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THE PROPOSED AMENDMENT OF THE JUDICIARY ARTICLE OF THE MINNESOTA CONSTITUTION

MAYNARD E. PIRSIG*

Twenty years of agitation over constitutional revision in the state of Minnesota has culminated in a proposal for the revision of Article VI dealing with the courts and judiciary of the state. This will be voted upon at the general election in the fall of 1956.¹

Those twenty years have seen two other proposals for revision of this article which were brought forward but which failed to enlist the support necessary. In 1941, the Minnesota Judicial Council appointed a committee headed by Justice Charles Loring and designated the "Committee on the Unification of the Courts." Some twenty distinguished practicing lawyers and judges of Minnesota made up the Committee. In 1942 it submitted its report with a proposed revision of Article VI. Something of the vision and perspective of the Committee can be gathered from the statement of Justice Loring which accompanied the report :

"It was the view of the committee that the principal weakness in our present judicial system arises from (a) lack of unity and administrative supervision in our courts; (b) the fettering of the courts by lack of complete and certain rule-making power, and (c) the unsatisfactory method of selection and the shortness of tenure of our judges. . . .

"The explanation of the inadequacy of our present judicial system lies in the fact that it was adopted to meet the needs of an earlier day having a simpler civilization and very different economic and social conditions. It has never been adjusted to the tempo of the present day, with all of its economic and social complexities. The constantly increasing demands upon the judiciary have been met by the piecemeal additions of new tribunals and more judges. Little attention has been paid to coordination or the orderly development of what could properly be called a judicial system. Rather lack of system became the rule.

"It is time that our whole judicial structure should be overhauled and modernized. That is what the committee has aimed to do. It has framed a plan that (a) establishes a unified court, (b) provides for adequate administrative supervision, (c) gives the courts full rule-making power, and (d) substitutes an improved plan for the selection of judges."

The proposed judiciary article of 1942 created a General Court of Minnesota with divisions consisting of the supreme court, the district court and a county court for each county. Within the framework of this court all justice in the state was to be administered.

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1. Minn. Laws 1955, c. 881.

There was no provision for the creation of inferior courts such as justices of the peace, probate courts and municipal courts.

To permit effective administration, an administrative council was created, consisting of representatives of each of the divisions. This council was given very broad powers. It could alter the jurisdiction of divisions, provide for appellate divisions of district courts, create subdivisions of district and county courts, provide for assignment of judges, change the number and boundaries of judicial districts, etc.

The proposed article conferred rule making power upon the supreme court for all divisions. It required that clerks of court be appointed by the court. It provided for the selection of judges through what is known as the Missouri plan, whereby the governor initially appoints from a list submitted by a nominating commission.

These proposals embodied the views and recommendations of most students of judicial administration. The committee's plan was hailed as "a thoroughly-modernized court system" which "combines the best of the profession's thinking and experience on virtually all phases of the structure and work of the courts. . . . Whether or not it is ever adopted by the people, the mere formulation of the plan is an outstanding contribution to the science of judicial administration."² In the state it received a cold if not hostile reception, and no action, legislative or otherwise, was taken on it.

In 1947, the legislature created a Constitutional Commission, made up largely of members of the legislature, to consider and report on needed changes in the constitution of the state. The Commission submitted its report in 1948. A preliminary report which had been prepared by its judiciary committee was given circulation and comments were invited.³ The preliminary report was a more conservative document than the proposal of the Loring Committee but still, it contained many of the latter's features. The spirit of the report is reflected in the following introductory words:

"The proposed revision presents no arbitrary or revolutionary changes. Your Committee has endeavored to provide an evolutionary plan of sufficient elasticity to allow, in the light of practical experience, for gradual changes through legislative action."⁴

Article VI, as it appeared in the final report of the Commission, eliminated many of the more liberal features of the preliminary draft

2. 26 J. Am. Jud. Soc'y 133 (1943).

3. See Preliminary Report on Revision of the Judiciary Article of the Minnesota State Constitution, 32 Minn. L. Rev. 458 (1948).

4. *Ibid.*

and reduced to a corresponding degree the changes it would effect in the existing judiciary article.

The draft of the constitution as prepared by the Commission failed to receive legislative approval and hence was never submitted to the voters. Its limited acceptance was probably due more to opposition to other provisions of the proposed constitution than to the judiciary article itself.

Thereafter, a committee of the Minnesota State Bar Association took up the subject, adopting essentially the draft of the 1947 Commission with some changes which are discussed below. It is the proposal of this committee, approved by the State Bar Association, which was adopted by the legislature at the 1955 session for submission to the electorate at the coming election.

The usual judiciary article of a state constitution deals with the court structure, jurisdiction of its various parts, the selection and tenure of its personnel, and the powers of the legislature and of the courts with respect to various judicial and court problems and details. In drafting such an article, fundamental questions of policy arise. What shall be incorporated in the constitution and thus placed beyond the power of change by courts or legislature? Which powers shall be allocated to the legislature and which shall be left to the courts? How general or detailed shall specific provisions be? These are questions quite aside from the policy questions on the subject matter itself such as election of judges as opposed to appointment.

It is possible and feasible to leave most questions to legislative decision in which event the provisions of the judicial article can be very brief and general. The United States Constitution Article III, consisting of but three short sections, is an example. States, however, have not followed this example and have tended to go into extensive detail, prescribing the various courts, their jurisdiction, districts, etc. The more modern tendency, exemplified by the 1945 New Jersey Constitution, is toward more general provisions, leaving to the legislature and courts the necessary detail. Details in the constitution not dealing with fundamental principles and problems, make for an inflexible structure and invite litigation over the application of the provisions.

The proposed judiciary article has moved in the direction of the modern trend. There has been a simplification and clarification of the article. But, as will be noted, in some respects it fails to incorporate the best thought on modern court organization.

SUPREME COURT⁵

The present constitution provides for the chief justice and six associate justices. The new proposal would authorize not less than six nor more than eight associate justices. Permitting some flexibility to the legislature on this score is perhaps desirable. The change is not dictated by any present need. The number of cases appealed has declined drastically over the last twenty-five years, from approximately 500 cases in which opinions were rendered to about 200 at the present time. At the same time there has been an increase in the research assistance made available to the court. However, many of the present cases may be more complex than past cases and there are of course more prior judicial decisions to canvass. Opinions have also become longer, although sometimes unnecessarily. Thus, while presently not needed, possible future needs warrant the proposed change.

If future needs are taken into account, it would seem that some provision should have been incorporated authorizing the creation of divisions within the court either by the legislature or by the court itself. This is not uncommon in other states and in appropriate cases serves every need and saves manpower for the more difficult and complex problems requiring consideration by the whole court. It might also have been desirable to authorize appellate divisions of the district court which could profitably deal with review of fact questions decided in district court cases such as the sufficiency of the evidence to sustain a verdict. Such cases serve very little purpose as precedents and could properly be left to appellate divisions with discretionary review in the supreme court. Without constitutional authorization it is probable that neither of these devices can be authorized.⁶

The obsolete provision that one or more terms shall be held at the seat of government and by two thirds authorization of the legislature in any judicial district has been wisely eliminated. It reflects merely the pioneer conditions of the early days of the state. Although harmless, today it serves no purpose.

