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COURT REFORM, TEXAS STYLE

by

Clarence A. Guittard*

REFORM of the judiciary has been a perennial theme among Texas lawyers. In July, 1918, the Texas Bar Association, meeting at Wichita Falls, heard an address by Roscoe Pound on "Judicial Organization"¹ and adopted the report of a special committee proposing to replace article V of the Constitution of 1876 with a judicial article that would be considered advanced, even by the standards of 1967. The proposal embodied the principles of unification, flexibility of jurisdiction and assignment of judicial personnel, and responsible supervision of the entire system by the supreme court, all as recommended by Pound.²

In support of this proposal, the association published a pamphlet pointing out the need for judicial reform in emphatic terms:

The public is in open rebellion. The best of our judges, working in the present machine, cannot always administer justice. The rightful compensation of lawyers is enormously decreased, their labors increased, by the intolerable expense, complication, delays and uncertainties inherent in the system. To a great extent the courts are being abandoned, because men would rather submit to wrong than litigate. Therefore the general public, and the professional, demand is for reform, and if the legal profession does not with careful deliberation bring forth a plan, it is inevitable that crude and injurious plans will be advanced, and probable that some of them will be adopted.³

Almost fifty years have passed since these words were published, and article V remains substantially intact. Yet no similar outcries are being heard today from any responsible group in the Texas bar. Our judicial structure has not broken down, antiquated though it may be. It has proved more adaptable to change than anyone would have had reason to suspect. The worst evils predicted have never quite materialized. Docket congestion, for instance, has never been and is not now as serious in Texas courts as it is in many metropolitan areas in the country.⁴ Important progress has been made toward efficiency in the operation of the Texas courts but broad and sweeping changes have not been our style of reform in the past, and probably will not be in the foreseeable future. The discussion which follows will indicate something of the Texas pattern of progress—a gradual process of specific constitutional amendment and statutory enactment. Although this process may not satisfy the advocates

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¹ 37 TEX. BAR ASS'N PROCEEDINGS 69 (1918).

² *Id.* at 150; resolution adopted, *id.* at 228. Justices of the peace were to be replaced by courts of record presided over by lawyers, district judges were to be authorized to sit together or separately, terms of court were to be abolished, and times and places of holding court were to be determined by a committee of judges.

³ 2 J. AM. JUD. SOC'Y 133 (1919).

⁴ See INST. JUD. ADMINISTRATION, CALENDAR STATUS STUDY—1966, STATE TRIAL COURTS OF GENERAL JURISDICTION, PERSONAL INJURY CASES (1966).

of thoroughgoing reforms, perhaps the reformers would do well to consider more modest alternatives to make sure that our judicial structure is capable of dealing with the new problems which an expanding population and the litigation explosion will inevitably bring.

I. GOALS OF COURT REORGANIZATIONS

Before reviewing the reforms of the past or anticipating those of the future, it may be helpful to define some of the goals upon which proponents of judicial reform are generally agreed. The great American authority in this field was, of course, Roscoe Pound, whose celebrated address to the American Bar Association in 1906 on "The Causes of Popular Dissatisfaction with the Administration of Justice,"⁵ is generally credited with initiating the movement for judicial reform in this country.⁶ In that address Pound pointed out that the American judicial structure was archaic in its multiplicity of courts with rigid districts and limited jurisdictions. He called attention to the unified court system under the British Judicature Acts of 1873 and 1875⁷ as the model for modern judicial organization. In 1909 Pound was a member of a committee of the American Bar Association which proposed a thorough reorganization of American courts on the British model.⁸ According to the recommendations of this committee, there should be one great court with three branches: a county court branch to try petty offenses and hear small causes, a superior court with general original civil and criminal jurisdiction, and a court of appeal with general appellate jurisdiction. All judges should be judges of the whole court and should be assigned administratively to some particular branch or division, but should be eligible to serve wherever their services were most needed. The administration of the court should be supervised by a judicial officer, preferably the chief justice of the ultimate court of appeal, who would have responsibility to see that the manpower of the court was used effectively. He would have the power of assignment of judges and of causes, and for each branch or locality a local judicial officer would have the same power, subject to his supervision.⁹

The three principles of unity, flexibility, and administrative supervision within the judiciary embodied within the above recommendations, have been features of practically every court reorganization plan seriously advanced since that time, including, as we have seen, the proposals of the Texas Bar Association in 1918.¹⁰ They were included in the recommendations for improvements in court organization, administration and procedure adopted by the House of Delegates of the American Bar Association in 1938¹¹ and in the Model State Judicial Article approved by the

⁵ 35 F.R.D. 273 (1964); 29 A.B.A. REP. 395 (1906).

⁶ Calvert, *Problems of Judicial Administration*, 25 TEXAS B.J. 639 (1962); Wigmore, *The Spark That Kindled the White Flame of Progress*, 46 J. AM. JUD. SOC'Y 50 (1962); *Proceedings Honoring Roscoe Pound*, 35 F.R.D. 241 (1964).

⁷ Judicature Acts, 36 & 37 Vict. c. 66 (1873), 39 & 40 Vict. c. 77 (1875).

⁸ ABA, Special Committee To Suggest Remedies and Formulate Proposed Laws To Prevent Delay and Unnecessary Cost in Litigation.

⁹ 34 A.B.A. REP. 578 (1909).

¹⁰ Note 2 *supra*.

¹¹ 24 A.B.A.J. 726 (1938).

House of Delegates in 1962.¹² They have been advocated by the American Judicature Society since its very beginning.¹³ More recently they have been included in the recommendations of the President's Commission on Law Enforcement and Administration of Justice.¹⁴

All major court reorganization measures which have been enacted in the last half century have adopted the same basic approach. Congress has led the way by reorganizing the federal judiciary.¹⁵ Among the states the pioneer effort was the New Jersey reform of 1947.¹⁶ New judicial articles establishing unified court systems have also been adopted in Arizona,¹⁷ New York,¹⁸ North Carolina,¹⁹ Illinois,²⁰ and Colorado,²¹ as well as in the new states of Alaska²² and Hawaii.²³

II. TEXAS PROPOSALS FOR GENERAL COURT REORGANIZATION

In Texas, proposals for general court reorganization, following the same pattern, from the Bar Association's proposal of 1918 down to the present, have not lacked for distinguished supporters, but have met only hostility or indifference on the part of the legislature. Among leading proponents of Pound-style reforms may be mentioned C. S. Potts,²⁴ Samuel B. Dabney,²⁵ James P. Alexander,²⁶ Robert W. Stayton,²⁷ Charles T. McCormick,²⁸ Robert G. Storey,²⁹ Charles I. Francis,³⁰ and Robert W. Calvert.³¹ Judiciary reform has been a longstanding project of the Texas Civil Judicial Council.³² In 1941 Chief Justice Alexander put the issue to the council succinctly:

[W]e need a reorganization of our judicial system. Our present system is composed of too many independent units, without any responsible head. We should have a single judicial system which all the members thereof have

¹² 87 A.B.A. REP. 130, 392 (1962); 47 J. AM. JUD. SOC'Y 8 (1963).

¹³ 46 J. AM. JUD. SOC'Y 110 (1962); 3 J. AM. JUD. SOC'Y 131 (1919); 1 J. AM. JUD. SOC'Y 5 (1917).

¹⁴ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 157 (1967).

¹⁵ Chandler, *Some Major Advances in the Federal System*, 31 F.R.D. 307 (1963); Parker, *The Integration of the Federal Judiciary*, 56 HARV. L. REV. 563 (1943); *Unification of the Judiciary, Federal and State*, 1 TEXAS L. REV. 214 (1923).

¹⁶ N.J. CONST. art. VI; English, *New Jersey Reorganizes Its Judicial System*, 34 A.B.A.J. 11 (1958); Medina, *Improving the Administration of Justice—Evolution or Revolution*, 47 J. AM. JUD. SOC'Y 51, 53 (1963); Milmed, *The New Jersey Constitution of 1947*, N.J. CONST. art. XIII, N.J. STAT. ANN. xxvii (1954).

¹⁷ ARIZ. CONST. art. 6.

¹⁸ N.Y. CONST. art. 6.

¹⁹ N.C. CONST. art. IV.

²⁰ ILL. CONST. art. 6; Freels, *Illinois Court Reform, A Two-Year Success Story*, 49 J. AM. JUD. SOC'Y 206 (1966); *A New Judicial Article for Illinois*, 45 J. AM. JUD. SOC'Y 283 (1962).

²¹ COLO. CONST. art. 6; *Colorado Adopts Merit Selection Plan*, 29 TEXAS B.J. 1012 (1966).

²² ALASKA CONST. art. IV.

²³ HAWAII CONST.; HAWAII REV. LAWS 9-26 (Supp. 1965).

²⁴ Potts, *Unification of the Judiciary; A Record of Progress*, 2 TEXAS L. REV. 445 (1924).

²⁵ Dabney, *Judicial Reconstruction*, 6 TEXAS L. REV. 302 (1928).

²⁶ 13 TEX. CIV. JUD. COUNCIL ANN. REP. 10 (1941).

²⁷ Stayton, *A Prospect of Justice*, 6 TEXAS B.J. 91 (1943).

²⁸ McCormick, *Modernizing the Texas Judicial System*, 21 TEXAS L. REV. 673 (1943).

²⁹ Storey, *Should Our Texas Constitution Be Revised?*, 11 TEXAS B.J. 621 (1948).

³⁰ Francis, *Proposed Judiciary Article*, 16 TEXAS B.J. 12 (1953).

³¹ Calvert, *Problems of Judicial Administration*, 25 TEXAS B.J. 639 (1962).

³² 12 TEX. CIV. JUD. COUNCIL ANN. REP., REPORT OF PRESIDENT MARION P. CHRESTMAN 18 (1904).

interchangeable duties with responsibility on an authoritative head, with authority not merely of reversal for trial errors, but to supervise the work of the entire system and see that it gets the job done.³³

After much study the council drafted a proposed revision of article V of the Texas Constitution and, in April 1946, submitted it to a joint meeting of the State Bar Committee on Administration of Justice and the Legislative Committee of the Judicial Section of the State Bar for suggestions and criticism. In the light of these discussions, the proposal was re-drafted³⁴ and was presented in the following year to the House Judiciary Committee, which buried it in a subcommittee.³⁵

The next major movement was instituted in 1952 by Cecil E. Burney, who, as president of the state bar, appointed a special committee composed of both lawyers and laymen to draft a new judicial article for submission to the legislature.³⁶ Charles I. Francis of Houston was named chairman. This committee went to work promptly,³⁷ drew up a proposed judiciary article embodying most of the features of the Judicial Council's plan, and published it in the *Texas Bar Journal*.³⁸ A referendum by state bar members on this proposal resulted in 2,171 votes in favor and 1,465 votes against.³⁹ At the committee's suggestion, the 53rd Legislature, which was already well advanced in its regular session, referred the matter to the Texas Legislative Council for further study and report to the next legislature.⁴⁰ Meanwhile, however, strong opposition to the proposal developed in the state bar. It was the subject of a lengthy debate in the Resolutions Committee at the 1954 annual meeting in San Antonio, and the convention assembly adopted a resolution to prohibit anyone from presenting any proposed revision of article V to the legislature as a proposal of the state bar until approved by a majority of the members by secret ballot. Accordingly, the board of directors ordered another referendum and the December issue of the *Bar Journal* contained a revised version of the proposed new article V, together with comments by Chairman Francis supporting it and three articles opposing it.⁴¹ Among the features drawing the strongest objections were the broad power given the supreme court to create, rearrange and abolish courts, the nominating commission method of selecting judges, and the merger of the supreme court and court of criminal appeals. The second referendum resulted in rejection of the proposal by a vote of 3,800 to 1,960, killing any hope of a general reform sponsored by the state bar.⁴²

Since this decisive setback, no major effort toward broad-scale court re-

³³ Note 26 *supra*.

³⁴ 18 TEX. CIV. JUD. COUNCIL ANN. REP. 13 (1946). This revision was presented to the bar in 9 TEXAS B.J. 347 (1946); 10 TEXAS B.J. 179 (1947).

³⁵ 21 TEX. CIV. JUD. COUNCIL ANN. REP. 13 (1949).

³⁶ 15 TEXAS B.J. 107 (1952).

³⁷ *Id.* at 197.

³⁸ 16 TEXAS B.J. 12 (1953).

³⁹ *Committee Reports: Constitutional Revision*, 16 TEXAS B.J. 398 (1953).

⁴⁰ 16 TEXAS B.J. 578 (1953); House Con. Res. No. 129, General & Special Laws of Texas, 53d Leg. 1160 (1953).

⁴¹ The articles are by R. R. Holloway of Brownwood, Carl Runge of San Angelo and William E. Loose of Houston; 17 TEXAS B.J. 686 (1954).

⁴² 18 TEXAS B.J. 65 (1955).

organization has been undertaken in Texas. The most noteworthy expression on the subject has been made by the Texas Conference on Judicial Selection, Tenure and Administration, composed of 300 judges, lawyers and laymen, who convened in Austin in April 1964, under the sponsorship of the state bar and the Joint Committee for the Effective Administration of Justice. At this conference the lawyers and laymen, voting separately, adopted "consensus statements," each of which declared, "Our present number of unorganized and fragmented courts, operating without efficient supervision and with little administrative control, is archaic and costly."⁴³ The conference called for "a single and unified court system, with definite supervisory and rule-making powers vested in the supreme court, to provide efficient and economical operation of the courts of Texas."⁴⁴

From the foregoing it appears that although there has been a wide consensus among reform-minded lawyers, judges, and even laymen on the principles of unification, flexibility and administrative supervision within the judiciary as goals of the judicial reform movement, efforts to obtain legislative action on proposals for general court reorganization in Texas so far have been uniformly unsuccessful. There has been no major alteration in the Texas judicial structure since the courts of civil appeals were added by the amendment of 1891. We still have essentially the same one-judge, one-court organization at the trial level, with rigid jurisdictional lines and with each judge largely independent of any supervisory control, except by way of appellate review. Yet it would be a mistake to conclude that there has been no progress toward those goals, as a brief review of our judicial history will show.

III. PAST STEPS TOWARD MODERN COURT ORGANIZATION

The pattern of one-judge, one-court structures arose in part out of pioneer conditions in late 18th and early 19th century America, as Roscoe Pound has explained. This was a departure from the pattern of the English common-law courts, which had several judges each and were centralized at Westminster. In England law judges traveled a circuit at certain seasons to conduct jury trials in the several counties nisi prius but legal arguments were heard and judgments were rendered by the courts sitting at Westminster. In America, west of the Alleghenies such centralized courts of first instance would have involved great expense and considerable inconvenience, and also would have been antithetical to emerging democratic criteria of selection and control. American courts were thought to belong to the people—they were organized in an effort to bring the administration of justice to each man's doorstep and to give each man a measure of control over the judiciary. To this end there was a tendency to divide each state geographically into circuits or districts, each with one court and one local judge without any type of administrative supervision. Judges were elected popularly and their tenure of office was for a term of

⁴³ *Lawyers, Laymen, Urge Modernization of Texas' Antiquated Judicial System*, 27 TEXAS B.J. 299, 305 (1964).

