their designation as the homestead, without reference to the value of any

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improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

History

The nature of the homestead was defined in the section creating the exemption until 1875, when the definition was moved to its own separate section, this Section 51. (See the *History* of Sec. 50.) The rural homestead acreage limit was increased from 50 to 200 acres, the present figure, by the Constitution of 1845.

The limit on urban homesteads has undergone qualitative as well as quantitative change. The 1839 statute placed no limit on the overall value of the urban homestead but protected improvements on the homestead only up to \$500. The 1845 Constitution eliminated this limitation on the value of improvements and instead imposed a \$2,000 limit on the value of the lot or lots claimed as the urban homestead. This figure was increased to \$5,000 in the 1869 Constitution and was raised to \$10,000 by an amendment adopted in 1970.

The requirement that city lots be valued "at the time of their designation as the homestead, without reference to the value of any improvements thereon" was added in 1869. This was a response to a decision holding that urban homesteads were to be measured at current value, including value of improvements, and that any excess over the constitutional limit could be subjected to forced sale. (*Wood v. Wheeler*, 7 Tex. 13 (1851).)

There was an attempt in the 1875 Constitutional Convention to limit the exemption in any event to \$10,000, but it was defeated. (*Journal*, pp. 711-12.)

The 1973 amendment described in the annotation of Section 50 also amended this section to make a business homestead available to single adults as well as heads of families.

Explanation

What is or is not homestead property under this section is a rather intricate question. The basic rule is that the debtor's property is subject to forced sale to the extent that it exceeds the stated acreage or value limits. In the case of a rural homestead, the excess acreage over 200 is severed from the rest and sold. The homestead claimant, however, has the right to decide which 200 acres to retain as his homestead. He is permitted to carve out a 200-acre tract of any shape, or even several separate tracts, and thus may select only the most valuable portions of his land as the homestead. (See *Cotten v. Friedman*, 158 S.W. 780 (Tex. Civ. App. - Galveston 1913, *no writ*.) And there is no limit on the value of the rural homestead.

When the property claimed as the homestead is located in a town or city, the limitations are entirely different. There is no limit on the size of an urban homestead, but to the extent that its value exceeds \$10,000 (at the time of designation), it is not exempt. The value of improvements is excluded from this calculation of value. If the value exceeds \$10,000, the excess can be reached in one of two ways. If the property is subject to partition (for example, if it consists of two lots, one of which is within the value limit), it will be divided and only part of it will be sold, just as in the case of a rural homestead. But if it is incapable of partition (for example, a single lot occupied by a residence), the entire property will be sold. A portion of the proceeds goes to the debtor as a sort of allowance in lieu of his homestead. That portion is a fraction whose numerator is the maximum exemption

and whose denominator is the value of the lot (less improvements) at the time of designation. For example, if the value of the lot without improvements was \$15,000 at the time of designation, and if the maximum exemption at that time was \$10,000, the exempt portion is two-thirds. (*Hoffman v. Love*, 494 S.W.2d 591 (Tex. Civ. App.—Dallas, writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973).) The nonexempt portion of the proceeds is applied to the debt, and if there are still proceeds left after that, they go to the debtor. If the property does not bring at least \$10,000 plus the present value of the improvements, the sale is nullified and the debtor retains title. The reasoning is that in such a case there is no excess over the constitutional limit—i.e., \$10,000 excluding the value of improvements. (*Whiteman v. Burkey*, 115 Tex. 400, 282 S.W. 788 (1926).)

The value of urban lots is determined “at the time of their designation as the homestead.” Although there is no authoritative decision on the point, the general rule seems to be that this means the time at which the property first takes on the character of a homestead. This in turn means the time at which the claimant begins to occupy it as a homestead, or take some action indicating his intent to do so. (See *Boerner v. Cicero Smith Lumber Co.*, 298 S.W. 545 (Tex. Comm'n App. 1927, jdgmt adopted).)

The statutes provide a procedure for formally designating the homestead. By this means, a claimant may choose whether to select as his homestead his rural property or his city lots and may decide which 200 acres of his rural property he wants to make exempt. (Tex. Rev. Civ. Stat. Ann. arts. 3841-3843.) No formal designation of the homestead is required, however. Property is exempt if it is in fact a homestead, and if the claimant owns more than 200 acres of rural land, or both rural and urban land, he is free at any time to select the land he wants to protect or change a designation already made. (*Green v. West Texas Coal Mining & Development Co.*, 225 S.W. 548 (Tex. Civ. App.—Austin 1920, writ ref'd).)

A debtor may be entitled to homestead protection even if he owns no realty in fee simple. The exemption applies not only to ownership in fee simple, but to any possessory interest in land. A tenant, therefore, can claim a homestead in his leasehold interest. (*Cullers & Henry v. James*, 66 Tex. 494, 1 S.W. 314 (1886).) This is significant primarily in the case of business and agricultural leases, since a residential leasehold rarely has enough value to interest a creditor in seizing it.

Texas is unique in permitting a “homestead” exemption for business property. A single adult or head of a family who owns a lot or lots in a city or town, upon which he operates a business, may claim a homestead exemption for those lots. If the combined value of his business lots and residential lots does not exceed \$10,000 (again, calculated at time of designation and without regard to value of improvements), he may also claim an exemption for his residential property. (*Rock Island Plow Co. v. Alien*, 102 Tex. 366, 116 S.W. 1144 (1909).) The owner of a rural homestead, however, cannot also claim a business homestead. (*Rockett v. Williams*, 78 S.W.2d 1077 (Tex. Civ. App.—Dallas 1935, writ dismissed).) The business homestead is a form of urban homestead, and the courts have held that the homestead may consist of either rural property or lots in a city or town, but not both. (See *Keith v. Hyndman*, 57 Tex. 425 (1882).)