Additional help for the court may be temporarily obtained under the proposed provision permitting district court judges to be

5. The verbal change from "The supreme court," to "a supreme court" in § 1, vesting power in the courts, is insignificant.

6. The provision of Minn. Const. art. VI, § 5, that the district court "shall have such appellate jurisdiction as may be prescribed by law," which appears also in the proposed amendment is probably insufficient to authorize appellate review of decisions made within the district court itself but refers to appeals from inferior courts and administrative and other bodies performing functions of a judicial nature.

assigned temporarily to the supreme court. This replaces the present provision in Article VI, section 3, to the effect that if all or a majority of the supreme court judges are disqualified in a case, the governor shall assign judges of the district court. This has been rarely resorted to. The new provision is a far more useful and practical one.⁷ Not only would this help relieve the court in periods of excessive case loads, but it would permit the testing of members of the trial bench for possible selection to the supreme court for later vacancies. It would also give to the supreme court the benefit of the experience of trial judges and therefore a better appreciation of the problems that face them in the trial of cases.

The supreme court now appoints its reporter. Under the proposal, it will also appoint its clerk, now selected by election. This is a desirable and needed change. The duties of that office are largely routine, clerical and without policy implications. Its main purpose is to serve the court and litigants with cases before that court. Voters do not and cannot be expected to know the functions of the office and the qualifications which the position requires. The inability of the court to select and control its own clerical force, on which it is in considerable part dependent for its efficient and effective operation, has led at times in the past to unpublicized embarrassments.

These observations apply also to the state law librarian now appointed by the governor with the advice and consent of the senate under Article V, section 4. Some difficulties of draftsmanship are presented however. The new proposal transfers the appointment to the supreme court. The proposal is only an amendment of Article VI. Section 2 of the proposed article provides for the appointment by the supreme court of "a state law librarian." Article V, section 4, which is not to be amended, contains the present provision for appointment by the governor of "a state librarian." Unless we are to have two librarians, it will be necessary to construe "a state law librarian" in the amendment as referring to the same office as "a state librarian" in Article V, section 4, and while the amendment does not purport to amend Article V, by necessary implication it does so. The point should have been dealt with more directly.

The supreme court is also to appoint "such other employees as it may deem necessary." This sweeping authority undoubtedly would not be abused and would still be subject to legislative control through the appropriations required to pay the salaries of the employees appointed.

7. It is to be regretted that the proposal does not relieve the chief justice of the burden of his duties as a member of the pardon board. See Minn. Const. art V, § 4.

The proposed article does not expressly confer rule-making power upon the supreme court. The present article provides that "legal pleadings and proceedings in the courts of this State shall be under the direction of the legislature."⁸ This is not retained in the proposed article. It is probable that under this provision of the present article legislation is authorized which confers power upon courts to make rules of pleading, procedure and evidence. On that assumption, the supreme court has been given power to make rules of procedure in civil actions.⁹ The question, however, is not beyond doubt, and the doubt may be increased by the omission of the quoted provision. A provision such as appeared in the draft of the 1947 Constitutional Commission would have been desirable.¹⁰

DISTRICT COURTS

The jurisdiction of the district courts will not be changed by the proposed amendment, the changes made in this respect being primarily verbal ones.¹¹

Article VI, section 4, of the present Minnesota Constitution requires that the legislature divide the state into judicial districts "which shall be composed of contiguous territory, be bounded by county lines, and contain a population as nearly equal as may be practicable." One or more judges, as prescribed by the legislature, are elected in each district.

There are now nineteen judicial districts. With minor exceptions they have not been changed since 1907. They differ widely in population. According to the 1950 census, the sixth judicial district has a population of approximately 55,000 and the seventh approximately 300,000. A recent special report of the Minnesota Judicial Council indicated wide differences in the case load per judge in the various districts.

The proposed judiciary article will permit greater freedom to make changes in the size and boundaries of judicial districts. Article VI, section 3, of the proposal provides that "The number and bound-

8. Minn. Const. art. VI, § 14.

9. Minn. Stat. §§ 480.051-.058 (1953).

10. Section 5 of the draft provided: "Rules of practice, procedure, and evidence for all courts shall be made as provided by law."

11. Some awkward language in the present constitution seems to exclude the jurisdiction of the district court in civil cases involving less than \$100 and in criminal cases involving punishment which exceeds three months' imprisonment or a fine of \$100. Minn. Const. art. VI, § 5. This language, however, which the proposed amendment removes, has been construed not to exclude the jurisdiction of the district court in such cases. *State v. Bach*, 36 Minn. 234, 30 N. W. 764 (1886); *Agin v. Heyward*, 6 Minn. 53 (1861).

aries of judicial districts shall be established or changed in the manner provided by law but the office of a district judge may not be abolished during his term." Under this provision, the legislature may itself fix the number of districts and their boundaries or, and this would be preferable, may transfer the responsibility for so doing to the district court or to the supreme court or to an administrative council of the courts or to some other appropriate body. This is essentially a matter of administrative organization and should properly be left to the judiciary.

There is a questionable provision in the new article that "there shall be two or more district judges in each district." At the present time, the seven districts which have but a single judge are in no need of additional judges.¹² The thought seems to be that, by requiring a minimum of two judges in any district, the legislature will be forced to enlarge the size of the single judge districts so that there will be sufficient judicial business for both judges.¹³ The underlying feeling is probably that the presence of two or more judges in a district makes for a more tolerant judiciary and permits some degree of choosing by the litigants, either by resort to affidavits of prejudice or otherwise. Whether this is a matter of such importance that it should be embodied in a constitutional requirement is open to serious question. The optimum size of judicial districts depends on a number of factors and will differ from one period to the next. Whoever is given the responsibility for determining the question should not be hampered by a constitutional provision of the nature proposed. The proposal also runs the risk that the pressures against increasing the size of a judicial district will be so great in some instances that legislation will be enacted adding an unneeded judge rather than changing the size of the district.

Administrative organization of the district court is now practically non-existent. There is the District Judges Association which meets annually, hears addresses, considers rules for the district court, which it has power to promulgate within a limited area,¹⁴ studies problems confronting the district courts and passes resolutions. But it has little administrative power. It cannot assign judges to overburdened districts or require reports of clerks of court or from judges as to the work being done and the conditions of trial

12. See letter of Chief Justice Roger L. Dell to the district judges of the state reproduced in 24 *Hennepin Lawyer* 51 (1956).

