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THE JUSTICE OF THE PEACE IN NEBRASKA*

Ronald J. Dolan and William B. Fenton**

I. INTRODUCTION

A. HISTORY.

The office of justice of the peace has existed in Nebraska since its territorial days. The organic act of 1855 provided that judicial power should be vested in a supreme court, district courts, probate courts and justices of the peace.¹ The justice of the peace is provided for in Nebraska's present constitution, which was adopted in 1875 and modelled closely after the Illinois constitution of 1870.² A constitutional convention was held in 1920 but none of the forty-one amendments proposed by this convention (all of which were later adopted) involved abolition of the justice courts.³ The convention did offer an amendment to section I of Article V, the judiciary article, to allow the legislature to substitute other courts for justice of the peace courts and to increase the jurisdiction of these substituted courts. This amendment permitted the legislature to later establish municipal courts to replace justice of the peace courts in Lincoln and Omaha, Nebraska's two largest cities, and to provide for their creation in other Nebraska cities of over 9,000 population.⁴ The convention's Committee on the Judicial Depart-

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¹ J. MORTON, HISTORY OF NEBRASKA 266 (1907).

² J. OLSON, HISTORY OF NEBRASKA 189 (1955) [hereinafter cited as OLSON]. See also Winter, *Constitutional Revision in Nebraska: A Brief History and Commentary*, 40 NEB. L. REV. 580, 583 (1961).

³ OLSON, *supra*, note 2, at 286. Olson characterizes the 1920 convention as "distinctly conservative," including in its membership "forty-five lawyers, among whom were some of the most conservative members of the old order in Nebraska politics." The convention "confined itself generally to the consideration of amendments designed to remedy the procedural defects in the Constitution of 1875."

⁴ NEB. REV. STAT. §§ 26-101, -201 (Reissue 1964).

ment, which submitted the proposed amendment of section I, Article V to the full convention, summed up its thinking on the matter:

The Committee, in the course of its deliberations, reached the conclusion that the courts of justices of the peace should not be abolished. There were proposals before us, and some members of the Committee favored abolishment of the justice of the peace courts and others said they were a 'poor man's' court. We concluded further, that an institution which had existed in this country since the beginning, more than 140 years in constant use, should not be abolished, and we therefore concluded to retain in that section courts of justices of the peace, but we decided that in certain of the larger towns and counties it might be advisable to substitute for the justice of the peace other courts of more extended jurisdiction, and we therefore, by that section, authorized the legislature to provide for courts as substitutes for courts of justice of the peace, and authorized the legislature to give to those courts additional jurisdiction if they saw fit to do so.⁵

Thus it appears that there was pressure to abolish justice of the peace courts in Nebraska as early as 1920. The committee's basic reason for not proposing abolishment was simply that one should not replace a piece of judicial furniture that has worn so well in the past, regardless of the contemporary need for it.

B. JURISDICTION.

The maximum jurisdiction exercisable by justices of the peace is limited by the state constitution. Section 18 of Article V provides that a justice shall not have jurisdiction in a civil case where the amount in controversy exceeds 200 dollars or in a criminal case where the punishment may exceed three months imprisonment and a fine of over 100 dollars or both. The justice is also barred by the constitution from hearing matters where the title or boundaries of land are in dispute.⁶ The legislature has given the justice courts jurisdiction commensurate with the maximum allowed them by the constitution: *i.e.* civil jurisdiction for cases involving 200 dollars or less⁷ and criminal jurisdiction where the punishment cannot exceed three months imprisonment, a fine of 100 dollars or both.⁸ In *Brown v. State*,⁹ the Nebraska Supreme Court held that a justice of the peace had jurisdiction to hear a complaint alleging multiple violations of a law, even though the aggregate punishment which

⁵ 1 PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL CONVENTION, (1919-20) at 994.

⁶ NEB. CONST. art. V, § 18.

⁷ NEB. REV. STAT. § 27-102 (Reissue 1964).

⁸ NEB. REV. STAT. § 29-601 (Supp. 1967).

⁹ 115 Neb. 366, 213 N.W. 339 (1927).

the justice might give could exceed three months imprisonment or a fine of 100 dollars. The defendant was charged before a justice with eight separate violations of state liquor laws. He was found guilty on six of the counts and sentenced to a total of 510 days in jail, a fine of 400 dollars and confiscation of his automobile. The supreme court affirmed the conviction and the justice court's jurisdiction to impose it. In the same case, the supreme court suggested that a justice of the peace also had jurisdiction to hear several causes of action in a civil suit, such as suits on distinct contracts, even though the total amount at issue exceeded the justice court's 200 dollar civil jurisdiction limitation.

In addition to possessing general civil jurisdiction in matters involving 200 dollars or less, a justice of the peace has specific statutory authority to try actions of forcible entry and detainer¹⁰ and replevin,¹¹ to issue attachments and garnishments, to solemnize marriages, to administer oaths and to take the acknowledgment of deeds and other instruments.¹² The legislature has seen to it that almost all violations of highway regulations (e.g., speeding or running a stop sign) may be heard by a justice of the peace by providing that a person convicted of a first violation of these regulations may be punished by a fine of not over 100 dollars or a jail sentence of not more than ten days.¹³ These punishments are within the justice's misdemeanor jurisdiction.

In addition to trying misdemeanor cases, justices of the peace also have authority to issue arrest and search warrants.¹⁴

Justices of the peace have county-wide jurisdiction,¹⁵ but to stay eligible for office they must live in the district, county or precinct from which they are appointed or elected.¹⁶

C. SELECTION AND NUMBER.

The following statement from the *Nebraska Blue Book, 1966*, compiled by the Nebraska Legislative Council, summarizes the mode of selection and potential maximum number of justices of the peace in Nebraska. Statutory citations have been added:

¹⁰ NEB. REV. STAT. §§ 27-101, -1401 (Reissue 1964).

¹¹ NEB. REV. STAT. §§ 27-1502 to -1503 (Reissue 1964).

¹² NEB. REV. STAT. § 27-101 (Reissue 1964).

¹³ NEB. REV. STAT. § 39-799 (Reissue 1960).

¹⁴ NEB. REV. STAT. § 29-404 (Supp. 1967). NEB. REV. STAT. § 29-812 (Reissue 1964).

¹⁵ *Jones v. Church of the Holy Trinity*, 15 Neb. 81, 17 N.W. 362 (1883).

¹⁶ NEB. CONST. art V, § 20.

Provision is made for nearly 2,000 justice courts in Nebraska, each one presided over by a justice of the peace. Justices of the peace are elected by popular vote, for two year terms,¹⁷ as follows: One from each of the 478 townships;¹⁸ one from each of the 962 precincts in counties not under township organization;¹⁹ one from each city or village of 500 population or more in counties not under township organization;²⁰ two from each city or village of 1,000 inhabitants or over in counties under township organization;²¹ two from each city of 5,000 or more population, except Omaha and Lincoln, regardless of whether the county is under township organization or not.²² Actually the number is not so great as these provisions suggest as some of the rural precincts do not elect justices of the peace.²³

There is no central agency in Nebraska which keeps track of the actual number and names of the present justices of the peace. To find out as nearly as possible the number and identity of the justices, we mailed letters to each of the ninety-three county clerks in the state, asking for the names of all those who ran for justice of peace in the last elections in their county, or who had been appointed to the office. We received replies from all but two of the county clerks. Twenty-eight of the counties, to the best knowledge of their clerks, have no justices of the peace. Thus approximately thirty per cent of Nebraska's counties are apparently doing without these judicial officers although they could elect them if they desired.

We received the names of 598 justices of the peace from the county clerks. Of these, about 438 were township justices and about 160 were justices from cities, villages and precincts in county commissioner counties or cities of over 1,000 population in township supervisor counties. We sent questionnaires to 530 of the justices of the peace, excluding from our mailing only sixty-eight of the township justices whose names we received. Questionnaires were not reproduced for sending to these sixty-eight justices because it became obvious from the returns to our first mailings of the questionnaire that almost all township justices perform no judicial functions.

¹⁷ NEB. REV. STAT. §§ 32-311, -314 (Reissue 1960). NEB. REV. STAT. § 23-244 (Reissue 1962).

¹⁸ NEB. REV. STAT. §§ 23-214, -221, -225, -231 (Reissue 1962); NEB. REV. STAT. § 32-314 (Reissue 1960).