The owner of an urban homestead may rent a portion of it temporarily without losing his exemption, but if the property takes on a permanent rental character, inconsistent with its use as a homestead, it loses its exempt status. (*Scottish American Mortgage Co. Ltd. v. Milner*, 30 S.W.2d 582 (Tex. Civ. App.—Texarkana 1930, writ ref'd); *Blair v. Park Bank & Trust Co.*, 130 S.W. 718 (Tex. Civ. App. 1910, writ ref'd).) The owner of a rural homestead or an urban business homestead apparently also may lease it for a term of years without losing the homestead exemption, provided he intends to reoccupy it as a homestead. (E.g., *Alexander v.*

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Lovitt, 56 S.W. 685 (Tex. Civ. App. 1900, *no writ*); *In re Buie*, 287 F. 896 (N.D. Tex. 1923).

Comparative Analysis

The constitutions of California, Washington, Nevada, Wyoming, North Dakota, and South Dakota permit the legislature to determine how much property is eligible for homestead protection. Most of the states that provide constitutionally for a homestead exemption, however, also prescribe a maximum homestead size or value. The constitutional homestead limits in Texas are more generous than those of any other state. Eight states have monetary limits of \$2,500 or less, and six have acreage limits of 160 acres or less. No other state prescribes an urban homestead maximum as great as \$10,000 or a rural homestead as large as 200 acres.

Oklahoma is the only other state whose constitutional homestead provision mentions business, but it does not create a business homestead in the sense that the Texas Constitution does; it refers rather to property used as a combination business and residence. (See Okla. Const. art. XII, secs. 1, 3).

Author's Comment

The present constitutional definition of the homestead creates a number of difficulties and inequities. These are elaborated in Cole, "The Homestead Provisions in the Texas Constitution," 3 *Texas L. Rev.* 217 (1925), and Woodward, "The Homestead Exemption: A Continuing Need for Constitutional Revision," 35 *Texas L. Rev.* 1047 (1957).) One inequity arises from the absence of any limit on the value of the 200-acre rural homestead. As a result, the exemption of rural property bears no relation to the claimant's needs. The owner of a rural homestead may be judgment-proof even though he occupies an elaborate country estate worth hundreds of thousands of dollars. To a lesser extent, the same problem arises in the case of an urban homestead because its value is fixed at the time the homestead is designated and does not include the value of improvements. Thus a \$100,000 home on a city lot now worth \$30,000 may be totally exempt from forced sale if the lot was worth less than \$10,000 at the time of designation as a homestead.

The definitions of business and rural homesteads go far beyond the original intent of preserving the family home. The rural homestead may include not only the home site and surrounding land, but also separate parcels of land many miles away, so long as the total does not exceed 200 acres. The business exemption bears little relation to the goal of preserving the home. Rather, it seems more nearly akin to such provisions as the prohibition against garnishment of wages. (Sec. 28, Art. XVI.) Like the garnishment prohibition, its goal is protection of one's means of livelihood rather than protection of the family home. No other state exempts a "business homestead," and exempting a business in addition to a residence is hard to justify. As interpreted, the provision discriminates against a person who lives in the country but operates a business in the city: He cannot have both a rural and an urban homestead even though a city dweller can.

These difficulties could be alleviated, if not eliminated, by removing from the constitution all language describing and limiting the homestead, leaving its nature and the extent of the exemption to be defined by the legislature. At least six state constitutions now do so. The major objection to this approach is that it permits the legislature to effectively abolish the homestead exemption by narrowing its definition or creating additional exceptions. Distrust of the legislature may be more understandable here than in other contexts. The economic interests that would benefit from restriction of the homestead exemption are a fairly well-defined and influential group and might be in a better position to secure passage of legislation

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than the more diffuse and disparate interests that benefit from the exemption.

The 1963 Michigan Constitution illustrates a compromise that insures some homestead protection without preventing the legislature from adjusting the extent of protection. Instead of fixing a maximum homestead amount, as Texas and most other states do, the Michigan Constitution fixes a minimum (“of not less than \$3,500”) and permits the legislature to define the kinds of liens excepted from homestead protection. (See Mich. Const. art. X, sec. 3.)

Sec. 52. DESCENT AND DISTRIBUTION OF HOMESTEAD; RESTRICTIONS ON PARTITION. On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.

History

The 1845 Constitution contained a general provision exempting the homestead of a family from forced sale to pay debts (see also the *History* of Sec. 50 of Art. XVI), but it did not mention the fate of the homestead after the claimant's death. The supreme court held that the homestead exemption created by the 1845 Constitution expired on the death of the person claiming it and did not apply to his heirs. (*Tadlock v. Eccles*, 20 Tex. 782 (1858).) The legislature, however, created a statutory exemption for widows and minor children. (Tex. Laws 1848, Ch. 157, 3 *Gammel's Laws*, p. 249.) The supreme court held that under this statute, the homestead property of an insolvent husband passed to his widow and children rather than to other heirs to whom the property otherwise would have passed. (*Green v. Crow*, 17 Tex. 180 (1856).)

Section 52 was added by the 1875 Convention, apparently in an attempt to abrogate this statute and ensure that homestead property would pass to the heirs in the same manner as other property. (See *Ford v. Sims*, 93 Tex. 586, 57 S.W. 20 (1900).) The second clause apparently was added to give the surviving spouse and minor children some protection in lieu of that previously available to them by statute. After adoption of the 1876 Constitution, the statute giving the widow and minor children the homestead to the exclusion of other heirs was held unconstitutional on grounds that it violated Section 52. (*Zwernemann v. von Rosenburg*, 76 Tex. 522, 13 S.W. 485 (1890).)