13. See Howard, *Proposed Amendment to Article VI of the Constitution*, 13 *Bench & Bar of Minn.*, No. 4, p. 13 (1956).

14. *Minn. Stat.* § 484.33 (1953).

calendars. It is not responsible for and has no control over setting of trial terms or any other aspect of the distribution of judicial business of the district courts. State and local budgets for district courts are not its concern. Nor is there any other agency within the judicial system in which these powers and responsibilities reside. Hence, legislative tinkering when some aggravated local condition arises has been the rule. At every session, legislation is passed changing the general terms of this or that judicial district, a function essentially for the courts and quite inappropriate for a busy legislature overburdened with major matters of statewide import.

When "the convenience or interest of the public or the interest of any litigant shall require,"¹⁵ a judge of one district may request a judge of another district to assist him. But until recently¹⁶ information has not been systematically kept in any central place to indicate who was free to assist and, if free, willing to do so.¹⁷ Nor, until recently, has there been evidence of any widespread sense of obligation on the part of unoccupied judges to go to the aid of those overburdened. This is probably an inevitable product of the fact that district court judges, while paid primarily by the state, are elected by the voters of their district. This tends to promote the feeling that their obligation is essentially to dispose of the litigation of their districts and no more.¹⁸

The situation as it has existed in this and many other states is

15. Minn. Stat. § 484.05 (1953).

16. See Minn. Laws 1955, c. 483, § 4; Minn. Laws 1955, c. 767, § 1, discussed *infra*.

17. A limited and inadequate system of statistics has been kept by the Minnesota Judicial Council. See the various reports of the Council.

18. Unfortunately, the proposed new judiciary article may emphasize this tendency. The district court judge must be a resident of his district at the time of his selection and during his continuance in office. Minn. Laws 1955, c. 881, § 3. He must be elected by the electors of the district wherein he is to serve. *Id.* § 8. These requirements exist also in substance under the present constitution. "Every district judge shall, at the time of his election, be a resident of the district for which he shall be elected, and shall reside therein during his continuance in office." Minn. Const. art. VI, § 4. But it further provides, "The legislature may provide by law that the judge of one district may discharge the duties of the judge of any other district not his own, when convenience or the public interest may require it." Minn. Const. art. VI, § 5. This does not appear in the proposed article nor is there any similar provision. There is no indication anywhere in the article that district court judges may be permitted to function in any district other than that in which they were elected. To enable them to do so, it will be necessary to contend that the article provides for but one district court, that judges are members of the entire court and therefore empowered to exercise its jurisdiction anywhere in the state.

The deficiencies of the proposed article in this respect are a product of the failure to give any recognition to the need for some means of effective court administration.

well described in a statement made forty years ago by the eminent lawyer-statesman, Elihu Root:¹⁹

"I do not wish to say anything against any justice of the supreme court,²⁰ but they are the only body of public officers that I know of anywhere who have the absolute power to determine what they shall do, when and where they shall do it, and whether they shall do it or not; I do not believe that a judicial system is perfect unless it provides for some way in which duties may be prescribed, which it shall be incumbent upon a justice of the supreme court to perform."

In the last twenty-five years there has been a rapid movement in the direction of creating an administrative organization of the courts for the more effective management of judicial business, particularly in the trial courts. The outstanding example is the Administrative Office of the United States Courts, established in 1939.²¹ The director of this office is given wide administrative powers including supervision of federal court employees, the gathering and analysis of statistical data concerning the work of the various federal courts, the preparation of the budgets of the lower federal courts and the expenditure of the funds appropriated for these courts. All of the activities of the office are under the direction of the Judicial Conference of the United States consisting of the chief judges of the judicial circuits and the Chief Justice of the United States as chairman.²² A glance at any of the annual reports of the office will demonstrate the invaluable service this office is rendering to the federal judicial system.²³

The success of the federal program has led to similar action in a number of states. Thus, the Constitution of New Jersey, adopted in 1947, provides:²⁴

"1. The Chief Justice of the Supreme Court shall be administrative head of all the courts of the State. He shall appoint an Administrative Director to service at his pleasure.

"2. The Chief Justice of the Supreme Court shall assign Judges of the Superior Court²⁵ to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from

19. Quoted in Report of the New York Committee on Administration of Justice, at 459 (1934).

20. The Supreme Court of New York is the trial court of general jurisdiction of that state.

21. 28 U. S. C. § 601 (1952).

22. 28 U. S. C. § 331 (1952).

23. See Pirsig, *A Survey of Judicial Councils, Judicial Conferences and Administrative Directors*, 47 *Brief* 181 (1952).

24. N. J. Const. art. VI, § 7. Art. VI, § 2, para. 3, also provides, "The Supreme Court shall make rules governing the administration of all courts in the State. . . ."

25. This is the trial court of general jurisdiction of New Jersey.

one assignment to another, as need appears. Assignments to the Appellate Division shall be for terms fixed by rules of the Supreme Court."

The great strides made in increasing efficiency and reducing delays as the result of the active exercise of these powers may be seen in the reports since made by Chief Justice Vanderbilt and his administrative director.²⁶

For many years Michigan provided for the assignment of judges from one district to another by the presiding judge of their trial court. In 1952, this program was expanded by the creation of an administrative director, following substantially the uniform act on the subject and conferring broad and comprehensive administrative powers.²⁷ In 1953, an Oregon act²⁸ conferred administrative authority over the trial courts of general jurisdiction upon the supreme court to be exercised by the chief justice who "shall appoint an assistant." In 1955, a judicial conference was created in New York consisting of representatives of the appellate and trial divisions of the supreme court with the chief judge of the court of appeals as chairman.²⁹ The function of this body appears to be primarily to study and make recommendations concerning improvements in the administration of justice, but some administrative functions are contemplated.³⁰ These are but recent examples of the steady progress that has been made in this area.

Stirred by this movement, the Loring Committee in its judiciary article provided for a strong administrative council. The 1947 Commission in its draft also created such a council but with less extensive powers. It was to be made up of representatives of the various courts plus a lawyer and a layman and its powers were defined as follows:

"Subject to law it shall formulate policies for the efficient administration of the court system of the state and cause such policies to be executed by its chairman.³¹ No action shall be taken hereunder which interferes with the exercise of the judicial functions of a judge in any case or proceeding, and whether there is such interference shall be a judicial question."

26. See Vanderbilt, *The First Five Years of the New Jersey Courts Under the Constitution of 1947*, 8 Rutgers L. Rev. 289 (1954). Vanderbilt, *The Record of the New Jersey Courts in the Sixth Year Under the Constitution of 1947*, 9 Rutgers L. Rev. 489 (1955). Prior annual reports of Chief Justice Vanderbilt appear in earlier volumes of *The Rutgers Law Review*.

27. Mich. Pub. Acts 1952, Act. No. 269.

28. Ore. Rev. Stat. §§ 2.310-340 (1953).

29. N. Y. Sess. Laws 1955, c. 869.

30. Departmental committees for each of the departments of the supreme courts are also provided for. The complex court organization of the state of New York presents problems not to be found in Minnesota.

