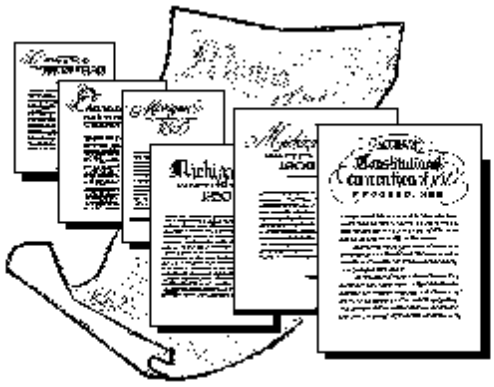
A Comparative Analysis of the Michigan Constitution

Volumes I

Articles VII



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CHAPTER VII JUDICIAL DEPARTMENT

(over)

Section Detail

VII JUDICIAL DEPARTMENT

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A. JUDICIAL POWER

Article VII: Section 1. The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 1 provided:

> The judicial power shall be vested in one supreme court, and in such other courts as the legislature may from time to time establish.

The 1850 constitution, Article VI, Section 1 provided:

> The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.

Constitution of 1908

The constitution of 1908 dropped the provision on municipal courts and authorized the legislature to establish by general law other courts of civil and criminal jurisdiction. According to the "Address to the People" the two-thirds vote was designed to guard against the creation of unnecessary courts.

Other State Constitutions

(In making the comparisons with other constitutions, reliance has been placed upon a 1959 study conducted by the Legislative Research Fund of Columbia University—Index Digest of State Constitutions. That source is hereafter referred to as ID.)

Most states (46) make provision in the constitution for establishment of the highest state court; ID, p. 215. Similarly, most states (40) provide for establishment of general trial courts (called circuit courts in Michigan); ID, p. 215. More-

over, 34 states have a general provision for the establishment of other courts by the legislature.

On the other hand, only 13 state constitutions provide for the establishment of probate courts, ID, p. 215; and only 26 provide for justices of the peace, ID, p. 215.

Nine states provide constitutionally for an intermediate court of appeals; ID, p. 215.

Comment

Three separate problems are posed by this section. The first has to do with the question of the unification of the court system; the second, with the need for and creation of a court of appeals; and the third with the place in the judicial system for courts of limited jurisdiction such as the justices of the peace.

Integration of Courts. The Model State Judiciary Article of the Section of Judicial Administration of the American Bar Association suggests this provision:

> § 1. The Judicial Power.
>
> The judicial power of the state shall be vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the district court, and one trial court of limited jurisdiction known as the magistrate's court.

Such a provision would achieve full unification and avoid many questions concerning the technicalities of jurisdiction of various separate courts.

Professor Charles W. Joiner of the University of Michigan Law School, who served as Chairman of the Joint Committee on Michigan Procedural Revision which recently promulgated a bill passed by the 1961 legislature to revise and modernize the judicature act in Michigan, comments on this subject in an article appearing in 38 U. of Detroit Law Journal 505 (1961):

> Although Michigan has not achieved complete integration of its court structure, it has succeeded in taking a number of substantial and worthwhile steps in recognizing the propriety and the need for an integrated court system. The appointment of a court administrator having active obligations in connection with the gathering of judicial statistics and recommending the transfer of circuit judges from one circuit to the other as needs are revealed; the power of the court to transfer judges to assist other circuits, to clean up dockets and to provide better judicial administration even against their will; the active judicial conference meeting annually involving all circuit judges in

> the state and meeting regionally in all areas of the state to discuss problems of judicial administration all point to a concern on the part of the judges about the need for an active integrated court system.
>
> How much more sound it would be to take the next step and provide that all courts in the state should be a part of a single court having all-inclusive powers including law, equity, probate, juvenile, family, criminal, etc. In the metropolitan areas, these courts could be divided into divisions to hear different types of cases. The advantage of this system would be that there could be no jurisdictional problems raised, no dismissals for technicalities of jurisdiction, greater expertise, and in many instances, economy in judicial manpower.
>
> The need is for far-reaching statutes and constitutional provisions creating an integrated court structure for the state embracing Pound's four general principles: (1) unification, (2) flexibility, (3) conservation of judicial manpower, and (4) responsibility. Unification can be accomplished by making all courts in the state a part of one court. Flexibility and conservation of judicial manpower can be accomplished by permitting the judges to be transferred as needs arise from one division to another and from one area to another. The center of responsibility for the ultimate enforcement of justice will be located in the judges of the highest division of that court, the Supreme Court. Provision must also be made for the growing metropolitan area in the state and the special problems encountered as a result of population growth and shift. Within the framework of the court structure provision must be made for a metropolitan court embracing the metropolitan area of Detroit and its environs, not limited by the arbitrary lines of city and county, having all-inclusive powers and sitting in various places in the metropolitan area, but a part of the larger single unified court of the state.

An alternative method of achieving substantial unification would be to provide in the constitution only for the supreme court, a court of appeals (if one is to be created), and the general trial court (circuit court). An additional provision could permit the legislature to establish such other courts as it deemed necessary. Thus, it may be felt that our present system of having separate probate courts, separate municipal courts in some cities, justice courts, recorder's court in Detroit, etc., presents too complicated a structure to be handled at the constitutional level, and that the problem should be handled at the legislative level under general constitutional authority.

Intermediate Court of Appeals. The question of establishing an intermediate court of appeals is an important one. The convention will have to decide both the question of need and the question of structure. Thirteen states today have such a court, and these states are those of heavy population and having large urban centers such

as New York, Ohio, Indiana, California and Illinois. Michigan is, to this extent, an exception to the pattern.

Professor Joiner, in the article referred to above, has commented on this question:

> During the past several years four separate and distinct facts point to the need for a re-examination of the appellate judicial structure of the state: (1) Population is increasing rapidly; economic activity is on the rise; people are living closer and closer together, creating more and more litigation. (2) The number of cases filed per year in the circuit courts of the state has increased during the past twenty years by fifty percent. (3) The Supreme Court has indicated a willingness to spend more time in the field of improving the administration of justice through the operation of the court administrator and through the Judicial Conference. (4) The concept of the minimum quality of justice for the state is changing. Although for many years criminal cases have not been appealed as a matter of right, the State Bar of Michigan has gone on record as recommending appeals as a matter of right in criminal cases.
>
> The work of the Michigan Supreme Court is as heavy as that of any other supreme court in a state of its size. Michigan is the only state of the heavily populated states that does not have an intermediate court of appeals. In 1959 a study was made which recommended and documented the need for an intermediate court of appeals as the means of providing a sound system of judicial administration at the appellate level. Alternatives were suggested and discussed but the only long-range solution to the problem faced by Michigan was for an intermediate court of appeals. If it were to be provided, all appeals should go from the circuit courts to the intermediate court of appeals. All appeals from the intermediate court of appeals to the Supreme Court would be by leave. This would bring appellate justice closer to the citizens of Michigan for the intermediate court would sit at various places throughout the state, would act more speedily and probably on many more interlocutory matters. This would also provide a method whereby the function of law-making by the judiciary could be supervised effectively at the highest level. The Supreme Court could concentrate on those cases in which guidance is needed in the development of the law of the state or in which conflicts exist between the various courts at the intermediate level or trial level.

The Model State Judiciary Article contains this provision:

> § 3. <u>The Court of Appeals</u>.
>
> The court of appeals shall consist of as many divisions as the supreme court shall determine to be necessary. Each division of the court of appeals shall

consist of three judges. The court of appeals shall have no original jurisdiction, except that it may be authorized by rules of the supreme court to review directly decisions of administrative agencies of the state and it may be authorized by rules of the supreme court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the supreme court shall specify by rules which shall, however, provide that a defendant shall have an absolute right to one appeal in all criminal cases and which may include the authority to review and revise sentences in criminal cases.