Explanation

Section 52 does three things. First, it prevents the legislature from prescribing rules of inheritance for homestead property different from those that govern other property. This means that title to homestead property ultimately passes by will or by the rules of descent and distribution to whomever would have taken it had it not been a homestead. For example, if a man dies leaving a will that gives his home to a church, the church eventually will get the property, even though it is homestead property. Although this section prevents the legislature from treating homestead property differently from other property for purposes of inheritance, it does not prevent the legislature from treating homestead property differently with respect to creditors. The legislature has done so; it has provided that if the owner of a homestead dies survived by a widow, minor children, or an unmarried daughter who lives with the decedent's family, the homestead property passes free of the decedent's debts. (Probate Code secs. 271, 179.) This is true even if the heir who

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thus acquires the homestead is not the widow, minor child, or unmarried daughter; the mere existence of one of those persons is enough to permanently free the homestead from the debt. (*Zwernemann v. von Rosenberg, supra.*)

Second, Section 52 gives the surviving spouse, or the minor children and their guardian, a right to occupy the homestead. In the case of a spouse, this right to occupy continues until the spouse dies or abandons the homestead. In the case of a minor child, it continues until the child dies or abandons the homestead, or until the court determines that the child no longer needs the homestead. Thus, since the survivor's interest can be terminated by events other than his death, it is not accurate to describe his interest as a life estate. The courts have been quite reluctant to find that the survivor has abandoned the homestead; they will find abandonment only if the occupant has not only moved from the homestead but also shown an intention not to return. (*La Brier v. Williams*, 212 S.W.2d 828 (Tex. Civ. App.—San Antonio 1948, *no writ*.) For example, the survivor does not lose his right to occupy the homestead by offering to sell it, leasing part of the premises, or temporarily vacating the premises. (See *Perkins v. Perkins*, 166 S.W. 915 (Tex. Civ. App.—Galveston 1914, *writ ref'd*); *Smith v. Simpson*, 97 S.W.2d 522 (Tex. Civ. App.—Eastland 1936, *writ ref'd*); *Hoefling v. Thulemeyer*, 142 S.W. 102 (Tex. Civ. App.—San Antonio 1911), *aff'd*, 106 Tex. 350, 167 S.W. 210 (1914).)

Section 52 does not speak of a "right to occupy"; it merely prohibits partition among the other heirs so long as the survivor chooses to occupy. But the courts have interpreted this as creating a right to occupy. (See *Rancho Oil Co. v. Powell*, 142 Tex. 63, 175 S.W.2d 960 (1943).) The language about partition simply means that the homestead cannot be divided among the heirs until the survivor's right to occupy ends. (See *George v. Taylor*, 296 S.W.2d 620 (Tex. Civ. App.—Fort Worth 1956, *writ ref'd n.r.e.*.)

The third effect of Section 52 is to continue the homestead exemption even after the claimant's death. This means not only that the homestead cannot be subjected to forced sale to pay the debts of the decedent, but also that it is exempt from forced sale to pay debts incurred by the survivor after the death of the original homestead claimant. This is true even if the survivor would not himself qualify for a homestead exemption under Section 50 (*i.e.*, is neither the head of a family nor a single adult). (See *Kessler v. Draub*, 52 Tex. 575 (1880).)

For purposes of this section, the scope of the homestead is the same as that defined by Section 51. That means it is limited to 200 acres if rural and \$10,000 if urban and may be a "business homestead" as well as a residence. (*Evans v. Pace*, 51 S.W. 1094 (Tex. Ct. App. 1899); see also the annotation of Sec. 51.) It is also subject to the exceptions of Section 50, so the surviving spouse or children have no protection against debts for the purchase money, taxes, or improvements on the homestead. (*E.g.*, *Robinson v. Seales*, 242 S.W. 754 (Tex. Civ. App.—Galveston 1922, *no writ*); *Sargeant v. Sargeant*, 19 S.W.2d 382 (Tex. Civ. App.—Fort Worth 1928, *no writ*.)

Comparative Analysis

Other state constitutions that deal with this problem do not address themselves to the question of rules governing inheritance of homestead property, nor to the question of partitioning the homestead. Rather, they speak directly to the question of continuing the homestead exemption after its claimant's death. About seven state constitutions contain language giving the benefit of the homestead exemption to the spouse or other survivors of the deceased claimant.

Since the *Model State Constitution* contains nothing about homestead exemptions, it of course contains nothing comparable to this section.

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Author's Comment

The retention or deletion of this section is inextricably tied to the decision to retain or delete Sections 49, 50, and 51. If the subject of homestead exemptions is to be removed from the constitution entirely, or left by the constitution to the legislature, there would be little point in retaining a section dealing with treatment of the homestead after the death of its original claimant.

If the homestead exemption is retained in the constitution, a good case can still be made for deleting or revising this section. There is no apparent reason to prohibit the legislature constitutionally from adopting special rules of distribution and descent for homestead property while leaving it free to adopt special rules with respect to any other classification of property. Neither of the other two major effects of the section is made clear by its language. The section does not in specific terms give the spouse and minor children a right to occupy the homestead, and the continued exemption of the homestead from forced sale is not mentioned at all. Both of those results are achieved rather obliquely by the prohibition against partition.

The major objectives of Section 52 could be accomplished simply by including in Section 50 a provision directing the legislature to provide for continuing homestead protection for the surviving spouse and minor children of the original claimant.