31. The chief justice.

The last sentence reflects the fears of trial judges and possibly others over the creation of such a body and the arguments used against it. As already indicated, nothing came of the recommendations of the 1947 Commission.

In the meantime, there have been signs of legislative dissatisfaction with the present state of affairs. In 1953, a house resolution requested the Minnesota Judicial Council, the District Judges Association and the Minnesota State Bar Association to study and report on the workload, redistricting, number and allocation of district court judges, and other related matters. Following a careful study, a valuable report on the conditions in the district courts was made. As a result the number of judges in some of the districts was increased. The report of the three organizations also recommended that some of the districts be combined into a single one, but no action has been taken on this recommendation. The report also urged, in view of the difficulty that had been experienced in securing adequate information about the work of the district courts, that legislation be enacted requiring clerks of district courts to keep a minimum of specified information and requiring this information to be reported to the judicial council. In response, an act was passed requiring the clerks to keep a record of all actions and proceedings and "furnish to the state Supreme Court any information concerning said actions as shall be prescribed by rule of civil procedure."³² Thus far such a rule has not been prescribed nor has the advisory committee to the supreme court on civil procedure as yet recommended such a rule.

The same concern for the effective utilization of the judicial force of the state also led to the enactment in 1953 of the following provision, appended to the act adding a judge to the eighth judicial district:³³

"The additional judge provided for by this act may, when the public convenience and necessity require it, be assigned by the Chief Justice of the Supreme Court to serve and discharge the duties of judge of any other district not his own at such time as the Chief Justice of the Supreme Court may determine."

A similar provision was added in creating an additional judgeship in the nineteenth district.³⁴

For reasons not known, the former provision was repealed in 1955.³⁵ But in the same legislative session, in adding some judges to

32. Minn. Stat. § 485.16 (1955).

33. Minn. Laws 1953, c. 584, § 3.

34. Minn. Laws 1953, c. 687, § 2.

35. Minn. Laws 1955, c. 147.

the fourth and tenth judicial districts, the following general provision was added:

"When public convenience and necessity require it, the chief justice of the supreme court may assign any judge of the district court to serve and discharge the duties of judge of any other district not his own at such times as the chief justice may determine."³⁶

Chief Justice Roger L. Dell moved vigorously to the discharge of his responsibilities under this act.³⁷

As a result, with the assistance of judges assigned from other districts, the calendar arrears in the fourth and second judicial districts have been attacked with a vigor and utilization of the judicial resources of the state not previously evidenced in the memory of the writer.³⁸

There has thus been, both nationally and within this state, a movement toward the creation of an administrative organization of the courts. A constitutional provision creating such an organization, as does the New Jersey Constitution, or authorizing or directing the legislature to so provide would appear to be most desirable. The draft of the Judiciary Committee of the Minnesota State Bar Association prepared for submission to the 1953 annual meeting of the Association contained such a provision, following almost verbatim the wording of the draft of the 1947 Commission.³⁹ But this met with vigorous opposition from the District Judges Association and at its request, the provision was deleted. It is probably too much to

36. Minn. Laws 1955, c. 483, § 4.

37. See letter of Chief Justice Dell to the district judges of the state, reproduced in 24 Hennepin Lawyer 51 (1946), in which, after reviewing the condition of calendars in the various districts, he stated:

"On the first day of the session of the next Legislature I will file with both the Senate and House a written report of the status of the calendars of the District Courts throughout the State and of what progress has been made in clearing up calendars since the adjournment of the 1955 session of the Legislature. I request the senior or sole judge of each of the districts to write me as to the status of the calendars in their districts on the first day of June and again on the 15th day of December 1956. If in the meantime a situation develops in your district which requires assistance from an outside judge if you will write to me I will endeavor to obtain assistance for you. I see no reason why I should not be able to report to the next Legislature that all district courts throughout the State are being maintained on a current basis except perhaps in Hennepin and Ramsey Counties and if those counties are not then current they should be nearly so."

38. The writer is familiar in some detail only with the conditions in the fourth judicial district. In recent years the inability to keep current in the trial of cases has not been attributable to lack of concern or effort on the part of the judges of that district. The cases to be tried were too great in number to be disposed of by the judicial force available.

39. See Final Report of Special Committee on Revision of the Constitution of the State of Minnesota, 10 Bench & Bar of Minn., No. 6, 88 (1953). The draft provided that the legislature "may" establish such a council. The draft of the 1947 Commission used the word "shall."

expect the lawyers of a state to override the determined opposition of the judges before whom they must practice. It is regrettable that the judges should have found it necessary to object to a measure designed to expedite their work and found useful and effective in other states.

As a result of this development, the proposed judiciary article likewise contains no provision on the subject. This undoubtedly will not prevent legislation on the subject but the history of previous efforts in the state indicates that without some stimulant in the constitution progress is likely to be slow and consist of piecemeal and inadequate measures passed to remedy some immediate and usually local situation.

The creation of an effective administration of the courts will also be made more difficult by the retention, in the proposed amendment, of the election of clerks of the district court. The primary functions of a district court clerk include the receipt and filing of pleadings and other documents incident to litigation, managing the trial calendar, administering oaths, entering judgments, maintaining the judgment docket, making and certifying copies of documents on file and other duties of a similar nature. These consist of administrative details essential to the administration of justice which someone other than the judge must perform. How they are performed affects vitally the work of the court and the efficiency with which litigation is disposed. Practically no question of general policy upon which the voter should pass is involved. It is a position peculiarly appropriate for appointment by the court. This was recognized in the Loring Committee plan and in the preliminary draft of the 1947 Commission.⁴⁰ But the final draft of the 1947 Commission omitted this provision and returned to the present system of election.

As has already been noted, the proposed article before the electorate this fall provides for appointment of the clerk of the supreme court. The considerations leading to this position apply with equal force to the district court clerk. As a minimum, the question should have been left to the legislature instead of freezing the elective method of selection in the constitution.⁴¹ As it is, the district court will be the only court in the state constitutionally prohibited from

40. See Preliminary Report on Revision of the Judiciary Article of the Minnesota State Constitution, 32 Minn. L. Rev. 458 (1948).

41. There is also a provision in the proposal that the compensation of a clerk of district court "shall not be diminished during his term of office," a provision usually reserved for judges in order to strengthen the position of independence essential to the judicial function. This seems designed still further to strengthen the independent position of the clerk and confers a constitutional advantage not given to the clerk of the supreme court or the clerk of any other court.

appointing its own clerk, a fact hardly in keeping with its status in other respects.

LOCAL COURTS

The present constitution provides on the local level for justices of the peace, probate courts and such other courts, inferior to the supreme court, as the legislature may establish by a two thirds vote. The courts established "inferior to the supreme court" have been almost wholly the municipal courts of the state.