Courts of Limits Jurisdiction. Reference bas already been made to the possible unification of these courts, either in the constitution or by the legislature. Specific comment on the justices of the peace is found later under Section 15, and on probate courts under Section 13.

B. THE SUPREME COURT

1. Justice; Election; Term

Article VII: Section 2. The supreme court shall consist of one chief justice and associate justices, to be chosen by the electors of the state at the regular biennial spring election; and not more than two justices shall go out of office at the same time. The term of office shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 2, provided:

> The judges of the supreme court shall hold their offices for the term of seven years; they shall be nominated, and by and with the advice and consent of the senate, appointed by the governor. They shall receive an adequate compensation which shall not be diminished during their continuance in office. But they shall receive no fees nor perquisites of office, nor hold any other office of profit or trust under the authority of this state or of the United States.

The 1850 constitution, Article VI, Section 2 provided:

> For the term of six years and thereafter, until the legislature otherwise provide, the judges of the several circuit courts shall be judges of the supreme court, four of whom shall constitute a quorum. A concurrence of three shall

> be necessary to a final decision. After six years the legislature may provide by law for the organization of a supreme court, with the jurisdiction and powers prescribed in this constitution to consist of one chief justice and three associate justices, to be chosen by the electors of the state. Such supreme court, when so organized, shall not be changed or discontinued by the legislature for eight years thereafter. The judges thereof shall be so classified that but one of them shall go out of office at the same time. The term of office shall be eight years.

Constitution of 1908

The provision in the 1908 constitution for a supreme court was changed from the 1850 provision. The 1850 constitution provided that judges of the circuit court should serve as judges of the supreme court until the legislature provided by law for the organization of a supreme court.

The 1850 provision required one chief justice and three associate justices, while the 1908 constitution did not specify the number of associate justices. The 1908 constitution provided that the term of office be prescribed by law, while the 1850 provision specified an eight-year term.

Other State Constitutions

Other state constitutions do not always specify the mode of judicial selection, the number of judges, or the term of office. Thus, only 20 states provide for election at large, seven provide for a qualified election at large, four provide for selection by joint vote of the legislature, six states use a combination of appointment by the governor or nomination by the governor with approval by the legislature or the senate (ID, pp. 259-62).

So far as the number of judges is concerned, 11 states provide for seven judges; six states provide for five judges; 15 states provide for three, five, or seven judges with an added provision that the legislature may increase the number (ID, pp. 261-62).

A term of six years is provided for in nine states, while 22 states provide in the constitution for ending the term at different times for different members of the court (ID, p. 266).

Comment

A study in 1958 (Judicial Administration at the Appellate Level—Michigan) shows 21 states with a seven-man court, 19 states with five or fewer. The number may be specified in the constitution or left to legislative determination. The Model State Judiciary Article provides:

§ 2. The Supreme Court.

1. Composition. The supreme court shall consist of the chief justice of the state and (four) (six) associate justices of the supreme court.

Michigan's present constitution specifies neither the term nor the number of judges—both matters being left to the legislature. It would not be inappropriate to prescribe a term in the constitution for it is the length of the term that gives to the judge a substantial amount of judicial independence. A very long term tends to make him a more independent judge and of course independence of thought and action is one of the requisites of a good judge.

The question of the method of selecting judges is more fully discussed under Section 23.

2. Terms of Court

Article VII: Section 3. Four terms of the supreme court shall be held annually at such times and places as may be designated by law.

Constitutions of 1835 and 1850

The 1835 constitution was silent in respect to the number of terms of court and the place of meeting. The 1850 constitution contained a provision identical to the present provision.

Constitution of 1908

This section has not been amended and there has been no litigation.

Other State Constitutions

It is not too common for the state constitution to prescribe the number of terms of court. In some states the matter is left to the legislature, while in others it is left to court rule (ID, pp. 278-9).

Comment

This does not appear to be a desirable provision in a constitution.

3. Jurisdiction

Article VII: Section 4. The supreme court shall have a general superintending control over all inferior courts; and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only.

Constitutions of 1835 and 1850

The 1835 constitution was silent as to jurisdiction and the supreme court.

The 1850 constitution, Article VI, Section 3 provided:

> The supreme court shall have a general superintending control over all inferior courts, and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo, and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only.

Constitution of 1908

The 1850 provision was carried over in the 1908 constitution without change and there have been no amendments.

Other State Constitutions

It is quite difficult to compare state constitutions with respect to their provisions for the jurisdiction of the highest court. A great deal depends upon the underlying court structure. There is a general comparison in the ID, pp. 269-282. The nature of the problems involved are set out in the Comment below. It is possible to find in one or more constitutional examples of almost every kind of provision that is mentioned, and no particular pattern is apparent.

Comment

This small section covers three very important and somewhat technical matters concerning the court structure of the state. They relate (1) to the power in the supreme court to exercise superintending control over the lesser courts; (2) the jurisdiction of the supreme court (that is, what cases will it consider); and (3) the power to issue certain extraordinary writs.

Power of Superintending Control. The general superintending control power over all inferior courts given the supreme court by this section is one of the most significant powers given to the court in the constitution. This same power exists in a number of other states and is the envy of other states not having it. Without any express grant, the power is exercised in a haphazard way through the use of extraordinary writs. The provision should be retained for it serves to fix responsibility and it has enabled the supreme court to make great strides in the management of the judicial business of the state.

The Jurisdiction of the Supreme Court. The Model State Judiciary Article contains these provisions:

§ 2. Jurisdiction.

A. Original Jurisdiction. The supreme court shall have no original jurisdic-

> tion, but it shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction.
>
> B. Appellate Jurisdiction. Appeals from a judgment of the district court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the supreme court in criminal cases, that court shall have the power to review all questions of law and, to the extent provided by rule, to review and revise the sentence imposed

There are several distinct questions which the convention will have to resolve in connection with this aspect of the present provision. One is whether the supreme court will be compelled to hear all cases, or compelled to hear certain cases, or whether it will have discretion to select only cases of substantial significance or cases which will resolve conflicts which may develop among the lower courts. This is basically a question of determining which litigants can appeal as a matter of right (that is, the supreme court must hear the case). Obviously, if there is an intermediate court of appeals so that all litigants can get at least one appeal to that court as a matter of right, then it is easier to provide for discretionary jurisdiction in the highest court, and to limit the compulsory jurisdiction. If there is no intermediate court of appeals, then it is usual to give the highest court much more compulsory jurisdiction. There are many ways to describe the jurisdiction. For example, some states provide that the supreme court shall hear cases only from certain specified lower courts; some states provide compulsory jurisdiction according to the kind of case (certain criminal cases, or land titles, etc.); some provide for a combination; some provide that the supreme court must hear cases certified by certain lower courts as involving important questions; and some provide that the supreme court itself will accept cases just as the United States supreme court now does.

Another important question is whether the supreme court shall have any original jurisdiction—that is, can any cases be started in the supreme court. The present constitution lists certain writs which it may issue, and there is generally some inherent power in the judicial branch of the government. Moreover, the express power of superintending control would seem to carry with it a power to issue such orders and hear such cases as are necessary to exercise the superintending control over the inferior courts. This matter is closely allied to the next subject.

Power to Issue Extraordinary Writs. If it be decided to grant the court power to issue extraordinary writs, it hardly seems necessary to list them. A general clause, such as may be found elsewhere, that "the court may issue prerogative writs either

as original jurisdiction, in aid of its power of superintending control, or in aid of its appellate jurisdiction, and may hear and determine the same" would be adequate and would seem preferable to the restricted listing.