⁴⁴ *Id.* at 306.

years. This pattern prevailed in twenty-three of the thirty-four states at the beginning of the Civil War.⁴⁵

One difficulty with this system of independent localized trial courts is that it presupposes districts of substantially equal population so that one judge may suffice for each. With the population rapidly expanding, the conditions so presupposed did not continue very long, and under the rigid constitutional provisions it was thought necessary to add additional independent single-judge courts rather than simply to add additional judges to existing courts.⁴⁶

The framers of the constitution of the Republic of Texas, following the pattern familiar to them, provided in article IV, section 2: "The Republic of Texas shall be divided into convenient judicial districts, not less than three, nor more than eight. There shall be appointed for each district a judge, who shall reside in the same, and hold the courts at such times and places as Congress may by law direct."⁴⁷ This provision was carried forward into the first state constitution in 1845,⁴⁸ and the same pattern was incorporated into the constitution of 1876.⁴⁹

The disadvantage of this primitive judicial organization was soon felt. The constitution of the Republic contained no provision for anyone to sit in place of a judge who was disqualified or disabled.⁵⁰ This defect was provided for by the first step toward a unified judicial system; a constitutional provision authorizing judges to "exchange districts or hold court for each other when they deem it expedient."⁵¹ This provision, which has been carried forward into subsequent constitutions,⁵² has supplied the constitutional basis for whatever flexibility exists today in assignment of judges and causes.⁵³

With the growth of the population, it was inevitable that the one judge per district formula would lead to difficulties. Not long after the present

⁴⁵ ROSCOE POUND, ORGANIZATION OF COURTS, 89, 91, 122, 130, 158 (1940); see 3 COOLEY, BLACKSTONE 352 (2d ed.). Popular selection of the judiciary for limited terms and localism in state court structures, the two dominant characteristics of nineteenth century American state systems, were the outgrowth of complex historical factors. Popular election was to a large extent the result of expanding democratization in the pre-civil war period. HAYNES, THE SELECTION AND TENURE OF JUDGES 80-101 (1944); HURST, THE GROWTH OF AMERICAN LAW 40 (1950). Localism was similarly a popular movement, but its rationale was broader than simple principles of democracy; an element of proximity to the people served was added. HURST, *op. cit. supra* at 92-97. During this short period of flux American innovators were experimenting with the codification movement.

⁴⁶ POUND, *op. cit. supra* note 45, at 130. Willard Hurst, after noting this by-product of localism, found that:

[A] characteristic cluster of features grew about the central factor of the locality as the unit of judicial organization: (1) a tendency to increase the number of courts and judges in rather mechanical response to the pressure of business; (2) complications of venue, process, and varied local procedure; (3) almost complete autonomy in each judge as to the efficiency, energy, and volume of work done in his court; (4) the absence of any central authority empowered to shift judicial manpower from underworked to overworked circuits.

HURST, *op. cit. supra* note 45, at 94.

⁴⁷ SAYLES, CONSTITUTIONS OF TEXAS 161 (1888).

⁴⁸ *Id.* at 197.

⁴⁹ TEX. CONST. art. V, § 7; SAYLES, *op. cit. supra* note 47, at 539.

⁵⁰ Wynne & Lawrence v. Underwood, 1 Tex. 48 (1846).

⁵¹ TEX. CONST. art. IV, § 14 (1845); Sayles, *op. cit. supra* note 47, at 199.

⁵² TEX. CONST. art. V, § 11 (1955).

⁵³ Chadick, *Texas-Style Court Administration*, 26 TEXAS B.J. 375 (1963).

constitution was adopted, additional judicial manpower was needed in Bexar and Dallas Counties. The 21st Legislature sought to meet this need by dividing each of these counties into two districts and running the division line through the courthouses so that each judge could hold court in his own district, though each was given concurrent jurisdiction throughout the county.⁵⁴ This arrangement was upheld by the supreme court in *Lytle v. Half*⁵⁵ and apparently it worked well enough until the Dallas County courthouse burned down. Since no suitable building could be procured in which each judge could sit within his own district, the commissioners' court procured a building wholly within the 44th District. This expedient was soon challenged. The supreme court held that although the legislature evidently intended each court to be held in its own district, it also intended both to sit in the same building, and since it was impossible under the unforeseen circumstances to comply with both requirements, the latter would prevail because of its greater importance to the public convenience. In this connection Justice Henry observed: "There is no constitutional restriction upon the power of the legislature to authorize both courts to be held in the same district."⁵⁶ Thus was the pattern set for the courts in our present multi-district counties.

In these same statutes creating additional district courts in Bexar and Dallas Counties the legislature took another step toward a unified judiciary. The judges were given power to transfer cases from one court to another.⁵⁷ It is apparent that if there are two district courts with concurrent jurisdiction throughout the county, and cases may be freely transferred from one court to another, and if the judges are authorized to act for each other, the system is similar to one court with two judges. This tendency toward practical unity while maintaining theoretical distinction between courts has been developed much further in the Special Practice Act of 1923⁵⁸ and in the Administrative Judicial District Act of 1927.⁵⁹

The Special Practice Act went a long way toward practical unification of the district courts in multi-district counties. Originally it applied only to civil litigation in counties having two or more district courts with civil jurisdiction only, but it was amended in 1939 to include civil litigation in all counties with five or more district courts, civil or criminal.⁶⁰ Most of the provisions of the act were carried forward into rule 330 of the Texas Rules of Civil Procedure and made applicable to all district courts with continuous terms.⁶¹ Since the terms of all district courts were made continuous in 1955,⁶² the act now applies to every district court.

⁵⁴ Acts of 1889, ch. 128, at 152; ch. 140, at 165, 9 GAMMEL, LAWS OF TEXAS 1180, 1193 (1889).

⁵⁵ 75 Tex. 128, 12 S.W. 610 (1889).

⁵⁶ *Wheeler v. Wheeler*, 76 Tex. 489, 13 S.W. 305 (1890).

⁵⁷ Acts of 1889, ch. 129, at 154; ch. 140, at 166, 9 GAMMEL, LAWS OF TEXAS 1181, 1194 (1889).

⁵⁸ TEX. REV. CIV. STAT. ANN. art. 2092 (1923).

⁵⁹ TEX. REV. CIV. STAT. ANN. art. 200a (1959).

⁶⁰ Acts of 1939, 46th Legislature, ch. 33, at 218; 31 GAMMEL, LAWS OF TEXAS ch. 33, at 218 (1939).

⁶¹ TEX. R. CIV. P. 330.

⁶² TEX. REV. CIV. STAT. ANN. art. 1919 (1964).

The provisions of the act pertinent to unification are sections 21, 22, 24, 25 and 26 (now subdivisions (e), (f), (g), (h) and (i) of rule 330). These provide that any judge may transfer cases from one court to another and may try cases pending in any other court without formal transfer, either in his own courtroom or in the court where the case is pending.⁶³ A judge may hear any part of any case, or any preliminary matter, and another judge may complete the hearing and render judgment.⁶⁴ To prevent a narrow construction, section 25 declares, perhaps too broadly, that, "any judgment rendered or action taken by any judge in any of said courts in the county shall be valid and binding."⁶⁵ The judges are directed to select one of their number as presiding judge, who may assign any case to any judge and may assign any judge to try any case.⁶⁶ When any judge becomes disengaged, he is directed to notify the presiding judge, who must transfer to him the next case ready for trial in any of the courts.⁶⁷

The constitutionality of the act has been upheld⁶⁸ and its provisions have been applied liberally in a variety of circumstances to sustain acts of judges in cases not actually pending in their courts.⁶⁹ The only limitation has been the practical consideration that a judge cannot act in a case which is actually in process of trial before another judge.⁷⁰

Proponents of a unified court system cite as one of its principal advantages the flexibility it offers in permitting judicial manpower to be shifted from one county to another as the volume of litigation requires. The same legislature that passed the Special Practice Act sought to deal with this problem also. It passed House Bill No. 537, which attempted to impose on the chief justice, or on any associate justice of the supreme court named by him, the duty to designate a district judge to call a special term in another district. This could be done "when required in the public

⁶³ TEX. REV. CIV. STAT. ANN. art. 2092, § 21 (1964).

⁶⁴ TEX. REV. CIV. STAT. ANN. art. 2092, §§ 24, 25 (1964).

⁶⁵ TEX. REV. CIV. STAT. ANN. art. 2092, § 25 (1964).

⁶⁶ TEX. REV. CIV. STAT. ANN. art. 2092, § 26 (1964).

⁶⁷ TEX. REV. CIV. STAT. ANN. art. 2092, § 22 (1964). Judge Smedley, as a member of the Commission of Appeals, recognized that the sweeping terms of this statute "apparently make the judge of each district court in effect or to an extent the judge of any other district court in the county." And the Dallas court of civil appeals has gone so far as to say that in effect it "obliterates all distinctions between the civil district courts of Dallas County and constitutes each a part of a greater judicial organism." See also, *DeZavala v. Scanlan*, 65 S.W.2d 489, 494 (Tex. Comm'n App. 1933); *DeWitt v. Republic Nat'l Bank*, 168 S.W.2d 711 (Tex. Civ. App. 1943).

⁶⁸ *Currie v. Dobbs*, 10 S.W.2d 438 (Tex. Civ. App. 1928).

⁶⁹ *DeBusk v. Cadenhead*, 346 S.W.2d 145 (Tex. Civ. App. 1961) (judge who presided at trial may have another judge hear testimony on motion for new trial and have such testimony recorded for first judge to read in passing on motion); *Bickman v. Herrin Transp. Co.*, 344 S.W.2d 953 (Tex. Civ. App. 1961) (judges could be changed in course of jury trial and judge who sat at first part of trial could pass on motion for new trial); *Rawlins v. Stahl*, 329 S.W.2d 308 (Tex. Civ. App. 1959) (after temporary injunction was granted, another court could hear merits and dissolve injunction); *Mullins v. Mullins*, 300 S.W.2d 133 (Tex. Civ. App. 1957) (though only court which granted divorce may modify child support order, it was presumed that judge who signed modification order was sitting for judge of that court); *Harkness v. McQueen*, 207 S.W.2d 676 (Tex. Civ. App. 1947) (new trial could be granted in different court from that which rendered original judgment); *Angelo v. Holland Tex. Hypotheek Bank*, 52 S.W.2d 785 (Tex. Civ. App. 1932) (judge could consolidate and try separate suits pending in different courts without having one transferred). Similar results have been reached under a local statute authorizing district judges in Harris County to act for each other. *Boyles v. Cohen*, 230 S.W.2d 604 (Tex. Civ. App. 1950) *error ref. n.r.e.*; *Porch v. Rooney*, 275 S.W. 494 (Tex. Civ. App. 1925) *error ref.*

⁷⁰ *DeZavala v. Scanlan*, 65 S.W.2d 489 (Tex. Comm'n App. 1933); *Harkness v. McQueen*, 207 S.W.2d 676 (Tex. Civ. App. 1948).

interest by reason either of the urgency of business, or the accumulation thereof." In the same manner, the Supreme Court was also authorized to designate a district judge to discharge the duties of the regular judge of another district along with the regular judge, with both judges sitting in the same court at the same time. In order to facilitate this procedure, district clerks were required to make an annual report to the clerk of the supreme court concerning the number of cases on their dockets.⁷¹ This was too much for the supreme court justices of that day, who felt that they were already overburdened, and held the bill unconstitutional as an attempt to confer upon them non-judicial duties.⁷² It is interesting to note that Justice Greenwood, who wrote the opinion for the court, was not at that time chairman of the Committee on Jurisprudence and Law Reform of the Texas Bar Association. At its meeting that year the association adopted his report recommending "that the State be redistricted into not over nine judicial districts, with enough judges in each district to attend to the business therein, with power lodged in the presiding judge to send any district judge anywhere in the district, to the end that business may be disposed of promptly."⁷³ This proposal seems to have been a forerunner of the Administrative Judicial District Act, generally known as article 200a, which was enacted by the 40th Legislature.⁷⁴ This act divides the state into nine administrative judicial districts, each with a presiding judge appointed by the governor. The presiding administrative judge is the key administrative officer in the Texas judicial system. He is empowered to assign judges to hold court in other districts when the regular judge is absent, disabled or disqualified, and also when the regular judge is present and trying cases.⁷⁵ He has the duty to call a conference of all judges in the administrative district at least once a year for consultation concerning disposition of both civil and criminal business, and such conference is empowered to adopt rules concerning the order of trials and such other rules and regulations as may be necessary.⁷⁶ By the amendment of 1957, it is made the duty of the judges to serve in the courts to which they are assigned, but no penalty is provided for refusal.⁷⁷ The amendment of 1961 provides incentive pay of twenty-five dollars per day in addition to his expenses,⁷⁸ and another amendment in 1965 adds the differential, if any, between the pay of the visiting judge and that of the regular judge of the court to which he is assigned.⁷⁹ The 1961 amendment also directs the chief justice of the supreme court to call meetings of the presiding judges to study the conditions of the dockets of the various courts to determine the need for assignment of judges and to promote effective administration. The chief justice is authorized by the amendment to assign judges for

⁷¹ Acts of 1923, ch. 146, at 315, 21 GAMMEL, LAWS OF TEXAS ch. 146, at 315 (1923).

⁷² *In re* House Bill No. 537, 113 Tex. 367, 256 S.W. 573 (1923); see comments of Potts, *Unification of the Judiciary: A Record of Progress*, 2 TEXAS L. REV. 445, 455-57 (1924).

⁷³ Baker, *The Bar Association's Legislative Program*, 2 TEXAS L. REV. 422 (1924).

⁷⁴ TEX. REV. CIV. STAT. ANN. art. 200a (1927).

⁷⁵ TEX. REV. CIV. STAT. ANN. art. 200a, §§ 2, 5 (1927).

⁷⁶ TEX. REV. CIV. STAT. ANN. art. 200a, § 4 (1927).

⁷⁷ TEX. REV. CIV. STAT. ANN. art. 200a, § 5a (1957).

⁷⁸ TEX. REV. CIV. STAT. ANN. art. 200a, § 2a(4) (1961).