Sec. 53. PROCESS AND WRITS NOT EXECUTED OR RETURNED AT ADOPTION OF CONSTITUTION. That no inconvenience may arise from the adoption of this Constitution, it is declared that all process and writs of all kinds which have been or may be issued and not returned or executed when this Constitution is adopted, shall remain valid, and shall not be, in any way, affected by the adoption of this Constitution.

History

All prior constitutions except that of 1869 contained a provision similar to Section 53. In the 1875 Convention it was proposed, together with many other sections, in the report of the Committee on General Provisions and was apparently adopted without debate. (See also the *History* of Sec. 48 of this article.)

Explanation

See the *Explanation* of Section 48.

Comparative Analysis

It is difficult to state how many other state constitutions have provisions similar to Section 53 because the *Index Digest of State Constitutions* does not contain transitional provisions. (See also the *Comparative Analysis* of Sec. 48.)

Author's Comment

See the *Author's Comment* on Section 48.

Sec. 56. APPROPRIATIONS FOR DEVELOPMENT AND DISSEMINATION OF INFORMATION CONCERNING TEXAS RESOURCES. The Legislature of the State of Texas shall have the power to appropriate money and establish the procedure necessary to expend such money for the purpose of developing information about the historical, natural, agricultural, industrial, educational, marketing, recreational and living resources of Texas, and for the purpose of informing persons and corporations of other states through advertising in periodicals having national circulation, and the dissemination of factual information about the advantages and economic resources

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offered by the State of Texas; providing, however, that neither the name nor the picture of any living state official shall ever be used in any of said advertising, and providing that the Legislature may require that any sum of money appropriated hereunder shall be matched by an equal sum paid into the State Treasury from private sources before any of said money may be expended.

History

In the 1876 Constitution, Section 56 provided: "The Legislature shall have no power to appropriate any of the public money for the establishment and maintenance of a Bureau of Immigration, or for any purpose of bringing immigrants to this State."

The continuation of a bureau to encourage immigration was the subject of passionate debate at the convention. The Constitution of 1869 had authorized creation of a Bureau of Immigration supported by public funds; among the appropriations authorized by the constitution was "the payment in part or in toto of the passage of immigrants from Europe to this State, and their transportation within this State." (Art. XI.)

Opposition at the Convention of 1875 to the expenditure of public funds to attract new settlers to Texas seems to have been based mainly on the belief that the Bureau of Immigration had spent too much. (*Debates*, pp. 239, 273, 283.) Many delegates also opposed the idea of paying immigrants to come to Texas. (*Debates*, pp. 275, 284-85.) The Committee on the Bill of Rights proposed a section in that article affirming the right of emigration from the state, but prohibiting "appropriation of money . . . to aid immigrants to the State." (*Journal*, p. 274.) This section, however, was eventually stricken. (*Debates*, p. 242.)

The Committee on Immigration concluded in its report that "the people ought not to be taxed for any such purposes. . . ." (*Journal*, p. 275 (emphasis in original).) Two minority reports were submitted. One proposal was essentially the same as the 1869 provision, except that it omitted the authorization for paying transportation costs. (*Journal*, pp. 300-02.) The other minority report, which apparently received more attention, favored creation of a Bureau of Agriculture, Statistics and Immigration to gather and disseminate information on the state and encourage immigration. (*Journal*, pp. 288-90.)

When the majority and minority reports were taken up, a resolution was offered proposing a section, to be included in the article on general provisions, which would prohibit the use of public funds for the establishment of a Bureau of Immigration or bringing immigrants into the state. (*Journal*, p. 402.) In the ensuing debate, supporters of the minority report (favoring creation of a bureau) stressed the long-standing tradition of openness to immigration, fearing the proposed section would make it appear that the state was discouraging new settlers. (*Debates*, pp. 272-86.) They also pointed out the sparse population of the state, particularly in the west, and argued that increased population would bring with it increased wealth and prosperity. They urged that a state agency was needed to disseminate correct information, both to Texans and others, on the advantages and resources of the state. Eloquent speeches were made for both sides. Speaking for the minority report, one delegate asserted that ". . . this Convention, holding within its hands in so great a measure the future welfare and destiny of the State, has before it no greater work, no nobler or wiser policy, than that which looks to peopling this immense territory with those who will bring willing hearts and strong arms to till the fertile soil and develop the magnificent but almost untouched resources of wealth with which Heaven has so lavishly blessed Texas." (*Debates*, pp. 277-78.)

Proponents of the majority report (against the bureau) did not oppose immigration and spoke glowingly, as had their opponents, of the past contributions

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of immigrants, especially the Germans in Central Texas. They were opposed, however, to the spending of state funds to aid in immigration. They felt there was no need to actively encourage immigration and preferred instead to let it take its natural course. A particularly passionate speech included this tribute to the state: "Advertise Texas. Why, sir, her name, fame, and territory are parts of the world's greatest history; her natural resources, her fertility, her broad, rich prairies, her magnificent forests of all the useful trees of the temperate zone, her wonderful and various agricultural resources, her mountains of iron, coal, granite, marble, silver, gold, copper, and gypsum, her splendid rivers, running from these mountains and flashing across her bosom to the sea, are known wherever civilization extends or American liberty has ever been heard of." (*Debates*, p. 285 (emphasis in original).) Following this speech the vote was taken. The minority proposal was defeated, and the proposed majority section, which became Section 56, passed by a vote of 44 to 39. (*Journal*, p. 403.)