¹⁹ NEB. REV. STAT. § 32-311 (Reissue 1960).

²⁰ NEB. REV. STAT. § 32-311 (Reissue 1960).

²¹ NEB. REV. STAT. § 32-312 (Reissue 1960).

²² NEB. REV. STAT. § 16-105 (Reissue 1962).

²³ NEBRASKA LEGISLATIVE COUNCIL, NEBRASKA BLUE BOOK, 1966 at 508-09 [hereinafter cited as NEBRASKA BLUE BOOK].

The purpose of our questionnaire was to find out just what the justices in Nebraska are actually doing, the kind and number of cases they are hearing, other duties they may be performing, the fees they collect, where they hold court and so on.

We received 215 replies to our questionnaire, 145 from township justices and 70 from city, village or precinct justices. We have classified the justices into two groups for discussion purposes: (1) active and (2) township. The criterion we established for including a justice in the "active" category was whether he reported regularly hearing cases, regardless of how many or how few. Only six of the township justices, all apparently having a village of fair size within their township, reported hearing cases with some regularity. These six township justices are hence included in both the "active" and the "township" categories for statistical and discussion purposes. There are 78 justices in the "active" category and 145 in the "township" category.

II. ACTIVE JUSTICES OF THE PEACE

A. EDUCATION.

One of the most frequently heard criticisms of the justices of the peace is their lack of qualifications, namely their lack of legal training and their ignorance of judicial procedure. It is reasonable to assume that in handling cases, they will be confronted with technical evidentiary questions which the untrained person will not even recognize, let alone make accurate and just rulings based upon the case law of the state and federal governments.²⁴ Many are accused of deciding on the basis of their "common sense" or personal feelings since for the greater part, most of them have little apparent knowledge of the law.²⁵

How does this image fit the Nebraska justice of the peace? First, only sixteen of the seventy-eight actives to answer the survey are lawyers. This group one would assume to be qualified to act as judicial officers. Twenty-six justices have only a high school education while twenty-three have had four years or less of college. Three have master's degrees while seven have had but two years of high school or less. It appears that a full eighty per cent of the Nebraska justices have had no legal training. This group's ignorance of judicial procedure was amply shown when several of the

²⁴ Note, *The Justice of the Peace in Florida*, 18 FLA. L. REV. 109, 118 (1965) [hereinafter cited as 18 FLA. L. REV.].

²⁵ Giese, *Why Illinois Proposes to Abolish Justice of the Peace Courts*, 46 ILL. B. J. 754, 758 (1958) [hereinafter cited as 46 ILL. B. J.].

replies suggested that training seminars, an outline of procedure in a justice's handbook and annual meetings should be required so that they would know what they should be doing. Some fifteen justices suggested that their office should be abolished, while the rest said that they were not qualified or that qualifications should be raised. Despite the lack of legal training, only sixty per cent had a current set of statutes which might familiarize them with the law. This would leave much of the decision making to a fallible common sense, and is sure to lead to non-legal decisions.

To get proper legal advice, several of the justices indicated that they try to call on the county attorney from time to time for legal opinions on questions which they cannot answer. However, there is no statute requiring the justices to do this.

One writer has suggested that the lack of qualifications might lead to constitutional objections.²⁶ The objection raised is that it is a fundamental principle of due process that a justice, having the power to deprive a person of his liberty or property, must have a working knowledge of the law since the guarantee of due process of law requires that every man have his day in court and the benefit of general law. The untrained justice of the peace is much less likely to make a decision based on the law than on his own personal feelings in the matter. Arbitrariness seems inherent in the system. Thus, a justice who bases his decisions on common sense rather than on the law may not meet the demand for procedural due process.

Fifty-six of the seventy-eight active justices indicated that they issued warrants for arrests and nineteen stated that they issued search warrants. The Nebraska arrest warrant statute permits a magistrate (which includes a justice of the peace) to issue such a warrant when a complaint has been filed with him charging a violation of "the laws of this state" if he finds there are "reasonable grounds to believe that the offense charged has been committed."²⁷ A justice of the peace may issue a search warrant if he concludes "that grounds for the application exist or that there is probable cause to believe that they exist."²⁸

The arrest warrant statute implies that the magistrate have some knowledge of the law allegedly violated and of the elements necessary to make out a violation. Search warrants must be issued

²⁶ Note, *The Justice of the Peace: Constitutional Questions*, 70 W. VA. L. REV. 314 (1967).

²⁷ NEB. REV. STAT. § 29-904 (Supp. 1967).

²⁸ NEB. REV. STAT. § 29-812 (Reissue 1964).

not only in compliance with the state's enabling statute but also in accordance with the directives of the fourth and fourteenth amendments to the Federal Constitution, as interpreted by the courts. Those sixty justices who are not attorneys may not possess the proper legal background to ascertain the proper standards for issuing arrest and search warrants.

B. JUSTICE COURTROOMS.

Lack of judicial decorum is another criticism leveled at the justice courts. It seems difficult for the public to hold any great respect for a court when an untrained and often uneducated justice, clothed with the state's judicial authority via a political party election, is presiding over important legal matters. Because of the part-time nature of the job, many justices must use makeshift judicial quarters which do not lend to the dignity of the law.

Visualize yourself being tried by a justice of the peace with only a high school education in the back room of a barbershop. This situation would certainly not engender respect for the law. Fortunately, this seems to be the exception in Nebraska rather than the rule, although the system leaves a lot to be desired. About seventeen justices hold court in some type of courthouse, either in a county, municipal or police building. These courts seem to be in rooms used specifically for justice of the peace courtrooms. Another seventeen surveyed hold court somewhere in a city or town hall. It is interesting to note that one justice uses the city hall only when hearing cases involving members of a racial minority. Otherwise he uses his home. Eighteen utilize their own offices to hold court. This would inconvenience the justice least since he could handle business and conduct court in the same building. How it would impress those brought before these justices with the law's dignity is another question.

Only about five of those surveyed use their own homes. Others use the police station or the police magistrate's office. One holds court in the fire hall after the fire truck is removed. More than half of those surveyed and answering hold court in surroundings which could reasonably be said to detract from the dignity of the law. Basements of homes, recreation rooms, empty rooms next to the justice's business office, the justice's business office, the outer office of a register of deeds, the sheriff's room at the county courthouse; all of these give the impression of "quick justice." The atmosphere must be one of "pay your fee and move on."

C. OTHER OCCUPATIONS.

Considering the part-time nature of the office, how can the justice, much less the defendant, feel that he is a judicial officer with the impersonal weight of the law behind him? Sixty-one of those who answered the survey have an occupation other than justice of the peace. The rest are retired. The indications are that most justices depend upon this office for part-time income. If the justice is processing several defendants per month, as is the case in many instances, it would be easy for most defendants to reach the conclusion that the justice is after a "quick buck."

D. LACK OF CONTROL.

One of the main criticisms of the justices of the peace is that there is no supervision over the work of the individual justice, and that his records are often unsatisfactory.²⁹ The present decentralization is said to prevent effective management of judicial affairs.

The complaint seems valid in Nebraska. One of the reasons for the survey was the state's total lack of knowledge about the state's justice system. No one on the state level knew how many justices Nebraska has, who they are, or what they are doing. There is no central administrative organization which can manage and instruct the justices around the state. Other than periodic reporting of fines and fees, and monthly and annual audits, there are few fiscal controls at the county level and none at all beyond that. Although each county clerk presumably knows the fees collected by each justice in his county, there are no official, published computations at the state level of fees and fines taken in by the justices.

Surprisingly, there seems to be a minimum of supervision on the county level. Part of the supervision comes from the county attorney who is supposed to approve the institution of criminal suits before each justice:

Magistrates and clerks of court may furnish to the county clerks of their respective counties certified copies of any cost bills that are not collectible in cases of misdemeanors, peace warrant and juvenile causes; . . . At the first meeting of the county board in each county in the months April and October of each year, the board shall appropriate from the general fund a sum sufficient to pay all such bills, or parts thereof, as may be found to be lawful and just, and thereupon the boards shall audit all such bills in the manner required by law; *Provided, no costs shall be allowed in any*

²⁹ Harper, *Justice of the Peace Courts in Oklahoma*, 23 OKLA. ST. B. J. 539 (1952).