4. Court Rules; Law and Equity

Article VII: Section 5. The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of master in chancery is prohibited.

Constitutions of 1835 and 1850

The 1835 constitution was silent with respect to the power of the supreme court to establish rules of practice and with respect to the distinction between law and equity.

The 1850 constitution, Article VI, Section 5 provided:

> The supreme court shall, by general rules, establish, modify, and amend the practice in such court and in the circuit courts, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of master in chancery is prohibited.

Constitution of 1908

The only change from 1850 was to extend the rules to "all other courts of record." This section has not been amended.

Other State Constitutions

Ten constitutions provide in varying ways that there is to be no distinction between law and equity (ID, pp. 197-198).

Comment

This seems an extremely good provision which places the responsibility on the court for the smooth administration of justice by requiring it to make general rules to see that justice operates in an effective manner. This provision has been used as the model for provisions in other constitutions.

There is no longer any reason to maintain distinction between law and equity proceedings. Until these proceedings are merged, with the exception of the jury trial, it is wise to carry a provision such as contained in this rule. Perhaps the provision should be broadened to read: "The legislature and the supreme court shall... ." See the Union of Law and Equity: A Prerequisite to Procedural Revision, Joiner, C. W. and Geddes, R. A., 55 Mich. 1 Rev. 1059 (1957).

The Model State Judiciary Article suggests this provision:

§ 9. Rule Making Power.

The supreme court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system. The supreme court shall, by rule, govern admission to the bar and the discipline of members of the bar.

5. Appointments; Clerk, Reporter, Crier; Fees

Article VII: Section 6. The supreme court may appoint and remove its clerk, a reporter of its decisions and a court crier, each of whom shall perform such duties and receive such salary as shall be prescribed by law; and all fees, perquisites and income collected by the clerk shall be turned over by him to the state treasury and credited to the general fund. No justice of the supreme court shall exercise any other power of appointment to public office.

Constitutions of 1835 and 1850

The l835 constitution, Article VI, Section provided:

The supreme court shall appoint their clerk or clerks; ... .

The 1850 constitution, Article VI, Section 10 provided:

The supreme court may appoint a reporter of its decisions...but no judge of the supreme court...shall exercise any other power or appointment to public office.

And, the 1850 constitution, Article VI, Section 12:

...The supreme court shall have power to appoint a clerk for such supreme court.

Constitution of 1908

The 1908 constitution added provision for a court crier and provided a salary prescribed by law for the clerk, reporter, and crier.

Other State Constitutions

Clerks are normally appointed by the court or the judges (25 states) (ID, pp. 250-51). Seven states provide for election. Most state constitutions are silent on duties, though nine contain a provision that his duties shall be prescribed by law (ID, p. 251). In some states the term is fixed (14 states have fixed terms ranging from two to eight years), while in others the clerk serves at the pleasure of the court (ID, p. 252).

Only fourteen state constitutions provide for the appointment of a reporter. In nine he holds office at the pleasure of the court. In six, his duties are referred to "as provided by law."

Comment

The present provision of the constitution has been criticized as being unduly restrictive so far as appointing administrative personnel is concerned. The business of the court has grown tremendously, in addition to the fact that the supreme court is generally thought to be obligated to supervise the entire judicial system. Appointive selection seems desirable.

The Model State Judiciary Article contains this provision:

> § 2. Head of Administration Office of the Courts.
>
> The chief justice of the state shall be the executive head of the judicial system and shall appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the state. The chief justice shall have the power to assign any judge or magistrate of the state to sit in any court in the state when he deems such assignment necessary to aid the prompt disposition of judicial business. The administrator shall, under the direction of the chief justice, prepare and submit to the legislature the budget for the court of justice and perform all other necessary functions relating to the revenues and expenditures of the courts.

6. Decisions; Dissenting Opinions

Article VII: Section 7. Decisions of the supreme court, including all cases of mandamus, quo warranto and certiorari, shall be in writing, with a concise statement of the facts and reasons for the decisions;

> and shall be signed by the justices concurring therein. Any justice dissenting from a decision shall give the reasons for such dissent in writing under his signature. All such opinions shall be filed in the office of the clerk of the supreme court.

Constitutions of 1835 and 1850

The constitution of 1835 contained no such provision.

The constitution of 1850, Article VI, Section 10 provided:

> ...The decisions of the supreme court shall be in writing and signed by the judges concurring therein. Any judge dissenting therefrom shall give the reasons of such dissent in writing under his signature. All such opinions shall be filed in the office of the clerk of the supreme court... .

Constitution of 1908

The constitution of 1908 added "all cases of mandamus, quo warranto and certiorari" and the requirement for "a concise statement of the facts and reasons for the decisions." There have been no amendments.

Other State Constitutions

It is not uncommon to find provisions as to the number of judges who must concur to render a decision (ID, pp. 253-54). Only two constitutions other than Michigan's provide for filing the decisions with the clerk; only nine recite that the legislature is to provide for publication; only 11 provide that the decisions shall be in writing; and six set a time limit for disposition of a decision (ID, p. 254).

Comment

This section seems to be of doubtful value today in the constitution, and, in fact, at times it seems to be violated. There are times today when dissents do not carry a separate opinion giving the reasons for the dissent. There are also times when it would be wise for the court to file a memorandum instead of an extensive opinion. It covers matters which would seem appropriate for legislation or court rule.

C. CIRCUIT COURTS

1. Judicial Circuits; Terms; Districts

Article VII: Section 8. The state shall be divided into judicial circuits in each of which there shall be elected one circuit judge. The legislature may provide by law for the election of more than one circuit judge

> in any judicial circuit. A circuit court shall be held at least four times in each year in every county organized for judicial purposes. Each circuit judge shall hold court in the county or counties within the circuit in which he is elected, and in other circuits as may be provided by law. The legislature may by law arrange the various circuits into judicial districts, and provide for the manner of holding courts therein. Circuits and districts may be created, altered or discontinued by law, but no such alteration or discontinuance shall have the effect to remove a judge from office.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 4 provided:

> Judges of all county courts, associate judges of circuit courts, and judges of probate, shall be elected by the qualified electors of the county in which they reside, and shall hold their office for four years.

The 1850 constitution provided:

> The State shall be divided into judicial circuits, in each of which the electors thereof shall elect one circuit judge who shall hold his office for the term of six years, and until his successor is elected and qualified. The legislature may provide for the election of more than one circuit judge in the judicial circuit in which the city of Detroit is or may be situated, and in the judicial circuit in which the county of Saginaw is or may be situated, and in the judicial circuit in which the county of Kent is or may be situated, and in the judicial circuit in which the county of St. Clair is or may be situated. And the circuit judge or judges of such circuits, in addition to the salary provided by the constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county. And the board of supervisors of each county in the Upper Peninsula, and in the counties of Bay, Washtenaw, Genesee, Ingham and Jackson and the counties in the judicial circuit in which the county of Isabella is or may be situated in the Lower Peninsula, is hereby authorized and empowered to give and to pay the circuit judge of the judicial circuit, to which said county is attached, such additional salary or compensation as may from time to time be fixed and determined by such board of supervisors. This section as amended shall take effect from the time of its adoption. (Article VI, Section 6)
>
> The legislature may alter the limits of circuits or increase the number of the same. No alteration or increase shall have the effect to remove a judge from

> office. In every additional circuit established the judge shall be elected by the electors of such circuit and his term of office shall continue, as provided in this constitution for judges of the circuit court. (Article VI, Section 7)
>
> A circuit court shall be held at least twice in each year in every county organized for judicial purposes, and four times in each year in counties containing ten thousand inhabitants. Judges of the circuit court may hold courts for each other, and shall do so when required by law. (Article VI, Section 11)

Constitution of 1908

The three provisions in the 1850 constitution were combined into one section in the 1908 constitution with the provision relating to specific counties omitted. Other changes from 1850 included the requirement that court be held at least four times instead of two times in some counties. Provision was also added for combining circuits into judicial districts.