⁷⁹ TEX. REV. CIV. STAT. ANN. art. 200a, § 10a (1965).

service outside their own administrative judicial districts.⁸⁰ Although this authority is limited, it can be viewed as the first step in vesting in the chief justice ultimate administrative responsibility for a unified judicial system. It appears that the present supreme court will adopt an attitude somewhat different from that of the court which rejected House Bill No. 537.⁸¹ Chief Justice Calvert has accepted his administrative responsibilities under article 200a, has called meetings of the presiding judges, and has begun to provide the leadership expected of his office.

The validity of article 200a has been upheld by courts of civil appeals.⁸² Since its enactment, extensive use has been made of visiting judges, principally as replacements for judges who have been disabled, disqualified, or on vacation, although they have also been used to some extent in metropolitan counties in addition to regular judges to relieve docket congestion.⁸³ However, this use has been hampered by shortage of court facilities and staff for visiting judges in the larger counties. Also, there has been some resistance to the use of visiting judges on the part of the bar, partly because of the inaccessibility of the judge after the trial is completed, and partly because of the "human element," in that lawyers prefer to present their cases before judges they know.⁸⁴ The financial inducements in the act seem to be effective, since it appears that assignments are rarely refused.⁸⁵

Article 200a has also facilitated another step toward a unified judiciary. In 1941 Chief Justice Alexander called the first statewide conference of trial and appellate judges in Texas.⁸⁶ Similar meetings have since been sponsored by the Judicial Section of the State Bar of Texas. Although the section is a voluntary organization, and attendance is not compulsory, meetings are well attended, particularly by district judges.⁸⁷ These meetings give the judges an opportunity to work together on common problems of administration, as well as to study matters helpful to them in their duties on the bench.

No account of progress toward a unified judiciary could properly omit the important work of the Texas Civil Judicial Council, which was created by the 53rd Legislature.⁸⁸ Besides its activities in studying and recommending changes in statutory and constitutional provisions concerning organization and operation of the courts, the council is the only agency

⁸⁰ TEX. REV. CIV. STAT. ANN. art. 200a, § 2a (1961).

⁸¹ *Supra* note 72.

⁸² *Haley v. State*, 151 Tex. Crim. 392, 208 S.W.2d 378 (1948); *Eucaline v. Standard Inv. Co.*, 25 S.W.2d 259 (Tex. Civ. App. 1930); *Currie v. Dobbs*, 10 S.W.2d 438 (Tex. Civ. App. 1928).

⁸³ Chadick, *Texas-Style Court Administration*, 26 TEXAS B.J. 375 (1963); Rogers, *Trial Court Administration*, 25 TEXAS B.J. 185 (1962); Smith, *Court Administration in Texas: Business Without Management*, 44 TEXAS L. REV. 1142, 1152-57 (1966).

⁸⁴ Rogers, *supra* note 83, at 235.

⁸⁵ Calvert, *Problems of Judicial Administration*, 25 TEXAS B.J. 639, 640 (1962); Chadick, *Obscurity Can Be an Asset*, 25 TEXAS B.J. 189, 190 (1962); Smith, *supra* note 83, at 1153.

⁸⁶ Alexander, *The Improvement of Our Judicial System*, 28 A.B.A.J. 326 (1942).

⁸⁷ The expenses of district judges are paid under section 8 of article 200a, since the nine presiding administrative judges customarily call conferences of the judges from their respective administrative districts at the same time and place. No similar provision is made for the expenses of appellate and county court judges.

⁸⁸ TEX. REV. CIV. STAT. ANN. art. 2328a (1929).

empowered to gather judicial statistics.⁸⁹ In 1961 the House of Representatives, confronted with demands for creation of new courts, directed the council to gather detailed information on the condition of the dockets of the district courts, and an appropriation was made for the employment of a full-time statistician.⁹⁰ Various problems have been encountered in obtaining reliable and accurate statistics, as well as in making use of them after they are tabulated, but substantial progress is being made toward developing the statistical information essential to any effective supervision of a unified judicial system.⁹¹

All of the developments mentioned so far have been made without the necessity of constitutional amendment. Article V has been amended several times but no major structural change has been made since the amendment of 1891. The following amendments may be considered steps in the process toward a unified judiciary: abolition of the commission of appeals and its absorption into the supreme court thereby increasing it to nine members (1945),⁹² discipline and removal of judges (1965),⁹³ and increase of the court of criminal appeals to five members (1966) by absorption of its two commissioners.⁹⁴

IV. POSSIBLE STEPS TOWARD A UNIFIED JUDICIARY

The foregoing discussion of some of the developments in the field of judicial administration in Texas during the past fifty years may give some indication of how Texas courts, without any major structural change, have been enabled to meet the tremendous increase in judicial business during that period. Other developments have contributed to that process, particularly the adoption of the Texas Rules of Civil Procedure in 1941. Texas does not yet have a unified judiciary, but the specific legislative enactments and constitutional amendments which have been noted do point unmistakably in that direction. The remaining portion of this article will be concerned with further steps toward that goal. Since proposals for general court reform have not found favor in the past, consideration will be given to various possible concrete measures related to present judicial structures, mainly by amendments to existing statutes and rules of procedure, with only a minimum of tinkering with the basic provisions of article V.

A. Multi-District Counties

Local Rules Section 27 of article 2092 provided that a majority of the judges of the district courts could make rules for calling the docket, for setting and postponement of cases, for classifying and distributing cases,

⁸⁹ TEX. REV. CIV. STAT. ANN. art. 2328a, § 5(4) (1929).

⁹⁰ Rogers, *Trial Court Administration*, 25 TEXAS B.J. 185, 234 (1962); House Simple Resolution 62, TEX. H.R.J. 424, 687 (1961).

⁹¹ Chadick, *Obscurity Can Be an Asset*, 25 TEXAS B.J. 189 (1962); Smith, *Judicial Statistics in Texas*, 25 TEXAS B.J. 193 (1962); and see further comments by Smith on inadequacy of statistics in Smith, *Court Administration in Texas, Business Without Management*, 44 TEXAS L. REV. 1142, 1158-65 (1966).

⁹² TEX. CONST. art. V, § 2.

⁹³ TEX. CONST. art. V, § 1a.

⁹⁴ 1 TEX. CONST. ANN. 6, 7 (Supp. 1966).

for having one calendar for all cases set in all courts, and could make such other rules as they deemed advisable to facilitate the dispatch of business.⁹⁵ When the Rules of Civil Procedure were adopted in 1941, section 27 was among the provisions of the statutes that were listed as repealed.⁹⁶ No comparable provision was brought forward into the new rules. Rule 817 merely authorizes each district and county court to make rules not inconsistent with the Rules of Civil Procedure.⁹⁷ The result is that local rules of practice cannot be uniformly effective in all the district courts of a county without unanimous action and consent of all the district judges. The same situation prevails in the county courts at law. No reason has been discovered for this curious step backward in the direction of separate, uncoordinated courts. It may be noted that article 200a authorizes the council of judges in each administrative district to adopt rules concerning the order of trials and other rules necessary to the purposes of the act,⁹⁸ and one of the purposes for which the chief justice is authorized to call a meeting of the presiding judges is to compare local court rules for achieving uniformity so far as practicably consistent with local conditions.⁹⁹

Suggestion: Amend rule 817 to restore the power of a majority of the district judges exercising civil jurisdiction in a county to adopt local rules of practice effective in all district courts, and extend this authority to the judges of the county courts at law. It has been noted that rule 330(i), which was carried forward from section 26 of article 2092, authorizes the district judges of courts having civil jurisdiction to select by majority vote a presiding judge with authority to assign a case in any court to another judge, and to assign any judge to try a case.¹⁰⁰ In a unified court system the usual pattern is for the local presiding judge to have wide administrative authority concerning the settling of cases, the assignment of judges to specialized divisions of the court, and the handling of other judicial business. Under present circumstances, there may be little need to increase the authority of the local presiding judge. In Harris and Bexar Counties, civil cases are handled under a master calendar system by local rules which empower the presiding judge to assign cases to individual courts.¹⁰¹ In Dallas and Tarrant Counties, the civil district courts operate under an individual assignment system which makes each individual judge responsible for the cases on his docket.¹⁰² Under this system the local presiding judge has little administrative authority beyond presiding at meetings. Both systems have advantages and seem to be well accepted by the bar in their respective counties.

⁹⁵ TEX. REV. CIV. STAT. ANN. art. 2092, § 27 (1964).

⁹⁶ TEX. R. CIV. P., list of repealed statutes following rule 822; and see editor's note following TEX. REV. CIV. STAT. ANN. art. 2092 (1964).

⁹⁷ TEX. R. CIV. P. 817.

⁹⁸ TEX. REV. CIV. STAT. ANN. art. 200a, § 4 (1959).

⁹⁹ TEX. REV. CIV. STAT. ANN. art. 200a, § 2(a) (1959).

¹⁰⁰ TEX. REV. CIV. STAT. ANN. art. 2092, § 26 (1964).

¹⁰¹ HARRIS COUNTY DIST. CT. R. 6-8; BEXAR COUNTY DIST. CT. SPECIAL R. § II(f).

¹⁰² DALLAS COUNTY DIST. CT. CIV. R. 1; TARRANT COUNTY DIST. & DOM. REL. CT. SPECIAL R. 1.

However, in the future, as the number of judges increases and the pressure of litigation mounts, it is likely that confusion and inefficiency will result unless effective and uniform administrative supervision is provided. Automated data processing is already in use in several metropolitan trial courts,¹⁰³ and it is not difficult to foresee an increased use of such methods for such purposes as determining the proper load and balance of litigation on weekly trial lists, minimizing conflicting engagements of counsel, printing and mailing out notices of settings, gathering and tabulating of statistics and the like. Such methods can be employed to reduce loss of time from postponements and uncertainties in bringing cases to trial, and can free the trial judges from administrative tasks so that they may use their time more productively in the actual disposition of litigation. Effective use of such methods, however, requires that overall responsibility for administration be fixed in a presiding judge, with adequate supervisory authority. Local rules enacted under rule 817, if that rule is amended as above suggested, may be sufficient as a source of such authority. However, a more general grant of such authority may ultimately be desirable.

Suggestion: Amend rule 330 to give the local presiding judge full control over assignment of cases and judges, and scheduling of preliminary proceedings, trials and the like, subject to the provisions of any local rules concerning such matters.

Selection of Local Presiding Judge Under rule 330(i) a majority of the civil district judges¹⁰⁴ elect a local presiding judge. Several local statutes authorize election of presiding judges by all district judges, civil and criminal.¹⁰⁵ There are advantages in the election of a local presiding judge by his colleagues. For instance, the effectiveness with which he discharges his administrative duties depends very largely upon their voluntary cooperation and confidence in him. They know his qualifications, and by electing him they commit themselves to some measure of support. However, there are also disadvantages. For example, when elected officials choose their own presiding officer, they will almost inevitably rotate the office among themselves without regard to qualification. There is a strong feeling that since each has the same rank, each is entitled to the same recognition, and also that each should take his turn with the administrative chores. Thus, in Harris and Bexar Counties, where the presiding judge has charge of the master calendar and assigns all contested cases out for trial, the practice is to change presiding judges every month or two. Under these circumstances, continuity of administration is difficult to maintain.

The fact is that judges differ very considerably in their administrative capabilities. A judge may be a profound legal scholar and may be an ideal trial judge in a jury case, but he may have neither the temperament nor the inclination for administration. It is a waste of the talents of such a judge to occupy his time and energy with administrative matters. Also,

¹⁰³ Adams, *How To Approach Computers*, NAT'L ASS'N OF TRIAL COURT ADM'RS PROCEEDINGS OF ANN. CONFERENCE 3 (1966); Ellenbogen, *Automation in the Courts*, 50 A.B.A.J. 655 (1964).

¹⁰⁴ TEX. R. CIV. P. 330(i).

¹⁰⁵ TEX. REV. CIV. STAT. ANN. art. 199(11) (Supp. 1966) (Harris County), art. 199(14) (Supp. 1966) (Dallas County), art. 199(37), § (H) (Supp. 1966) (Bexar County).

administration requires a certain firmness, and this is difficult to maintain where the presiding judge knows that another judge, whom he may have to deal with, may be trading places with him next month or next year.

The test is whether the advantages of administrative supervision outweigh the disadvantages. There is much to be said for a system which gives each individual judge undivided responsibility for handling cases on his docket from beginning to end. Each judge then has a strong stimulus to attend to his business and adopt efficient methods of operation, since under this system the bar and the public can easily determine which judges are keeping up with their dockets. Where each judge is administratively as well as judicially independent, the local presiding judge need have little power, and it makes little difference who holds the office. Without an increase in the authority of the presiding judge along the lines already discussed it may be preferable for his colleagues to elect him. However, in the future, if the pressure of business in metropolitan trial courts should create a strong demand for reform in the direction of a unified judiciary, the local presiding judge may have to be selected by and made responsible to a higher judicial officer, who has direct responsibility for efficient operation of the trial courts. The logical person would be the presiding judge of the administrative judicial district.

Suggestion: Amend rule 330(i), and perhaps also article 200a, to authorize the presiding judge of the administrative judicial district to appoint the local presiding judge.

Assignment of Criminal Cases The power of the local presiding judge to assign cases under rule 330(i) applies to civil litigation only. Whether similar authority should exist in criminal cases is a question which deserves serious consideration. Criminal district courts operate under particular statutes which typically permit transfer of cases between courts and authorize judges to exchange benches and sit for other judges in their absence, but provide no power of assignment or other administrative supervision.¹⁰⁶ Such authority could be granted by amending these particular statutes or by amending the Code of Criminal Procedure or article 200a. The most obvious need is for a responsible judicial officer to have authority to assign the best available judicial talent to criminal cases of great importance. In England, the Lord Chief Justice presides over important trials.¹⁰⁷ The presiding judge of the administrative judicial district is probably the proper person to exercise this authority since he is in a good position to select a judge for that purpose and to bring in a judge from another county, if needed.

Suggestion: Amend article 200a to authorize the presiding administrative judge to assign criminal cases for trial to any judge selected by him.

¹⁰⁶ TEX. REV. CIV. STAT. ANN. art. 1926-26 (Supp. 1966) (Dallas County), art. 1926-33, § 3 (Supp. 1966) (Harris County), art. 1926-43, §§ 3, 5 (Supp. 1966) (Tarrant County), art. 199(37), § 1 (Supp. 1966) (Bexar County). See also TEX. REV. CIV. STAT. ANN. art. 1916 (1959).

¹⁰⁷ Pound, *Remarks to Texas Bar Association*, 37 TEX. BAR ASS'N PROC. 215 (1918). See Goddard, *Organization and Jurisdiction of the Courts of England*, 44 J. AM. JUD. SOC'Y 60 (1960).