*case unless the suit shall have been instituted with the consent of the county attorney, or, after being brought, he shall approve of such action in writing.*³⁰

In *Conkling v. DeLany*,³¹ Conkling sought a writ of prohibition against being tried for an alleged weight-scale violation in a justice of the peace court because of the justice's pecuniary interest in the suit. He argued that the justice was disqualified by this interest. The Nebraska Supreme Court allowed the writ because the justice did not have permission from the county attorney to hear the case. Without this consent, it was apparent that the justice had to convict to get his fee, for the county would not pay the costs upon acquittal unless the justice had consent to hear the suit.

When asked if they obtained the permission of the county attorney to entertain misdemeanor cases, all the active justices surveyed replied in the affirmative. However if the county attorney is merely giving a blanket permission, this form of supervision would seem to be of little value.

At the county level, the justices seem to be keeping and submitting records to the county in fair compliance with the statutory requirements. Each justice is required to keep a docket which starts with the inscription of the title in every action and ends with a notation of how the judgment, if any, is satisfied.³² The justice must also pay his fines to the treasurer of his county within ten days of receiving the same.³³ The statute requires the justice to send a monthly statement to the county treasurer of all the criminal causes commenced or pending in his court during the previous month.³⁴ Each justice must make out and deliver to the county clerk a statement in writing of all the fines assessed by him for the prior year.³⁵ Another statute requires the justice to include the judgment of conviction of offenses in his docket of every case in which a person is charged with a moving traffic violation or any traffic regulations of cities or villages. Whenever such person is convicted or his bail forfeited, the justice must send a certified abstract of such conviction or judgment to the director of the Department of Motor Vehicles.³⁶

³⁰ NEB. REV. STAT. § 29-2709 (Reissue 1964) (emphasis added).

³¹ 167 Neb. 4, 91 N.W.2d 250 (1958).

³² NEB. REV. STAT. § 27-1802 (Reissue 1964).

³³ NEB. REV. STAT. § 29-2702 (Reissue 1964).

³⁴ NEB. REV. STAT. § 29-2702 (Reissue 1964).

³⁵ NEB. REV. STAT. § 29-2707 (Reissue 1964).

³⁶ NEB. REV. STAT. § 39-794 (Reissue 1960).

Most of the justices surveyed complied to a certain extent with the statutory requirements. It seemed the more active the justice, the more strictly he complied with them. Practically all the justices surveyed keep a docket book. Those who hear traffic cases send in the monthly abstract of convictions to the state. Beyond this, there is some variance in the frequency with which they submit their records. The monthly report to the county giving a list of all criminal cases is sent by all. To meet the requirement that fines and fees go to the county treasurer within ten days of receipt, many justices pay these every ten days, while others wait and pay every two weeks. It seems that several pay these fees only monthly, evidently on the theory that they are not at all that busy and it is more convenient to report monthly instead of within ten days after receipt. Of course this would have to be done with the acquiescence of the county clerk. Two of these justices, however, hear about 150 cases per month between them. No reason was given as to why they do not pay over their fines more frequently. One justice said that the books had been audited by the state auditor. All other justices hearing criminal cases are subject to an annual audit by the county, although the statute does not require the county to audit each set of books. Rather it says that the county board *may* cause the books to be audited. To do so, however, the county might have to hire an auditor and it may be that the county board finds it more expedient to forgo the audit in the interests of economy.³⁷

Other than abstracts of conviction, the justice sends no report to the state, nor is the county required to forward the records it receives from the justice to the state. The system admits of control over the justices only on the county level. This control can and does vary somewhat from county to county, if the survey is any indication, and probably depends on the interest of the county officers. If the officers are lax in requiring the justices to send in reports, there is no other level of authority to so require. This leaves the state in a position of total ignorance as to the condition of its justice system—an unhealthy state of affairs.

E. PLAINTIFF'S COURTS.

Justices of the peace are often criticized for being plaintiff's courts.³⁸ In Nebraska this is a valid criticism. From those justices who hear civil cases we asked what percentage of the cases went to the plaintiff by default. The answer of those surveyed ranged

³⁷ NEB. REV. STAT. § 29-2707 (Reissue 1964).

³⁸ Green, *The Business of the Trial Courts*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 7, 12 (1965).

from less than one per cent to as much as one hundred per cent. About half of those answering gave figures of seventy-five per cent or more. The justice most active in civil cases gave a figure of seventy-five per cent. The statistics show that plaintiffs are using the justice courts to some advantage. It is a tenable conclusion that when the justices say that their court is a convenience to those who come before it they mean plaintiffs—not defendants.³⁹

F. NUMBER OF JUSTICES AND THEIR FEES.

Two of the conclusions reached by the authors of the survey were that there are just too many justices and too great a variation in the fees they collect.

The active justices who answered the survey hear over 4,000 cases in a typical month. A mere fourteen, however, handle over 2,700 of these cases. Thus two-thirds, or sixty-seven per cent of all matters heard are handled by about fifteen per cent of the active justices. This would be about seven per cent of the total number of justices who answered our survey, both active and township justices. If this percentage held true in our projection of what we believe to be the total actual number of justices in the state, around 700, seven per cent or forty-nine would be doing almost all of the work in the state's unsalaried justice system.

These figures reveal more when studied further. Eighty per cent of all the civil cases handled by the active justices of the peace who answered are handled by one metropolitan justice. The survey also showed that although justices hear about 1,300 traffic cases from the state patrol, ten of them dispose of about 800 of these matters. Again a minority is doing over sixty percent of the business.⁴⁰

Because of the differing load among the justices, there is a great disparity in what each collects in fees. Of those who answered, two reported that they take in between 5,000 and 10,000 dollars per year. Another nine reported revenues between 3,000 and 5,000 dollars.

³⁹ No statistics were available in Nebraska to compare the percentage of decisions for the plaintiff in justice courts with the percentage of plaintiff decisions in the district courts, the courts of general jurisdiction. However a study of Michigan courts revealed that while in the justice courts plaintiffs won in about ninety-nine percent of the cases, in the superior courts plaintiffs won in only sixty-five percent of the cases. Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 CONN. B. J. 300, 332-33 (1947).

⁴⁰ A study of Kansas justices of the peace showed similar results. See Wetmore, *The Justice of the Peace in Kansas* 56-57 (Govt. Research Ctr., Univ. of Kansas 1960).

Eight said they collect somewhere between 1,000 and 3,000 dollars per year, while the rest take in less than 1,000 dollars per year. Their collections range from less than 20 dollars a month to 1,000 dollars per year. Two said they never collect costs. Twenty-six per cent of the active justices who replied received an estimated eighty-six per cent of the fees collected by the active group.

Compensation of the justice by fees, whatever the arrangement for payment, usually raises serious questions concerning the fairness of the trials he conducts and in Nebraska, as elsewhere, the voices of criticism are loudest when it comes to the fee system. The controlling statutes allow the justice to collect four dollars as costs for criminal cases and two dollars in civil cases.⁴¹ In criminal cases, the defendant pays these costs when he is convicted and the county pays them when he is acquitted.⁴²

The United States Supreme Court has not passed directly on the constitutionality of a system of compensation such as Nebraska's wherein the justice derives fees from defendants upon conviction and from the county upon acquittal. This method of payment is frequently defended on the ground that it does not require a justice to convict in order to obtain compensation. There are two problems with this thesis: Firstly, the county's slowness in paying costs in the event of acquittal tends to make the justice more zealous in returning convictions. In Nebraska, the county board meets twice yearly to consider payment of fees to justices in acquittal cases.⁴³ It is reasonable to assume that a justice might rather collect his fee from the defendant before him than wait for the county. Secondly, since the justice is dependent for his compensation upon fees and costs which he may collect from the litigants, he is interested in getting more business in order to enlarge his income and therefore, he could be disposed to encourage controversies which might not otherwise ever get into the courts, and what is more likely, to favor those who bring him business in order to encourage more business.⁴⁴

To curry favor with law enforcement officers, the justice could frequently be tempted to find violators brought in by them guilty. The testimony of the arresting officer may be given more finality than might otherwise be the case. Conversely, the officer will want to bring his case before a justice who will tend to convict. He wants

⁴¹ NEB. REV. STAT. § 33-134 (Reissue 1960).

⁴² NEB. REV. STAT. § 29-2709 (Reissue 1964).

⁴³ NEB. REV. STAT. § 29-2709 (Reissue 1964).