The 1876 language survived until 1958 when, apparently due to a realization of the need for promotion of investment and tourism, it was amended to its present form. The section now states in substance what the minority wanted to say in 1875.

Explanation

Apparently neither the original nor the present version of Section 56 has ever been construed by the courts. In 1963 the attorney general determined that the phrase "advertising in periodicals having national circulation" does not limit the choice of media to periodicals, but only requires that if the medium chosen is a periodical, it must be one of national circulation. (Tex. Att'y Gen. Op. No. C-25.) This ruling was reaffirmed in a later opinion stating that money may be expended for advertising in other media, such as radio, television, and billboards, without regard to the limitation of "national circulation." (Tex. Att'y Gen. Op. No. C-216 (1964).) Laws relating to the Texas Tourist Development Agency appear in Tex. Rev. Civ. Stat. Ann. art. 6144f.

The prohibition against use of the name or picture of "any living state official" in advertising is rather curious. Presumably, if the person is no longer living, he also is no longer a state official. A living person who no longer holds state office is not a state official, and therefore his name and likeness arguably could be used to advertise the state. The language probably was meant to include any state official or any former state official still living; whether the courts will so interpret it remains to be seen.

Despite the authorization in Section 56 to do so, the legislature does not require that all state monies expended under this section be matched by private funds. (See Tex. Rev. Civ. Stat. Ann. art. 6144e.)

Comparative Analysis

About eight states have constitutional provisions dealing with departments or bureaus of immigration, frequently combined with agriculture, statistics, and labor.

Other state constitutions contain no authorization comparable to the present Section 56, simply because they did not have the peculiar history that led to the 1876 ban on promotion of Texas and therefore did not need an equivalent of the 1958 amendment restoring the state's power to promote itself.

The *Model State Constitution* contains no comparable provision.

Author's Comment

Now that the prohibition contained in original Section 56 has been repealed, the

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state needs no specific authorization to spend money for promotion. (See the annotation of Art. III, Secs. 50 and 51.) The only other purposes served by the present language are to prevent advertising in periodicals of less than national circulation and to prevent use in advertising of the name and likeness of state officials. Neither of these is a matter of constitutional importance, and the former seems questionable as a matter of policy as well, especially since a national audience is not required in other advertising media.

Sec. 59. CONSERVATION AND DEVELOPMENT OF NATURAL RESOURCES; CONSERVATION AND RECLAMATION DISTRICTS. (a) The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment, and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as any [may] be prescribed by law and shall also, authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds; and also for the maintenance of such districts and improvements, and such indebtedness shall be a lien upon the property assessed for the payment thereof; provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted.

(d) No law creating a conservation and reclamation district shall be passed unless notice of the intention to introduce such a bill setting forth the general substance of the contemplated law shall have been published at least thirty (30) days and not more than ninety (90) days prior to the introduction thereof in a newspaper or newspapers having general circulation in the county or counties in which said district or any part thereof is or will be located and by delivering a copy of such notice and such bill to the Governor who shall submit such notice and bill to the Texas Water Commission, or its successor, which shall file its recommendation as to such bill with the Governor, Lieutenant Governor and Speaker of the House of Representatives within thirty (30) days from date notice was received by the Texas Water Commission. Such notice and copy of bill shall also be given of the introduction of any bill amending a law creating or governing a particular conservation and reclamation district if such bill (1) adds additional land to the district, (2) alters the taxing authority of the district, (3) alters the authority of the district with respect to the issuance of bonds, or (4) alters the qualifications or terms of office of the members of the governing body of the district.

(e) No law creating a conservation and reclamation district shall be passed unless, at the time notice of the intention to introduce a bill is published as provided in Subsection (d) of this section, a copy of the proposed bill is delivered to the commissioners court of each county in which said district or any part thereof is or will be located and to the governing body of each incorporated city or town in whose jurisdiction said district or any part thereof is or will be located. Each such commissioners court and governing body

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may file its written consent or opposition to the creation of the proposed district with the Governor, Lieutenant Governor, and Speaker of the House of Representatives. Each special law creating a conservation and reclamation district shall comply with the provisions of the general laws then in effect relating to consent by political subdivisions to the creation of conservation and reclamation districts and to the inclusion of land within the district.

History

In 1904 Article III, Section 52, was amended by the addition of Subsection (b) to authorize political subdivisions of the state to borrow and tax for "the improvement of rivers, creeks, and streams" However, the amendment limited the amount of debt permitted for this purpose and for roads to one-fourth of the assessed valuation of the real property in the subdivision. (See the *History* of Art. III, Sec. 52.)

This debt limitation hampered effective conservation programs. Texas experienced destructive floods during 1913 and 1914, and public sentiment began to favor a better conservation and flood control program. In 1917, an amendment comprising what are now Subsections (a), (b), and (c), and known as the "Conservation Amendment," was adopted to authorize unlimited borrowing and taxing by conservation districts and to mandate the conservation and development of all the state's natural resources, especially water resources. (See 3 *Interpretive Commentary*, p. 465.)

Subsection (d) was added in 1964 to require notice of a proposed district in the affected area and a recommendation on the proposal by the Texas Water Commission (now the Texas Water Rights Commission). Subsection (e) was added in 1973 to require notice of a proposed district to local governments within the district and to authorize written comment by the local governments on such proposals.

