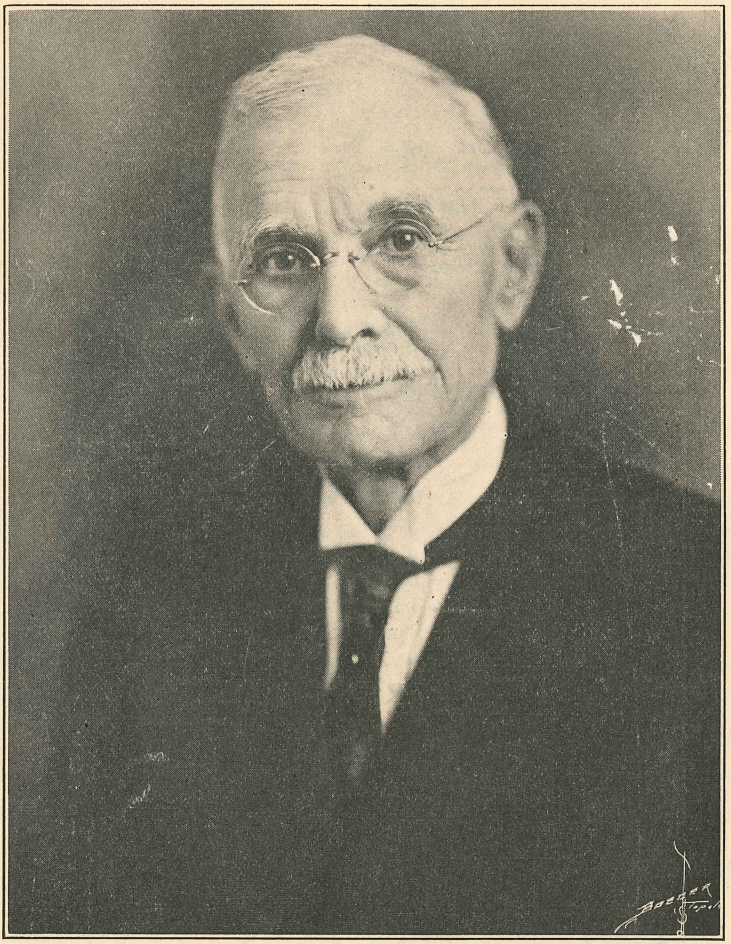
KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1932. PART 2.—SIXTH ANNUAL REPORT



W. A. JOHNSTON, Chief Justice, Kansas Supreme Court.

Application at post office at Topeka, Kansas, for second-class matter.

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JUDGES OF STATE COURTS AND THEIR ASSOCIATIONS,
COURT OFFICIALS AND THEIR ASSOCIATIONS,
MEMBERS OF THE PRESS,
OTHER ORGANIZATIONS, and leading citizens generally throughout the state,
For the improvement of our Judicial System and its more efficient functioning.

KANSAS JUDICIAL COUNCIL BULLETIN

Published Quarterly by the KANSAS JUDICIAL COUNCIL, Topeka, Kansas.

JULY, 1932

TABLE OF CONTENTS.

FOREWORD.

This is the second issue of our BULLETIN, and part 2 of our sixth annual report. The many favorable comments concerning our first BULLETIN from judges, lawyers, and the press throughout the state, encourage us to believe that our report printed in this form is more readily read and produces more beneficial results than when published in one number as our annual report.

The structure of our judicial system and methods of conducting judicial business therein are receiving more attention than perhaps at any time within the history of our state. That both may be improved is clearly recognized. There is developing a genuine spirit of coöperation to accomplish such improvement. To do this requires a thorough, unbiased study of the structure of our judicial system and of procedure therein as they now exist; a realization of what they should be, and the formulation of necessary measures to bring about desired changes.