⁴⁴ Vanlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389, 393 (1964) [hereinafter cited as 12 KAN. L. REV.].

his convictions, and the justice wants his fee. The system permits a very unhealthy reciprocity.⁴⁵ One Nebraska justice reports that his predecessor did a booming business in traffic cases which the former did not like. Therefore when he became justice he let it be known that he would not find every defendant guilty all of the time. He noted that as soon as this became known to the traffic patrol, they went to "greener pastures."

In civil cases, the justice might come to rely on a few individuals to supply him with enough cases to make the job economically worthwhile. This can be a strong temptation to favor several good customers in the county who institute suits in the justice courts with some regularity. The best customers of a justice for civil cases are usually the local stores and small loan companies. Two of the justices who replied to our questionnaire, and who hear civil cases, are managing either a collection agency or a small loan company. It is not inconceivable that they could find themselves both instituting and hearing the same case. This would be similar to having one person be the prosecutor and judge.

It is the personal interest of the judge which seems to be the basis of *Tumey v. Ohio*.⁴⁶ The paramount question there was whether a state and local system of compensating an unsalaried judge on a fee basis, the fee contingent upon him finding the defendant guilty, provided the judge with such a direct and substantial pecuniary interest in the outcome of the case as to constitute a denial of due process. Answering the question "yes," the United States Supreme Court indicated that whenever the trying magistrate has a pecuniary interest of any kind in the result of the case, this interest deprives the defendant of due process. We feel that we can say that the Nebraska justice of the peace is also interested in the outcome of his case.

G. ARGUMENTS GIVEN BY JUSTICES FOR RETENTION OF THE PRESENT SYSTEM.

Even though a number of the active justices offered suggestions for reform, a majority of them favor keeping the office of justice of the peace in being. They offered various reasons for its usefulness.

Many of the justices who replied claim that their court is an expedient method of trying traffic violators, most of whom are probably guilty anyway. Several questioned the necessity of a

⁴⁵ Reynolds, *The Fee System Courts—Denial of Due Process*, 17 OKLA. L. REV. 373, 377-78 (1964).

⁴⁶ 273 U.S. 510 (1927).

drive of twenty or thirty miles or more to the county court by a traffic offender when it is more convenient to have the local justice of the peace take care of the case.

Some justices maintain that the justice court may be the only practical way a trial of any sort in less populated counties can be had, especially at all hours of the day or night.⁴⁷ They remarked that the present system allows more persons an opportunity to be heard than would be the case if they were forced to go to court in the county, municipal or district courts. They point out that the latter courts are often too expensive for the client of the justice court. The cost of a suit in the justice court is small and thus a convenience to plaintiff and defendant both, it is argued. Many justices contend that if they did not hear the type of cases they do, the county, municipal or district courts would be swamped with these minor affairs. The existence of justice courts helps avoid overcrowding the state's higher trial courts.

The chief defense of the fee system was that salaries would be prohibitive if each justice was to become a full-time, salaried judge. Many covered their educational shortcomings by pointing out that several of the county judges are not attorneys either. A number of the justices urge that their courts do just as good a job as their county court, and one or two feel that they do a better job.

III. TOWNSHIP JUSTICES OF THE PEACE

Twenty-eight of the ninety-three counties in Nebraska have the township supervisor form of government. The remaining sixty-five have the precinct or county commissioner type.⁴⁸ As previously stated, there are 478 townships in the township supervisor counties,⁴⁹ and each is required by statute to have a justice of the peace.⁵⁰ The township justice of the peace, like his counterpart in the county commissioner or precinct counties, holds office for two years.⁵¹ The office is intended to be elective,⁵² although provisions exist for appointment in the absence of candidates for election.⁵³

⁴⁷ When asked in the questionnaire whether they held court sessions only during weekdays, or also sometimes on weekends or at night, about fifty percent of the justices responded that they held court at anytime needed.

⁴⁸ NEBRASKA BLUE BOOK, *supra* note 23, at 510.

⁴⁹ *Id.* at 508-09.

⁵⁰ NEB. REV. STAT. §§ 23-214, -221, -225, -231 (Reissue 1962).

⁵¹ NEB. REV. STAT. § 23-244 (Reissue 1962).

⁵² NEB. REV. STAT. § 23-222 (Reissue 1962); NEB. REV. STAT. § 32-314 (Reissue 1960). The returns to our questionnaire indicate that most township justice of the peace offices are filled by election.

⁵³ NEB. REV. STAT. §§ 23-214, -225, -231 (Reissue 1962); NEB. REV. STAT. § 32-1040 (Reissue 1960).

The township justice of the peace is a statutory member of the township board, serving along with a clerk and a treasurer.⁵⁴ The township board has charge of the township business, which includes keeping up roads and caring for cemeteries.⁵⁵ Because he bears the title "justice of the peace," the township justice is clothed with the same judicial authority as justices in precincts or cities.

To test the extent to which township justices of the peace actually perform judicial functions, we sent our questionnaire to approximately 370 of the 478 township justices. Returns were received from 145 of these. The results are informative. Practically none of the township justices hear any cases. The main function of the justice in the rural township is to act as chairman of the township board and to help supervise the maintenance of the township roads.

The township justices realize that their name ill-describes the duties they actually perform. The following comments by these justices are illustrative: "The title of Justice of the Peace is erroneous, as we only look after drainage and roads;" "The title Justice of the Peace for a township board man is phony. A regular member would do the job;" "Justice of the Peace in this township is not an acting office. It is merely a figure head;" "Title only in this township."

We feel that the following suggestion by one of the township justices is well taken: "I wish that the name of Justice of Peace for Townships [would] be changed to Chairman of Township Board." We recommend that the legislature amend the state's township supervisor statutes to change the title of the township justice of the peace to Chairman of the Township Board.

There may have been a need for a justice of the peace in each township back in 1895 when provision was made for the present township supervisor form of county government. Rural townships then were more highly populated and modes of transportation were slower. In fact some of the township justices informed us after reviewing their township's records that at one time the justice of the peace in that township heard cases regularly. But declining population in rural townships and improved methods of transportation have signaled a sharp drop in the township's judicial business and a movement of this remaining business to the county seat. Thus, the need for a justice of the peace in each township has dis-

⁵⁴ NEB. REV. STAT. § 23-221 (Reissue 1962); *Vandenburg v. Center Township*, 123 Neb. 544, 243 N.W. 636 (1932).

⁵⁵ NEB. REV. STAT. § 23-252 (Reissue 1962).

appeared.⁵⁶ Only two justices in rural townships hinted at performing occasional judicial duties: one stated that he has tried cases when the police magistrate is absent and another wrote that he had signed "a few state traffic tickets."

The educational background of the township justices does not bespeak the kind of qualifications desirable in a judge. Only seven of the 145 justices have completed four years of college, fifteen have been to college for less than four years, seventy-eight have gone no further than high school, and forty-five have only grade school diplomas. One hundred and twenty-four of the 145 township justices are either farmers or ranchers. These are not occupations which allow those engaged in them much time to study the law.⁵⁷ Moreover nearly all of the township justices lack a basic tool of the judicial trade—a set of the Nebraska statutes.

Six of the township justices who returned questionnaires indicated that they heard cases in villages within their townships. Villages in Nebraska have populations of less than 1,000.⁵⁸ Most of the cases heard by these six justices involve misdemeanors rather than civil matters. A police magistrate, which each village may elect, has the same misdemeanor jurisdiction as does a justice of the peace in the village or within three miles of its limits.⁵⁹ Those township justices who are active judicially in villages could run as the police magistrate if township justices of the peace are abolished.⁶⁰ Villages in township supervisor counties would thus still have the services of a local judicial officer for misdemeanors.

The authors do not wish to leave the impression that they approve of police magistrates as an acceptable substitute for justices of the peace. Although police magistrates are paid by salaries rather than by fees,⁶¹ they are nevertheless subject to many of the same criticisms as are justices of the peace: *e.g.*, inadequate legal education and insufficient supervision.⁶² We only suggest that if abolition of township justices is all the reform of the state's justice

⁵⁶ Compare the similar Illinois development in 46 ILL. B. J., *supra* note 25, at 754-55.

⁵⁷ G. WARREN, *TRAFFIC COURTS* 191 (1942) [hereinafter cited as WARREN].

⁵⁸ NEB. REV. STAT. § 17-201 (Reissue 1962).

⁵⁹ NEB. REV. STAT. §§ 18-201 to -202 (Reissue 1962) (first and second class cities may also elect police magistrates).