Outside of the large urban centers, the justices of the peace and the municipal court and probate court judges function largely on a part time basis and are compensated on a fee basis.⁴² Justices of the peace and municipal court judges need not be and most of them have not been members of the bar. Until the adoption of the 1954 amendment to the constitution and subsequent legislation limiting future candidates for the position to lawyers, this was true also of probate court judges.

Thus, in the rural counties, there are likely to be found three part time courts, the probate court, a municipal court and one or more justices of the peace. For all of the judges of these courts, except for those justices of the peace and municipal courts which prey upon sportsmen and the traveling public, their judicial work is likely to be a sideline activity.

The proposed new Article VI eliminates the justice of the peace as a constitutional officer. Surely, this is a step in the right direction. There should not be in the judicial system of a state, a constitutionally protected office as antiquated as the justice of the peace whose name has become almost synonymous with miscarriages of justice and in too many instances with outright corruption. The notion of a layman, ignorant of the law, deciding the legal rights of parties in civil litigation and of defendants in criminal cases is wholly irreconcilable with the fundamental tenet of our government that justice shall be administered in accordance with established principles of law and not at the whim, or caprice or personal notions of justice held by some individual exercising the power of the state. The fact that the amount in litigation is small or that the crimes charged are minor ones does not in a democratic society alter the application of this fundamental philosophy.

Whether the removal of the justice of the peace as a constitutional officer will stimulate action toward much needed reform may

42. However, municipal court judges are increasingly being placed on a salary.

be open to question. As has been observed⁴³ the present constitution does not require that the legislature confer any particular jurisdiction on justices of the peace. It could be conferred upon some other more competent court, but this has not taken place. Similarly, many municipal courts which now are under full legislative control may be occupied under present laws by laymen with qualifications and performance no higher than those of justices of the peace. But in any event the elimination of the justice of the peace from the constitution is desirable.

With several independent courts all operating on a part time basis in a county, it would seem to make good sense to combine all of these activities and, if necessary, enlarge their scope and the geographical area covered and establish a full time court manned by a competent judge paid an adequate salary. The Loring Committee plan proceeded on this premise and created a county court as a division of a comprehensive state court. Its jurisdiction was defined as follows:⁴⁴

“Subject to the power of the administrative council,⁴⁵ it shall have jurisdiction of civil cases where the amount in controversy does not exceed one thousand dollars; of cases of unlawful detainer; of the estates of deceased persons and of the persons and estates of insane persons and persons under guardianship except in counties embracing a city of the first class, and concurrently with the district court, of all criminal cases where the punishment for the offense involved does not exceed ninety days in jail or a fine of one hundred dollars.”

This provision, along with most others of the plan, received little serious or friendly public or professional consideration and this approach was not pursued by the Constitutional Commission of 1947. A preliminary draft of recommendations prepared by the judiciary committee of the 1947 Commission authorized the creation of local magistracies with minor civil and criminal jurisdiction and empowered the legislature to provide in lieu thereof for a county court. This recommendation, however, did not survive the final draft and in any event the proposed county court would not have encompassed the work of the probate court. The probate court was preserved as a constitutional court with defined jurisdiction but with some changes from the then existing constitutional provisions to

43. Howard, *Proposed Amendment to Article VI of the Constitution*, 14 Bench & Bar of Minn., No. 4, p. 13 (1956).

44. Committee on Unification of the Courts, *Recommended Constitutional Amendment*, § 4.

45. “The council shall have power, by rules approved by the supreme court, to alter the jurisdiction herein conferred upon the district and county courts. . . .” *Id.* § 9.

clarify the jurisdiction of the court. It also eliminated the county as the basis of geographical organization of the probate court and permitted the organization of probate court districts on some other basis. The justice of the peace was eliminated as a constitutional court.

Following the failure of the legislature to take favorable action on the recommendations of the 1947 Commission, two lines of action emerged on the part of those interested in the improvement of the organization of local courts. One of these appears to have originated with the probate judges of the state and led to legislation⁴⁶ submitting an amendment of Article VI, section 7, dealing with probate courts. The amendment was adopted at the 1954 election and is in force today. It reads as follows:⁴⁷

"There shall be established in each organized county in the State a probate court, which shall be a court of record, and be held at such time and place as may be prescribed by law. It shall be held by one judge, whose qualifications may be established by law. The judge shall be elected by the voters of the county for a term of four years. He shall be a resident of such county at the time of his election, and reside therein during his continuance in office. His compensation shall be provided by law. He may appoint his own clerk or register of probate for such county, whose powers, duties, term of office and compensation shall be prescribed by law. A probate court shall have jurisdiction over the person and estate, either or both, of persons under guardianship; over estates of deceased persons; and such further jurisdiction as the legislature may from time to time establish by a two-thirds vote."

Four changes resulted from this amendment:

(1) The legislature may now fix the qualifications of the probate judge. This, probably more than any other change, received public notice prior to the election at which the amendment was submitted. Legislation was immediately enacted in the 1955 session requiring probate judges, present occupants of the office excepted, to be members of the bar.⁴⁸

46. Minn. Laws 1953, c. 759.

47. Previous to the amendment, section 7 read as follows:

"There shall be established in each organized county in the State a probate court, which shall be a court of record, and be held at such time and place as may be prescribed by law. It shall be held by one judge, who shall be elected by the voters of the county for the term of four years. He shall be a resident of such county at the time of his election, and reside therein during his continuance in office; and his compensation shall be provided by law. He may appoint his own clerk where none has been elected; but the legislature may authorize the election, by the electors of any county, of one clerk or register of probate for such county, whose powers, duties, term of office and compensation shall be prescribed by law. A probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction, except as prescribed by this Constitution."

48. Minn. Laws 1955, c. 197. The phrase "learned in the law" is used

(2) The power of the legislature to provide for election of clerks or registers of the court was removed. So far as known, this power had not been exercised. These officials have uniformly been appointed by the probate judge.

(3) The language of the last sentence of the above quoted amendment more clearly spells out that the jurisdiction of the court extends to the person as well as to the estate of persons under guardianship.⁴⁹

(4) The legislature, by a two-thirds vote, may confer further jurisdiction upon the probate court. The scope of the jurisdiction that may be conferred appears to be without limitation of any kind. This was very probably included with the thought that thereby the probate court could serve as a nucleus for development as a county court, with jurisdiction extending to civil, criminal, and other matters which two thirds of the legislature might think desirable. With the improved qualifications now fixed for judges of this court, such expansion becomes feasible.

