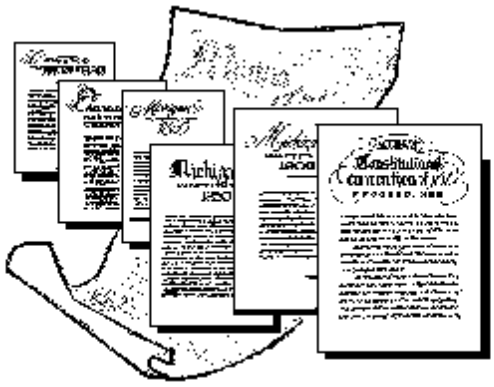
A Comparative Analysis of the Michigan Constitution

Volumes II

Articles VIII – XVII



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Report Number 208

October 1961

FOREWARD

The contributions of many persons and of many sources are involved in the production and publication of this document. The Citizens Research Council is exceedingly grateful for the cooperative efforts that are here represented.

Publication of this document was made possible by grants from W. K. Kellogg Foundation, The Kresge Foundation, McGregor Fund, and Relm Foundation.

Permission of the National Municipal League to use the 1961 draft version of the forthcoming edition of the Model State Constitution is gratefully acknowledged.

Heavy reliance for the provisions of other state constitutions has been placed on the Index Digest of State Constitutions, second edition, Columbia University, 1959, edited by Richard A. Edwards, and prepared under the auspices of the Legislative Drafting Research Fund of Columbia University, John M. Kernochan, director.

In preparing this document, the authors have placed extensive reliance on the Michigan Statutes Annotated, Volume 1. The sections on "Opinions of the Attorney General and Judicial Interpretation" have, for the most part, utilized the annotations written and published by Callaghan & Company in Volume 1 of Michigan Statutes Annotated. The Research Council is grateful to Callaghan & Company, publishers of Michigan Statutes Annotated, for permission to use their copyrighted material. Permission to reproduce any of the copyrighted material from Michigan Statutes Annotated must be obtained from Callaghan & Company.

The extensive contributions of individuals to this publication are revealed in the following series of sincere acknowledgements:

Article II, Declaration of Rights—Mr. Laurent K. Varnum, Varnum, Riddering, Wierengo & Christenson of Grand Rapids, organized the preparation of this Article. Sections 1, 2, 3 and 4 were prepared by the law firm of Clark, Klein, Winter, Parsons & Prewitt of Detroit, under the supervision of Mr. Robert C. Winter; Sections 5, 6, 7, 8, 21 and 22 were prepared by the law firm of Varnum, Riddering, Wierengo & Christenson of Grand Rapids, under the supervision of Mr. Laurent K. Varnum; Sections 9, 11, 12, 13 and 14 were prepared by the law firm of Warner, Norcross & Judd of Grand Rapids, under the supervision of Mr. David A. Warner; Sections 10,15 and 19 were prepared by the law firm of McKone, Badgley, Domke & Kline of Jackson, under the supervision of Mr. Maxwell F. Badgley; and Sections 16, 17, 18 and 20 were prepared by the law firm of Gault, Davison & Bowers of Flint, under the supervision of Mr. Harry G. Gault.

Article V, Legislative Department—Professor Charles W. Shull of Wayne State University (Part B, Legislative Apportionment); J. Edward Hutchinson, attorney at law, Fennville, Michigan (Part F, Legislative Procedure).

Article VII, Judicial Department—University of Michigan Law School, Allan F. Smith, Dean.

Article VIII, Local Government—Professor Louis H. Friedland of Wayne State University (Part B, Townships, Part C, Cities and Villages, and Part D, General Provisions).

Article X, Finance and Taxation—The law firm of Miller, Canfield, Paddock & Stone of Detroit. Messrs. John H. Nunneley, Stratton S. Brown, Robert E. Hammell, Fred M. Thrun (Sections 10, 11, 12, 21, 22, 27, and 28.)

Article XII, Corporations—The law firm of Dykema, Wheat, Spencer, Goodnow & Trigg of Detroit, Mr. John R. Dykema.

Article XIII, Eminent Domain—The Legal Division, Wayne County Road Commission, Messrs. Daniel J. Horgan, Jr., James N. Garber, John P. Cushman, and John C. Jacoby.

Article XIV, Exemptions—The Lawyers Title Insurance Corporation, Mr. John G. Heal.

Article VX, Militia—Brig. Gen. Philip C. Pack (Retired), Ann Arbor.

Article XVI, Miscellaneous Provisions—The Lawyers Title Insurance Corporation, Mr. John G. Heal (Sections 8 and 9).

Analyses of articles or parts of articles not listed above were prepared by the staff of the Citizens Research Council of Michigan. We are indebted to Mr. J. Edward Hutchinson, attorney at law, who reviewed a number of the chapters and offered helpful comments.

Citizens Research Council of Michigan
Robert E. Pickup, Executive Director

Detroit, Michigan
October, 1961

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INTRODUCTION

This two-volume analysis of the provisions of the Michigan constitution is the first of three major series of publications to be issued by the Citizens Research Council marking the occasion of the Michigan Constitutional Convention of 1961.

The publication at hand is designed to trace the history of the present state constitution and to compare its provisions with prior documents, with the constitutions of the other states, and with the Model State Constitution of the National Municipal League.

It is not the purpose of this publication to attempt to tell anyone how to change the present constitution. Rather, it is hoped that it will serve to indicate the evolution of the Michigan constitution, to delineate present meaning or interpretation of its provisions, and to draw attention to the significant alternative methods of handling particular subjects as included in constitutions of other states or as contemplated by recognized authorities in state constitutional law.

Suggestions, alternatives and critical or editorial statements have been included, where deemed proper, under the sections marked Comment. It has not been the purpose of the Research Council in publishing its own staff work and the contributed efforts of many other persons in these two volumes to take sides on any particular issue. The reader should, therefore, not confuse criticism with advocacy, nor allow his possible disagreement; with the views of others to obscure the fact that alternatives and differences do, in fact, exist.

An index prepared originally by the legislative service bureau for an official compilation of the constitution issued by the secretary of state has been used herein, in each volume, for the convenience of the reader. There will also be found a table of contents at the head of each chapter or separate article. Sections discussed out of context may be located in a cross-reference table following these individual tables of contents.

The other two series of the Council's constitutional convention publications will be issued shortly. The first of these will be a number of research papers discussing basic questions of constitutional import. Their purpose is to sum up for consideration of delegates to the convention the various views, attitudes, and possibilities regarding what has been, or could be done for the solution of particular major issues.

In contrast to this two-volume document, and to the research papers the Re-

search Council will also publish a series of “position papers” setting forth, in fact and argument, the findings of the Research Council regarding several constitutional issues.

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CHAPTER VIII LOCAL GOVERNMENT

(over)

Section Detail

VIII LOCAL GOVERNMENT

A. COUNTIES

1. Counties; Corporate Character, Suits

Article VIII: Section 1. Each organized county shall be a body corporate, with such powers and immunities as shall be established by law. All suits and proceedings by or against a county shall be in the name thereof.

Constitutions of 1835 and 1850

No similar provision is found in the 1835 constitution. The 1850 constitution contained an exact duplicate of this section (Section 1, Article X).

Constitution of 1908

This section has not been amended.

Judicial Interpretation

This section has been interpreted to mean that the "fundamental and necessary characteristics" which were possessed by counties prior to the adoption of the 1850 constitution, whether by usage or recognition, could not be changed by legislation (Attorney General v. Detroit Councilmen, 58 Mich. 213). The interpretation of what is "fundamental and necessary," however is left to the legislature.

With respect to "new" powers which the county may acquire, it is established judicial doctrine that the county is a creature of the state. The county is a quasi-municipal corporation which can exercise only those powers conferred upon it by the legislature (Mosier v. Wayne County Board of Auditors, 295 Mich. 27; Wright v. Bartz, 339 Mich. 55).

Other State Constitutions

Four states have similar provisions—Arizona, Article XII, Section 11; Oklahoma, Article XVII, Section 9; and Georgia, Article XI, Section 1. In at least 26 other states, however, introductory sections confirm the existence of counties by name or description or by defining their relationship as subdivisions of the state. Neither

the 1961 draft version of the Model State Constitution nor the United States constitution confirms existing counties. The Model State Constitution assumes the existence of counties and leaves their organization to the legislature.

Comment

None of Michigan's three constitutions has any preambles or introductory sections which contain a clear statement confirming existing counties. In each of the three constitutions the existence of counties is taken for granted and no mention is made of their relationship to the state.

Subsequent statutory legislation in Michigan makes it clear that the legislature assumed that the boundaries of the several counties were fixed at the time the 1908 constitution was adopted. The legislature actually has power to create new counties (M.S.A. 5.281) but has not done so.

For general comments on Sections 1 through 15a, see end of Part A, this chapter.

2. Townships in County; City as Separate County

Article VIII: Section 2. No organized county shall be reduced by the organization of new counties to less than 16 townships as surveyed by the United States, unless in pursuance of law a majority of electors voting on the question in each county to be affected thereby shall so decide. When any city has attained a population of 100,000 inhabitants, the legislature may organize it into a separate county without reference to geographical extent, if a majority of the electors of such city and of the remainder of the county in which such city may be situated voting on the question shall each determine in favor of organizing said city into a separate county

Constitutions of 1835 and 1850

The constitution of 1835 contained a provision which stated that no organized county could be reduced by the organization of new counties to less than 400 square miles (Section 7, Article XII). The constitution of 1850 (Section 2 of Article X) contained a provision similar to the present provision.

Constitution of 1908

The 1908 version modified the 1850 provision by making certain substantive changes: 1) The population requirement for the formation of new counties was raised from 20,000 to 100,000 in recognition of the population growth of the state, 2) approval for the formation of the new county was to be required of the city desiring county status and the remainder of the county voting separately. The latter clause was inserted to protect the interest of minorities residing in the "rump" of the county in the event large cities were to seek separate county status. It is significant that this provision has never been used.

Judicial Interpretation

Judicial interpretation has determined that a county cannot be organized in areas in which there are no organized townships (People v. Maynard, 15 Mich. 463); the constitutional prohibition against counties of fewer than 16 townships precludes counties of unreasonably small size but is not intended to prohibit the division of townships if convenience or necessity so dictates (Bay County v. Bullock, 51 Mich. 544); fractional townships as surveyed by the United States are townships within the meaning of this section (Rice v. Ruddiman, 10 Mich. 125).

Other State Constitutions

Some 22 other states make constitution provision for the creation of new counties, whether out of territory not previously organized, or by a division (or city-county separation) of an established and organized county. In 16 of these states some form of referendum in the affected areas is required in order to effect a division of the county. In four states such a division of the county is dependent upon some geographical requirement. In only two states, New York and Virginia, is such a division of counties at the virtual discretion of the legislature. In Virginia the discretion only applies to counties whose length is three times their breadth or which exceed fifty miles in length.

The 1961 draft version of the Model State Constitution empowers the legislature to provide for "...incorporating; merging, consolidating and dissolving such counties, cities and other civil divisions…." This presumably also empowers the legislature to divide counties at its discretion.

Comment

The convention may wish to review this section to see whether it meets the needs of the state in facilitating the trend toward larger and more economical units of government. As the section reads, the restriction to 16 townships, except by a vote of

the electorate, probably serves to discourage any kind of consolidation. The second portion of this section providing for city-county separation of cities of 100,000 or over appears to make possible the creation of another unit of government in an area which may already have too many overlapping units of government. The question is whether this section in any way facilitates or hinders progress in solving problems of metropolitan government, urban sprawl and fringe areas.

3. County Officers

Article VIII: Section 3. There shall be elected biennially in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be prescribed by law. The board of supervisors in any county may unite the offices of county clerk and register of deeds in one office or separate the same at pleasure.

Constitutions of 1835 and 1850

The 1835 constitution provided for the election for a two-year term of all of the officers now specified and, in addition, for the election of one or more coroners and a county surveyor (Article VII, Sections 3 and 4 and Article VI, Section 50). The 1850 constitution omitted reference to the election of a coroner and a surveyor and added a provision for combining the offices of clerk and register of deeds.

Constitution of 1908

The only change in the 1908 version is one of wording and the deletion of a stipulation for the filling of vacancies. In the 1908 constitution the filling of vacancies, including those occurring in county offices is provided for in Article XVI, Section 5, which authorizes the legislature to provide by law for the filling of all vacancies where no specific constitutional provision has been made.

Judicial Interpretation

The only portion of this section which has raised important litigation is that which deals with the power of the supervisors to combine the offices of clerk and register of deeds. It is now well established that boards of supervisors cannot consolidate these offices in mid-term (Op. Atty. Gen., Oct. 25, 1939) and cannot combine these offices once candidates for both offices have been nominated at primary election (Op. Atty. Gen., August 19, 1946, No. 0-4968).

Other State Constitutions

Over three-fourths of the state constitutions have provisions similar to this section of the constitution. The number and variety of county officers constitutionally provided for may vary from state to state but most states provide for at least five such offices by name and many stipulate eight or more. Sheriffs, prosecuting attorneys, clerks, treasurers, and coroners are among the officers most frequently provided for by constitutional provisions.

The 1961 draft version of the Model State Constitution makes no mention of county officers.

Comment

This section is rather specific in its requirements as to the election and terms of office of certain county officials. There is a real question whether such matters ought to be provided for in the constitution. In the interest of flexibility and adaptability, the advisability of leaving these matters to regulation by general law is an alternative which might be seriously considered. At least that part of the section dealing with the biennial election of these officers might perhaps better be statutory. The authorization to the board of supervisors to combine the offices of clerk and register of deeds might be reconsidered in the light of a broader grant of power to boards of supervisors to effect administrative reorganization of county governing machinery whether by constitutional or statutory authorization.

4. Offices at County Seat

Article VIII: Section 4. The sheriff, county clerk, county treasurer, judge of probate and register of deeds shall hold their offices at the county seat.

Constitutions of 1835 and 1850

The 1835 constitution had no similar provision. The 1850 constitution contained an exact duplicate of this provision.

Constitution of 1908

This section was carried over from the 1850 constitution without change and has not been amended. This provision apparently is sufficiently clear and precise as to have raised no important legal question.

Other State Constitutions

Ten other state constitutions specify that the office and records of some or all county officers must be located at the county seat or at a particular place in the county designated by law. Of these, only four—Florida, Montana, Nevada, and Pennsylvania—specifically state that it shall be the county seat where the offices and records are to be kept. The 1961 draft of the Model State Constitution has no such provision.

Comment

Consideration might be given to removing this section and to making provision for this by statute.

5. Sheriff

Article VIII: Section 5. The sheriff shall hold no other office. He shall be elected at the general election for the term of 2 years. He may be required by law to renew his security from time to time and in default of giving such security, his office shall be deemed vacant. The county shall never be responsible for his acts.

Constitutions of 1835 and 1850

The 1835 constitution contained a similar provision except that the time of election was not specified and there was a prohibition against holding the office of sheriff longer than four years in any period of six (Article VII, Section 4). The 1850 constitution continued the 1835 provision with minor changes in wording (Article X, Sections 3 and 4).

Constitution of 1908

The constitution of 1908 as originally adopted continued without change the 1850 provision. This section was amended in 1926 to delete the prohibition against holding office for more than four years out of a six-year period and to provide for a two-year term and election at the general election.

Other State Constitutions

The constitutions of most other states mention the office of sheriff. Election of this officer is provided for in the majority of them. In California, the legislature may provide either for election or appointment. In some 11 other states the term is fixed

for two years. In three states, Massachusetts, Washington, and California, the legislature is authorized to fix the term of office. In some 14 states dual office holding by sheriffs is prohibited for particular or all other public offices. The office most commonly prohibited, when specified, is that of legislator. At least six other states require that bond be posted and in at least two other states failure to post bond from time to time creates a vacancy in the office. The 1961 draft of the Model State Constitution contains no similar provision.

Comment

Dual office holding, whether of constitutional or statutory incompatibility, is a matter which should be reviewed as a total problem rather than as an isolated problem affecting particular public offices. There are a variety of reasons for prohibiting dual office holding and provisions, whether constitutional or statutory, for some or all public offices might be provided for in one place. Provision for biennial election and the matter of the security might both be deleted. The election provision is already covered in Section 3 of this article and the security matter is one which might properly be regulated by a general provision as it is a broader problem than one touching only the office of sheriff.

6. Jury Commissioners

Article VIII: Section 6. The legislature shall by general law provide for the appointment of a board of jury commissioners in each county; but such law shall not become operative in any county until a majority of the electors of the county voting thereon shall so decide.

Constitutions of 1835 and 1850

Neither the 1835 nor the 1850 constitutions contained a similar provision.

Constitution of 1908

The new section was included in the 1908 constitution on the ground that up to 1908 many of the larger cities and counties were in fact appointing jury commissioners on the basis of special acts. This section made it possible, by passage of a general law, to make this privilege available to all counties.

Other State Constitutions

There is no indication from available sources that a system of jury commissioners is constitutionally provided for in any other state.

Comment

As indicated, jury commissioners are not generally provided for in other states. Regardless, however, of whether or not jury commissioners ought to be part of our judicial system, matters of judicial procedure might better be left to a statutory judicial code which can be periodically reviewed and modified without recourse to constitutional amendment.

7. Board of Supervisors; Representation of Cities

Article VIII: Section 7. A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law. Cities shall have such representation in the boards of supervisors of the counties in which they are situated as may be provided by law.

Constitutions of 1835 and 1850

No such provision was contained in the 1835 constitution. The 1850 constitution contained substantially the same provisions except that they were contained in two separate sections—Sections 6 and 7 of Article X.

Constitution of 1908

This section has not been amended.

Judicial Interpretation

This section confers upon the legislature the power to fix the representation of cities on boards of supervisors (Op. Atty. Gen., 1913). The membership of a board of supervisors cannot be reduced to less than one supervisor from each organized township, without a constitutional amendment, even though an unwieldy board may exist (Op. Atty. Gen., 1933-1934). The board of supervisors of a county, as an administrative body, has no inherent powers.[1]

[1] Mason County Civic Research Council v. Mason County, 343 Mich. 313.

Boards of supervisors have such powers as shall be prescribed by law.[2]

Other State Constitutions

Except in the six New England states, where counties are primarily judicial districts rather than legislative or administrative units, all states provide for some effective governing body for the county (borough in Alaska and parish in Louisiana). In some 20 states, this body is called a board of county commissioners, county board, or county commissioners. Some six other state constitutions mention or authorize a board of supervisors. In the other states the name of the county governing authority varies greatly. A number of Southern states have county courts; Louisiana has a police jury; and Arkansas has a quorum court. At least nine state constitutions prescribe the size of the governing boards in the constitution. A number of state constitutions specify the term of office.

Comment

In view of the size of certain county boards of supervisors (Wayne County with over 100 supervisors), consideration might be given to the question of whether tying representation to a constitutional requirement such as this is in the best interest of efficient county government. Even if the unwieldy size of boards of supervisors is of itself insufficient reason to change the basis of representation, consideration of whether the whole question of representation might better be left to statute is of importance.

8. Powers of Counties

Article VIII: Section 8. The legislature may by general law confer upon the boards of supervisors of the several counties such powers of a local, legislative and administrative character, not inconsistent with the provisions of this constitution, as it may deem proper.

Constitutions of 1835 and 1850

No similar provision was contained in the 1835 document. The 1850 constitution, Article IV, Section 38, contained a provision similar to the present section which, however, was applicable to townships, cities, villages as well as counties. The 1850 provision did not require that the legislature act by "general law."

[2] Wright V. Bortz, 339 Mich. 55.

Constitution of 1908

In the 1908 constitution this grant of power can be found in separate sections dealing with each unit of local government.

The addition of the requirement "by general law" was an important change from the 1850 provision. The 1908 provision also added the stipulation "not inconsistent with the provisions of this constitution." This section has not been amended since 1908.

Judicial Interpretation

This provision is clear and precise and no significant litigation has arisen. Early in the history of the constitution two points were clarified (1) that the legislature in the exercise of its powers is only limited by the national and state constitutions (Attorney General v. Marr, 55 Mich. 445) and (2) boards of supervisors have no power to repeal or nullify valid enactments of the state legislature (Op. Atty. Gen., 1914, p. 327).

Other State Constitutions

At least 10 state constitutions have provisions which authorize the legislature by general law to confer powers upon counties. Several additional constitutions grant the substance of this power to their respective legislatures but are more specific in enumerating the general classes of powers that may be conferred upon counties.

Comment

This provision is a broad grant of power to the legislature to deal with the details of county government. It is the core of the legislature's power to deal with the civil subdivisions of the state. All other provisions dealing with county government in the present constitution are, in effect, limitations on this broad grant of power. See Comment at the end of Part A, this chapter.

9. Salaries; Claims Against Counties

Article VIII: Section 9. The boards of supervisors shall have exclusive power to fix the salaries and compensation of all county officials not otherwise provided for by law. The boards of supervisors, or in counties having county auditors, such auditors, shall adjust all claims against their respective counties; appeals may be taken from such decisions of the boards of supervisors or auditors to the circuit court in such manner as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution contained no similar provision. The 1850 constitution contained a provision (Article X, Section 10) dealing with the substance of the section but differing from the present section in the following:

> The 1850 provision as amended limited the power to fix salaries, compensation, and to adjust claims to a few counties rather than all counties.
>
> The 1850 section made no provision for appeal from the decisions of boards of supervisors or auditors.

Constitution of 1908

In changing this section the 1908 convention felt that the newer provision gave greater latitude to all counties in this matter.

In addition, appeal to the circuit court provided a less expensive appeal procedure than mandamus action which was possible under the 1850 provision.

Opinions of the attorney General

County officers are entitled to legal fees unless the supervisors in fixing salaries state that salaries shall be in lieu of fees (Op. Atty. Gen. 1917, p. 235); and county supervisors cannot change the compensation of county officers which have already been fixed by general or local statute (Op. Atty. Gen. 1926-1928, p. 753).

Other State Constitutions

All state constitutions make provisions for county control of their financial affairs. At least a dozen states make some specific reference to limitation on counties in the payment of fees, salaries, and other compensation. The 1961 draft of the Model State Constitution makes no reference to this subject matter

Comment

Consideration might be given to having these provisions provided for by general law.

10. Power of Taxation; Limitation

Article VIII: Section 10. The board of supervisors of any county may in any 1 year levy a tax of 1/10 of 1 mill on the assessed valuation of said county for the construction or repair of public buildings or bridges, or may borrow an equal sum for such purposes; and, in

> any county where the assessed valuation is less than 10,000,000 dollars, the board may levy a tax or borrow for such purposes to the amount of 1,000 dollars; but no greater sum shall be raised for such purposes in any county in any 1 year, unless submitted to the electors of the county and approved by a majority of those voting thereon.

Constitutions of 1835 and 1850

No similar provision was contained in the 1835 constitution. The provision in the 1850 constitution (Article X, Section 9) contained almost the exact duplicate of this section except that it stated that any county could borrow or raise by tax one thousand dollars for the purposes mentioned rather than specifying such borrowing and taxation in terms of "one tenth of one mill."

Judicial Interpretation and Opinions of the Attorney General

This provision appears to raise questions as to the kinds of purposes for which such taxes may be used, and also the nature of projects which may be financed from funds other than those raised by the millage. In Rude v. Muskegon County Building Authority, 338 Mich. 363, it was held that where the authority had a debt of $200,000 for acquiring a building for welfare purposes and where the county proposed to payoff the debt by a reasonable rent charge, such financing did not come within the limitations of this section. The substance of this decision was similarly upheld in Op. Atty. Gen. March 17, 1958, No. 2960. With respect to the purposes for which such moneys may be used, boards of supervisors apparently may not levy beyond the 1/10 of one mill tax limit for purposes of creating sinking funds for construction. The content of the provision is intended to limit legislative power to an authorization of taxes levied on the assessed valuation and to limit the purpose of such taxations, as well as of borrowing, to the construction and repair of county buildings (Op. Atty. Gen., August 28, 1951, No. 1436).

Other State Constitutions

Most state constitutions contain provisions which relate to the power of counties to tax and the purpose for which they may tax and incur debts. Some of these constitutional provisions state absolute tax and debt limits; some of them specify the limit of taxes and debts which may be incurred but authorize the legislature to fix the actual limits. Some, like the Model State Constitution, merely authorize the legislature to fix the limits by law.

11. Charitable Institutions

Article VIII: Section 11. Any county in this state, either separately or in conjunction with other counties, may appropriate money for the construction and maintenance or assistance of public and charitable hospitals, sanatoria or other institutions for the treatment of persons suffering from contagious or infectious diseases. Each county may also maintain an infirmary for the care and support of its indigent poor and unfortunate, and all county poor houses shall hereafter be designated and maintained as county infirmaries.

Constitutions of 1835 and 1850

No corresponding provisions were contained in either of the two earlier constitutions.

Constitution of 1908

The rationale for the inclusion of this section in the 1908 constitution was a conviction on the part of the convention that this was in line with modern conditions which demanded the prevention and treatment of contagious diseases as a means of preserving the public health.

Opinions of the Attorney General

Under this provision counties may make appropriations to public hospitals in which contagious diseases are treated even though this may not be the only function of the hospital (Op. Atty. Gen., May 26, 1943, No. 0-779). Non-tax derived funds, if not pledged to some other purpose by the legislature, may be used for a county infirmary (Op. Atty. Gen., April 5, 1957, No. 2931).

Other State Constitutions

Over a dozen state constitutions make some specific mention authorizing counties to provide infirmaries, charitable institutions, asylums, hospitals, poor houses, and penal institutions. Such authorization is either specifically granted in the constitution or authorized to be provided for by general law. Several of the constitutions, like the Michigan constitution, provide for cooperative arrangements among counties. The Model State Constitution is silent on this subject.

Comment

The subject matter of this section could be included in the powers conferred under Section 8.

12. Indebtedness; Limitation

Article VIII: Section 12. No county shall incur any indebtedness which shall increase its total debt beyond 3 per cent of its assessed valuation, except counties having an assessed valuation of 5,000,000 dollars or less, which counties may increase their total debt to 5 per cent of their assessed valuation.

Constitutions of 1835 and 1850

No similar provision was contained in the 1835 constitution. The 1850 constitution as amended (Article IV, Section 49) contained a similar provision though it did not specify that the total debt could not exceed three per cent of the assessed valuation. The 1850 provision, however, contained an additional limitation not found in the present section; viz., that any indebtedness in excess of one-half of one per cent was, in any event, to be authorized by a vote of the electorate.

Constitution of 1908

The original 1908 provision specified that the total debt could not exceed three per cent and deleted the portion the 1850 provision dealing with debt in excess of one-half of one per cent.

This section was amended in 1910. The amendment added that portion of the section which authorized counties of less than five million dollars assessed valuation to increase their debt to five per cent of such valuation.

From time to time some legal questions have arisen as to whether certain specific purposes fall within the limitations of this section but these have not significantly changed the operation of the section.

Other State Constitutions

The majority of state constitutions contain limitations on the amount of county indebtedness. Moreover, the majority of these are tied to some percentage figure of the assessed valuation of the county. Generally these limitations on indebtedness apply to all purposes for which the counties may incur debt. In a number of states, however, the percentage figure may vary depending on the purpose. The Model State Constitution is silent on this subject.

Comment

Inasmuch as there are presently no counties with a state equalized valuation of less than $5 million, consideration might be given to removing this portion of the provision.

13. Removal of County Seat

Article VIII: Section 13. No county seat once established shall be removed until the place to which it is proposed to be removed shall be designated by 2/3 of the board of supervisors of the county, and a majority of the electors voting thereon shall have voted in favor of the proposed location, in such manner as shall be prescribed by law.

Constitutions of 1835 and 1850

The constitution of 1835 contained no similar provision. The constitution of 1850 contained the same provision (Article X, Section 8).

Constitution of 1908

This section was carried over without change from the 1850 constitution and has not been amended. The provisions of this section are sufficiently clear and explicit as to have raised no significant litigation.

Other State Constitutions

The majority of state constitutions prohibit the relocation of county seats except with approval of the local electorate.

Approval by the "majority" or "two-thirds" of the electorate is the most common requirement. A handful of constitutions authorize the legislature to change county seats, but only by following certain extraordinary legislative procedures such as requiring extraordinary majorities in both houses to pass such laws or other special procedures. The Model State Constitution is silent on this matter.

Comment

Tradition has prevailed in providing the guarantees of this section. Most other constitutions contain such a guarantee. Whether this tradition is now sufficiently ingrained as to make a constitutional guarantee unnecessary is a matter for consideration.

14. Navigable Streams; Permission to Bridge or Dam

Article VIII: Section 14. No navigable stream of this state shall be either bridged or dammed without permission granted by the board of supervisors of the county under the provisions of law, which permission shall be subject to such reasonable compensation and other conditions as may seem best suited to safeguard the rights and interests of the county and the municipalities therein. No such law shall preclude the state from improving the navigation of any such stream, nor prejudice the right of individuals to the free navigation thereof.

Constitutions of 1835 and 1850

No provision concerning this subject was contained in the 1835 constitution. The 1850 constitution contained substantially the same provision (Article XVIII, Section 4).

Constitution of 1908

That portion of the section dealing with the requirement for obtaining reasonable conditions and compensation as a means of safeguarding the interests of the counties and other municipalities was not a part of the 1850 version and was added in 1908. This gave the board of supervisors authority to require reasonable compensation in return for the right or franchise granted.

Judicial Interpretation and Opinions of the Attorney General

This section stands as an authorization to counties to maintain navigable streams. The board of supervisors is authorized:

1. To dam streams without the consent of the electors (Op. Atty. Gen., 1916, p. 556).

2. To impose conditions and provisions on the construction of dams such as requiring power companies to construct and maintain roads over them (Op. Atty. Gen., 1916, p. 568).

3. To cause the removal of obstructions in streams if specifically authorized by statute (Op. Atty. Gen., 1930-32, p. 264).

However, it was held with regard to the 1850 provision, and presumably this is still law, that this section did not apply to waters that are part of the state boundary (Ryan v. Brown, 18 Mich. 196) or to streams which had no value as navigable waters (Shepard v. Gates, 50 Mich. 495).

Other State Constitutions

The Michigan constitution appears to be unique in the inclusion of this kind of a provision specifically related to the powers of local government. Generally, the regulation of navigable waters is constitutionally left to the state government, which may or may not divest itself of some of its power by statute. In the absence of such statutes, however, such regulation is exclusively a state function.

15. Townships; Organization and Consolidation

Article VIII: Section 15. The board of supervisors of each organized county may organize and consolidate townships under such restrictions and limitations as shall be prescribed by law.

Constitutions of 1835 and 1850

The constitution of 1835 contained no similar provision. The 1850 constitution (Article X, Section 11) contained a similar provision.

Constitution of 1908

References in the 1850 section relating to highways and bridges were deleted in the 1908 version as it was felt that this subject was already treated in Article VIII, Section 10. In the 1908 version, “consolidate” townships was added, as it was felt that this authorization was needed particularly in the northern counties.

Judicial Interpretation and Opinions of the Attorney General

The provision is specific in granting boards of supervisors the power to consolidate townships and this power cannot be taken away by the legislature (Op. Atty. Gen., 1917, p. 337). On the other hand, general laws which permit disconnection of land from cities and villages under certain circumstances and which may result in a change of boundaries do not violate this provision, as the legislature if also by the constitution empowered to provide by general law for the incorporation of cities and villages. This includes the drawing of boundaries (Tribbett v. Village of Marcellus, 294 Mich. 607; Rood v. City of Lapeert, 294 Mich. 621).

Other State Constitutions

It appears that no other state constitution empowers counties directly to organize or consolidate townships. Generally the power to organize and consolidate townships is left to the legislature which may do so by general law with or without reference to the government of the county.

16. Drainage District Bonds

Article VIII: Section l5a. Any drainage district, established under provision of law, may issue bonds for drainage purposes within such district.

Constitutions of 1835 and 1850

No such provision was included in either the 1835 or 1850 constitution.

Constitution of 1908

This provision was not included in the original 1908 constitution. It is an amendment added pursuant to Joint Resolution 2, 1917, ratified April, 1917.

Judicial Interpretation

Under this section a drainage district is an entity capable of being sued (Royal Oak Drain District Oakland Count Michigan v. Keefe, 87F (2d) 786; a drain district is less of a municipal corporation than a city but exhibits the essential characteristics of a public corporation and is, therefore, an entity capable of being sued (Bloomfield Village Drain District v. Keefe, 119F (2d) 157).

Other State Constitutions

At least a dozen states provide for the creation of drainage districts. Some of these empower such districts to issue bonds, to provide for special assessments, to levy taxes on property or a combination of these methods. All of these provisions are intended to authorize drainage districts to operate as independent fiscal authorities.

Comment

The necessity for this provision might be reviewed.

General Comment to Part A on “Counties”

Delegates to the constitutional convention will have to be exceedingly wary in com-

paring county government in Michigan with county government in other states. It is both easy and fruitful to compare constitutional provisions of the several states and the nation with respect to such matters as the powers, duties, and organization of the executive, legislative, and judicial branches of state government. The model is historically the United States constitution. In dealing with the framework of local government within the states, however, no model exists in the national constitution. The national constitution makes no provision for local governments. It leaves to the states the power to create and deal with local governments. It follows, therefore, that while state constitutions, with variations, follow the national constitutions with respect to the framework of state government and therefore display a degree of uniformity, no such uniformity exists with respect to local government.

Local government organization including county government is in a real sense the creation of each individual state. What has emerged as local government in the states is the product of historical development, tradition, geography, and other factors. To the extent to which these factors vary among the states, the structure of local government varies.

In Michigan, as in the rest of the middle west, the county occupies a middle position in importance. The organization of local government in Michigan ante-dates the constitution of 1835. An ordinance passed by the Congress of the Confederation in 1785 authorized the organization of the western lands into “survey” or “congressional townships” six miles square. The Northwest Ordinance of 1787 authorized the governor of the Northwest Territory, which included Michigan, to create counties and townships and to appoint county and township officials. The organization of counties took place over a period extending from 1815 to 1891. Eighteen counties were organized at or before the time the constitution went into effect. Thirty-nine counties were organized at or before the time the 1850 constitution went into effect.

In 1825 and 1827, respectively, two acts were passed by the legislative council of the territory which effectively fixed the pattern of local government in Michigan. These acts did three things: (1) the township was created as a political unit; (2) the township was made into a unit of representation on the county governing body; and (3) important county and township officials were to be elected. Constitutionally, it was possible for the framers of the 1835, 1850, and 1908 constitutions to ignore the pattern established for the government of the territory. The fact is, however, that not only did they not choose to ignore it but they assumed that this was an irrevocable pattern upon which they created the whole complex of Michigan’s framework of local government. This may explain the absence of provisions relating to county government in the 1835 constitution and it may explain why in the 1850 constitution, as well as in the 1908 constitution, for example, there is no statement which confirms the existence of counties.

The framers of the 1908 constitution did not intend that the basic framework of the 1850 constitution should be changed. Indeed, they made much of the fact that, "In the revised constitution the old framework of government is most carefully preserved" and "no structural changes are proposed." Thus in fact, the provisions governing counties today are the same provisions which have governed the counties of Michigan for over 110 years.

Delegates to the convention now have the opportunity to make some fundamental decisions regarding the character of county government, its powers, its duties, its responsibilities and its relationship to other units of government. The legal framework which currently underlies county government cannot be changed except by explicit language in the constitution to the contrary. In the absence of such language it is accepted and fixed judicial doctrine that counties are creatures of the state. They possess only such powers as are conferred upon them by direct language in the constitution, or by statute. Clearly, in the absence of a direct constitutional grant of power, the counties are wholly subject to legislative discretion. The legislature can create counties and confer power upon them and it can abolish them and curtail their powers at will. The county is a quasi-corporation in that it is primarily an administrative agent of the state. It has corporate entity only insofar as it can be sued in its own name. It is not a wholly public corporation because it does not have powers which it may exercise on its own volition.

What counties in Michigan mayor may not do, except for what is specifically stated in the constitution, is provided for by statute to be found in Part II, Chapters 35 through 46 of Michigan Statutes Annotated (1936). These statutes comprise the general laws governing counties in Michigan. They are comprehensive and explicit. To the extent to which they deal with the details of county organization, administration, powers and duties, any changes in constitutional language and intent must ultimately be reflected in changes in these statutes.

In meeting the needs of county government in a changing society, delegates to the convention should consider the possibility of giving counties home rule powers similar to those granted cities and villages in the 1908 constitution. This would relieve the legislature of the burden of dealing with the details of county government in the same way in which it has relieved the legislature from dealing with the details of city government.

The Michigan constitution provides a basically uniform system of government for all 83 counties in Michigan. In considering what kind of constitutional provision is needed for county government, the delegates to the convention will be faced with several alternatives or combinations of alternatives:

1. Continue the present uniform system of county government.

2. Provide for optional forms of county government.

3. Provide home rule for some or all of Michigan's counties.

Several states provide constitutionally for optional forms of county government. Generally these provisions authorize the legislature to provide optional forms with the option as to which form is to be used being left to the local electorate. Virginia, Montana, New York, North Carolina, North Dakota and Oregon all permit optional law forms of county government, as does the 1961 draft of the Model State Constitution.

A number of states have constitutional home rule for counties, which authorizes the electorate in a county to adopt a county charter. California, Maryland, Ohio, Texas, Missouri, Louisiana, Washington, Florida, Minnesota, New York, Oregon, Alaska, and Hawaii all provide for county home rule for all or certain counties. The 1961 draft of the Model State Constitution also authorizes counties to adopt charters in addition to the provision for optional law forms of organization for counties.

There are several factors which should be considered in relation to county home rule:

1. Should a county home rule provision be restricted to authorizing counties to determine locally the organization of county government?

2. Should a county home rule provision give counties a grant of taxing authority independent of the legislature?

3. Should a county home rule provision give counties the authority to exercise powers and provide services without express statutory authorization?

These questions must be considered in relation to municipal home rule and the possibility of some effective provision for metropolitan area government. For example, if counties are given constitutional authority to provide services, what procedure will be used to reconcile the county's home rule power with the home rule power of cities and villages lying within the county? Questions such as these make the question of what kinds of constitutional provisions should be included for counties one of the more vexatious problems which will confront the convention.

B. TOWNSHIPS

by
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1. Townships, Corporate Character, Suits

Article VIII: Section 16. Each organized township shall be a body corporate, with such powers and immunities as shall be prescribed by law. All suits and proceedings by or against a township shall be in the name thereof.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a similar provision on townships. However, townships were recognized in the 1835 constitution by several references to township officers.

The 1850 constitution contained a provision identical to that found in the present constitution (Article XI, Section 2).

Constitution of 1908

The 1908 constitution continued without change the 1850 provision and there have been no amendments.

Judicial interpretation

The supreme court has held that the legislature has been authorized to confer upon townships powers concerning local matters by general laws and may impose conditions or limitations upon the right or extent of exercise of powers granted.[3]

Other State Constitutions

Townships are organized units of government in 22 states and there are a total of 17,198 organized townships in the United States. In eight of these states townships are called “towns.” The township form of government is found in the six New England states, three middle Atlantic states (New Jersey, New York, and Pennsylvania), eleven north central states, and to a very limited extent in South Carolina and Washington. In the other 28 states the township either does not exist at all or does not operate as an organized unit of government. Between 1942 and 1957 one state, Iowa, discontinued the township as an organized unit of government.[4]

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[3] City of Highland Park v. Dearborn Township, 285 Mich. 440.

[4] U.S. Bureau of the Census, 1957 Census of Governments, Vol. 1, No. 1 and No. 3.

A majority of the 22 states with organized township governments have references in their constitutions, although many do not have a provision similar to Section 16. The Model State Constitution makes no reference to townships.

Comment

See Comment under Section 18, below, this chapter.

2. Local Legislation

Article VII: Section 17. The legislature may by general law confer upon organized townships such powers of a local, legislative and administrative character, not inconsistent with the provisions of this constitution, as it may deem proper.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a provision similar to this. The 1850 constitution contained a provision authorizing the legislature to confer these powers upon "organized townships, incorporated cities and villages, and upon the boards of supervisors of the several counties" (Article IV, Section 38). There was no requirement that this be done by general law—thus, special local acts were possible.

Constitution of 1908

The 1908 constitution continued this provision of the 1850 constitution as it applied to townships, with two additions. First, the 1908 provision added the requirement that the legislature act by "general law," and second, the wording "not inconsistent with the provisions of this constitution" was added.

Judicial Interpretation

The Michigan supreme court has held in a case involving the issuance of bonds that townships have only such powers as statutes confer, and are subject to no obligations except such as are derived from statutory provisions.[5] The court also held that the township board is of special and limited jurisdiction, having no power or authority by constitutional mandate, but deriving sole authority from the legislature which is authorized but not compelled by the constitution to delegate certain legislative powers to the township board.[6]

[5] Township of Royal Oak v. City of Pleasant Ridge, 295 Mich. 284.

[6] Township of Dearborn v. Dearborn Twp. Clerk, 334 Mich. 673.

Other State Constitutions

A number of states prohibit special or local legislation dealing with townships. For specific provisions see Index Digest, pp. 1085-1088.

Comment

See Comment under Section 18, below, this chapter.

3. Township Officers

Article VIII: Section 18. There shall be elected on the first Monday of April in each odd numbered year for a term of two years in each organized township one supervisor, one township clerk, one commissioner of highways, one township treasurer, and not to exceed four constables, whose powers and duties shall be prescribed by law. Justices of the peace shall be reclassified as shall be prescribed by the legislature to conform with the provisions of this section providing for biennial township elections.

Constitutions of 1835 and 1850

The 1835 constitution did not include a provision specifying township officials or their election. The constitution of 1850 contained a provision similar to the first sentence of the present provision. However, the 1850 constitution provided for annual election of officials and, in addition to the officers now specified, provided for the election of one school inspector and one overseer of highways for each highway district.

Constitution of 1908

The original 1908 provision was substantially similar to the 1850 provision in that it provided for annual election of all the officials enumerated in the 1850 provision except for the school inspector. This section was amended in 1943 to increase the term of office from one year to two. The 1943 amendment also deleted the original provision for "one overseer of highways for each highway district." The last sentence of the present provision relative to the re-classification of justices of the peace was added by the 1943 amendment. There has been no significant judicial interpretation of this provision as amended.

Other State Constitutions

Most of the states which provide constitutionally for townships do not specify as many constitutional officers as Michigan. The two-year term appears to the most common. The Model State Constitution does not provide for townships or their officers.

Comment

The 1957 Census of Governments indicates that the townships (and towns) in the United States range widely in their scope of governmental powers and organization and that most of them perform only a very limited range of services for predominantly rural areas. However, in some states, the Census Bureau notes that townships are vested with broad powers and perform many functions commonly associated with municipalities. The Census of Governments indicates that in some states there has been a transfer of township functions to the county and a diminution in the importance of the township.

In Michigan in recent years the counties in both rural and urban areas have assumed greater responsibilities in the area of local government services, which might appear to suggest a decline in the importance of townships. However, parallel with this, the legislature has tended also in recent years to give townships the authority to perform a wide variety of "municipal" services—that is, services which previously had been provided only by incorporated cities and villages. The trend in Michigan to increasing the powers and functions of townships is in contrast to many states where township powers have been considerably reduced.

There are substantial differences in the functions provided by townships in rural areas as compared with the functions of townships in urban areas in Michigan. The township in rural areas serves primarily as a unit for election administration and for assessment and collection of the property tax. In urban areas the township provides in addition a wide variety of services such as police, fire, refuse collection and disposal, sewage disposal, zoning, etc.

While in recent years the legislature has provided greater flexibility to townships in terms of functions, the organization of townships has remained the same except for the changes embodied in the charter township act of 1947. And, even the charter township must have the officers specified in Article VIII, Section 18. The board in a charter township may appoint a township superintendent, serving at the will of the board, to act as the administrator of township affairs. For the townships in urban areas the charter township act provides some additional flexibility and, of course, townships in urban areas can incorporate as home rule cities or villages to obtain substantial flexibility. Provisions relating to taxation and indebtedness for capital improvements are also more liberal under the charter township act.

There are a number of questions that might be considered by the convention in connection with the constitutional provisions relating to townships:

1. Should reference to the township be omitted from the constitution, leaving full discretion to the legislature?

2. Should the township be eliminated entirely as a unit of government with services in the rural areas to be provided by the county and in the urban areas by incorporated cities or villages?

3. Should the township remain a constitutional unit of government, but with greater flexibility through eliminating the constitutionally specified officers and substituting some type of "home rule" charter provision or through permitting the legislature to develop optional charter plans?

4. Should townships be granted even broader powers so that those located in urban areas can undertake additional responsibilities or should the ability to incorporate as a home rule city or village be considered an adequate solution?

The decision on these questions will be related to the decisions on municipal home rule, county home rule, and metropolitan area provisions.

Consideration might be given to eliminating the requirement in Section 18 for the election of a highway commissioner in view of the assumption of the highway function by the state and county road commissions since 1931. The reference to reclassification of justices of the peace in Section 18 might be covered more appropriately in Article VII, Section 15, which provides for the election of justices.

4. Public Utility Franchises

Article VIII: Section 19. No township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless such proposition shall have first received the affirmative vote of a majority of the electors of such township voting thereon at a regular or special election.

Constitutions of 1835 and 1850

Neither the 1835 nor the 1850 constitution contained a similar provision.

Constitution of 1908

This was a new section in the 1908 constitution. The "Address to the People" by the convention indicated that the purpose of this section was to secure publicity in the granting of franchises by townships and to preserve the rights of townships when granting franchises. This section has not been amended since 1908, nor has there been any significant interpretation by the courts.

Other State Constitutions

No other state has a provision comparable to this section of the Michigan constitution.

Comment

This is one of a number of provisions contained in the constitution relating to public utilities and franchises. A similar provision applies to cities and villages, but the requirement is for a three-fifths vote of the electors (see Article VIII, Section 25).

C. CITIES AND VILLAGES

by

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1. Incorporation

Article VIII: Section 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

Constitutions of 1835 and 1850

The 1835 constitution contained no provision for the incorporation of cities and villages. In the 1850 constitution, Article XV, Section 13 states that the legislature shall provide for the incorporation and organization of cities and villages, but without reference to the use of the general law process. Special legislation affecting individual cities and villages was therefore possible. The legislature was further empowered to restrict the power of cities and villages to tax, borrow money, contract debt, and loan their credit.

Constitution of 1908

The provisions of the 1908 constitution, Article VIII, Section 20 (as noted), requiring general law for incorporation of cities, and Section 21, empowering each city to frame, adopt and amend its own charter and to pass all ordinances relating to its municipal concerns, subject to the constitution and general laws of the state, were designed to give cities and villages more home rule than they formerly possessed, and almost exclusive rights in conducting their affairs, in harmony with the constitution and general laws.[7]

Judicial Interpretation

Judicial determinations relative to the status of cities and villages have been numerous. Only a few of the more important are presented here. The basic principle depicting their nature is presented in the following statements:

[7] People v. Sell, 310 Mich. 305.

> Cities are municipal corporations deriving their powers from the state, of which they are agencies for carrying on local municipal government.[8]
>
> The present constitution recognizes, as former constitutions have recognized, the general control of the legislature over cities.[9]

While the authority and powers exercised under "home rule" charters will be discussed in, the next section, an important decision to note here is:

> Under this section of the Michigan constitution and the Home Rule Act (Public Acts, 1909, No. 279) providing for freeholder's charters for cities, the system is one of general grant of rights and powers, subject only to certain enumerated restrictions, instead of the former method of granting new enumerated rights and powers definitely specified.[10]

With respect to tax or debt limits, the court has held:

> The legislature, under this section of the state constitution, has plenary power to regulate the amount of municipal indebtedness and the rate of taxation of cities.[11]

Other State Constitutions

Two states, Ohio and West Virginia, have provisions on incorporation similar to Michigan; i.e., the legislature is empowered to provide for incorporation through general law. Several other states so authorize their legislatures and, in addition, permit general laws to be altered, amended, or repealed; e.g., Virginia, California, Utah, Washington, Idaho.

In many states special or local legislation for incorporation is forbidden; e.g., Alabama, Arizona, Florida, Illinois, Iowa, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Wyoming.

Comment

Home rule in Michigan was made possible in 1908 by the constitutional requirement that the legislature through use of general law provide for the incorporation of

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[8] Streat v. Vermilya, 268 Mich. 1.

[9] City of Kalamazoo v. Titus, 208 Mich. 252.

[10] Gallup v. City of Saginaw, 170 Mich. 195.

[11] Harsha v. Detroit, 261 Mich. 586.

cities and villages. This provision is not "self-executing" in nature as it requires positive action on the part of the legislature to enact the necessary legislation. Whether Michigan's non-self-executing type of home rule should be revised is a moot question. More basic aspects of home rule will be commented on in the next section. In general, Section 20 has been adequate and no substantial changes appear necessary. It may be necessary to reconsider the matter of incorporation of cities and villages if optional forms of metropolitan government are to be provided.

Finally, consideration might be given to the possibility of prohibiting general legislative acts, "which revoke, decrease, or limit any power or immunity possessed by the city at the time of their passage or which add burdens to cities or villages, from becoming effective unless approved by the municipality affected."[12]

2. Charters; Laws; Ordinances

Article VIII: Section 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state.

Constitutions of 1835 and 1850

No such provision appears in either the 1835 or the 1850 constitution owing to the absence of any grant of home rule to cities or villages.

Constitution of 1908

The section ratified by the 1908 vote did not include the phrase "to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and... ." This was added by amendment at the November, 1912, election.

Judicial Interpretation

There is a large body of case law dealing with the framing of municipal charters. As the court decisions elaborate at great length on the provisions contained in Section 21, only the basic points are enumerated here.

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[12] Preliminary Report of the Michigan Constitutional Revision Study Commission, Honorable George E. Bushnell, General Chairman, 1942, p. 7, Article VIII.

> In the absence of constitutional provision and restriction, matters of local municipal concern may be determined by the citizens of the municipality.[13]
>
> Among the powers which the cities could assume under this section, and Section 20 of the state constitution and Public Acts 1909, No. 279, as amended are: the right to legislate as to the salaries of its officers, their subordinates and employees;[14] the right to determine what their bonding limit shall be up to a maximum of eight per cent of their real personal property;[15] the right to provide for the retirement of civil servants on pension and the establishment of a pension fund.[16]

Even with respect to court review, the state supreme court has held that:

> The court may not interfere with municipal authorities in the exercise of their discretionary duties, as long as their action is not contrary to law or sound public policy.[17]
>
> Every municipal charter is subject to the constitution and general laws of the state.[18]

Other State Constitutions

The power to frame municipal charters has been granted to political subdivisions generally by 20 states. Four other states grant this power to specified municipalities. There is usually added the provision that such power is subject to the constitution and laws of the state. This power can be either self-executing, as in Ohio, or non-self-executing, which requires state enabling legislation as in Michigan.

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[13] Harper v. City of Saginaw, 270 Mich. 256.

[14] Burton v. Detroit, 190 Mich.

[15] City Commission City of Jackson v. Vedder, 299 Mich. 291.

[16] Bowler v. Nagel, 228 Mich. 434.

[17] Veldman v. City of Grand Rapids, 275 Mich. 100.

[18] City of Hazel Park v. Municipal Finance Commission, 317 Mich. 582.

Comment

It is a well recognized legal concept that municipalities are subordinate units of the state government and, in the absence of specific constitutional limitations, the legislature has plenary power over all local units of government, including cities and villages. The 25-year period immediately preceding the adoption of the constitution of 1908 marked the high point of legislative interference with local affairs in Michigan.

Embodied in Article V, Section 30 (prohibiting special or local acts) and Article VIII, Sections 20 to 25 are the far-reaching "home rule" provisions which in 1908 represented a major step forward and even today are found in only about half of the state constitutions.

The three primary objectives of municipal home rule are:

1. To prevent legislative interference with local government.

2. To enable cities to adopt the kind of government they desire.

3. To provide cities with sufficient powers to meet the increasing needs for local services.[19]

Attempts have been made to classify home rule practices in the various states, but the categories established generally are meaningless apart from the specific provisions appearing in a particular constitution. The Michigan provisions are referred to as non-self-executing, constitutional home rule, as distinguished from self-executing home rule where the constitution actually spells out the procedure for organization and grants specific powers to local units. In the face of long-standing and much used home rule acts passed by the Michigan legislature pursuant to the mandate in Section 20, this distinction has little meaning today. More important are the differences of opinion among proponents of home rule relative to the grant of powers.

This phase of home rule—the autonomy of local units in the exercise of powers and the carrying out of functions relative to local affairs-bears further examination. While a radical change in Michigan's home rule system presumably is unnecessary, there are some improvements which could be made. One of these lies in the area of granting broader fiscal authority and taxing power at the local level. Another is the possibility of a more effective delineation of matters of statewide and local concern. The question of legislative encroachment continues to be vexatious.

The convention may wish to give consideration to the following methods that have been suggested to strengthen municipal home rule—

[19] Rodney L. Mott, "Home Rule For America I s Cities ,II American Municipal Associations, Chicago, 1949, p. 7.

1. The insertion of a requirement that liberal construction of home rule powers be made in all cases not in specific conflict with state law.

2. Providing for exclusive jurisdiction by cities and villages over matters of local governmental structure, personnel and administration.

3. Strengthening the concept of state and local sharing of regulatory functions by saving local powers unless there is specific pre-emption of authority by the state.

3. Power to Acquire and Maintain Parks, Hospitals, Etc.

Article VIII: Section 22. Any city or village may acquire, own, establish and maintain, either within or without its corporate limits, parks, boulevards, cemeteries, hospitals, almshouses and all works which involve the public health or safety.

Constitutions of 1835 and 1850

No such provision is to be found in the two earlier constitutions. Under both the 1835 and 1850 constitutions cities and villages had only such powers as were conferred by the legislature.

Constitution of 1908

This section was first included in the 1908 constitution. It presumably was placed here in accordance with and as a supplement to the home rule power.

Judicial Interpretation

There has been considerable litigation over the exercise of legislative discretion in conferring local powers on the municipalities as it relates to the above objects.

> This provision is not self-executing but depends upon legislative enactment to give it effect.[20]
>
> In conferring local powers the legislature may give extensive capacity to acquire or hold property for local purposes, or it may confine the authority within narrow bounds, and what it thus confers it may enlarge, restrict or take away at pleasure.[21]

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[20] Detroit v. Oakland Circuit Judge, 237 Mich. 446.

[21] People ex rel. Detroit Park Commissioner v. Common Council of Detroit, 28 Mich. 228.