Explanation

The legislature has enacted numerous local and general laws creating and authorizing creation of water districts. Professor W. G. Thrombley estimated there were 524 such districts as of February 1959. Of these, 115 were authorized by local law and 409 were created under some 13 general laws on water districts. The largest water district is the Brazos River Authority, encompassing approximately one-sixth of the state (42,000 square miles). It is a "master" district with some 97 separate water districts within it and subject to its authority. The Lower Colorado River Authority (LCRA), another giant, has jurisdiction over ten counties and has the most comprehensive program and organization. The LCRA is authorized to control, store, and preserve the waters of the Colorado River and its tributaries; sell the water; and generate and sell electricity. (See W. Thrombley, *Special Districts and Authorities in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1959).)

In 1918 the legislature enacted the "Canales Act" (now Water Code sec. 55.021) to authorize districts previously organized under Article III, Section 52(b), to switch to Section 59 status and thus avoid the former section's borrowing limitation. Most but not all districts originally organized under that section have elected to do so.

Taxes levied by conservation districts must be equitably distributed, but this has been construed to mean taxation either according to property value or on the basis of the degree of benefit each property owner receives from the district's improvements. (*Dallas County Levee Dist. No. 2 v. Looney*, 109 Tex. 326, 207 S.W. 310 (1918).) The various statutes authorize one method or another and some districts utilize a combination.

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Not surprisingly, these districts' taxing and borrowing powers have produced considerable litigation. For example, landowners along rivers have objected to paying taxes to water districts on the theory that they have preexisting riparian (*i.e.*, river bank ownership) rights to the river water. The courts have held that riparian landowners may not be charged for their use of the normal river flow but must pay district ad valorem taxes. (*Parker v. El Paso County Water Imp. Dist. No. 1*, 116 Tex. 631, 297 S.W. 737 (1927).)

Creation of a conservation and reclamation district without taxing power does not violate this section. Issuance of bonds secured by revenue rather than taxes does not require a vote of the taxpayers of the district since revenue bonds are not "indebtedness" within the meaning of Subsection (c). (*Lower Colorado River Authority v. McCraw*, 125 Tex. 268, 83 S.W.2d 629 (1935).)

In *Austin Mill & Grain Co. v. Brown County Water Imp. Dist. No. 1* (128 S.W.2d 829 (Tex. Civ. App. – Austin 1939), *aff'd*, 135 Tex. 140, 138 S.W.2d 523 (1940)), the court held that a vote by taxpayers authorizing construction bonds would not suffice to authorize application of bond proceeds to pay operation and maintenance costs. Taxes for operation and maintenance could be levied, but only upon favorable vote of the district's taxpayers. However, in *Matagorda County Drainage District v. Commissioners Court of Matagorda County* (278 S.W.2d 539 (Tex. Civ. App. – Galveston 1955, *writ ref'd n.r.e.*)), the court concluded that a district organized under Article III, Section 52(b), could levy a tax for maintenance of drainage ditches without a vote of the taxpayers. In *Matagorda* a statute authorized the drainage district to tax in order to pay off bonds and maintain the improvements while the bonds were being retired. The attorney general had ruled that when the bonds were paid off, a tax for continued maintenance was no longer authorized by the statute, with or without a vote of the taxpayers. Noting that the drainage system would quickly deteriorate without maintenance, the court "reinterpreted" the statute to authorize a tax for maintenance after retirement of the bonds and treated the original vote permitting the bonds as authorizing a perpetual maintenance tax.

In a recent case the Texas Supreme Court dealt with the relationship between the requirement for voter approval of a maintenance tax and the necessity for levying a tax to pay a judgment obtained by virtue of the Tort Claims Act. On the one hand, the court assumed, the legislature could not require the levy of a tax solely to pay a tort judgment. On the other hand, the court noted, a tax had been authorized for maintenance operations, thus making the tort judgment simply another cost of operations. In a way the court brought the two hands together by expressing bewilderment at how a tort judgment under the Tort Claims Act could ever arise unless operations were being carried on. (See *Harris County Flood Control Dist. v. Mihelich*, 525 S.W.2d 506 (Tex. 1975).)

The effect of the lien purportedly created by Subsection (c) is unclear. In *Hidalgo & Cameron Counties Water Control and Imp. Dist. No. 9 v. American Rio Grande Land & Irrigation Co.* (103 F.2d 509 (5th Cir. 1939)), a federal court said that the subsection does not create a tax lien in favor of the district. In a later case the same court held that the subsection likewise does not create a lien against district property to secure the bondholders. (*Borron v. El Paso National Bank*, 133 F.2d 298 (5th Cir. 1943).)

No Texas court opinion interpreting the lien language was found, but it appears superfluous in light of Article VIII, Section 15, which creates a special tax lien on assessed property generally. (See also Tex. Tax. – Gen. Ann. art. 1.07.)

Comparative Analysis

The Massachusetts Constitution has a provision similar to Subsection (a) of this

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section. Several states have constitutional provisions touching on one or more topics covered by this section, but comparison is difficult. The *Model State Constitution* has no similar provision. The Michigan, Illinois, and Montana constitutions, all recently revised, have provisions proclaiming the public policy of the state to protect air, water, and other natural resources and to maintain a healthful environment.

Author's Comment

The opening words of this section are in many ways decades ahead of the times. As the *Comparative Analysis* notes, putting affirmative words favoring the environment into a constitution is a most recent development. Texas, almost 60 years ago, made a declaration in favor of the environment in the first sentence of Section 59. The breadth of the concern is much narrower than a contemporary statement of concern for the environment; but the problems then were not so widespread as they are today. Certainly, in any revision of the constitution a much broader and stronger statement of environmental policy is a certainty.