Other State Constitutions

Courts of general jurisdiction are called circuit courts in Michigan and 16 other states; district courts in 15 states; superior courts in six states; and common pleas courts in three states (ID, p. 244).

Twenty-nine other states provide that the legislature shall establish (or increase or decrease) the number of districts. Only three make each county a judicial district (ID, pp. 237-39).

Eight states specifically provide for one judge per district. Fourteen others provide for one judge per district with power in the legislature to increase or decrease. Seven states limit the power of the legislature to change by reference to population (ID, pp. 228-9).

Only eight states provide that the number of terms shall be prescribed by the legislature; only three provide that the judges shall fix the terms; and only six states besides Michigan provide for a fixed number of terms (ID, pp. 247-8).

Some other state constitutions provide for judges acting in other courts and districts. Five provide that he may so act as prescribed by law; six provide that he may act at the request of the other judge; eight provide that judges may hold court for each other; and three besides Michigan provide that a judge is obliged to act in other districts when required by law (ID, pp. 230-31).

Fourteen other states provide that where the legislature changes the districts, such change is not to effect removal of a judge from office (ID, p. 235).

Comment

The question of the method of selection of circuit court judges will be discussed later under Section 23.

The present provision permits the creation, alteration and discontinuance of circuits and districts, but even with that provision the circuits in this state are now woefully out of balance. Some circuits have a caseload of as few as 200 cases per judge, while other circuits have as many as 1,600 cases per judge. The provision of the Model State Judiciary Article, set out below, gives the supreme court the power to determine districts and could perhaps alleviate this maldistribution.

§ 4. The District and Magistrate Courts.

1. Composition. The district court shall be composed of such number of divisions and the district and magistrate's courts shall be composed of such number of judges as the supreme court shall determine to be necessary, except that each district shall be a geographic unit fixed by the supreme court and shall have at least one judge. Every judge of the district and magistrate's courts shall be eligible to sit in every district.

2. Judges; Elections and Terms

Article VII: Section 9. Circuit judges shall be elected on the first Monday in April, nineteen hundred eleven, and every sixth year thereafter. They shall hold office for a term of six years and until their successors are elected and qualified. They shall be ineligible to any other than a judicial office during the term for which they are elected and for one year thereafter.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 4 provided:

Judges of all county courts, associate judges of circuit courts, and judges of probate, shall be elected by the qualified electors of the county in which they reside, and shall hold their office for four years.

The 1850 constitution provided:

Each of the judges of the circuit courts shall receive a salary, payable quarterly. They shall be ineligible to any other than a judicial office during the term for which they are elected, and for one year thereafter. All votes for any person elected such judge for any office other than judicial, given either by

the legislature or the people, shall be void. (Article VI, Section 9)

The first election of judges of the circuit courts shall be held on the first Monday in April, one thousand eight hundred and fifty-one, and every sixth year thereafter. Whenever an additional circuit is created, provisions shall be made to hold the subsequent election of such additional judge at the regular elections herein provided. (Article VI, Section 20)

Constitution of 1908

There was no substantial change in the 1908 constitution—salaries are now provided for in Section 12.

Other State Constitutions

Method of Selection of General Trial Court Judges

21 states provide that these judges shall be elected by the qualified voters of a district (ID, pp. 226-28).

5 states other than Michigan provide they shall be elected by qualified voters of circuit, county or district (supra).

1 state provides that the legislature shall appoint said judges upon nomination of governor (supra).

2 states declare that the governor shall appoint them with advice and consent of senate (supra).

3 states provide they shall be elected by legislature (supra).

Term of General Trial Court Judges

8 states specifically provide for a term of four years (ID, p. 235).

7 states provide for a term of four years and until their successors are elected and qualified (supra).

9 states specifically declare a term of six years (supra)

4 states other than Michigan provide for a term of six years and until successors are elected and qualified (supra).

4 states declare term to be eight years (supra).

1 state provides term is to be fourteen years (supra).

Twenty states including Michigan provide that the judge is not to hold any other office during term (ID, pp. 225-26).

Comment

The question of the method of selecting circuit judges will be discussed under Section 23.

3. Jurisdiction

Article VII: Section 10. Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this constitution and not prohibited by law, and appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto and certiorari and to hear and determine the same; and to issue such other writs as may be necessary to carry into effect their orders, judgments and decrees and give them general control over inferior courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the supreme court shall by rule prescribe.

Constitutions of 1835 and 1850

The 1835 constitution contained no provision relating to the jurisdiction or powers of the circuit courts.

The 1850 constitution, Article VI, Section 8 provided:

> The circuit court shall have original jurisdiction in all matters civil and criminal not excepted in this constitution, and not prohibited by law, and appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other writs necessary to carry into effect their orders, judgments and decrees, and give them general control over inferior courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the supreme court shall by rule prescribe.

Constitution of 1908

The 1850 provision was carried over in the constitution of 1908 with only minor changes in phraseology. Section 10 has not been amended.

Other State Constitutions

Original Jurisdiction

10 states provide that the general trial courts shall have original jurisdiction, as provided by law (ID, pp. 241-43).

9 states recite that the courts will have original jurisdiction over cases at law (supra).

12 states declare original jurisdiction over equity cases (supra).

9 other states provide that general trial courts shall have original jurisdiction over civil matters except as provided in constitution or law (supra).

9 other states provide that general trial courts shall have original jurisdiction over criminal matters except as provided by constitution or law (supra).

5 states including Michigan provide that the general trial courts shall have original jurisdiction over all matters criminal and civil not excepted by this constitution or prohibited by law (supra).

Appellate Jurisdiction

17 states provide appellate jurisdiction shall be prescribed by law (ID, pp. 240-41).

5 states describe appellate jurisdiction by character of cases (supra).

24 states including Michigan provide appellate jurisdiction as described by courts (supra).

Supervisory Jurisdiction

4 states other than Michigan declare that the general trial court shall have supervisory control over inferior courts and tribunals (ID, p. 275).

Very few states specify in their constitutions for specific writs (ID, pp. 248-9).

Comment

It would seem unnecessary to detail the specific writs in the constitution. A broader grant of power would be better drafting. The supervisory control over inferior courts and tribunals which is authorized by this section is as valuable to the circuit courts as is the superintending control to the supreme court. Only recently has this power begun to be used in an extensive way to bring improvement to the justice of

the peace system. It would be continued. The last clause in the section should be clarified to make certain that supreme court rule can vest the circuit courts with jurisdiction. The present sentence contains an ambiguity on this point.

The Model State Judiciary Article provides as follows:

> § 2. District Court Jurisdiction.
>
> The district court shall exercise original general jurisdiction in all cases, except in so far as original jurisdiction may be assigned exclusively to the magistrate's court by the supreme court rules. The district court may be authorized, by rule of the supreme court, to review directly decisions of state administrative agencies and decisions of magistrate's courts.

4. Clerk; Vacancies

Article VII: Section 11. The clerk of each county organized for purposes shall be clerk of the circuit court for such county. The judges of the circuit courts may fill any vacancy in the offices of county clerk or prosecuting attorney within their respective jurisdictions, but shall not exercise any other power of appointment to public office.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 5 provided:

> ... the electors of each county shall elect a clerk, to be denominated a county clerk, who shall hold his office for the term of two years, and shall perform the duties of clerk to all the courts of record to be held in each county, except the supreme court and court of probate.