W. A. Johnston, whose portrait appears on the frontispiece of this BULLETIN, a justice of the supreme court of this state since December 1, 1884, and its chief justice since January 12, 1903, by the statute creating the Judicial Council was authorized to appoint its members other than the chairmen of the judiciary committees of the legislature. He is therefore responsible in the main for the personnel of the Judicial Council and has been interested in its work since its organization. He frequently has been consulted, and repeatedly has given valuable advice concerning its many activities. His long and varied experience, his familiarity with the law, our judicial system and its purpose, and

his intimate knowledge of humanity, the aspirations of our people and the motives which prompt their conduct, render his judgment of exceptional value. We are pleased to print in this BULLETIN an article from him on "Our Judiciary: Its Improvement," with the confidence that it will be read with interest and profit.

This issue contains an article discussing some of the principal things the Judicial Council is doing now; an article by C. L. Hunt on the proposed amendment of the judicial article of our constitution; one by Judge Fischer on greater economy and efficiency in jury trials, with copies of proposed bills; one by Chester Stevens outlining a code of procedure in condemnation cases; a report by Judge Ruppenthal on the meeting of the Northwestern Kansas Bar, and a similar one from Judge Wilson on the meeting of the Southwestern Kansas Bar. These two associations are doing splendid constructive work.

George Austin Brown, whose article in our April BULLETIN on "The Redemption Period in Foreclosures" has aroused much favorable interest, was asked to prepare the form of a proposed bill embodying the ideas contained in the article. He found his time so occupied with his law business that he was unable to complete it for this BULLETIN. It will be completed, however, and appear in our next issue. We believe such a measure can be drawn that will be fair to all interested, materially reduce unnecessary expense and eliminate many confusing questions which now exist.

An interesting and instructive meeting of the State Bar Association was held at Hutchinson last month. It was well attended. The local bar, assisted by other organizations and individuals of the city, provided well for the comfort and recreation of their guests. Gilbert Frith, of Emporia, was elected president for the ensuing year. The program, including a report of the work of the Judicial Council, disclosed an earnest interest in legal matters generally and particularly as they relate to our government, and also specific interest in definite proposals for the improvement of our laws, our judicial system, and procedure therein. We abbreviate our report of this meeting as the State Bar Association, for the first time in its history, is undertaking the publication of a journal to be issued quarterly. The first issue, which will appear perhaps within thirty days, will contain the proceedings of this meeting.

On the day preceding the meeting of the State Bar Association the Judicial Council met at Hutchinson. District judges had been invited to meet with us. Those who could arrange their work so as to enable them to do so accepted the invitation. The following district judges were present: J. H. Wendorff, of Leavenworth, president of the Association of District Judges; Otis E. Hungate, of Topeka; J. G. Somers, of Newton; Tom Kennett, of Concordia; E. E. Kite, of Cheyenne; Ray H. Beals, of St. John; Herman Long, of Wakeeney; Geo. L. Hay, of Kingman; E. L. Fischer, of Kansas City; Wendell Ready, of Wellington; H. E. Walters, of Syracuse; Roscoe H. Wilson, of Jetmore; and F. O. Rindom, of Liberal. The time was largely consumed in discussing practical problems arising in trial courts and the utility of rules previously recommended by the Council and promulgated by the supreme court. The consensus of opinion was that these rules are useful and beneficial. No changes in them were suggested. The two proposed new rules set out on page 12 of our April BULLETIN also were discussed. With some changes which

were suggested placing more responsibility on trial attorneys the consensus of opinion was that they would be beneficial.

Our October BULLETIN, in addition to other matters, will contain some statistics. Our December BULLETIN will consist largely of proposed constitutional and statutory changes. We hope to have them in final form for submission to the legislature. Changes made by the proposed measures in existing provisions will be pointed out and the reasons for them will be given. In the meantime we want all the assistance we can get to help us frame these measures in the form to make them beneficial.

Our Judiciary: Its Improvement.

By W. A. JOHNSTON.

The work of the Kansas Judicial Council is attracting much attention among judges, lawyers, public officers and others interested in the improvement of the administration of justice. Every citizen and taxpayer is concerned in the operation of our judicial system, and especially that justice shall be administered promptly, justly, efficiently and without unnecessary expense.