The second line of development has been supplied by the Minnesota State Bar Association. While endorsing the 1954 amendment of section 7, it was proceeding through its own committee to study the recommendations of the 1947 Commission, including, of course, section 7. The committee report was submitted to the annual meeting of the Association in 1953. In the proposed draft of Article VI, not only was the justice of the peace removed as a constitutional officer, but the probate court was removed as well, thus leaving the legislature complete freedom in dealing with the local court problem. The legislature was permitted to establish "other courts . . . with jurisdiction inferior to the district court, including courts with probate and such other jurisdiction as may be provided by law." To do so, a two-thirds vote of the legislature was not required.⁵⁰ But the probate court was not to succumb to such easy death. By convention time, or as a product of the convention,⁵¹ it was restored

49. This seemed definitely settled by judicial decision even prior to the amendment. See *Jasperson v. Jacobson*, 224 Minn. 76, 27 N. W. 2d 788 (1947). In that case it was held that the exclusive jurisdiction of the probate court extended only to those guardianships which were known at the time the constitution was adopted and, hence, the guardianship of a child committed to an agency could be given by the district court acting as a juvenile court. The case arose in Hennepin County where the district court acts as the juvenile court. The adoption of the 1954 amendment raises this question: Does the amendment speak of guardianships as of the date of its adoption and hence encompass the kind of guardianship involved in the *Jasperson* case?

50. See Report of Special Committee on Revision of the Constitution of the State of Minnesota, 10 Bench & Bar of Minn., No. 6, p. 88 (1953).

51. The record is not clear. See Final Report of Special Committee on Revision of the Constitution of the State of Minnesota, 10 Bench & Bar of Minn., No. 10, p. 52 (1953).

as a constitutional court and its jurisdiction delineated. In this form it was approved by the Association, and in the same form it was adopted by the legislature. It is to be voted upon at the coming 1956 election. It appears as section 6 in the proposed article. The general pattern was taken from the draft of the 1947 Commission with one major change to be noted. It now reads as follows:

"The Probate Court shall have unlimited original jurisdiction in law and equity for the administration of the estates of deceased persons and all guardianship and incompetency proceedings, and such further jurisdiction as the legislature may establish, including jurisdiction over the administration of trust estates and for the determination of taxes contingent upon death. Until otherwise provided by law, each county shall constitute a probate court district and there shall be one or more probate judges in each district. Each judge of the probate court in any district shall be a resident of such district at the time of his selection and during his continuance in office."⁵²

Thus, two years after having approved an amendment to section 7 of Article VI, the voters are asked to reconsider and to approve a new version as part of the general revision of the article as a whole. They will be asked to approve the following changes from the amendment adopted in 1954:

(1) The legislature is given full authority to organize the probate courts into larger units and will not be required to establish probate courts in each county. The proposed amendment will also permit legislation to provide for more than one judge in a given district. This is particularly important to counties with large urban populations such as Hennepin which are now confined by constitutional provision to a single probate judge. In other parts of the state, a single county does not have enough probate work to warrant a full time judge. Under the proposed amendment, several counties could be combined into a single probate court district with a single full time judge. This is therefore a very desirable liberalization.

(2) The legislature, on a simple majority vote, may extend the

52. There is also a change in section 1 of Article VI. The present section provides for "courts of probate." The change substitutes "a probate court." Heretofore, district courts of the state have been treated as one court for the entire state. *Smith v. Barr*, 76 Minn. 513, 79 N. W. 507 (1899). The intention in the changed wording is to provide similarly for a single probate court rather than a separate court for each county. The bringing of a probate proceeding in a proper county becomes then merely a question of venue and not of jurisdiction. See *In re Estate of Martin*, 188 Minn. 408, 247 N. W. 515 (1933). However, this has been held to be only a question of venue under the present constitution. *In re Estate of Davidson*, 168 Minn. 147, 210 N. W. 40 (1926). The proposed change in language is but a recognition of existing law on the subject.

jurisdiction of the probate court to any area of judicial business whether civil or criminal litigation, divorce, unlawful detainer, registration of titles to real estate, or any other cases which the legislature may choose. A two-thirds vote is not required. The suggestion for this provision probably came from the 1954 amendment which, however, required a two-thirds vote of the legislature.⁵³ There was no similar provision in the draft of the 1947 Commission. It represents a radical departure from previous conceptions,⁵⁴ as to the function of the constitutional provision dealing with this subject. Heretofore, until the 1954 amendment, the constitution defined the entire jurisdiction of the probate court. With some minor qualifications such as the juvenile court jurisdiction which has been given by legislation to the probate courts in the rural district and to the district courts in the urban areas, this jurisdiction was exclusive. As judicially defined, nothing could be added to this jurisdiction and nothing could be taken away. Under the proposed amendment, all restrictions on the jurisdiction that may be added have been removed. The only function of the specific provisions of the section now will be to prohibit the legislature from depriving the probate court of the jurisdiction designated. The 1954 amendment took a long step in this direction but limited it by the requirement of a two-thirds vote.

(3) The jurisdiction which the legislature may confer on the probate court appears to be unlimited. It need not be "inferior to the district court" under section 1 of the proposed article since that qualification is limited to "other courts, minor judicial officers and commissioners" than the supreme court, district court and probate court.

Is this desirable? The writer believes that it is and that the real question is whether the draft should not have gone farther and also have removed the prohibition against removing the jurisdiction specifically defined. This will be developed in a moment.

(4) The jurisdiction of the probate court specifically designated and which cannot be taken away by legislation is redefined as "unlimited original jurisdiction in law and equity for the administration of the estates of deceased persons and all guardianship and incompetency proceedings." The phrase "jurisdiction in law and equity for the administration of the estates of deceased persons" will be very difficult to apply. The words "in law and equity" normally

53. The amendment is set out *supra* at note 47.

54. Except for the abortive first report of the State Bar Association Committee.

mean the jurisdiction of the courts of law and the courts of equity under the common law system of England. This immediately introduces an area of uncertainty. The administration of estates of deceased persons was principally in the ecclesiastical courts and the chancery court. The probating of wills and the granting of letters of administration were exclusively functions of the former. There was practically no administration in the true sense of the word in the courts of law, the rights and duties of representatives being enforced through ordinary litigation.⁵⁵ In the United States, from the earliest times, the probate court, under various names has generally existed as a separate and distinct court from that upon which general jurisdiction in law and equity has been conferred. One of the major problems in this and other states has been to define, through the processes of litigation in appellate courts, the scope of jurisdiction intended for these courts recognizing that formerly in England the intended jurisdiction resided principally in the ecclesiastical and equity courts. To refer, therefore, to "law and equity," language not previously used, as a source of jurisdiction for the administration of estates of deceased persons can introduce nothing but confusion on the subject.⁵⁶ The present language, embodied in the 1954 amendment, has the merit of retaining previous language which judicial decisions have in considerable measure construed.