⁶⁰ NEB. REV. STAT. § 18-209 (Supp. 1967).

⁶¹ NEB. REV. STAT. § 18-208 (Supp. 1967), *amending* § 18-211 (Reissue 1962).

⁶² While seventeen of the active seventy-eight justices who replied to our questionnaire are at present also serving as a police magistrate, only two of these seventeen are attorneys.

of the peace system that can be accomplished in the near future, this reform need not be thwarted by the argument that it would leave villages without a judicial officer.⁶³

IV. APPROACHES TO SOLVING THE JUSTICE OF THE PEACE PROBLEM

In the opinion of the authors, not only township justices but all justice of the peace positions in the state should be abolished.

Just as justices in the townships are not required by law to meet any educational standards, neither are those in cities, villages and precincts. Only twenty per cent of the active justices surveyed are qualified for their office by legal training. Several of the active justices do not have a current set of the state statutes. Their court-rooms, also unregulated by law, range from quarters which are completely adequate to rooms which convey no impression of a judicial officer at work. There is no control over city, village or precinct justices on the state level, and county supervision is probably minimal.

The fee system, by which all the justices are compensated, has inherent evils. Even though the justice may be paid by the county in misdemeanor cases when he finds the defendant not guilty, he will ordinarily be compensated much more speedily in such cases if he finds the defendant guilty and collects the fee directly from him. Moreover to be sure that he rather than another justice or judge gets the case, the justice may tend to find defendants guilty in order to keep on good terms with the arresting officer.

True, attempts could be made to improve the present system. The problem of inadequate legal education could be attacked by conducting training seminars for the justices. Experienced attorneys, including justices who are attorneys, could lecture at these seminars on matters such as jurisdiction and procedure. Or, a manual could be published for the justices, explaining the different functions of their office.⁶⁴

No doubt, a training school or a manual would be of some benefit. But in the absence of a statute, justices of the peace could not be forced to attend a training seminar and probably those justices

⁶³ Also, abolishing township justices of the peace only would not deprive cities of 1,000 or more population in township supervisor counties of their justices of the peace. A separate statute provides for the election of two justices of the peace in such cities separately from the township they are in. NEB. REV. STAT. § 32-312 (Reissue 1962).

⁶⁴ 18 FLA. L. REV., *supra* note 24, at 120.

who would learn the most from such a program would not attend. Too, training seminars cost money—money to put on and money to attend. Justices of the peace or the governmental units which elect them might not be willing to bear the expense of training schools, especially if the justice hears only a small number of cases. The question of who is to bear the cost would also arise over information manuals for the justices.

The fee system could be ended and each justice paid a salary. But again, this might place a heavy burden on the governmental unit which elects the justice, and perhaps it would be an unwarranted burden where the justice is not very busy.

We feel that, in the long run, the best solution would be to terminate the entire justice of the peace system in Nebraska. On the following pages we offer summaries of approaches which three states have taken to either minimize the activity of their justice of the peace courts or abolish these courts entirely. Comments on the advantages or disadvantages of these approaches follow the summaries. These approaches are by no means exhaustive of those taken by various states to attempt to solve the problem of their justice of the peace courts or to implement general court reform. They are simply presented as examples of approaches Nebraska might consider for alleviating its justice of the peace problem, and perhaps other problems in its present court system at the same time.

A. THE KANSAS APPROACH.

The justice of the peace is a constitutional officer in Kansas, just as he is in Nebraska. The Kansas constitution vests the state's judicial power in a list of courts, including justices of the peace.⁶⁵ It also provides for the election of two justices in each township "whose powers and duties shall be prescribed by law."⁶⁶

Prior to 1965, Kansas justices of the peace had jurisdiction in civil cases for the recovery of money not exceeding 300 dollars and criminal jurisdiction in misdemeanor cases where the sentence could not exceed a fine of 500 dollars or imprisonment for one year.⁶⁷ By a statute passed in 1965, the Kansas legislature provided that in any county in which there was then or thereafter located a county court or a court of equivalent jurisdiction, justices of the peace were to have no jurisdiction in any criminal or civil case, except in civil actions for the recovery of money where the amount claimed

⁶⁵ KAN. CONST. art. 3, § 1.

⁶⁶ KAN. CONST. art. 3, § 9.

⁶⁷ KAN. STAT. ANN. §§ 61-102, 63-101 (1964).

did not exceed one dollar.⁶⁸ In 1967 the legislature moved to insure that this act would have state-wide application by establishing a county court in every county which did not yet have either a county court or a court with similar jurisdiction.⁶⁹

Thus Kansas, a state which, like Nebraska, not only has the justice of the peace embedded in its constitution but also has provisions pertaining to his office sprinkled throughout its statutes, apparently decided that the easiest way to end the activity of most of the justices was to reduce their jurisdiction to civil cases involving a dollar or less. The main recipients of the cases formerly heard by justices of the peace were the county courts or their equivalents.

However justices of the peace have not been completely done away with in Kansas. The justice of the peace is one of the state's magistrates under the Kansas criminal procedure act.⁷⁰ Magistrates in Kansas have authority to, for example, issue warrants⁷¹ and conduct preliminary examinations.⁷² The section defining magistrates was amended in 1965 to provide that "[i]n all places where Section 1 [61-109] of this act is applicable the jurisdiction of justices of the peace is limited as therein provided."⁷³ Section 61-109 eliminated the criminal jurisdiction of justices as respects a "case."⁷⁴ However, it is questionable whether issuing a warrant or conducting a preliminary examination would be considered a "case" to which section 61-109 applies. Hence, Kansas justices may still have considerable authority in the area of criminal procedure.⁷⁵

Additionally, the Kansas justice seemingly continues to have full statutory authority to administer oaths and affirmations, to take acknowledgments, and to solemnize marriages.⁷⁶ In fact the 1967 legislature, in an apparent detour from its 1965 policy of abolishing the justice's jurisdiction explicitly recognized that justices still have authority to hear actions involving landlord and tenant where the amount claimed is as high as 300 dollars.⁷⁷ Indeed, the 1967 legislature actually removed all maximum dollar limitations on the

⁶⁸ KAN. STAT. ANN. § 61-109 (Supp. 1967).

⁶⁹ KAN. STAT. ANN. § 20-802a (Supp. 1967).

⁷⁰ KAN. STAT. ANN. § 62-201 (Supp. 1967).

⁷¹ KAN. STAT. ANN. §§ 62-202, -602, -604 (1964).

⁷² KAN. STAT. ANN. § 62-805 (1964).

⁷³ KAN. STAT. ANN. § 62-201 (Supp. 1967).

⁷⁴ KAN. STAT. ANN. § 61-109 (Supp. 1967).

⁷⁵ See also Wilson & Blackwood, *Criminal Law and Procedure*, 1965 *Survey of Kansas Law*, 14 KAN. L. REV. 221, 224 (1965).

⁷⁶ KAN. STAT. ANN. § 61-102 (1964).

⁷⁷ KAN. STAT. ANN. § 58-2529 (Supp. 1967).

justice's jurisdiction in certain kinds of forcible entry and detention cases.⁷⁸

B. COMMENT ON THE KANSAS APPROACH.

The Kansas approach demonstrates that justices of the peace may be indirectly removed as active judicial officers even though they are provided for in the state constitution. The Nebraska constitution, just as the Kansas constitution, states that the justice of the peace shall have such jurisdiction as may be provided by law, with only the addition in the former document of an upper limit beyond which this jurisdiction may not be extended.⁷⁹ Thus the Nebraska legislature could follow the Kansas approach of reducing the jurisdiction of its justices to civil cases of one dollar or less, no doubt without violating the state constitution.⁸⁰ Certainly this would be the simplest method of attacking the justice of the peace problem.

However the Kansas approach is faulty in that it consists only of two or three new statutes purporting to reduce the justice's jurisdiction to a specific monetary amount in civil cases while leaving in the books all the other statutes which give the justice his civil and criminal jurisdiction. Questions may arise, calling for court interpretation, as to whether certain criminal procedures which the justice still has ostensible power to exercise, are really "cases" and hence barred from the justice court. Even in the civil area, potential questions lurk as to what are and are not "cases."

If the Nebraska legislature decides to reduce the justice's jurisdiction to civil actions of one dollar or less in order to remove him from the ranks of the active judiciary, it should take the trouble to write him out of all those statutes where he may still have full authority regardless of the statutes limiting his jurisdictional amount and in spite of the legislature's intention otherwise.