B. District Administrative Reforms

Selection of Administrative Judge The presiding judge of each of the nine administrative judicial districts is now appointed by the governor from among the elected district judges.¹⁰⁸ In the past, governors have generally made these appointments on merit, without regard to political considerations, and have reappointed administrative judges upon expiration of their terms. However, continuation of the movement toward a unified judicial system would require application of the principle of administrative supervision *within the judiciary*. If the powers of the administrative judges are to be increased along the lines discussed in this article, it may become somewhat more important than it is now to eliminate the possibility of influence by the executive. In a unified judiciary, the chief justice of the supreme court, as administrative head of the system, would have power to appoint regional administrators who would then be responsible to him.¹⁰⁹

It may be observed that assignments under article 200a are now almost altogether voluntary. The presiding judge looks upon his functions as primarily that of providing assistance to the individual trial judge who is disabled or disqualified in a particular case, or has a particular docket problem, such as that created by a protracted trial. Upon a request for assistance, the presiding judge contacts judges in his own administrative district or in some other district until he finds one free to accept the assignment.¹¹⁰ If a particular judge does not want to go, he can usually find business to occupy him in his own district. Consequently, there is no occasion for the presiding judge to make an assignment over objection of either the judge assigned or of the judge of the court to which he is assigned. This arrangement has been helpful in relieving docket problems, but it is not administrative supervision of the type employed in a really unified system,¹¹¹ and it probably falls short of the objectives contemplated in article 200a.¹¹² To achieve effective administration it would be necessary to impose on the presiding judge greater responsibility for actual operation of the courts within his administrative district. This result may be accomplished by giving the local presiding judges more authority and by making them responsible to the presiding administrative judge, as previously suggested. If he, in turn, were made responsible to the chief justice, a workable administrative structure would be established.

Suggestion: Amend article 200a by giving the chief justice of the supreme court authority to appoint the presiding judges of the nine administrative judicial districts.

¹⁰⁸ TEX. REV. CIV. STAT. ANN. art. 200a, § 2 (1959).

¹⁰⁹ POUND, ORGANIZATION OF COURTS 284 (1940); *Report of the Special Committee To Suggest Remedies and Formulate Proposed Laws To Prevent Delay and Unnecessary Cost in Litigation*, 34 A.B.A. REP. 590 (1909).

¹¹⁰ Usually this is not difficult, since judges enjoy a change of scene, particularly when the change is to a larger city, and the attraction is further enhanced by the financial inducements afforded by article 200a. TEX. REV. CIV. STAT. ANN. art. 200a, §§ 2a(d) (1961), 10a (1965).

¹¹¹ Smith, *Court Administration in Texas: Business Without Management*, 44 TEXAS L. REV. 1142, 1152-57 (1966).

¹¹² 32 TEX. CIV. JUD. COUNCIL ANN. REP. 21 (1960); *Better Use of Judges*, Address by G. W. Parker, Jr. to Judicial Section of State Bar of Texas, September 1966.

Redistricting Board Under the constitution of 1876 it is the responsibility of the legislature to establish judicial districts, and, consequently, the number of district courts. Section 7 of article V provides: "The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law." Proper exercise of this responsibility has been very difficult. With the shift of population from rural areas to the cities, metropolitan courts have been overloaded and rural courts have frequently operated on a part-time basis. Temporary assignment of judges from rural districts under article 200a is a make-shift arrangement at best. Yet no general redistricting measure has been adopted by the legislature since 1933,¹¹³ notwithstanding repeated efforts by the state bar and the Judicial Council.¹¹⁴ Rural legislators, who have exerted a controlling influence in past sessions, have been reluctant to share their local district courts or abolish the jobs of local district judges, and have not been deeply concerned with docket congestion in the cities. Yet there has been strong resistance in the legislature to creation of needed new courts without a general redistricting measure. Governor Connally declared his views to this effect quite emphatically in addressing the Judicial Section Meeting in Brownsville in September 1963. In that same year the House of Representatives, by House Simple Resolution No. 348, directed the Texas Civil Judicial Council to make a comprehensive study of the adequacy of the present system of district courts and of the need to redistrict the state for judicial purposes. Pursuant to this direction, the council drafted a constitutional amendment and a statute to create a judicial redistricting board composed of the chief justices of the supreme court and of the courts of civil appeals, and the president of the council, with authority to make orders rearranging judicial districts, subject to legislative veto. The proposed amendment would retain in the legislature the power to enact a general judicial reapportionment. One feature of the proposal is the power of the board to abolish or rearrange districts on occurrence of a vacancy in the office of district judge.¹¹⁵ This proposal was a part of the state bar's legislative program in 1965,¹¹⁶ and again in 1967 judicial redistricting is on the agenda, this time with the support of a resolution by the judges themselves at their annual meeting, though the exact form of the proposal was not announced at the beginning of the session.¹¹⁷ If the measure adopted is solely a statutory rearrangement of existing districts, the effect will be temporary, and no lasting solution will be provided.

Since judicial apportionment has caused such difficulty for the legislature, a logical solution would be some type of redistricting board along

¹¹³ Acts of 1883, ch. 67, at 56, 9 GAMMEL, LAWS OF TEXAS 362 (1883). A redistricting measure is now pending in the legislature at the time this Article goes to press.

¹¹⁴ *Judicial Redistricting*, 16 TEXAS B.J. 65, 389 (1953); McSwain, *Proposed New System for District Court Apportionment*, 27 TEXAS B.J. 951 (1964).

¹¹⁵ McSwain, *supra* note 114; *Proposed Constitutional Amendment Creating the Judicial Redistricting Board*, 27 TEXAS B.J. 953 (1964); *Recommended Statute Regarding Judicial Districts Board*, 27 TEXAS B.J. 954 (1964).

¹¹⁶ *Directors Adopt Legislative Program*, 27 TEXAS B.J. 856 (1964).

¹¹⁷ Barker, *Bar's Legislative Program*, 29 TEXAS B.J. 999 (1966); Stovall, *Judicial Redistricting*, 29 TEXAS B.J. 1011 (1966). See note 113 *supra*.

the lines proposed by the Judicial Council, with power to give continuous attention to the problem and to minimize the impact on individual judges by rearranging districts when judicial vacancies occur. Probably, however, the presiding judges of the administrative districts would be more familiar with the problems and personalities involved and would be in a better position to function on the board than the chief justices of the courts of civil appeals. Moreover, the administrative judges, together with the chief justice of the supreme court, already constitute a functioning body under article 200a¹¹⁸ and judicial reapportionment would be directly related to the duties which they already perform.

Suggestion: Amend section 7 of article V by creating a judicial district board composed of the chief justice of the supreme court and the presiding judges of the nine administrative judicial districts, with continuing power, subject to legislative veto, to rearrange judicial districts in the manner proposed by the Judicial Council, and to increase the number of judges as needed.

Multi-Judge Courts Although Texas courts have come a long way under articles 2092 and 200a from the separate uncoordinated courts of frontier days, now and then the "one judge, one court" structure still leads to procedural complications. A recent example is the case of *Johnson v. Avery*.¹¹⁹ In that case *A* sued *J* in a district court and shortly afterward *J* brought a suit against *A* in another district court in the same county concerning the same subject matter. *A* sought to abate the second suit because of the pendency of the first, but the second district court overruled his plea on the ground that *A* had fraudulently induced *J* to delay filing his suit. *A* then sought a temporary injunction in the first court to restrain *J* from prosecuting the second suit, and this injunction was granted after a hearing lasting nine days. The court of civil appeals affirmed, but the supreme court reversed the temporary injunction on the ground that the second court had the right to determine whether *A* was estopped by his fraud to assert the prior active jurisdiction of the first court. Obviously, this controversy would have been much less complicated if there had been only one district court with several judges. Assignment of a judge to hear the case would then be purely an administrative matter. Actually, no reason is apparent why this particular problem could not have been handled administratively by transfer and consolidation or joint hearing under rules 330(i) and 174(a).¹²⁰ In the event of a disagreement between two judges, the local presiding judge has power to resolve the matter by an assignment under rule 330(i). However, the fact that a hearing was held for nine days on the question of which of two district judges should hear a case on the merits, with an appeal on this question going all the way to the supreme court, demonstrates the difficulties which can still arise from the existence of separate and distinct district courts in the same county.

Another example is *Lord v. Clayton*,¹²¹ where the judge of a district

¹¹⁸ See text accompanying notes 74, 80, 98, 99, 110 *supra*.

¹¹⁹ 10 Tex. Sup. Ct. J. 1191 (1966), reversing *Johnson v. Avery*, 400 S.W.2d 825 (1966).

¹²⁰ Tex. R. Civ. P. 330(i), 174(a).

¹²¹ 163 Tex. 62, 352 S.W.2d 718 (1961).

court which ordinarily tried only civil cases empaneled a grand jury, received an indictment, issued a *capias* for arrest of the accused; and after the district clerk transferred the case to the criminal district court as directed by statute, the judge of the first court sought to restrain the judge of the criminal district court from proceeding with a habeas corpus hearing, as well as to restrain the accused from prosecution of the habeas corpus. The supreme court held that although the first judge had authority to empanel the grand jury and had jurisdiction to try the case, he could not interfere with the habeas corpus proceeding in the other court.¹²²

Federal district courts have more than one judge,¹²³ but in Texas section 7 of article V, which survives from the constitution of the Republic, states: "For each district there shall be elected . . . a judge . . ."¹²⁴ A constitutional amendment would be necessary to authorize more than one judge to sit permanently in the same court, but it would be comparatively simple to draft such an amendment.

Another residual limitation of the one judge, one court concept is the lack of authority for more than one judge to sit together in the same case in the trial court. In important and difficult cases there are advantages in the common law practice of trial judges sitting *en banc* for certain matters, as there are in the modern federal practice of convening a special three-judge district court for certain cases.¹²⁵ If Texas district courts could have more than one judge, they could sit in panels or *en banc*, as they might determine from administrative considerations. The legislature or a judicial districts board would have authority to consolidate the trial courts in multi-judge counties into a single administrative unit, with a presiding judge who would have authority to resolve any conflicts between judges as a matter of administration.

Suggestion: Amend section 7 of article V to authorize more than one judge to be elected for each district, as provided by law. Include this provision, if possible, in any amendment establishing a judicial districts board.

C. Appellate Courts

Assignment of Judges to Appellate and Trial Courts One feature of a unified judiciary is that all judges are judges of but one court, which has specialized branches, both trial and appellate, to which judges are assigned administratively.¹²⁶ The Texas Bar Association's reform plan of 1918 went

¹²² In this connection, see also *Carlson v. Johnson*, 327 S.W.2d 704 (Tex. Civ. App. 1959). There a divorce decree with provisions for custody, visitation and child support was granted by one of the district courts of Harris County. Later a motion for contempt was filed in the same court to enforce the decree. The district judge signed an order transferring the case to one of the two domestic relations courts which had been created since the original decree. The court of civil appeals held that the transfer was improper because one court could not punish a party for contempt of another court, citing *Ex parte Gonzales*, 111 Tex. 399, 238 S.W. 635 (1922), a case arising before enactment of article 2092. Apparently the statute creating the domestic relations court did not authorize it to sit for the district court in such matters, though the district court was authorized to transfer to the domestic relations court matters within the latter's jurisdiction. TEX. REV. CIV. STAT. ANN. art. 2338-11 (1959). *Quaere:* Can one district judge sitting for another under rule 330(e) impose punishment for contempt of the latter's court?

¹²³ 28 U.S.C. § 132 (1964).

¹²⁴ TEX. CONST. art. V, § 7.

¹²⁵ 28 U.S.C. §§ 2281, 2282, 2284 (1964).

¹²⁶ POUND, ORGANIZATION OF COURTS 278 (1940).

so far as to require supreme court justices to sit for one month each year in the district courts, and provided that the chief justice should have the power to designate district judges to sit as needed on the supreme court.¹²⁷ In the federal courts, circuit judges may be assigned to the district court, and district judges may be assigned to the courts of appeals.¹²⁸ The same practice is employed occasionally in New Mexico.¹²⁹

Of course, the system functions more smoothly and with less waste of manpower when judges have permanent assignments, but occasion may arise where it would be advantageous to assign a trial judge temporarily to sit for a disabled or disqualified appellate judge. Also, where a trial judge of ability and reputation has been elevated to an appellate court, it may be sound administration to assign him to try an important case in the district court. Possibly the administration of justice would be promoted by occasional exchanges that would permit the trial judge to view a record through the eyes of an appellate judge, and would remind the appellate judge of the realities of the trial court. Here, again, constitutional difficulties arise, but a fairly simple amendment should suffice.

Suggestion: Amend article V so as to empower the chief justice to assign any appellate justice or district judge to sit in any court, trial or appellate.

Size of Court of Civil Appeals In 1891 in order to relieve the congested docket of the supreme court, the people of Texas adopted a constitutional amendment providing:

The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme Judicial Districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices¹³⁰

Though the increase in population and judicial business was definitely foreseen, the only remedy granted to deal with it was to create additional districts with a court of civil appeals in each. This process has gone on until there are now thirteen courts of civil appeals.¹³¹ The thirty-nine justices, together with the nine justices of the supreme court and the five judges of the court of criminal appeals amount to fifty-three appellate judges, by far the highest number for any state. According to the list of appellate judges in West Publishing Company's National Reporter System, New York has thirty-three,¹³² California has forty,¹³³ and Illinois has fourteen.¹³⁴

The justices of the courts of civil appeals may not exchange benches or sit for each other. The only element of flexibility is article 1738, which

¹²⁷ 37 TEX. BAR ASS'N PROCEEDINGS 151 (1918).

¹²⁸ 28 U.S.C. §§ 191-92 (1964).

¹²⁹ Carmody, *Trial Cases by Appellate Judges*, 5 TRIAL JUDGES J., No. 4, p. 1 (1966).

¹³⁰ TEX. CONST. art. V, § 6.

¹³¹ TEX. REV. CIV. STAT. ANN. art. 198 (Supp. 1966).

¹³² 272 N.Y.S.2d vii (1966).

¹³³ 52 Cal. Rep. v (1966), not including appellate divisions of the superior courts, which hear appeals from justices and other inferior courts.

¹³⁴ 219 N.E.2d v (1966).

authorizes the supreme court to equalize the dockets of the courts of civil appeals by transferring cases from one court to another and permits the justices to hear transferred cases in the courtrooms of the courts from which they were transferred.¹³⁵

Notwithstanding the increase in the number of appellate courts, their districts are so unequally apportioned that in 1965 the number of appeals filed by districts varied from 38 to 229 and extensive use was made of the supreme court's power to equalize the dockets. In that year the Houston court decided 115 cases and had 108 transferred to other courts, and the Dallas court decided 105 cases and had 110 transferred.¹³⁶ This continuing imbalance has raised the demand for a second court of civil appeals in Houston and Dallas. Since section 6 of article V says that each court "shall consist of a Chief Justice and two Associate Justices," a constitutional amendment would be required to add additional justices to existing courts.