So far as the balance of the section is concerned, Subsection (b) serves no constitutional purpose and Subsection (c) would be unnecessary if there were no constitutional limitations on the power of the legislature to authorize political subdivisions to incur debt. Finally, the struggle over who may control the creation, expansion, etc. of these districts—the legislature or the units of general local government—continues, with the latter apparently victorious in the latest round through the addition of Subsection (e) in 1973. (The notice and comment requirements could—and should—all be handled by statute, which is much easier to amend—to require notice of a district's proposed dissolution, for example, a requirement not now made by Sec. 59.)

The struggle for control is symptomatic of the larger debate now raging over the merits of special-purpose governmental districts. This debate is summarized in the *Author's Comment* on Article IX, Section 9.

Sec. 61. COMPENSATION OF DISTRICT, COUNTY AND PRECINCT OFFICERS; SALARY OR FEE BASIS; DISPOSITION OF FEES. All district officers in the State of Texas and all county officers in counties having a population of twenty thousand (20,000) or more, according to the then last preceding Federal Census, shall be compensated on a salary basis. In all counties in this State, the Commissioners Courts shall be authorized to determine whether precinct officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts, to compensate all justices of the peace, constables, deputy constables and precinct law enforcement officers on a salary basis beginning January 1, 1973; and in counties having a population of less than twenty thousand (20,000), according to the then last preceding Federal Census, the Commissioners Courts shall also have the authority to determine whether county officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts to compensate all sheriffs, deputy sheriffs, county law enforcement officers including sheriffs who also perform the duties of assessor and collector of taxes, and their deputies, on a salary basis beginning January 1, 1949.

All fees earned by district, county and precinct officers shall be paid into the county treasury where earned for the account of the proper fund, provided that fees incurred by the State, county and any municipality, or in case where a pauper's oath is filed, shall be paid into the county treasury when collected and provided that where any officer is compensated wholly on a fee basis such fees may be retained by such officer or paid into the treasury of the county as the Commissioners Court may direct. All Notaries Public, county surveyors and public weighers shall continue to be compensated on a fee basis.

History

The practice of compensating local officials from fees of office can be traced back at least six centuries in the Anglo-American system. As early as 1338, for example, justices of the peace were paid from fees collected by sheriffs. (See W. Holdsworth, *A History of English Law* (London, 1956), p. 288.) All of the early Texas constitutions, including that of 1876, were silent on the subject of compensating county and precinct officers, probably because it was simply assumed that they would be paid on the familiar fee basis.

The fee system came under attack in the early part of the 20th century, however, because of the potential conflict of interest it created. In 1927, the United States Supreme Court held unconstitutional a state statute that permitted a defendant in a criminal case to be tried by a judge who would receive a fee if the defendant were convicted, but nothing if he were acquitted. (*Tumey v. Ohio*, 273 U.S. 510 (1927).)

In 1935 the legislature submitted the first version of this section to the electorate with the stated objective of abolishing the fee system and replacing it with a system in which district officers would be compensated by salary. (See S.J.R. 6, 44th Legislature, Tex. Laws 1935, *Senate Journal*, p. 23.) That amendment required that all district officers, and all county officers in counties of 20,000 population or more, be compensated on a salary basis. In counties under 20,000, the commissioners court was authorized to determine whether to compensate county officers by fee or by salary. In all counties, the commissioners court was authorized to determine whether to compensate precinct officers by fee or by salary. The county treasury was to receive all fees except those to be paid to county and precinct officers still paid on a fee basis.

Another amendment in 1948 added constables, deputy constables, "precinct law enforcement officers," sheriffs, deputy sheriffs, and "county law enforcement officers" to the list of officers required to be compensated by salary regardless of the population of the county. Two opinions of the attorney general, however, stated that justices of the peace were not "law enforcement officers" within the meaning of the 1948 amendment and therefore could continue to be compensated on the fee basis in counties under 20,000 population. (Tex. Att'y Gen. Op. Nos. V-750, V-748 (1948).) This situation continued until January 1, 1973, the effective date of a 1972 amendment adding justices of the peace to the list of officials who must be compensated by salary, regardless of the county's population.

Explanation

Under this section, certain named officers must be compensated on a salary basis in every county, regardless of its population. These officers are justices of the peace, constables, deputy constables, "precinct law enforcement officers," sheriffs, deputy sheriffs, and "county law enforcement officers." It is not clear what officers, if any, are covered by the two phrases referring to law enforcement officers; the attorney general has said the term does not include justices of the peace, county judges, county attorneys, or district clerks. (Tex. Att'y Gen. Op. No. V-748 (1948).) The only real county law enforcement officers are the sheriff and his deputies, and the only precinct officials actually engaged in law enforcement are the constable and his deputies; but these officials are named specifically, so the phrase "law enforcement officers" presumably does not refer to them either.

If an officer is not among those specifically named, his method of compensation depends on two variables: (1) population of the county and (2) whether the office is district, county, or precinct.

District officers (*e.g.*, district judges, district clerks, district attorneys) must be compensated on a salary basis regardless of the county's population. All county

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officers (e.g., county judges, county clerks, county commissioners, county attorneys, county tax assessor-collectors, sheriffs) must be compensated by salary in counties of 20,000 population or more. In counties of less than 20,000, the method of compensating county officers (except, of course, those specifically required to be compensated by salary) is left to the commissioners court. In all counties the method of compensating precinct officers is left to the commissioners court—again, subject to the exception that justices of the peace, constables, deputy constables, and “precinct law enforcement officers” must be salaried. It is not at all clear whether there are any precinct officers other than those named; the statutes on the subject mention only the justice of the peace, constable, and deputy constables. (See Tex. Rev. Civ. Stat. Ann. art. 3912.) If these three are the only “precinct officers” within the meaning of this section, then the language permitting commissioners courts to determine the method of compensating precinct officers is meaningless, because all are required by this section to be compensated by salary.