C. THE COLORADO APPROACH.

Colorado has also made provision for county courts to take over most of the jurisdiction formerly exercised by justices of the peace. However, the method it chose for doing so has been much more complete than that of Kansas. Colorado has eliminated justices of the peace from both its constitution and its statutes.

⁷⁸ KAN. STAT. ANN. § 58-2529 (Supp. 1967), *amending* § 61-102 (1964).

⁷⁹ NEB. CONST. art V, § 18. The upper limit is \$200 in a civil case, and three months imprisonment and a fine of \$100 in a criminal case.

⁸⁰ WARREN, *supra* note 57, at 228-29; 12 KAN. L. REV., *supra* note 44, at 396-97.

By virtue of the adoption of a new judicial department article in 1962 (which became effective in 1965), justice of the peace courts have been removed from the Colorado constitution.⁸¹ The new article places the state's judicial power in a supreme court, district courts, county courts and other courts or judicial officers with jurisdiction inferior to the supreme court as the legislature may establish.⁸² A separate probate court and juvenile court exist for the city and county of Denver, and home rule cities and towns have authority to create municipal and police courts.⁸³

Concurrently with the elimination of the justices of the peace from the state's constitution, the Colorado legislature repealed the justices' civil and criminal authority which they had exercised by statute.⁸⁴ This removed any possibility of the justice continuing to function as an inferior court sanctioned by the legislature under the new judicial department article.

County courts, which are courts of record,⁸⁵ are designed to replace justice of the peace courts in most instances. The judicial department article stipulates that each county must have at least one county judge.⁸⁶ The legislature has already provided for two county judges in seven counties and three county judges in two counties. The city and county of Denver is allowed to select its own number of county judges.⁸⁷ Statutory provisions also exist for the selection of associate and assistant county judges with the same jurisdiction and power of a county judge. Associate or assistant county judge positions may be established "[i]n order to provide for the expeditious handling of county court business and for county court sessions in population centers which are not county seats"⁸⁸ An associate county judge receives one-half the salary of a county judge and an assistant county judge is paid one-fourth of a county judge's salary.⁸⁹ The chief justice of the state supreme court may assign a county judge to temporary duty in another county court if the press of judicial business so demands.⁹⁰ If a county judge meets the qualifications of judges of courts other than

⁸¹ COLO. CONST. art. VI, § 23.

⁸² COLO. CONST. art. VI, § 1.

⁸³ COLO. CONST. art. VI, § 1.

⁸⁴ COLO. REV. STAT. ANN. §§ 79-1-1 to -15-22 (Supp. 1965).

⁸⁵ COLO. REV. STAT. ANN. § 37-13-2 (Supp. 1965).

⁸⁶ COLO. CONST. art. VI, § 16.

⁸⁷ COLO. REV. STAT. ANN. § 37-14-2 (Supp. 1967).

⁸⁸ COLO. REV. STAT. ANN. § 37-14-8 (Supp. 1965, 1967).

⁸⁹ COLO. REV. STAT. ANN. § 37-13-8 (Supp. 1965, 1967).

⁹⁰ COLO. CONST. art. VI, § 5(3).

county courts, he may also be appointed for temporary service in them.⁹¹

In the more highly populated counties, a person is not eligible to be county judge unless he is admitted to practice law in Colorado.⁹² In the smaller counties the only educational requirement for the office is a high school education.⁹³ However those who become county judges for the first time and who are not attorneys cannot take office until they have attended an institute on the duties and functioning of the county court, which is held under the supervision of the supreme court. Attendance is mandatory unless waived by the supreme court. The supreme court holds the institute whenever the chief justice determines that the appointment of a sufficient number of non-lawyer county judges warrants it. County judges who are attorneys and who are taking office for the first time may also attend the institute.⁹⁴

Colorado adopted the non-partisan nominating commission method of selecting justices and judges of courts of record, effective in 1967. Vacancies in the office of county judge are now filled by appointment of the governor from a list of nominees certified to him by the judicial district nominating commission of that district.⁹⁵ The county judge then runs on his record at ensuing elections, the voters of the county voting "Yes" if they wish to keep him in office, and "No" if they desire his discharge.⁹⁶ The city and county of Denver continues, however, to select its county judges by the provisions of its charter and ordinances.⁹⁷

The county court has jurisdiction in civil actions where the amount in controversy does not exceed 500 dollars and in criminal actions for the violation of state laws which constitute misdemeanors.⁹⁸ The court may also issue warrants, conduct preliminary examinations, sign bindover orders and admit to bail in both felony and misdemeanor cases.⁹⁹ Colorado county courts do not have jurisdiction over matters of probate—a subject which occupies much of the time of Nebraska county courts.¹⁰⁰

⁹¹ COLO. CONST. art. VI, §§ 5(3), 18.

⁹² COLO. REV. STAT. ANN. § 37-14-3(2), (3) (Supp. 1965).

⁹³ COLO. REV. STAT. ANN. § 37-14-3(4) (Supp. 1965).

⁹⁴ COLO. REV. STAT. ANN. § 37-14-3(5) (Supp. 1967).

⁹⁵ COLO. CONST. art. VI, § 20.

⁹⁶ COLO. CONST. art. VI, § 25.

⁹⁷ COLO. CONST. art. VI, § 26.

⁹⁸ COLO. REV. STAT. ANN. §§ 37-13-4 to -13-6 (Supp. 1965).

⁹⁹ COLO. REV. STAT. ANN. § 37-13-6 (Supp. 1965).

¹⁰⁰ COLO. REV. STAT. ANN. § 37-13-5 (Supp. 1965).

A simplified civil and criminal procedure has been instituted for the small cases the Colorado county courts handle.¹⁰¹

Pursuant to its authority under the judicial department article to create courts with jurisdiction inferior to the supreme court, the legislature has established a police court or police magistrate in all cities and towns of the state.¹⁰² Apparently the legislature intends that, in most counties, the county courts will hear misdemeanor cases involving violation of state laws,¹⁰³ and police magistrates will hear misdemeanor cases where the violation of a city or town ordinance is alleged.¹⁰⁴ Cities are allowed to appoint a county judge to the office of police magistrate.¹⁰⁵

D. COMMENT ON THE COLORADO APPROACH.

The Colorado approach to abolishing its justice of the peace courts and transferring their jurisdiction to county courts has desirable features. Should the Nebraska legislature choose to get rid of its justice courts by moving their jurisdiction to the county courts,¹⁰⁶ it would be preferable to follow Colorado and abolish the office completely rather than take the Kansas approach of reducing the justice's jurisdiction and leaving his office in the constitution and statutes.

Provisions for more than one county judge and for associate and assistant county judges would help in the disposition of any increased case load which might result in the more populous Nebraska counties from termination of the justice of the peace courts. An associate or assistant county judge might be named to sit in a city of large population other than the county seat if the situation demanded.

The Colorado statute requiring all county judges from counties with sizable populations to be attorneys, and for non-attorney county judges to attend a training institute is meritorious. It is a recognition that although there may not always be attorneys avail-

¹⁰¹ COLO. REV. STAT. ANN. §§ 37-16-1 to -17-15 (Supp. 1965).

¹⁰² COLO. REV. STAT. ANN. §§ 139-85-1, -86-4 (Supp. 1965).

¹⁰³ COLO. REV. STAT. ANN. § 37-13-6 (Supp. 1965).

¹⁰⁴ COLO. REV. STAT. ANN. § 139-86-1 (Supp. 1965).

¹⁰⁵ COLO. REV. STAT. ANN. § 139-85-5 (Supp. 1965).

¹⁰⁶ Part or all of the justice's jurisdiction in Douglas and Lancaster counties might be moved to the existing municipal courts of Omaha and Lincoln, if the electors of the entire county had representation in the selection of the municipal judges. See *State v. Brown*, 131 Neb. 239, 267 N.W. 466 (1936); *State v. Morgan*, 138 Neb. 635, 294 N.W. 436 (1940).

able for county judge in smaller counties,¹⁰⁷ nevertheless those that do serve should be given a thorough and uniform instruction about the functions of the office.

Another desirable feature of the Colorado approach is the requirement that all of its county judges (except those in Denver) be chosen by non-partisan nominating conventions. Selection by non-partisan conventions should not only take the office out of politics but also help in the location of qualified persons to fill it.