The 1850 constitution provided:

> ... The judges of the circuit court within their respective jurisdictions may fill vacancies in the office of county clerk and of prosecuting attorney; but no judge of the supreme court or circuit court shall exercise any other power or appointment to public office. (Article VI, Section 10)
>
> The clerk of each county organized for judicial purposes shall be the clerk of the circuit court of such county. (Article VI, Section 12)

Constitution of 1908

The present provision was carried over from the 1850 constitution with only changes in wording. Section 11 has not been amended.

Other State Constitutions

Election or Appointment of Clerks

14 states provide that he be elected by the qualified electors of the county (ID, pp. 219-20).

4 states besides Michigan provide he is to be the county clerk (supra).

Vacancies in Office of Clerk

5 states besides Michigan provides in various ways that the judge or judges shall fill the vacancy (ID, pp. 221-22).

Comment

This provision has given rise to no difficulty.

5. Salary of Judges

Article VII: Section 12. Each of the judges of the circuit courts shall receive a salary payable monthly. In addition to the salary paid from the state treasury, each circuit judge 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. In any county where such additional salary is granted it shall be paid at the same rate to all circuit judges regularly holding court therein.

Constitutions of 1835 and 1850

The 1835 constitution was silent with respect to judicial salaries.

The 1850 constitution provided:

... And the circuit judge or judges of such circuits, in addition to the salary provided by the constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county. And the board of supervisors of each county in the Upper Peninsula, and in the counties of Bay, Washtenaw,

Genesee, Ingham and Jackson and the counties in the judicial circuit in which the county of Isabella is or may be situated in the Lower Peninsula, is hereby authorized and empowered to give and to pay the circuit judge of the judicial circuit, to which said county is attached, such additional salary or compensation as may from time to time be fixed and determined by such board of supervisors. This section as amended shall take effect from the time of its adoption. (Article VI, Section 6)

Each of the judges of the circuit courts shall receive a salary, payable quarterly. They shall be ineligible to any other than a judicial office during the term for which they are elected, and for one year thereafter. All votes for any person elected such judge for any office other than judicial, given either by the legislature or the people, shall be void. (Article VI, Section 9)

Constitution of 1908

The present provision provides for monthly payment of salary instead of the quarterly payment provided for in the 1850 constitution.

Other State Constitutions

Judge's Salary Amount

24 states provide he shall be compensated as prescribed by law (ID, pp. 224-25).

8 states provide for a fixed dollar amount, or a dollar minimum (supra).

2 states besides Michigan provide that he may receive supplemental compensation from the county (supra).

12 states specifically recite that his salary is not to decrease during term (supra).

2 states provide for mileage (supra).

6 states forbid any fees or perquisites (supra).

Judge's Salary - When Paid

6 states provide it shall be payable at stated time (supra).

4 states declare it to be paid quarterly (supra).

2 other states provide it shall be paid monthly (supra).

Comment

This section permits circuit judges in one circuit to be paid more than circuit judges in another if the local circuit so desires. This is thought by many to be a wise provision since each local circuit can then pay what it feels necessary to attract and hold high quality judges. It has on occasion created some misunderstanding as between judges. A uniform pay could be prescribed, or, the present system could be retained with an added proviso that the additional salary is to be paid at the same rate to all circuit judges holding court in the county. This then will include judges who are assigned to a county in which the judges are receiving a higher salary and will permit the assigned judge to draw from that county the additional salary paid to local judges. This seems fair for he is doing the work of the local judges.

D. PROBATE COURTS

1. Jurisdiction

Article VII: Section 13. In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 3 provided:

> A court of probate shall be established in each of the organized counties.

The 1850 constitution, Article VI, Section 13 provided:

> In each of the counties organized for judicial purposes there shall be a court of probate. The judge of such court shall be elected by the electors of the county in which he resides, and shall hold his office for four years, and until his successor is elected and qualified. The jurisdiction, powers and duties of such courts shall be prescribed by law.

Constitution of 1908

The present provision is similar to the 1850 provision, but the “original jurisdiction in all cases of juvenile delinquents and dependents” was added.

Other State Constitutions

15 other states set out probate jurisdiction in various ways; e.g., as conferred by law; matters pertaining to orphans' business; power to grant letters testamentary and administration (ID, pp. 321-22).

6 states specifically provide that general trial courts are to have probate jurisdiction (ID, p. 243).

Comment

If the Pound idea of unification, flexibility, conservation of judicial manpower, and responsibility is to be carried forward in this state, the power now vested in the probate courts should be vested in circuit court as is done in a number of states. This would permit the circuit courts to divide the judicial business, to have their own experts as is done at the present time, but prevent dismissals for lack of jurisdiction or for being in the wrong court. It also would tend to reduce the total number of judges to some extent. In a great many counties in the state the probate court would become a probate division of the circuit court to which judges would be assigned on the basis of their competence and interest but with some flexibility of judicial manpower.

In any event, there is some question of the desirability of having the probate courts, as a court of limited jurisdiction, specified in the constitution.

2. Election and Term of Office

Article VII: Section 14. Judges of probate shall be elected in the counties in which they reside, and shall hold office for four years and until their successors are elected and qualified. They shall be elected on the Tuesday succeeding the first Monday of November, nineteen hundred twelve, and every four years thereafter. The legislature may provide by law for the election of more than one judge of probate in counties with more than one hundred thousand inhabitants, and may provide for the election of such judges in such counties at alternate biennial elections.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 4 provided:

> Judges of all county courts, associate judges of circuit courts, and judges of probate, shall be elected by the qualified electors of the county in which they reside, and shall hold their office for four years.

The 1850 constitution provided:

> In each of the counties organized for judicial purposes there shall be a court of probate. The judge of such court shall be elected by the electors of the county in which he resides, and shall hold his office for four years, and until his successor is elected and qualified. The jurisdiction, powers and duties of such courts shall be prescribed by law. (Article VI, Section 13)
>
> The first election of judges of the probate courts shall be held on the Tuesday succeeding the first Monday of November, one thousand eight hundred and fifty-two, and every fourth year thereafter. (Article VI, Section 21)

Constitution of 1908

The present provision was carried over from the 1850 constitution with the added provision of providing by law for more than one probate judge in counties with more than 100,000 inhabitants. This section has not been amended.

Other State Constitutions

Election or Appointment

> 8 other states provide that probate judges shall be elected by the electors in the counties (ID, p. 320).

Term

> 3 states specifically set term at two years (ID, p. 321).
>
> 2 states specifically set term at four years (supra).
>
> 3 states specifically set term at four years and until successor is qualified (supra).
>
> 1 state declares term to be five years (supra).
>
> 1 state declares term to be six years (supra).
>
> 1 state declares term to be six years (supra).

Number

3 states declare there shall be one judge for each court (ID, p. 320).

1 other state recites that legislature may provide for election of additional judge in counties over so many population (supra).

Comment

The question of the selection of the judge of probate will be discussed under Section 23.

E. JUSTICES OF THE PEACE

1. Election; Vacancies; Justices in Cities

Article VII: Section 15. There shall be elected in each organized township not to exceed four justices of the peace, each of whom shall hold the office for four years and until his successor is elected and qualified. At the first election in any township they shall be classified as shall be prescribed by law. A justice elected to fill a vacancy shall hold the office for the residue of the unexpired term. The legislature may provide by law for justices in cities.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 6 provided:

> Each township may elect four justices of the peace, who shall hold their offices for four years; and whose powers and duties shall be defined and regulated by law. At their first election they shall be classed and divided by lot into numbers one, two, three, and four, to be determined in such manner as shall be prescribed by law, so that one justice shall be annually elected in each township thereafter. A removal of any justice from the township in which he was elected, shall vacate his office. In all incorporated towns, or cities, it shall be competent for the legislature to increase the number of justices.