The Judicial Department is said to be the most helpless of the three departments of our government, as it has not the sword of the executive nor the purse of the legislature, but must depend for its strength on the intelligence and good judgment of the people in order that the administration of the law be conducted so justly and efficiently as to gain and hold confidence. This can be accomplished only by a procedure which will prevent unnecessary delays, dispense with useless formalities and avoid needless expense. The adoption of rules that will simplify and expedite the business of our courts has been the subject of agitation among judges, lawyers, the press and general public for a number of years. Recognition of the necessity for improvement of our system was taken by the legislature of 1927, when it enacted a statute creating a Judicial Council. That act, in brief, provided that it is the duty of the Council to study the Judicial Department, the condition and volume of business in all courts, the rules and procedure therein, the time elapsing between the starting of actions and the conclusion of them, and the unfinished business at the conclusion of terms. It also directed the Council to obtain and consider suggestions from judges, lawyers, public officials and citizens as to new and better methods, and to recommend changes which it is thought would simplify procedure and expedite business and then submit its conclusions to the courts and judges, and also make an annual report of its work to the governor. Such reports are printed and distributed to members of the legislature, judges of courts, lawyers, and others interested.

The members appointed to the Council under the authority of the act proved to be well qualified for the duties imposed upon them and with a full understanding of the importance and difficulties of the task entered at once upon the work and have carried it out methodically, diligently and with a discriminating judgment and ability that has commanded the approbation of every observing citizen.

The annual reports of the Council and the improvements in the procedure and practice already achieved and the plans for other improvements correcting faults in the system now under consideration abundantly justify the action of the legislature in creating the Judicial Council. In the beginning and for five consecutive years the Council has collected from the records of the different courts the time occupied in trying and disposing of cases, tracing them from the time they were filed until they were finally disposed of on appeal. This information, freely furnished in considerable detail by the court officers, has been studied, and with this information a number of recommendations have been made with a view to simplifying procedure and expediting the business of the courts and correcting what was deemed to be faults in the administration. The reports show consideration of the making of rules by the

supreme court applicable to trial courts, and a number of rules so recommended have been adopted by the supreme court and are now in force.

The Council has assumed that there is no question as to the power of the supreme court to make rules which are not in conflict with the code, since that power has been expressly given by the legislature. It has not yet entered upon the more debatable field of making rules setting aside or amending code rules as being within the power of the court, and which is exercised in some other jurisdictions. The rules recommended and adopted have been in force now for several years and have met the general approval of judges and members of the bar, who are almost unanimous in the view that these rules have proven beneficial and are a real improvement of the system. Many attorneys in the state who were doubtful of the power and propriety of promulgating these rules are now advocating that other rules properly may be made superseding those in the code of civil procedure.

It appears from the reports of the Council that it is making a study of changes that might be made in the structure of our judicial system, changes that can be effected only through constitutional amendment adopted by a vote of the people. The Council has suggested a complete new judicial article of the constitution and has prepared and presented amendments for the consideration of the legislature at some early session. Our judicial article, however well adapted to the conditions existing when it was first adopted, may not be as well suited to present conditions. The law is a thing of growth, and the increase of population and vast economic changes suggest that changes in the structure of our system are necessary. The legislature in an attempt to meet public demands has created various courts under the restrictions of our present constitution with different and overlapping jurisdictions, causing unnecessary expense. There is an apparent need for the unification of the system. The judicial power of the state is scattered among one supreme court, thirty-six district courts, some of which have from two to four divisions, with a judge in each division, one hundred and five probate courts, twenty or more county courts and a great number of city courts with considerable differing degrees of jurisdiction. Without expressing a definite opinion as to the different features of the tentative proposal of the new article on the judiciary, I have no hesitation in saying that it is well worthy of the special attention of the bar and the people. Close study should be given it, as it is still under consideration by the Council and it will welcome suggestions of modification of the whole or any particular part of it.