One disadvantage of the Colorado plan for Nebraska may be that Nebraska does not need a county court in every county. The Colorado constitution requires that each county have at least one county judge.¹⁰⁸ It is difficult enough now for some smaller Nebraska counties to find persons with qualifications to take the position because of the small salary the county pays.¹⁰⁹ Such counties might be better off financially, their case load being low anyway, to have an itinerant county judge or magistrate who travels among several counties. With an itinerant county judge system, Nebraska might be able to fill all such judgeships with attorneys.

Also, Nebraska would have a more professional court system if it allowed judges from the county court to hear cases involving city or village ordinance violations rather than providing for a police magistrate in every city or village, as has Colorado.

E. THE ILLINOIS APPROACH.

Illinois abolished both its justice of the peace and police magistrate courts by approving a new judicial article to its constitution

¹⁰⁷ Winters & Allard, *Judicial Selection and Tenure in the United States*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 146, 170 (1965). Nebraska requires that in all of its counties with 16,000 population or more, the county judge must be an attorney or else have previously served as a county judge for at least four years. NEB. REV. STAT. § 24-501.01 (Reissue 1964). However, only seventeen of Nebraska's ninety-three counties have populations of 16,000 or more. The other seventy-six counties need not comply with the "attorney or four years previous experience" qualification, and there are no training requirements for non-attorney county judges.

¹⁰⁸ COLO. CONST. art. VI, § 16.

¹⁰⁹ There are provisions in the present Nebraska constitution and statutes for two or more adjoining counties to form a county court judicial district and elect a single district county judge. NEB. CONST. art. V, § 15; NEB. REV. STAT. §§ 24-554 to -561 (Reissue 1964). But either ten percent of the electors of the counties involved or the county boards of the counties must initiate a vote for adoption of the plan, and the plan does not take effect unless approved by a majority of the voters of the counties. NEB. REV. STAT. §§ 24-555 to -556 (Reissue 1964).

in 1962 (which became effective in 1964), embodying a unified court system. The old judicial article had remained substantially unchanged since adoption of the Illinois constitution of 1870. Since much of the present Nebraska judicial article was written from the Illinois constitution of 1870,¹¹⁰ the recent revision of the Illinois article should be of particular interest to those seeking solutions for Nebraska's court problems.

The new Illinois judicial article places the state's judicial power in a supreme court, an appellate court and circuit courts.¹¹¹ The circuit court has unlimited original jurisdiction over all justiciable matters.¹¹² There are no separate probate courts, juvenile courts, criminal courts and so on. The foundation thus exists in Illinois for the implementation of Roscoe Pound's theory that in a modern court system there should be "not *specialized courts* but *specialized judges*, dealing with their special subjects when the work of the courts is such as to permit, but available for other work when the exigencies of the work of the courts requires it."¹¹³

Each judicial circuit has a circuit court, and the number of circuit and associate judges and magistrates in each circuit is as prescribed by law.¹¹⁴ However, each county must have at least one associate judge of the circuit court.¹¹⁵

General administrative authority over the Illinois courts, including the temporary assignment of judges to other courts, has been given to the supreme court, and is to be exercised by the chief justice.¹¹⁶ An administrative director of the courts is appointed by the supreme court to assist the chief justice.¹¹⁷ The circuit judges and associate judges in each circuit select one of the circuit judges to serve as chief judge of the circuit. Subject to the authority of the supreme court, the circuit chief judge has administrative authority over the circuit court including authority to provide for divisions of court—either general or specialized.¹¹⁸

¹¹⁰ OLSON, *supra* note 2.

¹¹¹ ILL. CONST. art. 6, § 1.

¹¹² ILL. CONST. art. 6, § 9.

¹¹³ R. POUND, *PRINCIPLES AND OUTLINES OF A MODERN UNIFIED COURT ORGANIZATION* (Reprint, American Judicature Society).

¹¹⁴ ILL. CONST. art. 6, § 8.

¹¹⁵ ILL. CONST. art. 6, § 8; ILL. ANN. STAT. ch. 37, § 72.42 (Smith-Hurd, Supp. 1967).

¹¹⁶ ILL. CONST. art. 6, § 2.

¹¹⁷ ILL. CONST. art. 6, § 2.

¹¹⁸ ILL. CONST. art. 6, § 8. The two states previously reviewed have similar provisions. Colorado adopted provisions for a state court administrator and a chief judge of each judicial district by a constitutional amend-

The judicial officer replacing the justice of the peace and the police magistrate is the magistrate of the circuit court. Unlike the justices of the peace and police magistrates, who were substantially autonomous, magistrates are integrated into the state court system. Magistrates are appointed by the circuit judges in each circuit and serve at their pleasure.¹¹⁹ Only licensed attorneys are eligible to be appointed as magistrates with but two exceptions: (1) justices of the peace and police magistrates who held office when the new judicial article took effect may be appointed as magistrates upon resignation or expiration of their terms; (2) if a circuit has no available resident attorneys, a non-attorney may be selected as magistrate.¹²⁰ All justices of the peace and police magistrates in office when the judicial article took effect in 1964 were allowed to serve as magistrates of the circuit courts for the remainder of their respective terms.¹²¹

The circuit judges are directed to appoint magistrates on a non-partisan merit basis.¹²² Magistrates are required to devote full time to their judicial duties. They cannot, while serving as magistrate, practice law or hold a federal, state or city position or an office in a political party.¹²³ Magistrates are compensated by salaries rather than by fees.¹²⁴

A ratio which considers the circuit's population and the number of associate circuit judges in each county in the circuit determines the number of magistrates which may be appointed for that circuit.¹²⁵ However, the Director of the Administrative Office for the Illinois Courts may recommend that the supreme court provide for the appointment of additional magistrates for a circuit, based on the following factors: (1) case loads in the circuit; (2) the number of magistrates, and judges and circuit judges in the circuit; (3) the number and location in the circuit of major federal and state highways; (4) the location in the circuit of truck weighing stations; (5) the relationship of urban population to large metropolitan

ment, effective in 1967. COLO. CONST. art. VI, § 5(3),(4); COLO. REV. STAT. ANN. §§ 37-11-1 to -11-2 (Supp. 1967). Kansas has, since 1965, had a state judicial administrator and each justice of the Kansas Supreme Court serves as head judge of a group of the state's district courts. KAN. STAT. ANN. §§ 20-318 to -324 (Supp. 1967).

¹¹⁹ ILL. CONST. art. 6, § 12.

¹²⁰ ILL. ANN. STAT. ch. 37, § 160.3 (Smith-Hurd, Supp. 1967).

¹²¹ ILL. CONST. art. 6, *Schedule* (Paragraph 4 (e)).

¹²² ILL. ANN. STAT. ch. 37, § 160.4 (Smith-Hurd, Supp. 1967).

¹²³ ILL. ANN. STAT. ch. 37, § 160.5 (Smith-Hurd, Supp. 1967).

¹²⁴ ILL. CONST. art. 6, § 17.

¹²⁵ ILL. ANN. STAT. ch. 37, § 160.2 (Smith-Hurd, Supp. 1967).

centers in the various counties of the circuit; (6) the location of state institutions in the circuit; and (7) any other relevant factors.¹²⁶

Subject to rules promulgated by the supreme court, the chief justice of each circuit or a judge designated by him may assign to magistrates, severally or as a class, any or all of the kinds of matters over which magistrates have been given jurisdiction.¹²⁷ This permits specialization among the magistrates. Civil proceedings assignable to magistrates include suits for money recovery or personal property damage not exceeding 10,000 dollars, actions for rent, replevin, forcible entry and detainer and so on.¹²⁸ Criminal and quasi-criminal proceedings assignable to magistrates include actions in which the punishment does not exceed a fine of 1,000 dollars or imprisonment for one year, issuing arrest and search warrants, conducting preliminary examinations and releasing on bail.¹²⁹

Concern was expressed by many that elimination of justices of the peace and police magistrates would result in persons charged with minor traffic violations, misdemeanors or quasi-criminal offenses having great difficulty posting bail or pleading guilty and paying a fine.¹³⁰ To facilitate the handling of these and similar minor violations, the legislature provided that the circuit court may by rule set up a schedule of fines applicable to specified minor traffic offenses and that circuit clerks or their deputies may receive written appearances, pleas of guilty and waivers of trial.¹³¹ The supreme court or circuit court may also by rule prescribe the amounts of bail for specified quasi-criminal offenses and misdemeanors. Bail may be accepted by law enforcement officers and circuit court clerks or their deputies.¹³²

F. COMMENT ON THE ILLINOIS APPROACH.

Illinois has made all of its judicial officers part of the state court system. By giving the chief justice of the supreme court authority to supervise all of the courts, and the chief judge of each circuit administrative authority to supervise the business and divisions of

¹²⁶ ILL. ANN. STAT. ch. 37, § 160.2-1 (Smith-Hurd, Supp. 1967).