The 1850 constitution, Article VI, Section l7, provided:

> There shall be not exceeding four justices of the peace in each organized township. They shall be elected by the electors of the township, and shall

hold their offices for four years and until their successors are elected and qualified. At the first election in any township they shall be classified as shall be prescribed by law. A justice elected to fill a vacancy shall hold his office for the residue of the unexpired term. The legislature may increase the number of justices in cities.

Constitution of 1908

The present provision was carried over from the 1850 constitution with some changes in wording. Section 15 has not been amended.

Other State Constitutions

Justices of Peace, Election or Appointment

9 states provide they shall be elected in each district (ID, pp. 307-8).

5 states declare they shall be elected in each county (supra).

4 other states provide they shall be elected in each township (supra).

2 states provide that judges of general trial courts are to be justices of peace in certain cases (supra).

3 states recite that the governor shall appoint them with consent of the senate (supra).

Justices of Peace, Vacancy

2 other states provide for election for unexpired term (ID, p. 310).

5 states declare that some other judicial officer shall have duties of justice of peace until next election (supra).

Justices of Peace, Term

12 other states provide for a term of four years (ID, p. 310).

8 other states set term at two years (supra).

2 states set term at six years, 2 states set term at seven years (supra).

Comment

Professor Charles Joiner, in the article referred to in the Comment to Section 1, gives the following analysis of the justice courts:

> The justice of the peace is an outgrowth of township government in the state. With the change in the character of the state resulting from population increase and shift, townships more and more are becoming obsolete. In addition to this, the greatly increased ease of transportation has made county government more closely related to the individual citizen at the present time than was township government at an earlier time in our history.
>
> It is difficult for lay justices to perform adequately the functions of a judge. If the qualifications of the justice could be raised so that a reasonably competent lawyer could serve as a justice in a way to make him sufficiently independent from court fees and give him the necessary independence of thought and action, there is no reason why the justice system could not be maintained in a modified form. This necessarily, however, means consolidation of justice courts and integration into the judicial system with the circuit and other courts of the state. What really is needed is a county judicial officer or officers on salary to handle, among other like matters, the minor judicial business covered now by the justices of the peace. These judicial officers should be a part of the whole court system of the state.
>
> A suggested statute to establish county courts of record was proposed by the judicial council of 1945. Since that time the legislature on several occasions has given consideration to the problem of the justices of the peace. On no occasion, however, has sufficient pressure been brought to bear to upgrade the minor court justice, thus to provide the essential kind of judicial officer.
>
> The problem does not exist in the cities, for in cities there are municipal courts superseding the activities of the justice of the peace. In the counties, however, we find many justices, some of whom are good and some of whom are very, very bad. Our citizens are entitled to better than we have thus far given them.

To this might be added the fact that there is a serious question as to the constitutionality of the justice of the peace system as it is now operating in the state of Michigan. Although the justice's fees in an individual case do not vary depending upon whether or not the defendant is found guilty (this would clearly be unconstitutional), there is some evidence to the effect that law enforcement officials find some justices more effective than others and bring their cases to these justices, thereby substantially increasing the fees available for these justices. This has been the basis for a judicial attack upon the justice of the peace system elsewhere. To have the compensation of a judicial officer tied to the fees he collects from litigants presents what seems to be an unnecessary hazard to proper judicial impartiality.

As was suggested in the Comment to Section 1, consideration may be given to leaving the justice courts in operation but removing them from the constitution. This would leave them as legislative courts subject to unification after a proper study of all lower courts had been made.

2. Jurisdiction

Article VII: Section 16. In civil cases, justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars and concurrent jurisdiction to the amount of three hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law. They shall also have such criminal jurisdiction and perform such duties as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 6 provided:

> Each township may elect four justices of the peace, who shall hold their offices for four years; and whose powers and duties shall be defined and regulated by law.... In all incorporated towns, or cities, it shall be competent for the legislature to increase the number of justices.

The 1850 constitution, Article VI, Section 18 provided:

> In civil cases, justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars, and concurrent jurisdiction to the amount of three hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law. They shall also have such criminal jurisdiction and perform such duties as shall be prescribed by the legislature.

Constitution of 1908

This section was carried over from the 1850 provision. There have been no amendments. An amendment was proposed by J.R. 1, 1933, to increase jurisdictional amount to $1,500 in cities of over 250,000, but was defeated at the November election, 1934.

Other State Constitutions

Jurisdiction - civil

> 20 other states' constitutions give justice of peace courts jurisdiction in civil cases not to exceed a certain amount, ranging from $100 to $300 (ID, pp. 304-5).
>
> 15 states provide that the jurisdiction (in some cases limited by amount) shall be conferred by law (supra).

Jurisdiction - criminal

> 9 other states declare that criminal jurisdiction shall be as provided by law with no exceptions (ID, pp. 305-6).
>
> 8 states provide the legislature may confer criminal jurisdiction but with some exceptions (supra).

Jurisdiction - in general

> 17 states specifically state that justice of peace court jurisdiction is not to be regulated by private, local or special laws (supra, p. 306).

Comment

The Model State Judiciary Article contains this provision:

3. Magistrate's Court Jurisdiction. The magistrate's court shall be a court of limited jurisdiction and shall exercise original jurisdiction in such cases as the supreme court shall designate by rule.

Under a completely unified court system, the jurisdiction of the lower courts could be set either by court rule (as suggested in this provision) or by the legislature if the convention so decided. The present Michigan provision authorized the legislature to fix jurisdiction.

It has been suggested that the $500 limit is too low, and that the court which handles "small claims" should have a broader jurisdiction.

F. GENERAL PROVISIONS

3. Courts of Record; Seal; Qualification of Judges of Supreme and of Circuit Courts

Article VII: Section 17. The supreme court and the circuit and probate courts of each county shall be courts of record, and shall each have a common seal. Justices of the supreme court and judges of all circuit courts in this state elected or appointed after July 1, 1955, shall at the time of such election or appointment be under 70 years of age and licensed to practice law in this state.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 5 provided:

> The supreme court shall appoint their clerk or clerks; and the electors of each county shall elect a clerk, to be denominated a county clerk, who shall hold his office for the term of two years, and shall perform the duties of clerk to all the courts of record to be held in each county, except the supreme court and court of probate.

The 1850 constitution, Article VI, Section 15 provided:

> The supreme court, the circuit and probate courts of each county shall be courts of record, and shall each have a common seal.

Constitution of 1908

The first sentence of the present provision was carried over from the 1850 constitution. At an election April 4, 1955, an amendment was ratified which added this language to the present Section 17: "Justices of the supreme court and judges of all circuit courts in this state elected/or appointed after July 1, 1955, shall at the time of such election or appointment be under 70 years of age and licensed to practice law in this state."

Other State Constitutions

Court of Record

Only 7 other states specifically provide that the highest and general trial courts shall be courts of record (ID, p. 219).

Only 6 other states specifically provide that the probate court shall be a court of record (ID, p. 318).

Seal

Only 2 other states provide that the probate court shall have a seal (ID, p. 322).

5 other states declare the highest court and general trial courts shall have a seal (ID, p. 278; p. 245).

Qualifications of Highest Court Judges

14 states declare the highest court judge must be at least 30 (ID, pp. 263-64).

1 state declares he must be at least 25 (ID, pp. 263-64).

1 other state says he may not be over 70 (ID, pp. 263-64).

10 states specifically provide he must be learned in law (supra, p. 263).

11 others state he must have been admitted to practice, with varying qualifications (supra).

14 declare he must be citizen of United States (supra, p.263).

9 declare he must be citizen of state (supra, p. 263).

Qualifications of General Trial Court Judges

Qualifications set out by other states include these:

12 states require that he be a citizen of the United States (ID, pp. 231-32).

