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## History and Commentary on the Judicial Article

George H. Turner  
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# AN APPRAISAL OF THE JUDICIAL, LEGISLATIVE AND EXECUTIVE ARTICLES OF THE CONSTITUTION

*In this section, three Nebraska attorneys who hold high office in our state government examine the three branches of government found in the typically American political system set out in the Nebraska Constitution. George Turner, Clerk of the Supreme Court, traces the history of the state court system and advocates the adoption of a Nebraska Merit Plan for the selection of Supreme Court and district judges. A former state senator, Clerk of the Legislature Hugo Srb appraises the Unicameral Legislature of Nebraska in the second article and finds it to be efficient and stable after almost twenty-five years. Governor Frank Morrison concludes this section with a number of provocative proposals for streamlining the executive branch of state government.*

*The Editors*

## History and Commentary on the Judicial Article

**George H. Turner\***

### I. HISTORY OF THE JUDICIAL ARTICLE

The Organic Act approved May 30, 1854, by which the Territory of Nebraska was organized, provided that the judicial power of the new Territory should be vested in a Supreme Court, district courts, probate courts, and justices of the peace.<sup>1</sup> It further provided that the Supreme Court should consist of a chief justice and two associate justices who were to serve terms of four years and were required to hold a term annually at the seat of government.

\* LL.B., 1923, University of Nebraska. Secretary to Chief Justice Andrew M. Morrissey, 1923-1927; Deputy Clerk, Supreme Court of Nebraska, 1926-1932; State Librarian and Clerk, Supreme Court of Nebraska, since 1932. Secretary, since 1937, and Treasurer, since 1938, Nebraska State Bar Association.

<sup>1</sup> Nebraska-Kansas Organic Act, § 9, 10 Stat. 277, 280 (1854).

The Act required that the Territory be divided into three judicial districts and that district court be held in each district by one of the justices of the Supreme Court "at such times and places as may be prescribed by law."<sup>2</sup> The justice was required to reside in the district assigned to him.

The provision that justices of the Supreme Court should act also as judges of the district courts was carried over into the Constitution of 1866 and the practice was continued until the adoption of the Constitution of 1875.<sup>3</sup> By the Constitution of 1866, the Supreme Court was given original jurisdiction in cases relating to the revenue, mandamus, quo warranto, habeas corpus, and matters of impeachment.<sup>4</sup>

With the adoption of the Constitution of 1875, the state was divided into district court districts and members of the Supreme Court were relieved of trial duties. The titles of members of the Supreme Court were changed from justices to judges but the number of members remained fixed at three<sup>5</sup> and it was provided that the judge having the shortest term to serve should be chief justice.<sup>6</sup> This practice of rotation continued until the adoption of amendments to the constitution in 1908 by which the membership of the supreme court was increased from three to seven all of whom were to be elected from the state at large. In this amendment it was provided that the incumbent member of the court whose term would expire in January 1914 should serve as chief justice until the expiration of his term, and that thereafter the chief justice should be elected as such.<sup>7</sup>

The Constitution of 1875 also increased the term of office from four to six years<sup>8</sup> and added to the original jurisdiction of the court "civil cases in which the state shall be a party."<sup>9</sup> In 1912 the constitution was further amended to provide that the terms of judges should be staggered so that three members would be elected in the year 1916, three in 1919 and the chief justice in 1920.<sup>10</sup>

The present provision that the chief justice be elected by the

<sup>2</sup> *Ibid.*

<sup>3</sup> NEB. CONST. art. IV, § 2 (1866); NEB. CONST. art. VI, § 2 (1875).

<sup>4</sup> NEB. CONST. art. IV, § 3 (1866).

<sup>5</sup> NEB. CONST. art. VI, § 2 (1875).

<sup>6</sup> NEB. CONST. art. VI, § 6 (1875).

<sup>7</sup> NEB. CONST. art. VI, §§ 2, 5 (as amended, 1908).

<sup>8</sup> NEB. CONST. art. VI, §§ 4, 5 (1875).

<sup>9</sup> NEB. CONST. art. VI, § 2 (1875).

<sup>10</sup> NEB. CONST. art. VI, § 5 (as amended, 1912).

electors of the state at large and the associate judges by defined districts came into the constitution with the amendments of 1920. These changes fixed the districts to coincide with the six congressional districts as they were constituted at the time the amendments were adopted.<sup>11</sup>

Although vested with both appellate and original jurisdiction by the constitution, the court seldom exercises its original jurisdiction. It was held in *State ex rel. Herpolsheimer & Co. v. Lincoln Gas Co.*<sup>12</sup> and later in *State ex rel. Wycoff v. Merrell*,<sup>13</sup> that the court would not entertain an original action between private individuals except upon a showing of a good reason why such case was not commenced in the district court. By rule of court it is now provided that no original action may be commenced in the Supreme Court except by leave of court first obtained.<sup>14</sup> To obtain such leave the applicant must lodge with the Clerk of the Supreme Court a verified petition setting forth the action and a statement as to the court's jurisdiction and the reasons which make it necessary to commence the action in Supreme Court.<sup>15</sup>