The federal courts of appeals have as many circuit judges as Congress finds necessary, and although they are authorized to sit in panels of three,¹³⁷ as they normally do, they may sit en banc.¹³⁸ There would be an advantage in similar flexibility for the courts of civil appeals. A single court with six members can probably operate more efficiently than two separate courts with three members each. For instance, the same clerk, courtroom, library, and consultation room could serve a larger court. Moreover, if there are to be more than three justices in one district, there is no necessity for the number to be a multiple of three.

Authorizing more than three justices per district would also facilitate consolidation of some of the present unloaded districts without forcing any of the incumbents out of office. The legislature could then provide for reduction of the number of justices as vacancies occur. Then, the supreme judicial districts could be rearranged along more functional lines, and it might eventually be possible to reduce the total number of justices, or, at least, to avoid further increases, as well as to minimize the need for the transfer of cases. Although the equalization practice has been effective to prevent docket congestion, lawyers have a strong preference for presenting cases to their own local court of appeals.

Suggestion: Amend section 6 of article V to provide that each court of civil appeals "shall consist of a Chief Justice and two *or more* Associate Justices."

D. *Special Courts*

Family District Courts It is a mark of a primitive judicial system to create a specialized court to handle each new problem.¹³⁹ The distinguishing feature of advanced court organization is a flexible judiciary capable of adapting to new conditions with assignment of judges to specialized divi-

¹³⁵ TEX. REV. CIV. STAT. ANN. art. 1738 (1962).

¹³⁶ 37 TEX. CIV. JUD. COUNCIL ANN. REP. 47 (1965).

¹³⁷ 28 U.S.C. §§ 46(b), (c) (1965).

¹³⁸ *Textile Mills Corp. v. Commissioner*, 314 U.S. 326 (1941).

¹³⁹ POUND, ORGANIZATION OF COURTS 5 (1940).

sions when specialization is advantageous, but available for reassignment to other divisions when needed.¹⁴⁰ The creation of specialized courts of domestic relations in Texas is a reversion to primitive organization. At least nineteen of these courts now exist in various Texas counties, all created within the past twenty years.¹⁴¹ The principal reason for this has been the failure of the legislature to make a proper judicial apportionment so as to provide additional district courts as needed in the larger counties. In order to relieve intolerable pressures on regular district courts, which are financed in part by the state, the legislature has established these specialized courts under its authority to establish "other courts" not conforming to the constitutional pattern.¹⁴² The gimmick is that these courts are financed entirely from county funds; thus the legislation is essentially local in nature and no opposition is encountered from legislators from other districts.

A justification for these courts is that they permit more continuity in handling of domestic relations matters than was possible when domestic relations work was rotated among the district judges on a short-term basis.

The classic weakness of specialized courts with limited jurisdiction is that there are numerous cases where these courts cannot give complete relief because title to real estate or the interests of third persons are involved.¹⁴³ Consequently, the Family Law Section of the State Bar has proposed converting all these courts into "family district courts," which would simply be constitutional district courts operating under a statute requiring them to give preference to domestic relations and juvenile matters.¹⁴⁴ Juvenile and domestic relations courts do not need to be separate in order to secure the services of specialist judges sitting in branches or departments of unified courts.¹⁴⁵ Adoption of such legislation is a part of the State Bar's legislative program for the 1967 session.¹⁴⁶ At this writing, however, it is doubtful that the legislature is willing to assume this \$304,000 burden. Moreover, so long as no adequate measure for judicial redistricting is adopted, conversion of these courts into district courts may make it more difficult to add additional courts as needed in the future, without resorting to specialized courts again. However, adoption of this legislation in conjunction with other proposed changes would be an important step toward a unified judicial system.

Suggestion: Enact legislation converting the present juvenile courts and courts of domestic relations into family district courts with general district court jurisdiction.

Probate Courts Section 16 of article V gives the county court exclusive

¹⁴⁰ *Id.* at 271, 276. See also Pound's comments on Texas Bar Association's proposal of 1918, 37 TEX. BAR ASS'N PROCEEDINGS 209 (1918).

¹⁴¹ TEX. REV. CIV. STAT. ANN. arts. 2338-3 to 2338-20 (1951); See 37 TEX. CIV. JUD. COUNCIL ANN. REP. 97 (1965).

¹⁴² TEX. CONST. art. V, § 1; Jordan v. Crudgington, 149 Tex. 237, 231 S.W.2d 641 (1950).

¹⁴³ See, e.g., Rader v. Rader, 378 S.W.2d 373 (Tex. Civ. App. 1964) *error ref. n.r.e.*, holding that the domestic relations court has no jurisdiction of a suit for alienation of affections.

¹⁴⁴ Carrington, *The Need in Texas for Family District Courts*, 27 TEXAS B.J. 567 (1964); Raggio, *Family District Courts*, 29 TEXAS B.J. 1007 (1966).

¹⁴⁵ *Supra* note 140.

¹⁴⁶ Barker, *Bar's Legislative Program*, 29 TEXAS B.J. 997 (1966).

jurisdiction of the probate of wills, the appointment of administrators and guardians, and the administration of estates of deceased persons, minors, and incompetents. Section 8 gives the district court "appellate jurisdiction and general control" over the probate court in such matters. The only procedure for review in the district court of the orders of the county court is by trial de novo under the same rules and procedure as other civil cases in the district court.¹⁴⁷ Thus the problems arising from the limited jurisdiction of a specialized court are compounded by the inconvenience and expense of double trials of the same issues.

Although the county court has exclusive original jurisdiction to probate wills, it has no jurisdiction to construe a will,¹⁴⁸ or to enforce a contract to make a will,¹⁴⁹ or to determine the title to real or personal property claimed by the estate,¹⁵⁰ or to decide a claim against an estate after it has been denied by the executor, administrator or guardian, unless such claim is within the county court's civil jurisdiction.¹⁵¹ Whenever such issues arise, independent suits must be prosecuted in the district court and the judgment must be certified to the county court for observance.¹⁵²

On trial de novo the jurisdiction of the district court is purely appellate. The issues are confined to the issues made in the county court, and none of the district court's original jurisdiction can be exercised.¹⁵³ For example, on appeal from an order probating a will, the district court cannot enter an agreed judgment dividing property of the estate in a different manner from that provided in the will because such a judgment is beyond the jurisdiction of the probate court.¹⁵⁴

When the present constitution was adopted it made sense to commit probate and administration matters to the county court, which was always available, rather than to the district court, which met in rural counties only for a short session twice a year. Since the county judge was not normally a lawyer, he was not given jurisdiction to decide such important matters as land titles, and any party dissatisfied with his rulings was guaranteed a trial before the district judge at the next term of the district court. The original justification of this arrangement is not applicable to urban counties where most of the Texas population now lives. In some of these counties there are now special probate courts with judges who are required to be lawyers.¹⁵⁵ Moreover, the disadvantages of separate probate

¹⁴⁷ TEX. R. CIV. P. 337, 350.

¹⁴⁸ *Langenhennig v. Hohmann*, 139 Tex. 452, 163 S.W.2d 402 (1942); *McCarty v. Duncan*, 330 S.W.2d 899 (Tex. Civ. App. 1960).

¹⁴⁹ *Huston v. Cole*, 139 Tex. 150, 162 S.W.2d 404 (1942).

¹⁵⁰ *Jones v. Sun Oil Co.*, 137 Tex. 353, 153 S.W.2d 571 (1941); *Brown v. Fleming*, 212 S.W. 483 (Tex. Comm'n App. 1919); *McMahan v. McMahan*, 175 S.W. 157 (Tex. Civ. App. 1915) *error ref.*; *Berry v. Barnes*, 26 S.W.2d 657 (Tex. Civ. App. 1930).

¹⁵¹ *George v. Ryon*, 94 Tex. 317, 60 S.W. 427 (1901); *Marx v. Freeman*, 21 Tex. Civ. App. 429, 52 S.W. 647 (1899).

¹⁵² *Gregory v. Ward*, 118 Tex. 526, 18 S.W.2d 1049 (1929); *Higginbotham v. Davis*, 221 S.W.2d 290 (Tex. Civ. App. 1949); TEX. PROB. CODE ANN. § 313 (1956).

¹⁵³ *Huston v. Cole*, 139 Tex. 150, 162 S.W.2d 404 (1942); *In re Martin's Estate*, 284 S.W.2d 279 (Tex. Civ. App. 1955) *error ref. n.r.e.*

¹⁵⁴ *Pierce v. Foreign Mission Bd.*, 235 S.W. 552 (Tex. Comm'n App. 1921).

¹⁵⁵ TEX. REV. CIV. STAT. ANN. arts. 1970-31a, 1970-31b (1964) (Dallas County), art. 1970-110a (1963) (Harris County), art. 1970-345 (1957) (Tarrant County).

courts remain.¹⁵⁶ Chief Justice Alexander proposed that probate matters be handled by the district courts.¹⁵⁷ This would require a constitutional amendment,¹⁵⁸ but it would have the two-fold advantage of eliminating trials de novo and relieving rigid jurisdictional restrictions.

In rural counties the district judge still might not be available as often as needed in probate matters. A possible solution would be to give the district court original jurisdiction concurrently with the county court. Then the probate courts in the larger counties could be converted into district courts with unlimited jurisdiction, but would continue to specialize in probate matters, while in the smaller counties the county judge would be available to handle routine probate proceedings. The supreme court could then adopt rules of procedure providing for transfer of certain probate proceedings to the district court. Perhaps these rules would provide that in counties with several district judges all probate matters should be filed in the district court, whereas in smaller counties such matters would be filed in the county courts, but certain contested matters, such as will contests, would be transferred to the district court,¹⁵⁹ where they would be heard as original proceedings in a court of unlimited jurisdiction.

Concurrent jurisdiction in the district court would also provide the opportunity to assign to the family district court such matters as lunacy proceedings and appointment of guardians, and would increase the competency of those courts to deal with all aspects of family legal problems.¹⁶⁰

Suggestion: Amend section 8 of article V to give the district court original jurisdiction concurrent with the county court in probate, administration, guardianship, and lunacy proceedings, and to authorize the supreme court to provide, by rules of procedure, which matters within the concurrent jurisdiction should be heard by the county court and which by the district court. Also, enact legislation converting existing special probate courts into district courts with unlimited jurisdiction, but giving preference to probate matters.

Criminal District Courts Specialized criminal courts have a long history in Texas. The constitution of 1866 authorized the legislature to "establish criminal courts in the principal cities within the State,"¹⁶¹ and the same provision was carried forward into the reconstruction constitution of 1869.¹⁶² The first court of this nature to be established was the criminal district court for Galveston and Harris Counties.¹⁶³ It is not clear why such a spe-

¹⁵⁶ POUND, ORGANIZATION OF COURTS 179 (1940); Stayton, *Texas' Approach to the Parker Ideal and Her Shortcomings*, 37 TEXAS L. REV. 845, 848 (1959).

¹⁵⁷ 14 TEX. CIV. JUD. COUNCIL ANN. REP. 26 (1942).

¹⁵⁸ State v. Gillette's Estate, 10 S.W.2d 984 (Tex. Comm'n App. 1932).

¹⁵⁹ The committee who drafted the Probate Code favored this procedure for eliminating dual trials, but concluded that any statute so providing would be unconstitutional. See interpretative commentary following TEX. PROB. CODE ANN. § 5 (1955). See also 28 TEX. CIV. JUD. COUNCIL ANN. REP. 21 (1956).

¹⁶⁰ On the problem of conflict between the powers of the probate court to appoint a guardian of the person and the power of the district court to award custody, see *Thomason v. McGeorge*, 285 S.W. 285 (Tex. Comm'n App. 1926).

¹⁶¹ TEX. CONST. art. IV, § 1 (1866); 5 GAMMEL, LAWS OF TEXAS 864, 865 (1866).

¹⁶² TEX. CONST. art. V, § 1 (1869); 7 GAMMEL, LAWS OF TEXAS 410 (1871).

¹⁶³ Act of July 23, 1870, 6 GAMMEL, LAWS OF TEXAS 211 (1870).

cial court was considered preferable to another district court with general jurisdiction. Perhaps legal difficulties were envisioned in having more than one judicial district within the same county.¹⁶⁴

The constitution of 1876 continued the criminal district court of Galveston and Harris Counties because of the greater criminal problem arising there from the coming ashore of ships' crews, and it was desired "to free the jails and make justice prompt."¹⁶⁵ Other criminal district courts in cities with a population of not less than 30,000 were also authorized.¹⁶⁶ The amendments of 1891 omitted any particular reference to criminal courts, except to continue the criminal district court of Galveston and Harris Counties, but it added a new provision: "The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."¹⁶⁷

Under this provision criminal district courts have been created in several of the most populous counties. The statutes creating these courts typically limit their jurisdiction to criminal cases and provide that the regular district courts should have no criminal jurisdiction.¹⁶⁸ However, attempts to limit the jurisdiction of the other courts have been unsuccessful. Though the court of criminal appeals expressed the opinion that the power to "conform the jurisdiction of the other district and other inferior courts" authorized the legislature to give exclusive jurisdiction to the criminal district courts,¹⁶⁹ the supreme court has repeatedly held that the legislature cannot reduce the jurisdiction of a constitutional district court.¹⁷⁰ In *Lord v. Clayton*,¹⁷¹ the supreme court held that although the statute creating the 136th District Court of Jefferson County expressly limited its jurisdiction to civil cases and other legislation purported to give exclusive jurisdiction in criminal cases to the criminal district court of Jefferson county, the 136th court was nevertheless a constitutional district court with full power to impanel a grand jury, receive an indictment, and try the accused.

Whatever difficulties may exist in creating district courts with civil jurisdiction only, it is settled that the constitutional power to establish "other courts" does authorize the legislature to establish district courts with criminal jurisdiction only.¹⁷² Moreover, criminal district courts may

¹⁶⁴ See *Wheeler v. Wheeler*, 76 Tex. 489, 13 S.W. 305 (1890); *Lytle v. Half*, 75 Tex. 128, 12 S.W. 610 (1899).

¹⁶⁵ See interpretative commentary following TEX. CONST. art. V, § 1.

¹⁶⁶ TEX. CONST. art. V, § 1; 8 GAMMEL, LAWS OF TEXAS 800 (1876).

¹⁶⁷ TEX. CONST. art. V, § 1 (as amended 1891).