Under this section and Section 23 of the state constitution, a city may acquire and operate a power plant outside its limits for the purpose of supplying itself and its inhabitants with electricity.[22]

Other State Constitutions

Several states in their provisions for general powers to municipalities merely stipulate that the legislature may grant them health and welfare powers (see Missouri constitution, Article IV, Section 37). Or note the Ohio provision that municipalities have the authority to adopt and enforce within their limits local police, sanitary and other similar regulations not in conflict with general laws (Ohio constitution, Article XVIII, Section 3).

A more sweeping general grant is that provided by Massachusetts; namely, a municipality may exercise such powers, privileges, and immunities as are deemed necessary or expedient for the regulation, and government thereof so long as they are not repugnant to the constitution.

Comment

Whether it is necessary to enumerate the array of activities or facilities listed in this section is a debatable question. It may be desirable to reword this section in light of whatever revisions are made with respect to intergovernmental arrangements at the local level, particularly in the metropolitan areas.

4. Public Utilities; Power to Own and Operate

Article VIII: Section 23. Subject to the provisions of this constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof; and may also sell and deliver heat, power and light without its corporate limits to an amount not to exceed 25 per cent of that furnished by it within the corporate limits, and may also sell and deliver water outside of its corporate limits in such amount as may be determined by the legislative body of the city or village; and may operate transportation lines without the municipality within such limits as may be prescribed by law; Provided, That the right to own or operate transportation facilities shall not extend to any city or village of less than 25,000 inhabitants.

[22] City of Traverse City v. Blair Township, 190 Mich. 313.

Constitutions of 1835 and 1850

No reference to owning or operating a public utility by a city or village appears in either the 1835 or 1850 constitutions.

Constitution of 1908

This provision is new, appearing for the first time in the 1908 constitution. An amendment passed in 1944 deleted the 25 per cent restriction on the sale and distribution of water outside city limits which had been contained in the original 1908 provision.

The power granted municipalities to sell and deliver water, heat, power and light without their corporate limits is designed to prevent the duplication of plants in contiguous localities and to allow the extension of the benefits of such improvement to territory not sufficiently populous to warrant the establishment of such activities as either a public or a private enterprise.

Other State Constitutions

Two states, Arizona and Oklahoma, permit municipal corporations to engage in any business or enterprise which may be engaged in by person, firm, or corporation with respect to ownership and operation of public utilities by franchise. The two most detailed constitutional provisions, similar in nature to that of Michigan, are provided by California and Ohio. California has no limit on the amount of service (i.e., heat, water, power, light) which may be sold outside the seller's (municipal) boundaries. Ohio does place a limit on the amount which can be sold but permits a 50 per cent ratio, whereas the Michigan constitution restricts such sales, except of water, to 25 per cent of the amount used within its boundaries. The Michigan constitution also confers on the legislature the power to determine the extent to which a municipal transportation system may operate outside its corporate limits.

Comment

The courts have construed this section to mean that a city or a village cannot engage in any business but must restrict itself to public utilities per se.

The requirement of a minimum population of 25,000 as a prerequisite for the operation of transportation facilities may be too restrictive under certain circumstances. Smaller cities may be forced in times of emergency to undertake such services for their residents because of a lack of interest by private enterprise.

5. Public Utilities; Bonded Indebtedness

by
Miller, Canfield, Paddock and Stone
Stratton S. Brown

Article VIII: Section 24. When a city or village is authorized to acquire or operate any public utility, it may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law: Provided, That such mortgage bonds, issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such city or village, but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than 20 years from the date of the sale of such utility and franchise on foreclosure.

Constitutions of 1835 and 1850

Neither the 1835 nor 1850 constitution contained comparable provisions.

Constitution of 1908

This section was included in the 1908 constitution as a part of the grant of home rule powers to cities and villages. This section has not been amended.

Judicial Interpretation

This section of the state constitution provides that any city or village which is authorized to acquire and operate a public utility may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law, provided that the mortgage bonds do not impose any liability upon the city or village, but are secured only upon the property and revenues of the public utility, including a franchise thereon. This constitutional provision has had a most curious history. In Light and Power Company v. Village of Hart, 235 Mich. 682, the supreme court held that this section was self-executing and was not dependent upon enabling legislation or charter provisions. However, in City Commission v. City Attorney, 313 Mich. 644, the supreme court apparently reversed its decision and held that this section was not self-executing and that specific authority for this must be found in the city home rule act and in the local city charter. The city home rule act at the time of this case, and now, contains as a permissive grant of power to cities, the right to issue mortgage revenue bonds, but the charter of the City of Sault Ste. Marie (the city involved in this case) did not contain this power as the city had not written it into its charter. The supreme court, in addition, stated that a general

provision in the city charter to the effect that the city would have all of the powers that a city could have under the provisions of the home rule act was not broad enough to incorporate this power in the city charter. In Gentzler v. Constantine, 320 Mich. 394, the supreme court assumed that this section of the state constitution was not self-executing but used some rather peculiar language, that possibly could be construed as throwing a cloud on the decision in the Sault Ste. Marie case. At least for the present, it must be assumed that the provisions of Article VIII, Section 24, of the state constitution are not self-executing and that it is dependent upon appropriate provisions in the various home rule acts and in the city or village charter. In Light and Power Company v. Village of Hart, supra, the court also states that the legislature may not by law place a limit on the amount of mortgage revenue bonds that can be issued. In Gas and Electric Company v. Dowagiac, 278 Mich. 522, the supreme court held that the question of granting a franchise and issuing mortgage revenue bonds, which must be submitted to the electors, is not a proposition which is restricted to tax-paying electors under the provisions of Article III, Section 4, of the state constitution. In this case the court further construed this section of the constitution as not requiring the exhaustion of the general obligation bonding power of the city before mortgage revenue bonds could be issued.

The supreme court in several cases has held that Section 25 of Article VIII of the constitution must be read together with Section 24. Section 25 of Article VIII of the constitution requires, among other things, a three-fifths vote of the electors of the city or village as a condition precedent to either (a) the acquiring of a public utility, or (b) the granting of a public utility franchise. As a result, in order to issue mortgage revenue bonds under Section 24, it is necessary to submit to the electors the question of granting the franchise for the mortgage revenue bonds to meet the requirements of Article VIII, Section 25, and, if the city or village has not voted to acquire the utility previously, the proposition to acquire also must be submitted to the electors.

Other State Constitutions

A review of the constitutional provisions from other states having constitutional provisions for city and village home rule indicates that only the states of Missouri and Utah have specific authorization for revenue bonds or mortgage revenue bonds for public utilities in their constitutions.

Comment

As a practical matter, mortgage revenue bonds in the recent past have been issued in Michigan only in connection with electric utilities. Water system and improvements thereto have been financed since 1933 under the provisions of the revenue bond act (Act 94, Public Acts of Michigan, 1933, as amended). Moreover, all electric utilities improvements since 1954 have been financed by revenue bonds issued under the provisions of the revenue bond act as a result of the amendment to the

revenue bond act enacted in 1954, which included electric utilities as improvements which can be financed by revenue bonds. The financing of constitutional utilities such as described in Article VIII, Section 23, of the constitution (utilities for supplying water, heat, light, power, and transportation) under the revenue bond act was upheld by the Michigan Supreme court in Young v. Ann Arbor, 267 Mich. 241, and many later cases. The procedures provided by the revenue bond act, which place a lien only on the revenues of the utility and do not involve granting a franchise are much simpler. It is not necessary to have an election to grant a franchise and it is not necessary to execute a trust indenture to secure the bonds. Moreover, the bonds can be issued for a considerably longer period of time (up to 40 years) under the revenue bond act. Mortgage revenue bonds can be issued for not more than 20 years because that is the maximum length of time that the franchise to the bondholder can be granted under the provisions of this section. In view of the foregoing, and in view of the rather checkered history of this constitutional provision in the supreme court, Section 24 of Article VIII serves no useful purpose and consideration should be given to eliminating this provision.

6. Elective Franchise; Taxation; Public Utilities

by
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Article VIII: Section 25. No city or village shall have power to abridge the right of elective franchise, to loan its credit, nor to assess, levy or collect any tax or assessment for other than a public purpose. Nor shall any city or village acquire any public utility or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city or village voting thereon at a regular or special municipal election; and upon such proposition women taxpayers having the qualifications of male electors shall be entitled to vote.

Constitutions of 1835 and 1850

The constitution of 1835 contained no comparable provisions.

In the constitution of 1850 the legislature was authorized to confer on cities and villages such powers of a local, legislative and administrative character as they deemed proper (Article IV, Section 38) and to restrict their powers of taxation, borrowing money, contracting debt and loaning their credit.

Constitution of 1908

The “Address to the People” of the 1907-08 convention states in connection with this section:

> The transfer of the powers of legislation from the state legislature to the people of the municipalities or their representatives necessitated the imposition of certain checks and prohibitions designed to secure conservative action on the part of those to become responsible for the future conduct of such affairs.

The major change resulting from this provision of the 1908 constitution was to take from the state legislature the authority to provide by statute for the matters referred to in this section. This section has not been amended.

Judicial Interpretation and Opinions of the Attorney General

The supreme court has held that a city charter providing for electing city commissioners by the proportional representation system by the "Hare system" of proportional and preferential voting violated this section.[23]

There have been a series of decisions and opinions defining the prohibition of lending credit or taxing for other than a public purpose. The court has pointed out that the term "public purpose" cannot be given a definite meaning that will be applicable under all circumstances.[24]

The courts have held that municipalities cannot exercise power of taxation in aid of private corporations and the attorney general has ruled that municipalities cannot lend their credit in aid of private enterprise.[25]

In regard to "public utilities," the court has held that the term is confined to "public utilities for supplying water, light, heat, power and transportation" and that garbage disposal and sewage treatment systems are not public utilities within the meaning of this section.

The court has pointed out that this section does not give the electors power to grant franchises, but transfers to them the power formerly held by the common council to make a franchise irrevocable. Insofar as revocability of franchises is concerned, this section limits the legislature in authorizing franchises and the municipality in granting franchises.[26]

Other State Constitutions

The portion of this section specifying that "no city or village shall have power to abridge the right of elective franchise" appears to be unique among state constitutions.[27]

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[23] Watt1es v. Upjohn, 211 Mich. 514.

[24] Hays v. City of Kalamazoo, 316 Mich. 443.

[25] See M.S.A., Vol. 1, pp. 394 and 395; 1959 Cumulative Supplement, pp. 163 and 164.

[26] See M.S.A., Vol. 1, pp. 394 and 395; 1959 Cumulative Supplement, pp. 163 and 164.

[27] Index Digest, p. 72.

A number of states generally prohibit levying taxes for other than public purposes. Cities are specifically prohibited from appropriating money or lending credit for any company, association or corporation in a sizeable number of states.

The provision of this section on acquiring public utilities and granting irrevocable franchises seems to be unique among state constitutions.[28]

Comment

The prohibition on abridging the right of elective franchise could be covered either in Article III on the elective franchise, or consideration could be given to leaving this matter to legislative enactment in the home rule act. The prohibition on taxing and lending credit might be covered more appropriately in a general prohibition for all governmental units in the Article X on finance. The provision authorizing women taxpayers to vote is obsolete and could be omitted.

The constitution of 1908 contains several other sections dealing with public utility franchises. Section 19 of this article prohibits townships from granting irrevocable public utility franchises without approval of a simple majority of the voters while Section 25 requires a three-fifths vote for cities and villages. Sections 28 and 29 also relate to public utility franchises. See the Comment section under Article VIII, Section 28 concerning these various provisions.

[28] Index Digest, p. 90-91.

D. GENERAL PROVISIONS

by

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1. Highways; Powers of Supervisors; County or District Road System; Tax Limitation

Article VIII: Section 26. The legislature may by general law provide for the laying out, construction, improvement and maintenance of highways, bridges and culverts by the state and by the counties and townships thereof and by road districts; and may authorize counties or districts to take charge and control of any highway within their limits for such purposes. The legislature may also by general law prescribe the powers and duties of boards of supervisors in relation to highways, bridges and culverts; may provide for county and district road commissioners to be appointed or elected, with such powers and duties as may be prescribed by law; and may change and abolish the powers and duties of township commissioners and overseers of highways. The legislature may provide by law for submitting the question of adopting the county road system to the electors of the counties, and such road system shall not go into operation in any county until approved by a majority of the electors thereof voting thereon. The tax raised for road purposes by counties shall not exceed in anyone year five dollars upon each one thousand dollars of assessed valuation for the preceding year.

Constitutions of 1835 and 1850

The 1835 constitution had no provision similar to this. The constitution of 1850, as amended in 1893 and 1899, had a provision (Article IV, Section 49) somewhat similar to the present provision through which the state legislature was given much the same authority to authorize county or township commissioners to take charge and control of any highways within their limits. The tax to be raised in anyone year for such purpose could not exceed $2.00 per $1,000 of assessed valuation. Other limitations were placed on indebtedness as well.

Constitution of 1908

The original provision of the 1908 constitution increased the 1850 limit of taxation for road purposes from $2.00 to $3.00 per $1,000 of assessed valuation and added authorization for the legislature to change and abolish the powers and duties of township commissioners and overseers of highways.

The provision was amended to its present form in 1917. The 1917 amendment added to the original 1908 provision authority for the legislature to provide for the performance of these highway functions by the state as well as by counties, townships and road districts. The 1917 amendment also increased the tax limitation from $3.00 to $5.00 per $1,000 of assessed valuation.

Judicial Interpretation

The court has held the legislature has power to make the state highway commissioner's decision final as to the necessity for repairing a highway and that this section confers broad powers on the legislature respecting highways.[29] The legislature has power to delegate to the county boards of supervisors power to appoint county road commissioners.[30]

Opinions of the Attorney General

The attorney general has held that the county road commission is not responsible to the board of supervisors, nor has the board any authority or control over the road commission, except as to appointment, removal and audit of accounts as provided by law.[31] The attorney general has also held that the voters cannot increase the millage for road purposes in excess of the maximum provided for in this section.[32]

Other State Constitutions

California and Missouri appear to be the only states with a provision similar to that contained in the Michigan constitution except for the tax limitation at the end of the section. The Missouri constitution limits the tax to $3.50 per $1,000 of assessed valuation while the California constitution requires approval by a majority of two-thirds of the qualified electors of a district to set up a county road system without stipulating a tax maximum.

Several states authorize the legislature to provide for the formation of road districts, either in specified counties (Alabama), or by general law (Louisiana, Washington).

Comment

The grant of authority to the state legislature contained in Section 26 is plenary and needs little amplification. In order to avoid doubt as to its authority in related vital functions, the word "drains" might be added after "culverts." As the township

[29] Attorney General v. Bruce, 213 Mich. 532.

[30] Matthews v. Montgomery, 275 Mich. 141.

[31] Op. Atty. General, May 23, 1957, No. 2945.

[32] Op. Atty. General, August 13, 1957, No. 3053

no longer functions as a road district the reference to township commissioners and overseers of highways is superfluous. However, deletion of this reference should be made in conjunction with revision of Section 18, so as to remove any reference to the township commissioner of highways.

Consideration might be given to reappraisal of the limitation of $5.00 per $1,000 of assessed valuation for road tax purposes in the light of the use of gas and weight taxes for some of these purposes. Possibly some other type of control could be substituted which would not require the stipulation of a fixed amount imbedded in the constitution.

2. Highways; Vacation; Alteration

Article VIII: Section 27. The legislature shall not vacate nor alter any road laid out by commissioners of highways, or any street, alley or public ground in any city or village or in any recorded town plot.

Constitutions of 1835 and 1850

There was no comparable provision in the 1835 constitution. A provision quite similar to this one appears in the 1850 constitution, Article IV, Section 23. The 1850 provision had an added, limitation preventing the state legislature, by private or special law, from selling or conveying any real estate belonging to any person.

Constitution of 1908

The 1908 provision placed the prohibition against sale of real estate in Article V, Section 31 and added herein “alley or public ground” to the prohibition against vacating or altering any street. Section l7 is in the nature of a provision which should be considered in conjunction with the preceding provision, Section 26. There has been little controversy and court action based on this provision.

Other State Constitutions

At least 25 states have similar provisions forbidding the altering or vacating of roads, streets or alleys laid out by highway commissioners. Few refer to such limitation specifically as recorded in a “town plat.”

Comment

As this section enjoins the legislature from interfering with essentially a matter of local concern, there is little to consider here.

3. Highways, Streets, Etc.; Use by Utilities; Control

Article VIII: Section 28. No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from each city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

Constitutions of 1835 and 1850

No such provision appears in either the 1835 or 1850 constitution. The authority granted cities, villages and townships by this section previously was exercised in its entirety by the state legislature.

Constitution of 1908

This provision was new in the 1908 constitution. Professor John A. Fairlie, a delegate to the convention, stated that:

> One of the most important sections in the revised constitution is that reserving to cities, villages, and townships the reasonable control of their streets and public places, and more specifically requiring the consent of the local authorities for the use of the highways or streets for any public utility. ...(This) provision serves to prevent the legislature from granting rights in the public streets of a local district.[33]

This section has not been amended.

Judicial Interpretation

The courts have held that in adopting this provision the people took from the legislature certain powers over municipalities and vested in municipalities reasonable control over their streets.[34] The reasonable control of their streets granted to municipalities may not be taken away by the courts, by individuals, by administrative bodies or by the legislature.[35] The court has also held-that the term “corporation

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[33] John A. Fairlie, The Michigan Constitutional Convention, May, 1908, p. 10.

[34] Red Star Motor Drivers Assn. v. Detroit, 234 Mich. 398.

[35] Highway Motbrbus Co. v. City of Lansing, 238 Mich. 146.

operating a public utility" includes municipal corporations and municipal utilities are therefore subject to the provision of this section.[36] There have been a substantial number of decisions regarding what constitutes "reasonable control" of streets and the use thereof by public utilities.[37]

Other State Constitutions

Municipalities are usually vested with the power to control use of their streets by public utilities. Typical constitutional provisions are found in the constitutions of Arizona (Article XV, Section 3); California (Article XI, Section 19); and Colorado (Article XXV).

Comment

The basic authority of a municipality over the control of its streets, alleys, and other public places is made specific by this section. Such controls are generally considered desirable, except of course, as the exercise of such controls may conflict with a more basic responsibility of the state for the general welfare. It is conceivable that conflicts may arise in connection with provisions for metropolitan agencies, should home rule powers be granted to either counties or newly formed jurisdictions within the framework of a revised constitution. More will be said about this issue in connection with Section 31.

This section contains only a portion of the numerous provisions in Article VIII relating to public utilities which include:

1. A public utility must obtain a franchise from each city, village and township before transacting a local business therein (Section 28).
2. No public utility has the right to use the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township (Section 28).
3. No franchise shall be granted by any municipality for more than 30 years (Section 29).
4. No such public utility franchise shall be granted which cannot be revoked at the will of the city or village (Section 25) or township (Section 19), unless approved by the electors—a simple majority in townships (Section 19) and a three-fifths majority in cities and villages (Section 25).
5. Finally, there are a series of provisions relating to the power of cities and villages and metropolitan districts to own, acquire, operate, and incur indebtedness for public utilities (Sections 23, 24, 25, and 31).

[36] Bay City Plumbing and Heating Co. v. Lind, 235 Mich. 455.

[37] See M.S.A., Vol. 1, pp. 398-402 and 1959 Cumulative Supplement, pp. 166-170.

4. Duration of Franchise

Article VIII: Section 29. No franchise or license shall be granted by any municipality of this state for a longer period than thirty years.

Constitutions of 1835 and 1850

Neither the 1835 nor 1850 constitution contained a similar provision,

Constitution of 1908

This section was new to the 1908 constitution. The purpose of including this provision was "to guard against the grant of franchises beyond the life of one generation, even by a vote of the present inhabitants."[38]

Judicial Interpretation

This section relating to "municipality" does not include counties.[39] This section is not a grant of authority to issue franchises, but rather establishes a time limit on franchises which the legislature may authorize municipalities to grant.[40]

Other State Constitutions

The most common limitation on the granting of public utility franchises found in other state constitutions is that the franchise is not to be exclusive. However, several states also specify time limits: e.g., Kentucky, 20 years; Arizona and Oklahoma, 25 years; and Alabama and Virginia, 30 years.

5. Ports and Port Districts

Article VIII: Section 30. The legislature may provide for the in corporation of ports and port districts, and confer power and authority upon them to engage in work of internal improvements in connection therewith.

Constitutions of 1835 and 1850

No comparable provision appeared in either the 1835 or 1850 constitution.

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[38] John A. Fairlie, The Michigan Constitutional Convention, May, 1908, p. 10.

[39] Wayne County Prosecuting Attorney v. Grosse Ile Bridge Co., 318 Mich. 266.

[40] City of Niles v. Michigan Gas and Electric Co., 273 Mich. 255.

Constitution of 1908

This section was not a part of the original 1908 constitution. It was added by amendment as a new section at the April, 1923, election. There have been no significant court decisions.

Other State Constitutions

Several states provide for the incorporation of ports and port districts and authorize the state legislature to provide by general law for their operation. Louisiana has very detailed provisions in its constitution with respect to organization and financing.

The constitutional provision itself does not appear to have created any problems which may have been encountered by port districts in Michigan. The constitutional grant of authority to the legislature is comprehensive.

In 1945 the voters approved an amendment to Article X, Section 14 relating to the general prohibition against internal improvements. Harbors of refuge and waterways were added to the improvements specified in the amendment, as activities in which the state could engage. Consideration might be given to adding "ports" to the specified improvements. If this were done, this section would appear to be unnecessary.

6. Metropolitan Districts; Incorporation; Purposes; Powers

Article VIII: Section 31. The legislature shall by general law provide for the incorporation by any two or more cities, villages or townships, or any combination or parts of same, of metropolitan districts comprising territory within their limits, for the purpose of acquiring, owning and operating either within or without their limits as may be prescribed by law, parks or public utilities for supplying sewage disposal, drainage, water, light, power or transportation, or any combination thereof, and any such district may sell or purchase, either within or without its limits as may be prescribed by law, sewage disposal or drainage rights, water, light, power or transpiration facilities. Any such districts shall have power to acquire and succeed to any or all of the rights, obligations and property of such cities, villages and townships respecting or connected with such functions or public utilities: Provided, That no city, village or township shall surrender any such rights, obligations or property without the approval thereof by a majority vote of the electors thereof voting on such question. Such general law shall limit the rate of taxation of such districts for their municipal purposes and restrict their powers of borrowing money and contracting debts. Under

> such general law, the electors of each district shall have power and authority to frame, adopt and amend its charter upon the approval thereof by a majority vote of the electors of each city, village and township, voting on such question, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this State.

Constitutions of 1835 and 1850

No provision empowering the creation of metropolitan districts appeared in either the 1835 or 1850 constitution.

Constitution of 1908

The present provision was added by amendment in 1927, having been ratified at the April election. The action made possible by Section 31 is not self executing. The legislature was merely authorized to enact general laws to establish districts as therein mentioned.

Other State Constitutions

Florida, while not providing in its constitution for metropolitan districts as such, does provide for a county home rule charter which may be adopted by the electors of the county. Under such a charter the powers and the functions of any municipal corporation or other governmental unit in the county may be transferred to the board of county commissioners. This is applicable only to Dade County in which the city of Miami is located. (See Article VIII, Section 11).

California permits its counties to provide many municipal functions to incorporated or unincorporated municipalities located within their boundaries. Missouri also has a similar provision for home rule counties. New York's constitution permits transfer of any function of local government to or from cities or counties but requires a majority of all votes cast thereon.

The Model State Constitution provides that "Any county, city or other civil division may agree, except as limited by general law, to share the costs and responsibilities of functions and services with anyone or more other governments."

Comment

In spite of the tremendous proportions of Michigan's metropolitan problems (almost half of Michigan's population in 1960 lives in one metropolitan area), there are only two sections in Michigan's constitution which provide in some way for meeting these problems. Section 2, Article VIII states that:

> . . . when any city has attained a population of 100,000 inhabitants, the legislature may organize it into a separate county without reference to geographical extent, if a majority of the electors of such city and of the remainder of the county in which such city may be situated voting on the question shall each determine in favor of organizing such city into a separate county.

The second provision is Section 31, under consideration here.

No action has been taken by the state legislature based on Section 2. Few and relatively inconsequential districts have been formed as a result of the provisions of Section 31. There is, therefore, in the present constitution, no effective provision for meeting the problems of government in Michigan's metropolitan areas. It appears essential to provide such a provision in the constitution.

There are several approaches which might be considered: expanding county authority and streamlining its organization; federated metropolitan government; stronger and well-defined metropolitan districts; etc. Rather than having any particular approach "frozen" into the constitution, it might be preferable to empower the legislature to provide for metropolitan governments, with the local electorate to have a voice in their framing and adoption.

The matter of municipal home rule has a bearing on the question of metropolitan area government. While Michigan has been reasonably successful with the present home rule system, the relationships between metropolitan area authority and municipal authority must be reassessed.

The financial base for local and area-wide operations must also be examined in order to provide more adequately for the financing of government at these levels.

A basic principle to be observed in fashioning new provisions for a challenging set of new problems brought about by the concentration of population in Michigan's urban centers is that considerable flexibility must be provided by the constitutional provision and the subsequent enactment of legislation permitted thereby. The metropolitan problems in Michigan vary from one area to another and no single pattern may be suitable for all areas. Further, the future patterns and problems of metropolitan growth may require different solutions than are entailed by the present problem.

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CHAPTER IX IMPEACHMENTS AND REMOVALS FROM OFFICE

Section Detail

IX IMPEACHMENTS AND REMOVALS FROM OFFICE

A. IMPEACHMENT PROCEDURE

Article IX: Section 1. The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office, or for crimes or misdemeanors; but a majority of the members elected shall be necessary to direct an impeachment.

Section 2. When an impeachment is directed, the house of representatives shall elect from its own body 3 members, whose duty it shall be to prosecute such impeachment. No impeachment shall be tried until the final adjournment of the legislature, when the senate shall proceed to try the same.

Section 3. Every impeachment shall be tried by the senate. When the governor or lieutenant governor is tried, the chief justice of the supreme court shall preside. When an impeachment is directed, the senate shall take an oath or affirmation truly and impartially to try and determine the same according to the evidence. No person shall be convicted without the concurrence of 2/3 of the members elected. Judgment in case of impeachment shall not extend further than removal from office, but the person convicted shall be liable to punishment according to law.

Constitution of 1835 and 1850

The 1835 constitution (Article VIII, Sections 1 and 2) had provisions similar to Sections 1 and 3 of the present constitution, except that the concurrence of only two-thirds of those present was required for conviction rather than two-thirds of those elected as in the 1850 and 1908 provisions. The 1835 constitution did not have a provision like that of Section 2 of the present constitution. The provisions in the constitution of 1850 (Article XII, Sections 1, 2 and 3) were the same as in the present constitution (but Sections 2 and 3 were in reverse order).

Constitution of 1908

These provisions for the basic process of impeachment and trial of civil officers including judges were carried over from the 1850 constitution unchanged except for the reversal in sequence of Sections 2 and 3. These sections are related to Article VI, Section 16 which requires the lieutenant governor to succeed to the governorship when the governor is impeached. By Article VI, Section 9 the governor is prohibited from granting reprieves, commutations and pardons in cases of impeachment.

Statutory Implementation

The 1850 provisions were implemented by legislation in 1872. This legislation is still in effect. The trial must be at the state capital; the senate has the power to compel attendance of members; upon the appearance of the officer impeached to answer the charge, he must receive a copy of the articles and be given a reasonable time to answer them; the managers of the prosecution and the officer impeached are entitled to process to compel the appearance of witnesses and records.[1]

Other State Constitutions

The constitutions of 22 states do not specify the number of votes necessary for impeachment by the house of representatives; some 17 states require a majority of those elected as in Michigan, or a majority of all members for this purpose. Most of the remainder require a vote of two-thirds of the members, all members, or members elected. Oregon is the only state whose constitution does not provide for an impeachment process. The constitutions of approximately one-half of the states require a two-thirds vote of those elected to the senate to convict. Somewhat fewer state constitutions require a two-thirds vote of those present to convict. The Alaska constitution uniquely requires a two-thirds vote of the senate to impeach and two-thirds vote of the house to convict.[2] The Model State Constitution (which provides a unicameral legislature) provides that the legislature may impeach officers of the state by a two-thirds vote of all the members and shall provide by law procedures for the trial and removal of officers so impeached, requiring for a conviction a two-thirds vote of the tribunal trying the impeachment.

The chief justice is required by most state constitutions to preside over the senate when the governor is on trial. In several states, the chief justice is the officer who presides over the senate trial of most impeachments. A more common provision among state constitutions is requirement that the lieutenant governor, or other senate presiding officer, preside over such trials. The constitutions of most states including Michigan restrict the judgment of the court of impeachment to removal from office, but provide that an officer convicted is liable to further punishment according to law. The constitutions of most states, not including Michigan, further disqualify an officer convicted in an impeachment trial from holding future state office.[3]

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[1] M.S.A. 2.191 - 2.206, 6.1083. The statute of 1872 was in preparation for the impeachment trial of a commissioner of the state land office in that year. This officer was acquitted; a judge of probate was tried and removed from office in 1943, by the impeachment process.

[2] Index Digest, pp. 536-539. Missouri and Nebraska provide for the trial of most impeachments by the highest court; in New York the senate and the highest court are combined to form a court of impeachment.

Comment

These provisions on the impeachment process seem to be generally adequate for their purpose. The impeachment process has been used infrequently, but might tend to be a more influential factor, if the term of office for elective executive state officers were lengthened. Unless some change were made in the house of representatives vote required to impeach or in the senate vote required to convict, or unless the trial of impeachments were assigned to the supreme court or to a special court, little or no revision would seem necessary. Consideration might be given to placing the impeachment provisions in the legislative article in the revised constitution.

B. SUSPENSION OF JUDGES AND OTHER OFFICERS DUE TO IMPEACHMENT

Article IX: Section 4. No judicial officer shall exercise his office after an impeachment is directed until he is acquitted.

Section 5. The governor may make a provisional appointment to fill a vacancy occasioned by the suspension of an officer, until he shall be acquitted or until after the election and qualification of a successor.

Constitution of 1835 and 1850

There were no provisions similar to these in the 1835 constitution. The 1850 constitution (Article XII, Sections 4 and 5) originated these provisions

Constitution of 1908

These provisions were carried over unchanged from the 1850 constitution. Section 4 provides for mandatory suspension of a judicial officer when impeached until acquitted. Section 5 allows the governor to fill a vacancy arising from the impeachment of an officer.

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[3] Index Digest, pp. 537-539. The provision of Article VI, Section 16 which requires the lieutenant governor to act as governor, for the remainder of the term or until the disability ceases when the governor is impeached, is common to most state constitutions. Ibid, p. 503.

Statutory Implementation

Statutes pursuant to Section 5 have made the governor's suspension of an officer under impeachment discretionary.[4]

Other State Constitutions

Provisions of this type are not unusual among state constitutions.[5]

Comment

Little or no revision would seem to be necessary in regard to Section 4. Some consideration might be given to placing this provision in the judicial article, or in the legislative article with the impeachment provisions if these were also transferred thereto.

Some consideration might be given, in regard to Section 5, to making mandatory the suspension of officers under impeachment. The governor's power to make a provisional appointment to fill a vacancy caused by such suspension could be provided for in the executive article in connection with a comprehensive section dealing with the governor's power of appointment and removal of officials. (See the discussion of Article VI, Section 10.)

C. REMOVAL OF JUDGES

Article IX: Section 6. For reasonable cause, which shall not be sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to each house of the legislature; and the cause for which such removal is required shall be stated at length in such resolution.

Constitutions of 1835 and 1850

In the related provision of the 1835 constitution (Article VIII, Section 3), the term "address" was used rather than "concurrent resolution;" and "two-thirds of each branch of the legislature" were necessary rather than "two-thirds of the members

[4] M.S.A., 2.191-2.206.

[5] Index Digest, p. 534.

elected to each house" for removal of judges. The 1850 provision (Article XII, Section 6) was identical in meaning with the present provision.

Constitution of 1908

Although some changes in phraseology were made, this provision has the same meaning and effect as the 1850 provision. Mr. Burton's proposal in the convention of 1907-08 to require removal of a judge by a majority of those elected to each house rather than two-thirds was not accepted by the convention and his subsequent motion to allow removal of judges by the governor for manifest incompetency until the next session of the legislature was also rejected.[6] Under the current provision, the legislature may require removal of any judge by the governor for reasonable cause (insufficient for impeachment).

Other State Constitutions

Approximately one-half of the states have provisions for removal of a judge other than by impeachment. These vary somewhat widely among state constitutions. Twelve states have a procedure similar to the Michigan provision in their constitutions. The legislative vote required in Michigan is the most common requirement among the states having this procedure. In New Jersey, when the supreme court certifies that a superior court judge is incapacitated, the governor appoints a three-member commission. If this commission recommends it, the governor may retire the judge on pension as provided by law (New Jersey Constitution, Article VI, Section VI 5). Some state constitutions provide for removal of judges by the state supreme court.[7] The Model State Constitution provides, in addition to impeachment, for removal for cause of judges of the appellate and superior courts by the supreme court.

Comment

It would probably be advisable in revising, the constitution either to retain the present feature for removal of judges or to provide some other procedure for the same purpose. Impeachment is limited to "corrupt conduct in office, or for crimes or misdemeanors." Occasions would arise that would not fall under those categories, but would be "reasonable cause" for removal—for example, incapacitating mental illness.

A provision such as this is an alternative to the difficult process of impeachment, while at the same time safeguarding the principle of separation of powers by the

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[6] Proceedings and Debates, pp. 288-289, 1335-1336.

[7] Index Digest, pp. 232-233, 296-297.

requirements of a two-thirds vote, reasonable cause, and the involvement in the process of the governor.

D. REMOVAL OF STATE OFFICERS BY THE GOVERNOR

Article IX: Section 7. See VI EXECUTIVE DEPARTMENT, Part C. This section is discussed in connection with the governor's power of appointment.

E. REMOVAL OF LOCAL OFFICERS

Article IX: Section 8. Any officer elected by a county, city, village, township or school district may be removed from office in such manner and for such cause as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution (Article VIII, Section 4) gave the legislature power to provide by law for the removal of justices of the peace and other county and township officers. The 1850 constitution (Article XII, Section 7) made the same provision "for the removal of any officer elected by a county, township or school district."

Constitution of 1908

The 1908 provision kept the 1850 specification of elected officers, but broadened the language to include those of cities and villages.[8]

Statutory Implementation

In addition to provisions for removal of local officers by local authority through laws and charters, statutes pursuant to this section have given the governor general power to remove the following elected local government officers for cause with notice of specific charges and hearing: county officers including auditors and road commissioners; city officers; justices of the peace and township officers; and village officers.[9] The governor may inquire into charges against such officers himself or he may direct the attorney general or county prosecuting attorney to hold an examination before some circuit court commission or judge of probate.[10]

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[8] Proceedings and Debates, pp. 290, 294, 1141.

[9] M.S.A.. 6.1207, 6.1238, 6.1268, 6.1327, 6.1369, 6.1383.

Other State Constitutions

There is little uniformity among state constitutions on the matter of removal of local government officers. Several state governors are granted power to remove local officers either by constitutional or supplemental statutory authority. Several states provide for removal of local officers by court action.[11] The Model State Constitution does not provide for removal of local officers by state authority.

Comment

Removal of elective local officers "in such manner and for such cause as shall be prescribed by law," as presently provided in Section 8, appears to be reasonably flexible. The legislature by statute has vested power in the governor to remove such officers for cause. Unless removal of local officers by state authority as presently provided for in the constitution (and implemented by statute) were felt to be an inappropriate limitation upon principles of local home rule, there appears to be no need for extensive revision of this section. Consideration might be given to transferring this provision or a revision of it to the local government article of the revised constitution.

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[10] M.S.A., 6.697-6.701.

[11] Index Digest, pp. 69, 151, 741-742.

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CHAPTER X FINANCE AND TAXATION

(over)

Section Detail

X FINANCE AND TAXATION

A. TAXATION – AUTHORITY, STANDARDS AND LIMITATIONS

1. Tax for State Expenses

Article X: Section 2. The legislature shall provide by law for an annual tax sufficient with other resources to pay the estimated expenses of the state government, the interest on any state debt and such deficiency as may occur in the resources.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision. The 1850 constitution (Article XIV, Section 1) contained this same provision and the only change in language in the constitution of 1908 was the addition of "by law" to describe the way the legislature shall provide for an annual tax.

Constitution of 1908

Section 2 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have made it clear that Section 2 does not prohibit the state from acquiring monies through sources other than taxation.[1]

Other State Constitutions

Section 2 of the Michigan constitution is similar to provisions in the constitutions of North Dakota, Nevada, South Carolina, South Dakota, Wisconsin, Colorado, Kentucky, Oklahoma, Utah, Arizona, Oregon, Washington and West Virginia. Language of these provisions differs primarily with regard to time and concerns such phrases as "each fiscal year," "fiscal year" and "ensuing fiscal year." Although Michigan mentions "an annual tax," it uses the standard "estimated expenses" to imply that the legislature shall balance anticipated tax revenues with anticipated expenditures.

Seven state constitutions give added substance to requirements such as the Michigan provision that taxes must cover "such deficiency as may occur in the resources" by granting authority to the legislature to levy taxes, in the year following any fiscal

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[1] Black v. Liquor Control Commission, 323 Mich. 290.

year when expenses exceed income, sufficient with other sources of income to pay the deficiency in addition to estimated expenses for that year (Arizona, Oklahoma, Oregon, South Carolina, South Dakota, Oregon and Wisconsin). Two other states make such a levy to cover deficiencies mandatory during the ensuing year (West Virginia) or two years (Nevada).

In contrast to constitutional instruction to the legislature to provide revenues sufficient to cover expenditures (such as Michigan's Section 2) eight state constitutions limit the amount which may be appropriated to the amount of revenue available or anticipated (Colorado, Idaho, Montana, Utah, Nebraska, New Jersey, Oklahoma and Texas). Illinois limits annual appropriations for "ordinary and contingent expenses" to the amount of revenues authorized to be raised during periods for which the appropriation is made.

Other State Constitutions

A provision comparable to Section 2 appeared in the 1948 edition of the Model State Constitution as a part of a larger section relating to the legislative budget procedure. This section has been omitted, however, in the proposed revision of the Model.

> Legislative Budget Procedure. No special appropriation bill shall be passed until the general appropriation bill, as introduced, by the governor and amended by the legislature shall have been enacted, unless the governor shall recommend the passage of an emergency appropriation or appropriations, which shall continue in force only until the general appropriation bill shall become effective. The legislature shall provide for one or more public hearings on the budget, either before a committee or before the entire legislature in committee of the whole. When requested by not less than one-fifth of the members of the legislature it shall be the duty of the governor to appear in person or by a designated representative before the legislature, or before a committee thereof, to answer any inquiries with respect to the budget.
>
> The legislature shall make no appropriation for any fiscal period in excess of the income provided for that period (emphasis supplied). The governor may strike out or reduce items in appropriation bills passed by the legislature, and the procedure in such cases shall be the same as in case of the disapproval of an entire bill by the governor. (Article VII: Section 704)

This section of the 1948 Model State Constitution stands between two other sections relating to the budget and the expenditure of money and must be considered in connection with them as a part of the overall control of finances. Note that Section 705 gives the governor the authority to reduce expenditures when it becomes apparent that revenues are not adequate to meet appropriations.

> The Budget. Three months before the opening of the fiscal year, the governor shall submit to the legislature a budget setting forth a complete plan of proposed expenditures and anticipated income of all departments, offices and agencies of the state for the next ensuing year. For the preparation of the budget the various departments, offices and agencies shall furnish the governor such information, in such form, as he may require. At the time of submitting the budget to the legislature, the governor shall introduce therein a general appropriation bill to authorize all the proposed expenditures set forth in the budget. At the same time he shall introduce in the legislature a bill or bills covering all recommendations in the budget for new or additional revenues or for borrowing by which the proposed expenditures are to be met. (Article VII: Section 703)

The preliminary discussion draft of the new Model contains a provision similar to Section 703 above (Section 6.03).

> Expenditure of Money. No money shall be withdrawn from the treasury except in accordance with appropriations made by law, nor shall any obligation for the payment of money be incurred except as authorized by law. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates. The governor shall have authority to reduce expenditures of state departments, offices and agencies under appropriations whenever actual revenues fall below the revenue estimates upon which the appropriations were based and, through allotments or otherwise, to control the rate at which such appropriations are expended during the fiscal year, provided that the legislature may exempt specific appropriations from the exercise of this power by the governor (emphasis supplied). (Article VII: Section 705)

The preliminary discussion draft omits the governor's power to reduce or control the rate of expenditures during the fiscal year.

Comment

The Michigan provision amounts to an instruction to the legislature to use its taxing power to assure the state sufficient revenue to pay its bills. This is an indirect association of the taxing power with the budget process. The Michigan constitution contains no specific section relating to budget procedure and no provisions for a single general appropriation bill. By inference, the legislature is expected (under Section 2) to provide revenues sufficient to satisfy the cumulative totals of whatever appropriations are made. It is significant in this respect that Section 2 uses the word shall instead of may and specifies an annual tax sufficient with other resources to pay the estimated expenses. While other resources clearly include surpluses or balances, they can include borrowed funds only within a ceiling of $250,000 of "debts to meet deficiencies in revenue" (Article X, Section 10).

The absence of any constitutional provision for a general appropriation bill (approximately one-half of the states have such a provision) related to a formalized budget procedure makes the implied relationship between state expenditures and state tax revenues difficult to implement and cumbersome to enforce. Some examples of how other state constitutions have sought to solve this problem are indicated below.

The Oklahoma constitution (Article X, Section 23) provides for official estimate of all resources available to the state (and each state fund) prior to the convening of each session of the legislature and states that "all appropriations made in excess of such estimate shall be null and void." Further provision is made for adjusting such estimates to reflect legislative tax changes and inter-fund transfers and "the amount of such adjusted estimate shall be the maximum amount which can be appropriated for any purpose from any fund for each year." It is further provided that this estimate "shall exceed the average total revenue which accrued to each such fund for the last three preceding fiscal years," to which may be added any unappropriated cash surplus.

The New Jersey constitution (Article VIII, Section II (2)) provides that "...All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year. No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor."

The California constitution (Article IV, Section 34) provides that the governor shall present at each regular session of the legislature a complete budget of all proposed expenditures and all estimated revenues. If proposed expenditures exceed estimated revenues "the Governor shall recommend the sources from which the additional revenue shall be provided." There is a further provision that "the budget shall be accompanied by an appropriation bill covering the proposed expenditures" and "until the budget bill has been finally enacted, neither house shall place upon final passage any other appropriation bill, except emergency bills recommended by the Governor, or appropriations for salaries, mileage and expenses of the Senate and Assembly."[2]

California (Article IV, Section 34a) also provides that appropriations from the general fund, exclusive of appropriations for the public school system, "shall not exceed by more than 5 percentum the appropriations...for the preceding year unless two-thirds of all the members elected to each house of the legislature vote in favor thereof." Procedures are provided for cutting back appropriations made in excess of

[2] New York constitution is similar, but not identical. California is one of nine states with constitutional restrictions against adopting any appropriations prior to enactment of a general appropriation bill.

this limitation.

The Missouri constitution (Article IV, Section 27) provides that the governor may control the rate of expenditure during the period of appropriation, by allotment or other means, and may reduce expenditures below appropriations whenever actual revenues are less than revenue estimates upon which the appropriations were based.

Property taxes are the "residual" tax source in the American system of taxation and constitutional provisions such as Michigan's Section 2 have their roots in the property tax. The requirement that the legislature shall levy "an annual tax sufficient with other resources" relates, as a last resort, to an annual property tax. In this respect "other resources" include all state tax sources other than the property tax. Although many states, like Michigan, levy no general property taxes for state purposes, they accomplish this by collecting non-property tax revenues sufficient to make application of the "residual" property tax unnecessary.

2. Laws Imposing Taxes

Article X: Section 6. Every law which imposes, continues or revives a tax shall distinctly state the tax, and the objects to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

Constitutions of 1835 and 1850

The 1835 constitution contained no similar provision. Section 6 was carried forward from the constitution of 1850 (Article IV, Section 14) without change.

Constitution of 1908

This section has not been amended since the present constitution was adopted

Judicial Interpretation

Michigan courts have ruled that when the object for which a tax is raised is apparent from the statute providing it, a statement in detail on the manner in which it is to be expended is not necessary.[3]

While the courts have been liberal in interpreting this section, they have ruled that the scope of tax laws cannot be extended by implication or forced construction, and language, if dubious, is not to be resolved against the taxpayer.[4]

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[3] Moreton v. Secretary of State, 240 Mich. 584; Detroit Automobile Club v. Secretary of State, Id.; Reading v. Secretary of State, Id.

[4] Waterways Navigation Co. v. Corporation & Securities Commission, 323 Mich. 153.

It has been determined that provisions of the corporation act imposing annual privilege fees and referring to another section of the corporation act for the purpose of computing the privilege tax does not violate the restrictions imposed by Section 6.

Other State Constitutions

Article X, Section 6 of the Michigan constitution is identical with New York's provision (Article III, Section 22).

Comparison with other state constitutions requires a separation of Section 6 into its two parts – 1) the requirement that tax laws must state the object to which the tax is to be applied and 2) the requirement that tax laws must state the tax without reference to other laws.

North Carolina provides that tax laws must state the object to which tax is to be applied (Article V, Section 3, Section 7). Other states requiring that laws distinctly state tax objects are Arizona, Arkansas, Kansas, North Dakota, South Carolina, South Dakota, Washington and Wyoming. States requiring a statement of tax purposes are Ohio, Oregon, Kentucky and Oklahoma. Kentucky and Oklahoma extend this requirement to local ordinances as well as legislative acts.

State constitutions containing the second requirement that tax laws must state the tax without reference to other laws are Arizona, Iowa, and Virginia.

Comment

Selection of the phrase "objects to which it is to be applied" to describe what a law must say about the tax it imposes opens the door to various interpretations. This may be interpreted to describe the purpose for which the tax is to be used, or it may be interpreted to describe the thing that is to be taxed. Past decisions of Michigan courts have accepted it as descriptive of the purpose. Greater clarity of such an interpretation could be assured by following the lead of Ohio, Oregon, Kentucky, and Oklahoma in use of the word "purpose."

Except as it concerns taxation for support of certain services or purposes through dedicated funds, the requirement could be rendered unnecessary by a general provision that taxes may be levied only for a public purpose or for the support of legislative appropriations for such purposes.

The provision of Section 6 that "it shall not be sufficient to refer to any other law to fix such tax or object" is in effect a requirement that each law imposing taxes must be sufficiently explicit to be capable of standing alone. Although this provision is frequently discussed when new tax legislation is adopted, it has been the subject of little litigation in Michigan. Based upon an analysis of opinions developed by New York courts as a result of litigation under the identical provision of the New York constitution, the Michigan attorney general has expressed an "opinion that a tax

imposed on a percentage of the federal income tax required to be reported and paid to the United States under the Internal Revenue Code in effect on May 1, 1959, does not violate Section 6 of Article X of the Michigan Constitution."[5]

The opinion of the attorney general indicated a literal interpretation of the restriction in terms of a reference to any other law. He called attention to the fact that the legislative bill (House Bill 628, 1959) "does not make reference to the federal income tax laws, but instead refers to an extrinsic fact; i.e., the amount of income tax required to be paid or reported to the United States pursuant to the Internal Revenue Code in effect on May 1, 1959."

3. Power of Taxation – Surrender by Contract

Article X: Section 9. The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party.

Constitutions of 1835 and 1850

Section 9 was new material in the 1908 constitution and the earlier constitutions contained no similar provision.

Constitution of 1908

Section 9 has not been amended since the present constitution was adopted.

Other State Constitutions

With slight variation in language, provisions similar to Section 9 appear in the constitutions of more than one-half of all states. Two states (Missouri and Alaska) qualify the same provision by adding exceptions authorized by their constitutions. These exceptions, however, relate to delegation of taxing powers to local governments and are thus exceptions more in form than substance. New York provides an exception for securities issued for public purposes pursuant to law. In a number of states the declaration is made in terms of power to tax corporations and their property.

The Model State Constitution also contains a similar provision with the assumption that it, together with a restriction that no tax shall be levied except for a public purpose, is about all that is necessary for a constitution to say about taxing powers.

> The power of taxation shall never be surrendered, suspended or contracted away. (Article VI, Section 6.01)

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[5] Michigan Attorney General, Opinion Re: Constitutionality of House Bill No. 628 (June 8, 1959) page 17 and page 14.

Comment

In this basic declaration (Section 9) Michigan follows what has become accepted as a good constitutional policy. The power to tax is an inherent power of sovereign states and constitutional statement is sometimes criticized as stating the obvious. The significance of provisions such as in Michigan's Section 9 is not their declaration of power to tax, but rather their reservation of that power to public purposes.

4. Specific Taxes

Article X: Section 4. The legislature may by law impose specific taxes which shall be uniform upon the classes upon which they operate.

Constitutions of 1835 and 1850

The 1835 constitution contained no reference to specific taxes.

The 1850 constitution was amended in 1900 to read as follows:

> "The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value by a state board of assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporation as are paying specific taxes under the laws in force on November sixth, A.D. nineteen hundred, shall be applied as provided for specific state taxes in section one of this article."[6] (Article 14, Section 10).

Constitution of 1908

This section was the subject of considerable debate in the constitutional convention of 1908 when an amendment was proposed to include a reference to real estate mortgages and to provide that "the legislature may by law impose specific taxes, which shall be uniform, upon real estate mortgages and upon the classes upon which they operate".[7]

The amendment failed of adoption because it was believed to impose restrictions upon the general authority of the legislature to impose specific taxes. It was argued that mortgages could be taxed without the amendment.

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[6] J.R. No. 1 (Ex. Sess. of 1900), ratified at November election of 1900.

[7] Proceedings and Debates (February 19, 1908) pp. 1336-1338.

Section 4 has remained unchanged since the present constitution was adopted.

Judicial Interpretation

Michigan courts have held that the state constitution permits two general methods of taxation, ad valorem and specific, and that a tax on an occupation or privilege, whether called a license, occupation or privilege tax, is a specific tax and not an ad valorem tax on property.[8] Also that a tax which requires no assessment other than listing and classification of subjects to be taxed and which imposes a sum by bead or number or by some standard of weight or measurement is a specific tax.[9] The constitutional rule of uniformity forbidding double taxation has no application to property paying specific taxes.[10]

Other State Constitutions

The term "specific taxes" is used to describe legislative power to tax in only two state constitutions other than Michigan (Arizona and Oklahoma). These states simply provide that the legislature may provide for the levy and collection of specific taxes and rely upon general provisions for uniformity. Kentucky has a similar provision for legislative enactment of "special taxes" by general law only. Illinois and Texas have provisions to the effect that specification of subjects and objects of taxation shall not deprive the legislature of power to tax other subjects or objects consistent with principals of taxation fixed by constitutions.

Without reference to the term "specific taxes," the other 45 state constitutions either contain no comparable reference to taxes other than ad valorem taxes, or they name the kinds, of taxes which may or may not be adopted.

The Model State Constitution contains no similar provision.

Comment

Section 4 is in effect a limitation upon the power of the legislature to impose taxes. As it has been interpreted, the principal limitation has concerned the requirement of uniformity and is not very different from the provision that "All taxes shall be uniform upon the same class of subjects" (Minnesota, New Mexico, Oklahoma, Arizona, Colorado, Delaware, Idaho, Kentucky, Missouri, Montana and Pennsylvania). By classifying a tax as specific, the Michigan legislature may tax almost any subject on a uniform basis according to reasonable classification.

Michigan courts have never ruled directly on the question of whether or not a tax measured by net income would be termed a "specific tax" permitted under Section 4

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[8] C. F. Smith Co. v. Fitzgerald, 270 Mich. 659.

[9] Shivel v. Kent County Treasurer, 295 Mich. 10.

[10] Shapero v. Department of Revenue, 322 Mich. 124.

or a property tax subject to the uniformity rule of Section 3.[11] A recent opinion by the attorney general expressed his belief that "an income tax, either flat rate or graduated," would be a specific tax under Section 4 and that graduated rates "would not otherwise impair its validity."[12]

The Michigan Constitutional Revision Study Commission (Subcommittee on Taxation and Finance, June 27, 1942) included Section 4 together with Section 3 in its recommendation that "...the uniformity clause...could be redrafted to permit the legislature to graduate and classify all types of taxes, both ad valorem and specific, providing, however, for uniformity within classes" (p. 7). The Subcommittee was concerned with the "constitutional uncertainty" associated with distinctions between ad valorem taxes and specific taxes. The Subcommittee stated: "Under the present constitution, in drafting tax measures, there is the constant fear that the tax will be called a property tax, and the legislature rightly refuses to take chances with necessary revenue producing measures" (p. 6).

5. Uniform Rule of Taxation

Article X: Section 3. The legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: Provided, That the legislature shall provide by law a uniform rule of taxation for such property as shall be assessed by a state board of assessors, and the rate of taxation on such property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision. The 1850 constitution (Article XIV, Section II) contained this same provision and the only change in the 1908 constitution was the grammatical substitution of "a" uniform rule for "an" uniform rule.

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[11] In Shivel v. Kent County Treasurer, 259 Mich. 10; 294 N.W. 78 (1940), the Michigan court quoted with approval from Young v. Illinois Athletic Club, 310 Ill. 75, 81; 141 N.E. 369 to the effect that "an income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived."

[12] Michigan Attorney General, Opinion Re: Constitutionality of House Bill No. 628 (June 8, 1959).

Constitution of 1908

A proposal to provide that "the legislature may classify property for the purpose of taxation and shall provide a uniform rule for the taxation of the several classes" was defeated in the constitutional convention of 1908.[13] Section 3 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have tended to interpret this requirement liberally. It has held that "presumption of constitutionality applies more strongly to tax statutes than to laws generally, and taxing system will be held invalid only where it clearly violates fundamental law"[14] and that the restriction upon the power of taxation "does not compel adoption of iron rule of equal taxation, nor prevent variety of differences in taxation, or discretion in selection of subjects, or classification for taxation of properties, businesses, trades, callings or occupations."[15]

While the state is committed by constitution and statutes to the basic principles of uniformity in matters pertaining to taxation of property under general tax laws,[16] the rule of uniformity does not extend to property paying specific taxes.[17]

Other State Constitutions

While virtually every state constitution contains some provision relating to uniform taxation of property, there is a wide variation in language and content of these provisions. Some of the differences concern the extent to which property may or may not be classified for taxation.

Property tax classification is a term used to describe property tax procedures whereby properties of different classes are (1) assessed according to different standards or at different percentages of the same standard, or (2) taxed at different rates. Although "unofficial" classification is a common result of failure by local assessors to apply constitutional or statutory standards of uniformity, "official" classification can result only when provided by statutory standards consistent with constitutional provisions permitting (or not prohibiting) such variation among property classes.