Standing also as a challenge to interpretation is the curious addition of the word "unlimited" to the "original jurisdiction" of the probate court. Unlimited by what? It may have had some place in the draft of the 1947 Constitutional Commission. In this draft, the jurisdiction of the probate court was to be that specified in the constitution—no more or less. The word "unlimited" might then be said to be an admonition to the courts that this provision was to be construed broadly in favor of jurisdiction. Under the amendment now proposed, as we have seen, the function of the provisions dealing with jurisdiction of the probate court in section 7 is to define the jurisdiction that cannot be taken away. The legislature can give additional jurisdiction without limit. Under those circumstances, a provision that the minimum jurisdiction specified shall be "unlimited" would appear to have little constitutional purpose.

55. 3 Holdsworth, *History of English Law* 585 (4th ed. 1935); see Simes and Basye, *The Organization of the Probate Court in America*, 42 *Mich. L. Rev.* 965 (1944).

56. Since this provision of the constitution would be self-executing, the probate courts would be required to provide for jury trial immediately after adoption of the amendment for any case or issue "in law" coming before the probate court.

Under the proposed amendment, the probate court is also to have jurisdiction of "all guardianship and incompetency proceedings." This is in keeping with past provisions and with the present specific language of the 1954 amendment. It has been traditional also in the United States, generally, to confer such jurisdiction on probate courts although not necessarily by constitutional provision.⁵⁷ The serious question is whether this combination is so essential that it should be commanded by the constitution. Particularly with respect to incompetency proceedings this is open to doubt. Great strides have been made in the recognition of the nature and treatment of mental illness and the legislature might properly conclude that proper adjudication in this complex and important medical field calls for skills found or to be provided in some other court than the probate court. If so, it is difficult to see why the constitution should prohibit the legislature from removing the jurisdiction from the probate court and placing it where the public interest will best be served. Similarly, with the growing concern over litigation involving the family which is now spread over several courts, the legislature may deem it in the public interest to establish a family and children's court in which all this litigation would be integrated and dealt with by a judiciary and staff skilled in this field. The guardianship of minors should undoubtedly be included. It may be that the legislature would deem it desirable and practical to place responsibility for the family and children's court on the court having jurisdiction over probate matters. But if it should decide otherwise, it is difficult to see why it should be constitutionally prohibited from acting accordingly. A separate family and children's court, distinct from the probate court and which includes guardianship of minors, cannot be said to be so unwise that under no circumstances should it be permitted.

The specification of the jurisdiction of the probate court may create difficulties in the way of desirable solution of another problem. Presently, an issue litigated and determined in probate court may be appealed to the district court for a trial *de novo*. The legislature might well decide that all contested cases should go in the first instance to the district court for trial and thus reduce the waste of time and expense incident to double trials. This would not be possible under the proposed amendment.

57. See Simes and Basye, *The Organization of the Probate Court in America*, 43 Mich. L. Rev. 113, 130 (1944).

Also in the larger centers, and even in rural districts, it might be thought desirable to transfer the entire area of probate jurisdiction to the district court. In Iowa and a number of other states this has been done for the entire state and there is no probate court. This has been advocated by eminent scholars of the subject:⁵⁸

"The probate court should be the same court as the court of general jurisdiction or should be a division of it. This does not mean merely a unification of judges, such, for example, as is the plan in certain counties in Ohio and Pennsylvania. It means a unification of *courts*. Indeed, this unification should be so complete that, if, after a proceeding is begun, it is found to come under the equity or common-law jurisdiction of the court, it can be transferred to another docket of the court or to another division, without beginning the proceeding anew. Only in this way can be completely avoided the hardships incident to determining where the shadowy, marginal line of probate jurisdiction is to be drawn. The question of whether a given matter should be in equity or in probate will cease to be one in which a slight misstep on the part of the attorney may prejudice an innocent litigant."

Under the proposed amendment transfer of the entire area of probate jurisdiction to the district court cannot be accomplished.

The foregoing observations point up the major objection to the proposed amendment with respect to local courts. It represents an effort to carve out a limited jurisdiction and confer it upon a court created for the purpose. In so doing, that court is placed beyond the reach of legislation or other means of change short of another constitutional amendment. This runs counter to the trend toward greater flexibility in court organization which leaves the legislature free to provide the kind of organization which a growing state with shifting needs requires. There is an increasing feeling in Minnesota that improvement in the organization of our local courts is needed. The part time probate courts, and the part time and usually fee paid justices of the peace and municipal courts are not rendering the kind of justice the average citizen should have. Public and professional opinion has not crystalized as to the form the reorganization should take. The county court similar to that proposed by the Loring plan is one solution offered. Expanding the jurisdiction of the probate court is another. Specialized courts such as the domestic relations or family court or, short of that, a separate juvenile court, have also been proposed. Under these circumstances, when considering a desirable solution it appears unwise to start with a probate court with a constitutionally protected jurisdiction which cannot be reduced or removed. It would have been better to follow the

58. *Id.* at 150.

examples of New York,⁵⁹ Michigan,⁶⁰ and Wisconsin⁶¹ which give their legislatures wide powers over the subjects. These states have served as examples for Minnesota in many other fields of law. We should have the same confidence in our legislature that they have in theirs. The probate court should not be a constitutional court with an irreducible jurisdiction of its own.

JUDGES

Term of Office. In the interest of simplification, the provisions as to the terms of office of the judges of the various courts have been reduced to a single section and a single term provided for all of them. The term is for six years.⁶² This represents no change with respect to supreme court and district court judges. It increases the term of probate judges from four to six years. The present term of office for justices of the peace is two years⁶³ and for other courts created by the legislature such as municipal courts, the present constitution does not designate a term. The desirability of increasing the terms of justices of the peace and of lay fee paid municipal court judges and thus expanding the opportunity of those disposed to predatory activities is open to question.

Qualifications. The only change in qualifications for judges is in the probate court. The proposed amendment would require them to be "learned in the law."⁶⁴ The present constitutional provision appearing in the 1954 amendment is that the "qualifications may be established by law." This difference probably has little practical significance unless the legislature should desire to add to the qualifications of probate judges either because they also act as juvenile

59. "Surrogates and surrogates' courts shall have the jurisdiction, legal and equitable, and powers now established by law until otherwise provided by the legislature." N. Y. Const. art. VI, § 13.

60. "In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents." Mich. Const. art. VII, § 13 (1908).

The requirement of a a probate court in each county seems unwise in so far as it prevents the combining of counties to permit a single full time judge. If the last clause means that juvenile court jurisdiction cannot be conferred upon other courts and is more than an enabling provision, it is similarly subject to the objections stated in the text.

61. "There shall be chosen in each county, by the qualified electors thereof, a judge of probate . . . whose jurisdiction, powers and duties shall be prescribed by law. Provided, however, that the legislature shall have power to abolish the office of judge of probate in any county, and to confer probate powers upon such inferior courts as may be established in said county." Wis. Const. art. VII, § 14.