One of the early cases in which the court did exercise its original jurisdiction is *State v. Hill*,<sup>16</sup> an action to recover against the bondsmen upon the bond of a former state treasurer, which is unique in that it is the only case in the entire history of the court to be tried to a jury. Earlier, in the case of *In re Petition of the Attorney General*,<sup>17</sup> the jurisdiction of the court to entertain the suit was challenge and, among other grounds, the question was raised that there was no provision for the empaneling of a jury. In its opinion the court answered this contention by stating that, "Whenever a proper case is presented wherein there must be a jury, this court will make such order in that regard as shall be deemed necessary."<sup>18</sup>

Pursuant to this opinion the court on November 21, 1894, promulgated a rule providing that whenever a particular case docketed in the Supreme Court required that a jury be called, a commission of two resident electors of different political affiliation should be

<sup>11</sup> NEB. CONST. art. V, § 4 (as amended, 1920).

<sup>12</sup> 38 Neb. 33, 56 N.W. 789 (1893).

<sup>13</sup> 38 Neb. 510, 56 N.W. 1082 (1893).

<sup>14</sup> NEB. SUP. CT. R. 2(a) (1).

<sup>15</sup> NEB. SUP. CT. R. 2(a) (2).

<sup>16</sup> 47 Neb. 456, 66 N.W. 541 (1896).

<sup>17</sup> 40 Neb. 402, 58 N.W. 945 (1894).

<sup>18</sup> *Id.* at 410, 58 N.W. at 947.

appointed to select a jury. Under this rule, commissioners were appointed who chose a jury from widely scattered parts of the state to hear the testimony in the *Hill* case. In this, the only jury case ever tried in the Supreme Court as an original action, the jury returned a verdict for the defendants on December 7, 1895.<sup>19</sup>

## II. THE NEBRASKA MERIT PLAN

The manner of selection of judges set out in the 1920 amendments has remained unchanged without any concentrated move for amendment until the present. For several years the Bar Association and other groups have been studying the so called "Missouri" or "merit" plan. The main reason that the present method of selecting judges through competitive popular election has been criticized is that the system has not necessarily insured selection of judges of the highest caliber, partly because the electorate cannot judge adequately whether a person is fitted for judicial office, and partly because the system often does not attract the best qualified persons to seek the office. It is the proposal of the Bar that the present method of selecting judges be abolished and a "merit plan" be adopted.

The proposed plan,<sup>20</sup> which is a refinement for Nebraska of the Missouri plan, is specifically applicable only to judges of the Supreme Court and the district courts although it is broad enough to allow a later inclusion of judges of the county courts if the Legislature so provides. It provides for nominating commissions; one state-wide for the chief justice of the Supreme Court; one for each of the Supreme Court judicial districts; and one for each of the district court judicial districts.

A member of the Supreme Court selected by the governor would be chairman of each judicial nominating commission. The remaining six members of each commission would consist of three lawyers residing and practicing within the judicial district, to be selected by members of the Bar, and three laymen similarly residing within the judicial district to be appointed by the governor.

The appropriate nominating commission would recommend two persons to fill any judicial vacancy from which the governor must make an appointment. The judge appointed would remain in office for a fixed term subject to approval or rejection by the electorate

<sup>19</sup> See *State v. Hill*, 47 Neb. 456, 66 N.W. 541 (1896).

<sup>20</sup> L.B. 315, introduced Jan. 24, 1961. The bill was revised extensively by the Judiciary Committee.

after three years from the date of appointment and every six years thereafter. Each judge would run on his own record, or "merit" and not against opponents. If the plan becomes effective, incumbent judges at that time would continue their term and run on their record at the general election immediately prior to the end of their elective term.

This plan, although incorporating the basic features of the plan recommended by the American Bar Association, is designed especially to meet the needs of Nebraska. It affords the means of avoiding the weaknesses in the existing system, and retains the desirable features. It relieves judges from the necessity of campaigning for office against opposing candidates and still requires them to answer to the electorate. These features tend to assure appointment and retention of the best qualified judges.

Missouri adopted its merit plan in 1940. The growing number of states, including the state of Alaska, which have adopted similar plans or are working on similar plans at this time, as well as satisfaction with the system in Missouri, is testimony to the success of the merit plan. Adoption of the Nebraska merit plan will require a state constitutional amendment. Much public education<sup>21</sup> concerning the shortcomings of the present system and the advantages of the proposed plan must be accomplished if public acceptance of the plan is to be secured.

<sup>21</sup> See, e.g., McCown, 10 NEB. S.B.J. 41-42 (1961).