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[13] Michigan Constitutional Convention of 1908, Proceedings and Debates, p. 890 (January 21, 1908).

[14] Thoman v. City of Lansing, 315 Mich. 566.

[15] W. S. Butterfield Theatres, Inc. v. Department of Revenue. 353 Mich. 345.

[16] School District No. 9, Pittsfield Township Washtenaw County v. Washtenaw County Board of Supervisors, 314 Mich. 388.

[17] Shivel v. Kent County Treasurer, 295 Mich. 10.

Eleven state constitutions contain direct reference to the power of the legislature to classify property for assessment purposes. These references range from a simple provision that all property be defined and classified by law (Idaho) to a statement that nothing in the constitution shall be construed to prevent valuation of different classes of property by different means or methods (Oklahoma). Missouri lists three classes including (1) real property, (2) tangible personal property and (3) intangible personal property and permits the legislature to provide further classification of personal property (classes 2 & 3). California allows classification of personal property only and Washington accomplishes the same purpose by requiring real estate to constitute one class. Maryland permits the legislature to provide for classification of improvements on land and personal property as it may deem proper. Georgia establishes classification of tangible property and one or more classes of intangible personal property and permits the legislature to adopt different tax rates and methods for different classes. Ohio takes the opposite approach by forbidding classification for purposes of levying taxes at different rates, but permits classification with taxes levied at a uniform rate.

Classification accomplished through maximum tax rate limitations is illustrated by the West Virginia constitutional maximums as follows:

personal property, including intangibles, used in agriculture	$0.50 per $100
property occupied exclusively by owner for residence or farms occupied and cultivated by owner or bona-fide tenants	$1.00 per $100
all other property situated outside of municipalities	$1.50 per $100
all other property situated within municipalities	$2.00 per $100

In states where “official” property tax classification has been applied, it has been used, for the most part, to distinguish between real estate and personal property. This kind of classification has been particularly well developed in Ohio where personal property is assessed at different ratios and it was the basis for new legislation adopted in New Jersey in 1960. The New Jersey constitution requires that all real estate shall be assessed for taxation according to the same standard and says nothing about personal property.

Only three states use a general classification of both real and personal property for assessment purposes. The most notable is Minnesota (adopted in 1913); West Virginia and Montana also use classification, while North Dakota adopted such a system in 1917 and abolished it in 1923. Minnesota has 13 classes of property subject to varying rates of assessment ranging from 5 percent to 50 percent of “full and true value.” This is done under a constitution which contains no reference to classification at all.

The Michigan provision (Section 3) apparently does not permit classification of property within the general property tax itself, but the same purpose can be achieved through the grant of legislative authority to subject classified property to "specific taxes." This exception causes the Michigan provision to be comparable in effect to provisions in more than 20 states requiring uniformity of taxation for property within the same class.

Some state constitutions relate the "uniformity rule" to standards of assessment in terms of value. The Michigan constitution does not specify what the uniform rule must be, but Section 7 fills this void by specifying "all assessments hereinafter authorized shall be on property at its cash value." These two articles together cause the Michigan rule to be comparable with Arkansas, Tennessee, Maine, Idaho, and Utah which provide for uniform taxation of property according to its value.

Inclusion of provision specifying taxation of property assessed by a state board of assessors at the average local property tax rate within the constitutional uniform rule of taxation (Section 3) is peculiar to Michigan. A number of states provide state assessment for utility and other property by constitutional mandate and some of them apply average local property tax rates to such assessments by legislative act. Michigan stands out only in that it makes special reference to uniform state assessments in addition to the general reference to uniform taxation and specifies the average rate.

Constitutional requirements concerning uniform taxation are sometimes looked upon as unnecessary and the Model State Constitution contains no such provision. Such provisions are in the nature of restrictions upon legislative authority in the matter of taxation.

Comment

Section 3 is the basic property tax requirement in Michigan and the one which underlies the entire tax environment. Although it imposes no restrictions upon the power of the legislature to "prescribe by law" what property is taxable and what property is exempt, it does establish the requirement that all taxable property not paying specific taxes shall be subject to a "uniform rule" of taxation. This exception for "property paying specific taxes" is the authorization under which the legislature is enabled to classify property for special treatment, or to adopt other tax measures commonly regarded as non-property taxes. Such specific taxes may be in lieu of property taxes or they may be in addition to them.

These restrictions and requirements are responsible for the development of a legislative tax language designed to draw distinctions between property taxes and specific taxes to meet judicial interpretations of Section 3. In some instances this language appears to draw a distinction without a difference.

The Michigan Constitutional Revision Commission of 1942 (Subcommittee on Taxation and Finance; June 27, 1942) recommended that "...the uniformity clause in the Michigan Constitution as now worded is an unnecessary obstacle to effective tax legislation, and that there would be great advantage to the State if Sections 3 and 4 could be redrafted to permit the legislature to graduate and classify all types of taxes, both ad valorem and specific, providing, however, for uniformity within classes."

6. Assessment of Property of Public Utilities

Article X: Section 5. The legislature may provide by law for the assessment at its true cash value by a state board of assessors, of which the governor shall be ex-officio a member, of the property of corporations and the property, by whomsoever owned, operated or conducted, engaged in the business of transporting passengers and freight, transporting property by express, operating any union station or depot, transmitting messages by telephone or telegraph, loaning cars, operating refrigerator cars, fast freight lines or other car lines and running or operating cars in any manner upon railroads, or engaged in any other public service business; and for the levy and collection of taxes thereon.

Constitutions of 1835 and 1850

The constitution of 1835 contained no comparable provision. Article XIV, Section 10 added to the 1850 constitution by amendment in 1900 provided:

> The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value by a state board of assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under the laws in force on November sixth, A.D. nineteen hundred, shall be applied as provided for specific taxes in section one of this article.

The amendment was adopted after a state assessed tax upon telephone and telegraph lines was held unconstitutional as a property tax in violation of the uniformity rule.[18] This tax had been levied at the average rate for all taxes and the con-

[18] Pingree v. Auditor General, 120 Mich. 95.

stitutional amendment was recommended to make its readoption possible. Governor Pingree asked for the amendment because, "Under our Constitution, as construed by the Supreme Court of Michigan, it is practically impossible to frame a law by which property of railroad, telegraph, telephone and express companies can be taxed upon its true value unless we resort to local taxation."[19]

Constitution of 1908

Section 5 has not been amended since the present constitution was adopted and has been the subject of little litigation.

Other State Constitutions

While state assessment of utility property in general, and railroad property in particular, is common among the states, Michigan stands out in the way its constitution spells out the procedure by which the legislature may provide for such state assessment. The nearest thing to it is a provision of the Georgia constitution to the effect that the legislature may provide different methods and time of returns, assessments, payment and collection of ad valorem taxes on public utilities, but not a greater basis or higher rate than other properties.

The California constitution (Article XIII, Section 14) lists the properties which shall be assessed by the state board of equalization as that owned by (1) railroad companies, street railways, and interurban electric railways, (2) sleeping, dining, drawing, refrigerator, oil, stock, fruit and other car companies operating upon railroads within state, (3) express companies, (4) telegraph and telephone companies, (5) gas or electric companies. Note that this California provision includes gas and electric companies not listed in Michigan's Section 5, but does not contain the Michigan phase "or engaged in any other public service business." In this respect, the Michigan provision is narrower in actual listing of utility property, but apparently broader in legislative authority to extend state assessment than the California provision. The Michigan provision thus is more like the Oklahoma provision relating to all railroad and public service property (Article X, Section 21).

North Dakota has a provision similar to that of California supplemented by an "all other" provision restricted to property "used directly to carry persons, property or messages" (Article XI, Section 179). Although North Dakota includes light, heat or power facilities in its listing of state assessed property, its "all other" provision is thus more narrow than Michigan's.

Comment

Section 5 must be considered in terms of the environment in which its predecessor section originated as an amendment to the 1850 constitution (Article XIV, Section 10). Although it describes a procedure for taxing public service corporations not

[19] Michigan Legislature, House Journal, Extra Session, 1900.

unusual among states, Michigan is apparently unusual among states in that its supreme court ruled at one time (1898) that such a procedure could be followed only if specifically provided by a constitutional exception to the "uniformity" rule of taxation. This presumably accounts for the fact that Michigan has a provision which other states have, for the most part, found unnecessary to include within their constitutions.

Inclusion of the definition "by whomsoever owned" in the definition of utility property clearly indicates that this provision is not limited to corporate-owned property.

Inclusion of "other public service business" within the listing of corporate property for which the legislature may provide for state assessment would seem to cause Michigan's Section 5 to place no obstacle in the way of legislative provision for such assessments of any utility property. In this respect, the only limitation upon legislative authority to provide for state assessment of utility property would seem to relate to the method of assessment rather than to the kinds of utilities. The implication is that Michigan, under its present constitution, could follow the practice of some of the other states in broadening the coverage of state assessed utilities to include gas and electric companies, if the legislature elected to do so.

7. Assessments

Article X: Section 7. All assessments hereafter authorize shall be on property at its cash value.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision. Section 7 was carried forward from the constitution of 1850 (Article XIV, Section 12) without change.

Constitution of 1908

Section 7 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have ruled that requirements of this section that all assessments shall be on property at its cash value relate to assessments upon rate basis for ad valorem taxes and not upon specific taxes imposed by legislative act.[20] Also, that the final authority for determining true cash value of property for purposes of taxation is the state board of equalization;[21] and that cash value means not only property which may be put to valuable uses, but that which has a recognizable pecuniary value inherent in itself and not enhanced or diminished according to the person who owns or uses it.[22]

[20] Shivel v. Kent County Treasurer, 295 Mich. 10.

[21] School District No. 9, Pittsfield Township, Washtenaw County v. Washtenaw County Board of Supervisors, 341, Mich. 388.

[22] Hudson Motor Car Co. v. City of Detroit, 136 F. (2d) 574.

Other State Constitutions

The principal distinction among state constitutions in the matter of assessment standards concerns the choice between fixed constitutional standards and more general provisions that assessments must be according to standards established by legislation and the extent to which classification of property is permitted.

The Michigan provision that property shall be assessed "at its cash value" is more precise than most state constitutional provisions.

It compares with California "at full cash value," Kentucky "at fair cash value," Louisiana "at actual cash value," South Carolina "upon actual value," Virginia "at fair market value."

Assessments at something less than full value are provided in Washington "50% of true and fair value;" Oklahoma, "not over 35% of fair cash value;" South Dakota, "never to exceed actual value;" Texas, "at (not) more than its fair cash market value;" and New York, "shall in no case exceed full value."

Modifications of the inflexibility of assessments "at" a standard are found in constitutions of Mississippi, "according to true value;" Alabama, "exact proportion to value;" Utah, "according to its value in money;" Arkansas, Tennessee and Ohio "according to value;" Idaho and Illinois, "in proportion to value;" Maine "according to just value."

Other states rely upon legislative acts to establish assessment standards within the framework of general constitutional requirements concerning powers of taxation and uniformity. Some of them by constitutional direction such as in the new state of Alaska which prescribes that "standards for appraisal of all property assessed by the State or its political subdivisions shall be prescribed by law."[23]

Others, such as the new state of Hawaii accomplish the same purpose with constitutions which contain no direct reference to assessments.

The New Jersey constitution stands midway between these different approaches with a provision that "property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value...."[24]

Comment

By whatever name it may be called, the traditional standard of value for property assessments relates to market value and the Michigan standard of "cash value" is no exception. In this respect the choice of words to describe value is of no great consequence.

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[23] Alaska State Constitution, Article IX, Section 3.

[24] New Jersey State Constitution, Article VIII, Section 1.

Constitutional provision of the "cash value" standard is in fact a restriction upon the authority of the legislature to provide by law any other standard or provide for the assessment of property at any percentage of value lower than 100 percent. If Michigan wishes to continue this restriction, there is some advantage in retaining the exact language in order to preserve the accumulated body of judicial interpretations. Customary assessment of property at something less than the constitutional (or statutory) standard complicates tax appeal procedure in discrimination cases arising from assessments above the average but lower than the constitutional standard. From this standpoint, there is much to be said in support of changing the constitutional standard to more nearly reflect actual practices or to leave the matter of assessment standards to legislative action.

8. Equalization of Assessments

Article X: Section 8. In the year 1911, every fifth year thereafter and at such other times as the legislature may direct, the legislature shall provide by law for an equalization of assessments by a state board, on all taxable property, except that taxed under laws passed pursuant to sections 4 and 5 of this article.

Constitutions of 1835 and 1850

The 1835 constitution contained no provision for equalization of assessments.

The 1850 constitution was amended in 1900 to contain the same language (Article XIV, Section 13) as Section 8 with the exception that the year 1901 was the starting point and the taxes excepted were then contained in Section 10 of that constitution.

Constitution of 1908

This section was the subject of extended debate in the constitutional convention of 1908 and language from the prior constitution (1850 as amended) was adopted after rejection of a proposal by the committee on taxation and finance that the board should consist of the governor, the attorney general, the auditor general, the commissioner of the state land office and the three members of the board of state tax commissioners coupled with an additional provision that "The Legislature shall by law, in 1909, to take effect not later than 1911, provide and put into operation methods by which property subject to ad valorem assessment shall be assessed at a uniform value." The state board of tax commissioners had declared property valuations were too low and the commissioners were therefore said not to be in a position to act as impartial judges in the matter of property assessments.[25]

Section 8 has not been amended since the present constitution was adopted.

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[25] Michigan Constitutional Convention of 1908, Proceedings and Debates, (Feb. 4, 1908) pp. 1181-1190; (Feb. 5, 1908) pp. 1238-1245.

Judicial Interpretations

This section is an old one and court recognition of practices under it is well established.

Other State Constitutions

Michigan is one of nine states which provide by constitution for state boards or commissions responsible for equalization of assessments (Michigan, California, Colorado, Idaho, Missouri, Montana, Nebraska, Utah and Wyoming). Among these states, Utah and Idaho assign responsibility to the state tax commission and Wyoming simply instructs the legislature to provide by law for a board of equalization. The other five states (including Michigan) indicate the membership or specify the way it is to be appointed.

The New York constitution requires the legislature to provide "for review and equalization of assessments for purposes of taxation" (Article XVI, Section 2) without indicating what provisions shall be made. Similar provisions are in the constitutions of Arizona and Texas. Although New Mexico does not establish a board of equalization by constitution, it has a constitutional provision forbidding members of the state board of equalization from receiving favors from railroads (Article XX, Section 1).

Comment

While property assessment equalization procedures are common among the states, more of them are provided by legislative act than by the constitution. The Michigan provision is in effect an instruction to the legislature to provide for equalization. Except for stating that equalization shall be provided "by a state board," it follows the sound practice of leaving procedure to legislative determination.

The Michigan exclusion of specific taxes from equalization is unusual because the Michigan concept of specific taxes is itself unusual. The Michigan exclusion of property assessed by the state board of assessors is also unusual, but five of the "equalization board" states have a provision for constitutional assignment of responsibility for assessing corporation property to the same boards.

9. 15 Mill Limitation

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Article X: Section 21. The total amount of taxes assessed against property for all purposes in anyone year shall not exceed one and one-half per cent of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums shall be separately assessed in all cases: Provided, That this limitation may be increased for a period of not to exceed twenty years at anyone time, to not more than a total of five per cent of the assessed valuation, by a majority vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation: Provided further, That this limitation shall not apply to taxes levied in the year 1932.

Constitutions of 1835 and 1850

There was no similar provision in either the 1835 or 1850 constitutions.

Constitution of 1908

The 1908 constitution as originally adopted did not contain a comparable provision. This provision, popularly known as the fifteen mill amendment, was added to the 1908 constitution by amendment proposed by initiatory petition and adopted at the general election of November 8, 1932. As originally worded, it provided that the limitation specified could be increased for a period of not to exceed five years by a two-thirds vote. An amendment to this section was proposed by initiatory petition and adopted in 1948 to provide for the 20 year increase by simple majority vote.

Previous to the adoption of the 15 mill limit amendment in 1932 there had been no similar limitation in the constitution or in statute.

The Michigan supreme court in commenting on the circumstances leading to the adoption of the 15 mill limit in 1932, has stated:

> The burden of unrestricted property taxation had grown to the point of confiscation. The people were aroused and determined to restrict—permanently—the power of property taxation which then reposed generally in legislative (state and local) hands. Added to their tax

> troubles, the people were enduring a great and widespread economic depression...with homes and farms everywhere threatened by sale for delinquent property taxes and with the legislature failing to take decisive action in the direction of tax limitation, a desperate electorate took matters into its own lawful hands.[26]
>
> Careful study of the amendment leads to these conclusions: clearly the intent was to provide by the fundamental law of the state, which had not theretofore contained such provision, a general limitation upon the exercise of the taxing power of the state. The evil or abuse sought to be remedied was excessive taxation imposed by governmental agencies without the consent of those upon whom the burden was placed.[27]

Judicial Interpretation & Opinions of the Attorney General

The language of Article X, Section 21, has been subjected to frequent interpretation both through court decisions and opinions of the Michigan attorney general. These interpretations have produced the following limitations and clarifications:

Cities and villages are exempt from its provisions. Only the state government, counties, townships and, at least in part, school districts are affected. (School District of the City of Pontiac v. City of Pontiac, 262 Mich. 338; City of Hazel Park v. Municipal Finance Commission, 317 Mich. 582; Hall v. Ira Township, 348 Mich. 402; Bacon v. Kent-Ottawa Metropolitan Water Authority, 354 Mich. 159)

The word “electors” means those electors voting on the proposition to increase millage, rather than all qualified registered electors. (Wilcox v. Board of Commissioners of Sinking Fund of City of Detroit, 262 Mich. 699)

Neither principal nor interest of obligations refunding pre-1932 debt is subject to Article X, Section 21. (Wilcox v. Board of Commissioners of Sinking Fund of City of Detroit, 262 Mich. 699; Chemical Bank & Trust Co. v. County of Oakland, 264 Mich. 673)

The words “assessed valuation” mean local assessed valuation as equalized by the state. (St. Ignace City Treasurer v. Mackinac County Treasurer, 310 Mich. 108; Waterford Township v. Oakland County Tax Allocation Board, 312 Mich. 556; Morley Brothers v. Carrollton Township Supervisor, 312 Mich. 607; School District No. 9, Pittsfield Township, Washtenaw County v. Washtenaw County Board of Supervisors, 341 Mich. 388)

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[26] Black, J., in Bacon v. Kent-Ottawa Authority, 354 Mich. 159.

[27] Quoted by Black, J., Ibid., from School District v. City of Pontiac, 262 Mich. 338, 347, 348.

Local assessors may apply the equalization factor to rates rather than valuations. (Attorney General's Opinion, June 13, 1945)

Use tax is not subject to fifteen mill limitation. (Banner Laundering Co. v. State Board of Tax Administration, 297 Mich. 419)

Special assessments are not subject to fifteen mill limitation. (Graham v. City of Saginaw, 317 Mich. 427)

Certain metropolitan authorities are not municipal corporations within the meaning of the fifteen mill amendment and are therefore subject to its terms (Morse v. Wayne County Supervisors, 355 Mich. 100) while other metropolitan districts are such municipal corporations and are therefore not so subject (Attorney General's Opinion No. 3462, November 19, 1959).

A port commission is subject to the fifteen mill amendment. (Attorney General's Opinion No. 2924, March 15, 1957)

An approving vote by electors of a school district authorizing a bond issue requiring taxation in excess of mills guaranteed to school districts is not equivalent to an approving vote of a millage increase in the amount of the taxes needed. (In re School District No. 6, Paris and Wyoming Townships, Kent County, 284 Mich. 132, but see Article X, Sections 27 and 28, added to the constitution by amendment subsequent to this decision, in effect authorizing such a double approval vote.)

A legislature can effect changes in a municipal charter removing that charter from the provisions of the fifteen mill amendment as well as can the voters of that municipality. (Council of City of Saginaw v. Saginaw Policemen & Firemen Retirement System Trustees, 321 Mich. 641)

A charter township is a municipal corporation within the meaning of that term in the fifteen mill amendment and consequently is not subject to the provisions of that amendment. (Charter Township of Warren v. Municipal Finance Commission, 341 Mich. 607)

Also significant here are the provisions of Sections 27 and 28 of Article X dealing with school district borrowing. These provisions will be considered elsewhere, but their effect is to permit school districts to levy taxes unlimited as to rate or amount, outside of the provisions of the fifteen mill limitation, for payment of specified types of bond issues.

Statutory Implementation

As noted under "Judicial Interpretation," cities and villages are not automatically included under the limitation. In 1949 the legislature amended the general property tax act to prohibit a municipality from including a tax limitation in its charter which would reduce the combined taxing power of the other units in the county to less than fifteen mills.

The legislature has provided by law for a procedure to allocate the fifteen mills among the overlapping taxing jurisdictions in the county which are subject to the limitations. In each county there is a six-member county tax allocation board composed of the county treasurer, the chairman of the board of county auditors if there be such a board, and if not, the chairman of the finance or ways and means committee of the board of supervisors, the county school superintendent, and three other members appointed by the probate judge(s)—a member of a school board, a representative of a city, and a representative of the public at large—a total of six members.

Under certain specified limitations, each unit of government subject to the limitation is entitled to a minimum allocation—the county 3 mills, school districts 4 mills, and townships 1 mill. Community college districts are allocated a minimum of 1/1000 of a mill under certain circumstances and, if the state were to levy a general property tax, its rate would also have to be allocated. The remaining millage is allocated by the county tax allocation board on the basis of "needs" of the respective units.[28]

Other State Constitutions

It is difficult to make valid comparison of Michigan's tax rate limitation and those in other states. Just as judicial decisions have interpreted the meaning of Michigan's provision, so the provisions of other states have been interpreted by their courts. Thus, a comparison of the wording of the various constitutional provisions themselves does not provide a satisfactory comparison of the effect of the limitations in the various states. It is beyond the scope of this paper to attempt a comprehensive comparison, but certain facts should be noted.

Many other states have tax rate limitations generally similar to the fifteen mill amendment. In twenty-six states there is either a statutory or constitutional limitation on the rate of state taxes, and in forty states there is some limitation on the tax rates of political units.[29] Nineteen states, including Michigan, incorporate their tax rate limitations into their constitutions, and two additional states have consti-

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[28] See M.S.A. 7.61ff. for the Property Tax Limitation Act.

[29] Graves, American State Government, 4th edition, D. C. Heath & Co. Boston, 1953, page 531.

tutional provisions authorizing the legislature to set limitations.[30] Only some twelve states have over-all property tax limitations, nine of these, including Michigan, listing these limitations in their constitutions.[31]

The types of limitations vary greatly. The oldest and most widely used type is one setting maximum rates for various funds or purposes. Newer limitations employ percentage amounts of collections in previous years. Other limitations are based on maximum rates per valuation or governmental unit, or maximum dollar amounts per capita, or a stated maximum dollar amount, or a ratio between property tax collections and collections of other taxes.[32]

The millage amounts specified in formulas employing limitations based on that factor vary from five to fifty mills, with the average being approximately twenty-four mills. Most states permit an increase in the maximum amount specified upon proper vote of the electorate of the taxing district, and often with the concurrence of the legislature. There is usually no limitation fixed upon the amount of this permissible increase. Also nearly all states exclude from the effects of their tax rate limitations taxes levied for payment of principal and interest on debt existing previous to the enactment of the limitation, and a large minority of states exclude from those provisions taxes levied for payment of all debt.[33]

Many recent texts and studies in the area advise against the inclusion of tax rate limitations in a state's constitution.[34] The Model State Constitution prepared by the committee on state government of the National Municipal League (5th edition, 1948) and the 1961 revised draft contain no such limitations, and the constitutions of our two newest states, Alaska and Hawaii, also have no such provisions.

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[30] Index Digest of State Constitutions, Legislative Drafting Research Fund, Columbia University, 2nd edition, 1959.

[31] Manual on State Constitutional Provisions, prepared for the constitutional convention of the territory of Hawaii, 1950, by the Legislative Reference Bureau, University of Hawaii; and Graves, supra, page 532.

[32] Graves, supra, page 531.

[33] Manual on State Constitutional Provisions, supra; Graves, supra; Index Digest of State Constitutions, Supra.

[34] Manual on State Constitutional Provisions, supra; Graves, supra; Constitutional Studies, prepared on behalf of the Alaska Statehood Committee for the Alaska Constitutional Convention by the Public Administration Service, November, 1955, Volume 3, Section IX, page 18.

Comment

In the Michigan supreme court decision in the case of Bacon v. Kent-Ottawa Authority (354 Mich. 159) Mr. Justice Black noted that:

> Through and by means of an attritional series of judicial decisions the fifteen mill amendment has been bruised, beaten and backed to the brink of sterile and forceless words. No intervening act of the electorate brought this about.

There are indications in that decision that the process of attrition spoken of above is at an end.

As of today the fifteen mill limitation does not cover cities, villages, the few charter townships, certain metropolitan districts, special assessment districts, and school districts in certain specific financing situations. (See Article X, Sections 27 and 28)

The political entities still subject to the restrictions of the fifteen mill limit are the state itself, counties, the 1,200 odd unchartered townships, school districts (as to operating taxes and short term bond issues) and a few metropolitan authorities. The state does not now levy a general property tax and has none in prospect. Townships can escape the limitation by incorporation as charter townships, but only a handful have done so.

Figures available from the state tax commission show that in 1960 a total of $851 million was levied in property taxes consisting of the following:

(in millions of dollars)

	Regular Taxes	Extra Voted	Debt Service Prior to 1932	Total
Counties	$133.3	$ 12.8		$146.1
Townships	7.6	5.2		12.8
Schools	216.9	217.1	$ .2	434.2
City and Village Taxes	224.1	3.1	30.9	258.1
Total	$581.9	$238.2	$31.1	$851.4

While it is not possible to break down these figures precisely between the levies subject to the millage limitation and those not subject, a rough approximation would be that slightly less than 70% of the total or about $590 million is subject to the provisions of Section 21 (within the fifteen mills and millage extra voted by the people).[35] Thus, while the provisions of Section 21 have been “bruised and beaten”

[35] This includes all county taxes and almost all township and school taxes.

the section has not been completely broken. The limitation still applies to a major portion of the property taxes levied by local units in Michigan.

One of the most significant of the "attritional series of judicial decisions" was the ruling, cited previously, that the limitation applied to state equalized valuations. From 1933 to 1944 the term "assessed value" as used in the amendment was considered to be the local assessed value. In 1944 the court held that "assessed value" meant the local assessment as changed or corrected through the process of county equalization—thus, the limitation applied to the county equalized value. In 1954 in the Pittsfield case, the court held that "assessed value" meant the local assessment as proved or changed and corrected through the statutory process of county and state equalization;—thus, the state equalized value became the base against which the limitation applied.

In terms of 1960 valuations, the potential significance of these changes can be noted. The local assessed valuation or the state in 1960 was $16.6 billion. The county equalized valuation was $20.8 billion, about 25 per cent higher than local assessed. The state equalized value was $24.9 billion, about 20 per cent higher than county equalized values and 50 per cent higher than local assessed value. Thus, the use of state equalized values as the base against which the limitation applies enables the units of government subject to the limitation to increase property taxes they levy by 25 per cent over what they could levy on county equalized values and by 50 per cent over what they could levy on local assessed values. This application of the limitation to state equalized valuations has made available a very significant potential increase in the general property taxes levied by the local units subject to the limitation.

It is of interest to note that in 1932 prior to the fifteen mill limit the total amount of general property taxes levied in Michigan was $217 million at an average state tax rate of $32.79 per $1,000 of state equalized valuation. In 1933 after the millage limitation the total dropped to $159 million and the average state tax rate dropped to $27.39. It is not possible to distinguish between the effects of the millage limitation and the effects of the depression. The average state tax rate fluctuated between 1933 and 1947, but generally hovered around the $27 level. Following 1947 the average state tax rate began a gradual although not regular increase and in 1960 the average rate reached $35 per $1,000 of state equalized valuations.

Possible Areas of Revision. The convention may wish to consider a number of possible alternatives in connection with this section.

It is beyond the scope and purpose of this paper to attempt to provide either solutions to the problems involved or to present the kinds of detailed information that will be needed in finding appropriate solutions to these problems. However, consideration might be given to these questions:

1. Should there be a constitutional limitation on the amount of property taxes levied in Michigan or should this matter be left to the discretion of the legislature? In the absence of a specific constitutional provision the legislature would have the power to prescribe tax rate limitations. It should be noted that there is some controversy as to whether tax rate limits have any real effect on the level of property taxes in a state. Further, there is a question as to whether a low tax rate limit has any more effect on the property tax level than a high limit.[36]

2. If a tax rate limitation is to be included in the constitution then consideration should be given to the following questions:

a) Should the limit apply to all units of government which levy property taxes—cities, villages, townships, school districts, counties, metropolitan districts, the state and any other political unit? If not, which units should be excluded and what, if any, limitations should apply to them?

b) Should the limit cover all purposes for which property taxes might be levied—special assessments, operating millage, debt service, capital outlay millage, etc.? If not, which purposes should be included and which excluded?

c) What should the rate limitation be? This will, of course, depend in part on which units are subject to the limitation.

d) To what base should the limitation be applied—local assessed, county equalized, or state equalized? This question should be reviewed in connection with the constitutional provision on assessment and equalization.

e) If there is to be a millage limitation applying to several overlapping local units, should a provision be included in the constitution for allocating the millage among them?

f) Should there be, as at present, a limit that can be increased by vote of the people up to some stipulated maximum limit? Or, should the limit apply only to the rate that can be set by local governing bodies with no maximum rate specified if approved by vote of the people? Or, should there be only a maximum rate that can be levied by local governing bodies with no provision for a vote of the people?

g) Should the present twenty year time limit be continued; should approval by a simple majority of voters be adequate; should any voter or only property owners be able to vote on the question?

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[36] See the Michigan Tax Study Staff Papers, "The General Property Tax," pp. 230-232.

These questions, as well as others, should be considered in relation to revision of Section 21. There are several of these areas that require further comment.

Units of Government Subject to a Limitation. One problem that can arise as a result of the present system of having only certain units subject to the tax limitation while other overlapping units are not subject to it is a possible uneconomic allocation of functional responsibilities among the various levels of government. For example, counties might be the level of government that could most efficiently and economically provide a certain function, such as public health services. However, as a result of the millage limitation the county may be unable to finance a county-wide health service, leaving this service to be provided by the cities in the county which have the financial resources to do so under their more flexible charter tax rate limitation. This can be even more true in the financing of public improvements such as sewer and water facilities. Such improvements may have to be provided on a less economic piecemeal basis because the county or metropolitan authority lacks the taxing authority to provide the required facility. Even though it may be the same taxpayers who are paying the cost, the decision as to which level of local government will provide a service or a facility must be based in some instances on the question of which of the overlapping units has the more flexible tax rate limitation. Factors such as which unit can provide the service most responsibly, efficiently, and economically may often be ignored because of the problem of millage limitations.

Effect on Capital Financing. In respect to financing capital facilities several other problems stem from the millage limitation. One problem is that restrictions on the governing bodies' ability to levy taxes can often encourage the governing body to resort to other devices to finance improvements. For example, a unit may use "revenue bonds" for facilities which do not in fact produce revenues and that could be more economically financed through full faith and credit bonds. A second problem is that faith and credit bonds issued by the units subject to the millage limitation (except for schools—see Article X, Sections 27 and 28) are limited tax bonds rather than unlimited tax bonds. It is necessary to get voter authorization for the millage required to meet the debt service requirements and this results in what are called limited tax bonds. In contrast, an unlimited tax bond issued by a local unit not subject to the fifteen mill limit can pledge the full faith and credit of the community to paying off the bonds. Limited tax bonds are at a competitive disadvantage with unlimited tax bonds in the bond market, most bond buyers preferring the latter. Finally, the twenty year time limit on extra voted millage necessitates the issuance of shorter term bond issues than might otherwise be desirable under some circumstances.

It is possible to impose tax limits in respect to operating funds and eliminate them for debt service funds. In Michigan the voters have approved two constitutional amendments (Article X, Sections 27 and 28) relating to school districts which achieve this end. Debt service for school bonds is now excluded from the millage limitation. The vote authorizing school bonds automatically authorizes whatever millage is necessary to meet the debt service requirements—hence, unlimited tax bonds. Further, under the provision of Section 28 the twenty year time limit does not apply, thus permitting longer term bond issues. Operating funds remain under the limitation provisions.

B. DEDICATION OF TAX REVENUES FOR SPECIFIC PURPOSES

1. Primary School Interest Fund

Article X: Section 1. All subjects of taxation now contributing to the primary school interest fund under present laws shall continue to contribute to that fund, and all taxes from such subjects shall be first applied in paying the interest upon the primary school, university and other educational funds in the order herein named, after which the surplus of such moneys shall be added to and become a part of the primary school interest fund.

Constitutions of 1835 and 1850

There was no comparable provision in the constitution of 1835. The constitution of 1850 included the following provision as a part of Article XIV, Section 1:

> Specific Taxes; Disposition. Section 1. All specific state taxes, except those received from the mining companies of the upper peninsula, shall be applied in paying the interest upon the primary school, university and other educational funds and the interest and principal of the state debt in the order herein recited, until the extinguishment of the state debt, other than the amounts due to educational funds, when such specific taxes shall be added to, and constitute a part of the primary school interest fund. The legislature shall provide for an annual tax, sufficient with other resources, to pay the estimated expenses of the state government, the interest of the state debt and such deficiency as may occur in the resources.

Constitution of 1908

Section 1 was developed in the 1908 constitution as a way to continue the same tax support for the primary school fund as was provided in the constitution of 1850. It has not been amended since the present constitution was adopted.

A proposal to channel some of the primary school fund money “toward the constructing and maintaining of manual training, domestic science, mechanical, industrial and technical schools” was not accepted after extensive debate in the constitu-

tional convention of 1908.[37] The convention delegates apparently received voluminous mail and other communications indicating strong popular sentiment to retain in the constitution existing provisions relating to the primary school fund and its support.

Judicial Interpretation

Michigan courts have ruled that provisions of the 1850 constitution, providing that all specific taxes should belong to the primary school interest fund, were retained in the constitution of 1908, but only as to the sources of revenue as they existed before its adoption, leaving the state free in dealing with every other source of revenue, every other subject of taxation.[38] The courts have also ruled that "subjects of taxation," as used in the constitution, means something more than corporation, public utility or individual taxpayer who may be made liable for tax by legislative enactment; it connotes the underlying principle on which the tax is designed and imposed.[39]

Apparently the legislature is free to repeal any specific tax dedicated by Section 1 to the primary school interest fund and replace it by another tax measured in a different way upon the same taxpayers without dedicating the new tax.

Other State Constitutions

Although provisions for the support of public schools are common in state constitutions and references to permanent school funds are the rule, constitutional dedication of particular state taxes for this purpose is not so common. The West Virginia dedication of "money and taxes" formerly payable to a permanent fund appears to be the only state other than Michigan with a constitutional provision preserving tax dedications by reference from a prior provision.

Texas provides an "available school fund" with constitutional revenues from 1/4 of revenue from state occupation taxes, a poll tax of $1 on state inhabitants between 21 and 60 years old and 1/4 of the net revenue from the motor fuel tax. Oklahoma provides for payment to a school fund of school taxes upon property of railroads, pipelines, telegraph companies or public service corporations. Missouri specifies no tax, but requires that at least 25 per cent of state revenue, exclusive of interest and

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[37] Constitutional Convention of 1908, Proceedings and Debates, June 29, 1850, pp. 1096-1103.

[38] Union Steam Pump Co. v. Secretary of State, 216 Mich. 261 (Michigan Statutes Annotated 1936) Vol. 1, p. 407.

[39] Western Electric Co. v. Department of Revenue, 312 Mich. 582; also Duluth S. S. & A. R. Co. v. Corporation and Securities Commission, 353 Mich. 636. (Michigan Statutes Annotated, 1959 Cumulative Supplement, Vol. 1, pp. 171, 172).

sinking fund, be applied annually to the support of the free public schools. South Carolina provides similar dedication of revenues from sale or license of alcoholic beverages exceeding that allowed by law to counties and municipal corporations. Utah provides that taxes on income and intangible property be allocated to support the public school system, together with other moneys not to exceed 75 per cent of the minimum school program. Several states prescribe a minimum amount of money without reference to its source (for example, Delaware $100,000, Pennsylvania $1,000,000). Various smaller dedications include fines, escheats, etc. The Model State Constitution contains no provision comparable to Section 1.

In most instances, state constitutional provisions accomplish little more than to establish school funds which are supplemented by legislative appropriation.

Comment

There is more emotion associated with the Michigan constitutional dedication of certain specific taxes to the primary school interest fund than there are tangible benefits derived from it. School support resulting from this provision (Section 1) is a small part of total amount of state support provided for local schools. From the standpoint of effective dedication of state tax revenues for local schools, Section 1 is vastly overshadowed by Section 23 dedicating sales taxes. The taxes dedicated to the primary school interest fund include the inheritance tax, corporation organization fees, foreign insurance companies' tax, and the four ad valorem taxes on railroads, telephone and telegraph, car loaning, and express companies. During the fiscal year 1959-60 these taxes yielded $57 million in revenues.

2. State Sales Tax, Distribution

Article X: Section 23. There shall be returned to local governmental units by the method hereinafter set forth, l/2 cent of a state sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate). The state disbursing authority shall remit to counties as a whole on a population basis and payment shall be made to the county treasurer who shall remit to the respective cities, townships and villages within the county on a per capita basis. Population computation shall be based on the last and each succeeding state-wide federal census for purposes of division among counties and upon the same basis or upon any special federal county-wide census, whichever is later, for intra-county division purposes. There shall be excluded from such computation 50 per cent of the total number of persons who are wards, patients or convicts committed to or domiciled in any city institution located outside the boundaries of said city or committed to or domiciled in any county, state or federal tax supported institution, provided such persons were included in said federal census. All remittances provided shall be made on a quarterly basis.

There shall be set aside for the school districts 2 cents of a state sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate), to be allocated among said school districts by law. Such taxes so collected shall be deposited in a special school aid fund and be expendable only by legislative appropriations for aid to the school districts and school employees' retirement purposes as shall be provided by law. Said school aid fund shall be separate and distinct from the state general fund.

Prior to any division or allocation of the sales tax, the cost of collection as determined by the department of revenue shall be deducted from total collections and credited to the general fund of the state.

The legislature shall by law appropriate from the school aid fund for such public school employees' retirement systems as shall from time to time be in effect under the laws of this state an amount which shall not be less than 5 per cent nor more than 7-1/2 per cent of the salaries of school district employees participating in the respective retirement systems. Such percentages shall apply only to that portion of salary as may be provided by law. At no time shall the legislature levy a sales tax of more than 4 per cent.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 contained no similar provision. The nearest thing to it was the dedication of specific taxes in the 1850 constitution. (See Section 1 above.)

Constitution of 1908

Section 23 was added to the present constitution by amendment proposed by initiatory petition and adopted at the November election in 1946. A proposal by joint resolution of the 1947 legislature to repeal this section failed of ratification at the November election of 1948. It was amended in 1954 and again in 1960 to its present form.

Commonly referred to as "the sales tax diversion amendment," Section 23, as originally adopted in 1946, required payment to local governments of portions of "total sales tax revenues" as follows:

1/6 to townships, cities and villages on per capita basis
1/6 to school districts on school census basis
44.77 per cent to school districts on basis of formula adopted by the legislature of prior year's sales tax revenue

The amendment adopted in 1954 established a 3 per cent sales tax rate ceiling and provided that the "cost of collection as determined by the department of revenue shall be deducted from total collections." This same amendment provided that the distribution should be as follows:

> 1/2 cent of sales tax on 1946 statutory base to cities, townships and villages on per capita basis
>
> 2 cents of sales tax on 1946 statutory base to school districts on basis of formula adopted by legislature

The amendment of 1954 also provided for exclusion of 50 per cent of persons "who are wards, patients or convicts committed to or domiciled in any city institution located outside the boundaries of said city..." or "in any county, state or federal tax supported institution..." from the census count used as basis for distributing sales tax to cities, townships and villages. It provided that the legislature shall appropriate from school funds for school employees' retirement systems an amount "not less than 5 per cent nor more than 7-1/2 per cent of salaries of school district employees participating in the respective retirement systems."

The amendment of 1960 increased the sales tax rate ceiling from 3 per cent to 4 per cent without changing the portions payable to townships, cities, villages and school districts. This amendment was adopted after the supplemental state use tax on retail sales of 1 per cent, adopted in 1959, had been declared in violation of the 3 per cent sales tax limitation imposed by Section 23.[40] Its purpose was to enable the state to collect revenues from a 1 per cent additional sales tax for its own purposes as a replacement of revenues it had sought from the 1 per cent use tax.

Judicial Interpretation

Section 23 has been the subject of extensive litigation. The amendment of 1954 providing for deduction of cost of collection grew out of a court ruling that for the purpose of determining local shares, "'sales tax levy' must be taken to mean sales tax money collected, ... and there must be excluded from consideration all such items as expenses of collection."[41]

The same decision rendered prior to the 1954 amendment held that direct distributions of 1 cent of sales tax levy to cities, townships, villages and schools included only the sales tax itself without reference to "...refunds, appropriations made therefrom, license fees and penalties arising from enforcement of the law..." but that the percentage (44.77 per cent) which must be appropriated by the legislature "to provide for continuance of annual school grants" applied to "total sales tax revenue" including license fees, interest and penalties.

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[40] Lockwood V. Nims (October 22, 1959).

[41] City of Jackson v. Commissioner of Revenue, 316 Mich. 694.

Michigan courts have ruled that, except for the provision directing annual legislative grants to school districts, Section 23 is self-executing and does not require implementation by legislation.[42] Also, that the legislature cannot establish the state as a school district for purposes of appropriating part of sales tax revenue for support of state institutions or functions assumed directly by the state government.[43]

Opinion of the Attorney General

The reference in the amendment to the "1946 statutory base (not rate)" has led to some question as to whether this restricts the legislature's power to change the base of the tax as prescribed by law. However, the attorney general has ruled sales of food and fuels could be exempted from the sales tax act without violating this provision.[44]

Other State Constitutions

Although various provisions appear in several state constitutions regarding sharing of state taxes with local schools and other local governmental units (see discussion of Section 1), no other state constitution contains detailed apportionments similar to Michigan's Section 23 relative to sales taxes or any other tax of so large a magnitude.

Comment

Section 23 is an example of legislation by constitution. It has the effect of dedicating a large source of state tax revenue in such a way as to influence the entire state financial environment.

Although it assures local governments in general and local schools in particular of substantial non-property tax revenues, it does so in a way which bypasses the kind of legislative determination and review ordinarily associated with legislative responsibility for overall financial planning and adjustment to changing circumstances.

Prior to the adoption of the sales tax diversion amendment in 1946, the sales tax had been the major source of revenue for the state government. In the fiscal year 1945-46 the sales tax constituted almost 87 per cent of general fund-general purpose tax revenues. By fiscal 1960 the state's one-half cent share of the three cent sales tax amounted to less than 18 per cent of general fund-general purpose tax revenues. The one cent increase in the sales tax, effective January 1, 1961, is not dedicated, making a total of one and one-half cent of the four cent sales tax available for general fund-general purpose financing. In fiscal 1961-62 it is estimated that the sales tax will constitute about 40 per cent of general fund-general purpose tax revenues.

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[42] City of Jackson v. Commissioner of Revenue, 316 Mich. 694.

[43] Board of Education of Detroit v. Superintendent of Public Instruction, 319 Mich 436.

[44] Op. Atty. Gen., January 26, 1956, No. 2470.

In July, 1955, a separate school aid fund was created in accordance with the 1954 amendment to Section 23. Under provisions of this amendment two cents of the sales tax were earmarked for aid to local school districts with the thought that such aid would be limited to the revenue yield of this part of the tax together with other revenues of the fund. In the interval since 1954, a dollar-per-pupil formula was developed to distribute aid to the local school districts. The cost of this formula increased more rapidly than annual income of the school fund.

For fiscal 1958, the legislature by law dedicated a one-cent cigarette excise tax and a four per cent liquor excise tax to the school aid fund and in 1958 began also to appropriate a general fund supplement to the school aid fund in order to meet the statutory school aid formula.

In fiscal 1961-62 the excise taxes dedicated to the school aid fund will yield about $28 million and the sales tax about $210 million; it is estimated that a general fund appropriation of $44 million will be required to supplement the sales tax and excise taxes to payout the statutory formula.

Constitutionally restricted state revenues (sales tax primary school interest fund, and gasoline and weight taxes) now account for approximately 50 per cent of total state revenues.

3. Gas and Weight Taxes

by
Miller, Canfield, Paddock and Stone
John H. Nunneley

Article X: Section 22. All taxes imposed directly or indirectly upon gasoline and like fuels sold or used to propel motor-vehicles upon the highways of this state, and on all motor vehicles registered in this state, shall, after the payment of the necessary expenses of collection thereof, be used exclusively for highway purposes, including the payment of public debts incurred therefor, and shall not be diverted nor appropriated to any other purpose; provided, the legislature may provide by law a method of licensing, registering, and transferring motor vehicles and their certificates of title, and licensing and regulating motor vehicle dealers and operators; and may prescribe charges sufficient to pay for the enforcement thereof. The provisions of this section shall not apply to the general sales tax, the use tax, the fees and taxes collected under the auto theft and operators' and chauffeurs' license laws which are used for regulatory purposes; the application fees and mileage fees appropriated to the Michigan public utilities commission by Act

No. 254 of 1933; the franchise or privilege fees payable generally by corporations organized for profit; nor to ad valorem taxes payable generally by manufacturers, refiners, importers, storage companies, and wholesale distributors on gasoline and like fuels held in stock or bond, and by manufacturers and dealers on motor vehicles in stock or bond.

Constitutions of 1835 and 1850

There was no similar provision in the Michigan constitutions of 1835 or 1850.

Constitution of 1908

This provision, sometimes known as the "anti-diversion amendment" was added to the 1908 constitution by amendment proposed by initiatory petition and adopted at the general election of November 8, 1938. It was brought about because of the use of moneys derived from gasoline and weight taxes[45] for other than highway purposes by the state legislature, particularly during the depression years in the early 1930's. It was felt by the sponsors of the amendment that such taxes collected from users of the highways of the state were in a different category than general taxes, and were more in the nature of a privilege tax collected from and paid only by those using highways. Hence, it was argued, the funds collected from such use should be earmarked for the improvement and construction of highways. The voters of Michigan agreed by a substantial majority.

This amendment has become firmly ingrained into the state fiscal picture and no serious attempts have been made by the state legislature to raid said funds. Because of this amendment the construction and necessary renovation and maintenance of highways has continued in Michigan within the limits of funds provided by gasoline and weight taxes irrespective of the financial condition of the state's general funds. This amendment, as will be shown later, is the cornerstone upon which the highway program now under way is based.

Opinions of the Attorney General

Occasionally some minor attempts have been-made to justify use of said funds for purposes claimed to be related to highway purposes, but these attempts have usually met with failure because of adverse opinions of the attorney general. An attempt to appropriate such funds to pay uniformed state police patrolling highways was ruled unconstitutional by the attorney general (Op. Atty. Gen. March 17, 1958, No. 3250). No attempt has resulted in a law which necessitated a Michigan supreme court decision.

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[45] By weight taxes is meant the annual license fees on motor vehicles based upon the weight thereof.

Statutory Implementation

How firmly ingrained into the Michigan fiscal picture this amendment has become can be demonstrated by the following recent history of Michigan highway financing:

1. Such taxes are collected by the state and distributed quarterly to the state highway department, the various county road commissions, and the cities and villages based upon a statutory formula. The current distribution formula is set forth in Act 51, public acts of 1951; as amended, as: state highway department, 47 per cent thereof; the various county road commissions, 35 per cent thereof; and the various incorporated cities and villages, 18 per cent thereof. The sums so distributed are earmarked and can be used under the above amendment and the law solely and only for highway purposes or for payment of debts incurred for such purposes. They constitute the basic funds to enable such units of government to construct, maintain and operate the highways and streets under their respective jurisdictions.[46]

2. The state legislature by amendments to Act 205, public acts of 1941, authorized the issuance of limited access highway bonds secured by contractual pledges of the state highway department, and contracting cities, villages and counties of specified portions of their highway revenues derived from state-collected and returned gasoline and weight taxes. These pledges constitute the total security for such bonds. Under said act the following principal amount of bonds has been issued by the state for the following purposes:

Purpose	Principal Amount
Ford-Lodge Expressway (three series)	$100,000,000
Detroit-Toledo Expressway	20,000,000
Grand Rapids Expressway	10,000,000
Farmington-Brighton Expressway	5,000,000
Fenton-Clio Expressway	10,000,000
Grand Haven-Muskegon Expressway	11,000,000
Detroit-Toledo Expressway-Rockwood North	5,000,000
Midland-Bay City Expressway	17,000,000
Northwestern Expressway	25,000,000
Total	$203,000,000

The balance of principal outstanding as of June 30, 1961, was $165,035,000.00.

3. The state legislature by Act 87, public acts of 1955, as amended, authorized the state highway department to issue bonds secured by pledges of necessary gasoline

[46] During the fiscal year ending June 30, 1960, such taxes were distributed as follows: state highway department $98,657,304.63; county road commissions $73,468,205.58; and incorporated cities and villages $37,783,648.78.

and weight taxes returned to the state highway department pursuant to law.[47] Under said act the state highway department issued bonds in the aggregate principal amount of $25,000,000 for trunk line highway construction. Bonds in the principal amount of $20,840,000 of this issue were outstanding as of June 30, 1961.

4. The state legislature by comprehensive amendments adopted in 1957 to Act 51, public acts of 1951, as amended, greatly expanded the bonding powers of the state highway department, and extended said bonding powers to counties. Such bonds are secured by these constitutionally earmarked gasoline and weight taxes, and such bonds together with outstanding bonds are given a prior lien for their payment against such funds. Under this authorization the state highway department has issued, as of August 1, 1961, a total of $260,000,000 of highway bonds to carry out its highway construction program, receiving, in the case of interstate highways, 90 per cent federal participation in addition, and on other trunk lines 50 per cent participation. This bonding program enabled the state to put up its matching money immediately. Federal aid has been a major factor in supplementing bond moneys in all cases where bonds have been issued by the state. An additional $100,000,000 has been authorized, and $50,000,000 issued, to finance the local share of the new expressway system being constructed in Detroit, and $18,000,000 issued to pay the local share of completion of the Grand Rapids expressway. These bonding provisions are a necessary and integral part of the current major highway program under way in the state.

5. There have been issued, thus, by the state highway department $521,000,000 in principal amount of highway bonds, of which $465,280,000 are outstanding as of June 30, 1961. These bonds in no way involve the credit of the state of Michigan but are payable solely out of pledged amounts of gasoline and weight taxes earmarked by the above amendment for “highway purposes, including the payment of public debts incurred therefor.”

6. In addition to the above bonds which have been issued by the state highway department, bonds of like nature have been and are being issued by incorporated cities and villages of the state for street purposes under the provisions of Act 175, public acts of 1952, as amended, secured primarily by pledges, within statutory limits, of such highway funds returned to them pursuant to law. Said bonds are known as “motor vehicle highway fund bonds” and total many millions of dollars. Also, counties are authorized to issue bonds of like nature under the provisions of Act 51, public acts of 1951, as amended. St. Clair county has issued $2,900,000 of such bonds, and other counties are in the process of issuance. Under Act 143, public acts of 1943, as amended, many counties have issued road notes secured by gasoline and weight tax moneys returned to them.

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[47] The bonding provisions of this law were repealed by the amendments adopted to Act 51, public acts of 1951, as amended, referred to herein. The outstanding bonds and their security were fully preserved in said amendments.

Judicial Interpretation

The Michigan supreme court has sustained this type of bond and the security pledged therefor. The court passed upon legal questions involved at the time of the first issue of Ford-Lodge expressway bonds in 1951, in the case of State Highway Commissioner v. Detroit Controller, 331 Mich. 337, and the following brief quotes from said decision are pertinent:[48]

> Vehicular taxes, almost since their origin, have been earmarked exclusively for highway purposes, PA 1915, No. 302 (CL 1948, § 256.1 et seq. (Stat Ann § 9.1431 et seq.)), PA 1925, No. 2. In 1938, the Constitution of 1908 was amended to include article 10, § 22. This section provides:
>
> > All taxes imposed directly or indirectly upon gasoline and like fuels sold or used to propel motor vehicles upon the highway of this state and on all motor vehicles registered in this State, shall. . . be used exclusively for highway purposes, including the payment of public debts incurred therefor.
>
> Vehicular taxes have often been termed privilege taxes for the use of the State's highways. They are paid only by motor vehicle owners and users, and the moneys derived therefrom are used solely for the benefit of those persons who paid the tax.
>
> * * *
>
> Nor would a constitutional amendment which had the effect of impairing the bondholder's security be valid, for the supreme court has held that an amendment to a State Constitution is passing a law for the purpose of the contracts clause. Railroad Company v. McClure, 77 US (10 Wall) 511 (19 L ed 997); Russell v. Sebastian, 233 US 195 (34 S Ct 517, 58 L ed 912, Ann Cas 1914C 1282). The pledge is irrevocable as any statute or amendment to the Constitution impairing the obligation of the bonds would be invalid insofar as it affected bonds theretofore issued.

In view of these decisions it could certainly be argued with considerable merit that any attempt to do away with the constitutional earmarking of motor vehicle taxes as set forth in Section 22, Article X, of the present constitution would be invalid under the contracts clause of the United States Constitution (Article 1, Section 10) as having the effect of impairing the security of the above specified outstanding bonds.

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[48] See also Nichols v. State Administrative Board, el al, 338 Mich. 617.

Other State Constitutions

Constitutional earmarking of gasoline taxes occurs in 28 states and of motor vehicle taxes, in 27 states. Twenty-six states earmark both taxes, but only two states (California and Florida) earmark only gasoline taxes and only Nebraska earmarks only motor vehicle taxes. It is common to include administrative and collection costs of the tax(es) as an allowable purpose for which the revenues derived therefrom may be used. With but few exceptions these revenues are specifically set aside for roads and highways, bridges, and other purposes incident to the provision of vacilities for and supervision over, vehicular travel on public roads and highways. Arizona uses revenues from motor vehicle taxes for local units. Nebraska uses revenues from the same source for distribution to both the state and to local units, with no requirement as to purpose. Pennsylvania includes the construction and improvement of facilities for air navigation as a legitimate use of motor vehicle tax receipts. Finally, Oregon allows use of revenues from gasoline and motor vehicle taxes for the acquisition, development, use, maintenance, and care of parks, scenic, recreational and historic areas and the publicity thereof. The Model State Constitution does not earmark any taxes.