5 states require that he have had residence in the district for some years preceding election (supra).

13 states require that he have had his residence in the state for from 1 to 5 years (supra).

21 states also provide that the judge's residence while in office is to be in the district (ID, pp. 233-34).

2. Conservators of the Peace

Article VII: Section 18. Justices of the supreme court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision.

The 1850 constitution, Article VI, Section 19 provided:

Judges of the supreme court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions.

Constitution of 1908

The 1850 provision was continued in the 1908 constitution with minor wording changes. This section has not been amended.

Other State Constitutions

Only 2 other states have a similar provision for general trial court judges (ID, p. 229).

Only 6 other states have a similar provision for highest court judges (ID, p. 262).

Only 8 other states have a similar provision for justices of the peace (ID, p. 307).

Comment

It is not clear that this provision in the constitution serves any useful purpose.

3. Vacation of Office

Article VII: Section 19. Whenever a judge shall remove beyond the limits of the jurisdiction for which he was elected, or a justice of the peace from the township in which he was elected, or by a change in the boundaries of such township shall be placed without the same, he shall be deemed to have vacated the office.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 6 provided:

> ... A removal of any justice from the township in which he was elected shall vacate his office. In all incorporated towns, or cities, it shall be competent for the legislature to increase the number of justices.

The 1850 constitution, Article VI, Section 22 provided:

> Whenever a judge shall remove beyond the limits of the jurisdiction for which he was elected, or a justice of the peace from the township in which he was elected, or by a change in the boundaries of such township, shall be placed without the same, they shall be deemed to have vacated their respective office.

Constitution of 1908

The 1850 provision was carried over in the 1908 constitution with only minor changes in wording. This section has not been amended.

Other State Constitutions

Several states have comparable provisions

Comment

If the section is to be retained, and it probably should be retained, the meaning of the word “remove” should be clarified. It is probably intended to refer to the domicile of the judge, and not to the body of the judge, and the drafting could be improved.

4. Vacancy; Appointment of Successor

Article VII: Section 20. When a vacancy occurs in the office of judge of any court of record, it shall be filled by appointment of the governor, and the person appointed shall hold the office until a successor is elected and qualified. When elected, such successor shall hold the office the residue of the unexpired term.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision.

The 1850 constitution, Article VI, Section 14 provided:

> When a vacancy occurs in the office of judge of the supreme, circuit or probate court, it shall be filled by appointment of the governor, which shall continue until a successor is elected and qualified. When elected, such successor shall hold his office the residue of the unexpired term.

Constitution of 1908

The 1908 constitution contained, with minor changes in wording, the 1850 provision.

Other State Constitutions

Highest Court

> 22 other states provide that the vacancy shall be filled by the governor, with different provisions for next term (ID, pp. 266-67).

General Trial Court

> 19 states recite that a vacancy here is to be filled by the governor, with provisions for new election (ID, pp. 235-36).

Comment

This section is so intimately tied with the method of selecting judges that it will be discussed along with the election of judges under Section 23.

5. Circuit Court Commissioner

Article VII: Section 21. The legislature may provide by law for the election of 1 or more persons in each organized county who may be vested with judicial powers not exceeding those of a judge of the circuit court at chambers.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision.

The 1850 constitution, Article VI, Section 16 provided:

> The legislature may provide by law for the election of one or more persons in each organized county, who may be vested with judicial powers not exceeding those of a judge of the circuit court at chambers.

Constitution of 1908

The 1850 provision was identical to the present provision.

Other State Constitutions

Four other states recite that legislature may provide for election of circuit court commissioners (ID, p. 222).

Comment

The circuit court commissioners provided for in this section perform valuable services in this state. Perhaps thought should be given to the appointment of circuit court commissioners by the circuit judge, since they serve really to expedite the work of the general court.

6. Style of Process

Article VII: Section 22. The style of all process shall be: "In the Name of the People of the State of Michigan."

Constitutions of 1835 and 1852

The 1835 constitution, Article VI, Section 7 provided:

> The style of all process shall be, "In the name of the people of the state of Michigan"; and all indictments shall conclude against the peace and dignity of the same.

The 1850 Constitution, Article VI, Section 35 provided:

> The style of all process shall be, "In the Name of the People of the State of Michigan."

Constitution of 1908

This section was carried over in the 1908 constitution. Article V, Section 20 provides that "The style of the laws shall be: 'The People of the State of Michigan enact.'"

Other State Constitutions

Only two other states have the same provision (ID, p. 325).

Twenty-two states provide the style shall be "The state of....." (supra).

7. Non-partisan Elections for Judiciary

Article VII: Section 23. All primary elections and elections of justices of the supreme court, judges of the circuit court, judges of probate courts and all county judicial officers provided for by the legislature under section 21 of article 7 of the constitution shall be non-partisan and shall be conducted as prescribed by law. All elections at which candidates for said judicial offices are nominated are designated "primary elections." Nominations for justices of the supreme court shall be made as now or hereafter provided by law; nominations for all other said judicial offices shall be made at non-partisan primary elections. Except as in the constitution otherwise provided, all primary election and election laws, including laws pertaining to partisan primaries and elections, shall, so far as applicable, govern nominating procedures, primary elections and elections hereunder.

> There shall be printed upon the ballot under the name of each incumbent judicial officer, who is a candidate for nomination or election to the same office, the designation of that office.

Constitutions of 1835 and 1850

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

Constitution of 1908

The constitution of 1908, as originally adopted, did not contain this provision. The section was originally adopted in 1939 and contained several times as many words which, by specifying in detail election procedures, was designed to make the provision self-executing. The provision was amended in 1947 to add still further detail regarding the primary. In 1955 the provision was amended to its present form, with most of the detail omitted and providing that the primaries and elections shall be conducted as prescribed by law.

Other State Constitutions

Highest Court Judges

4 states provide for non-partisan ballot (ID, pp. 259-61).

3 states constitutionally provide for non-partisan nomination of judges (supra).

1 state provides in constitution for partisan nomination (supra).

General Trial Courts

3 states recite that both nomination and election of judges is to be non-partisan (ID, pp. 226-28).

There are no provisions in other states for non-partisan election of probate judges.

Comment

The question of the method of selection of judicial officers in all courts is one of great importance. At issue are the two fundamental safeguards: (1) an independent judiciary; and (2) high quality judicial personnel. It is, of course, known that either an elective system (which Michigan now has) or an appointive system (which the federal courts and some other states have) can produce some excellent judges and also some mediocre or poor judges. The question to be decided is which system is more likely to produce consistently the high quality, impartial judges which are essential to the proper functioning of our judicial system.

The Model State Judiciary Article contains these provisions:

§ 5. Selection of Justices, Judges and Magistrates.

1. Nomination and Appointment. A vacancy in a judicial office in the state,

other than that of magistrate, shall be filled by the governor from a list of three nominees presented to him by the judicial nominating commission. If the governor should fail to make an appointment from the list within sixty days from the day it is presented to him, the appointment shall be made by the chief justice or the acting chief justice from the same list. Magistrates shall be appointed by the chief justice for a term of three years.

2. Eligibility. To be eligible for nomination as a justice of the supreme court, judge of the court of appeals, judge of the district court, or to be appointed as a magistrate, a person must be domiciled within the state, a citizen of the United States, and licensed to practice law in the courts of the state.

§ 6. Tenure of Justices and Judges

1. Term of Office. At the next general election following the expiration of three years from the date of appointment, and every ten years thereafter so long as he retains his office, every justice and judge shall be subject to approval or rejection by the electorate. In the case of a justice of the supreme court, the electorate of the entire state shall vote on the question of approval or rejection. In the case of judges of the court of appeals and the district court, the electorate of the districts or district in which the division of the court of appeals or district court to which he was appointed is located shall vote on the question of approval or rejection.