When an officer is required by this section to be compensated on a salary basis, the supreme court has held that the legislature may not permit that official to also receive compensation from fees. (*Wichita County v. Robinson*, 155 Tex. 1, 276 S.W.2d 509 (1954).) Presumably this rule also applies in the opposite direction, so that notaries public, county surveyors, and public weighers, who are required by this section to be compensated on a fee basis, cannot also be paid a salary. That question apparently has not been authoritatively decided, however.

Salaried officials are required to turn over to the county treasury all fees collected in their official capacity. (*State v. Glass*, 167 S.W.2d 296, (Tex. Civ. App.—Galveston), *writ ref'd n.r.e. per curiam*, 170 S.W.2d 470 (Tex. 1942).) The attorney general has said this includes such incidental fees as payments received by a county clerk for sending mortgage lists to banks and commissions received by a district attorney for making collections. (Tex. Att’y Gen. Op. Nos. V-1460 (1952), V-882 (1949).) The rule is not as inclusive as it sounds, however; for example, justices of the peace are allowed to keep fees they receive for performing marriages, acting as ex officio notaries public, and reporting to the board of vital statistics. (See Tex. Rev. Civ. Stat. Ann. art. 3912-2a.)

Comparative Analysis

State constitutional provisions on compensation of local officers vary widely. Approximately nine states give the legislature or some agency such as a board of supervisors general power to regulate compensation of officers. About six states prohibit fee compensation altogether, requiring that officers be paid fixed salaries; but at least three of these have exceptions permitting constables and/or justices of the peace to receive fees.

At least four constitutions direct that fees be paid into the county treasury, and three others require that fees in excess of amounts authorized as salaries be paid into the treasury.

The *Model State Constitution* does not mention the method of compensation of local officials.

Author's Comment

Despite its length and complexity, Section 61 really accomplishes only one thing: It prohibits fee compensation of most county officials and all precinct and district officials. This could, of course, be accomplished by statutes; in fact, the entire subject already is fully covered by statute. (See Tex. Rev. Civ. Stat. Ann. arts. 3882-3912.)

Since the exceptions in Section 61 have largely swallowed the rule, if the section is to be retained at all, it should be rewritten to specify the officers who *may* be compensated by fees, rather than listing those who may not.

Sec. 62. STATE AND COUNTY RETIREMENT, DISABILITY AND DEATH COMPENSATION FUNDS. (a) The Legislature shall have the authority to levy taxes to provide a State Retirement, Disability and Death Compensation Fund for the officers and employees of the state, and may make such reasonable inclusions, exclusions, or classifications of officers and employees of this state as it deems advisable. The Legislature may also include officers and employees of judicial districts of the state who are or have been compensated in whole or in part directly or indirectly by the state, and may make such other reasonable inclusions, exclusions, or classification of officers and employees of judicial districts of this state as it deems advisable. Persons participating in a retirement system created pursuant to Section 1-a of Article V of this Constitution shall not be eligible to participate in the Fund authorized in this subsection; and persons participating in a retirement system created pursuant to Section 48-a of Article III of this Constitution shall not be eligible to participate in the Fund authorized in this subsection except as permitted by Section 63 of Article XVI of this Constitution. Provided, however, any officer or employee of a county as provided for in Article XVI, Section 62, Subsection (b) of this Constitution, shall not be eligible to participate in the Fund authorized in this subsection, except as otherwise provided herein. The amount contributed by the state to such Fund shall equal the amount paid for the same purpose from the income of each such person, and shall not exceed at any time six per centum (6%) of the compensation paid to each such person by the state.

There is hereby created as an agency of the State of Texas the Employees Retirement System of Texas, the rights of membership in which, the retirement privileges and benefits thereunder, and the management and operations of which shall be governed by the provisions herein contained and by present or hereafter enacted Acts of the Legislature not inconsistent herewith. The general administration and responsibility for the proper operation of said system are hereby vested in a State Board of Trustees, to be known as the State Board of Trustees of the Employees Retirement System of Texas, which Board shall be constituted and shall serve as may now or hereafter be provided by the Legislature. Said Board shall exercise such powers as are herein provided together with such other powers and duties not inconsistent herewith as may be prescribed by the Legislature. All moneys from whatever source coming into the Fund and all other securities, moneys, and assets of the Employees Retirement System of Texas shall be administered by said Board and said Board shall be the trustees thereof. The Treasurer of the State of Texas shall be custodian of said moneys and securities. Said Board is hereby authorized and empowered to acquire, hold, manage, purchase, sell, assign, trade, transfer, and dispose of any securities, evidences of debt, and other investments in which said securities, moneys, and assets have been or may hereafter be invested by said Board. Said Board is hereby authorized and empowered to invest and reinvest any of said moneys, securities, and assets, as well as the proceeds of any of such investments, in bonds, notes, or other evidences of indebtedness issued, or assumed or guaranteed in whole or in part, by the United States or any agency of the United States, or by the State of Texas, or by any county, city, school district, municipal corporation, or other political subdivision of the State of Texas, both general and special obligations; or in home office facilities to be used in administering the Employees Retirement System including land, equipment, and office building; or in such corporation bonds, notes, other evidences of indebtedness, and corporation stocks, including common and preferred stocks, of any incorporation created or existing under the laws of the United States or of any of the states of the United States, as said Board may deem to be proper investments; provided that in making each and all of such investments said Board shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as probable safety of their capital; and further provided, that a sufficient sum shall be kept on hand to meet payments as they become