Comment

While there are many arguments which can and will be advanced against the constitutional earmarking of general tax revenues collected by the state, it is suggested that the revenues derived from gasoline and weight taxes as presently earmarked fall into a different category for the following reasons:

1. Such taxes do not fall within the category of general taxes, but are more in the nature of privilege taxes collected from users of the highways, and thus should be used for highway purposes. Constitutional earmarking is the only sure means by which this purpose can be realized. As stated by the Michigan supreme court in State Highway Commissioner v. Detroit Controller, 331 Mich. 337, at p. 350:

> Vehicular taxes have often been termed privilege taxes for the use of the State's highways. They are paid only by motor vehicle owners and users, and the moneys derived therefrom are used solely for the benefit of those persons who paid the tax.

2. A removal of the present constitutional earmarking may impair the security of presently outstanding bonds in the principal amount of $465,280,000 issued by the state, as well as many additional millions of dollars of bonds issued by cities and villages, and notes and bonds issued by counties, all secured by pledges of gasoline and weight tax revenues. A removal of a very important factor in the security

thereof—the constitutional earmarking of such funds which "shall be used exclusively for highway purposes, including the payment of public debts incurred therefore"—would be dangerous from a legal standpoint in that it may result in court invalidation of such removal of the provision from the new constitution.

The constitutional earmarking is of prime importance to the above type of bond as enhancing their security and making them more saleable at a favorable interest rate. For example, all official statements issued in connection with each bond series issued by the state highway department contain the following statement, or one in similar language:[49]

Constitutional Provisions

> This amendment was popularly known as the 'anti-diversion amendment' proposed by initiative petition and adopted by the electors of the State at the general election of November 8, 1938. It effectively prevents the legislature of the State from diverting these specific tax moneys to any other purpose except highways or the payment of debts incurred for highway purposes. It is a very effective anchor securing the type of highway bonds herein described as these bonds are debts incurred for highway purposes. Thus, the taxes out of which these bonds are payable and which are pledged as a security for payment thereof, are constitutionally earmarked and cannot be used or appropriated by the State legislature for any other purpose. The general fund or general taxes of the State are in no way involved or pledged for the payment of these bonds.

Such attempt, as a practical matter, may also impair the future credit of the state.

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[49] Taken from official statement issued in connection with state trunkline highway bonds, series VI, in the aggregate principal amount of $35,000,000.00, dated August 1, 1961.

C. CONTROL OF STATE FUNDS

1. State Depositories

Article X Section 15. No state money shall be deposited in banks other than those organized under the national or state banking laws. No state money shall be deposited in any bank in excess of 50 per cent of the capital and surplus of such bank. Any bank receiving deposits of state money shall show the amount of state money so deposited as a separate item in all published statements.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 contained no comparable provision.

Constitution of 1908

Section 15 has not been amended since the present constitution was adopted.

Judicial Interpretation

This section has been the subject of little litigation.

Other State Constitutions

Section 15 is unusual among state constitutional restrictions concerning the deposit of state, money in that it limits such deposits to 50 per cent of the bank's capital and surplus and requires that state deposits must be separately reported in all published statements. Although such restrictions may be imposed by legislative act or by administrative practice in some states, they are not set forth in any other state constitution.

The Michigan restriction of state deposits to national or state banks is provided only in California and New Mexico. Wyoming qualifies a similar restriction with "whenever practicable" and California makes an exception for deposit of monies in banks outside the state for payment of principal or interest of its own bonds at the place where payable. Maryland leaves the choice of depositories to the treasurer with approval of the governor and Missouri adds approval of the state auditor to a similar selection. Montana provides a state depository board consisting of the governor, state auditor and state treasurer. Indiana permits the legislature to invest trust funds "in a bank with branches on unquestionable security." Colorado,

Minnesota and South Carolina do no more than require the legislature to provide by law for safekeeping of state funds. Montana supplements a similar requirement with the provision for national or state banks mentioned above.

The Model State Constitution contains no comparable provision.

Comment

Section 15 is the type of constitutional provision which few states have found necessary and the restrictions imposed by it are in greater detail than any other state has found necessary. At the same time, it is a type of provision which "does no harm" in that it imposes no undue restriction upon the state's financial management. Its provisions are of a nature which might be described as "good law" and may be questioned only on the grounds of the necessity to do in the constitution what could be done by the legislative act.

2. Payments from Treasury

Article X: Section 16. No money shall be paid out of the state treasury except in pursuance of appropriations made by law.

Constitutions of 1835 and 1850

The Michigan constitution of 1835 contained one article which provided essentially the same restrictions provided in Sections 16 and 17 (Article X) of the present constitution:

> No money shall be drawn from the treasury but in consequence of appropriations made by law, and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws annually (Article XII, Section 4).

Section 16 of the present Michigan constitution is identical with a provision of the 1850 constitution (Article XIV, Section 5).

Constitution of 1908

Section 16 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have ruled that appropriations can be made by constitutional provision as well as by legislative act,[50] but they have also ruled that payments from the general fund of the state cannot be made except in accordance with appropriations by the legislature.[51] In this last ruling, the court determined that it could not direct the legislature to appropriate money from the general fund to cover deficiencies "in mandatory payments provided by constitutional appropriations."

These interpretations make it clear that the legislature has complete control of all state money not clearly designated for a particular purpose or use in a particular way by the constitution.

Other State Constitutions

Michigan is one of 39 states with constitutional provisions that require "appropriations made by law" as a condition for paying money from the state treasury. New Mexico, Maine and North Dakota accomplish the same purpose by requiring an appropriation authorizing payment and New Hampshire requires that payments must be "agreeable to acts of the legislature." The language of these provisions is not identical, but the intent is the same, except that a few states exclude payments of interest on the public debt (New Mexico, Montana, Wyoming). Hawaii provides that provision for control of rate of expenditures of appropriated state moneys shall be made by law. Oklahoma and Missouri also have provisions for allotting appropriations during the fiscal year and keeping them within available revenues.

The Model State Constitution contains essentially the same provision as Michigan's Section 16.

Comment

Section 16 is consistent with what is recognized as good constitutional policy. It requires all expenditures of money to be authorized by the legislature or by the constitution and thus places the state in a position to exercise controls at the point of appropriation.

3. Public Moneys; Statement of Receipts and Expenditures

Article X: Section 17. An accurate statement of the receipts and expenditures of the public moneys shall be attached to and published with the laws passed at every regular session of the legislature.

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[50] Civil Service Commission v. Auditor General, 302 Mich. 673.

[51] Board of Education of Detroit v. Superintendent of Public Instruction, 319 Mich. 436.

Constitutions of 1835 and 1850

Section 17 (as well as Section 16) has its origin in one section of the Michigan constitution of 1835, which provided that:

> No money shall be drawn from the treasury but in consequence of appropriations made by law, and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws annually. (Article XII, Section 4)

Section 17 of the present constitution is identical with Article XVIII, Section 5 of the constitution of 1850.

Constitution of 1908

Section 17 has not been amended since the present constitution was adopted.

Judicial Interpretation

Provisions of Section 17 have been in Michigan constitutions since the state was first organized. Their interpretation is well established and the section has been the subject of little litigation.

Other State Constitutions

Michigan is one of nine states which require by constitution the publication of an accurate statement of receipts and expenditures together with legislative session laws (others are California, Florida, Indiana, Iowa, Maryland, Oregon, South Carolina and Tennessee). Nineteen other states have constitutional provisions for the publication of statements of accounts.

The Model State Constitution contains no provisions comparable to Section 17, but does provide that all state expenditures shall be matters of public record.

Comment

Although all states do not have such a constitutional requirement, it is recognized as good practice to publish accounts of revenues and expenditures and some form of public reporting is practiced in every state.

Although publication is possible without constitutional mandate, it would be difficult to be critical of the provisions contained in Section 17.

4. Accounts of Public Officials

Article X: Section 18. The legislature shall provide by law for the keeping of accounts by all state officials, boards and institutions, and by all

> county officials; and shall also provide for the supervision and audit thereof by competent state authority and for uniform reports of all public accounts to such authority. Such systems of account shall provide for accurate records of all financial and other transactions and for checks upon all receipts and disbursements of all such officials, boards and institutions; and shall be uniform for all similar boards, institutions and county officials. All public accounts and the audit thereof shall be public records and open to inspection.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 contained no provisions comparable to Section 18.

Constitution of 1908

Section 18 has not been amended since the present constitution was adopted.

This section was the subject of extended debate in the constitutional convention of 1907-08. It was forced out of the committee on miscellaneous provisions to the floor of the convention over the objections of the chairman of that committee.[52] Principal support for it developed in recognition of inadequate record keeping by the state and its local governments. It was modeled principally after new systems of state auditing which had been installed in Wyoming and Ohio and the proposal extended to municipalities as well as to the state and counties. Villages and school districts were also brought into the debate. Objections were raised to the effect that such a provision would generate a large and costly bureaucracy of accountants and that it was a proper subject for legislative action rather than for the constitution. This last objection was countered by the argument that the legislature had always had the necessary authority and had not exercised it. An effort to substitute “may” for “shall” was defeated.[53]

Judicial Interpretation

In view of the background of its adoption, it is interesting to note that Section 18 has been the subject of little litigation.

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[52] Michigan Constitutional Convention of 1908, Proceedings and Debates, January 2, 1908, pp. 487, 499, 500.

[53] Ibid., January 15,1908, pp. 771-775, January 29, 1908, p. 1080, February 20, 1908, pp. 1383-1388.

Other State Constitutions

Michigan stands alone among states with its constitutional requirement that the legislature must provide for a system of accounting. Connecticut, Maryland and New York place this function with the comptroller; Missouri places it with the state auditor; and Oklahoma with the state examiner. Michigan and Oklahoma require the legislature to provide for keeping of accounts. Michigan and West Virginia make public accounts public records open for inspection.

Constitutional requirements concerning audits and examinations of state accounts vary primarily in terms of who is made responsible. Michigan, Kentucky and Wisconsin require the legislature to provide for audits. Alaska requires the auditor to conduct post-audits "as prescribed by law" and Vermont simply requires that the treasurer's accounts must be audited annually. Other constitutional provisions for audit require examination by the comptroller (four states), the governor (four states), the grand jury (Colorado), secretary of state (Oregon), state auditor (six states) and state examiner (four states). Governors in nine states are under constitutional requirement to account to legislatures for moneys paid out to them or received. The Delaware treasurer must settle accounts annually with the legislature. Maryland permits the lower house of the legislature to examine records and appoint auditors, and Virginia requires the legislature to appoint a standing auditing committee.

Although state constitutions contain various provisions relating to county finances, Michigan is exceptional in the completeness of its requirement for state audits and uniform reports and availability of public accounts and audits for inspection. The nearest comparable provisions are the Virginia requirement that the legislature shall provide for examination of officers charged with collection and disbursement of public funds, and the Pennsylvania and Idaho requirements that the legislature provide for accountability for all fees collected and public and municipal moneys paid. Washington has a similar provision, but excludes combined city-counties or counties which have adopted home rule charters.

Although the Model State Constitution says nothing about uniform systems of accounts, it requires the legislature to appoint an auditor to conduct post audits as follows:

> Post-audit. The legislature shall appoint an auditor to serve at its pleasure. The auditor shall conduct post-audits as prescribed by law and shall report to the legislature and to the governor.

Comment

Although general requirements for audit are coming more and more to be subjects of basic law, the detailed subject matter of Section 18 is commonly regarded as more legislative than constitutional and its treatment in the various state constitutions is

in no way uniform. It was first introduced into the Michigan Constitution in 1908 as a way to force the legislature to make suitable provision for uniform accounts and audits and must be appraised against this background.

5. Ineligibility of Certain Persons to Public Office

Article X: Section 19. No collector, holder or disburser of public moneys shall have a seat in the legislature, nor be eligible to any office of trust or profit under this state, until he shall have accounted for and paid over, as provided by law, all sums for which he may be liable.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 (Article IV, Section 8 and Article IV, Section 6, respectively) contained sections restricting dual office-holding by legislators in the manner provided in Article V, Section 6 of the present constitution. This restriction was all that was provided in this regard by the 1835 constitution.

The 1850 constitution added the further restrictions (Article IV, Section 18) upon civil appointments and interests in contracts with the state or counties as provided in Article V, Section 7 of the present constitution. The 1850 constitution also added a section (Article IV, Section 30) making a collector, holder or disburser of public moneys ineligible for a seat in the legislature. This section was carried forward into the 1908 constitution as Article, X, Section 19.

Constitution of 1908

Section 19 of the present constitution is identical with Article IV, Section 30 of the 1850 constitution with the single exception of an editorial change substituting or for nor. This section has not been amended since the present constitution was adopted.

Judicial Interpretation

Section 19 is well established in Michigan constitutional law and has been the subject of little litigation.

Other State Constitutions

Michigan is one of twelve states with constitutional provisions that collectors or holders of public moneys are ineligible for membership in the legislature while continuing to be collectors or holders and prior to the time when proper accounting

has been made. (Others are Illinois, Iowa, South Dakota, Tennessee, West Virginia, Ohio, Maryland, Louisiana, Texas, Arkansas and Kentucky.) Mississippi has a similar provision applicable to persons "liable as principal for public moneys unaccounted for" and New Hampshire applies the restriction to "collectors of excise and state and continental taxes." Delaware makes former state treasurers ineligible until financial settlement and discharge of balance due.

Georgia makes a defaulter for public money or any legal taxes required of him ineligible.

Michigan is also one of twelve states which provides by constitution that collectors or holders of public moneys are ineligible for office of trust or profit prior to the time when proper accounting has been made (others are Arkansas, Colorado, Illinois, Iowa, Indiana, Oregon, Louisiana, Maryland, Tennessee, Texas and West Virginia). Mississippi has the same provision for offices of trust or profit as for membership in the legislature. California, Georgia and Nebraska provide ineligibility in case of defaults or fraud. Wisconsin makes any defaulter to the United States or to state or local governments ineligible for an office of trust or profit.

It is notable that although there are some duplications in the two lists of 12 states, there are also some differences between them.

The Model State Constitution contains no provision comparable to Section 19.

Comment

Constitutional provisions such as Michigan's Section 19 have their origin in efforts to assure that legislators and public officials will not be in a position to create policies or circumstances under which they may profit as collectors and holders of public moneys or under which they may combine the functions, of collector or custodian with those of director or spender. In contrast to the more common practice of excluding particular officers or officials, these provisions exclude all collectors, holders or disbursers of public money and thus seek to avoid any question of incompatibility of interest. The lessons of history suggest the wisdom of protecting the integrity of handlers of public money.

D. LIMITATIONS OF STATE INTEREST AND ACTIVITIES

1. Stock, Interest of State in

Article X: Section 13. The state shall not subscribe to, nor be interested in the stock of any company, association or corporation.

Constitutions of 1835 and 1850

The 1835 constitution contained no similar provision.

Section 13 of the present constitution is identical with Article XIV Section 8 of the 1850 constitution except for the substitution of nor for or.

Constitution of 1908

Section 13 has not been amended since the present constitution was adopted.

Judicial Interpretation

Section 13 is an established provision of long standing and has not been the subject of much litigation. Its interpretation has been literal and Michigan courts have ruled that it prohibits state investments in building and loan associations and that the same prohibition applies to investments by school districts which are state agencies.[54] The attorney general has ruled, however, that it does not prohibit insurance of state risks by contract with mutual insurance companies.[55]

Other State Constitutions

Michigan is one of 27 states with constitutional prohibitions against state ownership of stock. Although the precise language of these provisions varies among the states, their general content is surprisingly uniform. It is their purpose to prevent the state from assuming the role of joint owner or joint participant in private activities. Ohio states that the state is “not to be joint owner or stockholder in any company” and four other states (Pennsylvania, Florida, Georgia and South Carolina)

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[54] Michigan Savings & Loan League v. Municipal Finance Commission, 347 Mich. 311.

[55] Opinion of the Attorney General, No. 0-1323, September 28, 1943.

forbid joint ownership in any company, association or corporation. West Virginia has the same restriction without the word corporation. Tennessee adds municipalities to the things in which the state cannot become a stockholder and Virginia forbids interest in company, association or corporation "for purpose of aiding in construction or maintenance of its work." Louisiana says the state shall "not purchase or subscribe to stock of or become part owner in any corporation or association, or for any private enterprise." The Utah restriction includes bonds as well as stocks.

There are some exceptions provided in some of the state provisions. For example, California excepts mutual water company associations or corporations and makes special allowances for irrigation districts. Oregon permits the state to receive donated stock and Nevada excepts corporations formed for educational or charitable purposes. Arizona, Montana and Colorado provide exceptions for stocks coming into state ownership by operation or provision: of law through such things as tax foreclosures, breach of bond, etc.

Comment

The popularity of constitutional restrictions such as Michigan's Section 13 is a direct outgrowth of the unhappy historical experience of many states in seeking to encourage development through public participation in private ventures. The hard-learned lesson of this experience is that governmental functions of regulation and control are incompatible with entrepreneurial functions of self-interest, and especially so under conditions of divided ownership. It is significant, however, that the new state constitutions in Missouri, New Jersey, Alaska and Hawaii contain no such restriction. Its absence permits investment of state funds in corporate stocks, subject to whatever investment controls are provided.

It is not entirely clear whether this provision applies to "public corporations" or only to agencies of the state. For example, can a university own stock in an endowment fund or could a city pension fund own stock under this provision? These are questions which might be clarified.

2. Internal Improvements

Article X: Section 14. The state shall not be a party to, nor be interested in, any work of internal improvement, nor engage in carrying on any such work, except:

1. In the development, improvement and control of or aiding in the development, improvement and control of public roads, harbors of refuge, waterways, airways, airports, landing fields and aeronautical facilities;

2. In the development, improvement and control of or aiding in the development, improvement and control of rivers, streams, lakes and water levels, for purposes of drainage, public health, control of flood waters and soil erosion;

3. In reforestation, protection and improvement of lands in the state of Michigan;

4. In the expenditure of grants to the state of land or other property.

Constitutions of 1835 and 1850

The constitutional history of Michigan in the matter of internal improvements is the story of extreme changes in position. The 1835 constitution contained the following provision:

> Internal improvement shall be encouraged by the government of this state; and it shall be the duty of the legislature, as soon as may be, to make provision by law for ascertaining the proper objects of improvement in relation to roads, canals and navigable waters; and it shall also be their duty to provide by law for an equal, systematic, economical application of the funds which may be appropriated to these objects.[56] (Article XII, Section 3)

As originally adopted, the 1850 constitution provided:

> The state shall not be a party to, or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the state of lands or other property.[57] (Article XIV, Section 9)

After two amendments adopted in 1893 and 1905, this provision of the 1850 constitution read as follows:[58]

> The state shall not be a party to, nor interested in, any work or internal improvement, nor engaged in carrying on any such work, except in the improvement of or aiding in the improvement of the public wagon roads and in the expenditure of grants to the state of land or other

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[56] Michigan Statutes Annotated (1936), Vol. 1, p.147.

[57] Michigan Statutes Annotated (1936), Vol. 1, p.421.

[58] Joint Resolution No. 9, 1893, ratified at spring election of 1893 and Joint Resolution No. 4, 1905, ratified at April election of 1905.

> property: PROVIDED, HOWEVER, That the legislature of the state, by appropriate legislation, may authorize the city of Grand Rapids to issue its bonds for the improvement of Grand river.[59] (Article XIV, Section 9)

Constitution of 1908

The constitution of 1908 contained a revised statement of the section on internal improvements which provoked surprisingly little debate in the convention and was adopted as follows:

> The state shall not be a party to, nor be interested in any work of internal improvement, nor engage in carrying on any such work, except in the improvement of, or aiding in the improvement of the public wagon roads, in the reforestation and protection of lands owned by the state and in the expenditure of grants to the state of land or other property.[60] (Article X, Section 14)

The original version of Section 14 was amended in 1945 and 1946 to reach its present wording as stated previously. The major amendments were in broadening the exceptions to the prohibition against internal improvements

Judicial Interpretation

This provision has been the subject of extensive litigation relating essentially to two basic questions: (1) authority of local governments to engage in public improvements or to be delegated such authority by the state and (2) definition of internal improvements which are permitted and those which are prohibited. Michigan courts have established that the state has no authority to delegate powers it does not have for its own purposes and that local governments, as instrumentalities of the state, can engage in no improvements forbidden to the state.[61] The courts have tended to decide each question concerning definition of public improvements in terms of particular circumstances as presented in each case. It has been determined that a self-liquidating project is not a work of internal improvement within the constitutional prohibition of Section 14.[62] In general, such public facilities as parks, waterworks, sewers and lighting have been found not in violation of the constitutional prohibition.

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[59] Michigan Statutes Annotated (1936), Vol. 1, p. 184.

[60] Michigan Statutes Annotated (1936), Vol. 1, p. 421.

[61] Oakland County Drain Commissioner v. City of Royal Oak, 306 Mich. 124, and other cases, see Michigan Statutes Annotated (1936), Vol. 1, p. 421.

[62] Oakland County Drain Commissioner v. City of Royal Oak, 306 Mich. 124, also Attorney General ex rel. Eaves v. State Bridge Commission, 277 Mich. 373.

Other State Constitutions

Michigan is one of eight states with constitutional limitations upon state participation in internal improvements. Differences among these limitations relate to exceptions. For example, Alabama, Kansas and Virginia exclude public highways from general limitations. Minnesota permits use of the tax on motor vehicles for roads and Wyoming excludes highways, water and irrigation works and airports and related facilities from requirements of a two-thirds vote of the people for any work of internal improvement. In contrast to these states, Kentucky declares that the state shall not construct any railroad or other highway.

In addition to highways, Alabama excludes harbors and seaports under state management and control up to $10,000,000; airports, facilities, and navigable waterways up to $10,000,000; and hospitals and other health facilities. Maryland permits only limited amounts in particular counties. Minnesota and Wyoming make special provision for works where property is granted to the state.

The Model State Constitution contains no comparable restrictions to those contained in Section 14.

Comment

Section 14 is another provision of the Michigan constitution which has its roots in the state's unfortunate experience with excessive involvement in internal improvements during its first years of existence. Its principal function is to keep the state and its subdivisions out of business and to protect the public purse against burdens of ill-advised ventures. In most instances the restriction has been applied in a manner to permit public facilities commonly associated with governmental services and wholly owned by government. Other states have managed with more or less success to accomplish the same purpose without such a prohibition by relying upon such other constitutional restrictions as those relating to stock ownership, appropriations for private purposes, debt and credit restrictions, etc.

3. Railroads; Acquisition and Disposal by State

Article X: Section 20. It shall be competent for the State to acquire, purchase, take, hold and operate any railroad, or railroad property, belonging to any railroad or railway company in this State heretofore organized under a special charter still in force and effect and constituting a contract between the State and said company,

wherein the right to purchase or acquire has been reserved to the State, whenever in the judgment of the Legislature such acquisition or purchasing is necessary to protect and conserve the rights and interests of the State under such charter or contract. Any and all debts or obligations of such company constituting a lien upon such railroad, or railroad property, may be assumed by the State; and such road or property may be leased, sold or disposed of in such manner as may be provided by law.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 contained no provisions comparable with Section 20 of the present constitution.

Constitution of 1908

Section 20 was added to the present constitution by amendment ratified in 1917.[63]

This amendment must be considered against the historical background of railroad development in Michigan. Early efforts by the state to develop railroads resulted in severe financial difficulties and the state proceeded to divest itself of its railroad holdings.[64] The constitution of 1850 closed the door to future internal improvements of a similar character.[65]

Railroad charters were granted with provisions limiting the amount of taxes payable, but reserving rights to the state to buy the railroads. Similar rights to purchase reserved by other states in similar charters became instruments for changing the charters in a way to permit tax changes.[66] Michigan found this instrument ineffective because of its constitutional restrictions upon internal improvements[67]

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[63] Joint Resolution 3, 1917, ratified at April election, 1917.

[64] See Byron M. Cutcheon, Michigan as a Province, Territory and State, Vol. 3 pp. 280-287 (The Publishing Society of Michigan, 1906).

[65] See discussion of Article X, Section 14, above.

[66] See William G. McLoughlin, The Beginning of the Railroad Tax System of New Jersey (The Historical Society of Hudson County, Paper No. 13, January, 1917).

[67] 1850 Constitution, Article XIV, Section 9; 1908 Constitution, Article X, Section 14.

and the United States supreme court had ruled that the charters were contracts which the state must observe. The constitutional amendment to include Section 20 had as its purpose making the right of the state to purchase railroads effective and thus enabling the state to change the railroad tax.

Judicial Interpretation

Section 20 has not been the subject of litigation.

Other State Constitutions

No other state has a constitutional provision comparable with Michigan's Section 20. The Model State Constitution contains no such provision.

Comment

Section 20 is in the Michigan constitution for the sole purpose of overcoming the prohibition against internal improvements (Section 14) as they relate to railroads and thus to make effective the reservation of the state's right to purchase railroads contained in railroad charters. Its purpose is not to accomplish state ownership of railroads, but rather to give the state greater freedom in developing railroad taxation. It is in the nature of a special provision made against the background of special circumstances peculiar to Michigan arising out of other constitutional provisions.

E. STATE CREDIT AND DEBIT

1. Indebtedness; Limitation

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Article X: Section 10. The State may contract debts to meet deficits in revenue, but such debts shall not in the aggregate at any time, exceed 250,000 dollars. The State may also contract debts to repel invasion, suppress insurrection, defend the State or aid the United States in time of war. The money so raised shall be applied to the purposes for which it is raised or to the payment of the debts contracted. The State may borrow not to exceed 50,000,000 dollars for the improvement of highways and pledge its credit, and issue bonds therefor on such terms as shall be provided by law.

Section 11. No scrip, certificate or other evidence of state indebtedness shall be issued, except for such debts as are expressly authorized in this constitution.

Constitutions of 1835 and 1850

Section 10 has its origins in financial difficulties experienced early in Michigan statehood and associated with excessive state borrowing and bad credit management.[68]

The 1835 constitution as originally adopted contained no limitation on borrowing by the state. As a matter of fact, Article XII, Section 3 of the 1835 constitution directed that works of internal improvement should be encouraged, and required the legislature to provide by law funds for such purpose. Pursuant to this constitutional authorization, the legislature authorized the issuance of $5,000,000.00 in

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[68] Henry M. Utley and Bryon M. Cutcheon, Michigan as a Province, Territory, and State, Vol. 3, pp. 109-180 (The Publishing Society of Michigan, 1906).

bonds for canals and railroads. These bonds were negotiated by Governor Mason to the Morris Canal and Banking Company and to the United States Bank of Pennsylvania. The Canal and Banking Company and the Bank defaulted in making payment for the bonds and, in addition, the works of internal improvement contemplated did not materialize in the way originally contemplated. Accordingly, the people became quite antagonistic to works of internal improvement and to the state's financial participation therein. The 1835 constitution was amended in 1843 to require public referendum for the issuing of any debt "on the credit of the state." This amendment did not establish a dollar amount of debt limit, but it contained some of the language of the present Section 10. The entire amendment appears as follows:

> Amendment No. 2: That the constitution of this state be so amended, that every law authorizing the borrowing of money or the issuing of state stocks, whereby a debt shall be created on the credit of the state, shall specify the object for which the money shall be appropriated; and that every such law shall embrace no more than one such object, which shall be simply and specifically stated, and that no such law shall take effect until it shall be submitted to the people at the next general election, and be approved by a majority of the votes cast for and against it at such election; that all money to be raised by the authority of such law be applied to the specific object stated in such law, and to no other purpose, except the payment of such debt thereby created. This provision shall not extend or apply to any law to raise money for defraying the actual expenses of the legislature, the judicial and state officers for suppressing insurrection, repelling invasion, or defending the state in time of war.[69]

There is some legislative confusion associated with the resolution leading to this amendment to the 1835 constitution and some doubt that it was actually agreed to by the legislature of 1843.[70]

The constitution of 1850 dropped the referendum provision and established a $50,000 debt limit. It contained in two sections virtually the same language that was carried forward into Section 10 of the 1908 constitution as originally adopted.

These sections of Article XIV of the 1850 constitution provided:

> Section 3. The state may contract debts to meet deficits in revenue. Such debts shall not in the aggregate at anyone time exceed fifty thou-

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[69] Joint Resolution, approved March 9, 1843, and ratified at November election, 1844.

[70] Michigan Statutes Annotated (1936), Vol. 1, p. 152.

sand dollars. The moneys so raised shall be applied to the purposes for which they were obtained, or to the payment of debts so contracted.

Section 4. The state may contract debts to repel invasion, suppress insurrection, or defend the state in time of war. The money arising from the contracting of such debts shall be applied to the purposes for which it was raised, or to repay such debts.

The 1850 constitution (Article XIV, Section 7) added a provision similar to the present Section 11.

Constitution of 1908

Section 10, Article X of the constitution of 1908, as originally adopted, raised the amount of permissive debt from $50,000 to $250,000 and contained all of the language of the present Section 10 except the last sentence authorizing $50 million of highway bonds. This sentence was added by amendment ratified in 1919.[71] The specific provision in Section 10 with respect to borrowing for highway improvements has been interpreted as being a one-time authorization and, as soon as the $50,000,000.00 was issued, this authority expired.

Section 11 of the 1908 constitution continued the 1850 provision prohibiting issuing evidences of indebtedness, omitting the 1850 provision "except for the redemption of stock previously issued."

Judicial Interpretation

Michigan courts have ruled that the constitutional limitation upon the power of the state to borrow money for bridge purposes applies only upon indebtedness where the credit of the state is pledged, and that revenue bonds issued by the state which are payable only from tolls of the bridge, are not subject to such limitations.[72] This interpretation of the constitutional limitation also extends to bonds which are not general state obligations, but payable from taxes levied for highway purposes upon gasoline and motor vehicles.[73]

Other State Constitutions

A review of other state constitutional provisions indicates that most states have some sort of limitation on the amount of money that the state can borrow. These are either in the form of provisions similar to Michigan, which virtually prohibit borrowing, or are in the form of a provision permitting borrowing after approval of

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[71] Joint Resolution No. 1, 1919, ratified at April election, 1919.

[72] Attorney General v. State Bridge Commission, 277 Mich. 373.

[73] State Highway Commissioner v. Detroit City Controller, 331 Mich. 337.

electors or permitting borrowing up to a fixed amount. In connection with this, it should be noted that some state constitutional provisions, particularly Missouri, California, Oklahoma, Oregon and Utah, in the constitutional provision restricting state borrowing, also restrict borrowing by local communities such as cities, villages, counties and school districts.

Realistic comparison of Michigan constitutional debt provisions with those in other state constitutions requires that Section 10 and Section 11 be considered together. Section 11 prohibits the issuing of any evidence of state indebtedness "except for such debts as are expressly authorized in this constitution" and Section 10 spells out the exceptions. In this combination, the Michigan provisions are similar to those in 17 other states.

In the matter of the exception provided in Michigan for debt to "meet deficits in revenue," a majority of states authorize the incurrence of debt for such purposes. Of the 18 states, including Michigan, which have, a general constitutional prohibition against incurring any debt, eleven have a provision similar to Michigan's exception to meet deficits in revenue. Both the new constitutions of Alaska and Hawaii permit borrowing to meet deficits in revenue.

General debt limits are provided in varying degrees of stringency in a large number of state constitutions and subject to varying exceptions; Some are expressed in dollar amounts and others are expressed in percentages of assessed values (per cent is most common). It is a common practice to establish a limit which may be exceeded only by referendum.

Debt limits associated directly with debts incurred "to meet deficits in revenue" similar to the Michigan $250,000 limit provided in Section 10 vary widely as indicated below:

Nebraska	$ 100,000	
Texas	200,000	
Illinois	250,000	
Georgia, Kentucky	500,000	
Pennsylvania	1,000,000	
Alabama	300,000	
Ohio	750,000	
Arizona	350,000	
New Mexico	200,000	
Iowa	250,000*	
Washington	400,000*	
Maryland	50,000	without levying tax for interest and redemption

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* Exclusive of losses of permanent school or university funds by default.

South Dakota	$ 100,000	including debt for public improvements
Louisiana	2,000,000	1,000,000 total in one fiscal year, and $100,000 for one budget unit
Missouri	1,000,000	for unforeseen emergency in year without referendum
Utah	1 & 1/2	per cent of taxable values-debts for all public purposes
Colorado	3/4	mill on taxable value up to $100,000,000 and $100,000 thereafter. Maximum for one year 1/4 mill.

Authorization for state borrowing to "repel invasion, suppress insurrection and defend the state" without limitations otherwise provided is a common provision of state constitutions. Although the language varies, similar provisions appear in 44 state constitutions. Michigan is unusual in its inclusion of "aid to the United States in time of war" within this provision, but it is generally assumed that such authorization is implied in the "war and insurrection" provisions of other state constitutions.

Special provisions authorizing state debts for highway purposes and restricting their amount appear in the constitutions of nine states other than Michigan. Limitations upon amount of such debt and its use vary. New York permits use of $60 million for highways and parkways from proceeds of bonds sold for "elimination of railroad crossings and grades and incidental improvements" and also permits the legislature to make the state liable for $500 million of a public corporation to construct throughways. Ohio establishes a ceiling of $500 million of revenue bonds secured by taxes upon vehicles and motor fuels, with a further limitation to $125 million in any single year "and none after March 31, 1962." Pennsylvania establishes a ceiling of $100 million upon bonds for highway purposes "irrespective of any debt" and $10 million for self-supporting toll bridges in addition to including a list of improvements for which the state may issue bonds within a $50 million ceiling. California permits $40 million, Minnesota $150 million, and West Virginia $85 million for state highways and $50 million for secondary roads. Oregon sets the ceiling at 4 per cent of aggregate assessed value of property in the state. Louisiana has detailed provisions for financing specified road and bridge projects.

The Model State Constitution provides:

> No debt shall be contracted by or in behalf of this state unless such debt shall be authorized by law for a single project or object distinctly specified therein.

The new states of Alaska and Hawaii have provisions which apparently reflect lessons learned from the accumulated experience of all states. It is notable that these two new constitutions include one "long" provision and one "short" provision:

> Alaska State Debt: No state debt shall be contracted unless authorized by law for capital improvements and ratified by a majority of the qualified voters of the state who vote on the question. The state may, as provided by law and without ratification contract debt for the purposes of repelling invasion, suppressing insurrection, defending the state in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective (Article IX, Section 8).

> Hawaii—Debt Limitation: All bonds and other instruments of indebtedness issued by and on behalf of the state or a political subdivision thereof must be authorized by the legislature, and bonds and other instruments of indebtedness of a political subdivision must also be authorized by its governing body.
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> Sixty million dollars is established as the limit of the funded debt of the state at any time outstanding unpaid. Bonds and other instruments of indebtedness in excess of such limit may be issued when authorized by a two-thirds vote of all the members to which each house of the legislature is entitled provided, such excess debt at the time of authorization, would not cause the total of state indebtedness to exceed a sum equal to fifteen per cent of the total of assessed values for tax rate purposes of real property in the state as determined by the last tax assessment rolls pursuant to law.
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> Instruments of indebtedness to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, which shall be payable within one year, and bonds or other instruments of indebtedness to suppress insurrection, to repel invasion, to defend the state in war or to meet emergencies caused by disaster or act of God, may be issued by the state under legislative authorization without regard to any debt limit.

A sum equal to ten per cent of the total of the assessed values for tax rate purposes of real property in any political subdivision, as determined by the last tax assessment rolls pursuant to law, is established as the limit of the funded debt of such political subdivision at any time outstanding and unpaid. The aggregate, however, of such debts contracted by any political subdivision during a fiscal year shall not exceed two per cent of the total of such assessed values in such political subdivision.

Instruments of indebtedness to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, which shall be payable within one year, may be issued by any political subdivision under authorization of law and of its governing body, without regard to the limits of debt herein-above provided.

All bonds or other instruments of indebtedness for a term exceeding one year shall be in serial form maturing in substantially equal annual installments, the first installment to mature not later than five years from the date of the issue of such series, and the last installment not later than thirty-five years from the date of such issue. Interest and principal payments shall be a first charge on the general revenues of the state or political subdivision, as the case may be.

The provisions of this section shall not be applicable to indebtedness incurred under revenue bond statutes by a public enterprise of the state or political subdivision, or by a public corporation, when the only security for such indebtedness is the revenues of such enterprise or public corporation, or to indebtedness incurred under special improvement statutes when the only security for such indebtedness is the properties benefited or improved or the assessments thereon.

Nothing in this section shall prevent the refunding of any indebtedness at any time (Article VI, Section 3).

Comment

The wide diversity of state constitutional provision in the matter of legislative authority to incur debt suggests that all states are seeking ways to avoid accumulated debts and debt service costs. Extreme variation in the amount of debt limits suggests that each amount was more a produce to conditions at that time of adoption rather than of any reasonable program of capacity. Dedication of revenues, especially highway revenues, for the payment of debts has been a common way to get around restrictions upon “general state debt.” Referendum requirements have been more effective in some states than others as restraining influences. Where the state of Michigan has issued its bonds, a specific amendment to the constitution has been approved by the electors. In this connection, veterans’ bonus bond issues were

authorized by specific amendments adding Sections 20a, 23a and 26 to Article X. The mental health hospital bond issue was authorized by adding Section 24 to Article X. State indebtedness to assist in school construction was specifically added by Sections 27 and 28 of Article X.

It does seem that limiting the amount that may be borrowed to meet deficits to $250,000.00 is somewhat unrealistic. At the time that the 1908 constitution was approved, the obligations of the state in various social areas, particularly welfare, were not particularly large and the sources of revenue were considerably more stable. Revenue produced by present sources (whether sales tax, income tax or various business activity taxes) will vary from time to time, depending upon general business conditions. Further, the obligations of the state will also vary from time to time, depending upon business conditions. Unfortunately, it may well result that times when revenues are down, obligations and requirements of the state may be increased. Accordingly, it would seem desirable to permit the state to borrow money to cover expenses during these times. Perhaps some sort of limitation based on a percentage of the budget could be imposed limiting the maximum amount that could be borrowed. It further might be desirable in connection with this to specifically provide that any borrowing must be repaid over a relatively short period of time. Both Alaska and Hawaii permit borrowing to meet deficits in revenues. In Alaska it must be paid before the end of the next fiscal year, and in Hawaii it must be repaid within one year.

It is further desirable to provide specifically in the constitution for procedures for the state borrowing moneys, upon approval of the electors, for major capital improvement purposes. This would avoid the necessity of amending the constitution every time a specific borrowing is required, thus avoiding cluttering up the constitution with specific borrowing authorities, as is presently done. In any event, any constitutional limitation on state borrowing should specifically be confined to the state itself and should not cover subordinate municipal units.

2. State Credit

by
Miller, Canfield, Paddock & Stone
Stratton S. Brown

Article X: Section 12. The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private.

Constitutions of 1835 and 1850

There is no provision similar to Article X, Section 12, in the 1835 constitution. For reasons noted in the discussion under Sections 10 and 11 of Article X, a provision

similar to Section 12 was included in the 1850 constitution (Article XIV, Section 6).

Constitution of 1908

The 1908 constitution added the words "public or private" to the 1850 provision. The section has not been amended.

Judicial Interpretation

This section is somewhat similar to Article VIII, Section 25, of the state constitution which prohibits cities and villages from loaning their credit, or collecting any tax "for other than a public purpose." The Michigan supreme court and several attorney general's opinions have held that Section 12, Article X, of the Michigan constitution applies not only to the state but to its several political subdivisions such as counties, cities, villages and school districts. (Detroit Art Museum v. Engle, 187 Mich. 432)

This constitutional provision has been interpreted several times by the Michigan supreme court. In Detroit Art Museum v. Engle, supra, the court held that because of this provision the city of Detroit could not appropriate funds to support the Detroit Art Museum even though the title to the land was in the city and the board of directors had some city-appointed members.

In Skutt v. Grand Rapids, 275 Mich. 258, it was held that this provision of the constitution prohibited a scheme whereby the city of Grand Rapids permitted tax delinquents to work off delinquent city taxes by performing labor for the city.

In Youngglass v. Flint, 345 Mich. 456, the supreme court ruled that this provision prohibited the city of Flint from giving land for a federal armory. In Hays v. Kalamazoo, 316 Mich. 443, the Michigan supreme court held that the city of Kalamazoo could pay dues to the Michigan Municipal League because the city was receiving benefits in the form of professional advice from the League.

Other State Constitutions

Most states (approximately 46 including Michigan) have provisions of this type. The restriction on the grant of state credit, however, in contrast to the Michigan provision, is applied only to private persons, associations or corporations in almost all of these states. Sixteen of these states have provisions which specify further exceptions to the general restriction.[74]

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[74] Index Digest, pp. 950-951.

Comment

It is believed that the prohibition in Article X, Section 12, of the state constitution against lending of credit should be clarified with respect to its application to the investment of public funds. This constitutional provision has been variously interpreted by municipal attorneys in permitting investment of public funds only in United States obligations, only in bonds of federal and state agencies or subdivisions, and in some situations in any securities other than corporate stocks, which is specifically prohibited by Article X, Section 13, of the 1908 constitution.

The background of Article X, Section 12, which involved proprietary participation by the state in the construction of railroads and canals, indicates that perhaps the intention and purpose of this constitutional provision is to prohibit the state or its political subdivisions from participating in a proprietary manner or in various enterprises normally carried on by private enterprise. Since 1908, retirement systems and pension funds have become common things with the state and with its political subdivisions. A narrow interpretation of the subject constitutional provision would seriously hamstring prudent investment of public funds. Moreover, it would seem that over a long period of time better management of public funds could be accomplished by legislative regulation of investment rather than a constitutional prohibition. In any event, Article X, Section 12, of the state constitution should be changed in such a way as to make certain that it does not limit the investment of public funds.

3. State Bonds for Loans to School Districts

Prepared in Part
by
Miller, Canfield, Paddock & Stone
Fred M. Thrun

Article X: Section 27. The state may borrow from time to time such amounts as may be required but not to exceed an aggregate of $100,000,000.00, pledge its faith and credit and issue its notes or bonds therefore, for the purpose of making loans to school districts for the payment of principal and interest on school bonds heretofore or hereafter issued for acquiring, constructing, enlarging, improving and equipping school buildings and sites and for the funding or refunding of obligations incurred for 1 or more of the aforesaid purposes.

If the minimum amount necessary to be levied in any calendar year for the payment of principal and interest on the bonds of a

school district issued prior to July 1, 1962, after deducting any funds pledged to and available for the payment thereof, shall exceed 13 mills on each dollar of its assessed valuation as shall loan such school district the amount of such excess, but all loans so made shall not exceed in the aggregate the sum of $100,000,000.00 and shall be, subject to such terms and conditions as shall be prescribed by law. After a school district shall have received such a loan or loans from the state, it shall thereafter levy each year no less than the said 13 mills until the amount loaned has been repaid and any tax collections in an year over and above the minimum requirements for principal and interest shall be used towards the repayment of such loan or loans. The legislature shall prescribe the conditions upon which levies for bond principal and interest shall be included in computing the amount to be loaned by the state under this section, one of which conditions shall be that the maturities on the bonds of any future issue shall conform with statutory requirements, with the last maturity date not less than 25 years from the issuance date on the bonds.

The tax limitation prescribed in section 21 of this article shall not apply to tax levies for any future issue of school district bonds issued prior to July 1, 1962, including refunding bonds and such tax levies shall be without limitation as to rate or amount: Provided, That the bonds of such issue last maturing shall be due in "not less than 25 years" from date of issuance but may be subject to prior redemption in accordance with the provisions thereof.

Section 28. The state, in addition to any other borrowing power, may borrow from time to time such amounts as shall be required, pledge its faith and credit and issue its notes or bonds therefor, for the purpose of making loans to school districts as provided in this section.

If the minimum amount which it would otherwise be necessary for a school district to levy in any year to pay principal and interest on its qualified bonds, including any necessary allowances for estimated tax delinquencies, exceeds 13 mills on each dollar of its assessed valuation as last equalized by the state, or such lower millage as the legislature may prescribe, then the school district may elect to borrow all or any part of the excess from the state. In that event the state shall loan the excess amount to the school district for the payment of principal and interest. If for any reason any school district will be or is unable to pay the principal and

interest on its qualified bonds when due, then the school district shall borrow and the state shall loan to it an amount sufficient to enable the school district to make the payment.

The term “qualified bonds” means general obligation bonds of school districts issued for capital expenditures, including refunding bonds, issued (1) prior to May 4, 1955, (2) on or after May 4, 1955 but prior to July 1, 1962, only if, and to the extent that, such bonds shall have been qualified as provided by law pursuant to section 27 of this article, and (3) on or after July 1, 1962, but prior to July 1, 1972, if such bonds shall be qualified as provided by law pursuant to this section.

After a school district has received loans from the state, each year thereafter it shall levy for debt service, exclusive of levies for nonqualified bonds, not less than 13 mills or such lower millage as the legislature may prescribe, until the amount loaned has been repaid, and any tax collections therefrom in any year over and above the minimum requirements for principal and interest on qualified bonds shall be used towards the repayment of state loans. In any year when such a levy would produce an amount in excess of the requirements and the amount due to the state, the levy may be reduced by the amount of the excess.

Subject to the foregoing provisions, the legislature shall have the power to prescribe and/or limit the procedure, terms and conditions for the qualification of bonds, for obtaining and making state loans, and for the repayment of loans.

The power to tax for the payment of principal and interest on bonds hereafter issued which are the general obligations of any school district, including refunding bonds, and for repayment of any state loans made pursuant to this section, shall be without limitation as to rate or amount.

All rights acquired under section 27 of this article by holders of bonds issued prior to July 1, 1962, shall remain unimpaired.

This section shall take effect on July 1, 1962.

Constitutions of 1835 and 1850

The earlier Michigan constitutions contained no provisions of this type.

Constitution of 1908

These provisions were not a part of the constitution as originally adopted in 1908. They were respectively added by amendment in 1955 and 1960.

1955 Amendment. Section 27 was added to the constitution by an amendment approved by the electors of the state at the general election of April 4, 1955. The provisions of this amendment exempt tax levies for debt charges on future school bonds (issued after 1955 but prior to July 1, 1962) from the provisions of the l5-mill property tax limitation, provided, however, that the last bond in such an issue matured in not less than 25 years. In addition, the amendment permits refunding of outstanding school bonds under the same terms so that they also could be brought out from under the l5-mill limit. These provisions apply to all school districts subject to eligibility requirements prescribed by statute. The school bond loan fund authorized under Section 27 expires July 1, 1962.

1960 Amendment. Section 28 was added to the constitution by an amendment approved by the electors of the state at the November election of 1960. Section 27 of Article X expires as to bonds issued on or after July 1, 1962. Section 28, therefore, is in a sense a continuation of Section 27, but contains some important differences (see Comment, below).

Statutory Implementation

Act 74 of 1955, as amended, prescribes the procedures to be followed by the state for issuing its notes or bonds to provide the funds necessary to be loaned to school districts eligible for loans under the provisions of Section 27 of Article X. The eligibility for such loans was set forth in Act 151 of 1955. The necessity for the latter act is prescribed in Section 27 which states:

> …all loans so made shall not exceed in the aggregate the sum of $100,000,000 and shall be subject to such terms and conditions as shall be prescribed by law.

The statute places the duty of determining “qualification” of any proposed issue of bonds for eligibility for loans from the state in the superintendent of public instruction. The act further denies such eligibility for bonds issued for certain purposes, such as athletic fields and swimming pools.

Act 112 of 1961 provides the procedure for the issuance and sale of bonds and notes of the state to provide the necessary funds to be loaned to eligible school districts under the provisions of Section 28 of Article X.

Act 108 of 1961 prescribes the terms and conditions for qualifying bond issues for eligibility for state loans, and the procedures for obtaining such loans under Section 28.

Judicial Interpretation

Soon after the adoption of Section 27 a test case was presented for decision to the Michigan supreme court because of the refusal of a New York firm of attorneys to furnish its approving opinion as to the validity of a bond issue proposed to be issued in accordance with the provisions of this section. (Graham v. Miller, 348 Mich. 684.) The court, in essence, held that the section was properly presented and adopted by the electors of the state, and that the section was not invalid because of duality of purpose.

Opinions of the Attorney General

The attorney general rendered a comprehensive opinion, dated August 12, 1955, numbered 2236, answering detailed procedural questions presented by the municipal finance commission concerning "unlimited tax" school bonds issued under Section 27.

Other State Constitutions

The constitutions of California and Ohio, in addition to Michigan, authorize state bond issues to provide school sites and buildings. California, like Michigan, makes loans to school districts from bond proceeds. State borrowing in Ohio is authorized for the purpose of acquiring sites and for constructing, equipping or repairing public buildings or structures for classroom facilities which are leased or sold by the state to public school districts that are unable to provide adequate facilities without state assistance.

California's constitution provides that the legislature shall require each district receiving an allocation from the bond fund to repay the loan "on such terms and in such as may be within the ability of the district to pay."

Ohio provides that the bonds are to be payable from state taxes and excises. The proceeds of an excise tax on cigarettes are earmarked to the capital improvements bond retirement fund.[75]

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[75] Index Digest, pp. 955, 958.

Comment

In 1938 the Michigan supreme court upheld the public debt commission in refusing to approve a school bond issue where no increase in the fifteen-mill limitation on taxes had been voted by the electors to provide taxing funds for the payment of principal and interest on the bonds. (In re School District No. 6, Paris and Wyoming Townships, Kent County, 284 Mich. 132.) The requirement to provide an adequate increase in the limitation on taxes was subsequently incorporated in the municipal finance act. (Act 202 of 1943)

Until amended in 1948, the tax limitation provided in Article X, Section 21, could only be increased for a period of five (5) years, and required a 2/3 vote of the qualified electors for approval of any increase. Necessarily, then, school bonds could not have a longer maturity than provided by five (5) years of taxing power. As a result, in general, tax rates for bond issues were necessarily on the average very high and in many cases could not supply the funds necessary for an adequate building program.

To remedy this situation Article X, Section 21, was amended at the general election in November, 1948, to the effect that the limitation on taxes could be increased for a period of twenty (20) years and by a majority vote of the electors.

Although the 1948 amendment did alleviate the situation with respect; to high tax rates for school bond issues in many of the districts of the state, nevertheless, the results were not nearly as good as the sponsors of the amendment had hoped. Purchasers of tax-limited bonds required voted millage increases considerably in excess of the actual requirements at the time of the issuance of the bonds in order to provided adequate safety against declines in valuation or tax collections, and further required that even with a voted increase of twenty (20) years the bond plan required pledged levies sufficient to retire the bonds in approximately fourteen (14) years. Also, in many growing communities where successive bond issues were required to meet the increasing school building needs, the total voted increases for such issues approached and sometimes equaled the total thirty-five (35) mills available. This was largely because the bond issues had to be voted earlier in time than the increases in taxable valuation resulting from increased population and new construction.

Most of the school districts experiencing a rapid growth in population were further penalized as to interest rates by the low ratings given by the bond rating agencies.

Section 28, although in a sense the successor to Section 27, contains important differences resulting from the experience gained under the operation of Section 27. First, it will be noted that there is no limitation on the amount that may be borrowed by the state for the purposes of the section.

Borrowing by school districts from the state loan fund has been considerably less than had been anticipated.[76]

Rating agencies and bond purchasers have objected to the limit of $100,000,000, on the grounds that commitments to qualified bond issues could, in the future, exhaust the fund, even though current borrowings appeared small. The removal of the limit undoubtedly will result in better ratings for qualified bond issues.

Under the provisions of Section 27, bond issues could be qualified for loans only where the last maturity date was not less than twenty-five (25) years from the date of issuance. This provision in Section 27 was included to avoid having relatively short term bonds with high tax rates proposed in order to borrow from the state loan fund. Also, there was the view that the electors of the state were not yet ready to do away with limitation on taxes for relatively short term bond issues. Stated in another way, the provision was to force lower tax rates for school bond issues.

A great many districts continued to issue tax-limited bonds because of the belief that sound financing to meet their particular requirements required bonds with a shorter last maturity than twenty-five (25) years.

No one questions the soundness of such financing in many instances and, therefore, Section 28 leaves the determination of the conditions under which relatively short term bonds may be qualified to the legislature. Act 108 of 1961, referred to above, meets the problem by setting a minimum maturity period for any issue to be qualified in relation of the debt of the district to its taxable valuation.

The act further has liberalized the conditions under which bonds may be qualified by the superintendent of public instruction, and provides for the enforced borrowing by school districts where default appears or is in prospect.

See also the Comment under Article X Section 21 on the 15-mill limitation.

4. Bond Issue Authorizations

Article X: Section 20a. The state shall borrow not to exceed 30,000,000 dollars, pledge its faith and credit and issue its notes or bonds therefor, for the purpose of paying to each person who entered into the military, naval or marine forces of the United States between April sixth, 1917, and November eleventh, 1918, and served honestly and faithfully therein during the late world war and who was a resident in this state at the time of entering such service, the sum of 15 dollars for each month or major fraction thereof, of such service, up to and including August first, 1919.

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[76] As of September 15, 1961, the total amount loaned was $535,500.00 of which $332,323 is outstanding. Figures obtained from the superintendent of public instruction.

Article X: Section 23a. The state shall borrow not to exceed $270,000,000.00, pledge its faith and credit and issue its serial notes or serial bonds therefor, for the purpose of paying to each person, or if deceased to the surviving husband or wife, child or children, or to the surviving dependent mother, father, person standing in loco parentis, brothers and sisters, in the order named, of any person who served in the military, naval, marine or coast guard forces of the United States, including women serving in auxiliary branches thereof, between September 16, 1940, and June 30, 1946, who served honorably and faithfully therein during said period, who was a resident of this state at the time of entering such service and for a period of at least 6 months prior to entering therein, and whose service continued for more than 60 days during said period, the sum of $10.00 for each month, or major fraction thereof, of service during said period in any state of the United States, and the District of Columbia, and the sum of $15.00 for each month, or major fraction thereof, of service during said period outside any state of the United States, and the District of Columbia, but not to exceed a total payment of $500.00 to anyone person: Provided, That there shall be paid to the surviving husband or wife, child or children, or to the surviving dependent mother, father, person standing in loco parentis, brothers and sisters, in the order named, of each person who has heretofore died or who shall thereafter die from service connected—causes incurred between September 16, 1940, and June 30, 1946, a sum equal to the difference between what he has received and the sum of $500.00.