¹²⁷ ILL. ANN. STAT. ch. 37, § 621 (Smith-Hurd, Supp. 1967).

¹²⁸ ILL. ANN. STAT. ch. 37, § 622 (Smith-Hurd, Supp. 1967).

¹²⁹ ILL. ANN. STAT. ch. 37, § 624 (Smith-Hurd, Supp. 1967).

¹³⁰ Saltiel, 1963 *Legislative Implementation of the Judicial Article*, 52 ILL. B. J. 10, 17 (1963) [hereinafter cited as 52 ILL. B. J.].

¹³¹ ILL. ANN. STAT. ch. 16, § 84 (Smith-Hurd, Supp. 1967).

¹³² ILL. ANN. STAT. ch. 16, § 81 (Smith-Hurd, Supp. 1967); 52 ILL. B. J., *supra* note 130, at 17-18.

the court of his circuit, an effective control may be exercised over the case load and functioning of the magistrate divisions of the circuit courts.

Giving the circuit judges power to appoint the magistrates for their circuits rather than have the magistrates run for office might seem undemocratic at first glance but it may actually be a wise provision. In Nebraska, the district courts are equivalent to the Illinois circuit courts and Nebraska district judges would appoint magistrates for their districts if this feature of the Illinois plan were adopted in Nebraska. Nebraska district judges are selected by non-partisan judicial district nominating commissions and run on their records at general elections.¹³³ The voters thus would have the opportunity to object to unsatisfactory magistrates by voting against the appointing district judges. On the other hand, the district judges, being non-political judicial officers, would most probably seek to appoint only the best qualified persons available for the position of magistrate in order to maintain a high standard of competence in all the divisions of their district court. This would be true even if some magistrate positions had to be filled with non-attorneys.¹³⁴

If a version of the Illinois plan were adopted in Nebraska, existing municipal and juvenile judges, as well as several of the present county judges, justices of the peace and police magistrates with the requisite qualifications for office, could be integrated into the state court system—some as additional district judges and the rest as magistrates. In areas of the state where attorneys might not be available for the position of magistrate, county judges who are not attorneys could be appointed to this office and given authority over probate matters, as are the Illinois magistrates.¹³⁵ The district judge or judges could decide by rule based upon a continuing study of the case load situation within the district, whether a magistrate should be permanently stationed in the district's larger cities and whether one should travel a regular circuit among the smaller cities and villages. An administrator for the entire state court system, and perhaps a court administrator for each district, would greatly facilitate such case load studies.

¹³³ NEB. CONST. art. V, § 21; NEB. REV. STAT. §§ 24-801 to -818 (Reissue 1964).

¹³⁴ Actually, the feature of having district judges appoint the magistrates for their district would be more non-political if effectuated in Nebraska than it is in Illinois. In Illinois, the circuit judges are first nominated for office by party convention or primary. Only after once gaining office do they run on their record without party designation in subsequent general elections. ILL. CONST. art. 6, §§ 10, 11.

¹³⁵ ILL. ANN. STAT. ch. 37, § 623 (Smith-Hurd, Supp. 1967).

Magistrates would be full-time judges, paid by salary and not by fee. There would be fewer judges, hence higher salaries could be paid to attract competent men to the bench.

Also desirable are the implementing Illinois statutes permitting the supreme court or circuit courts to provide by rule for circuit clerks or their deputies to receive written appearances, pleas of guilty and waivers of trial in minor traffic cases, and for law enforcement officers and court clerks to accept bail in quasi-criminal and misdemeanor matters. One of the most common reasons given by the Nebraska justices of the peace for retention of their office was that it provides a readily available court for those charged with minor offenses, particularly violation of traffic laws. The justices maintain that it would be a hardship on the motorist, especially the one who lives a distance from the scene of the infraction, to have to return a week or a month after his violation when a court is able to hear his case. The problem could be largely eliminated for the motorist who is from a distance by use of the waiver ticket, which is a ticket on which the motorist may by his signature plead guilty and waive his right to a trial, and then immediately pay his fine.¹³⁶ The motorist, of course, has the right to a court hearing rather than to plead guilty if he so chooses.

Waiver tickets should not be used for serious violations such as driving under the influence of intoxicating beverages or motor vehicle homicide. Nor should they be used for even minor traffic violations where the motorist lives in the near vicinity, lest drivers get the impression that they can always "violate for a price" and never have to go to court.¹³⁷

The waiver ticket could be used by all law enforcement authorities, including the police in cities and villages, for motorists who are from a distance. The waiver ticket device, coupled with giving law enforcement officers and court clerks authority to accept bail for minor offenses, would rather effectively eliminate the need for a court to be available at all hours in every city and village in Nebraska.¹³⁸

¹³⁶ The waiver part of the Uniform Traffic Ticket and Complaint Summons, prepared by the American Bar Association Traffic Court Program, appears in J. ECONOMICS, TRAFFIC COURT PROCEDURE AND ADMINISTRATION 42 (1961).

¹³⁷ *Id.* at 81.

¹³⁸ Apparently the waiver ticket device, or a variation of it, is already being used in parts of Nebraska. One of the justices of the peace commented that most traffic cases in his county were being handled that way.

The only reservations we would express about the Illinois court plan as applied to Nebraska are that it requires an associate judge of the circuit court from each county and it provides for an appellate court. A number of Nebraska district courts may not need a representative judge from each county in the district. Too, the Nebraska appellate case load may not necessitate a separate court of appeals.¹³⁹

V. CONCLUSION

Abolition of township justices of the peace in Nebraska can be accomplished by simply amending the township statutes to change the name of these justices to Chairmen of the Township Board. But abolition of the state's entire justice of the peace system will require either major statutory change, constitutional change or both.

The authors believe that all Nebraska justice of the peace positions should be abolished. The justices are essentially independent islands of judicial power, holding court as a part-time occupation for which they are compensated by fees rather than by salaries. Their educations vary from the law school degree to the grade school diploma and their courtrooms range from spacious quarters in county courthouses to the back rooms of business establishments. Most of the justices no doubt make an honest effort to do a good job, but the system in which they are forced to operate is obsolete.¹⁴⁰

Three approaches Nebraska could follow in either seriously restricting the jurisdiction of its justices of the peace or entirely abolishing the office have been presented. Nebraska may choose to borrow from one or all of these approaches, from still different approaches taken by other states, or it may wish to take a new course, not as yet adopted by any other state.¹⁴¹

¹³⁹ Under the present constitution the Nebraska Supreme Court may sit in two divisions of five judges each, with district judges appointed to make up the three judges who serve in addition to the seven already on the high bench. The supreme court may sit in divisions "[w]hen-ever necessary for the prompt submission and determination of causes . . ." NEB. CONST. art. V, § 2.

¹⁴⁰ Uhlenhopp, *Some Plain Talk About Courts of Special and Limited Jurisdiction*, 49 J. AM. JUD. Soc'y 212 (1966).

¹⁴¹ A recent editorial in the American Judicature Society's Journal suggests that a two-level state court system, with a unified appellate division and a unified trial division rather than separate appellate and trial courts, may be the best approach for states to take in rewriting the judicial articles in their constitutions. The editorial envisions that in such a court system: "The Trial Division will be divided by ad-

The authors would personally prefer to see a thoroughgoing reform of the entire Nebraska court system with the adoption of a unified court plan. If properly written a unified court plan, with such features as court administrators and specific rule making and assignment powers given to the chief justice of the supreme court and the head judge of the district court, would permit the courts themselves to aid in the solution of many of their case load and personnel problems as they may arise in the future.

ministrative rule into as many individual trial units as convenience and efficiency dictate, having due regard for geography, specialization and other factors. The Appellate Division will be divided into as many three-judge panels as the volume of appellate work requires, and these will sit at such times and places as convenience and efficiency dictate." The Case for a Two-Level State Court System, 50 J. AM. JUD. Soc'y 185, 186 (1967).