¹⁶⁸ TEX. REV. CIV. STAT. ANN. arts. 1926-1 to 1926-63 (Supp. 1966).

¹⁶⁹ *Cockrell v. State*, 85 Tex. Crim. 326, 211 S.W. 939 (1919).

¹⁷⁰ *Lord v. Clayton*, 163 Tex. 62, 352 S.W.2d 718 (1961); *Ex parte Richards*, 137 Tex. 520, 155 S.W.2d 597 (1941); *Reasonover v. Reasonover*, 122 Tex. 512, 58 S.W.2d 817 (1933); *St. Louis S.W. Ry. v. Hall*, 98 Tex. 480, 85 S.W. 786 (1905); See *Castro v. State*, 124 Tex. Crim. 13, 60 S.W.2d 211 (1933).

¹⁷¹ *Ibid.*

¹⁷² *Hull v. State*, 50 Tex. Crim. 607, 100 S.W. 403 (1907); *Cunningham v. City of Corpus Christi*, 260 S.W. 266, 269 (Tex. Civ. App. 1924).

be granted limited jurisdiction over certain types of civil cases, such as those involving domestic relations and payment of taxes.¹⁷³

The disadvantages of narrow jurisdictional limitations exist in the case of special criminal courts, though perhaps not to the same extent as other specialized courts so long as the jurisdiction is criminal only. In the larger counties, where these courts exist, there is a sharp division between civil and criminal practice, and seldom, if ever, is a criminal court hampered by lack of civil jurisdiction. The principal disadvantage is the lack of flexibility—that is, the unavailability of the criminal district judge to help with civil business when needed. If he is given jurisdiction of a limited class of civil cases, then other difficulties arise, as illustrated by *Ex Parte Richards*,¹⁷⁴ where it was held that the criminal district court of Willacy County, in a suit brought within its special jurisdiction over tax collection suits, did not have jurisdiction of a cross action for injunctive relief.

Recently there has been a trend away from narrow jurisdictional restrictions on these courts. The 1963 statute creating one new civil and one new criminal district court for Dallas County provides:

All of said courts hereby created shall have and exercise, in addition to the jurisdiction now conferred by law on said Courts, concurrent jurisdiction coextensive with the limits of Dallas County in all actions, proceedings, matters and causes both civil and criminal of which District Courts of general jurisdiction are given jurisdiction by the Constitution and laws of the State of Texas.¹⁷⁵

In Bexar County the former criminal district courts have been converted into the 144th and 175th district courts, and all district courts have concurrent jurisdiction in both civil and criminal cases, although it is provided that the 144th and 175th shall give preference to criminal cases, and all indictments shall be returned to them. The other seven district courts are directed to give preference to civil cases, and all civil cases are directed to be filed in such other courts.¹⁷⁶

Because of the division between civil and criminal practice, and the obvious advantages of specialization, it seems likely that the practical distinction between civil and criminal district courts will continue for the foreseeable future. However, it may be expected that rigid jurisdictional lines between the two will continue to disappear, so that the divisions will become purely an administrative matter. Of course, no such jurisdictional limitation would exist in a unified judicial system.

Suggestion: Enact legislation converting the remaining limited criminal district courts into full constitutional district courts.

E. Courts of Lesser Jurisdiction

County Courts In each of the 254 counties of Texas there is a constitu-

¹⁷³ *Ex parte Richards*, 137 Tex. 520, 155 S.W.2d 597 (1941).

¹⁷⁴ *Ibid.*

¹⁷⁵ TEX. REV. CIV. STAT. ANN. art. 199(162) (Supp. 1966).

¹⁷⁶ TEX. REV. CIV. STAT. ANN. art. 199(37) (Supp. 1966). Also, in Travis County, the criminal district court, which already had civil jurisdiction, was renamed the 147th district court. TEX. REV. CIV. STAT. ANN. art. 199(153) (1955), art. 1926-51 (1923), art. 199(147) (1963).

tional county court, presided over by a county judge, who is supposed to be "learned in the law," but who is not required to be a lawyer.¹⁷⁷ Under the constitution the county court has original jurisdiction of misdemeanors where the fine to be imposed may exceed \$200.00, exclusive jurisdiction in civil cases where the amount in controversy exceeds \$200.00 but is not more than \$500.00, concurrent jurisdiction with the district court in civil cases in which the amount exceeds \$500.00 but is not more than \$1,000.00, appellate jurisdiction in both civil and criminal cases of which justice courts have original jurisdiction, and general probate jurisdiction, including wills, administration of estates, guardianships and lunacy proceedings.¹⁷⁸ An element of flexibility is provided by section 22: "The Legislature shall have power, by local or general law, to increase, diminish or change the civil and criminal jurisdiction of County Courts, and in cases of any such change of jurisdiction, the Legislature shall also conform the jurisdiction of the other courts to such change." Under this section the county courts have been given jurisdiction over appeals from municipal corporation courts¹⁷⁹ and original jurisdiction in statutory eminent domain proceedings without regard to the amount in controversy.¹⁸⁰

Section 22 has been held to authorize the legislature to increase the jurisdiction of the county court by giving it jurisdiction concurrent with the justices of the peace,¹⁸¹ and also to take away civil and criminal jurisdiction of the county court and transfer it to the district court.¹⁸² This power to diminish or increase the jurisdiction of the county courts in particular counties has been exercised frequently by the legislature.¹⁸³ The power does not extend to probate matters, which have been held to be neither "civil" nor "criminal" within section 22; consequently, the probate jurisdiction of the county court is said to be exclusive.¹⁸⁴ However, other courts with concurrent probate jurisdiction may be established if no attempt is made to deprive the constitutional county court of its probate jurisdiction.¹⁸⁵

In providing additional judges to handle county court litigation, the legislature has not attempted to increase the number of judges of the constitutional county courts, perhaps because section 15 provides for the election in each county of "a county judge" who is also made presiding officer of the county commissioners' court by section 18.¹⁸⁶ Consequently, separate courts have been created under the power granted in the last paragraph of

¹⁷⁷ TEX. CONST. art. V, § 15 (as amended 1954).

¹⁷⁸ TEX. CONST. art. V, § 16 (as amended 1891).

¹⁷⁹ TEX. CODE CRIM. PROC. ANN. art. 45.10 (1965); *Hickman v. State*, 79 Tex. Crim. 125, 183 S.W. 1180 (1916); *Taylor County v. Jarvis*, 209 S.W. 405 (Tex. Comm'n App. 1919).

¹⁸⁰ TEX. REV. CIV. STAT. ANN. art. 3266 (1941). *Pearson v. State*, 159 Tex. 66, 315 S.W.2d 935 (1958); *Southern Kan. Ry. v. Vance*, 104 Tex. 90, 133 S.W. 1043 (1911).

¹⁸¹ *Gulf, W.T. & P. Ry. v. Fromme*, 98 Tex. 459, 84 S.W. 1054 (1905); *White v. Barrow*, 182 S.W. 1155 (Tex. Civ. App. 1916).

¹⁸² *Muench v. Oppenheimer*, 86 Tex. 568, 26 S.W. 496 (1894); *Chappell v. State*, 153 Tex. Crim. 237, 219 S.W.2d 88 (1949).

¹⁸³ TEX. REV. CIV. STAT. ANN. art. 1970-141a (1951); See particularly TEX. REV. CIV. STAT. ANN. art. 1970-310 (1964).

¹⁸⁴ *State v. Gillette's Estate*, 10 S.W.2d 984 (Tex. Comm'n App. 1928).

¹⁸⁵ *State v. McClelland*, 148 Tex. 372, 224 S.W.2d 706 (1949).

¹⁸⁶ TEX. CONST. art. V, §§ 15, 18 (as amended 1954).

section 1 to "establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof." A whole class of statutory courts has been formed, upon each of which the legislature has conferred some portion of the jurisdiction of the constitutional county courts. These courts have various names and a wide variety of jurisdictional restrictions. The earliest seems to have been the County Court of Dallas County at Law, established in 1907, with "concurrent jurisdiction with the County Court of Dallas County in all matters and causes, civil and criminal, original and appellate," except probate matters, which were reserved to the county court.¹⁸⁷ Additional courts have since been added, so that now there are in Dallas County ten statutory county courts: four "County Courts of Dallas County at Law" with civil jurisdiction only (including eminent domain),¹⁸⁸ three "County Criminal Courts" with criminal jurisdiction only,¹⁸⁹ a "County Criminal Court of Appeals" with sole jurisdiction over appeals in criminal matters from justice and corporation courts, as well as concurrent jurisdiction in other criminal cases,¹⁹⁰ and two probate courts.¹⁹¹ The constitutional county court, though it still technically has jurisdiction concurrent with that of all the statutory courts, has ceased to exist as an operating court. The county judge is occupied with his administrative duties as presiding officer of the commissioner's court, which is not really a court, but rather the governing body of the county; but he hears mental illness cases, as do the two probate judges.

At the end of the 1965 session of the legislature there were forty-seven statutory county courts existing in nineteen counties.¹⁹² Although the statutes establishing these courts generally authorize the judges of courts of like jurisdiction in the same county to transfer cases, exchange benches, and sit for each other,¹⁹³ they are distinct tribunals, as illustrated by cases holding that one county court at law cannot set aside an execution sale had in another,¹⁹⁴ and that one court has no jurisdiction of a condemnation case upon filing of objections to the award of special commissioners appointed by the judge of another court.¹⁹⁵

There has been some confusion as to just what kind of courts these are. In *State ex. rel. Peden v. Valentine*¹⁹⁶ it was held that the act creating the "County Court at Law of Tarrant County for Civil Cases" was unconstitutional insofar as it authorized the governor to appoint the judge to fill a vacancy because the court was essentially a constitutional county court

¹⁸⁷ TEX. REV. CIV. STAT. ANN. arts. 1970-1 to 1970-14 (1907).

¹⁸⁸ TEX. REV. CIV. STAT. ANN. art. 1970-15 (1917), art. 1970-31.1 (1963).

¹⁸⁹ TEX. REV. CIV. STAT. ANN. art. 1970-31.10 (1927), art. 31.11 (1951), art. 31.12 (1959).

¹⁹⁰ TEX. REV. CIV. STAT. ANN. art. 1970-31.20 (1961).

¹⁹¹ TEX. REV. CIV. STAT. ANN. art. 1970-31a (1951), art. 1970-31(b) (1963).

¹⁹² 37 TEX. CIV. JUD. COUNCIL ANN. REP. 99 (1965).

¹⁹³ See, e.g., TEX. REV. CIV. STAT. ANN. art. 1970-31.1, §§ 2, 8 (1963) (county courts of Dallas County at law), art. 1970-31b, § 10 (1963) (probate courts of Dallas County), art. 1970-31.20, §§ 14, 15 (1961) (county criminal courts of Dallas County).

¹⁹⁴ *Sharp v. Yniquez*, 324 S.W.2d 291 (Tex. Civ. App. 1959).

¹⁹⁵ *Henderson v. Texas Turnpike Authority*, 308 S.W.2d 199 (Tex. Civ. App. 1957).

¹⁹⁶ 198 S.W. 1006 (Tex. Civ. App. 1917); See *Johnson v. City of Dallas*, 78 S.W.2d 265 (Tex. Civ. App. 1934); *City of Dallas v. Johnson*, 54 S.W.2d 1024 (Tex. Civ. App. 1932).

with limited jurisdiction, not a court "other" than those named in the constitution. Consequently, the judge was a county officer, and the appointment had to be made by the commissioners' court under article V, section 28. Though a judge of such a court may be a "county officer," he is not a constitutional "county judge," and the better view seems to be that these courts are "other courts" under section 1 of article V.¹⁹⁷ The importance of this latter view is that "other courts" created under section 1 do not have to conform to the pattern of the constitutional courts. It has been contended that although the legislature can establish special district courts to exercise part of the jurisdiction of the constitutional district courts and can establish special county courts with part of the jurisdiction of the constitutional county courts, it cannot create courts of a wholly different kind. This argument was laid to rest in *Jordan v. Crudgington*,¹⁹⁸ where the supreme court upheld the validity of the Potter County Court of Domestic Relations and declared that the legislature had power under section 1 to establish a "family of courts" different from those specifically defined in the constitution. Thus we may assume that the further evolution of the statutory county courts will not be hampered by constitutional inhibitions.

In examining the statutes establishing these courts, one is struck by the minute detail of their administrative provisions, which vary from county to county. In Dallas County, for instance, civil cases must be filed in rotation in the county courts at law, but the judges are directed to equalize the dockets at least once a year.¹⁹⁹ In Tarrant County, filings in the two county criminal courts are alternated by the month.²⁰⁰ There is a provision that civil cases in Tarrant County may be filed in either of the two county courts at law, but it is not clear whether this supersedes an earlier statute authorizing the commissioners' court to prescribe the ratio in which cases are docketed in these courts.²⁰¹ In Harris County civil cases must be filed in the two county civil courts at law alternately, and criminal cases must be filed in the four county criminal courts in rotation.²⁰² In Bexar County all criminal cases must be filed in the Bexar County Court for Criminal Cases, all eminent domain and mental health cases must be filed in the county civil court at law, and other cases in rotation in the three county courts at law.²⁰³ In Galveston County, probate matters, mental illness cases and condemnation cases are filed in the County Court No. 2 or in the Constitutional County Court, and all other civil and criminal cases are filed in the County Court No. 1.²⁰⁴ In Nueces County there are two county courts at law with concurrent civil and criminal jurisdiction,

¹⁹⁷ *Allen v. State*, 122 Tex. Crim. 186, 54 S.W.2d 810 (1932); *Sterrett v. Morgan*, 294 S.W.2d 201 (Tex. Civ. App. 1956).

¹⁹⁸ 149 Tex. 237, 231 S.W.2d 641 (1950).

¹⁹⁹ TEX. REV. CIV. STAT. ANN. art. 1970-31.1, § 3 (1963).

²⁰⁰ TEX. REV. CIV. STAT. ANN. art. 1970-62b, § 13 (1961).

²⁰¹ TEX. REV. CIV. STAT. ANN. art. 1970-58 (1907), art. 1970-59 (1925).

²⁰² TEX. REV. CIV. STAT. ANN. art. 1970-110c.1, § 10 (1963), art. 1970-110d(h) (1961).

²⁰³ TEX. REV. CIV. STAT. ANN. art. 1970-75a, art. 1970-301f, § 4, art. 1970-301g, § 2 (Supp. 1966).