The legislature is authorized and directed to provide for the issuance of serial notes or serial bonds, for the method of and eligibility for payment of the sums herein directed and for the retirement of such notes and bonds as shall be issued hereunder. The legislature is authorized and directed to provide for the borrowing of the money herein provided at the lowest possible cost to the state, and is further authorized and directed to provide by taxation or other means for the retirement of the debt at the earliest possible time. In the event that the cost of the payments herein provided shall be greater than the amount authorized to be borrowed, the legislature is authorized and directed to provide for the payment thereof from the general fund of the state.

Section 25. There shall be paid, from the moneys authorized to be borrowed under the provisions of section 23 of this article for the payment of a bonus with respect to military service, to the surviving husband or wife, child or children, or to the surviving mother or father, or surviving dependent person standing in loco parentis, dependent brothers and dependent sisters, in the order named, of any person who has heretofore died or who shall hereafter die from service connected causes and who served in the military, naval, marine or coast guard forces of the United States, including women serving in auxiliary branches thereof, between June 27, 1950, and the termination of the state of national emergency, which state of national emergency was proclaimed on December 16, 1950, who served honorably and faithfully therein during such period, who was a resident of this state at the time of entering such service and for a period of at least 6 months prior to entering therein, the sum of $500.00: Provided, That the termination of the national emergency for the purpose of this section shall be determined by act of the legislature of this state, and the liability of the state for the purposes herein set forth shall not exceed the total amount that may be borrowed under the provisions of said section 23 of this article.

Section 26. The state shall borrow not to exceed $80,000,000.00, pledge its faith and credit and issue its serial notes or serial bonds therefor, with maturities of not to exceed $1,000,000.00 in each of the years 1956 to 1965, both inclusive, and $13,000,000.00 in each of the years 1966 to 1968, both inclusive, and $14,000,000.00 in each of the years thereafter, for the purpose of paying to each person, or if deceased to the surviving husband or wife, child or children, or to the surviving mother, father, person standing in loco parentis, brothers and sisters, in the order named, of any person who served in the military, naval, marine or coast guard forces of the United States, including women serving in auxiliary branches thereof, between June 27, 1950, and December 31, 1953, who served honorably and faithfully therein during said period, who was a resident of this state at the time of entering such service and for a period of at least 6 months prior to entering therein, and whose service continued for more than 60 days during said period, the sum of $10.00 for each month, or major fraction thereof, of service during said period in any state of the United States, and the District of Columbia, and the sum of $15.00 for each month, or major fraction thereof, of service during said period outside any state of the United States, and the District of Columbia, but not to

exceed a total payment of $500.00 to any one person: Provided, That there shall be paid to the surviving husband or wife, child or children, or to the surviving dependent mother, father, person standing in loco parentis, brothers and sisters, in the order named, of each person who has heretofore died or who shall hereafter die from service connected causes incurred between June 27, 1950, and December 31, 1953, a sum equal to the difference between what he has received and the sum of $500.00: Provided further, That no payment shall be made under the provisions of this section in any case in which payment has been made or shall hereafter be made under the provisions of section 25 of this article, payment both under the provisions of this section and section 25 of this article being expressly prohibited.

The state administrative board is authorized and directed to provide by resolution from time to time for the issuance and sale of serial notes or serial bonds at the lowest possible cost, and the legislature is authorized to provide for the method of and eligibility for payment of the sums herein directed. For the retirement of such notes and bonds as shall be issued hereunder, there is appropriated from the general fund each year during their life a sum equal to the amount of principal and interest payments due and payable in each such year. The powers and duties conferred by this amendment on the state administrative board are self-executing.

Section 24. The state may borrow not to exceed $65,000,000.00 to plan, acquire, construct and equip hospitals for the mentally ill and epileptics, and training schools for mental defectives and the tuberculosis hospitals and issue bonds pledging the full faith and credit of the state, on such terms as shall be provided by law.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 did not contain these provisions.

Constitution of 1908

These provisions were not included in the constitution of 1908 as originally adopted. They were added by amendment as follows:

Section 20a—Military Service Bonus, World War I—Approved April, 1921.
Section 23a—Military Service Bonus, World War II—Approved November, 1946.
Section 25 –Death Benefit, Korean Period—Approved April, 1951.
Section 26 –Military Service Bonus, Korean Period—Approved November, 1952.
Section 24 –Hospital Building Fund—Approved, November, 1950.

There has been little or no litigation in connection with these sections.

As of June 30, 1960, the bonds issued pursuant to these provisions were as follows:

Section	Purpose	Total Amount of Bonds Issued (in millions)	Amount Outstanding June 30, 1960 (in millions)	Final Maturity
20a	Military Service WWI	$ 30.0	0	1942
23a	Military Service WWII	230.0	65.3	1965
26	Military Service Korea	60.0	55.0	1970
25	Death benefit—Korea—no bonds issued—paid from funds under Section 23a.			
24	Hospital Building Fund	65.0	39.6	1971

Comment

Consideration might be given to deleting these provisions from the constitution. The benefits still payable under them and the interests of the bond holders could be protected by including a “saving clause” in the schedule of a revised constitution—to the effect that nothing in this constitution be construed as in any way impairing the obligation of the state in connection with any benefits conferred by or issue of bonds authorized by the provisions of Article X, Sections 20a, 23a, 24, 25, and 26 of the constitution of 1908 and the obligation of the state in connection with said sections is specifically recognized.

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CHAPTER XI EDUCATION

(over)

Section Detail

XI EDUCATION

A. GENERAL

1. Encouragement of Education

Article XI: Section 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Constitutions of 1835 and 1850

The language of this provision is found in the Ordinance of 1787 (Article III, Articles of Compact). However, the provision does not appear in the constitutions of 1835 and 1850.

Constitution of 1908

Section 1 has not been amended since the present constitution was adopted.

Judicial Interpretation

In regard to the relationship of education and local government, the Michigan courts have held that education is a subject for the legislature and is not a part of the local self-government inherent in the township or municipality, except as the legislature may provide otherwise.[1]

Other State Constitutions

Ten other states have provisions of the type set forth in Section 1. The provisions of the Massachusetts and Maine constitutions are somewhat more specific in that they mention certain types of schools and institutions that are to be encouraged. Maine makes it a duty of the legislature to encourage and endow academies, colleges and seminaries, but the legislature must make this endowment conditional on the reservation of the power to alter, limit or restrain the powers of the institutions.[2]

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[1] Attorney General v. Board of Education of Detroit, 154 Mich. 584.

[2] Index Digest, pp. 369-370.

The Model State Constitution provides that the legislature shall provide for a system of free public schools and such other public educational institutions, including public institutions of higher learning, as may be desirable.

The U.S. constitution contains no provision of this type.

Comment

There has been a long line of legislative enactments indicating a settled purpose on the part of the state to encourage education. Such a provision neither grants nor limits the power of the state in this area but rather indicates intent.

B. ELEMENTARY-SECONDARY SCHOOLS

1. Superintendent of Public Instruction

Article XI: Section 2. A superintendent of public instruction shall be elected at the regular election to be held on the first Monday in April, nineteen hundred nine, and every second year thereafter. He shall hold office for a period of two years from the first day of July following his election and until his successor is elected and qualified. He shall have general supervision of public instruction in the state. He shall be a member and secretary of the state board of education. He shall be ex officio a member of all other boards having control of public instruction in any state institution, with the right to speak but not to vote. His duties and compensation shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution (Article X, Section 1) and the 1850 constitution (Article XIII, Section 1) both provided for the office of the superintendent of public instruction.

The constitution of 1835 provided for the appointment of the superintendent by the governor with the consent of the legislature, in joint vote. The constitution of 1850 (Article VIII, Section 1) provided for the election of the superintendent at each general biennial election and Article IX, Section 1 provided for compensation of $1,000 annually.

Constitution of 1908

The constitution of 1908 continued the 1850 provision for election of the superintendent, but provided that he be elected at the April election. Those parts of the present section which provide that the superintendent will be a member and secretary of the state board of education and an ex officio member of all other boards having control of public instruction were added in the constitution of 1908. The provision that the compensation of the superintendent was to be prescribed by law was also added in the constitution of 1908. Section 2 has not been amended since the present constitution was adopted, nor has it presented any serious problem of interpretation.

Statutory Implementation

The statutes provide the superintendent with little real control over primary and secondary education. Such control for the most part has been delegated by the legislature to the local school districts under authority granted by the constitution to the legislature to establish a common or primary school system (Article XI, Section 9).[3]

The superintendent is required to report to the legislature on the general educational conditions of the state including a statement of the operation of the several state institutions and recommendations for the improvement of the general educational system.[4]

The superintendent has executive authority to require school officers to observe the laws relating to schools and to maintain school or educational facilities for the minimum prescribed statutory period. The superintendent may examine and audit the official records and accounts of any school district, require school officers to account for illegally expended funds, appoint a time and place and proper instructors for a state teachers' institute and county institutes,[5] approve the establishment of community colleges,[6] adopt rules and regulations for keeping school census records[7] and institute proceedings on the dissolution of an educational corporation which fails to comply with the law.[8]

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[3] M.S.A. 15.3023, sec. 23; Belles v. Burr, 76 Mich. 1.

[4] M.S.A. 15.5252, sec. 252.

[5] M.S.A. 15.3252, sec. 252.

[6] M.S.A. 15.3792, sec. 792.

[7] M.S.A. 15.3948, sec. 948.

[8] M.S.A. 21.178, sec. 177.

In the way of fiscal duties, the superintendent is required to apportion according to law the primary school interest fund among the townships and cities,[9] submit to the county clerks and treasurers a statement of the townships, school districts, and cities that are entitled to receive library moneys,[10] and act as the sole state agency to apply for and receive federal aid grants to the state for the use of public schools.[11]

In addition the superintendent is assigned a wide range of non-educational legal responsibilities. He is by law or by appointment a member of several boards and commissions. These include: the state administrative board,[12] the board of auditors,[13] the state board of canvassers,[14] the board of escheats,[15] and the municipal finance commission.[16]

Other State Constitutions

All 50 states provide by constitution or statute for a chief school officer called variously, "Superintendent of Public Instruction," "Commissioner of Education," etc. The position of chief school officer is provided for in the constitutions of 36 states and by statute in the remaining 14 states.

Method of Selection Among the 50 states there are three distinct methods of selection of the constitutional and statutory chief school officers. In 23 of the 50 states the position is filled by popular election. In the remaining 27 states, the chief school officer is appointed. The appointment is by the state board of education in 22 states and by the governor in five states.

In the 36 states which provide constitutionally for a chief school officer, 23 provide that he shall be elected, 12 provide that he be appointed (10 by the board of education and 2 by the governor) and one state, Nevada, provides the method of selection be determined by the legislature (which has provided for appointment by the state board of education).

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[9] M.S.A. 15.3258, sec. 250.

[10] M.S.A. 3915., sec. 951.

[11] Except vocational education funds made available under the Smith-Hughes Act and vocational rehabilitation funds. The legislature created a special board of control for vocational education. Under the law the superintendent is an ex officio member of this board and is its executive officer (Act 149, 1919).

[12] M.S.A. 3.261.

[13] M.S.A. 13.451, sec. 1.

[14] M.S.A. 6.470.

[15] M.S.A. 13.451, sec. 1.

[16] M.S.A. 5.3188 (3), sec. 1.

Since 1947 there has been a distinct trend among the 50 states towards appointment rather than election of the chief school officer. Eight states have changed from popular election to appointment and none has changed from appointment to election. Not only are an increasing number of chief school officers being appointed, but there is also a trend toward appointment by a state board of education rather than by the governor.[17]

Term of Office Of the 23 state whose constitutions provide for an elected chief school officer, seven (including Michigan) provide for a two-year term while 15 provide for a four-year term. Oregon does not constitutionally fix the term of office.

Of the 12 states whose constitutions provide for an appointed chief school officer, one provides for a two-year term, three provide for a four-year term, and the remaining eight provide that the chief school officer serve at the pleasure of the appointing authority. In Nevada, where the office is constitutional, the method of selection and term of office are provided by law.

Powers and Duties In the 36 state constitutions which provide for a chief school officer, ten (including Michigan) give the chief school officer supervision or general supervision over public education. Twelve state constitutions provide that the chief school officer's powers shall be as prescribed by law, which allows legislative discretion in providing for the organization of the education authority.

In the remaining fourteen states with a constitutional chief school officer, the state board of education is given supervisory powers over public education and the chief school officer serves as the chief executive or administrative officer of the board of education. In most of these 36 states it is provided that the duties of the chief school officer shall be prescribed by law.

As previously indicated, the constitutions of fourteen states make no mention of the office, nor do they assign responsibility for public education beyond requiring the legislature to establish and maintain a system of public schools. This leaves the responsibility for providing for the organization of the education authority with the legislatures.

Comment

A number of studies have recommended substantial changes in Michigan's constitutional provisions relating to the organization for state supervision of el-

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[17] See The Book of the States, 1960-61, p. 294 and the Index Digest.

ementary-secondary education.[18] The recommendations of these studies have focused on two items: 1) the method of selection of the superintendent of public instruction and 2) the respective roles of the state board of education and the superintendent of public instruction.

The results of these studies suggest that consideration might be given to appointment rather than election of the superintendent of public instruction and strengthening the state board of education by assigning to it the powers and duties now vested in the superintendent, with the superintendent serving as the chief executive-administrative officer of the board. (See also Comment on Section 6, below, relating to the state board of education.)

If the superintendent is to continue to be elected, consideration might be given to extending the term of office to four years. (See Chapter VI, Executive Department.)

And, even though election of the superintendent is continued, consideration might be given to providing that all the powers and duties be prescribed by law, thus giving the legislature discretion in assigning powers and duties.

2. Primary School System

Article XI: Section 9. The legislature shall continue a system of primary schools, whereby every school district in the state shall provide for the education of its pupils without charge for tuition; and all instruction in such schools shall be conducted in the English language. If any school district shall neglect to maintain a school within its borders as prescribed by law for at least 5 months in each year, or, to provide for the education of its pupils in another district or districts for an equal period, it shall be deprived for the ensuing year of its proportion of the primary school interest fund. If any school district shall, on the second Monday in July of any year, have on hand a sufficient amount of money in the primary school interest fund to pay its teachers for

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[18] The Improvement of Public Education in Michigan, July, 1944, Lansing, Michigan, Michigan Public Education Study Commission, p. 159. Ninety-third Report of the Superintendent of Public Instruction, 1933-35. Lansing, Michigan, Department of Public Instruction, p. 14. Ninety-seventh Report of the Superintendent of Pub1ic Instruction, 1944, Lansing, Michigan, Department of Public Instruction, p. 14. The state reorganization (Little Hoover) study of 1951, Michigan's Educational Agencies, Report 17, pp. 13-27.

the next ensuing 2 years as determined from the pay roll of said district for the last school year, and in case of a primary district, all tuition for the next ensuing 2 years, based upon the then enrollment in the seventh and eighth grades in said school district, the children in said district shall not be counted in making the next apportionment of primary school money by the superintendent of public instruction; nor shall such children be counted in making such apportionment until the amount of money in the primary school interest fund in said district shall be insufficient to pay teachers' wages or tuition as herein set forth for the next ensuing 2 years.

Constitutions of 1835 and 1850

Both of the earlier constitutions contained provisions on this subject. The comparable section of the 1835 constitution was relatively brief. It enjoined the legislature to provide for a system of common schools by which a school was to be kept up and supported in each school district at least three months in every year. The 1835 constitution also provided that any district neglecting to keep up such a school might be deprived of its share of the interest of the public fund.[19]

Comparable provisions in the 1850 constitution were in two sections under the education article (Article XIII, Sections 3 and 4). The legislature was enjoined to provide for and establish a system of primary schools within five years after the adoption of the constitution. A school was to be kept without charge for tuition at least three months in each year in every district of the state and instruction in such schools was to be conducted in the English language. The sanction for neglecting to maintain a school as provided was changed from might be deprived to shall be deprived for the ensuing year of its proportion of the income of the primary school fund and funds from taxes for the support of schools.[20]

Constitution of 1908

The provisions of the 1850 constitution were carried over into the present constitution with some changes. A school district was required to maintain a school

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[19] A perpetual fund established with the proceeds from the sale of lands granted by Congress for school purposes.

[20] The 1850 constitution (Article XIV, Section 1) earmarked all revenues from specific taxes, except those received from mining companies, to paying the interest upon the primary school, university and other educational funds.

for five months instead of three and neglect to do so would forfeit its proportion of the "primary school interest fund" instead of the income from that fund and other funds arising from the specific taxes. That is, the forfeiture was limited to the primary school interest fund.

1911 Amendment An amendment passed in 1911 provided that if school districts had sufficient primary school money to pay teachers and tuition for the following two years, they were to be omitted from the succeeding annual distribution of primary school money. This represented the first constitutional mention of a method of distributing primary school fund money.

Statutory Implementation

By statute, the legislature has provided for a system of public instruction and primary schools. The school code of 1955 provides for the classification, organization, regulation and maintenance of schools and school districts.[21] Their rights, powers, and duties are also prescribed by statute. The superintendent of public instruction has been given certain powers and duties relative to the operation and fiscal affairs of local school districts.[22] The state board of education is responsible for the official certification of all elementary and secondary teachers and for schools for the blind and deaf.[23] The state board of control for vocational education has supervisory control over joint federal-state programs of vocational education in secondary schools.[24]

Judicial Interpretation

The provision has given rise to very little litigation. The 1911 amendment, however, did raise some question as to whether it required an annual school census and whether the census was to be the only basis for apportioning primary school interest funds. The supreme court held that the amendment fixed, at

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[21] Act No. 269, Public Acts of 1955, as amended.

[22] See Section 2 of this chapter, The Superintendent of Public Instruction, above.

[23] M.S.A.,15.3001-15.3984.

[24] M.S.A., 15.821-15.830. In 1942, the Governor's Public Education Study Commission recommended the abolition of the board of control and a transfer of its authority to the state board of education. See the Commission's report, "The Improvement of Public Education in Michigan," 1942, Lansing, Michigan Public Education Study Commission, p. 267. The state reorganization (Little Hoover) study of 1951 repeated the recommendation. See Michigan's Educational Agencies, Report 17, p. 29. The abolition of the board of control and transfer of its powers could be accomplished by a statutory amendment.

least impliedly, the census of school-age children as the basis, for distributing such funds. It held unconstitutional a public act which made the assessed valuation the basis for distribution, although only a part of the fund was to be so distributed. The court also held that the provisions of this section clearly anticipate an annual census and it is to be provided for by the legislature.[25]

Opinions of the Attorney General

Should a district not maintain a school within its district and pay no tuition but pay transportation costs for sending its pupils to schools in another district, the attorney general has held that the fact that it has insufficient funds to meet such costs for an ensuing two years does not entitle the district to a proportion of the primary school interest funds. This is on the basis that a district which pays no tuition but shows a balance in the primary school interest fund is not entitled to the distribution in the following year.[26]

Other State Constitutions

The constitutions of 38 states in addition to Michigan contain a provision requiring the legislature to establish and maintain a system of public schools.[27] Thirty of these states provide that they shall be free schools.

Maine makes it a duty of the legislature to require towns to make provision for schools supported and maintained at their own expense. By way of contrast, Alabama provides that nothing in the constitution is to be construed as creating or recognizing any right to education at public expense. The legislature in that state may provide for or authorize the establishment of schools as it may prescribe.

A section of the Mississippi constitution requiring the legislature to establish a system of free common schools was amended by virtue of another section inserted in 1944 authorizing the legislature to abolish the public schools by a majority vote in each house.

Montana, Mississippi, Kansas, and Colorado join Michigan in depriving school

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[25] Board of Education of Detroit v. Auditor General, 242 Mich. 186

[26] Opinion of the Attorney General No. 0-5094, October 11, 1946.

[27] Those states without a similar provision are: Alabama, Colorado, Connecticut, Iowa, Massachusetts, New Hampshire, North Carolina, South Carolina, Tennessee, Vermont, and Wisconsin. Index Digest, pp. 373-374.

districts of school funds for neglecting to maintain a school for a specified number of months in each year. The number varies from three to six months.

Missouri deprives a district of school moneys should it permit teacher wage differentials on race or color basis. Nevada deprives a district of school fund interest moneys should it allow sectarian instruction.

Michigan's provision for a sliding scale arrangement for the distribution of primary school interest fund moneys[28] based on the amount of money on hand compared to teacher payroll and tuition appears to be unique.

Ten states provide that school funds be distributed on the basis of the number of resident school-age children or children between specified ages, usually between five and twenty.[29] Eight states require the legislature to determine the method of allocation.[30] Nebraska and Delaware require simply that school funds be distributed equitably among school districts. New Mexico requires school funds to be apportioned among school districts in the proportion that the number of school-age children in the district bears to the total number of children in the state. A reserve is set up before distribution sufficient to provide for five months' schooling in every district by special help to districts where a full local school tax plus current funds[31] is not sufficient.

Only Missouri among the states with newer and more recently revised constitutions includes a similar provision for the apportionment of school funds.

The Model State Constitution provides:

> The legislature shall provide for the maintenance and support of a system of free public schools, open to all children in the state.

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[28] Contained in 1911 amendment.

[29] Montana, Kansas, Iowa, Louisiana, Minnesota, North Dakota, Oregon: Virginia, Wisconsin and Wyoming. Index Digest, pp. 384-385.

[30] Utah, California, Colorado, Idaho, Kentucky, Missouri, Nevada and South Carolina. Index Digest. pp. 384-385.

[31] Comparable to combined primary school interest fund and school aid fund moneys in Michigan.

Comment

The provision of this section dealing with the maintenance of a system of free primary schools would not likely be a subject of much controversy. However, the portion of this section dealing with the distribution of primary school fund moneys may be subject to considerable discussion. There are five sections of the constitution which deal with aid to local school districts 1) Article XI, Section 9 (this section) insofar as it affects the distribution of primary school interest fund money; 2) Article X, Section 1, which establishes the primary school interest fund, and dedicates certain specific taxes to it; 3) Article XI, Section 11, which establishes the primary school fund; 4) Article XI, Section 12, which dedicates escheats to the primary school fund; and 5) Article X, Section 23, which establishes the school aid fund and dedicates two cents of the state sales tax to the fund. All of these sections are inter-related and Section 9 must be considered in relation to these other provisions.

The inter-relationship of these provisions is discussed in the next section of this chapter, "proceeds of School Land" (see the Comment section).

In respect to the provisions of this article relating to the distribution of primary school interest funds, consideration might be given to allowing the legislature to determine the method of distribution. If the present provision is to be continued, the language might be changed to clarify the method that is to be used in apportioning primary school interest funds.

In view of the several provisions of the constitution relating to state aid for local schools, consideration might be given to consolidating these provisions into one section, or to eliminating them entirely and placing the responsibility in the hands of the legislature (see Comment under next section).

3. Proceeds of School Land

Article XI: Section 11. The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the state for educational purposes and the proceeds of all lands or other property given by individuals or appropriated by the state for like purposes shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant or appropriation.

Constitutions of 1835 and 1850

Both of the earlier Michigan constitutions contained similar provisions. Congress in 1785 approved the land grant ordinance for the Northwest Territory which dedicated the sixteenth section of land in each township to public school purposes.[32] Article X, Section 2 of the 1835 constitution provided:

> ... The proceeds of all lands that have been or hereafter may be granted by the United States to this state, for the support of schools, which shall hereafter be sold or disposed of, shall be and remain a perpetual fund; the interest of which, together, with the rents of all such unsold lands, shall be inviolably appropriated to the support of schools throughout the state.

Thus the constitution of 1835 established a permanent fund with the proceeds of the lands granted by Congress and provided for the continuous payment of interest on the fund. This permanent fund is known as the primary school fund.[33]

The language of the present provision was originally inserted in the constitution of 1850 and was carried over unchanged into the 1908 constitution.

Constitution of 1908

This section has not been amended since the present constitution was adopted.

Statutory Implementation

The legislature has provided that the proceeds from the sale of educational lands received into the state treasury and placed to the credit of the several school

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[32] States admitted to the union after 1802 also received two or more sections for the support of higher education. See Edgar W. Knight, Education in the United States, Ginn and Company, New York, 1941, pp. 241-306.

[33] This fund should not be confused with the primary school interest fund (see Article X, Section 1 of the 1908 constitution).

funds "shall be used in defraying the expenses of the state government."[34] The auditor general is by law assigned responsibility for computing and paying the interest on the principal of the educational funds (including the primary school fund) out of the specific taxes.[35]

By law the proceeds from escheated property also go into the primary school fund. For a discussion of escheated funds see Article XI, Section 12.

Judicial Interpretation

There have been no recent problems in the interpretation of this provision.[36]

Other State Constitutions

Thirty-two states in addition to Michigan constitutionally provide for a permanent fund for the support of public schools or for educational purposes. Proceeds of lands granted by the United States for public schools represent a source of the permanent fund in 18 states, which are for the most part mid-west and western states with constitutions dating from 1850 and states which shared in the congressional land grants.[37]

Most of the thirty-two states appear to earmark more than one source of revenue to the permanent fund. Five states, in addition to Michigan, provide that gifts and bequests for educational purposes constitute a source of revenue for the permanent fund. Twenty-three states mention escheated estates as a source of the fund, while others include unclaimed shares and dividends of corporations, fines and forfeitures, and appropriations by the state.

Twenty state constitutions place limitations on the use of the permanent fund. Eleven states specify the fund is to remain inviolate. Seven restrict the use of the funds to school purposes while four provide that the fund may be increased but not diminished.

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[34] M.S.A. 3.721. Consistent with this act the money credited to the primary school fund is in reality commingled with the general fund and is used for general state purposes. The primary school fund is only a bookkeeping memorandum record showing accumulation of a principal within the general fund. (From information supplied by the Department of Public Instruction.)

[35] M.S.A. 3.731. For specific taxes see Article X, Section 1.

[36] Under the similar provision of the 1850 constitution the supreme court ruled that an 1859 act appropriating a portion of the proceeds of swamp lands to the primary school fund did not remove them from 1egislalative control. (People ex re1. Superintendent of Public Instruction v. Auditor General, 12 Mich. 171.) The court also ruled that the 1850 provision did not deprive the legislature of the power of regulating the state policy regarding the primary school lands. (People ex rel. Jones v. Pritchard, 21 Mich. 236.)

[37] Index Digest, pp. 385-387.

Among the states with newer and more recently revised constitutions, Alaska and Hawaii are silent on the matter of a permanent fund, while New Jersey and Missouri provide that the public school fund shall be securely invested and remain a perpetual fund.[38]

Comment

An understanding of this section necessarily requires an explanation of the inter-relationships among the several constitutionally established funds which contribute to the support of the primary school system.

History

The primary school fund was created by the first constitution of the state in 1835 and is the first of several funds established for the support of primary schools. It was established with the proceeds from the sale of lands granted by Congress to the state for educational purposes. It was established as a permanent or perpetual fund which was to remain inviolate and never to be distributed.

Although the fund could not be distributed, the legislature borrowed from the fund and then annually payed interest on the loans.

Apparently to insure that there would be no failure on the part of the state to pay interest on the primary school fund, provision was made in the 1850 constitution for the primary school interest fund and certain specific taxes were earmarked to the payment of interest on the primary school fund through the medium of the primary school interest fund.

Also in 1850 the proceeds from escheated property were dedicated to the support of primary schools.[39] These monies by legislative act have been dedicated specifically to the primary school fund.[40]

These provisions for a primary school fund, a primary school interest fund, and the dedication of escheats were carried over in the 1908 constitution in Article XI, Sections 11 and 12, and Article X, Section 1. For the change see the discussion of each section. In addition to these funds, Article X, Section 23 establishes a school aid fund and provides that two cents of the state sales tax levy be depos-

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[38] Missouri provides that the general assembly may liquidate certificates of indebtedness to the public school fund but all funds derived from the liquidation must be invested in bonds of the United States, the state, or other securities fully guaranteed by the United States of not less than par value. The legislature is also authorized to levy an annual tax to pay the interest accruing on the certificates of indebtedness. Missouri constitution of 1945 (Revised 1960). Article IX, Section 4.

[39] Artic1e XI, Section 12.

[40] M.S.A. 26.1053 (52).

ited in the school aid fund and expended for the aid of school districts and for such school employee's retirement systems as shall be provided by law.[41]

Operation of the School Funds

There are, then, three basic funds created by the constitution: 1) the primary school fund; 2) the primary school interest fund; and 3) the school aid fund. The following is an explanation of the methods by which these funds are administered.[42]

The primary school fund is actually only a bookkeeping memorandum record showing accumulation of a principal amount within the general fund. The amounts received from the sale of school lands and escheats are "credited" to the primary school fund, but the money is actually commingled with the general fund money and used for general state purposes.[43]

The interest paid on the corpus of land sale funds is seven per cent per annum, except in the case of swamp lands where the rate of interest is set by statute at five per cent. This interest is paid from the specific tax revenues of the primary school interest fund. However, the total revenue from the specific taxes earmarked to the primary school interest fund far exceeds each year the amount that is owed in interest on the principal of the primary school fund.

The balance in the primary school fund as of June 30, 1960, (excluding amounts credited to the university and other college funds) amounted to some $16.6 million, including $998,590 in proceeds from the sale of swamp lands. With an accumulated principal of about $16 million, the interest on the primary school fund would amount to less than $1 million a year. In fiscal 1960, however, the specific taxes earmarked to the primary school interest fund yielded $56.9 million, which far exceeds the less than $1 million of interest due on the primary school fund. After deducting a comparatively small amount of the total for other educational purposes, the whole primary school interest fund is available for distribution to local school districts.

The primary school interest fund monies are distributed on the bases of the number of children between the ages of 5 and 19 as indicated by the school census. The amount each district receives per child is determined by dividing the total amount in the fund by the total number of school-age children in the state. The primary interest fund distributions currently account for some 20 per cent of total state aid for schools.

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[41] Added by amendment in 1946 and revised by amendment in,1954. The 1954 amendment provided for the creation of a school aid fund to be effective July 1, 1955. Prior to 1955 school aid monies were appropriated and expended from the general fund of the state. See Michigan State Operations and Local Benefits Budget, 1960, Section Q, p. 1.

[42] Based on reports of the auditor general and information received from the department of public instruction.

[43] Consistent with the provisions of law (see M.S.A. 3.721).

As previously mentioned the constitution (Article X, Section 23) provides that two cents of the sales tax levy be credited to the school aid fund—$216 million in fiscal 1960. The legislature has provided that in addition to this, two cents of the cigarette tax levy and a four per cent liquor excise tax be placed in this fund—$26 million in fiscal 1960. The distribution of school aid fund monies is by a statutory formula which takes into account a number of deductible factors, one of which is the amount of primary school interest fund monies received by the school district. As a practical matter, therefore, the primary school fund monies are an offset against school aid fund monies.

In recent years the statutory formula for distributing these constitutionally and statutorily earmarked funds has required more money than the revenues of the funds produced and the legislature has made supplemental appropriations from the general fund. In 1959-60 the legislature appropriated $21.4 million from the general fund as a supplement to the school aid fund. Thus, in fiscal 1960 there was available from these funds for distribution for primary school purposes the following:

Source	
Constitutional Dedications	
Specific taxes*	$ 57 million
Sales tax	216
Statutory Dedications	
Cigarette tax	19
Liquor excise taxes	7
Supplemental Appropriation From General Fund	21
Total	$320 million

In view of these various provisions dealing with state aid to school districts, consideration might be given to consolidating the provisions of Sections 11 and 12 of Article Xl and Sections 1 and 23 of Article X into a single provision on state aid to schools, with the distribution of the funds to be provided by law. Or, consideration might be given to leaving the whole question of state aid to schools to legislative discretion.

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* For convenience this term includes ad valorem taxes on railroad, telephone and telegraph, car loading, and express companies in addition to inheritance taxes, out-of-state insurance company taxes and corporation organization fees.

4. Escheats

Article XI: Section 12. All lands, the titles to which shall fail from a defect of heirs, shall escheat to the state, and the interest on the clear proceeds from the sales thereof shall be appropriated exclusively to the support of the primary schools.

Constitutions of 1835 and 1850

This provision originated in the constitution of 1850 and was carried over into the present constitution virtually unchanged. The word "title" was changed to "titles" and the word "the" was inserted before the words "primary schools" at the end of the section.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Statutory Implementation

In the implementation of this provision the law provides that the proceeds from escheated property go into the primary school fund. The board of escheats has the responsibility by law to administer the funds credited and accruing. The investment of the funds is subject to the supervision and direction of the state administrative board.[44]

Judicial Interpretation

There has been no recent litigation on this section.

Other State Constitutions

Twenty-three other state constitutions contain a provision of this type. In most of these states, the provision is incorporated in sections establishing a permanent school fund.

The constitutions of Alaska, New Jersey, and Hawaii have no provisions of this type, nor does the Model State Constitution.

Comment

See Comment under previous section.

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[44] M.S.A. 26.1053 (52). Under the law escheated funds returned to the state are transferred by the board of escheats to the primary school fund, usually only once annually. The board of escheats determines when and how much is to be so transferred. During 1951-52 no transfers were made, while in the fiscal year 1958-59 $450,000 was transferred to the primary school fund out of total receipts of $862,359. (From information supplied by the department of public instruction.)

C. HIGHER EDUCATION

1. Educational Institutions

Article XI: Section 10. The legislature shall maintain the university, the college of mines, the state agricultural college, the state normal college and such state normal schools and other educational institutions as may be established by law.

Constitutions of 1835 and 1850

Although this section is new in the 1908 constitution, it apparently stems from earlier provisions of the 1835 and 1850 constitutions. The 1835 provision (Article X, Section 2) was as follows:

> The legislature shall encourage, by all suitable means, the promotion of intellectual, scientifical and agricultural improvement.

The 1850 constitution (Article XIII, Section 11) provided:

> The legislature shall encourage the promotion of intellectual, scientific and agricultural improvements; and shall, as soon as practicable, provide for the establishment of an agricultural school.

Constitution of 1908

In the Address to the People the convention of 1907-08 stated that the intent of this section was to make it "mandatory upon the legislature to maintain the educational institutions therein specified."

Other State Constitutions

A number of other state constitutions include similar provisions relative to the establishment of state institutions of higher education.

Twenty-one states provide for the establishment and maintenance of a state university; twelve include provisions for teachers colleges and normal schools; eleven provide for agricultural colleges, which in Arizona and California are part of the state university. Five states require the legislature to establish a school of mines while two others (Nevada and North Carolina) require the provision of a department of mines at the state university. The North Dakota constitution provides for a school of forestry, while New Mexico requires the legislature to support a military institute.

Several constitutions, including those of Vermont, Maine, New Hampshire, Connecticut, Massachusetts, Rhode Island, and New Jersey contain no provision of this type. The newer constitutions of Alaska and Hawaii simply require that the legislature provide for a state university and such other educational institutions as may be deemed desirable.

The Model State Constitution provides that the legislature shall establish organize and support such public institutions of higher learning as may be desirable.

Comment

This section, like Section 1, is not a grant of or restriction on the power of the legislature, but rather expresses the intent of the people that these institutions be supported. Consideration might be given to eliminating this section and combining it with the provision of Section 1 in a general statement of intent.

The table on the following page summarizes the constitutional provisions for Michigan's nine major state-supported colleges and universities. In the pages following the table individual sections of the constitution which relate to these institutions are discussed.

Constitutional Provisions For Michigan's
Nine Major State-Supported Colleges and Universities

Institution	Citation	Governing Board			Powers and Duties
		Name	No. Members	Term of Office	
University of Michigan	Article XI, Sections 3, 4 and 5	Board of Regents	8	8	Regents "shall have the general supervision of the university and the direction and control of all expenditures from the university funds."
Michigan State University	Article XI, Sections 7 and 8	Board of Trustees	6	6	Trustees "shall have the general supervision of Michigan State University, and the direction and control of all Michigan State University funds; and shall perform such other duties as may be prescribed by law."
Wayne State University	Article XI, Section 16	Board of Governors	6	6	Governors "shall have general supervision of Wayne State University and the duties of said board shall be as prescribed by law. The legislature shall be given an annual detailed accounting of all income from whatever source derived and all expenditures by Wayne State University."
Ferris Institute	None				
Board of Education	Article XI, Section 6		4	6[a]	State Board of Education shall have general supervision of the state normal schools, and the duties of said board shall be prescribed by law.
Central Michigan University		State Board of Education			The legislature shall maintain the state normal college and such normal schools and other educational institutions as may be established by law.
Eastern Michigan University		State Board of Education			
Northern Michigan College		State Board of Education			
Western Michigan University		State Board of Education			

Note: Act 120. Public Acts of 1960 established Grand Valley College as a state-supported institution of higher education.

[a] Three members elected for six-year term, Superintendent of Public Instruction who serves as an ex officio member is elected for a two-year term.

2. The University of Michigan

a. Regents and Name

Article XI: Section 3. There shall be a board of regents of the university consisting of eight members, who shall hold the office for eight years. There shall be elected at each regular biennial spring election two members of such board. When a vacancy shall occur in the office of regent it shall be filled by appointment of the governor.

Section 4. The regents of the university and their successors in office shall continue to constitute the body corporate known as "The Regents of the University of Michigan."

Constitutions of 1835 and 1850

The constitution of 1835 contained no provisions of this type.[45]

The constitution of 1835 left the legislature with full power to manage the affairs of the university and to regulate the appointment of the regents.[46]

Provision for a board of regents elected directly by the people originated in the 1850 constitution (Article XIII, Section 6). As originally adopted the 1850 constitution provided for the election of eight regents to serve the same six-year term. The regents were to be elected from separate judicial districts. An amendment in 1862 extended their term to eight years, required election at large and introduced staggered terms. The provision giving corporate status to the university also originated in the 1850 constitution (Article XIII, Section 7) . These provisions were carried over in the 1908 constitution.

Constitution of 1908

Sections 3 and 4 have not been amended since the present constitution was adopted and there has been little litigation. (See Judicial Interpretation under Sections 5 and 6 of this chapter.)

Other State Constitutions

The organization of public higher education as provided by the several state constitutions varies considerably from state to state. Table A shows those states which constitutionally create boards responsible for higher education and the levels of education and types of institutions under the boards.

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[45] The legislature authorized a board of regents by Public Act in 1837.

[46] The University of Michigan, an Encyclopedia Survey, Part I, History and Administration, Ann Arbor, University of Michigan, 1941, p. 121.

The table shows that a tota1 of 25 states (including Michigan) constitutionally create a board or boards responsible for one or more institutions of higher learning in the state. Six of these states provide for a single board which is responsible for governing and coordinating all public higher education in the state. These states are: Georgia, Idaho, Montana, North Dakota, Nevada, and South Dakota.[47]

Oklahoma provides for an over-all board to be responsible for the coordination of all public institutions of higher learning. This board is authorized to set standards, determine courses, recommend budget allocations for the several institutions and allocate legislative appropriations. This board is not responsible for the direct control and operation of any of the state's universities or four-year colleges.[48] The constitution creates three boards for this purpose: one to govern the University of Oklahoma; one to govern the agricultural and mechanical college, a land-grant college, a four-year college and five two-year colleges; and one to govern six four-year colleges. (Three statutory boards govern two state two-year colleges and a four-year college.)

New York, which designates no one institution as the state university, holds the Board of Regents, The University of the State of New York—an administrative board—responsible for all education in the state.[49]

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[47] Rhode Island and Hawaii have a statutory board responsible for all higher education. (In Hawaii the state university is the only institution of higher education in the state.) Seven other states, by provision pf the constitution or state statutes, place all public higher education institutions except 2-year colleges under a single board. These states are: Arizona, Florida, Iowa, Kansas, Mississippi, Oregon and Wyoming. State Boards Responsible for Higher Education, U.S. Department of Health, Education and We1fare, Office of Education, Circular No. 619, Washington, U.S.G.P.O., 1960, pp. 17-25.

[48] While the over-all coordinating board (the State Board of Regents of Oklahoma Colleges) is responsible for the government of six junior colleges, the junior colleges are each directly controlled and operated by separate local boards.

[49] The Board of Regents, The University of the State of New York is constitutionally responsible for the administration, supervision and coordination of 28 institutions which comprise the state university. By statute the Board of Trustees, State University of New York, is responsible under the general supervision of the board of regents, for all public higher education institutions except four New York City colleges. Legally the actions of the board of trustees are subject to approval by the board of regents.

Table A
Constitutionally Created Boards Responsible for
Higher Education and Levels of Education
Under Such Boards

Boards Responsible for Institutions	Institutions Under Each Board Higher Education							Other Educational Responsibilities of Board	
	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
Alabama									
Board of Trustees, U. of A.	1						1		
Board of Trustees, Auburn U.		1					1		
Arizona									
Board of Regents, Universities and State College of Ariz.	1	1			1		0 3		
State Board of Education						2[b]	2	X	X
Arkansas									
Board of Trustees, U. of Ark.		1		1			2		
Board of Trustees, Agricultural, Mech., and Normal College			1				1		
Board of Trustees, Arkansas Agricultural and Mechanical College					1		1		
Board of Trustees, Ark. Poly. Col.					1		1		
Board or Trustees, Ark. St. Col.					1[c]		1		
Board of Trustees, Ark. St. Teach. Col.					1		1		
Board of Trustees, Henderson St. Teach. Col.					1		1		
Board of Trustees, Southern St. Col.					1		1		

See footnotes at end of table.

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
California									
The Regents of the U. of Calif.	1	1	1	3	2		8		
State Board of Education					14[d]	63[e]	77	X	X
Colorado									
The Regents of the U. of Colorado	1			1			2		
State Board of Education						6[b]	6	X	X
Florida									
State Board of Education of Florida						16[b]	16	X	X
Georgia									
Regents of the U. System of Georgia		1	1	3[a]	7	7	19		
Idaho									
State Bd. of Education & Bd. of Regents, Univ. of Idaho		1[c]			1	2[b]	0	X	X
Louisiana									
Bd. of Supervisors of Louisiana St. Univ. & Ag. & Mech. Col.		1		1	1		0 3		
Louisiana St. Bd. of Education			1		8[a]		9	X	X

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
Michigan									
The Regents of the Univ. of Mich.	1						1		
Bd. of Trustees, M.S.U.		1					1		
Bd. of Governors of Wayne St. Univ.	1						1		
State Bd. of Education					4	14[b]	18		
Minnesota									
Regents of the Univ. of Minn.		1			1		2		
Mississippi									
Bd. of Trustees of St. Institutions of Higher Learning	1		2	1	5		9		
State Bd. of Education								X	X
Missouri									
The Curators of the Univ. of Mo.		1					1		
State Bd. of Education					1	6[b]	7	X	X
Montana									
State Bd. of Education	1		1		4	2[b]	8	X	X
Nebraska									
The Bd. of Regents of the Univ. of Neb.		1					1		
Bd. of Education of State Normal Schools					4		4		
Bd. of Educational Lands and Funds									
State Board of Education						4[b]	4	X	X
Nevada									
Board of Regents, Univ. of Nev.		1			1		2		

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
New Mexico									
Regents of the Univ. of N. M.	1						1		
The Regents of the N. M. St. Univ.		1					1		
Bd. of Regents, Eastern N. M. Univ.					1		1		
Bd. of Regents, N. M. Highlands Univ.					1		1		
Bd. of Regents, N. M. Inst. of Mining & Tech.				1		1			
Bd. of Regents, N. M. Western Col.					1		1		
Bd. of Regents, N. M. Military Inst.						1	1		
New York									
Bd. of Regents, The Univ. of the St. of N.Y.					4[f]		4	X	X
North Carolina									
Bd. of Trustees, Univ. of N. Carolina	1		1		1		3		
North Dakota									
State Bd. of Higher Education	1	1			5	4[g]	11		
Oklahoma									
Oklahoma St. Regents for Higher Education					6	6[b]			
Regents of the U. of Oklahoma	1						1		
Bd. of Regents, Ag. & Mech. Col.		1	1		1	5	8		
State Bd. of Regents of Oklahoma Colleges				6		6			
South Dakota									
Bd. of Regents of All Higher Education	1	1			5		7		

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
Utah									
Board of Regents, Univ. of Utah	1					1	2		
Bd. of Trustees, Utah St. Univ. of Ag. & Applied Science		1			1	1	3		
State Bd. of Education						2	2	X	X
Virginia									
Bd. of Visitors, Virginia Poly. Inst.			1		1		2		
Bd. of Visitors, Col. of Wm. & Mary in Virginia				1	2		3		
State Bd. of Education			1		2	1	4	X	X
Wyoming									
The Trustees of the Univ. of Wyoming		1					1		

[a] One institution operates a branch.

[b] All institutions controlled by other boards.

[c] Operates a branch.

[d] One institution controlled by another board.

[e] One institution has two campuses.

[f] All four units controlled by another board.

[g] Two controlled by other boards.

Source: State Boards Responsible For Higher Education) U.S. Department of Health, Education and Welfare, Office of Education, Circular No. 619, Washington, U.S.G.P.O., 1960, pp. 203-208, 216-220.

XI Education

New Mexico creates seven institutional boards, each of which is responsible for governing one of five state colleges and two universities. These boards have authority to approve budgets, establish personnel policies, finance current operations, plan and finance physical facilities. New Mexico provides by statute for an overall coordinating board appointed by the governor which is primarily responsible for the coordination of the financial affairs of the state's seven institutions of higher education. The prime concern of this board is to insure that the institutions are adequately financed under an equitable distribution of available funds. The board reviews and may adjust the budgets of the several institutions as they are submitted to the state's budget officer.[50]

The constitutions of Alabama, Michigan, New Mexico, Oklahoma, and Utah create individual boards for more than one major state university. Two institutional boards are provided for in Virginia's constitution to govern institutions other than the state university which is governed by a statutory board. The Arkansas constitution creates eight institutional boards, one of which governs the state university. The remaining seven each govern one of seven state colleges.

Method of Selection In those states where it is constitutionally provided, the prevalent method of selection is appointment by the governor subject to confirmation by the senate. Seven states, including Alaska,[51] Missouri,[52] and Hawaii,[53] provide that the entire board be so selected, while six others[54] require the appointment of a majority of the board membership and ex officio membership for a varying number of other board members.[55]

The U.S. office of education reports that of some 209 state boards responsible for higher education, created by either the state constitution or the state statutes, seventy percent of the board members are appointed, eighteen percent are

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[50] State Boards Responsible for Higher Education, p. 124.

[51] The governor's appointments in Alaska are subject to confirmation by a majority of the members of the legislature' in joint session. (Article VII, Section 3).

[52] Article IX, Section 9(a).

[53] Article IX, Section 5.

[54] Arizona, California, Louisiana, Montana, New Mexico, Wyoming. Index Digest, pp. 405-408.

[55] Index Digest, pp. 405-408.

elected, and some twelve percent serve as ex officio members. Sixty-eight percent of those appointed are appointed by the governor subject to senate confirmation, and another twenty-five percent by the governor alone. By far the most prevalent practice within the elective process is that of election by the legislature. Forty-five percent of those elected are reportedly covered by this practice.[56]

Size of Board The size of constitutionally created boards responsible for the major public university in 16 states ranges from six in Nebraska to 24 in California.[57] The average membership provided for is 10.6. Appointed boards are for the most part larger than elected boards.

The size of board membership for some 209 state boards varies in the extreme Two boards have a membership of three, while the board of trustees of the University of North Carolina has a membership of 102. With this latter board excluded, however, the high membership is 32. The average membership of all such boards is 10.6.[58]

Length of Term Eight of the states which constitutionally provide for board to govern the major public university also prescribe the board members' term of office and, except Alabama, require overlapping terms. These states are: Alabama (12 years), California (16 years), Colorado (6 years), Georgia (7 years), Louisiana (14 years), Michigan (8 years), Nebraska (6 years), and New Mexico (6 years).

The U.S. office of education reports that the average term constitutionally or statutorily provided for 209 state boards is six years.[59]

Corporate Status The constitutional boards responsible for the major public university in eight states (including Michigan) derive authority for corporate status from the state constitution.[60] Such boards in eight other states have no constitutional corporate status,[61] while in thirty-three states they derive corporate authority from the statutes.

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[56] State Boards Responsible for Higher Education, p. 26.

[57] The remaining fourteen states are: Alabama, Alaska, Arizona, Colorado, Georgia, Hawaii, Louisiana, Missouri, Montana, New Mexico, North Dakota, Oklahoma, South Dakota and Wyoming. Index Digest, pp. 405-408.

[58] State Boards Responsible for Higher Education, p. 28.

[59] State Boards Responsible for Higher Education, pp. 29,227-233.

[60] California, Colorado, Georgia, Idaho, Louisiana, Minnesota, and Utah. State Boards, pp. 216,220.

[61] Board of Trustees, University of Connecticut; Iowa State Board of Regents; Kansas State Board of Regents; Montana State Board of Education; Board of Regents, University of Nevada; North Dakota State Board of Higher Education; Oregon State Board of Higher Education; and Board of Regents, University of Texas.

In regard to higher education, the Model State Constitution provides simply (Article X) that "The legislature shall provide in addition to a system of common schools such other educational institutions, including institutions of higher learning, as may be deemed desirable."

Comment

The voters of Michigan elect a total of 24 board members to govern institutions of higher education (eight regents of the university, six trustees of Michigan state university, six governors of Wayne state university and four members of the state board of education).[62]

In a recent study of state boards responsible for higher education conducted by the office of education, U.S. department of health, education, and welfare the authors conclude:

> State-supported colleges and universities are increasingly being viewed as parts of a total State enterprise in higher education rather than as individual, separate, institutions with purposes or programs unrelated to others in the State.[63]

If Michigan desires to move in this direction, some consideration might be given to removing Sections 3 and 4 as well as other provisions establishing individual boards and, in their place, creating a single board responsible for all higher education in the state. As mentioned earlier, six states constitutionally provide for a single state-wide board.

Or, consideration might be given to omitting any constitutional reference to a governing board for the major university, leaving the matter to legislative enactment. The legislature now statutorily provides for the governing boards of the college of mining and technology and Ferris institute.

On the other hand, consideration might be given to leaving Sections 3 and 4 unchanged and providing elsewhere in the constitution for a master coordinating board or leaving the matter to legislative discretion. As mentioned earlier, New Mexico has seven constitutional boards coordinated by a board created by statute.

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[62] Three members are elected directly to the board of education. The fourth member, the superintendent of public instruction, is elected to the office of superintendent and serves as an ex officio member of the board of education.

[63] State Boards Responsible for Higher Education, p. 47. See also Lyman A. Glenny, Autonomy of Public Colleges; The Challenge of Coordination, New York, McGraw-Hill Book Co., Inc., 1959.

b. President and Supervision

Article XI: Section 5. The regents of the university shall, as often as necessary, elect a president of the university. The president of the university and the superintendent of public instruction shall be ex-officio members of the board of regents, with the privilege of speaking but not of voting. The president shall preside at the meetings of the board and be the principal executive officer of the university. The board of regents shall have the general supervision of the university and the direction and control of all expenditures from the university funds.

Constitutions of 1835 and 1850

There was no comparable provision in the constitution of 1835. Previous to 1850 members of the faculty served one year each as president. The governor served as the presiding officer of the board of regents while the internal administration of the university was fully subject to legislative control.[64] This provision originated in the 1850 constitution.

The 1850 provision (Article XIII, Section 8), was as follows:

> The regents of the university shall, at their first annual meeting, or as soon thereafter as may be, elect a president of the university, who shall be ex officio a member of their board, with the privilege of speaking but not voting. He shall preside at the meetings of the regents and be the principal executive officer of the university. The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund.

Constitution of 1908

The 1850 provision was carried over in the constitution of 1908 with the addition of the superintendent of public instruction to the board as an ex officio member. The constitution in 1908 omitted the word “interest” which in the 1850 provision had followed the word “university” and the word “fund” was changed to “funds.”

This section has not been amended since the present constitution was adopted.

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[64] The University of Michigan. An Encyclopedic Survey, Part I, History and Administration, Ann Arbor, University of Michigan, 1941, p. 227.

Statutory Implementation

A series of legislative acts passed since 1851 vested the government of the university in the board of regents; required university branches to be established; required an annual report to the superintendent of public instruction; and authorized the board to perform a number of functions.[65]

In 1867 the legislature passed the first of a series of "mill-tax" laws which provided financial assistance to the university of Michigan and to the agricultural college (now Michigan state university). The laws were permanent in that they regulated the amount of support that was received by the institutions until changed by affirmative action of the legislature.

Under the first of these laws the legislature appropriated to the university of Michigan a sum equal to five cents on each thousand dollars of taxable property in the state. This method of support provided the institutions with an increasing amount of income during a period when the valuation of taxable property in the state was increasing. During the depression years, however, the legislature limited the amount paid to the university and in some cases reduced an original appropriation. At the same time the state tax on real property was abolished and the state began to rely on the sales tax and other sources of income. Thus, in 1935 the earlier form of the mill-tax laws was changed.

New acts passed in 1935[66] provided for the support of the university of Michigan and Michigan State college out of the general funds of the state, but they also provided for an appropriation proportionate to the tax valuation of the state. In 1936 and each fiscal year thereafter, a sum was to be appropriated to the university of Michigan equal to 73 cents on each thousand dollars of taxable property in the state while a sum equal to 24.3 cents on each thousand dollars of taxable property was to be appropriated to Michigan state college. With some changes these laws remained in effect until repealed in 1947.[67] Since then the legislature's support of the university of Michigan and Michigan state university has been on an annual appropriation basis.

Judicial Interpretation

The supreme court has held that under the constitution of 1908 the state board of agriculture (board of trustees of Michigan state university) was put on the same plane with the regents of the university of Michigan.

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[65] M.S.A. 15.901-15.993.

[66] Acts 112 and 113 of 1935.

[67] Act 304 of 1941.

Consequently, this section includes cases relating both to the board of regents of the university of Michigan and to the board of trustees of Michigan state university.

Institutional Nature The courts have held that by the constitution the board is made "the highest form of juristic person known to the law," with authority within the scope of its functions equal to and coordinate with that of the legislature. The courts have held that the board is a separate entity, independent of the state in the management and control of the university and the fact that it is state property does not necessarily bring the board within the purview of the statutes.[68]

On the other hand the courts have held that the board of regents is a department of the state government created to perform state functions. The lands, buildings and equipment under the control of the regents are state property.[69]

Property and Funds Funds appropriated for the use of the university have been held by the supreme court to be under the exclusive direction of its governing board. The court has also held that the board's judgment as to the legality and expediency of expenditures for the use and maintenance of the university is not subordinate to that of the auditor general.[70]

In regard to conditional appropriations the court has held that the legislature may attach any conditions it may deem expedient and wise to appropriations for

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[68] People ex rel. Board of Regents v. Brooks, 224 Mich. 45; Weinberg v. The Regents of the University of Michigan; Attorney General ex rel. Cook v. Burhano, 304 Mich. 108 (1942) ; Board of Regents, University of Michigan v. Auditor General, 167 Mich. 444. In a relatively recent case, the supreme court divided over the question of whether the legislature constitutionally could subject the state board of agriculture to the workmen's compensation act. (Peters v. Michigan State College, 320 Mich. 243) The attorney general from time to time has held invalid statutes which purported to regulate aspects of university activity and on occasion has ruled statutes couched in general form to be inapplicable to the university. For example, Statutes purporting to fix fees (Op. Attorney General 1701, p. 87) and entrance requirements (Op. Attorney General, 1911, p. 215) were held invalid. Acts requiring state agencies to submit reports to the state board of auditors, requiring performance bonds from contractors and requiring annual inventories of state-owned property were said to have no application to the university. (Op. Attorney General, 1920, p. 106; Op. Attorney General, 1921-22, p. 289).