2. Retirement. Every justice and judge shall retire at the age specified by statute at the time of his appointment, but that age shall not be fixed at less than sixty-five years. The chief justice is empowered to authorize retired judges to perform temporary judicial duties in any court of the state.

3. Retirement for Incapacity. A justice of the supreme court may be retired after appropriate hearing, upon certification to the governor, by the judicial nominating commission for the supreme court that such justice is so incapacitated as to be unable to carry on his duties.

4. Removal. Justices of the supreme court shall be subject to removal by the impeachment process. All other judges and magistrates shall be subject to retirement for incapacity and to removal for cause by the supreme court after appropriate hearing. No justice, judge, or magistrate shall, during his term of office, engage in the practice of law. No justice, judge, or magistrate shall, dur-

ing his term of office, run for elective office other than the judicial office which he holds, or directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign.

§ 7. Compensation of Justices and Judges.

1. Salary. The salaries of justices, judges, and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the highest salary paid to an officer of the executive branch of the state government other than the governor.

2. Pensions. Provision shall be made by the legislature for the payment of pensions to justices and judges and their widows. In the case of justices and judges who have served ten years or more, and their widows, the pension shall not be, less than fifty per cent of the salary received at the time of retirement or death of the justice or judge.

3. No Reduction of Compensation. The compensation of a justice, judge, or magistrate shall not be reduced during the term for which he was elected or appointed.

§ 8. The Chief Justice.

1. Selection and Tenure. The chief justice of the state shall be selected by the judicial nominating commission from the members of the supreme court and he shall retain that office for a period of five years, subject to reappointment in the same manner, except that a member of the court may resign the office of chief justice without resigning from the court. During a vacancy in the office of chief justice, all powers and duties of that office shall devolve upon the member of the supreme court who is senior in length of service on that court.

§ 10. Judicial Nominating Commissions.

There shall be a judicial nominating commission for the supreme court and one for each division of the court of appeals and the district court. Each judicial nominating commission shall consist of seven members, one of whom shall be the chief justice of the state, who shall act as chairman. The members of the bar of the state residing in the geographical area for which the court or division sits shall elect three of their number to serve as members of said commission, and the governor shall appoint three citizens, not admitted to practice law before the courts of the state, from among the residents of the geographical area for which the court or division sits. The terms of office and compensation for members of a judicial nominating commission shall be fixed by the legislature, provided that not more than one-third of a commission

> shall be elected in any three-year period. No member of a judicial nominating commission shall hold any other public office or office in a political party or organization and he shall not be eligible for appointment to a state judicial office so long as he is a member of a judicial nominating commission and for a period of five years thereafter.

Professor Joiner, in the article referred to in the Comment to Section 1, provides this analysis:

> Two special qualifications distinguish the judge from other state officials: (l) reasonable legal ability, and (2) independence of thought and action. Other qualities essential to the good judge, such as honesty, intelligence, and the ability to understand human problems with detachment, are also necessary for other types of public officials. Because of these additional qualities, it is important to examine the means of selecting men to be judges and the term of their office to determine whether we are obtaining men with these qualities.
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> At the present time Michigan judges are elected to the Supreme Court on a non-partisan ballot after a partisan convention nomination, and for the circuit courts in a non-partisan election after a non-partisan primary. Their terms of office respectively are eight years and six years. I submit that neither the method of selection nor the term of office is conducive to producing the kind and quality of persons essential for the Michigan judiciary and the independence of thought and action that is essential to carrying out the job of the judge. New ideas and new devices need to be brought forward to improve our system.
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> The National Conference of Judicial Selection and Court Administrators, held in 1959, recommended that 'security of tenure must be provided for judges. If methods of selection are such that the highest quality of lawyers are chosen for the bench, long terms of office or good behavior appointments are desirable.' The Conference went on to recommend that the American Bar Association's plan for the selection of judges is a means whereby qualified persons can be selected for the bench and tenure assured. In this plan the appointment is made by the governor from a panel suggested by a judicial commission. Thereafter the judge runs against his record only, not against other persons who may desire his job. This permits the electorate to remove an incompetent judge but prevents a popularity contest to determine whether or not a judge should continue in office. Because the judge will not have to stand for re-election against a popular prosecuting attorney, etc., he is more assured of tenure and can devote himself to the solution of his problems with the independence of thought and action essential to good judicial conduct. Certainly in this state more thought needs to be given to means whereby

> judicial personnel are originally selected and more protection should be given the judge from the chance of losing an election solely because a more popular person may happen to be running.
>
> In the federal government, judges are appointed by the chief executive with the advice and consent of the Senate. The term is good behavior. This has provided a quality of judicial personnel that is very high indeed. In areas in which there is a great popular pressure for one kind of judicial decision, as for example, in the South on the issue of civil rights, it has been the federal bench that withstands the pressure and decides the cases upon the merits. Perhaps our state can learn from this experience.

In 1953, the state bar of Michigan presented the affirmative and the negative on a then new proposal for gubernatorial appointment of judges nominated by a commission—the so-called "Missouri Plan." The following are excerpts from the negative argument presented by Stanley E. Beattie.[1]

> At the risk of referring to the obvious let us recall some of the landmarks in the progress of the American people toward democracy.
>
> First, the bill of rights is reckoned by many an integral part of the original constitution of the United States. It is said that without the promise of the bill the constitution could not have been adopted. (The first Congress sponsored the said bill in its first session.) The whole tenor of the bill of rights is a vigorous assertion of the power of the people. Is it necessary to remind the reader that the bill of rights lays emphasis on freedom of speech, of the press, of the right to assemble, of the right to jury trial in civil and criminal cases and of the reservation of rights in the people, except as expressly delegated? Second, the body of electors of the president was and remains constituted in form as possessing power of discretion and of decision in the electors in their choice of president. Third, amendments XIII, XIV and XV expanded the right of suffrage, re-emphasized the inherent rights of the people, and secured them against invasion by the states. Fourth, amendment XVII took the election of senators from a select group, viz., the state legislators, and placed that right in the people. Fifth, amendment XIX expanded the franchise of the people by giving women the vote.

[1] Michigan State Bar Journal, Vol. 32, 1953, pp. 42-3.

While these expansions of democratic sovereignty were in ferment and in process, the people of Michigan by the constitution of 1835 (VI, section 4) determined that they would elect judges of their county courts, associate judges of circuit courts and judges of probate. In the constitution of 1850, article VI, section 2, the people determined to elect supreme court justices.

The foregoing instances are cited to demonstrate the admittedly obvious: The people are determined that they shall have the say not only as to what the law shall be, but as to those who shall make, enforce and interpret the law.

Law is logic, ethics, economics, sociology and politics. (The word "politics" is used in the sense of political science.) Is it seemly for the governing body of the State Bar of Michigan, for the lawyers of Michigan, and indeed for anyone, to tell the people of Michigan that they are not competent to have their say as to who shall be judges of law, so defined?

Please look back to the constitutional amendment rejected in 1938. It concerns supreme court justices, but the basic principle of the rejected amendment is in part the warp and woof of the plan now under debate. The governor shall appoint but he shall appoint upon nomination by a commission. Who composes the commission? Three lawyers, three judges and three laymen. If a candidate does not receive the endorsement of that commission, he cannot be judge. How can it be expected that the people will take kindly to such a disparagement of their elective choice? Surely the proponents of the Plan will admit that they cannot as sure the people that judges so appointed will turn out well. And surely it is impossible to present a statistic to demonstrate that, percentage wise, appointive judges are more faithful, honorable, diligent and learned than those elected by the people.