²⁰⁴ TEX. REV. CIV. STAT. ANN. art. 1970-342a, § 3 (Supp. 1966).

but all criminal cases of original jurisdiction must be docketed in one, while all civil cases and criminal cases appealed from inferior courts must be docketed in the other.²⁰⁵

The foregoing demonstrates how minutely the administration of these courts has been regulated. It is not clear why such detailed regulations have been thought necessary. If the judges of these courts are capable of deciding the matters of law and fact that come before them in contested litigation, apparently they should also be capable of making sound decisions concerning the administration of the business of their courts. Presumably they know more about that business than anyone else. The same considerations which have brought about the demand for freeing courts in general from detailed procedural legislation and transferring the rule-making function to the supreme court would seem to apply here.

There is some evidence of the beginning of a trend toward more autonomy for county court judges. In 1965 the legislature created a second county court at law for Jefferson County and provided that all cases, civil and criminal, should be docketed in such manner as may be determined by the judges of the two courts.²⁰⁶ In the same year the legislature replaced a similar provision for the county courts at law of Bexar County with a mandatory rotational filing requirement, but authorized a majority of the judges to adopt rules of practice and elect a presiding judge with authority to assign any pending case to another court and to assign any judge to another court to try a pending case.²⁰⁷

These statutory courts need not conform to the constitutional pattern and their organization is subject to legislative control. Moreover, since the legislation affecting these courts is local in character and does not involve the appropriation of any state funds, no opposition is normally encountered where the legislators from the county in question are in agreement. Consequently, the opportunity exists to establish a unified court on a local basis. If such a reorganization is made in one county and is well accepted, other counties may be expected to follow suit.

Such a local court reorganization can be carried out to whatever extent is necessary. If complete unification is desired, there is apparently no legal obstacle to replacing all of the statutory courts in one county with a single county court at law, of which all the incumbent judges would be members, including possibly the county judge as well, although the constitutional county court would continue to exist in theory as a separate court with concurrent jurisdiction. The unified county court at law would have all the jurisdiction conferred by the constitution or by statute on constitutional county courts, and such other jurisdiction as the legislature might determine, and would have authority, by a majority vote of its judges, to adopt rules governing the administration of its business and to elect a presiding judge with authority to carry such rules into effect. Under such rules the business of the court could be organized, if desired, into

²⁰⁵ TEX. REV. CIV. STAT. ANN. art. 1970-339a, §§ 3, 19 (1954).

²⁰⁶ TEX. REV. CIV. STAT. ANN. art. 1970-126a, § 4 (Supp. 1966).

²⁰⁷ TEX. REV. CIV. STAT. ANN. art. 1970-75a (Supp. 1966), superseding former art. 1970-301d, § 3, Tex. Rev. Civ. Stat. Ann. (1957).

separate civil, criminal, appellate, eminent domain, probate, and mental health divisions; and judges would be assigned to such divisions administratively upon consideration of their experience and the requirements of pending litigation. Such assignments would be modified from time to time as circumstances might require. Since the county commissioners are the governing body of the county and have responsibility for providing the funds to operate the county courts, they may properly be given authority to increase or reduce the number of judges, but authority to reduce the number should probably be limited to the occurrence of vacancies in the membership of the court. Ultimately, if it is desired to integrate the county courts into a unified judicial system, it may be appropriate to give the presiding judge of the administrative judicial district authority to appoint a presiding judge with statutory power to transfer cases and assign judges.

Suggestion: Enact a local law in one or more metropolitan counties replacing all statutory county courts with a single county court at law, of which all judges of these courts would be members, with concurrent jurisdiction of all matters of which the constitutional county court has jurisdiction. Authorize the county commissioners' court to increase the number of judges or to reduce the number when vacancies occur, as needed. Empower a majority of the judges to elect a presiding judge and to adopt rules providing for the administration of business and the assignment of judges. Alternatively, provide for appointment of the presiding judge of the county court at law by the presiding judge of the administrative judicial district and give him statutory power to transfer cases and assign judges.

Small Causes and Petty Offenses In Texas justices of the peace have jurisdiction in civil cases where the amount in controversy is not more than \$200.00 and in criminal cases where the fine to be imposed may not be more than \$200.00.²⁰⁸ Corporation courts have jurisdiction of criminal cases arising under municipal ordinances and have concurrent jurisdiction with the justices of the peace in other criminal cases arising within the territorial limits of the municipality.²⁰⁹

There is probably more widespread dissatisfaction with the administration of justice in small causes and petty offenses, particularly traffic cases, than in any other aspect of the judicial system. The cause of this dissatisfaction is the quality of justice administered by untrained, poorly paid and often part-time justices of the peace, as well as by lay judges of corporation courts in the smaller municipalities.²¹⁰ The poor quality of justice in these courts seems to be assumed by provisions for appeal and trial de novo of all issues in the county courts.²¹¹

²⁰⁸ TEX. CONST. art. V, § 19.

²⁰⁹ TEX. REV. CIV. STAT. ANN. art. 1195 (1899).

²¹⁰ POUND, ORGANIZATION OF COURTS, 260 (1940); Litke, *The Modernization of the Minor Courts*, 50 J. AM. JUD. SOC'Y 67 (1966); McCormick, *Modernizing the Texas Judicial System*, 21 TEXAS L. REV. 674, 688 (1943); Randolph, *Local Option Abolition of Justice Courts*, 25 TEXAS B.J. 15, 16 (1962); Uhlenhopp, *Some Plain Talk About Courts of Special and Limited Jurisdiction*, 49 J. AM. JUD. SOC'Y 212 (1966).

²¹¹ TEX. CONST. art. V, §§ 16, 19 (as amended 1891); TEX. CODE CRIM. PROC. ANN. art. 45.10 (1965).

Roscoe Pound has pointed out that the amount of money involved in a case does not necessarily determine the difficulty of the case or the amount of learning, skill, and experience which should be applied to determine it; that it is feasible to administer a much higher grade of justice than that dispensed by justices of the peace without resorting to the more expensive methods of the superior courts; and that judges assigned to small causes should be of such caliber that they would command the respect and confidence of the public, and so that no retrial would be necessary on appeal.²¹²

Abolition of justices of the peace has been an interest of the Texas bar as far back as the Texas Bar Association's court reorganization plan of 1918. Samuel Dabney, in proposing the plan to the association, said: "We have no sympathy with the idea so prevalent in Texas: Ignorant man, ignorant judge to try his case—poor man, poor judge—little litigant, little judge. That we propose to abolish absolutely. However small a litigant may be, or however small the amount involved, he is entitled to an adequate judge."²¹³

In 1960 Paul Carrington, as President of the State Bar of Texas appointed a special committee, which was reappointed the following year by President William C. Kerr. This committee drafted a constitutional amendment that would permit local option replacement of justice courts by courts of record with jurisdiction concurrent with both justice and county courts, except for probate jurisdiction.²¹⁴ The proposal was approved by a vote of 4,532 to 1,012 in a referendum by members of the state bar.²¹⁵ It was included in the state bar's legislative program for 1963,²¹⁶ but was buried in a subcommittee of the House of Representatives as a result of "small but vocal opposition" by justices of the peace, constables, and sheriffs.²¹⁷

Since this defeat the state bar has adopted a different tactic to deal with the problem of traffic courts. In 1965, and again in 1967, the state bar has included in its legislative program the creation of traffic courts of record. Two companion bills have been proposed, one for a county-wide traffic court to be activated on order of the county commissioners' court, and the other for a municipal traffic court to be established by the governing body of any city with a population of more than 50,000. The county traffic court would have jurisdiction concurrent with county courts, county courts at law, and county criminal courts of all cases involving motor vehicles, including registration, certificates of title, operators' licenses, driving while intoxicated, and of appeals from corporations and justice courts in traffic cases. The municipal court would have exclusive original juris-

²¹² POUND, ORGANIZATION OF COURTS 279 (1940). See also *Report of the Special Committee To Suggest Remedies and Formulate Proposed Laws To Prevent Delay and Unnecessary Cost in Litigation*, 34 A.B.A. REP. 578, 591 (1909).

²¹³ 37 TEX. BAR ASSOC. PROCEEDINGS 145 (1918).

²¹⁴ *Suggested Legislation for Local Abolition of Justice Courts*, 25 TEXAS B.J. 16 (1962); Rudolph, "Local Option" Abolition of Justice Courts, 25 TEXAS B.J. 1021 (1962).

²¹⁵ 25 TEXAS B.J. 281 (1962).

²¹⁶ 25 TEXAS B.J. 951 (1962).

²¹⁷ *Improving Justice Court Justice*, 26 TEXAS B.J. 522 (1963).

diction within the territorial limits of the city of all misdemeanors arising under traffic and motor vehicle laws, and exclusive appellate jurisdiction in all other criminal cases of which the corporation courts have original jurisdiction.²¹⁸

The proposed county traffic court would be simply another specialized statutory county court. Establishment of such a court would not affect trials in justice and corporation courts, or eliminate trials de novo. There is no reason why a court of general jurisdiction could not handle the same cases and be available to handle other cases as well. The proposed municipal court would be able to handle all types of traffic misdemeanors, including cases now tried in the county courts as well as those now tried in the corporation courts. Trials de novo would be eliminated in traffic cases, but other cases would still be tried in the corporation courts with trials de novo in the municipal court, and the municipal court would not be available to try any other kind of misdemeanor cases.

As an alternative to such specialized courts, consideration may be given to bringing all misdemeanors and all civil cases below the district court level within the jurisdiction of statutory county courts of general jurisdiction and providing as many properly qualified judges as may be necessary. It has been noted that the legislature has power under section 22 of article V to give the county courts jurisdiction concurrent with the justice courts in both civil and criminal cases.²¹⁹ Statutory county courts now have jurisdiction concurrent with that of the justice courts in several counties.²²⁰ Such statutory courts of record would be available to try all small causes and petty offenses, and there would be no occasion for trials de novo. The only appeal would be to the court of civil appeals or court of criminal appeals in cases within their respective jurisdictions. Depending upon the amount involved, a simplified procedure and reduced costs might be available. Thus in small causes the county court could sit as a small claims court, as the justice courts are now authorized to do.²²¹

Even though small causes and petty offenses were triable in a centralized county court, the legislature could authorize the judges to ride circuit and hold court in the different justice precincts of the county. In this manner, effect could still be given to statutes concerning venue of cases in the justice courts.²²² District courts must hold their regular terms at the county seat, and any attempt to establish a court with district court jurisdiction elsewhere may offend the constitutional provision forbidding re-

²¹⁸ Barker, *Bar's Legislative Program*, 29 TEXAS B.J. 999 (1966); Eskew, *Public Enemy No. 1*, 29 TEXAS B.J. 1009 (1966); Eskew, *Traffic Courts of Record, County-Wide and Metropolitan*, 27 TEXAS B.J. 957 (1964); Shook, *State Bar Board of Directors Adopt Legislative Program*, 27 TEXAS B.J. 933, 934 (1964); and copies of proposed bills obtained from office of State Bar.

²¹⁹ Gulf, W.T. & P. Ry. v. Fromme, 98 Tex. 459, 84 S.W. 1054 (1905); White v. Barrow, 182 S.W. 1155 (Tex. Civ. App. 1916).

²²⁰ TEX. REV. CIV. STAT. ANN. art. 1970-305, § 3 (1959) (Cameron County), art. 1970-311a, § 3 (1955) (Potter County), art. 1970-339, § 3 (1955) (Nueces County), art. 1970-34, § 3 (1925) (Tarrant County), art. 1970-340.1, § 3 (1957) (Lubbock County), art. 1970-347, § 3 (1959) (Nolan County).

²²¹ TEX. REV. CIV. STAT. ANN. art. 2460a (1964).

²²² See TEX. REV. CIV. STAT. ANN. art. 2390 (1964); TEX. CODE CRIM. PROC. art. 45.22 (1966).

moval of the county seat without the required vote of the people of the county.²²³ However, these restrictions probably do not apply to county courts, and certainly not to cases within the jurisdiction of the justice courts.

Justices of the peace are constitutional officers. Each county must be divided by the commissioners' court into not less than four nor more than eight precincts, and in each precinct where there is a city of more than 8,000 inhabitants, two justices of the peace must be elected.²²⁴ Consequently, the office of justice of the peace cannot be abolished without constitutional amendment. However, the legislature has power over the salaries paid to justices of the peace. It is reasonable to assume that when a statutory court of record with a properly qualified judge is made available to try small causes and petty offenses without the necessity of trials de novo, the justice courts will gradually be displaced, and can eventually be abolished. In this connection notice may be taken of a general trend over the country to abolish justices of the peace and replace them with courts of record.²²⁵ Though efforts at abolition have failed so far in Texas, such efforts would have a better chance of success after more efficient courts with better qualified judges have taken over a substantial part of their functions.

Of course there will be a need for additional judges of the statutory county courts to take over the jurisdiction of the justices of the peace, and it may be advisable to make incumbent justices eligible for appointment to such courts.

In case of the corporation courts, there is no constitutional difficulty, since they are statutory "other courts" created under section 1 of article V.²²⁶ The problems here arise out of the fact that the judges are usually selected by the governing body of the city rather than by popular election and the fines assessed constitute a substantial source or revenue. In the smaller municipalities it would seem that relieving the towns of the expense of maintaining their own courts and paying their own judges, while continuing the fines from the same cases as a source of municipal revenue, should neutralize any serious municipal objection.

In the event a unified county court at law is established in the county as previously suggested, the legislation proposed would simply add small

²²³ TEX. CONST. art. V, § 7, art. IX, § 2; *Turner v. Tucker*, 113 Tex. 434, 258 S.W. 149 (1924); *Wheeler v. Wheeler*, 76 Tex. 489, 13 S.W. 305 (1890).

²²⁴ TEX. CONST. art. V, § 18.

²²⁵ The office of justice of the peace no longer exists in fourteen states, including Virginia, Ohio, Connecticut, North Carolina, Illinois, Colorado, Michigan, and Maine. They have been deprived of constitutional status in Montana and Idaho, have been replaced by other courts on a local basis in Tennessee, and in Kansas their civil jurisdiction has been reduced to \$1.00. INST. JUD. ADMINISTRATION, ANNUAL SURVEY OF AMERICAN LAW 607 (1965); INST. JUD. ADMINISTRATION, ANNUAL SURVEY OF AMERICAN LAW 651 (1963); INST. JUD. ADMINISTRATION, ANNUAL SURVEY OF AMERICAN LAW 714 (1962); *Court Reorganization Reform—1962*, 46 J. AM. JUD. Soc'y 110 (1962); Pettengill, *Court Reorganization Success in Connecticut*, 58 A.B.A.J. 58 (1960); Shannon, *Judicial Reform for Colorado Courts of Special Jurisdiction*, 50 J. AM. JUD. Soc'y 16 (1966); Winters, *The National Movement To Improve the Administration of Justice*, 48 J. AM. JUD. Soc'y 17 (1963).