[69] People ex rel. Board of Regents v. Brooks, 224 Mich. 45.

[70] State Board of Agriculture v. The Auditor General, 226 Mich. 417; Bauer v. State Board of Agriculture, 164 Mich. 415; Board of Regents of University of Michigan v. Auditor General, 167 Mich. 444.

the university. Where such conditions have been attached the regents may accept or reject the appropriations as they see fit. Should the regents accept the appropriation, the conditions are binding upon the regents.[71]

The legislature does not have unlimited freedom in the use of this device, however, for the court has said that the legislature can attach only such conditions as it has the power to make. In State Board of Agriculture v. The Auditor General (226 Mich. 417) the court said that the language used in previous decisions "did not mean that a condition could be imposed that would be an invasion of the constitutional rights and powers of the governing board of the college." In this case a condition attached to an appropriation for the support of the agricultural college requiring the funds to be used subject to the general supervision of the state administrative board was held unconstitutional.

Other State Constitutions

Alaska and Hawaii in addition to Michigan provide that the university president shall be appointed by the governing board to serve as its executive officer. Alabama provides that the governor serve as ex officio president. Oklahoma provides for the office of president of the board of regents of Oklahoma colleges,[72] but the office is not provided for in provisions which create the university of Oklahoma governing board. California provides that an acting university president shall serve as an ex officio member of the university board of regents.[73]

Alabama, California, Hawaii, Montana, and Wyoming, in addition to Michigan, make the superintendent of public instruction an ex officio member of the university board. Michigan's provision granting the superintendent and the president the privilege of speaking but not of voting appears to be unique among the states.[74]

The constitutions of Colorado and Idaho contain provisions similar to that of Michigan's that the board of regents shall have "the general supervision of the university and the direction and control of all expenditures from the university funds." In addition, it has been said that the state constitutions of Minnesota and California give the principal state university governing board full control over the internal affairs of the university.[75]

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[71] People ex rel. Regents of the University v. Auditor General, 17 Mich. 161; Weinberg v. The Regents of the University of Michigan, 97 Mich. 246.

[72] Responsible for the government of 6 four-year colleges.

[73] Alaska constitution of 1956, Article VII, Section 3. Hawaii constitution of 1950, Article IX, Section 5. California constitution of 1849, Article IX, Section 9. Oklahoma constitution of 1907, Article XIII, Section 8, a(1,2), b(1,3).

[74] Index Digest, pp. 405-408.

[75] M. M. Chambers, The Campus and the People, The Interstate Printers and Publishers, Danville, Illinois, 1960, p. 45.

Minnesota provides (Article VIII, Section 4):

> The location of the University of Minnesota, as established by existing laws, is hereby confirmed, and said institution is hereby declared to be the University of the State of Minnesota. All the rights, immunities, franchises and endowments heretofore granted or conferred are hereby perpetuated unto the said university; and all lands which may be granted hereafter by Congress, or other donations for said university purposes, shall vest in the institution referred to in this section.

California provides (Article IX, Section 9):

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "the Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds...said corporation shall also have all powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued.

Louisiana provides that the Louisiana state university and agricultural and mechanical college are to be directed, controlled, supervised and managed by a board of supervisors. Missouri provides that the government of the university shall be vested in a board of curators. Nevada, Nebraska, North Carolina, and Wyoming grant the legislature power to provide for the control and management of the state university.

Comment

Under the terms of the present constitutional provisions the board of regents of the university of Michigan and the board of trustees of Michigan state university are charged with the responsibility for general supervision of the respective universities and the direction and control of their funds.[76] These provisions have

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[76] There has been no authoritative interpretation of the language of Article XI, Section 16 which provides for Wayne state university. In the absence of a definitive interpretation of the section, there would appear to be some question as to whether the provisions of the section put Wayne state university on the same constitutional footing with the university of Michigan and Michigan state university. For further comment on the point see the Comment under Wayne state university (Article XI, Section 16) below.

been interpreted to give the boards the responsibility and authority to determine the amount and quality of higher education services that are to be provided by these institutions. But the boards do not have taxing authority to finance such educational services.[77] The constitution gives this authority to the legislature.

Thus, while the boards have the authority and responsibility for determining the amount of higher education services that are to be provided, they lack the authority to levy taxes to pay the cost of such services.

The legislature has the authority to levy taxes to pay the cost of higher education services, but does not have the authority to determine the factors that make up the educational program (and thus the cost) of the universities.[78]

Thus, the constitution creates a division of responsibility and authority between the boards and the legislature for providing higher education services at these two institutions.

If the convention believes that the responsibility and authority for providing higher education services at the universities should, be vested in one body and not split between two bodies, there are two basic alternatives:

1. Give the governing boards (or board) of the universities the authority to levy the taxes necessary to fulfill their responsibility for providing higher educational services. This could be done in several ways—by authorizing the boards to levy certain enumerated taxes or by earmarking certain taxes for their use. Under this alternative the boards (or possibly a single board) would be given by the people complete responsibility and authority for providing higher educational services. But, the legislature would be relieved of its responsibility and authority in this area.

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[77] The board of regents and the board of trustees have the institutional responsibility for making those policy decisions which determine the total cost of operating the university (enrollment, curriculum, faculty, salaries, etc.) and are similarly responsible for determining how much of that total cost is to be financed from "university funds" (fees and charges, gifts, endowment, etc.). The difference is the net tax cost, which is requested annually of the legislature.

[78] Dr. John Dale Russell in his Survey of Higher Education in Michigan makes the following observation: "It is very clear that the Legislature and its committees have no very good way of estimating either the total needs of the State for higher education or the needs of the individual institutions for support. This is not a criticism of the legislature or its committees for they have done remarkably well, considering the limited data and analyses available upon which to make determinations of appropriations and other matters affecting the institutions."

2. A second alternative, if both responsibility and authority for providing higher education are to be vested in one body, would be to give the legislature the constitutional responsibility for determining the higher educational program (which the legislature could vest by law in a university board or president).

On the other hand, the convention may feel that it is undesirable to give either agency complete authority and responsibility. In that event, consideration might be given to keeping the present provisions, or to modifying them by granting the legislature authority and responsibility over all finances of the universities, but leaving with the university boards the authority and responsibility for providing the best possible services within the limits set by the funds made available by the legislature. Consideration might be given to keeping the present provisions, while providing that all funds (state appropriations and university generated funds) be audited by a legislative auditor. This would provide one centralized accounting to the public.

Should consideration be given to providing an overall coordinating board, some modification of the powers of the separate boards might be considered necessary to permit such inter-institutional coordination.

Section 2 of Article XI specifies that the superintendent of public instruction shall be ex officio a member without vote of all boards having control of public instruction in any state institution. Thus, the specified ex officio membership of the superintendent on the board of regents in Section 5 would seem unnecessary.

3. Michigan State University

a. Board of Trustees

Article XI: Section 7. There shall be elected on the first Monday in April, 1909, a board of trustees to consist of 6 members, 2 of whom shall hold the office for l years, 2 for 4 years and 2 for 6 years. At every regular biennial spring election thereafter, there shall be elected 2 members whose term of office shall be 6 years. The members thus elected and their successors in office shall be a body corporate to be known as "The board of trustees of Michigan state university of agriculture and applied science." The board of trustees shall be the successor in interest to all the rights, powers, assets and liabilities of the state board of agriculture.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 contained no provision of this type. The 1850 constitution directed the legislature to provide for the establishment of an agricultural school (the first of its kind in America) as soon as practicable and authorized the legislature to make the school a branch of the university. Twenty-two sections of salt spring lands were appropriated for the support and maintenance of the school. The legislature established a state agricultural school in 1855 which until 1861 was under the control of the state board of education.[79] From 1861 to 1909 the state board of agriculture, created by the legislature in 1861 (and predecessor of the present board of trustees), was appointed by the governor.[80]

Constitution of 1908

Original Provision In the convention of 1907-08, spirited debate followed a proposal to insert into the constitution provisions for the regulation of the agricultural college which were then in force by statute. The proposal failed of passage on two early votes in the convention. The debate revolved around the question of whether the board should be elected as proposed or appointed by the governor, as was then provided for by statute. Some objected to treating the agricultural college in a manner different from the college of mines, which was also controlled by an appointed board. Others argued that better qualified members would be appointed to the board than could be obtained under the elective process. It was pointed out, however, that the college of mines was a purely technical institution requiring specialists in its management and that under no circumstances should the government of the college of mines be interfered with. The college of agriculture, on the other hand, was not held to be such a technical institution with the same requirements in its management. The elected board, it was argued, would serve to raise the character and dignity of the board. The purpose of the elective proposal, as pointed out by Mr. Barbour, a member of the education committee, was to put the board on a rooting with the board of regents of the university of Michigan. The proposal, providing for an elective board, passed on the third reading.[81]

1959 Amendment In 1959, an amendment to this sections provided for the board of trustees of Michigan state university as the successors to the state board of agriculture.

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[79] Act 130 of 1855.

[80] Act 188 of 1861.

[81] Proceedings and Debates, pp. 1143-1148.

Judicial Interpretation

As previously indicated, the supreme court has held that under the constitution of 1908 the state board of agriculture was put on the same plane with the regents of the university of Michigan.[82]

Other State Constitutions

The constitutions of eighteen states contain provisions relative to an agricultural college or an agricultural and mechanical college. In ten states the agricultural college and the state university are combined—Arizona, California, Georgia, Idaho, Louisiana, Minnesota, Missouri, Nebraska, Nevada and Wyoming.[83]

In Colorado the control and management of the agricultural college are regulated by the legislature.

South Dakota provides that the agricultural college be under the control of five members appointed by the governor and confirmed by the senate.

New Mexico requires the legislature to provide for the control and management of state universities (including the college of agriculture and mechanical arts) by a five-member board of regents appointed by the governor with the consent of the senate.

Oklahoma provides for a board of regents for its agricultural and mechanical college and all other such colleges (it has one other land-grant college). Eight board members are appointed by the governor with the advice and consent of the senate. The president of the state board of agriculture is a ninth member.[84]

Of those states with newer and more recently revised constitutions, Hawaii, Alaska and New Jersey have a combined state university and land-grant college. The first two constitutionally provide for the single institution.[85] New Jersey is silent on the matter. The board of governors of its combined institution, Rutgers,

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[82] Alger v. Michigan Agricultural College, 181 Mich. 559. For references to other decisions bearing on the constitutional status of the board, see previous section on the university of Michigan.

[83] Index Digest, pp. 403-405. Also, see State Boards Responsible for Higher Education, pp. 203-220.

[84] The state board of agriculture consists of five farmers selected according to law to have jurisdiction over matters affecting animal industry and animal quarantine regulation.

[85] See previous section on university of Michigan.

was created by authority of the state statutes. Missouri requires the legislature to maintain a state university which has been classified as a combined state university and land-grant college. The board of control for a second state-designated land-grant institution, Lincoln university, was created by statute.[86]

Comment

Michigan state university and the university of Michigan are treated similarly under the constitution. See Comment under the sections on the university of Michigan for a discussion of these provisions.

b. President; Board Duties

Article XI: Section 8. The board of trustees shall, as often as necessary, elect a president of Michigan state university, who shall be ex-officio a member of the board with the privilege of speaking but not of voting. He shall preside at the meetings of the board and be the principal executive officer of Michigan state university. The board shall have the general supervision of Michigan state university, and the direction and control of all Michigan state university funds; and shall perform such other duties as may be prescribed by law.

Constitutions of 1835 and 1850

There was no provision of this type in the earlier Michigan constitutions.

Constitution of 1908

Original Provision Prior to 1908 the regulation of this institution had been provided for by legislative enactment. Members of the 1907-1908 convention inserted provisions of the statutes then in force into this section and Section 7, putting the institution at or on a par with the university of Michigan with regard to constitutional treatment.[87]

The superintendent of public instruction is an ex officio member of the board of trustees (Article XI, Section 2).

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[86] State Boards Responsible for Higher Education, p. 205.

[87] Proceedings and Debates, p. 1143.

1959 Amendment In 1959 this section was amended to effect a change in the name of the institution from the agricultural college as previously referred to in this section to Michigan state university of agriculture and applied science. The name of the board of control was changed from the state board of agriculture to the board of trustees. Except for these changes the section otherwise remained unchanged.

Statutory Implementation

The legislature has by statute vested the government of the university in the board and set forth the powers and duties of the board as assigned by the constitution.[88]

Judicial Interpretation

The supreme court has held that under the constitution of 1908 the state board of agriculture (board of trustees) was put on the same plane with the regents of the university of Michigan. Neither the legislature nor any state officer or board may interfere with the control and management of these institutions.[89]

Opinions of the Attorney General

In regard to the board's powers, the attorney general has held that powers given to the state board of agriculture and to the legislature are not mutually exclusive except in matters dealing solely with the operations of the university. In matters where general laws and welfare are affected, the attorney general has held that the legislature has the same powers of legislation as over any other portion of the state.[90]

Other State Constitutions

Alabama, Michigan, New Mexico, Oklahoma and Utah constitutionally create a separate board for more than one major state university. See Other State Constitutions under section on university of Michigan (Article XI, Section 5) for discussion of similar provision.

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[88] M.S.A. 15.1121-15.1303 (4).

[89] Alger v. Michigan Agricultural College, 181 Mich. 559. For other cases bearing upon the construction of this section see previous section on the university of Michigan (Article XI, Sections 3 and 4).

[90] Attorney General, Opinion No. 227, Dec. 9, 1955. Legislation purporting to designate the college faculty, its president and his powers were held unconstitutional by the attorney general as an invasion by the legislature of the board's authority. Likewise an attempt by the legislature to exempt certain students from military courses was held unconstitutional by the attorney general as depriving the board of supervision and control conferred by the constitution. (Atty. Gen. Opn. No. 1099, December 8, 1948) See Volume 11, Michigan Statutes Annotated, Powers of Board, p. 182.

Comment

This section is virtually the same as an earlier one treating the university of Michigan. For comment on the provision, see the earlier discussion under the university of Michigan (Article XI, Section 5).

c. Salt Spring Lands

Article XI: Section 13. The legislature shall appropriate all salt spring lands now unappropriated, or the money arising from the sale of the same, where such lands have already been sold, and any funds or lands which may hereafter be granted or appropriated for such purpose, for the support and maintenance of the agricultural college.

Constitutions of 1835 and 1850

Salt spring lands were granted by Congress to the state of Michigan in an act of 1836, which authorized up to 12 salt springs and six sections of land contiguous to each to be used as the legislature prescribed.[91] This meant an original dedication of a maximum of 72 sections or slightly over 46,000 acres of land as salt spring lands.

In actual fact, slightly over 45,300 acres were finally selected by the state and approved by the federal government. Unlike some other grants of lands by the Congress, salt spring lands were not specifically given to the state for the support of education. Their partial dedication for this purpose was permitted by constitutional provision in 1850 and required in 1908.

In the infancy of the state, salt springs were invested with a substantial public interest. Plentiful pulp wood supplies were available for fuel to evaporate the brine to produce crystalline salt for human consumption. Otherwise salt had to be imported from distant areas, such as New York state, at fairly significant prices for those days. Reports of the state geologist and the commissioner of the state land office and legislative resolutions and acts clearly indicate the economic importance attached to salt springs in the early years of statehood.[92] The development of techniques for mining salt directly has obviated the original need for and use of salt springs. In addition, much of the contiguous land granted was not needed for improvement of the springs and was more valuable for agricultural or other purposes.

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[91] See 5 U.S. Statutes-at-Large 59. A section of land is one square mile, or 640 acres.

[92] See especially Geological Reports of Douglas Houghton. 1837-1845, Michigan Historical Commission, 1928, and Land Office Reports, 1843-1861, Michigan.

The constitution of 1835 did not mention salt spring lands specifically. The 1850 constitution said (Article XIII, Section 11)—"The legislature may (emphasis supplied) appropriate the twenty-two sections of salt spring lands now unappropriated, or the money arising from the sale of the same. . . for the support and maintenance of (an agricultural school) . . . ." This section also enjoined the legislature to establish an agricultural school "as soon as practicable." The 22 sections of land were so appropriated by Act 130, 1855, which established what is now Michigan state university.

Constitution of 1908

The 1908 constitution virtually repeated the provisions of 1850 except that the word the legislature "may" was changed to "shall."

Statutory Implementation

As with many other lands granted by the federal government or the state for educational purposes, the lands themselves have been sold and the money used by the state. As provided by statute or the constitution, an amount equivalent to the proceeds of such sales form the corpus of various funds of which a memorandum record is made as a basis for determining the amount of interest to be paid annually to the designated educational function. All salt spring lands have been sold.[93]

The original disposition of the 72 sections is shown below.[94]

Authority	Sections	Disposition
Act 187, 1848 Act 133, 1849 Act 282, 1850	25	Asylums for Deaf, Dumb and Blind, and the Insane.
Act 138, 1849	25	State Normal School (Eastern Michigan University)
Act 130, 1855	22	Agricultural College (Michigan State University)

Eastern Michigan university, the original state normal school, still receives an annual income which was $6,070 in 1960-61 and which is said by officials of that institution to be solely from a fund resulting from the sale of salt spring lands.

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[93] An original federal prohibition against sale or lease of these lands for longer than 10 years was rescinded in 1847.

[94] Twelve of the originally selected sections were found to have been sold by the federal government in error to private individuals. In 1852 Congress granted 12 additional sections to replace the sold lands.

The matter of salt spring lands is now so obscure that it is currently impossible without a tedious and possibly unprofitable review of records to know exactly how much money is annually received by Michigan state university specifically from the sale of this sort of land. From funds resulting from the sale of all types of land that university now receives slightly more than $74,000 annually. These monies are paid out of the primary school interest fund from receipts of the specific taxes in accordance with the provisions of Article X, Section 1 of the constitution.

The act giving lands for asylum uses did not require a perpetual fund to be established and the lands were sold, with the proceeds being used in full for institutional support.

Interest paid on the corpus of land sale funds (including salt spring lands) is seven per cent per annum, except in the case of swamp lands where the rate is set by statute at five per cent. The statute governing interest on funds from the sale of agricultural lands is the only one that can be found setting a seven per cent rate in so many words (Act No. 140, 1863). Apparently the seven per cent rate on other funds stems from a supreme court decision in 1896, Regents v. Auditor General, 109 Mich. 134. A law of 1859 (Act 143) relating to the income from lands reserved to the use of the university of Michigan (not salt spring lands, however) was passed at a time when the usury laws allowed a seven per cent interest rate, which rate had been paid on these funds by the auditor general since 1845.[95] The court ruled that the auditor general must continue the seven per cent rate, since the act of the legislature granting the lands and income therefrom, when passed, implicitly set seven per cent, the rate of interest at that time. With this legal precedent, no further challenge to the seven per cent interest rate, on all except swamp lands, has yet occurred.[96]

Other State Constitutions

A number of state constitutions contain provisions appropriating lands to school purposes or to perpetual funds for school purposes.[97] In most cases such provisions appropriate to school purposes the proceeds of all lands granted by the

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[95] So states the court decision (see 109 Mich.136). However, figures in the annual report of the auditor general for the fiscal year 1900-01 (p. 350, Table No. 247) indicate that less than seven per cent (presumably six per cent) was paid on the university and other educational funds in the one year, 1881, the year in which by Act No. 138 the legal interest rate was reduced from seven to six per cent.

[96] The law providing for the normal school interest fund paid to Eastern Michigan university (see Section 390.412 of the Compiled Laws of 1948) does specifically provide for the payment of interest "at the rate or six per cent per annum." (Act No. 194, 1889) Payment at the rate of seven per cent on this fund appears to be sanctioned only by the custom of more than seventy years' standing.

[97] Nebraska, New Mexico, Wisconsin, Wyoming, North Carolina, Texas, California, Iowa, Kansas, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington. (Index Digest, pp. 386-387).

United States. Exceptions to this are university lands granted by Congress to the state for the support of a university. Wisconsin, for example, appropriates the proceeds of such land to a perpetual fund the interest of which is to be used for the support of the university.[98]

North Dakota constitutionally provides for the establishment of specified educational and charitable institutions with federal lands granted for the purpose.[99]

Michigan's provision appropriating salt spring lands, however, appears to be unique.

Comment

The mention of salt spring lands in the state constitution is obsolete and does not need to be continued in any new version. As distinct from this, the question of the corpus of the funds established from the sale of these and other lands and of the disposition of the interest thereon poses a problem.

The constitutional convention appears to have three basic alternatives respecting these funds. It can abolish them and provide for state support of education through regular or other forms of appropriation.[100] It can retain the funds as a nostalgic nod to the past. It can consolidate the funds into a single "fund for educational purposes" with interest to be paid out as the legislature or the constitution may direct.

4. Wayne State University

Article XI: Section 16. There shall be a board of governors of Wayne state university, consisting of 6 members, who shall hold office for 6 years. There shall be elected at each regular biennial spring election 2 members of such board. When a vacancy occurs in the board of governors, it shall be filled by appointment of the governor. The board of governors of Wayne state university and their successors in office shall continue to constitute the body corporate known as "the board of governors of Wayne state university". The board of governors shall, as often as necessary, elect a president of Wayne state university. The president and the superintendent of public instruction shall be ex

[98] Article X, Section 6.

[99] By Act of Congress in 1889; see constitution of North Dakota, Article XIX, Section 215, p. 62.

[100] Specific taxes (see Article X, Section 1) now amount annually to many times the money due from the established interest rate on the primary school, university, and other educational funds.

officio members of the board of governors, with the privilege of speaking but not of voting. The president shall preside at the meetings of the board and be the principal executive officer of Wayne state university. The board of governors of Wayne state university shall have general supervision of Wayne state university and the duties of said board shall be prescribed by law. The legislature shall be given an annual detailed accounting of all income from whatever source derived and all expenditures by Wayne state university.

Constitutions of 1835 and 1850

The earlier constitutions contained no provision of this type.

Constitution of 1908

The original constitution of 1908 did not contain this provision. In 1933, the Detroit board of education united several institutions of higher learning to form Wayne university. The present board of governors of Wayne State university was created by a constitutional amendment in 1959. A prior board had been created by statute[101] in 1956 as a temporary board during the transition from a municipally supported to a state-supported institution.

The section apparently has presented no serious problem of interpretation to date. The section has given rise to no litigation.

The original act of 1956 which provided for the establishment and regulation of the university has continued in force following the 1959 amendment.

Other State Constitutions

For the practice followed in other states providing for state-supported universities see Other State Constitutions under the preceding sections on the university of Michigan and Michigan state university.

Comment

This section gives the board of governors similar powers of general supervision to those granted to the boards controlling the university of Michigan and Michigan State university. The section does not provide, however, for the "direction and control of all expenditures" by the board of governors, similar to the provision of authority for the board of regents of the university of Michigan and the board of trustees of Michigan state university. From the interpretation given this clause

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[101] Public Act 183 of 1956.

by the courts, in the case of the university of Michigan and Michigan state university, it would appear that omission of this provision makes an important difference in the extent to which Wayne state university is free from statutory controls as compared to the university of Michigan and Michigan state university.

It is also provided in this section that the duties of the board of governors of Wayne state university "shall be prescribed by law" while the constitution provides that the board of trustees of Michigan state university "shall perform such other duties as may be prescribed by law." The constitution makes no provision for the legislature to assign duties to the board of regents of the university of Michigan. The provisions of Section 16 relating to the powers and duties of the Wayne state university board of governors are actually the same as those made for the state board of education. The constitution provides that the state board of education "shall have general supervision of the state normal college and the state normal schools, and the duties of said board shall be prescribed by law."

While lacking an authoritative interpretation of the language of this section, there would appear to be some question as to whether the provisions of this section put Wayne state university on the same constitutional footing with the university of Michigan and Michigan state university. However, the statutes applicable to Wayne state university have not attempted to limit the powers of its board of governors and its present status is, in fact, if not by express constitutional provision, on an equal footing with the boards of regents and trustees.

The last clause of this section providing for an "annual detailed accounting of all income" is not contained in sections providing for the university of Michigan and Michigan state university, although another section (Article X, Section 18) requires the legislature to provide for "the keeping of accounts by all state officials, boards and institutions" which accounts and the audit thereof "shall be public records and open to inspection."

Consideration might be given to clarifying the constitutional wording of Section 16 to indicate more clearly the status of Wayne state university in these respects.

Article X, Section 18 provides for the keeping of accounts by state institutions. In view of this provision the requirement for an annual accounting of income in Article XI, Section 16 might be unnecessary.

For additional comment see Comment under the university of Michigan (Article XI, Sections 3, 4 and 5).

5. State Board of Education

Article XI: Section 6. The state board of education shall consist of four members.

> On the first Monday in April, nineteen hundred nine, and at each succeeding biennial spring election, there shall be elected one member of such board who shall hold his office for six years from the first day of July following his election. The state board of education shall have general supervision of the state normal college and the state normal schools, and the duties of said board shall be prescribed by law.

Constitutions of 1835 and 1850

This provision originated in the constitution of 1850 and was carried over into the constitution of 1908.

Constitution of 1908

Section 6 has not been amended since the present constitution was adopted. This section has given rise to very little litigation.

Statutory Implementation

Legislative enactments implementing the provisions of this section provide for the establishment, location and control of the four normal schools, which in 1959 were designated as Eastern Michigan, Western Michigan and Central Michigan Universities and Northern Michigan College.

In addition to responsibilities for the operation of the four schools, the board is responsible for issuing certificates for public school teachers in the state and the supervision of the schools for the blind and deaf. The board is empowered to hear appeals from county boards of education decisions on the transfer of territory between school districts. The board is also required to examine textbooks used in certain specified courses and to set standards for the transportation of pupils by local school districts.[102]

Other State Constitutions

Nineteen states in addition to Michigan constitutionally provide for a state board of education.[103] Colorado, Louisiana, Nebraska, and Utah select board members by popular election. Board members in Georgia, Missouri, and Vir-

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[102] M.S.A. 15.001 through 15.1117.

[103] State boards of education responsible for various levels of education are provided for in 29 additional states—by state statute. Illinois, without a general board, has a specialized board responsible for limited phases of the school program. (The Book of the States, p. 294) (Index Digest, pp. 364-365).

ginia are appointed by the governor with the consent of the senate in the first two states and with the consent of the legislature in Virginia. Florida, Mississippi and Oklahoma have ex officio boards, while five other states provide for both ex officio and appointed membership. Texas, California, and Idaho leave the matter to be provided by law.[104]

Tenure Nine states fix the term of office for board members. Terms range from four years (in South Carolina, Virginia, Michigan) to eight years (in Georgia, Louisiana, Missouri, and North Carolina). The average term provided for in the nine states is 6.3 years.

The size of board membership fixed by thirteen states ranges from three in Mississippi to 15 in Georgia. The average membership of the thirteen boards is eight members.

Powers and Duties Nebraska and Michigan vest the general government of the state normal schools in a state board of education. The Louisiana board is responsible for nine state colleges and for elementary-secondary education. North Carolina grants the board powers of supervision over free public schools.[105] Eleven states provide, as does Michigan, that the duties of the board shall be as provided by law.

Comment

The principal question involved in a consideration of this section is whether the state board of education should continue to have responsibilities for both higher education and elementary-secondary education.

The state board of education is now responsible under the constitution for four institutions of higher education. By statute it is assigned certain general educational responsibilities for elementary-secondary education. In a revision of the constitution, the general educational responsibilities now exercised by the board, plus all of the constitutional authority now vested in the superintendent (see Article XI, Section 2) could be lodged in the state board of education.

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[104] Eight states (including Idaho) make the superintendent of public instruction an ex officio member, five make the governor a member. Other state officers occasionally made ex officio members of the state board include the lieutenant governor, secretary of state, state treasurer, auditor general, and attorney general. Index Digest, pp. 364-365.

[105] As provided by statute or by state constitutions, three states (Idaho Montana, and New York) assign responsibility for all levels of education to a single state-wide board. Eighteen states assign their state boards responsibility for four-year colleges and higher levels of educational institutions in addition to elementary and secondary education. Eleven states place only their two-year colleges under the state board responsible for elementary and secondary education. State Boards Responsible for Higher Education, pp. 203-208.

Should this responsibility for elementary-secondary education be lodged in the state board of education, the constitution might continue to hold the state board responsible for the government of the four institutions of higher education. Or, the four institutions might be placed under separate boards of control or under one centralized board responsible for the government of all four institutions or one board for all institutions of higher education in the state. The matter of providing for the government of these institutions could, of course, be left to the discretion of the legislature. The college of mining and technology and Ferris institute are now governed by separate statutory boards.

Another possible issue in connection with this section is whether the members of the board should continue to be elected or whether they should be appointed by the governor.

As previously indicated, a number of states now provide for appointment by the governor subject to the advice and consent of the senate. Determination of this issue would depend in part on what the future role of the state board of education is to be.

In the interest of making the board broadly representative in providing educational policy, consideration might be given to increasing the size of the board. The average membership on thirteen constitutionally created state boards of education is about eight.

D. OTHER PROVISIONS

1. Township and City Libraries

Article XI Section 14. The legislature shall provide by law for the establishment of at least 1 library in each township and city; and all fines assessed and collected in the several counties, cities and townships for any breach of the penal laws shall be exclusively applied to the support of such libraries.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 contained similar provisions. The 1835 provision (Article XI, Section 4) required the legislature to provide for the establishment of one library in each township, while the 1850 provision (Article XIII, Section 12) required the legislature to support city as well as township libraries. It differed from the 1835 provision, also, in that the earlier provision required only that the clear proceeds of penal fines[106] be appropriated, implying that the cost of collecting the fines should be deducted before the moneys were distributed.

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[106] Fines collected for violations of motor vehicle laws, hunting, fishing and game laws.

Following the adoption of the 1850 provision the supreme court ruled that collection expenses could not be deducted from penal fine moneys.[107] Subsequently, however, an amendment was passed in 1881 which allowed for some diversion of the funds by township or school district boards.

Constitution of 1908

The draft provision presented to the convention of 1907-1908 by the committee on education was phrased in the same manner as the provision originally passed in 1850, omitting the clauses added by amendment and again requiring penal fine moneys to be used exclusively for the support of township and city libraries.

Several members of the committee pointed to measures employed by the counties, cities, and townships to divert penal fine moneys from the library fund,[108] and indicated that the clauses had been omitted as a measure aimed at stopping such practices.

On the other hand, others pointed out that to omit the clauses and restrict the use of penal fines would tie the hands of local authorities who were, it was argued, in a better position than the framers of the constitution to discern the needs of their locality.[109] The fear was expressed in the debate that the matter of providing for libraries would go unheeded, which argument seems to have been influential in the convention's decision to restrict penal fines for library purposes.

A proposal to insert in this section a requirement that both penal fines and fines for violations of city ordinances be credited to the library fund was not accepted by the convention, apparently because the proposal did not include an acceptable method for distributing fines from city ordinances.[110]

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[107] People ex rel. Board of Education of Detroit v. Wayne County Treasurer, 8 Mich. 392.

[108] Court costs were being assessed in amounts exceeding the fine imposed for a breach of the penal laws. Revenue from fines had to be credited to the library fund, while revenue derived from court costs could be credited to other funds.

Ordinances were enacted duplicating the penal laws in which case the cities could credit fines collected for violations of the ordinance to the city's general fund. From the Proceedings and Debates, pp. 172-176.

[109] Some city libraries were established with Carnegie Foundation funds and, under the terms of the gift, were supported by tax funds. It was argued that these cities should be allowed some discretion in the use of penal fines. From the Proceedings and Debates, p. 175.

[110] The proposal would have required fines from city ordinances to be distributed throughout the county on a per capita basis while the expense of collecting such fines would be borne by the city in which they were collected. From the Proceedings and Debates, p. 176.

The section has not been amended since the adoption of the present constitution.

Judicial Interpretation

Section 14 has been interpreted to permit the distribution of penal fine moneys to county law libraries[111] while it would not permit the county treasurer to assign all penal fine moneys to the county library board at any time school districts in the county report $20,000 or more in unexpended penal fine moneys.

The supreme court ruled in 1943 that "penal fines" as referred to in this section are those recovered for violation of state laws while fines recovered under parallel city ordinances can be retained by the city.[112]

Statutory Implementation

Enabling legislation authorizes city, county, township, village and school district governing boards to contract for library services, to establish libraries and to cooperate in the establishment of district libraries. Under varying conditions they may also levy an annual tax to provide library services.[113]

Regional libraries are also provided for by law. This extension toward a larger library unit continues to rely on the county as a base for organization. The state librarian is held responsible for planning the establishment of such libraries, while member counties must approve such plans and appropriate sums for the support of the inter-county unit.[114]

A state board for libraries was created in 1937[115] to have powers and duties formerly vested in a state librarian[116] and a board of library commissioners.[117]

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[111] County of Gratiot v. Federspiel, 1945.

[112] Delta County v. City of Gladstone, 1943.

[113] Act 92, 1952; Act 138, 1917; Act 164, 1955; Act 164, 1877; Act 5, 1917; Act 26, 1921; Act 213, 1925; Act 261, 1913; Act 269, 1955.

[114] Act 250, 1931.

[115] Act 106, 1937.

[116] Act 28, 1895. Previous to 1937 this officer was appointed by the governor and had general control and supervision over the state library. In addition, the powers and duties of the board of library commissioners were performed by the state librarian after the board was abolished in 1921.

[117] Created by Act 115, 1899 and abolished in 1921. The board served primarily as an agency to promote better library service in the state.

The act provided for the appointment of a state librarian by the state board which was given general control and supervision over the state library, the exchange medium for documents of the state, serving branches of the state government and other states. The state board is responsible for setting standards for the certification of libraries and librarians, distributing grants to public libraries, controlling the establishment of regional libraries, and developing state-wide school library service.

In 1937 the legislature also provided for a state aid fund supplementing penal fines. The fund is designed to provide an incentive for improving library service in that eligibility for aid is dependent on whether a library conforms to requirements set by the state board to libraries.[118] Thirty percent of the fund is used to provide establishment grants for county and regional libraries and to reimburse the salaries of county or regional librarians up to $4,800 per year. The remaining 70 percent is distributed on a per capita basis to public libraries which have met the standards set by the state board.

Legislation implementing the provision earmarking penal fines was first passed in l837-l838, authorizing the distribution of penal fines to school districts. County law libraries were authorized penal fines distributions in 1921. Legislation passed in 1947 provided for penal fine distributions to the county library and other independent libraries in counties having a county library.

Specific procedures now used for distributing penal fine money were developed in accordance with rulings of the department of public instruction as approved by the attorney general. The present order of distribution[119] calls for the first distribution to be made to the county law library in an amount varying from $750 to $4,000 depending upon the population of the county. The balance of the penal fine moneys is distributed by the county treasurer to county, city and school district libraries on the basis of the number of children in each jurisdiction as certified by the superintendent of public instruction.[120]

Other State Constitutions

Few state constitutions contain provisions similar to those found in this section.[121] The Missouri constitution provides that it shall be a policy of the state to promote the establishment of free public libraries and to accept the obligation of

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[118] Attorney General Opinion, No. 555, August 1, 1947.

[119] Ibid.

[120] Act 269, 1955. See also memorandum, "Michigan State Library Penal Fines," The State Board for Libraries, Lansing, Michigan, July, 1960.

[121] Index Digest, pp. 683-684.

their support by the state, its subdivisions and municipalities as provided by law. The legislature is required to grant aid to libraries in a manner and in amount as provided by law.

Iowa earmarks moneys paid for exemption from military duty and the clear proceeds of penal fines to the support of common schools or the establishment of libraries as the board of education may provide.

New York provides that revenues from certain funds shall be applied to the support of both common schools and libraries.

Comment

There are now some 300 established libraries throughout the state. If consideration is given to removing this section, the matter of providing for the support of these libraries could be left to the discretion of the legislature which, as previously mentioned, now provides state aid to libraries.

Consideration might also be given to replacing this constitutional protection given penal fines with a provision similar to that found in the Missouri constitution which does not earmark specific revenues for library purposes but does recognize in principle the state's obligation to participate in the support of the establishment and maintenance of libraries.

2. Charitable Institutions

Article XI: Section 15. Institutions for the benefit of those inhabitants who are deaf, dumb, blind, feeble minded or insane shall always be fostered and supported.

Constitution of 1835 and 1850

There was no provision of this type in the 1835 constitution. This provision for charitable institutions originated in the 1850 constitution (Article XIII, Section 10) and was carried over in the 1908 constitution.

Constitution of 1908

The present provision differs from that in the 1850 constitution only in that the word "feeble-minded" was added. The provision was considered and accepted by the 1907-08 convention without debate.

This section has not been amended, nor has it given rise to much litigation.

Statutory Implementation

There is a Michigan school for the deaf at Flint and a school for the blind at Lansing, both under the jurisdiction of the state board of education.

The department of mental health is charged with the responsibility for all phases of the state's mental health program performed at the state level.

Other State Constitutions

A number of other state constitutions, most of which were drafted before 1900, authorize their legislatures to provide for various charitable institutions. Institutions are authorized for the mentally handicapped in twenty states; for the blind in twenty-seven; and for the deaf in seventeen.[122]

Newer and more recently revised constitutions authorize the legislature to support a variety of programs which come under the heading of "general welfare."

Comment

As is the case with "encouraging education," this section does not grant power to the state, but rather expresses the intent of the people to support the types of institutions specified. If the provision were eliminated, the state would still be able to support these institutions and programs. The recent trend has been away from specific provisions of this type and to the "promote the general health and welfare" type of provision.

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[122] Index Digest, pp. 526-530.

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CHAPTER XII CORPORATIONS

(over)

Section Detail

XII CORPORATIONS

Dykema, Wheat, Spencer, Goodnow & Trigg
John R. Dykema

1. Creation of Corporations

Article XII: Section 1. Corporations may be formed under general laws, but shall not be created, nor shall any rights, privileges or franchises be conferred upon them, by special act of the legislature. All laws heretofore or hereafter passed by the legislature for the formation of, or conferring rights, privileges or franchises upon corporations and all rights, privileges or franchises conferred by such laws may be amended, altered, repealed, or abrogated.

Constitutions of 1835 and 1850

The 1835 constitution (Article XII, Section 2) provided that the legislature should pass no act of incorporation, unless with the assent of at least two-thirds of each house. It evidently did not forbid the formation of corporations by special acts. This prohibition appeared first in the 1850 constitution (Article XV, Section 1) which forbade the creation of corporations by special acts except for municipal purposes. A reservation of power in the legislature to amend or repeal corporate laws first appeared in the same section of the 1850 constitution as follows: “All laws passed pursuant, to this section may be amended, altered or repealed.”

Constitution of 1908

Section 1 has not been amended since the adoption of the present constitution.

In connection with the elimination of “except for municipal purposes” from the prohibition against forming corporations by special acts, Mr. Townsend chairman of the committee on private corporations, said in the course of the 1907-08 convention, “We know very well that a great portion of the time of our legislature for a number of years past, has been taken up by passing local laws, and it is evident that there has been nothing done by the legislature of Michigan that has brought it so much in disrepute with the people of the state as the passage of local acts.”

The draft provision presented to the legislature was amended by adding the words “of the legislature” after the phrase “by special act.” The purpose of the addition was to remove the inference that municipalities would be forbidden to confer franchises upon public service corporations, and thus to limit the prohibition to the legislature.

Judicial Interpretation

Elimination of even the partial power to create corporations by special acts in the 1908 constitution almost completely eliminated litigation under this provision. In 1942, however, the supreme court was called on to decide the constitutionality of Act 147, P.A. 139, which authorized the electorate of five counties in southeastern Michigan to form the Huron-Clinton Metropolitan Authority, against the claim, among others, that it violated the first clause of Section 1. The court held that the authority was not a corporation in the constitutional sense, but rather a state agency designed to function in a limited sphere in the accomplishment of public purposes for which existing municipal corporations were not suited.[1]

The reservation of power to amend, alter, repeal or abrogate corporation laws and franchises is clearly and comprehensively expressed and has not occasioned any substantial amount of controversy.

There was a substantial body of litigation under the comparable sections of prior constitutions, particularly with relation to special acts of incorporation and the reserved power to amend or repeal.

Statutory Implementation

The legislature has over the years extensively exercised its power to enact general corporation laws, the broadest in scope among which, in its present form, is the Michigan general corporation act, P.A. 327 or 1931, as amended, M.S.A. Section 450.1 et seq. Among others are: the insurance code of 1956, P.A. 218 of 1956, M.S.A. Section 24.1100 et seq.; summer resort associations, P.A. 230 of 1897, M.S.A. Section 21.661 et seq. and P.A. 137 of 1929, M.S.A. Section 21.751, et seq.; railroad, bridge and tunnel companies, P.A. 198 of 1873 as amended, M.S.A. Section 22.201 et seq.; union depot companies, P.A. 244 of 1881 as amended, M.S.A. Section 22.321, et seq.; train railway companies, P.A. 148 of 1855 as amended, M.S.A. Section 22.371 et seq.; street railway companies, P.A. 35 of 1867 as amended, M.S.A. Section 22.421 ; brine pipeline companies, P.A. 182 of 1881 as amended, M.S.A. Section 22. 1271, et seq.; telegraph companies, P.A. 59 of 1851 as amended, M.S.A. Section 22.1361 et. seq.; telephone and messenger service companies, P.A. 129 of 1883 as amended, M.S.A. Section 22.1411 et seq.; canal and harbor companies, P.A. 233 of 1875 as amended, M.S.A. Section 22.1481 et seq.; river improvement companies, P.A. 149 of 1869, M.S.A. Section 22.1511; water power companies, P.A. 232 of 1863, M.S.A. Section 22.1581, and P.A. 39 of 1883, M.S.A. Section 22.1611; power companies in the upper peninsula, P.A. 283 of 1905, M.S.A. Section 22.1651.

Other State Constitutions

It is noted that the preliminary discussion draft, sixth edition, of August 4, 1961, of the Model State Constitution, published by the National Municipal League, New York, contains no provisions whatsoever on the subject of corporations.

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[1] Huron-Clinton Metropolitan Authority v. Boards of Supervisors of Five Counties, 300 Mich. 1.

The constitutions of 39 states provide for the formation of corporations under general laws; constitutions of 36 states forbid the formation of corporations by special acts.

There are a variety of provisions permitting incorporation by special act in special cases: banking corporations (Indiana), cities (Wisconsin), charitable, educational, penal or reformatory corporations under state control (Arkansas, Colorado, Delaware, Idaho, Illinois, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota), municipal (Minnesota, Nevada), and municipal purposes and cases where the objects of the corporation cannot otherwise be obtained (Maine, Maryland, New York and Wisconsin).

Twenty states specifically reserve power in the legislature to amend alter or repeal corporate charters under general laws; seven states reserve such legislative: power, "provided no injustice is done the incorporators."

Some constitutions set forth other causes for forfeiture of corporate charters: Texas permits the attorney general, for sufficient cause, to seek a judicial forfeiture; Virginia provides that failure to pay a registration fee for two successive years or to make an annual report within ninety days after two such years works a revocation of the charter Arizona, Idaho, Louisiana and Montana provide for forfeiture of corporations which form monopolies or trusts.

Comment

The convention may well believe that the legislature does not require constitutional authority to pass general corporation laws. It may well be, however, that the convention will believe that the public policy against creating corporations by special acts is important enough to have constitutional status; if so, clause 1 of the present section could well be retained as it stands. Clause 2 no doubt originally appeared in response to the Dartmouth College case.[2] Though perhaps no longer necessary, the convention may well believe that it should be retained, if only to avoid any inferences that might arise by reason of its removal.

2. Construction of "Corporation;" Suits

Article XII: Section 2. The term "corporation" as used in this article shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. All corporations shall have the right to sue and be subject to be sued in all courts in like cases as natural persons.

[2] Trustees of Dartmouth College v. Woodward, 17 U.S. 5.18 (1819).

Constitutions of 1835 and 1850

This provision first appeared, in substantially identical form, in the constitution of 1850, Article XV, Section 11.

Constitution of 1908

The substance of this provision occasioned no debate in the 1907-08 convention. It has not been amended since the adoption of the constitution.

Judicial Interpretation

The first clause of Section 2 has occasioned little litigation.

Sections 7 and 8 of Chapter XIV of P.A. 314 of 1915, as amended, constituting the judicature act, relate to actions by and against corporations. Neither the constitutional clause nor the implementing statute has occasioned substantial litigation.

Other State Constitutions

Eighteen states have a constitutional definition of "corporation" substantially identical to that in Michigan. Oklahoma and Virginia exclude municipal corporations and state-controlled public institutions. North Dakota and South Carolina exclude municipal corporations; Minnesota excludes associations and joint-stock companies with banking privileges; and the Delaware constitution does not apply to religious corporations except as specifically set forth.

Twelve constitutions specifically permit corporations to sue as in the case of natural persons; Kansas provides simply that corporations may sue in their corporate name. Eleven states provide that corporations may be sued as in the case of natural persons; Kansas provides that such suit may be brought in the corporate name. Pennsylvania provides that the statute of limitations as to actions against individuals shall apply to corporations and the California constitution provides that a corporation may be sued in the county where a contract is made or to be performed, where an obligation or a liability arises or breach occurs or where the principal place of business of the defendant is located, subject to power of the court to change the place of trial.

Comment

Though it may be doubted whether the provisions of Section 2 are of sufficient moment to entitle them to constitutional status, and the convention might believe that they are subjects appropriate for legislative or judicial determination, their retention may be thought expedient in order to avoid inferences that might be drawn from their removal.

3. Duration of Franchise; Extension of Corporate Life

Article XII: Section 3. No corporation shall be created for a longer period than thirty years, except for municipal, railroad, insurance, canal or cemetery purposes, or corporations organized without any capital stock for religious, benevolent, social or fraternal purposes; but the legislature may provide by general laws, applicable to any corporations, for one or more extensions of the term of such corporations, while such term is running, not exceeding thirty years for each extension, on the consent of not less than two-thirds of the capital stock of the corporation; and by like general laws for the corporate reorganization for a further period, not exceeding thirty years, of such corporations whose terms have expired by limitation, on the consent of not less than four-fifths of the capital stock.

Constitutions of 1835 and 1850

The subject covered by this section first appeared in Article XV, Section 10, of the constitution of 1850, which excepted from the thirty-year limit only corporations for municipal purposes or for the construction of railroads, plank roads and canals. The vote requirements for extension of corporate charters before and after expiration were identical, except that the legislature was given power to provide for such extension in the case of corporations with no capital stock.

Constitution of 1908

Section 3 has not been amended since the adoption of the constitution.

When this section was considered by the committee of the whole convention, there evidently was no debate whatsoever as to the advisability of carrying over the thirty-year limit to the 1908 constitution. The committee of the whole added cemetery purposes to the classes of corporations excepted from the limit. Insurance companies were excepted from the limit on the ground that there were certain life insurance companies whose policies did not expire within thirty years.

Judicial Interpretation

This section has occasioned almost no litigation since its adoption in 1908; in 1930 the supreme court decided that under a statute permitting extension of corporate charters, a municipal franchise granted to a gas company with no express time limitation is automatically extended by extension of the corporate charter pursuant to the statute.[3]

Statutory Implementation

Sections 60-63 inclusive of the general corporation law, P.A. 327 of 1931 as amended, M.S.A. Sections 21.60-21.63 inclusive, and predecessor acts, have exercised the legislative power to provide for extension of corporate charters.

[3] City of Benton Harbor v. Michigan Fuel and Light Co., 250 Mich. 614.

Other State Constitutions

Other than Michigan, Mississippi is the only state fixing a constitutional limit on the duration of corporate charters (99 years), applicable to private corporations for pecuniary gain. California, Utah and Washington provide that the legislature may not extend an individual franchise or charter, and the California constitution goes on to permit the legislature to provide for extension of existence of any corporation by general laws uniformly applicable to corporations formed for a limited period.

Comment

It may be seriously doubted whether this provision should be retained. It first appeared in the 1850 constitution at a time when corporations generally were the subject of lively public suspicion and distrust. It may be argued that the only practical effect of the provision is to require extensions of the terms of Michigan corporations every thirty years; the state maintains through this section no effective actual control not otherwise available to it. It may be pointed out that probably the only practical effect of the section is to encourage incorporating in other states, so as to avoid the franchise fees payable on the occasion of extension of term. It might also be argued that the reason for excepting, for instance, insurance companies on the grounds that their contracts may run beyond the expiration of their term if not excepted, nowadays applies to corporations of every sort.

4. Liability of Stockholders

Article XII: Section 4. The stockholders of every corporation and joint stock association shall be individually liable for all labor performed for such corporation or association.

Constitution of 1835 and 1850

This provision first made its appearance, in identical form, in the constitution of l850 (Article XV, Section 7).

Constitution of 1908

Section 4 has not been amended since the adoption of the constitution.

There was no debate on this subject in the 1907-08 convention.

Judicial Interpretation

This provision has been strictly construed. It was held as early as 1877 in Hanson v. Donkersley, 37 Mich. 184, that the constitutional provision and the then statute

(How. Stat. Section 4017) did not have the effect of making shareholders primarily liable for labor debts of their corporation, that the constitutional liability is not self-executing, and that statutory provisions implementing it must be fully complied with. The Hanson case held further that the secondary liability of a shareholder for labor debts of the corporation is discharged by a creditor's extending time for payment for his labor and accepting a note.

Statutory Implementation

The legislature has circumscribed the generality of the constitutional language by making the right available against a shareholder only after the return unsatisfied of a judgment against a corporation or an adjudication in bankruptcy, and the court has held that the winding-up of a corporation in receivership without payment for labor provided no rights against the shareholders, Knapp v. Palmer, 324 Mich. 694 (1949).

The legislature early implemented this section, Act 41, Section 17, Laws of Michigan, 1853, and has further provided for its enforcement, in somewhat varying terms, with respect to various classes of corporations as follows:

> Generally, Chapter XX, Section 13, P.A. 314 (1915) (Judicature Act), M.S.A., Section 27.1363.

1. Partnership Association, P.A. 191, 1877 as am.; M.S.A. 20.92.
2. Summer Resort Associations, Section 17, P.A. 230, 1897 as am.; M.S.A 21.677.
3. Canal and Harbor Companies, Section 14, P.A. 233, 1875 as am. M.S.A. 22.1494.
4. Pipeline Companies, Section 10, P.A. 182 of 1881 as am.; M.S.A. 22.1280.
5. Railroad, Bridge, Etc. Companies, Article V, Section 1, P.A. 198, of 1873 as am.; M.S.A. 22.282.
6. River Improvement Companies, Section 26, P.A. 149, of 1869 as am. M.S.A. 22.1536.
7. Street Railway Companies, Section 22, P.A. 35, of 1867 as am.; M.S.A. 22.441.
8. Telegraph Companies, Section 8, P.A. 59, of 1851 as am.; M.S.A. 22.1368.
9. Telephone Companies, Section 7, P.A. 129, of 1883 as am.; M.S.A 22.1416.

10. Train Railway Companies, Section 18, P.A. 148 of 1855 as am.; M.S.A. 22.388.

11. Municipal Water Companies, Section 11, P.A. 113, of 1869 as am.; M.S.A. 22.1691.

12. Water Power Companies, Section 21, P.A. 232, of 1863 as am.; M.S.A, 22.1601.

13. Water Power Companies, Section 15, P.A. 39 of 1883 as am.; M.S.A. 22.1624.

14. Water Power Companies, Section 15, P.A. 202, of 1887 as am.; M.S.A. 22.1645.

15. Water Power Companies, Section 15, P.A. 283 of 1905 as am.; M.S.A. 22.1665.

16. Cooperative Savings Associations, Section 20, P.A. 206, of 1877 as am.; M.S.A. 23.530.

With respect to shareholder contribution generally, see Section 19 R.S. 1946, Ch. 55, M.S.A. 21.253, and Section 30, P.A. 327, of 1931 as am.; M.S.A. 21.30 (General Corporation Act).

Other State Constitutions

Michigan is the only state whose constitution provides for stockholder liability for labor performed. Constitutions of five states (Nebraska, Oregon, South Carolina, Washington and West Virginia) provide positively for stockholder liability up to the amount of stock subscribed and unpaid for, except, in Oregon and West Virginia, bank stockholders; and the constitutions of four states (Alabama, Idaho, Missouri and Ohio) specifically prescribe stockholder liability in excess of the amount of unpaid stock owned. The Nevada constitution provides that incorporators of domestic corporations are not individually liable for debts of the corporation. Indiana, Kansas, New York and North Carolina provide that dues from corporations may be secured by individual liability as may be provided by law.

Comment

It could be argued that this provision, particularly as circumscribed by the legislature and the supreme court, affords no substantial protection to corporate employees with respect to their wages. Evidence of this might be found in the almost total absence of successful litigation against stockholders by employees. If this is so, consideration might be given to omitting it from the constitution. The convention might also take the view that the presence of this section in the Michigan constitution argues in favor of incorporating in other states, where such potential liabilities do not exist.

5. Limitation of Time of Holding Real Estate

Article XII: Section 5. No corporation shall hold any real estate for a longer period than 10 years, except such real estate as shall be actually occupied by such corporation in the exercise of its franchises.

Constitutions of 1835 and 1850

Article XV, Section l2 of the constitution of 1850 saw the appearance of this language, in identical form, except that the phrase "hereafter acquired," appearing in the 1850 constitution after "shall hold any real estate" was dropped in the present constitution.

Constitution of 1908

This section has not been amended since the constitution was adopted.

Section 5 of present Article XII was carried over by the 1908 convention from the 1850 constitution substantially unchanged, over vigorous objection on the part of Mr. Pratt who said, "I cannot see any possible good reason for that provision being inserted in the Constitution." The debates make it clear that the ten-year limitation on the power to hold real estate does not apply to corporations in the real estate business or corporations actually using real estate in the conduct of their own business. Mr. Townsend, the chief proponent of the provision, said, "This provision is here for the purpose of preventing them (corporations) from owning real estate in large tracts, for which they have no use at all in the exercise of their franchises, and which they do not use in their business. I do not think it is of any great importance in the Constitution, but it has been there for all this period of years and was thought to be useful at the time it was placed there. I do not see any reason why it is not still useful." Mr. Pratt pointed out that the general distrust of corporations, which was evident in 1850, had largely disappeared.