62. Section 8 of the proposed amendment.

63. Minn. Const. art. VI, § 8.

64. Section 7 of the proposed amendment.

court judges or because other jurisdiction is conferred upon them requiring specialized talents. The language is open to the construction that no other qualifications can be added.⁶⁵

Selection. The draft of the judiciary article prepared by the Loring Committee contained rather complete provisions incorporating the method of selection of judges in force since 1945 in Missouri and known as the Missouri plan.⁶⁶ Under this plan, when a vacancy in a judicial office occurs, a non-partisan judicial commission submits three names to the governor who appoints one of them to fill the vacancy. After holding office for a limited period, the name of the appointee is submitted to the electorate without a competing candidate on the question: "Shall Judge _____ be retained in office?" If a majority of the votes cast on the question are in the affirmative, the appointee remains in office for a new and full term. If the vote is in the negative, the process is repeated. A somewhat similar plan has been in operation in California since 1934.⁶⁷ In both states the plan has operated with general satisfaction. It has had vigorous sponsorship by the American Bar Association and the American Judicature Society, but thus far it has not been adopted in other states.⁶⁸

The 1947 Constitutional Commission approached this plan with considerable caution and some abandonment of its principles. The legislature was authorized to provide for the adoption of the plan subject to the limitation that the first election of the appointee should not be on his retention but should be a normal election open to competing candidates. Subsequent elections of the successful candidate would then be on the question of his retention. This modification increases the security of the candidate once elected but does not retain the safeguards of the Missouri plan with respect to the initial selection.

The judiciary article, drafted by the Minnesota State Bar Association and following in most other respects the article prepared by the 1947 Commission, removed all explicit provisions dealing with the Missouri plan and retained only the section providing for election of judges. In this form it was approved by the legislature for submission to the electorate. It provides that all judges "shall be

65. See State *ex rel.* Boedigheimer v. Welter, 208 Minn. 338, 293 N. W. 914 (1940).

66. Mo. Const. art. V, § 29 (1945).

67. Cal. Const. art. VI, § 26.

68. For a view opposing the plan see Anderson, *Reorganizing Minnesota's Judiciary—A Layman's View*, 27 Minn. L. Rev. 383 (1943). The plan is included in the Constitution of the Territory of Alaska, ratified April 24, 1956. See 39 J. Am. Jud. Soc'y 175 (1956).

elected in the manner provided by law by the electors of the state, district, county, municipality, or other territory wherein they are to serve."⁶⁹

The phrase "elected in the manner provided by law" is new. An argument can be made that it permits legislation adopting the Missouri plan or some modification of it.⁷⁰ Voting on the question of retention in office might be deemed an election and the initial appointment by the governor for a limited period as merely preliminary to the election. Nevertheless, this is a strained construction of the language used. Its natural meaning contemplates competing candidates for the office and an election at which a choice between them is made. That has been the meaning of "elected" heretofore. The proposed words, "in the manner provided by law" ought to mean only that legislation may prescribe the details and methods of election. Thus, the phrase would permit laws prescribing whether the election shall be bypartisan or non-partisan designation. It would permit the "alley" plan of election whereby each judge of a multi-judge court is considered a separate position and candidates must designate for which position they seek election.⁷¹ It would permit incumbants to be identified as such on the ballot.⁷² If more than this is intended, and a plan of selection such as the Missouri plan is authorized, it should have been specifically stated so that voters in considering the adoption of the proposed article will be aware of it. However desirable, a change of this importance should not come about through the implication of some innocuous appearing words.

Vacancies in a judicial office are to be filled by appointment by the governor as under the present constitution.⁷³ However, a desirable change has been made in increasing from 30 days to one year the period of time which must elapse between the appointment and the next general election at which the appointee's successor is elected. This will enable the public to become better acquainted with the appointee, who usually is a candidate to succeed himself, and it

69. The language is patterned on Article VI, section 9, of the present constitution which reads: "All judges other than those provided for in this Constitution shall be elected by the electors of the judicial district, county, or city, for which they shall be created. . . ." State *ex rel.* Rosckes v. Dreger, 97 Minn. 221, 106 N. W. 904 (1906), should continue to be applicable notwithstanding the change in wording. In this case, the county-wide jurisdiction of the Municipal Court of Minneapolis was sustained, although the judges of the court were elected by the voters of the City of Minneapolis only.

70. See Howard, *Proposed Amendment to Article VI of the Constitution*, 13 Bench & Bar of Minn., No. 4, p. 13 (1956).

71. See Gustafson v. Holm, 232 Minn. 118, 44 N. W. 2d 443 (1950).

72. *Ibid.*

73. Minn. Const. art. VI, § 10.

will avoid the embarrassing situations which arise when a vacancy occurs after the primary election has taken place but more than 30 days remain before the next general election.

Retirement. No one is more tenacious in his belief in his own competence than an aging judge. Unless some provision is made for his retirement the administration of justice in too many instances will suffer at the hands of a judge of declining ability. Heretofore, in this and most other states the assumption has been that the judge will retire on his own volition if provided with a retirement compensation that will permit him to do so. Accordingly many states, including Minnesota,⁷⁴ provide retirement allowances on certain conditions being fulfilled such as reaching a designated age and service on the bench for a given period of time. This, however, frequently does not induce a judge eligible for the allowances to retire. Usually the retirement compensation is substantially less than his salary. But even when equal to his salary, as in the federal system, judges continue on beyond the age of retirement, even though in many instances it would be to their advantage and that of the court if they would give up the reins to younger men. Hence, in some states, retirement at a specific age is made compulsory by constitutional provision. In Minnesota, the problem has been partially met in the case of the district court judge by withholding retirement allowances if a judge does not retire within one year after becoming eligible to do so.⁷⁵

Another problem arises when a judge becomes disabled from performing his duties. Legislation usually provides for his retirement with compensation upon a determination of his disability.⁷⁶

The present constitution contains no provision on the subject. The proposed judiciary article authorizes legislation on the subject and "for the extension of the term of any judge who shall become eligible for retirement within three years after expiration of the term for which he is elected."⁷⁷ This provision is designed to permit legislation which will protect the judge whose term will expire before he becomes eligible for retirement and is compelled to run again for another term if he is to receive the benefits of the retirement laws. Another provision permits a retired judge to continue judicial work under such conditions as may be specified by law.

74. See Minn. Stat., c. 490 (1953).

75. Minn. Stat., § 490.102 (1953).

76. See Minn. Stat., §§ 490.04-12 (1953).

77. The draft of the 1947 Constitutional Commission provided for compulsory retirement at the age of 70.

CONCLUSION

The proposed judiciary article contains a substantial number of desirable improvements over the present constitution. But, in general, it represents a conservative and limited advance. In a few instances serious problems of interpretation are introduced. With respect to the three major needs of court organization existing in this state, the article is a disappointment. These are the need for an effective administrative organization of the courts, the reorganization of the local court structure, and substitution of court appointment for the present election of clerks of district court. On the whole, a modern and satisfactory solution to the problems of court organization in this state is not to be found in the proposed judiciary article. But still, it represents some advance—and some advance is probably better than none at all.

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