²²⁶ TEX. REV. CIV. STAT. ANN. arts. 1194-1200a (1955); *Harris County v. Stewart*, 91 Tex. 133, 41 S.W. 650 (1897).

claims, traffic and petty offense divisions to the other divisions of the unified court.

Suggestion: By separate statutes applicable to such counties as may desire courts of record for small causes and petty offenses, extend the jurisdiction of the statutory county courts to include jurisdiction in civil and criminal cases concurrent with that of the justices of the peace and concurrent with that of the corporation courts. Authorize transfer of cases to such statutory courts, provide for additional judges where needed, and make incumbent justices of the peace eligible for appointment.

Municipal Courts of Record In proposing the establishment of municipal traffic courts of record in cities with more than 50,000 inhabitants, the state bar has recognized that municipal authorities would not willingly give up their corporation courts in favor of a county wide court. However, from the point of view of sound judicial administration, there is no reason why municipal courts of record should be limited to traffic cases. Statutory municipal courts could well have jurisdiction of all misdemeanors committed within the city limits, whether such misdemeanors would now fall within the jurisdiction of corporation, justice, or county courts.²²⁷ Trials de novo could then be eliminated in all cases, court reporters could be made available, and appeals could be taken to the court of criminal appeals, as appeals now lie from cases tried de novo in the county criminal courts. Civil jurisdiction in motor vehicle licensing and registration cases could also be added. Ultimately it may be desired to merge such a municipal court of record with a unified county court at law.

Suggestion: Enact legislation authorizing the governing bodies of cities having more than 50,000 inhabitants to establish municipal courts of record, each with one or more judges, with jurisdiction of all misdemeanors within their corporate limits, and of all civil cases involving registration and titles of motor vehicles and licensing of operators.

F. Auxiliary Personnel

District Court Commissioners Several states have constitutional and statutory provisions which authorize commissioners appointed by the judges to perform a wide variety of functions subject to revision by a judge.²²⁸ In

²²⁷ 34 A.B.A. REP. 578 (1909).

²²⁸ CAL. CONST. art. VI, § 14 authorizes the legislature to provide for appointment by the superior courts of commissioners "with authority to perform chamber business of the judges of the superior courts, to take depositions, and to perform such other business connected with the administration of justice as may be prescribed by law." Under this provision commissioners are authorized by statute to hear and determine ex parte motions for orders and writs, except injunctions, to take proof and report his findings as to any matter upon which information is required by the court, to take and approve bonds, to act as judge pro tempore when properly appointed for that purpose, to hear and report findings and conclusions in preliminary matters concerning custody and support of children when so ordered by the court, and to hear, report on and determine all uncontested actions and proceedings other than actions for divorce or annulment of marriages when ordered to do so by the court. CAL. CODE CIV. P. §§ 259, 259a (Deering 1959). And it has been held that a court commissioner has authority to approve or reject probate claims. *In re Roberts' Estate*, 49 Cal. App. 2d 11, 120 P.2d 933 (1942).

In Washington commissioners appointed by the superior courts have authority concurrently with that of the superior courts to hear and determine various matters, including all matters in probate, defaults, adoption and other ex parte proceedings, commitment of persons to mental hospitals and commitments of minors to the state reform school, and may act as referee on any matter

the larger counties of Texas probate judges have long had administrative assistants who handle routine matters and frequently act in at least a quasi-judicial capacity, although they have no statutory authority. It may be desirable to extend this practice and give it a legal basis, particularly if the district court is to have original jurisdiction in probate proceedings.

Conservation of judicial manpower would be promoted if the judge were able to delegate routine matters to a qualified assistant chosen by him. Besides the many non-contested matters arising in the administration of estates, various other routine judicial functions could be delegated, such as examining papers and hearing proof of damages in default cases, removal of disabilities, workmen's compensation settlements, application for increase or reduction in child support payments, applications for modification of visitation privileges, fixing bail and issuing writs of habeas corpus in criminal cases, and so on. The judge would establish general policy and the assistant would carry out the policy under his supervision. The judge would be available for consultation on difficult questions, and could hear a matter himself if he should think proper or if requested by counsel.

The person selected to provide this kind of assistance would have to be a lawyer employed on a regular basis and appointed by the district judge or by the district judges collectively, and would have the legal status of a court commissioner. Such a commissioner would be available to serve as a master in chancery under rule 171.²²⁹ This rule is not used often because of the expense of a special master, which is taxed as costs. From the litigant's point of view there is little to be gained by incurring the expense of a hearing before a special master who has no power of adjudication, when the same matter can be heard and decided by a judge paid by the state. However, the rule would probably be used more often if a salaried commissioner were available to hear evidence on issues involving detailed data, and make a report to the judge, who then would need to hear evidence only on matters specified in objections to the report.²³⁰

The main problem in this connection is to determine which functions should be delegated and which should be reserved for the judge himself.

as ordered by the court. All acts of the commissioners are subject to revision by the superior court on written demand, and revision is on the record of the case, rather than upon evidence taken anew. Unless the demand for revision is made within ten days, the commissioner's order becomes the judgment of the court. WASH. CONST. art. IV, § 23; WASH. REV. CODE ANN. §§ 2.24.010-2.24.060 (1961 and Supp. 1966).

Other states have various provisions authorizing the appointment of court commissioners and defining their powers. Kentucky: KY. REV. STAT. §§ 27.100, 395.520, 395.525 (1962); Michigan: MICH. STAT. ANN. § 27A.1022 (1962); Wisconsin: WIS. STAT. ANN. § 252.14 (Supp. 1967). Masters in chancery for domestic relations matters are authorized by local court rule in Virginia. *Raiford v. Raiford*, 193 Va. 221, 68 S.E.2d 888 (1952).

²²⁹ TEX. R. CIV. P. 171.

²³⁰ Former art. 2338-2a, Tex. Rev. Civ. Stat. Ann. (1949). In Texas an experience with a standing officer to assist with work ordinarily done by a judge has been the referee formerly employed in the juvenile court of Harris County. By statute the judge of the juvenile court was authorized to refer to the referee any case before him involving dependent, neglected or delinquent children for hearing evidence, making findings of fact, and recommending judgment to be entered. Apparently this arrangement was not entirely satisfactory, since in 1965 the statute was repealed and a new juvenile court was created. TEX. REV. CIV. STAT. ANN. art. 2338-18 (Supp. 1966). See similar statute authorizing district judges of Wichita County to appoint special referees in juvenile and domestic relations matters, with compensation to be paid by litigants if they are able. TEX. REV. CIV. STAT. ANN. art. 2338-2b (Supp. 1966).

Serious objection may be raised to having adjudicatory functions performed by anyone besides a judge. Ideally, most contested matters should be reserved for the judge, except highly standardized proceedings which may be heard and determined under guidelines set by the judge, and except for unusual cases such as would authorize appointment of a special master under rule 171. Ordinarily, there is little value in presenting a contested matter before a commissioner, since his rulings would be subject to revision by the judge, and it would usually be better presenting it to the judge in the first instance. Only a serious shortage of judges would justify extensive use of commissioners to hear contested matters. On the other hand, in non-contested matters a commissioner could handle a large volume of business that need never come to the judge's attention at all except in those few cases where an interested party comes in and demands a hearing.

If the determination by the commissioner amounts only to a recommendation to the judge, who must himself sign any binding order, it would be possible to define the functions of the commissioner by statute, or perhaps by rule of court. However, in order to make full use of the commissioner's services it should be possible to make certain classes of his orders final and binding in the absence of timely objection by an interested party. This result could probably only be accomplished by a constitutional amendment,²³¹ and if such an amendment is to be adopted, it would be appropriate to authorize the supreme court to define the powers of the commissioners as well as to prescribe the procedure applicable.

Suggestion: Amend article V by adding a section 7a, which would provide that district judges may appoint commissioners to whom they may delegate such of their judicial and ministerial functions as the supreme court may determine and define by rule, and adopt a rule of civil procedure to implement such amendment. Alternatively, enact a statute to the same effect and adopt a rule of procedure which would define the more limited powers such a statutory commissioner would be authorized to exercise.

Administrative Staff The existing pattern of judicial administration in Texas, so far as it goes, is to impose administrative duties on judges who are already engaged full-time in the regular duties of their courts. The suggestions considered above would preserve this pattern, but would impose additional responsibilities on the chief justice, the presiding administrative judges, and the local presiding judges. It is not to be expected that these judges could perform all the details of administration personally without impairment of their regular judicial responsibilities, but it is essential to keep full control of administrative procedures within the judiciary. Consequently, it would be necessary to provide them an admin-

²³¹ *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 645 (1933); *Brown v. Bay City Bank & Trust Co.*, 161 S.W. 23 (Tex. Civ. App. 1913); *Southern Oil Co. v. Wilson*, 22 Tex. Civ. App. 534, 56 S.W. 429 (1900); and see TEX. ATT'Y GEN. OP. No. V-846 (1949) holding that House Bill 912, 51st Legislature, which proposed to authorize the county court to appoint a master in chancery to perform the probate duties exclusively required of the judge of the county court was in violation of TEX. CONST. art. V, § 16.

istrative staff which would attend to the details of administration under their direct supervision.

Beginning with the establishment of the Administrative Office of the United States Courts in 1939,²³² provisions for staff assistance for judges charged with responsibility for court administration have been widespread. Over twenty states have some sort of court administrator,²³³ and the National Conference of Commissioners on Uniform State Laws has drawn up a Model Act to provide for an administrator for the state courts.²³⁴ In 1943 Chief Justice Alexander called for establishment of such an agency in Texas,²³⁵ and the Texas Civil Judicial Council has had the proposal under study.²³⁶ In 1961 a bill originating with a state bar committee was introduced for the purpose of creating a court administrator to be attached to and directed by the supreme court, but this bill was rejected in favor of amendments to strengthen article 200a by giving the chief justice authority to make inter-district assignments and to pay assigned judges an extra stipend.²³⁷

Under present administrative procedures, it is doubtful whether full advantage could be taken of the services of a court administrator. However, if the administrative structure were strengthened along the lines here suggested, staff assistance would be essential to effective administrative supervision. It may be better to avoid the term "court administrator," since it may have the connotation of judges taking orders from a non-judicial functionary. All supervisory authority should remain in the hands of the chief justice, the presiding administrative judges and the local presiding judges, who would perform their supervisory duties with assistance of a competent administrative staff.

Rather than establish a general administrative office for all Texas courts, it would be more in keeping with the Texas pattern of administration to authorize the chief justice and each of the presiding administrative judges to employ an administrative assistant. The administrative assistant to the chief justice would serve as secretary to the Judicial Council and take over the statistical reporting function of the Council. The administrative assistant to the presiding administrative judge would have his office in the courthouse of the major city within the administrative district, and would be available to render assistance to the local presiding judge in performing his administrative responsibilities. Each of the administrative assistants would have clerical personnel under his supervision, and the administrative assistant to the chief justice would also have a competent research assistant.

Suggestion: Amend article 200a to authorize the employment of an administrative assistant by the chief justice and employment of a similar

²³² 53 Stat. 1123 (1939), 28 U.S.C. §§ 332-33 (1964).

²³³ INST. JUD. ADMINISTRATION, COURT ADMINISTRATION, app. B (1959).

²³⁴ ABA JUD. ADMINISTRATION SECTION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 27 (1949).

²³⁵ Alexander, *An Administrative Agency for the Texas Courts*, 27 J. AM. JUD. Soc'y 90 (1943).

²³⁶ 32 TEX. CIV. JUD. COUNCIL ANN. REP. 21 (1960).

²³⁷ Chadick, *Obscurity Can Be an Asset*, 25 TEXAS B.J. 189 (1962).

assistant by the presiding judge of each of the nine administrative judicial districts, together with necessary clerical personnel. Amend article 2328a to make the administrative assistant to the chief justice the ex officio secretary of the Judicial Council, and give him or the chief justice authority to gather statistics from all courts, both civil and criminal.

V. PROSPECT

The suggestions considered in this article have not been advanced as a program of immediate action for the state bar or any other group concerned about court reorganization. No attempt has been made to determine whether any of them would be acceptable to the bench, the bar, or the public. The purpose, rather, has been to indicate how the essential features of a unified court system may be achieved within the framework of our present judicial structure.

From the long-range point of view, this prospect emerges: a unified county court at law for all misdemeanors and all civil cases below the district court level; a unified district court with civil, criminal, family, juvenile, mental health, probate and appellate divisions; a board of managers of the entire system consisting of the chief justice and nine administrative judges appointed by him with power to establish, rearrange and discontinue judgeships; a chief justice with authority to assign any district or appellate judge to sit temporarily in any court; nine administrative judges appointed by the chief justice, with authority to make assignments within their districts; a local presiding judge in each of the larger counties, appointed by the administrative judge, with authority to assign judges and transfer cases; and adequate administrative personnel to assist the chief justice, administrative judges, and local presiding judges with their administrative tasks, as well as to keep statistical records upon which administrative decisions may be based. This picture is very nearly that projected by the special committee of the American bar in 1909,²³⁸ and approximates the structure delineated in the Model State Judicial Article in 1962.²³⁹

Whatever the merits of such a unified system, it is not likely to be accepted in Texas as a single package. Concerning judicial reform, Judge Harold Medina has said: "A quick, sudden, revolutionary change is possible but unusual, almost as rare as hen's teeth. Unless you have some strong political support, the changes must always be effected by the evolutionary process."²⁴⁰

One reason why general court reform programs, however carefully prepared, have never drawn sufficient support from the bar and from the public in Texas is that the evolutionary process of specific changes as needed has thus far prevented docket congestion from getting bad enough to create a demand for drastic reforms. Another reason is that proposals

²³⁸ 87 A.B.A. REP. 130, 392 (1962); 47 J. AM. JUD. Soc'Y 8 (1963).

²³⁹ *Ibid.*

²⁴⁰ Medina, *Improving the Administration of Justice—Evolution or Revolution*, 47 J. AM. JUD. Soc'Y 51 (1963).

of multiple reforms in a single package tend to unite the opponents of each specific change proposed into a solid phalanx of opposition to the entire proposal. Also, such proposals in the past have involved highly controversial features, such as changes in the method of selecting judges, which have tended to obscure the merits of proposed changes which might otherwise be more readily accepted.

That further changes will come in Texas judicial organization cannot be doubted. That any of the specific changes suggested here will actually be adopted cannot be confidently predicted. It seems highly probable, however, that the reforms which do come will be of a similar evolutionary nature. That is to say, they will be directed to specific needs and be capable of standing on their separate merits rather than being included as elements of a general program of reform, and in perspective they will tend toward the principles of unification, flexibility, and responsible supervision within the judiciary which are characteristic of a modern judicial system.

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