Judicial Interpretation

It was held in 1904, under substantially identical language in the 1850 constitution, that this provision can be enforced only at the instance of the public.[4]

In 1948 it was held that a foreign insurance company duly authorized by its state of incorporation to construct, maintain and operate a housing project would "actually occupy" real estate owned by it in Michigan, as landlord and through its agents and employees within the meaning of the constitutional limitation, in the light of a Michigan statute empowering such insurance companies doing business in Michigan to invest their funds "in housing projects including incidental retail and service

[4] Pere Marquette Railroad Co. v. Graham, 136 Mich. 444.

facilities ...if such investment is within the franchise of such insurer under the laws of the State or country under which such insurer organized."[5]

The court thus construed "actually occupied by such corporation in the exercise of its franchise" broadly to encompass occupancy through ownership and managership, if such ownership and managership was authorized by the corporation's charter.

Other State Constitutions

The Louisiana constitution forbids corporations to hold real estate longer than ten years, except for legitimate corporate purposes; and Missouri, Pennsylvania, and South Dakota forbid holding real estate at all except such as is necessary and proper for legitimate business, provided that Missouri permits holding for ten years and such longer period as general law may provide real estate acquired in payment of a debt by foreclosure or otherwise. The Kentucky constitution forbids holding real estate longer than five years except as is necessary and proper for business; and California provides that the holding of large tracts, uncultivated and unimproved, is against the public interest and is to be discouraged by lawful means. The New Mexico constitution provides that corporations in which the majority stock is owned by aliens ineligible to citizenship may not acquire any interest in real estate until otherwise provided by law.

Comment

Two points may be made about this section. First, it could be plausibly argued that the ten-year limitation, as construed by the supreme court, is in fact illusory: since a corporation can exercise no powers whatsoever that are not permitted by its charter and the laws of its state of incorporation, and since "actual" occupancy of real estate is accomplished simply by compliance with such charter and laws, the constitutional limitation is more apparent than real. Second, it may be argued equally plausibly that if the reasons for the limitation had not disappeared by 1908, they probably have today. Consideration might well be given to omitting this restriction from the constitution.

6. Prohibition of Extension of Special Incorporation Acts

Article XII: Section 6. The legislature shall pass no law renewing or extending any special act of incorporation heretofore granted.

Constitutions of 1835 and 1850

Article XV, Section 8 of the constitution of 1850 provided:

[5] John Hancock Life Insurance Co. v. Ford Motor Company, 322 Mich. 209.

> The legislature shall pass no law altering or amending any act of incorporation heretofore granted, without the assent of two-thirds of the members elected to each house; nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations.

The step-by-step attrition of power in the legislature to create corporations by special act no doubt accounts for the shorter treatment given to this subject in the 1908 constitution as against the 1850 constitution.

Constitution of 1908

This section has not been amended since the adoption of the constitution.

A specific provision with respect to the incorporation and power of cities and villages appears as Article VIII, Sections 20-25 inclusive of the 1908 constitution which, parallel to private corporations, contemplates their incorporation under the aegis of general rather than special laws.

Mr. Burton in the course of the debate moved to retain in this section the following language from the 1850 constitution:

> This restriction shall not apply to municipal corporations.

As originally proposed in the convention, the new language forbade the legislature from "altering and amending" as well as "renewing or extending" special acts of incorporations. It was evident that Mr. Burton's concern was that this would freeze forever the act under which the city of Detroit was incorporated. Removal of the prohibition against altering and amending satisfied the convention that the charter of the city of Detroit and similar charters would not be frozen. Further, the so-called "home rule" provision of the 1908 constitution radically altered the usual methods of forming municipal corporations.

This section has occasioned no litigation, nor, of course, have statutes been passed thereunder.

Other State Constitutions

Some of the notes under Section 1 of Article XII concerning the reserved power to amend incorporation statutes and franchises generally are relevant to special acts. The constitutions of New York, North Carolina and Wisconsin specifically permit legislatures to alter or repeal special corporation acts; the constitution of Iowa grants like permission by a two-thirds vote. The Utah and Washington constitutions forbid the legislature to extend any franchise or charter; and the California constitution does the same, but permits the legislature to provide for extension of the existence of any corporation by general law as uniformly applicable to corporations formed for a limited period.

Comment

It appears that the only corporations presently existing under special acts of incorporation are municipal corporations; it further appears that as recently as 1960 only 19 of 221 cities in Michigan retained their "special act" charters. Furthermore, Article VIII, Section 21 of the constitution as amended now provides that even cities whose charters were formed by special acts may amend their own charters. If the substance of Article VIII, Section 21 should be carried over to a new constitution, the convention might well find that Section 6 of Article XII has become unnecessary.

7. Regulation of Transportation Rates; Discrimination Prohibited

Article XII: Section 7. The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this state, and may pass laws establishing reasonable maximum rates of charges for the transportation of property by express companies in this state, and may delegate such power to fix reasonable maximum rates of charges for the transportation of freight by railroad companies and for the transportation of property by express companies to a commission created by law; and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad.

Constitutions of 1835 and 1850

Article XIX-A, Section 1, of the constitution of 1850 provided:

> The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this state, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad.

The 1908 constitution expanded this provision to include express companies and specifically to authorize delegation of a portion of the rate-fixing power to a commission created by law.

Constitution of 1908

Section 7 has hot been amended since the adoption of the constitution.

Section 7 was originally proposed to the convention in the same form as in the constitution of 1850. There were also presented to the convention a large variety of proposals to authorize the creation of a public utilities commission, which should have power to regulate the services and rates of all public utilities and such other powers as the legislature might prescribe. None of these was adopted. The convention clearly felt that in the absence of such a provision the legislature was without power to delegate rate-fixing powers to a commission. Mr. Sharpe, chairman of the committee on public service corporations, said on this subject: “I want to suggest this one thing, that this is not a matter that can be regulated by legislation. I think the lawyers of the convention will all agree upon the proposition that it is very doubtful whether the legislature has any authority to delegate to a commission the right to regulate the rates. The legislature has given authority under the old constitution to fix rates for transportation companies but not given authority to delegate that power of fixing rates to someone else.” Further, Mr. Barbour said, “It is in the first place conceded that the legislature has no power to organize such a commission or to create such a commission, or to create it in a way so that it will stand, without some provision in the constitution to give it effect.” As noted, the proposals for a public utilities commission were defeated.

An amendment was proposed to amend Section 7 as initially presented, authorizing the legislature to delegate power to fix rates to a commission. It was objected that such delegation, having been rejected in the public utilities commission proposal, could not be considered. It was pointed out in debate that the authority to delegate with respect to railroads was an effort simply to legalize the already existing railroad commission. In fact, Public Act 312 of 1907 established a railroad commission for the express purpose of regulating railroads and the transportation of persons and property, preventing the imposition of unreasonable rates and unjust discrimination and the ensuring of adequate service. It was a detailed and comprehensive regulatory statute, giving the commission power, on complaint and after investigation, to change rates found to be unreasonable or unjustly discriminatory and to make appropriate orders as to service found to be inadequate. At the time of the convention this act had not been judicially tested, and doubts as to its validity were expressed in the course of debate.

Regulatory power over express companies was added in the course of floor debate, again partly for the reason that the railroad commission act of 1907 already include regulation of express company rates and service.

The issue of whether to authorize the legislature to establish a commission to regulate railroad and express company rates and services was warmly and extensively debated.

Note that the section authorizes the legislature to establish maximum rates for transportation of passengers and freight, but permits it to delegate such power to a commission with respect only to freight the proponents of the provision argued that

there was no necessity for administrative determination with respect to passenger fares because they involved comparatively few neceties and distinctions, whereas the freight rate structure was "too intricate, extensive and difficult to be regulated by so large a body as the legislature." There was a substantial minority in the convention in favor of permitting the legislature to give a commission power over both.

There was also substantial objection to delegation of passenger rate control from the delegates from the cities, on the ground that the existence of such power in a commission would imperil the freedom of the cities to control the fares on their street railways.

Statutory Implementation and Judicial Interpretation

Public Act 312 of 1907, establishing a railroad commission, was in 1909, held constitutional against the claim that it purported to give courts power to fix railroad rates.[6]

Act 312 of 1907, establishing a railroad commission, was replaced by Act 300 of 1909, which covered the same subject matter. Thereafter, P.A. 419 of 1919 created a public utilities commission with broad regulatory powers over all public utilities within the state, including railroads. This act was eventually supplanted by P.A. 3 of 1939, which established the present public service commission, whose regulatory powers are set forth in all-inclusive and comprehensive terms. It supplements and, to a large extent, supplants a large number of statutes previously providing for the regulation of union depot companies, train and street railway companies, electric gas and light companies, motor vehicle carriers, carriers by water, etc.

The validity of the predecessor act and the reviewability of the decisions of the commission by the supreme court are discussed in re Consolidated Freight Co., 265 Mich. 340 (1933), holding the statute invalid insofar as it purports to give the supreme court power to review the commission's findings of fact, and valid with respect to the supreme court's power to review the commission's conclusions of law.

The role of the commission in the setting of rates and granting of certificates of convenience and necessity are discussed in several cases, notably, recently, Michigan Bell Telephone Company v. Public Service Commission, 332 Mich. 7 (1952) and Huron Portland Cement Company v. Public Service Commission, 351 Mich. 255 (1958)

Though Section 7 of Article XII of the constitution in terms permits the legislature to establish a commission with respect only to freight and express rates, the establishment by the legislature of a public service commission with vastly broader regulatory powers has evidently not been the source of serious constitutional argument.

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[6] Michigan Central Railroad Co. v. Wayne Circuit Judge, 156 Mich. 459.

Other State Constitutions

The constitutions of Illinois, Nebraska, Utah, Washington, and West Virginia authorize the legislature to establish maximum rates for passengers and freight. The Georgia constitution authorizes the legislature to regulate the charges of public utilities generally. The constitutions of nine states (Arizona, California, Colorado, Louisiana, Nebraska, New Mexico, Oklahoma, South Carolina and Virginia) authorize delegation to an administrative agency of authority over public utility rates generally. The constitutions of 24 states include provisions prohibiting various forms of discrimination, authorizing the legislature to do so, or authorizing the legislature to delegate authority to do so. State constitutions generally contain a wide variety of more or less specific provisions with respect to public utilities. Subjects covered include frequency of directors' meetings, reporting requirements, uniform accounting systems, appeal from public utility commission orders, compensation and qualifications of public utility commissioners, common carrier safety appliances, railroad passes or reduced rates, location of railroad stations, consolidation and merger of public utilities, warehouse storage charges, etc., etc.

Comment

Doubts were expressed in the convention of 1907-08 as to the constitutional validity of the railroad commission act of 1907. These doubts were largely responsible for the inclusion of this section in the 1908 constitution. The constitutional climate soon became so hospitable to exercise of police power by the states, however, that no full-scale testing of the validity of the public utilities commission act, even in the absence of specific constitutional authorization for a general regulatory commission, has been attempted. In the light of current constitutional hospitality to exercise of the police power, particularly with respect to public utilities, consideration may well be given to omitting the subject matter of this section from the constitution.

8. Consolidation of Railroads

Article XII: Section 8. No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon at least sixty days public notice to all stockholders in such manner as shall be provided by law.

Constitutions of 1835 and 1850

The constitution of 1835 did not have a comparable provision.

Article XIX-A, Section 2 of the constitution of 1850 is identical in substance with Section 8.

Constitution of 1908

This section has not been amended since the adoption of the constitution.

Statutory Implementation

Article II, Section 29 of P.A. 198 of 1873, relating to the incorporation and regulation of railroad, bridge and tunnel companies (M.S.A. Section 22.233, as amended) provides in detail for the consolidation of railroad companies and the effect thereof. There are also statutes with respect to the consolidation of union depot companies with suburban railway companies and the consolidation of street and electric railways.

This section has not generated any substantial amount of litigation.

Other State Constitutions

The constitutions of eleven states (Arkansas, Colorado, Illinois, Kentucky, Montana, North Dakota, Pennsylvania, South Dakota, Texas, Utah and Washington) forbid the consolidation of stock, property or franchises of railroads with parallel or competing lines, and the constitution of West Virginia forbids such consolidation without the consent of the legislature.

The constitutions of four states (Illinois, Missouri, North Dakota and South Dakota) have a provision paralleling the Michigan requirement of sixty days public notice as provided by law in the case of all consolidations.

The constitutions of three states (Mississippi, Missouri and South Carolina) forbid consolidation with railroad corporations of other states if the resulting corporation is a foreign corporation, and the Oklahoma and Texas constitutions forbid consolidations with any foreign corporations.

Comment

The convention may well reach the conclusion that the subject matter of this section is one for legislative consideration, and need not be included in the constitution.

9. Banking and Trust Company Laws

Article XII: Section 9. No general law providing for the incorporation of trust companies or corporations for banking purposes, or regulating the business thereof, shall be adopted, amended or repealed except by a vote of two-thirds of the members of each house of the legislature. Such laws shall not authorize the issue of bank notes or paper credit to circulate as money.

Constitutions of 1835 and 1850

Article XV, Section 2 of the constitution of 1850 provided:

> No general banking law shall have effect until the same shall, after its passage, be submitted to a vote of the electors of the state at a general election and be approved by a majority of the votes cast thereon at such election.

Section 1 of the same Article XV permitted the legislature, by a vote of two-thirds of the members elected to each house, to create a single bank with branches, by a special act, and Section 3 provided:

> The officers and stockholders of every corporation or association for banking purposes, issuing bank notes or paper credits to circulate as money, shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation or association, equally and ratably to the extent of their respective shares of stock in any such corporation or association.

Sections 4, 5 and 6 of Article XV of the 1850 constitution respectively provided for the registry of bills or notes issued or circulated as money provided for priority of bill-holders of banks as against other creditors in the event of insolvency, and forbade the suspension of specie payments by any person, association or corporation. Elimination of the power to authorize the issuance of bank notes or paper credit to circulate as money has evidently made these provisions unnecessary.

Constitution of 1908

Section 9 has not been amended.

In the 1907-08 debates there was extensive discussion of these sections. Debate centered on the question of whether banks or trust companies should be specifically forbidden to issue bank notes or paper credit to circulate as money; if they were to be so forbidden, the provisions of Sections 3, 4, 5 and 6 of Article XV of the 1850 constitution would be unnecessary. The convention vacillated somewhat during the debates; eventually the power to issue bank notes or paper credit to circulate as money was forbidden, the other sections became unnecessary and were removed. The prohibition of issuance of money by state banks was stated to be “justified by experience in the state and throughout the country and well authenticated public sentiment on the question.”

The 1908 constitution substituted the two-thirds legislative requirement for the referendum provision that had previously existed. It was pointed out in the debates that the general banking law in existence in 1908 was submitted to the people in accordance with the 1850 constitution, and it provided for its own amendment by two-thirds vote of the legislature. There apparently was some doubt as to the consti-

tutionality of that provision in the light of the referendum requirement of the 1850 constitution; incorporation of the two-thirds vote requirement in the 1908 constitution was intended to remove that doubt. Delegate George W. Moore, chairman of the banking committee, said, "I do not think a banking law should be amended lightly, and I think the provision in the general law is a good one, and it should be cleared up in this manner, that is the reason for the proposal." Further, Mr. H. M. Campbell said, "The reason... is simply to provide all the safeguards possible around the passing of acts creating financial corporations whose operations might and do affect the public generally."

Objection to the substitution of a two-thirds legislative vote for a referendum was made on the ground that, in the words of delegate James H. Hall, "It looks to me as though it was unjust to the small towns and the people, and in favor of the large banking corporations," and it was moved to strike out the two-thirds requirement. His motion was defeated, 54 to 13.

Statutory Implementation

Since at least 1887, the legislature has prescribed rules under this section. The incorporation and regulation of banks and trust companies are now comprehensively regulated in the Michigan financial institutions act, P.A. 341 of 1937 as amended, M.S.A, Section 23.711 et seq. There are other statutes in related fields, relating to the formation or regulation, or both, of:

Credit unions, P.A. 285 of 1925, M.S.A. Section 123.481 et seq.

Cooperative savings associations, P.A. 206 of 1877, M.S.A., Section 23.511 et seq.

Building and loan and saving and loan associations, P.A. 1887, M.S.A., Section 23.541 et seq.

There has evidently been little or no litigation under this section.

Other State Constitutions

The banking commissioner is a constitutional officer in Louisiana, and Oklahoma, and the constitution of Virginia specifically authorizes the legislature to create a division or bureau of banking.

The circulation of paper money by state banks is constitutionally forbidden in Arkansas, California, Nevada, Oregon and Washington.

Fifteen state constitutions specifically authorize the passage of a general banking law. The Minnesota constitution requires a two-thirds vote of the legislature for

adoption of a general banking law and the Wisconsin constitution requires a two-thirds vote of all members elected to each house. The Iowa, Illinois, Kansas and Ohio constitutions require banking laws to be approved by a majority of all votes cast at a general election after passage by the legislature.

10. Provisions Omitted in the 1908 Constitution

Aside from the sections of Article XV of the 1850 constitution discussed above in connection with Section 9 of Article XII of the 1908 constitution, certain other provisions relating to corporations in the 1850 constitution did not survive. They are:

Section 16 of Article XV provided that previous notice of any application for an alteration of the charter of any corporation shall be given in such manner as may be prescribed by law. This provision, evidently referring to the alteration of charters of corporations formed by special acts, People ex rel. Ellis v. Calder, 153 Mich. 724, outlawed by Section 1 of Article XII in the 1908 constitution, was of course no longer necessary.

Article XIX, Section 9 of the 1850 constitution provided for legislative modification of charters of mining corporations in the Upper Peninsula. Referring to corporations organized under special acts, this section also had no place in the 1908 constitution.

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CHAPTER XIII EMINENT DOMAIN

Section Detail

XIII EMINENT DOMAIN

by
Legal Division, Wayne County Road Commission*

Article XIII: Section 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.

Constitution of 1835 and 1850

In the 1835 constitution (Article l, Section 19) the only prerequisite to the taking of property for public use was that just compensation be paid therefor. The requirement that just compensation be "first made or secured" originated in the 1850 constitution (Article XV, Section 9 and Article XV, Section 15). The requirement that necessity be first determined; did not appear in either the 1835 or 1850 constitutions.

Constitution of 1908

The prohibition against taking private property "without the necessity therefor being first determined" was a significant change in the Michigan constitutional provision. Section 1 has not been amended since the adoption of the present constitution.

Judicial Interpretation

This section has given rise to voluminous litigation, the majority of which concerns the interpretation of such words as "public use," "necessity" and "just compensation." One notable decision is that of Hendershott vs. Rogers, 237 Mich. 338, in which the court held, after a lengthy discussion of the history of this section and Section 2 following, that the determination of necessity was thereby made a judicial question, even though prior to the adoption of the section, it had been a legislative

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* This material was prepared by Daniel J. Horgan, Jr., James N. Garber, John P. Cushman, and John C. Jacoby, all of whom are attorneys on the staff of the Wayne County Road Commission.

question—that is, the condemning authority determined the necessity for the improvement and the taking.

Other State Constitutions

The vast majority of other state constitutions as well as the Constitution of the United States include a section granting a general power of eminent domain which allows the taking of private property for public use. Those states whose constitutions do not include such a section apparently rely on the inherent right of the state to exercise the power of eminent domain, which right was recognized by common law. It should be noted that while these states do not have a general grant of eminent domain power, they do have sections in their constitutions pertaining to specific delegations of the power and the procedures involved therein.

All states, without exception, recognize that just compensation must be made for the private property which is to be taken. They do, however, differ as to the procedures to be used in the determination of that compensation and the time of payment of such compensation, in relation to the passage of title. The states also differ as to what type of things must be compensated for; for example, some states including Michigan limit compensation only to payment for the land actually acquired; others, either by express language in the constitution or by judicial interpretation, require that compensation must also be made for any damage which is a consequence of the use to which the private property so taken is to be put. With the exception of Wisconsin, Michigan is the only state in which the determination of necessity is required to be made by a body or group other than the condemning authority itself, as more particularly discussed under Section 2, below.

Comment

Except where it has been noted above, this section of the constitution is similar both in language and intent to those of other states.

* * *

Article XIII: Section 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than 3 commissioners appointed by a court of record, as shall be prescribed by law: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.

Constitutions of 1835 and 1850

The 1835 constitution did not contain any requirement similar to this section. The section originated in the 1850 constitution (Article XVIII, Section 2) and was carried in toto into the present document.

Constitution of 1908

Section 2 has not been amended since the adoption of the present constitution.

Judicial Interpretation

There bas been much litigation relative to the interpretation of this section, a large part of which dealt with the qualifications, duties and functions of the jury or commission. One judicial decision of note, which has been followed in all condemnation cases to date, holds that the jury members are the triers of both the law and the fact. This, of course, is a substantial divergence from the normal courtroom situation, in which the jury is the trier of the facts only. The rationale behind this interpretation is that the jury, as contemplated by this section of the constitution, is a jury of special inquest in which all of the power of the tribunal is vested. In re Widening of Bagley Avenue 248 Mich. 1 and in re Board of Education, City of Grand Rapids 249 Mich. 550.

Other State Constitutions

Approximately one-half of the constitutions of other states contain a section similar to Michigan's Section 2, relating to the procedure by which private property is acquired for a public use. These states, in addition, require a judicial determination of compensation. Some few also specifically empower the jury or commissioners, as the case may be, to determine whether or not the use to which the property is to be applied is public or private in nature.

Comment

The delegates may desire to consider the possibility of deleting the words "the necessity for using such property and." The deletion of these words would have the effect of making the determination of necessity a legislative or administrative question rather than a judicial question as is presently the case when the state condemns property. This would once again put Michigan in line with all the other states, except Wisconsin, as pointed out above.

* * *

Article XIII: Section 3. Private roads may be opened in the manner prescribed by law; but in every case the necessity for the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of 6 freeholders or by not less than 3 commissioners, and such amount, together with the expense of proceedings, shall be paid by the person or persons to be benefited.

Constitutions of 1835 and 1850

There was no section in the 1835 constitution which provided for the acquisition of property through eminent domain for the opening of a private road. This provision originated with the 1850 constitution (Article XVIII, Section 14) and with slight change was carried into the present constitution—the change being that the commissioner system was authorized in the 1908 provision.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Judicial Interpretation

There is but one Michigan case which has arisen under this section, Leighton v. The Elysium Hunting and Fishing Club, 318 Mich. 146. In actuality this case interprets a statute (Section 9, 281 et seq. M.S.A.) which is the legislation designed to implement the authority contained in this Section 3. The case was decided on the basis of the facts involved and did not really delve deeply into areas of constitutional or statutory interpretation.

Other State Constitutions

Approximately one-half of the other state constitutions have sections similar in nature to Section 3. The language of these sections is surprisingly similar to that used in the instant case. There are, of course, some differences in the method of procedure. These differences however, are superficial rather than basic.

Comment

In view of the similarity of this language with that of other states and in view of the fact that it has been present in the Michigan constitution for well over 100 years, there would undoubtedly be some reluctance to make a change of language at this time, and little benefit to be derived therefrom.

* * *

Article XIII: Section 4. The regents of the university of Michigan shall have power to take private property for the use of the university, in the manner prescribed by law.

Constitutions of 1835 and 1850

This section originated with the 1908 constitution and consequently does not appear in either of the prior constitutions.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Judicial Interpretation

There is but one case which has interpreted this section, People for use of Regents of University of Michigan vs. Brooks, 224 Mich. 45. In actuality this case interpreted enabling act (Section 8.1 et seq. M.S.A.) contemplated by this section and held that any proceeding to condemn land for the use of the board of regents must be brought in the name of the state and that although the property was held subject to the exclusive control and management of the board of regents, title was to vest in the state.

Other State Constitutions

The present section is unique in that it empowers a specific university to acquire property by virtue of eminent domain. However, the nature of the section is by no means unique in that a majority of the other states have seen fit to delegate eminent domain power to specific boards or groups.

Comment

The delegates may desire to consider the possibility of deleting this section since the regents of the University of Michigan as well as those of the other state colleges and universities do not require a specific delegation of eminent domain power. The taking of property for educational purposes has been judicially interpreted to be a taking for a public use. Therefore, such colleges and universities would fall well within the authority granted by Article XIII, Section 1. However, if this section is to be retained, the delegates may wish to investigate the possibility of expanding it to include the other state colleges and universities. This is especially true in view of the fact Section 8.1 et seq. M.S.A, presently allows the use of the eminent domain power by other colleges and universities.

* * *

Article XIII: Section 5. In exercising the powers of eminent domain and in taking the fee of land and property that is needed for the acquiring, opening and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greatest degree of public advantage from such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made. Bonds may be issued to supply the funds to pay in whole or in part for the property so appropriated, but such bonds shall be a lien only on the property so acquired and they shall not be included in any limitation of the bonded indebtedness of such municipality.

Constitutions of 1835 and 1850

This section does not appear in either the 1835 or 1850 constitution.

Constitution of 1908

This section originated as a constitutional amendment to the 1908 constitution, pursuant to joint resolution of the legislature, and was ratified at the November election of 1928.

This section has not been amended since its original adoption.

Judicial Interpretation

There is but one case which has interpreted this section, Emmons vs. Detroit, 261 Mich. 455, which held that under this section a municipality is not limited to the acquisition of land actually necessary for a proposed improvement but may take any other land which may be appropriate in order to secure the greatest degree of public advantage from the improvement.

Other State Constitutions

Approximately one-half of the other state constitutions have similar provisions allowing the acquisition of property in excess of that actually needed for the proposed public use and further allow the resale of this property at some future time. The bonding provision of this section is also a part of those constitutions having a similar provision.

Comment

This section is seemingly entirely in line with a great number of other states insofar as it pertains. The question will undoubtedly be raised as to the desirability of expanding this section and specifically granting this power in the constitution to other levels of government, such as those county and state authorities having the eminent domain power (which at the present time rely on statutory law for excess condemnation).

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CHAPTER XIV EXEMPTIONS

Section Detail

XIV EXEMPTIONS

Prepared in Part by
Lawyers Title Insurance Corporation
John G. Heal

1. Personal Property Exemptions

Article XIV: Section 1. The personal property of every resident of this state, to consist of such property only as shall be designated by law, shall be exempted to the amount of not less than five hundred dollars from sale on execution or other final process of any court.

Constitutions of 1835 and 1850

The 1835 constitution did not have a provision of this type. The 1850 constitution (Article XVI, Section 1) originated this provision. The 1850 provision was the same as the present provision, except that a comma was placed where the period now stands and an additional explanatory and limiting clause followed it—"issued for the collection of any debt contracted after the adoption of this constitution."

Constitution of 1908

In the convention of 1907-08, the last clause of the 1850 provision, quoted above, was eliminated. Mr. Burton urged that it be removed because "there are judgments that are not issued for debt" to which the exemption should also apply.[1] Except for this change, the provision was otherwise carried over from the 1850 constitution. It has not been amended.

Statutory Implementation

Detailed statutes deal with the definition of personal property under the constitutional exemption and the processes relating to this matter.[2]

Judicial Interpretation

Many judicial opinions deal with this provision and statutory details pursuant thereto. This provision and statutes under it are intended to prevent a debtor from being made completely destitute and unable to recover from the loss of all property and means of livelihood.[3]

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[1] Proceedings and Debates, p. 177.

[2] M.S.A. 27.1543-27.1556.

[3] One of the basic cases in this area is Rosenthal v. Scott, 41 Mich. 632. See also cases cited under M.S.A. 27.1543-27.1556.

Other State Constitutions

The constitutions of 10 states, including Michigan, provide a specific amount of exemption of personal property alone or in conjunction with the homestead exemption. Under nine other state constitutions this matter is to be determined by law.[4]

Comment

If the $500 exemption specified in 1908 was a prudent and reasonable amount, its relative loss in purchasing power over the years might indicate that it is now not fully adequate. Monetary stability may be no greater in the future than it has been in the past. If a provision of this type is to be retained, greater flexibility might be gained by specifying an amount in the constitution which may be changed by law, by leaving the amount to be determined by law, or, if the matter is considered of sufficient import, by leaving the amount to be determined or changed by extraordinary vote of the legislature.

2. Homestead Exemptions

Article XIV: Section 2. Every homestead of not exceeding 40 acres of land and the dwelling house thereon and the appurtenances to be selected by the owner thereof and not included in any town plat, city or village; or instead thereof, at the option of the owner, any lot in any city, village or recorded town plat, or such parts of lots as shall be equal thereto, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the state, not exceeding in value $2,500.00 shall be exempt from forced sale on execution or any other final process from a court. Such exemption shall not extend to any mortgage thereon lawfully obtained, but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of his wife to the same: Provided, That, notwithstanding anything in this section to the contrary, such mortgage or other alienation of such land shall be valid without the signature of said wife, after 25 years unless within said 25 years from the date of the recording thereof in the office of the register of deeds of the county or counties wherein the property is located, there is filed in said office notice of claim of the invalidity of such mortgage or alienation under this section, excepting that in case of every mortgage or alienation recorded prior to January 1, 1920, said notice of claim may be filed prior to January 1, 1950.

[4] Index Digest, pp. 475-477.

Constitutions of 1835 and 1850

The 1835 constitution had no provision of this type. The 1850 constitution (Article XVI, Section 2) originated this provision providing for a $1,500 homestead exemption.

Constitution of 1908

This provision was carried over from the 1850 constitution with only minor change of phraseology and punctuation.

Amendment in 1943. An amendment proposed by the legislature and adopted, in April, 1943, by a vote of 169,736 to 126,164 changed Section 2 to its present form. The value of the homestead exemption was raised from $1,500 to $2,500. The words starting with "Provided, That" to the end of the provision were added by the same amendment in order to validate mortgages or other alienations not having the wife's signature if not contested within 25 years.

Judicial Interpretation

Many supreme court decisions have dealt with the subject matter of Section 2. This provision, however, is clearly expressed and most of these judicial opinions merely restate its application to particular instances. Alienation of a homestead by a married owner is invalid without the wife's signature. In order to determine if the value of the homestead exceeds the constitutional exemption, the amount of mortgage encumbrance on the homestead must be deducted.[5]

Other State Constitutions

The constitutions of approximately one-half of the states have provisions similar to Section 2. In several of these the amount of the exemption is to be determined bylaw. The amount set varies from $1,000 to $5,000 in those provisions which specify an amount. The Michigan provision in its protection of the interest of the owner's wife is not unusual among state constitutions.[6]

Comment

The increase in the amount of homestead exemption from $1,500 to $2,500 by amendment in 1943 reflects the difficulty inherent in fixing a particular amount of money for this or other purposes in the constitution. In view of the historical lack of any long-range monetary stability, consideration might be given, if a provision of this type is retained, to fixing an amount in the constitution which may be changed by law or perhaps by a law requiring an extraordinary vote for passage.

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[5] Ter Keurst v. Zinkewicz, 253 Mich. 383; Bartold v. Lewandowska, 304 Mich. 450.

[6] Index Digest, pp. 474-476, 480-481.

3. Exemption of Decedent's Homestead During Minority of Children

Article XIV: Section 3. The homestead of a family, after the death of the owner thereof, shall be exempt from the payment of his debts in all cases during the minority of his children.

Constitutions of 1835 and 1850

The 1835 constitution had no provision of this type. The 1850 constitution (Article XVI, Section 3) originated the substance of the present provision. As set forth in the 1850 provision, the homestead was exempt from the payment of the owner's debts "contracted after the adoption of this constitution."

Constitution of 1908

This provision was carried over from the 1850 constitution, but the words "contracted after the adoption of this constitution" relating to the owner's debts were deleted. This provision has not been amended. The binding force of this provision has been restated in opinions of the state supreme court.[7]

Other State Constitutions

The constitutions of approximately nine states including Michigan have similar provisions.[8]

Comment

If this provision is retained, it would appear to present little difficulty or need for revision. This provision might be combined with Article XIV, Section 4, if the substance of both provisions is retained.

4. Homestead Exemption; Death Without Surviving Children

Article XIV: Section 4. If the owner of a homestead die, leaving a widow but no children, such homestead shall be exempt, and the rents and profits thereof shall accrue to her benefit during the time of her widowhood, unless she be the owner of a homestead in her own right.

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[7] Sowers v. Robinson, 43 Mich. 502; Kraft v. Kraft, 102 Mich. 439.

[8] Index Digest, pp. 474-47.

Constitutions of 1835 and 1850

This provision originated in the 1850 constitution and was carried over into the present constitution virtually unchanged.

Constitution of 1908

In the convention of 1907-08 one change was made in the phraseology of the section. The words “the same” appeared after the word “children” in the 1850 section and were replaced by the words “such homestead” in the revised constitution of 1908. This section has not been amended since the adoption of the present constitution and it has presented no serious problem of interpretation.

Other State Constitutions

The constitutions of Alabama, Arkansas and North Carolina contain a provision of this type. Texas provides that the property descend and vest in the same manner as other real property unless surviving widow (or children) elect to occupy property as homestead.

Comment

Should the section be retained, some consideration might be given to combining the subject matter of Sections 3 and 4 into a single section of the revised constitution.

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CHAPTER XV MILITIA

Section Detail

XV MILITIA

By

Philip C. Pack
Brigadier General (Retired)
Former Judge Advocate General of Michigan

Article XV: Section 2. The legislature shall provide by law for organizing, equipping and disciplining the militia in such manner as it shall deem expedient, not incompatible with the laws of the United States.

Constitutions of 1835 and 1850

The constitution of 1835 provided in Section 1 of Article IX that "The Legislature shall provide by law for organizing and disciplining the militia in such manner as they shall deem expedient, not incompatible with the constitution and laws of the United States." The 1835 document further provided under Section 2, Article IX, that "The Legislature shall provide for the efficient discipline of the officers, commissioned and non-commissioned, and musicians, and may provide by law for the organization and discipline of volunteer companies."

The constitution of 1850, Article XVII, Section 2 contained a section almost identical to Section 1, Article IX of the 1835 document, but added "equipping" to organizing and disciplining, and deleted the reference to incompatibility with the U.S. Constitution. The 1850 constitution did not contain the provisions of Article IX, Section 2 of the 1835 document.

Constitution of 1908

The 1850 provision was carried over to the constitution of 1908 except for the change "they" (the legislature) to "it." This provision has not been amended.

Statutory Implementation

With respect to the provision for disciplining the militia, it has long been held that the militia, when not in federal service, is not responsive to the Federal Uniform Code of Military Justice. So as to provide for such discipline, the State of Michigan has enacted its own code of military justice.[1]

[1] Public Act No. 291 (1951); M.S.A. 4.686 (1) et seq.

Other State Constitutions

The constitutions of nearly half of the states contain militia provisions which are almost identical with those found in Michigan's present constitution.[2]

The older state constitutions, for the most part, contain very similar provisions, and some attempt to go into such detail as to leave the legislature virtually hamstrung in the field. While some uniformity exists as between the basic militia clauses in the various state constitutions, subsidiary provisions show such wide diversity that comparisons are very difficult, if not impossible. Furthermore, as many such provisions have been vitiated by the Congress since 1903, no useful purpose would be served in attempting a generalized comparison.

However, two of the newer state constitutions provide interesting study.[3] The new constitution of Georgia gives to the legislature the authority to say how the militia shall be officered, trained, armed, equipped and of whom it shall consist; how it shall be organized and how it shall be paid. Most of such authority the Congress has now arrogated to itself.

On the other hand, the new constitution of Missouri provides that "the General Assembly shall provide for the organization, equipment, regulations and functions of an adequate militia and shall conform the same as nearly as practicable to the regulations for the government of the armed forces of the United States." Here, in effect, the constitution of that state says to the legislature: "You may go as far as Uncle Sam will let you."

The Model State Constitution contains no militia article recommended for inclusion in a state constitution.

Comment

Under its paramount power as enunciated in the militia clauses of the Constitution of the United States, the Congress has enacted four laws, among others, which have virtually abolished the militia as a state military force and entirely changed the "state militia" concept.[4] The four significant federal laws are as follows:

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[2] Arizona, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Mississippi, Montana, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington and Wyoming.

[3] Georgia (1945) and Missouri (1945).

[4] Article 1, Section 8, Clauses 15 and 16, Constitution of the U.S. (For an exhaustive treatise on the subject of the "militia clauses", see 54 Harvard Law Review, pp. 181-220.)

The Dick Act of Jan. 21, 1903, which provided that the militia of the states must conform to the organization of the regular army, be equipped at federal expense and be trained by instructors of the regular army.

The National Defense Act of 1916, which made the organized militia a part of the armed forces of the United States and which prohibited the states from maintaining troops save to the extent Congress might permit. It also provided, inter alia, that while the states might continue to appoint officers as permitted by the United States Constitution, officers so appointed might receive no federal status or pay until recognized, upon examination, as possessing requisite physical, mental, moral and professional qualifications.

The Army Reorganization Act of 1920, which established "The National Guard of the United States" and which provided that officers would be commissioned therein by the President of the United States, as well as initially by the various governors.

The Universal Military Training and Service Act of 1951, which, as a practical matter, divested the governors of the power to draft into military service men in the 18-26 age group and vested this power in the president. In requiring also that men released from military training, after being drafted by the president, continue as trainees in a reserve military component for as many as eight years more, the law thus left in an inchoate, unorganized state militia only those men of about 35 and older.

As a result, it may be concluded that, to all practical intents and purposes, the United States has taken over the organized militia (national guard) both by law[5] and subsidization[6] and has placed such an inclusive priority label upon the unorganized, inchoate militia by law[7] as to leave the states virtually without any manpower pool potentially responsive to state military draft.

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[5] The four laws, cited above, should be considered in the light of the long-settled supremacy of the United States to legislate in this field. In one of his most famous opinions on this federal supremacy, John Marshall said: "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This, we think, is the unavoidable consequence of that supremacy which the Constitution has declared." (Also in point: McCulloch v. Maryland, 4 Wheat. 316 (1819); Houston v. Moore, 18 N.S., 5 Wheat., 5 L.Ed. 19 and Dunne v. People, 94 Ill. 120.)

[6] As to the extent to which the United States now subsidizes the Michigan national guard, a memorandum report of the United States property and fiscal officer for Michigan, dated 2 June 1961, discloses two interesting items: (1) that the United States has provided military arms, equipment, vehicles and aircraft for the use of the Michigan national guard of the value of $108,700,000 and (2) the United States meets an annual payroll for the Michigan national guard amounting to $10,700,000.

[7] Universal Military Training and Service Act of 1951.

Article XV: Section 1. The militia shall be composed of all able-bodied male citizens between the ages of 18 and 45 years, except such as are exempted by the laws of the United States or of this state; but all such citizens of any religious denomination who, from scruples or conscience, may be averse to bearing arms, shall be excused therefrom upon such conditions as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a provision similar to this nor did the 1850 constitution as originally adopted. A provision almost identical to the present Section 1 was added in 1870 by amendment to the 1850 constitution.

Constitution of 1908

The 1908 constitution carried over the 1870 amendment in its entirety with changes in punctuation and with the omission of the word "whatever" from the 1850 phrase "of any religious discrimination whatever."

Other State Constitutions

The constitutions of three states use the same language but impose various age restrictions.[8] The constitutions of a few states are silent on the subject and those of the remaining states leave the composition thereof to the judgment and discretion of the legislature.[9] All states limit the militia to males, but two states, including Michigan, have attempted, administratively or by statute, to permit enrollment of females.[10]

The Model State Constitution contains no militia article recommended for inclusion in a state constitution.

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[8] Age Limits: Kansas, 21-45; North Carolina, 21-40; Oklahoma, 17-70.

[9] Alabama, California, Georgia, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, Tennessee, Texas, Vermont and Wisconsin.

[10] Rhode Island: By Statute (P.L. of R.I., Ch. 3742, Par. 1). Michigan: In reliance on an Opinion of the Attorney General (Advisory Op., Atty. Gen. to Adj. Gen., dated 18 June 1957, No. 3029).

While the courts (as in State ex rel. McGaughey v. Grayson, 163 S.W. 2d., 335) have defined the militia very broadly thus: "The terms 'militia' and 'militiaman' comprehend every temporary citizen soldier who, in time of war or emergency, forsakes his civilian pursuits to enter, for the time-being, the active military service of his country and are not restricted to the National Guard" (emphasis supplied), none have yet gone so far as to interpret the term "male" as also including female.

Article XV: Section 3. Officers of the militia shall be elected or appointed and be commissioned in such manner as may be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution provided that "officers shall be elected or appointed in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor." The 1850 instrument provided that "officers of the militia shall be elected or appointed and be commissioned in such manner as may be provided by law."

Constitution of 1908

The constitution of 1908 carried over, verbatim, the 1850 provision and there have been no amendments.

Other State Constitutions

The older state constitutions contain provisions similar to this section and many still provide for the election of officers, an ancient idea when personal popularity rather than military efficiency was thought to be an important consideration. The election of officers has long since been discarded in practice. A few states still permit the governor to appoint non-military individuals as "colonels" in the state militia, but this practice has, fortunately, abated with time.[11]

The Model State Constitution again is silent.

Comment

From the preceding discussion of Article XV, Section 2, it is apparent that, while under the militia clauses of the Constitution of the United States[12] the governors may (indeed, must) initially appoint officers of the militia, the United States has restricted appointees to fully qualified persons by denying unqualified persons federal recognition or payor status in the national guard of the United States. The convention may wish to give consideration to a constitutional prohibition against the appointment of officers in its organized militia who cannot gain and hold federal recognition, as such, by the United States. An implementing provision to this end might read: "Officers of the militia shall be appointed solely on the basis of mental, moral, physical and personal qualification as the same are, or may be, required by the United States." Such a provision would provide recognition of the fact that the organized militia of Michigan is now, and for many years has been, a highly trained instrument for the public safety and national security.

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[11] E.g., Kentucky and Wisconsin.

[12] Art. I, Sec. 8, Clauses 15 and 16, Constitution of the United States.

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CHAPTER XVI MISCELLANEOUS PROVISIONS

(over)

Section Detail

XVI MISCELLANEOUS PROVISIONS

1. Terms of Public Officers; Commencement

Article XVI: Section 1. The terms of office of all elective state officers and of all judges of courts of record shall begin on the first day of January next succeeding their election, except as otherwise prescribed in this constitution. The terms of office of all county officers shall begin on the first day of January next succeeding their election, except as otherwise prescribed by law.

Constitutions of 1835 and 1850

There was no comparable provision under the 1835 constitution. The governor and lieutenant governor were to hold office until the first Monday in January (Article XII, Section 10), but there was no specified date for any other officers. In the 1850 constitution, Sections 1 and 2, of Article VIII provided that the secretary of state, superintendent of public instruction, state treasurer, commissioner of the land office, auditor general, and attorney general were to hold office for a two-year term commencing on the first day of January. The schedule, Sections 8 and 9, provided the same day for county officers and for judicial officers.

Constitution of 1908

The only state officials whose terms as set forth in the constitution begin on a day other than January 1, are the superintendent of public instruction and the members of the state board of education whose terms commence on July 1 following their election (Article XI, Sections 2 and 7). The term of the state highway commissioner, not a constitutional officer however, also begins by law on July 1.

Judicial Interpretation

The courts have held that in the absence of any (express or implied) statutory prohibition a public officer holds office until his successor is elected and qualified.[1] A ruling of the attorney general excepted the office of state highway commissioner from this provision since it is not a constitutional office.[2]

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[1] Messenger v. Feagan, 106 Mich. 654.

[2] Opinion of the Attorney General, March 5,1958, No. 3204.

Statutory Implementation

The legislature has provided by statute that the regular terms of office of the county officers elected at the general election shall commence on January 1 next succeeding their election, but those elected to fill vacancies at the general election or at a special election may qualify and begin their terms of office immediately after being notified of their election.[3]

Other State Constitutions

Only 19 states have constitutional provisions setting a day upon which terms of public officers commence. Thirteen of these set a given day; only three of these (including Michigan) use January 1.[4] Four states use the first Monday in January; no other single date is used in more than one state. The Model State Constitution provides that the terms of office for both the governor and legislators shall begin on December 1, following their election.[5] The federal constitution sets January 20, as the beginning of the terms of office for the president and vice president and January 3 for senators and representatives.

Comment

If changes are made in the elective offices, time of election, length of term, etc., alterations will be necessary here. One problem that has arisen in relation to this section is in connection with state officers and judges of courts of record who are elected at the biennial spring election. The time lag between election in April and the "swearing in" in January can work a hardship on the "official-elect" and leaves a "lame-duck" in office for eight months after he has been replaced by the voters. This problem could be solved by eliminating the biennial spring election, or by providing that all officers elected at the spring election take office on July 1.

[3] Michigan Statutes Annotated 5.1087.

[4] Index Digest, pp. 845-6.

[5] Model State Constitution, Article III, Section 302 and Article V Section 500.

2. Oath of Office

Article XVI: Section 2. Members of the legislature and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office _____ of according to the best of my ability." No other oath, declaration or test shall be required as a qualification for any office or public trust.

Constitutions of 1835 and 1850

This provision originated in the 1835 constitution (Article XII, Section 1). It originally excepted "such inferior officers" as might be exempted by statute. In the 1850 constitution (Article XVIII, Section 1) the word "inferior" was dropped.

Constitution of 1908

The present Section 2 was carried over from the l850 constitution with only inconsequential change.

Statutory Implementation

Consistent with the constitutional provision, the statutes provide: "The word 'oath' shall be construed to include the word 'affirmation,' in all cases where by law an affirmation may be substituted for an oath; and in like cases the word 'sworn' shall be construed to include the word 'affirmed.'" (M.S.A., 2.212, Section 3 (11)) The statutes also require that every person employed by or in the service of the state or any governmental agency thereof take and subscribe to this oath (or affirmation). (M.S.A. 3.855) Failure or neglect to take the oath constitutes cause enough for an office to become vacant (M.S.A., 6.693, Section 3 (7)).

Judicial Interpretation

Various court decisions have defined and applied the provision. The courts invalidated a law requiring the filing of an affidavit of party affiliation before names could be printed on a ballot, holding that, under this section, no other oath, declara-

tion or test could be required as a qualification for any office.[6] It has been judicially determined that this form of oath does not require an appeal to the Deity.[7] In a recent decision, the United States supreme court declared unconstitutional a Maryland constitutional provision requiring as a qualification for public office statement of belief in the existence of God.[8] This ruling will no doubt invalidate any such similar requirement included in present or future state constitutions or laws.

Opinions of the Attorney General

In a recent opinion, the attorney general felt that the taking of an oath was one of the factors in deciding that the delegates to a constitutional convention are state officers.[9] He referred to a 1907 court case involving a state legislator suing for a writ of mandamus to have his name placed on the ballot as a candidate for delegate. The court determined (1) that convention delegates are state officers and (2) that state legislators are thus ineligible to become delegates.[10]

Other State Constitutions

It is difficult to generalize about other state constitutions because of the very wide diversity of provisions. About a third of the states require their particular oath for all officers; included in this group are Alaska and Hawaii, with the most recent state constitutions.[11] The Model State Constitution makes explicit the fact that all officers must take the oath; it requires it of "All officers of the state—legislative, executive and judicial—and of all the civil divisions thereof... ."[12] The next largest group of states (including approximately seven states) requires an oath for all executive officers except those exempted by law.[13] The other states demand the oath from numerous combinations of officers. A total of 11 states require that no other oath or test be required for office.[14]

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[6] It might be pointed out that the delegates to the 1850 convention took no oath; there was a debate on the question in the 1867 convention and the delegates voted to take an oath. Opinion of the Attorney General, No. 3605, May 3,1961, pp. 4-5.

[7] People v. Mankin, 225 Mich. 246, 253.

[8] Torcaso v. Watkins, US, 6 L ed 2d 982, 81 S ct (No. 373), decided June 19, 1961.

[9] Opinion of the Attorney General, No. 3605, May 3, 1961, pp. 4-7.

[10] Fyfe v. Kent County Clerk, 149 Mich. 349.

[11] Index Digest, pp. 826-7.

[12] Model State Constitution, Article XII, Section 1202.

[13] Index Digest, pp. 826-7.

[14] Ibid., p. 828.

Comment

This provision has apparently sufficed in its present form. It is not in conflict with the United States supreme court decision mentioned above.

3. Extra Compensation; Increase or Decrease of Salaries

Article XVI: Section 3. Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment.

Constitutions of 1835 and 1850

There was no comparable provision in the constitution of 1835. In the 1850 constitution, Section 21 of Article IV prohibited the legislature from granting or authorizing extra compensation to any public officer, agent or contractor after the service was rendered or the contract entered into. Section 20 of the Schedule prohibited an increase in the salaries or compensation of all persons holding office under the then current (1835) constitution until superseded by their successors elected or appointed under the new constitution. In addition, it forbade thereafter an increase or decrease in the compensation of any public officer during the term for which he was elected or appointed.

Constitution of 1908

The constitution of 1908 included the two provisions of the 1850 constitution, but made two additions: First, it prohibited the legislature and all municipal authorities from granting or authorizing extra compensation after the service had been rendered or the contract entered into; and second, it excluded circuit judges from the restriction against increases in compensation for the incumbent. The latter was done to make the section consistent with Section 12 of Article VII, which provides that each circuit judge, in addition to his salary from the state, "may receive from any county in which he regularly holds court such additional salary as may be determined from time to time by the board of supervisors of the county." There was a great deal of debate on this exemption of circuit judges from the general rule during the 1907-08 convention, put this view prevailed.

Judicial Interpretation

In 1907 the legislature increased the salary of the members of the Wayne County board of auditors. The matter was taken to court, the plaintiff holding that, under

Section 20 of the Schedule of the 1850 constitution, the salaries of the incumbents could not be increased. The supreme court held that since the provision in question was placed in the Schedule, it was not meant to be a permanent part of the laws and was thus not applicable.[15] The raise was thus held valid. It was to prevent the recurrence of such events that this section was made an integral part of the constitution.

A plethora of decisions and opinions of the attorney general have defined and applied this section. In 1956 a ruling by the attorney general declared that Michigan state government employees already retired were prohibited by this section from receiving increases in their pensions.[16] This opinion was overruled in 1957. The attorney general then decided that an act providing an increased minimum pension for retired employees having completed at least 15 years of service was constitutional.[17]

Other State Constitutions

Four constitutions other than Michigan's (Colorado, Montana, Pennsylvania and Wyoming) prohibit extra compensation after election or appointment. Delaware forbids only a decrease and Oklahoma prohibits any change unless the law is passed prior to election or appointment. About half the state constitutions have provisions prohibiting or restricting change in compensation during the term for which the official is elected or appointed.[18]

The U.S. constitution contains such a provision regarding the president; Section 1(7) of Article II requires that his compensation "shall neither be increased nor diminished during the Period for which he shall have been elected." Section 1 of Article III forbids diminishing the compensation of federal judges during their continuance in office.

Comment

Constitutional restrictions against increasing or decreasing salaries and other emoluments, including fees, of public officers after their election or appointment are adopted for the two-fold purpose of protecting the public by restraining those in public office from using their positions and official influence to obtain added compensation and also to secure the individual officer in his rightful emoluments against any unfriendly power which might seek to reduce or abolish them.[19]

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[15] Joseph L. Hudson v. Attorney General, 150 Mich. 67.

[16] Opinion of the Attorney General, July 13, 1956, No. 2472.

[17] Opinion of the Attorney General, December 4, 1957, No. 3126.

[18] Index Digest, p. 815.

[19] Michigan Statutes Annotated, 1959 Cumulative Supplement to Vol. 1, p: 214.

While this provision has admirable purposes and has generally seemed to be adequate, it has created problems, particularly as applied to judges. Justices elected to the supreme court can receive no increase in compensation for an eight-year period. In a time of inflation, this can work a serious hardship. Further, when the judges' terms of office are staggered, as they now are, the situation arises wherein the various judges receive different salaries. Thus, the most recently elected justice receives $25,500, while the remaining justices receive $18,500. This situation is not equitable and is not conducive to high morale.

Thought might be given to prohibiting all decreases in compensation during the term of the incumbent and prohibiting all increases to those directly responsible for the setting of pay scales; i.e., to the legislators and the governor, for the term for which they are elected. An alternative might be to exclude from the provision all officers, employees, etc. serving constitutional or statutory terms of over two years.

Article XVI: Section. 4.

This section relating to tie votes is discussed in Chapter III on Elective Franchise.

4. Vacancies in Office; Continuity of Government; Emergencies

Article XVI: Section 5. The legislature may provide by law the cases in which any office shall be deemed vacant and the manner of filling vacancies, where no provision is made in this constitution.

The legislature, in addition to and not in derogation of the power heretofore conferred in section 5 of this article XVI, in order to insure continuity of state and local governmental operations in periods of emergency only resulting from disasters occurring in this state caused by enemy attack on the United States shall have the power to such extent as the legislature deems advisable (1) to provide by legislative enactment for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt by legislative enactment such other legislation as may be necessary and proper for insuring the continuity of governmental

> operations. Notwithstanding the power conferred by this amendment elections shall always be called as soon as possible to fill any elective vacancies in any office temporarily occupied by operation of any legislation enacted pursuant to the provisions of this paragraph.

Constitutions of 1835 and 1850

There was no such provision in the constitution of 1835. As discussed previously in the executive article, the nature of the executive branch under the 1835 constitution was entirely different from that to which we are accustomed today. The chief subordinates in the executive branch were appointed by the governor rather than elected, as is true today. This obviated the need for provision for succession in office.

Section 11 of Article XII read:

> When a vacancy shall happen, occasioned by the death, resignation, or removal from office of any person holding office under this state, the successor thereto shall hold his office for the period which his successor had to serve, and no longer, unless again chosen or re-appointed.

This section clearly left the matter of succession in the governor's hands.

The first paragraph of the present provision originated in the constitution of 1850, though not in these exact words. The 1850 constitution provided for the election of the secretary of state, superintendent of public instruction, state treasurer, commissioner of the land office, auditor general and the attorney general (Article VIII, Section 1). The governor was to fill all vacancies by appointment, by and with the consent of the senate, if in session. This particular provision gave the legislature the power to determine when vacancies actually existed and to provide for succession to offices for which no specific constitutional provision was made.

Constitution of 1908

The wording is the same as in the 1850 constitution except for changes made for the purpose of improving the phraseology. There were no debates on the provision.

Amendment Since 1908. At the April, 1959, election, the electorate approved an amendment to this section of the 1908 constitution. The amendment is comprised of the second paragraph of the section as it now stands. The purpose of this amend-

ment was to give the legislature power to provide for continuity of state and local governmental operations in periods of emergency only caused by enemy attack.

Statutory Implementation

Public Act 40 of 1954 defines the instances in which an office would be deemed vacant (M.S.A. 6.693). Public Act 116 of 1954 sets forth in detail how vacancies in certain offices (i.e., those for which no specific constitutional provision is made) shall be ascertained and how these vacancies shall be filled. The 1959 amendment was implemented by Public Act 203 of 1959 (M.S.A. 5.5000 (1) et seq.). The act authorizes the passage of local ordinances or resolutions providing for emergency interim successors to local political subdivision offices, except for judicial and civil service offices. Officers included were to designate five emergency interim successors and specify the order of succession. It is interesting to note that the temporary successors are to receive no compensation beyond actual expenses (Act 203,1959, Section 9).

Other State Constitutions

About two-fifths of the state constitutions provide that vacancies may be filled as directed by law except where there are specific constitutional provisions. Apparently no other states have detailed emergency provisions such as that found in this section of the Michigan constitution.

Comment

There is probably no reason why this provision need be changed. It is an emergency provision and, hopefully, the latter paragraph will never be needed.

5. Laws, Records, and Proceedings; Use of English Language

Article XVI: Section 6. The laws, public records and the written judicial and legislative proceedings of the state shall be conducted, promulgated and preserved in the English language.

Constitutions of 1835 and 1850

The 1835 constitution had no comparable provision. This provision appeared originally in the constitution of 1850 (Article XVIII, Section 6).

Constitution of 1908

The section emerged from the convention of 1907-08 unchanged and seems not to have been debated.

Other State Constitutions

A provision such as this found only in a very few other state constitutions; California, Nebraska and Illinois require official publications to be in English.[20] Such a provision is found neither in the Model State Constitution nor in any of the newer state constitutions; similarly there is no mention made of it anywhere in the federal constitution.

Comment

There appears to be little, if any, controversy on this section. Consideration might be given to the question of whether this provision is still necessary.

6. Courts of Conciliation

Article XVI: Section 7. The legislature may establish courts of conciliation with such powers and duties as shall be prescribed by law.

Constitutions of 1835 and 1850

This provision is not found in the 1835 constitution, but is present in identical language in the 1850 constitution.

Constitution of 1908

This section has not been amended.

Statutory Development and Judicial Interpretation

The legislature established a court of conciliation and arbitration as a court of record and limited its jurisdiction to labor disputes. The constitutionality of this court was upheld although the jurisdiction established by the legislature was limited to one type of situation.

Subsequently the state labor mediation board was created to handle labor disputes. Today, Michigan has no courts of conciliation.

Other State Constitutions

The legislature is authorized by constitutional provision to provide for deciding differences by arbitration in the states of Colorado, Kentucky, South Carolina,

[20] Index Digest, p. 856.

Texas and Louisiana. In four other states arbitration courts are authorized with such powers and duties as may be prescribed by law, but the constitution provides that judgments are not binding unless the parties voluntarily submit their differences and agree to abide by the judgment. These states are Indiana, North Dakota, Ohio and Wisconsin. The constitution of Wyoming authorizes the legislature to establish courts of arbitration for labor disputes and provides that appeals may be taken from the compulsory board's decisions to the highest cost.

7. Estates of Married Women

Prepared in Part by
The Lawyers Title Insurance Corporation
John G. Heal

Article XVI: Section 8. The real and personal estate of every woman, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance or devise shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried.

Constitutions of 1835 and 1850

There was no provision of this type in the constitution of 1835; this provision originated in the 1850 constitution (Article XVI, Section 1)

Constitution of 1908

Only a few minor changes in phraseology were made in this section by the 1907-08 convention. The convention rejected a proposal to exclude from the provision property acquired after marriage that was held in joint ownership with others.

In the convention debates, several reasons were given as to why this proposal to exclude jointly owned property was unnecessary:

1. In the first place, all real property held jointly by husband and wife is held as tenants in entirety and is survivorship property.
2. In the second place, she cannot be a partner with her husband and, therefore, her property could not be involved with his in that form.
3. In the third place, if she does engage in a partnership business, her property is amenable to the claims of creditors exactly the same as though she were single.[21]

[21] Proceedings and Debates, p. 497.

Statutory Implementation

This provision was written into, law by Act 168 of l855.[22] The statute followed the wording of the constitutional provision very closely, but expanded the powers of married women over the disposition of their property; it could be "contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with the like effect as if she were unmarried."

Judicial Interpretation

Literally scores of cases have applied the law in specific instances.[23]

Other State Constitutions

Fourteen state constitutions have provisions safeguarding the property rights of women and two others provide that laws shall be passed on the subject. None of the newer state constitutions is included in this group. The Model State Constitution contains no similar provision.

Comment

At common law a married woman had very limited rights with respect to her property. Section 8 of Article 16 is the provision which, to a large extent, has changed the common law so that property which the married woman owns at time of marriage and property which she thereafter acquired is her property to deal with as she may see fit. It is no longer subject to the debts, obligations and engagements of the husband, as was formerly the case. This section of the constitution is one of the basic factors of our modern law relating to married women. Statutes have, been enacted further extending the married woman's rights as set forth in Michigan Statutes Annotated 26.161 et seq. A tremendous volume of judicial law interpreting the constitution and statutes with respect to married women is to be found in our books. Nevertheless, married women are in certain respects still inhibited by some of the old common law restrictions and attitudes. Many people feel that all such common law restrictions and attitudes should be eliminated so that a married woman in every respect would have the same rights and the same duties as she would have if she were unmarried or as her husband has.

[22] M.S.A., 26.161-26.164.

[23] For some of the particular decisions, see the editor's note on the law, M.S.A., Vol. 18, pp. 590-618.

8. Property Rights of Aliens

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Article XVI: Section 9. Aliens, who are or who may hereafter become bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens.

Constitutions of 1835 and 1850

This provision originated in the constitution of 1850 (Article XVIII, Section 13).

Constitution of 1908

The 1908 constitution made only minor changes in phraseology in the 1850 provision. There was a great deal of discussion in the convention about altering the provision to safe-guard property owned by aliens who were not covered in the provision (e.g., residents of Canada who owned substantial property in Detroit).[24] Most of the discussion dealt with 1) whether the legislature has the power to protect the property rights of non-resident aliens under this provision; 2) whether this legislative discretion should be taken away; 3) whether non-resident aliens should be given all the protection of citizens and of resident aliens; 4) whether this should be dealt with in the constitution or by statute; and 5) what the relation of such a provision (whether constitutional or statutory) was to federal treaties. After much debate it was decided that the 1850 provision was adequate.

Other State Constitutions

Twenty other state constitutions have provisions dealing with property rights of aliens. These provisions deal with: acquisition (two states), disposition (only West Virginia) and possession (eight states, including Michigan), inheritance (nine states, including Michigan), taxation (Wyoming) and tenure (West Virginia). Several states restrict rights of non-resident aliens. Other constitutions leave the regulation to the legislature. None of the newer constitutions or the Model State Constitution deal with the subject.

Comment

Section 9 of Article XVI deals with the property rights of aliens and sets forth that

[24] Proceedings and Debates, pp. 98-99,113-116.

aliens who are bona fide residents of Michigan shall have the same property rights as native born citizens.

State law bearing upon the rights of aliens has, in many respects, been modified by federal law. Such modifications generally relate to enemy aliens in time of war and property rights of citizens of countries deemed to be involved in an emergency faced by the United States.

Generally, the provisions of this section of the constitution would seem to be desirable. Insofar as modifications may be needed from time to time, it would seem that the requirements should be met by the United States government.

9. Agricultural Land Leases

Article XVI: Section 10. No lease or grant of agricultural land for agricultural purposes for a longer period than 12 years, reserving any rent or service of any kind, shall be valid.

Constitutions of 1835 and 1850

The 1835 constitution had no comparable provision. This provision originated in the 1850 constitution. It included the word "hereafter" following the word "grant."

Constitution of 1908

Two minor changes were made in the 1908 convention. The word "hereafter" was omitted at the suggestion of the committee on arrangement and phraseology. The phrase "for agricultural purposes" was inserted to clarify which lands were included, since some agricultural lands were used for mining.

The debates of the 1907-08 convention suggest that there was some question as to the necessity of this entire section. They indicate the purpose of this provision to be the following:

> It was a clause in the old constitution and was for the purpose of prohibiting the leasing of farm lands for a period longer than twelve years; in some cases the leases might be made for ninety-nine years and thus cut off the heirs, ... , long leases being detrimental to the land owners.[25]

Judicial Interpretation

In dealing with the above distinction, the court said, "A lease of agricultural land for a

[25] Proceedings and Debates, II, p. 1264.

term of 50 years for mining and removing ore was not within the prohibition....[26]

Other State Constitutions

A similar provision is included only in the constitutions of Minnesota (with a 2l-year limit), Iowa (20-year limit) and Wisconsin (15-year limit).[27]

Comment

Consideration might be given to deleting this provision, leaving the matter to legislative regulation.

10. Liquor Control

Article XVI: Section 11. The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Providing, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same.

Constitutions of 1835 and 1850

Neither of the preceding constitutions had any provisions pertaining to liquor or alcoholic beverages.

Constitution of 1908

The constitution as adopted in 1908 had no provisions pertaining to liquor. In 1916 an amendment was proposed by the initiative procedure and ratified which prohibited the manufacture and sale of alcoholic liquors except for medicinal, mechanical, chemical, scientific or sacramental purposes. The present language was also proposed by initiative petition and was ratified at the November election in 1932.

[26] DeGrasse v. Verona Mining Co., 185 Mich. 514, quoted in M.S.A., I, pp. 470-471.

[27] Index Digest, p. 5.

Legislative Implementation and Judicial Interpretation

The language of the constitutional provision is sufficiently broad to permit the legislature to set up a state monopoly system, an open state system, (i.e. one in which private licensees engage in the wholesale and retail trade), or to establish a system with a mixture of the features of the two.

The legislature pursuant to Section 11 established a three-member liquor control commission. It made the commission responsible for the operation of a system of state stores which sell both at wholesale and retail. The state maintains a monopoly as a wholesale vendor but permits retail sales through licensed outlets known as specially designated distributors, and by Class C license holders for sale of liquor by the glass. In addition to the responsibility for operating the distribution system, the commission is charged with enforcement of the state liquor laws and of its own regulations.

The courts have upheld broad authority for the liquor control commission. The courts held that this provision of the constitution was limited only by the express provisions of the legislative act creating the liquor control commission. In a case challenging the state's right to monopoly operation on the wholesale vending, the court held that in the absence of other limitations, the words "complete control" carry with them the power for the state to engage in the business of buying, selling and storing liquor.

The legislature has also created a board of hearing examiners to hold hearings on cases of licensees charged with violations of the liquor control act. The court found that the creation of this hearing board did not violate the constitutional provision of complete control over alcoholic beverage traffic being placed in the liquor control commission since the commission retains complete power to accept or reject the examiner's findings and to revoke or issue licenses as the commission determines.

The constitutional provision establishes the right of any county to prohibit the manufacture or sale of alcoholic beverages within its boundaries. The legislature has extended this right to municipal units as well as the counties. The court, in a local option case, held that a county-wide Sunday closing vote prevailed over the previous rejection of Sunday closing by the village electors of a village within the county. The courts have upheld the authority of the legislature to permit sale of liquor by the glass in private clubs within political jurisdictions that have either refused or failed to authorize such sale by the glass in public restaurants.

The court had occasion to decide the interrelationship of the constitutional provision for state civil service and the constitutional provision for the liquor control commission. The case arose when the liquor control commission abolished the position of executive director which was within the classified civil service of the state. The court

held that the two amendments should be considered together and, in case of conflict, the civil service amendment which was adopted later was controlling. The specific holding was that the commission did not have the power to abolish the position of executive director without the prior approval of the civil service commission.

Other State Constitutions

Approximately one-fourth of the states make some provision in their constitutions pertaining to liquor control. The other three-fourths of the states provide for the subject entirely by legislation.

Most of the constitutional provisions are grants of permissive authority to the legislature. For example, Florida's constitution provides that the legislature may authorize the manufacture and sale of liquor by individuals and firms, or by the state, its subdivisions, or by any governmental commission or agency created for that purpose. South Carolina's constitution provides that the legislature may license or prohibit the manufacture and retail sale of liquor, or it may prohibit such activities by private individuals and firms and authorize the state, county or municipal officers to purchase and retail liquor under statutory regulations. And it further provides that the income derived from the regulation of liquor traffic shall be dedicated to public schools. Texas specifically authorizes monopoly operation as one of the alternate ways of controlling the sale of liquor.

The constitutions of nine state require the legislature to provide for local option; in addition to Michigan, the other states are Delaware, Florida, Kentucky, Maryland, Oregon, Texas, Virginia, and West Virginia. The constitution of South Carolina provides that the legislature may not delegate to municipal corporations the power to issue licenses to sell liquor.

Comment

The legislature would have inherent power to provide for liquor control without specific constitutional provision.

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CHAPTER XVII AMENDMENT AND REVISION

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XVII AMENDMENT AND REVISION

A. AMENDMENT PROCEDURE

1. Amendment Proposed by Legislature

Article XVII: Section 1. Any amendment or amendments to this constitution may be proposed in the senate or house of representatives. If the same shall be agreed to by two-thirds of the members elected to each house, such amendment or amendments shall be entered on the journals, respectively, with the yeas and nays taken thereon; and the same shall be submitted to the electors at the next spring or autumn election thereafter, as the legislature shall direct; and, if a majority of electors qualified to vote for members of the legislature voting thereon shall ratify and approve such amendments, the same shall become part of the constitution.

Constitutions of 1835 and 1850

According to the 1835 provision (Article XIII, Section 1) an amendment or amendments could be proposed in either house of the legislature. If agreed to by a majority of the members elected to each house, it was to be referred to the next legislature, and published for three months previous to the time of electing the new legislature. If the proposal were agreed to by two-thirds of the members elected to each house of the newly elected legislature, submission to the people was required in a manner and at a time prescribed by the legislature. If the people by a "majority of the electors qualified to vote for members of the legislature voting thereon" approved and ratified the proposal or proposals, they would "become part of the constitution."

The provision on amendment in the 1850 constitution (as amended in 1876—Article XX, Section 1), was identical in meaning and effect with the provision of the 1908 constitution.

Constitution of 1908

This provision was carried over from the 1850 constitution as amended unchanged.

Judicial Interpretation

Under this provision, the legislature may control the manner of submitting a proposed amendment to a vote of the people, and is not bound by any statutorily pre-

scribed process.[1] Proposed constitutional amendments must be submitted at regular general elections either spring or fall and not at a special election.[2] A 1913 amendment to Article XVII, Section 2 required that every amendment was to take effect 30 days after the election at which it was approved. This applies to those proposed by the legislature as well as to those initiated by petition.[3]

There is no limit to the subject matter of a constitutional amendment. One amendment may encompass more than one subject.[4] In regard to interpretation of a constitutional amendment, court decisions have held that it must be construed with the whole constitution; that it should be interpreted in the light of conditions at the time of its adoption with attention given to the purpose for which it was adopted; and that if two amendments conflict, they must be construed together and the one adopted more recently will be given preference.[5]

Opinions of the Attorney General

The legislature may propose a constitutional amendment during a special session without regard to the scope of the governor's call or messages according to an opinion of the attorney general of 1948. An attorney general's opinion of 1913 held that proposed amendments were made by joint resolution and were not subject to the gubernatorial veto. An attorney general's opinion of 1948 held that the legislature could rescind by an extraordinary vote (presumably two-thirds of the members elected to each house) a proposed constitutional amendment before it had been submitted to a vote of the people.

Other State Constitutions

In 48 states the legislature may propose constitutional amendments to be voted on by the electorate. In Delaware, however, if two-thirds of all members of each house in two successive legislatures vote to adopt a proposed amendment, it becomes a part of the constitution, and no provision is made for its submission to the electorate. In New Hampshire, the legislature has no authority to make or propose amendments, since this must be done by a constitutional convention.

In 35 states, the action of one legislature is sufficient to submit proposed amendments to a vote of the people. In nine of these, only a simple majority of both houses is required. In one of these (Minnesota) the vote required is only a majority

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[1] Barnett v. Secretary of State, 285 Mich. 494.

[2] Chase v. Board of Election Commissioners of Wayne County, 151 Mich. 407.

[3] Hamilton V. Secretary of State, 204 Mich. 439.

[4] Graham v. Miller, 348 Mich. 684

[5] People ex rel. Attorney General v. Burch, 84 Mich. 408; Civil Service Commission v. Auditor General, 302 Mich. 673; Kunzig v. Liquor Control Commission, 327 Mich. 474.

of those present, while in the other eight a majority of those elected to both houses is required. In one of the eight states, New Mexico, approval of three-fourths of the members elected is required for proposals to amend the elective franchise article and that on education.

Seven states require a three-fifths vote in one legislature to propose an amendment. In one of these states (North Carolina) the requirement is three-fifths of those present, while in the remaining six states (including Nebraska with a unicameral legislature) three-fifths of those elected is required, but in one of these, Florida, a vote of three-quarters of those elected is required for submission at a special election. New Jersey might be considered an eighth state in the group requiring a three-fifths vote, since one legislature may submit an amendment if the vote is three-fifths of all members of each house. If the vote is less than three-fifths, but a majority of all members, it can be submitted if the legislature has a similar majority vote for it in the next legislative year.

A two-thirds vote of each house is required in 18 states, or a majority of those states in which proposed amendments may be submitted by action of one legislature. In four of these, a vote of two-thirds of those present is required (but Mississippi requires this action to be taken three times on three separate days). In two of these 18 states, it must be a two-thirds vote of all members, while in the remaining 14 (including Michigan), the vote necessary is that of two-thirds of those elected to each house.

Thirteen states require two legislatures to vote for submission of an amendment, not including New Jersey under its alternate procedure noted above. All of these appear to require that the action be taken by two separate legislatures, not the same legislature meeting in two sessions. In one of these 13 (Hawaii), only a majority of those present in each house in two legislatures is required for submission. Nine of these states require a majority of those elected in two legislatures—in one of these states (Massachusetts), the vote is taken in joint session. In Connecticut, merely a majority vote in the lower house is required in the first legislature, but two-thirds of each house is required in the second legislature. Tennessee requires a simple majority of those elected to each house in the first legislature, but two-thirds of those elected to each house in the second legislature. Vermont requires a two-thirds vote of the senate and a majority of the lower house in the first legislature, but only a majority of each house in the second legislature for submission of an amendment.[6]

Vote Required on Submission to Electorate. In 48 of the 50 states, amendments proposed by the legislature are submitted to a vote of the electorate for approval. In

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[6] Index Digest, pp. 10-15; Manual on State Constitutional Provisions, pp. 315-317, 324-326; Book of the States, 1960-61, p. 13.

39 states (including Michigan), a majority of the electors voting on the amendment or question is sufficient for approval. In two of these states (Nebraska and Hawaii), the majority of those voting on the amendment must equal 35 per cent of those voting at the election.[7] In another of these 39 states (New Mexico) there is the exception that proposed amendments affecting the elective franchise or education articles require not only the extraordinary legislative vote mentioned above, but also three-quarters of those voting on the question throughout the state and two-thirds of such vote in each county.

Rhode Island is the only state to require more than a majority vote of those voting on the question or at the election when an amendment is submitted to the electors. However, since this requirement is three-fifths of those voting on the amendment, it may often be more easily attained than would a majority of those voting at the election. Seven states have the more difficult requirement of a majority of those voting at the election to approve an amendment. The Illinois constitution provides for alternative requirements in the vote of the electorate on an amendment. This vote must be either a majority of those voting at the election or two-thirds of those voting on the amendment.

In Delaware, amendments are not submitted to a referendum vote, but are adopted by action of two legislatures. The New Hampshire constitution provides that amendments can be proposed only by a constitutional convention and not by the legislature.[8]

Other Features. Many constitutions require that each amendment be voted on separately if more than one is proposed.[9] A few states have limits on the number of amendments to be submitted at one time or the frequency with which the same amendment can be proposed or submitted.[10]

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[7] This acts as a safeguard against adoption of an amendment by a small percentage of participants but is not as stringent as requiring an absolute majority of those voting at the election. In the states having this requirement, those who vote at the election, but do not vote on the amendment, are in effect counted as voting, "No" on the amendment.

[8] Index Digest, pp. 13-16; Manual on State Constitutional Provisions, pp. 319-320,337-338 (Alabama, North Carolina and Texas provisions misstated); The Book of the States, 1960-61, p. 13 (Alabama, Arkansas, New Jersey and Michigan provisions misstated). In view of the many state constitutions that appear to lack basic flexibility, provisions which make amendment or general revision overly difficult intensify the problems resulting from inflexibility.

[9] However, this appears to be the rule in all states (including Michigan) whose constitutions do not specify this detail. In Michigan an amendment can encompass more than one subject.

[10] Index Digest, pp. 10-17; Manual on State Constitutional Provisions, pp. 315-320, 330, 331; Book of the States, 1960-61, p.15. Restrictions on the number and frequency of amendments have caused problems in some of the few states having such provisions, and are not recommended by constitutional specialists.

The Model State Constitution provides that the legislature may propose amendments if by a vote of a majority of all the members. For approval a majority of those voting on the question is required at an election held not less than two months after it has been agreed to by the legislature.

Article V of the U.S. Constitution requires approval of a proposed amendment by two-thirds of both houses of Congress and ratification by three-fourths of the states by the legislatures or conventions as indicated by the Congress. There is also an alternate method of federal amendment. Upon application by the legislatures of two-thirds of the states, the Congress shall call a convention for proposing amendments to be ratified by three-fourths of the states in the same manner.

Comment

In view of the inter-relationship between this section and the one following it (Section 2) which provides for amendments to be proposed by initiative petition, these two sections will be commented upon jointly. See Comment under Section 2 following.

2. Amendment Proposed By Initiative

Article XVII: Section 2. Amendments may also be proposed to this constitution by petition of the qualified and registered electors of this state. Every such petition shall include the full text of the amendment so proposed, and be signed by qualified and registered electors of the state equal in number to not less than 10 per centum of the total vote cast for all candidates for governor at the last preceding general election, at which a governor was elected. Petitions of qualified and registered electors proposing an amendment to this constitution shall be filed with the secretary of state or such other person or persons hereafter authorized by law to receive same at least four months before the election at which such proposed amendment is to be voted upon. The legislature may prescribe penalties for causing or aiding and abetting in causing any fictitious or forged name to be affixed to any petition, or for knowingly causing petitions bearing fictitious or forged names to be circulated. Upon receipt of said petition the secretary of state or other person or persons hereafter authorized by law shall canvas the same to ascertain if such petition has been signed by the requisite number of qualified and registered electors, and may, in determining the validity thereof, cause any doubtful signatures to be checked

against the registration records by the clerk of any political subdivision in which said petitions were circulated, for properly determining the authenticity of such signatures. If the secretary of state or other person or persons hereafter authorized by law to receive and canvass same determines the petition is legal and in proper form and has been signed by the required number of qualified and registered electors, the proposed amendment shall be submitted to the electors at the next regular election at which any state officer is to be elected. An official declaration of the sufficiency or insufficiency of the petition shall be made by the secretary of state or such other person or persons as shall hereafter be authorized at least two months prior to such election. Any constitutional amendment initiated by the people as herein provided, shall take effect and become a part of the constitution if the same shall be approved by the number of qualified electors required in section one hereof for the approval of amendments proposed by the legislature, and not otherwise. Every amendment shall take effect 30 days after the election at which it is approved. The secretary of state or such other person or persons as may be hereafter authorized by law shall submit all proposed amendments to the constitution initiated by the people for adoption or rejection in compliance herewith. The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the secretary of state, or such other person or persons hereafter authorized by law to receive, canvass and check the same. Such petition shall be signed by qualified and registered electors in person only with the residence address of such persons, showing street names and also residence numbers in cities and villages having street numbers, and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached the affidavit of the qualified and registered elector circulating the same, who shall be required to identify himself by affixing his address below his signature, stating that each signature thereto was signed in the presence of such qualified and registered elector and is the genuine signature of the person signing the same, and that to the best knowledge and belief of the affiant each person signing the petition was at the time of signing a qualified and registered elector.

Constitutions of 1835 and 1850

There was no provision of this type in the earlier constitutions.

Constitution of 1908

The longest and most spirited debate in the convention of 1907-08 revolved around the Proposal for the initiative process as an additional amendment procedure.[11] A proposal for a direct initiative on amendments was accepted in the convention but later a substitute measure was adopted by a vote of 49 to 47 whereby the initiative became indirect to the extent that the initiated proposal for amendment was to be submitted to the legislature in which a majority of those elected to both houses in joint session could veto the initiated proposal or offer by the same vote an alternative proposal to be submitted with the one initiated for a choice by the electorate or rejection of both.[12]

This was the origin of the provision for the initiative on constitutional amendments. Under the original provision, the number of petitioners for a proposed amendment was required to "exceed twenty per cent of ...the total number of electors" who voted for secretary of state at the last election. The petitions were to be signed at the regular places of election and registration with the officials thereof required to verify the signatures, as well as the fact that the signers were registered electors. No amendment to change this section by the initiatory process was permitted. In the vote of the electorate upon submission of an amendment, a majority of those voting thereon was sufficient, but a minimum of one-third of the highest number of votes for any office at the election was required.

1913 Amendment. In 1913, an amendment to this section was proposed by the legislature and adopted by the people. This made a substantial change in the provision whereby the initiative or proposed amendments became direct. That part of the original provision was eliminated whereby initiated proposed amendments were required to be submitted to the legislature for possible veto or submission of an alternative. Also eliminated was the prohibition against change of this section itself by the initiative method and the minimum vote of the electorate formerly required for approval. The number of petitioners required for the initiative was reduced to ten percent of the "legal voters" to be computed on the basis of the total number of votes cast for governor at the preceding election.

A new requirement, that the petitions be filed with the secretary of state four

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[11] Proceedings and Debates, pp. 546-687.

[12] Proceedings and Debates, pp. 680-687, 960-965.

months before the election, was added in this amendment, as was the requirement that the secretary of state canvass the petition for signatures by the "requisite number of qualified electors." It was also specified that: "Every amendment shall take effect thirty days after the election" at which it was approved.[13] Additional requirements were included in the amended version pertaining to signatures on petitions and affidavits of those circulating the petitions.

1941 Amendment. The amendment of this section proposed by the legislature and adopted in 1941, put the provision in its present form. It did not change the provision as radically as did the 1913 amendment. There was some rearrangement of the language, and the provision was made more specific as to the form of the petition, and in requiring the electors signing the petitions to be registered and to indicate their addresses. Provision for further checking the signatures on the petitions was also made. Discretion was given to the law-making process to assign the functions of the secretary of state in regard to such petitions to another "person or persons." A further feature required by the 1941 amendment was that an "official declaration of the sufficiency or insufficiency of the petition" be made "at least two months prior" to the election.

Statutory Implementation

By statute, the duties assigned by this provision to the "secretary of state or such other person or persons" have been given to a board composed of the board of state canvassers and the attorney general.[14] Various details relating to the initiatory process for constitutional amendments have been set forth in statutes.[15]

Judicial Interpretation

Various opinions of the supreme court (and of attorneys general) have interpreted this section in its present and previous forms. These opinions seem not to have expanded or contracted the meaning of this section or caused it to deviate substantially by interpretation beyond the usual sense of its language. The initiative procedure, as set forth in the section, is sufficiently explicit that it needs no statutory implementation of a substantive nature, and statutory conditions or additional procedures in relation to the initiatory process are not binding.[16]

Other State Constitutions

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[13] This language was interpreted, as mentioned above, to apply to all amendments whether submitted by initiative petition or by the legislature.

[14] M.S.A., 6.1474.

[15] M.S.A., 6.1471-6.1484.

Number of Signatures Required - Direct Initiative. Of the 11 state constitutions having provision for the direct initiative for proposals of constitutional amendment, the North Dakota constitution requires that the petitions be signed by 20,000 electors. This is the only state having an absolute number required. Three of these 11 states require the number of petition signers to be eight percent of the votes cast in the last general election—Colorado uses the standard of votes cast for secretary of state; California uses those cast for governor; and in Missouri the requirement is eight percent of the votes cast for governor in each of two-thirds of the state's congressional districts. Five states of these eleven (including Michigan) require the number of electors signing petitions to be ten percent of the vote in the last pertinent election in order to initiate an amendment. Of these five, Oregon requires a number of electors "not more than" ten percent of all votes for supreme court justice—probably the easiest requirement to meet of these five states. Four states require the number of signers to be ten percent of the vote for governor. In Michigan, this is the only requirement, while the other three states have additional stipulations. In Arkansas, this number must include five percent of the vote for governor in 15 counties (Arkansas has some 80 counties). In Nebraska, this number must equal five percent of the vote for governor in two-fifths of the state's counties. In Ohio, the number of signers must include five percent of the vote for governor in one-half of the state's counties. In two states of the 11, the number of petition signers for initiating an amendment proposal must be 15 percent of the vote in the last election. Arizona requires the number to be 15 percent of the vote for governor, while in Oklahoma it must be 15 percent of the highest number of votes cast for any state office.[17]

Number of Signatures Required - "Indirect Initiative." The constitutions of two states Massachusetts and Nevada provide for proposed amendments by an initiatory process which is indirect to the extent that the proposal is submitted first to the legislature which may accept or reject the proposal of amendment. However, in Nevada, if the initiated proposal is rejected, the proposal is submitted to the electorate regardless of this disapproval, although the legislature may also submit an alternative proposal to the electorate for a choice between them or rejection of both.

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[16] Hamilton v. Secretary of State, 221 Mich. 541; Opinion of the Attorney General, March 22,1950, No. 1151; City of Jackson v. Commissioner of Revenue, 316 Mich. 694. In regard to the initiative for both constitutional amendments and statutes to 1940, see J. K. Pollock, The Initiative and Referendum in Michigan (Univ. of Michigan, 1940).

[17] Index Digest, pp. 556-558 (Colorado provision not included); Manual on State Constitutional Provisions, pp. 317-318, 327 (percentage of voters required in Oregon misstated); Book of the States, 1960-61, p. 14 (percentage of voters required in Ohio misstated); pertinent constitutional provisions.

This type of provision is somewhat similar to the original form of the Michigan provision—1908-1913, before amendment, although the Michigan legislature could then kill the initiated proposal by a joint majority vote. The complicated Massachusetts provision is also similar to the original Michigan provision in that the legislature may veto the proposal; however, this veto is not highly restrictive, since in order to be submitted to the electorate, the initiated proposal must receive the vote in joint session of only one-fourth of those elected to both houses in two successive legislatures. The Massachusetts legislature may also submit alternative proposals.

The number required to sign petitions in order to initiate a proposal of amendment in Nevada is 10 percent of the total vote at the last general election including 10 percent of that vote in 75 percent of the state's counties; while in Massachusetts the number required is only three percent of the last vote for governor, but no one county may contribute more than one-quarter of the required number of signatures.[18]

Vote Required on Submission to Electors. All of the 13 states having an initiatory process for amendments (11 direct, two indirect) require approval by a majority of those voting on the amendment, except Oklahoma where the requirement is a majority of those voting at the election. However, Massachusetts requires for approval of initiated proposals a majority voting on the amendment equal to at least 30 percent of those voting at the election; Nebraska has a similar stipulation, but the majority must be a minimum of 35 percent of those voting at the election. Arkansas, although requiring a majority voting at the election to ratify a legislative proposal of amendment, reduces the requirement to a majority voting on the amendment for initiated proposals.[19]

Other Features Regarding Initiated Proposals. Seven states, including Michigan, of the 13 having an initiatory process for proposals of amendment have no limit on the subject matter or frequency of amendments so proposed. All of the others, with the possible exception of Massachusetts, have limitations, but these are not particularly restrictive. Even the restrictions on the use of the initiative for amendments in

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[18] Index Digest, pp. 558 (Ohio included as having indirect initiative on amendments, but provision seems to apply only to laws; see Ohio Constitution Article II, Section 1 a, b, g); Manual on State Constitutional Provisions, p. 327 (number of signers listed for Mass. not now applicable); Book of the States, 1960-61, p. 14; and pertinent constitutional provisions.

[19] Index Digest, pp. 556-558; Book of the States 1960-61 p. 14 (Mich. requirement misstated).

Massachusetts—relating to changes in the bill of rights, courts, particular local governments, and specific appropriations—are probably not far-reaching in practice.[20] The Michigan provision seems to be the most comprehensive and specific with regard to requirements concerning circulation of petitions, examination of them and the declaration of sufficiency. The requirement of filing the petitions four months before the election is the most common requirement in regard to this matter among the 13 states.[21]

The Model State Constitution provides for amendments to be proposed by initiative petition (somewhat indirect). The number of signers as a percentage of the preceding vote for governor is not specified. If the legislature fails to approve it in the usual manner, the proposal is submitted to the voters at an election not less than two months after the end of the legislative session. The legislature is permitted to provide by law procedure for withdrawal of a petition by its sponsors prior to its submission to the people.

The Model requires approval of initiated proposals of amendment by a majority of those voting on the amendment. In case of conflict in amendments (proposed in any manner) adopted at the same election, the one receiving the highest number of affirmative votes "shall prevail to the extent of such conflict." The U.S. constitution has no provision of this type.

Comment

Of the 125 constitutional amendments that have been proposed in Michigan since 1908, 69 have been adopted. Almost two-thirds (59) of the 90 proposed by the legislature have been adopted, while less than one-third (10) of the 35 initiated by petition have been adopted. However, most of the ten initiated amendment proposals ratified by the voters have been unusually important: prohibition, 1916; establishment of the liquor control commission, 1932; property tax limitation, 1932 and 1948; earmarking gas and weight taxes for highways, 1938; nonpartisan election of

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[20] Manual on State Constitutional Provisions, pp. 317-318, 327; Index Digest, pp. 556-558.

[21] Manual on State Constitutional Provisions, p. 327; Index Digest, pp. 556-557. For some of the more recent material relating to state constitutional amendment and revision—the subject matter of all four sections of Article XVII of the Michigan constitution—see A.L. Sturm, Methods of State Constitutional Reform (Univ. of Michigan, 1954); Sturm, "Constitutional Amendment and Revision," Major Constitutional Issues in West Virginia (West Virginia, University, 1961); John P. Keith, Methods of Constitutional Revision (University of Texas, 1949); w. Brooke Graves, Editor, Major Problems in State Constitutional Revision (Public Administration Service, 1960, particularly chapters 2-7.

judges, 1939; state civil service, 1940; legislative reapportionment, 1952; earmarking of sales tax, 1946; and the change in ground rules for a constitutional convention, 1960.

In view of Michigan's expanding population and a trend toward greater participation in elections, some might favor a reduction in the required number of initiative petition signers as a percentage of votes cast in the previous election in order to facilitate the use of the initiative.[22] However, contrary to this view, others believe that the initiatory process should be reserved for extraordinary occasions—the electorate's last resort, and that the initiative in Michigan has already been used too frequently for substantial constitutional changes. If there is a need to facilitate the submission of constitutional amendments to the voter, some might argue that it would be preferable to make it easier for the legislature to submit amendments by reducing the extraordinary majority requirement of two-thirds of the members elected to each house to some smaller number. And, it is argued, legislative proposals of amendment tend to be more carefully drafted and considered in relation to the remainder of the constitution.

The detailed procedure spelled out in Section 2 is self-executing and forestalls possible statutory obstruction of the initiatory procedure. The vote requirement in Michigan for approval or ratification by the voters of amendments proposed by either legislative or initiatory action is found in most states. Some might favor the further requirement that the majority voting on the question must be at least 30 or 35 percent of those voting at the election in order to forestall adoption of amendments by too small a minority of the electorate.[23]

The time for voting on proposed amendments is the same in Sections 1 and 2 although expressed differently—at the next spring or fall election (Section 1), and at the next regular election for any state officer (Section 2 for initiated proposals). If

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[22] If the governor were given a four-year term and elected at the "off-year" election, the difficulty of meeting the petition signature requirement would not be alternately intensified following presidential elections with enlarged voter participation.

[23] The Georgia constitution (Article XIII, Section 1) under certain conditions requires the vote by the electorate only in the affected locality or localities rather than state-wide for constitutional amendments pertaining only to specific local governments. This feature has been suggested for inclusion in the Pennsylvania constitution.

the spring election is eliminated in the revised constitution, some consideration might be given to providing for submission to the electorate of amendment proposals (perhaps in event of emergency) more frequently than every two years.[24]

3. Publication and Statement on Ballot of Proposed Constitutional Amendments

Article XVII: Section 3. All proposed amendments to the constitution and other questions to be submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted in each polling place. The purpose of any such proposed amendment or question shall be designated on the ballots for submission to the electors in not more than 100 words, exclusive of caption. Such designation and caption shall be prepared by the secretary of state or by such other authority as shall be hereafter designated by law within 10 days after the filing of any proposal and shall consist of a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against such proposal.

Constitutions of 1835 and 1850

The constitution of 1835 in the provision (Article XIII, Section 1) dealing with amendment by proposal of two separate legislatures required publication of the proposed amendment for three months previous to the election of the succeeding legislature.[25] The 1850 constitution had no provision relating to the publication of proposed amendments or any of the subject matter of this present provision.

Constitution of 1908

The original form of this section as it came from the hands of the convention was as follows:

> Section 3. All proposed amendments to the constitution submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated

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[24] Some states provide for submission of amendment proposals at special elections or when prescribed by the legislature.

[25] See above—discussion of Article XVII, Section 1.

> thereby, and a copy thereof shall be posted at each registration and election place. Proposed amendments shall also be printed in full on a ballot or ballots separate from the ballot containing the names of nominees for public office.

Amendment of 1918. An amendment adopted in 1918 required that proposed amendments "together with any other special questions to be submitted" at the election be printed in full on a single ballot separate from that containing the names of "candidates or nominees." The chief purpose of this amendment was to require that questions to be voted on would be on a single separate ballot rather than "on a ballot or ballots" as originally required.

Amendment of 1941. The present form of this section is the result of an amendment proposed by the legislature and adopted in the April, 1941, election. Article XVII, Section 2 was concurrently altered by this same amendment. The amendment to Section 3 discarded the requirement that proposed amendments be printed in full on the ballot. The caption and designation of the proposed amendment's purpose in "not more than 100 words" replaced the former requirement.

The procedure required in this section applies to amendments proposed by the legislature as well as to those proposed by the initiatory process.

Statutory Implementation

The preparation of the caption and designation of the proposed amendment's purpose has been assigned by statute to the "director of elections with the approval of the state board of canvassers."[26]

Judicial Interpretation

Section 3 requires that "any existing provisions" of the constitution that would be "altered or abrogated" by the proposed amendment must be published in full with the proposed amendment. This has been interpreted to mean that if a specific provision would be amended or replaced by the proposal it must be published, but that it is not necessary to publish other existing provisions which will remain opera-

[26] M.S.A., 6.1474.

tive even though they may be modified by, or need to be construed with, the proposed new provision.[27]

Other State Constitutions

Most state constitutions have provisions requiring notice or publication of proposed amendments to the constitution before their submission to the electorate. Many require such publication in newspapers. The requirement in the Michigan provision that proposed amendments be published with any existing provisions which would be "altered or abrogated thereby" appears to be unique among state constitutions.[28]

The Model State Constitution provides that a proposal of amendment shall be submitted by a "ballot title" descriptive but not argumentative or prejudicial, "prepared by the legal department of the state, subject to review by the courts." The U.S. constitution has no provision of this type.

Comment

Although the requirement that existing constitutional provisions, which would be "altered or abrogated" by a proposal of amendment, be published with the proposal is unique among state constitutions, it appears to have merit. The electorate is given thereby a greater opportunity to understand more fully the impact and ramifications of the proposed amendment.

B. CONSTITUTIONAL CONVENTION —GENERAL REVISION AND/OR AMENDMENT

Article XVII: Section 4. At the biennial spring election to be held in the year 1961, in each sixteenth year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors qualified to vote for members of the legislature. In case a majority of the electors voting on the question shall decide in favor of a convention for such purpose, at an election to be held not later than 4 months after the proposal shall have been certified as approved, the electors of each house of representatives district as then organized shall elect 1 delegate for each state repre-

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[27] School District of Pontiac v. City of Pontiac, 262 Mich. 338; City of Jackson v. Commissioner of Revenue, 316 Mich. 694; Graham v. Miller, 348 Mich. 684.

[28] Index Digest, pp. 11-12, 557; Manual on State Constitutional Provisions, pp. 319-320, 332-333.

sentative to which the district is entitled and the electors of each senatorial district as then organized shall elect 1 delegate for each state senator to which the district is entitled. The delegates so elected shall convene at the capital city on the first Tuesday in October next succeeding such election, and shall continue their sessions until the business of the convention shall be completed. A majority of the delegates elected shall constitute a quorum for the transaction of business. The convention shall choose its own officers, determine the rules of its proceedings and judge of the qualifications, elections and returns of its members. In case of a vacancy by death, resignation or otherwise, of any delegate, such vacancy shall be filled by appointment by the governor of a qualified resident of the same district. The convention shall have power to appoint such officers, employees and assistants as it may deem necessary and to fix their compensation, and to provide for the printing and distribution of its documents, journals and proceedings. Each delegate shall receive for his services the sum of 1,000 dollars and the same mileage as shall then be payable to members of the legislature, but such compensation may be increased by law. No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner provided by such convention on the first Monday in April following the final adjournment of the convention; but, in case an interval of at least 90 days shall not intervene between such final adjournment and the date of such election, then it shall be submitted at the next general election. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon such constitution or amendments shall take effect on the first day of January following the approval thereof.

Constitutions of 1835 and 1850

Article XIII, Section 2 of the 1835 constitution provided the following procedure for the calling of a constitutional convention. If two-thirds of each house of the legislature thought it "necessary to revise or change this entire constitution," the question was to be submitted to the electors at the next election for legislators. If a majority of the electors voting at the election were in favor of it, the legislature was required at its next session to "provide by law for calling a convention, to be holden within six months" after passage of the law. The convention was to have a "number of members not less than that of both branches of the legislature."

The 1850 constitution (Article XX, Section 2) originated the requirement of submitting the question of general constitutional revision by convention to the electorate every 16 years and at other times as provided by law. Approval by a majority of the electors voting at the election was required for calling a convention (as in the 1835 provision and the original form of the 1908 provision), in which event the legislature at its next session was required to provide by law "for the election of such delegates to such convention."[29] In 1866 the people voted on the question of calling a convention. Although the vote for the proposal fell short of the required majority of those voting at the election (even though the vote was three to one in favor) the legislature interpreted this as having been an effective call and made provision for a convention.[30] The proposed constitution resulting from this convention was rejected by the voters, by a vote of 110,582 to 71,733 in 1868.[31]

Constitution of 1908

Before its recent amendment, the original form of Section 4 required submission to the electors of the question of general revision in 1926 and in "each sixteenth year

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[29] The last sentence of this 1850 provision seems to have been somewhat out of context in this section concerned with "general revision," except that this revision could have been in the form of amendments. The last sentence (probably referring also to the preceding section) read: "All the amendments shall take effect at the commencement of the year after their adoption."

[30] The legislators used a Wisconsin court decision as a precedent.

[31] In 1873, creation of a. constitutional revision commission was authorized by the legislature, the governor appointing two members from each of the nine congressional districts. This commission's revision was submitted in amendment form, but was rejected by a vote of 124,034 to 39,285 in 1874. C. R. Tharp, "Michigan State Constitutional Revision Procedures," Michigan Governmental Digest (No. 3, Univ. of Michigan, September, 1948), p. 2.

thereafter." Approval by a majority of the electors voting at the election was required in order to call a convention, in which event three delegates were to be elected from each senatorial district at the "next biennial spring election." These delegates were required to "convene at the state capitol" on the first Tuesday in September following the election.

The constitutional convention of 1907-08 in the part of its address to the people relating to this section indicated that the detail in the section was intended to enhance the independent power of a convention and restrict legislative control or interference with it. The section was "designed to place beyond question the power such a convention shall exercise." Because "grave doubt" had arisen during the convention as to whether it had power under the 1850 constitution "to submit a complete instrument and also at the same time, separate amendments," this section was "designed to provide a method for submitting special questions. . . about which there might be great conflict of opinion to a vote of the electors, separate and apart from the instrument" or main body of the constitution.[32]

Under the original 1908 provision requiring a majority of those voting at the election, the question of calling a convention was submitted to the electorate four times, (three by the automatic provision and one by law in 1948). It failed to carry each time. On the last two of the four occasions, a majority of those voting on the question favored the proposal, but it failed to carry by a majority of those voting at the election:

"Yes" Vote Required For Approval

Year	For Approval	"Yes" Vote	"No" Vote
1926*	315,377	119,491	285,252
1942*	613,387	408,188	468,506
1948 (by law)	1,056,561	855,451	799,198
1958*	1,170,915	821,282	608,365

*By constitutional mandate

Amendment of 1960. As a result of successive failure to achieve the vote required to call a convention under the original 1908 provision, civic organizations, early in 1960, undertook the task of changing this provision by initiating a proposed amendment by petition. The proposed amendment was adopted at the November, 1960,

[32] Proceedings and Debates, pp. 1442-1443. The intent of the convention so clearly spelled out is still valid for the present form of this section since the limited though important changes made by amendment in 1960 do not affect its general intent as specified in the address to the people.

election. This amendment reduced the vote required for the call from a majority voting at the election to a majority changed from three for each senatorial district to one for each senator and representative. The only other change made by the amendment, except for those chronological in nature, was that the delegates were to convene "at the capital city" rather than "at the state capitol."

By constitutional mandate under the new amendment, the question of calling a constitutional convention was submitted in the April, 1961, election in which the "yes" vote carried. The constitutional convention will convene in Lansing, October 3, 1961.

Statutory Implementation

Statutes relating to this section passed prior to adoption of the 1960 constitutional amendment have been amended since its adoption, largely to make them conform with the new constitutional amendment.[33]

Judicial Interpretation and Opinions of the Attorney General

Since the constitutional convention to be held in 1961 will be the first under the constitution of 1908, there has previously been no need for interpretation of constitutional provisions which appear to make some state officials ineligible to election as convention delegates, such as Article V, Sections 6 and 7 and Article VII, Section 9 which explicitly prohibit legislators and circuit judges from being delegates. Under the 1850 constitution with similar provisions, legislators were interpreted as not eligible to be delegates.[34] Circuit and probate judges were also held to be ineligible.[35] An opinion of the attorney general, No. 3605, May 3,1961, held that:

> Members of the legislature are ineligible as delegates to constitutional convention during the term for which elected. Circuit judges are ineligible for the term for which elected and one year thereafter. The sheriff is ineligible unless he resigns his office. No other officers are ineligible.

Ten states (including Michigan) have constitutional provisions requiring the question of calling a constitutional convention to be submitted to the electorate at set

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[33] M.S.A. 6.1181-6.1190; 3.640.

[34] Fyfe v. Kent County Clerk, 149 Mich. 349; Opinion of the Attorney General, 1907.

[35] Opinions of the Attorney General, 1907—ineligibility of probate judges is not as explicit in either the constitution of 1850 or that of 1908.

intervals. In New Hampshire the interval is seven years; in Iowa, Alaska, and Hawaii 10 years; in Michigan 16 years; and in the remainder (Maryland, Missouri, New York, Ohio, and Oklahoma) 20 years. Most state constitutions, including these 10, provide explicitly that the question of calling a convention may be submitted to the electorate as provided by law or by an extraordinary vote of the legislature.[36]

Eighteen states (including Michigan) have constitutional provisions for the question to be submitted by law or by a majority (usually of those elected) of each house of the legislature.[37] In one state (Nebraska), a three-fifths vote of those elected to the unicameral legislature is necessary to submit the question to the voters. Twenty states have constitutional provisions whereby a two-thirds vote (usually of those elected or the equivalent) of each house of the legislature is necessary for submission of the question of calling a convention to the electorate.[38]

Required Vote of Electorate on Submission of Question. Of the 40 states having constitutional provisions for submission of the question of calling a convention to the voters (or where this is done in practice despite the absence of such provision in three of these states), 27 (now including Michigan) require a majority of those voting on the question to call a convention.[39] Thirteen states require a majority of those voting at the election to call a convention.[40]

Number and Qualifications of Delegates and other Provisions. The number of convention delegates is specified by constitutional provision in 14 states (including Michigan). Five other states specify a minimum number of delegates equal to the number in the lower house or both houses of the legislature, while two states provide a maxi-

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[36] Eleven states have no constitutional procedure for calling a convention, but action of the legislature has been widely interpreted as authoritative to accomplish this purpose in such states.

[37] In one of these (Kentucky) the majority vote in each house must be attained in two successive legislatures.

[38] Index Digest, pp. 17-18; Manual on State Constitutional Provisions, pp. 328-329. Book of the States 1960-61, p. 15. Discrepancies and incomplete coverage checked against state constitutional provisions.

[39] Index Digest, p. 19; Book of the States 1960-61, p. 15 - Idaho, Kansas and Nevada provisions misstated. In one of these (Kentucky) this majority must equal one-fourth of those voting in the last general election; in Nebraska it must be at least 35 percent of those voting at the election.

[40] Loc. cit. This does not include West Virginia where the question is submitted at a special election – therefore classified with those states requiring a majority voting on the question.

mum number. The Georgia provision requires convention representation to be based as nearly as practicable on population. Approximately one-half of the states have no specific provision relating to the number of convention delegates.[41] Nine states provide qualifications for convention delegates – in most cases the same as for senators or all legislators. At least six states (including Michigan) make the convention the judge of its delegates' qualifications. Most other state constitutions are not as largely self-executing or as specific and detailed with regard to such matters as compensation of delegates, the time of their election, or the organization and powers of the convention, although a few states such as Missouri and New York also have somewhat detailed provisions. Most state constitutions indicate that a constitutional convention may revise and/or amend the constitution.[42]

Vote Required on Submission of Convention's Work. In almost one-half of the states there are no constitutional provisions regarding submission to the voters of a convention's work of revision or amendment. This is usually provided for, in practice, by law. In a few states approval by the voters is constitutionally required, but the size of the vote is not specified. Fifteen states have provisions whereby the work of a convention must be approved by a majority of those voting on the proposal,[43] while seven states have provisions requiring approval by a majority of those voting at the election. Minnesota requires approval by three-fifths of those voting on the question, and New Hampshire approval by two-thirds of those voting on the question. Rhode Island requires approval by three-fifths of those voting at the election.[44]

Model State Constitution and U.S. Constitution

The Model State Constitution provides that the question of calling a convention may be submitted to the electorate by a majority vote of all members of the legislature. If the question has not been submitted within any period of 15 years, the secretary of the legislature shall submit it at the general election "in the fifteenth year following the last submission." The legislature is required to provide for a

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[41] Index Digest, p., 21; Manual of State Constitutional Provisions, pp. 318-319; 328-329.

[42] Index Digest, pp. 19-22; Manual on State Constitutional Provisions, p 319: 328-329. The Michigan provision leaves no doubt concerning the plenary powers of a constitutional convention. In some other states controversy has arisen with respect to legislative power to control or limit the subject matter of a convention's deliberation. "Limited Conventions" have been held in some states. The New Jersey convention of 1947 was limited only to the extent that reapportionment of the legislature could not be considered. A. L. Sturm, Major Constitutional Issues in West Virginia, pp. 132-133.

[43] Hawaii, one of these, requires that this majority be at least 35 percent of the total vote at the election.

[44] Index Digest, pp. 22-23; Book of the States 1960-61, p. 15.

"preparatory commission" before the vote on the question. The commission collects "information on constitutional questions to assist the voters." If the convention is authorized, this commission will continue "for the assistance of the delegates." A majority of those voting on the question is required to call the convention. If the convention is authorized, the delegates shall be chosen "at the next regular election not less than three months thereafter," unless the legislature provides by law for the election of delegates at the same time that the question is submitted. One delegate shall be elected from each existing legislative district. Further detailed provisions relate to the organization and procedure of the convention. This provision was intended to be comprehensively self-executing.

The Model's provision is similar to (but goes somewhat beyond) the Michigan provision in that the work of the convention shall be submitted to the voters "either as a whole or in such parts and with such alternatives as the convention may determine."

In the U.S. Constitution (Article V), a convention "for proposing Amendments" shall be called by the Congress upon application of the legislatures of two-thirds of the states. Amendments proposed by such a convention would also require ratification by three-fourths of the states (by the legislatures or conventions as indicated by the Congress).[45]

Comment

This provision has been recently amended and is largely self-executing. Some may feel that a revised constitution should be safeguarded from future tampering by restrictive provisions on general revision or amendment. Others, however, may argue that a constitutional revision which establishes a basic governmental structure with lasting qualities of flexibility and adaptability is likely to survive as a venerated instrument without overly rigid restrictions intended to make alteration difficult.

The constitutional convention is the most widely used means for general revision of state constitutions. A convention's revision is likely to command more popular support than the proposals of a constitutional revision commission. General revision has been attempted in several states by a single amendment. General constitutional revision in Georgia (1945) was accomplished in this manner.[46]

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[45] No federal convention for such purpose has ever been authorized since the adoption of the federal constitution 1787.

[46] The constitution proposed in Michigan in 1874 was framed by a revision commission and offered as a single amendment, but was rejected by the voters.

Constitutional conventions of the 1920's and 1930's (such as those in Missouri and New York), fearful that individual controversial provisions would defeat acceptance at the polls of their revision proposals as a whole, offered them for acceptance part by part. Many of these parts were rejected. The constitutions framed in the 1940's and 1950's such as those in Missouri, New Jersey, Hawaii, and Alaska were proposed as a single unit and adopted as such.

Since the various parts of a general constitutional revision are inter-related, problems and confusion could result from some parts of a revision being accepted and others rejected. If any parts of a constitutional revision, expected to be controversial, were to be submitted for approval separate from the main body of the proposed revision, it might be well to limit the number of these. It is clear that a constitutional convention in Michigan has power to submit its proposed revision in whole or in parts. It might be interpreted (in view of the very wide discretion allowed it under Section 4) as having power to submit its revision in whole and in parts at the same election – the vote on the-parts having effect only if the vote for the whole failed to carry.[47]

The present statute requires the constitutional convention to frame and publish 25,000 copies of an address to the people explaining any changes that may be made in the constitution and the reasons for such changes. This would appear not to be binding upon the convention in view of its independent and plenary power. However, the convention might well decide to write and publish an address of this kind in view of the success of this device in 1908, and its obvious value of throwing light upon the delegates' intentions in framing the various provisions for those who will be called upon for future interpretation of the document.

[47] It might possibly be interpreted as having authority to submit the whole revision at one election, and if the vote for it failed to carry, to submit the revision in parts at a succeeding election.

This index is based on the index prepared by the Legislative Service Bureau for the Constitution of the State of Michigan, compiled and published under the supervision of the Secretary of State, 1961.