Suggestions of changes in the system that may be made below the district courts, which might be effected without changing the entire judicial article, have been made by the Council. The suggested changes under this head have been formulated in a tentative act which will be presented for legislative action, and as its provisions are studied it has grown in favor among the members of the bar and those that have given it attention. The necessity for this reorganization by statute will bring substantial relief without waiting for the slow process of constitutional changes. The reasons for the proposed measure have been well stated in the reports of the Council. The Council reasons that the legislature has created a dozen or more courts in large cities, it also has created county courts in twenty counties, the general aim being to find substitutes for the courts of justices of the peace and provide in each county a court

open all of the time for the transaction of business. These courts are to be well equipped, have qualified judges, capable of transacting probate business, which is growing more important every year, and also have a limited jurisdiction in civil and criminal actions which they can handle efficiently with a more speedy procedure than is appropriate for the district courts. This proposal, I think, would be a great improvement of our system and would tend to facilitate the prompt and efficient disposition of business in our courts and effect a reduction of the costs of litigation.

The reports of the Council show that it is giving thoughtful consideration to a number of suggested improvements, including the trial of certain classes of cases with a less number of jurors than now is required, and also to provide a better method of selecting jurors. Considerable time and effort have been devoted by the Council to the improvement of the procedure and practice in probate courts. This is regarded by many as a crying need, and the recent meetings of the Northwest Kansas Bar Association and the Southwest Kansas Bar Association gave most of their attention to probate procedure. It will be observed, too, that the Council is interested in finding more effective and better methods of criminal procedure, and of desired changes in the granting of paroles to prisoners. These and some other matters, which I have not time to mention, are of vital and pressing importance in improving our judicial procedure.

What is of paramount importance in carrying out the beneficial purpose of the act is that the Council shall have the earnest interest and assistance of all the judges, lawyers and officers. It is noticeable that there is a growing interest in these plans among members of the bar, and many helpful suggestions are coming to the Council every day which are fully appreciated. The Council already has accomplished much, and many other important improvements are contemplated which it is diligently working upon, and if all of us who are interested join it in the good work we may be assured of a better judicial system by which justice will be administered more promptly, efficiently and without unnecessary expense.

The Judicial Council: What It Is Doing Now.

We find that lawyers and judges throughout the state like to know from time to time the problem receiving special consideration of the Judicial Council. We hope to convey that information here.

On the recommendation of the Judicial Council, the supreme court recently promulgated two additional rules relating to procedure in district courts, to become effective September 1, 1932, as follows:

"No. 35. In all cases tried before the court without a jury, where either party shall urge the application of a presumption of law, the trial judge, upon timely written request of the party setting forth the presumption of law which the party contends applies, shall file with the clerk, either separately or as part of his findings of fact and conclusions of law, a written statement as to whether, in deciding the case, he did or did not give effect to the presumption of law contended for.

"No. 36. In trials before the court, without a jury, where evidence is admitted over proper objections, and not stricken out on timely motion therefor, it shall be presumed that such evidence was considered by the court and entered into its final decision in the case."

These rules have been under consideration for more than a year. They were discussed at our meeting with the district judges of western Kansas held in June of last year at Hays. They were printed and discussed (pages 9 and 10) in our 1931 report and again at page 12 in our April BULLETIN. Some changes of wording were suggested by trial judges at our recent meeting in Hutchinson. In the form promulgated they place responsibility upon trial lawyers as well as trial judges to conduct the trial as it relates to the issues before the court and to make the record so that the controverted questions referred to in the rules may be presented for review on appeal. Compliance with these rules should shorten the time for the trial of actions before the court, make it possible to have a review of rulings upon presumptions of law contended for, and on admission of evidence complained of, and litigants will be better assured of obtaining their legal rights. The natural result should be the more prompt and efficient administration of justice.

The concensus of opinion among lawyers and trial judges throughout the state, as we have been able to ascertain it, is that the rules heretofore promulgated by the supreme court relating to district courts very decidedly have resulted in the more prompt dispatch of judicial business and in more efficient results. These and other considerations are leading many attorneys, at first in doubt on the matter, to believe that purely procedural matter should be governed entirely by rules of court as distinct from legislative enactment. The practicability of doing so has been demonstrated. The facility with which they may be modified to conform to discovered needs is found desirable. To be effective it is essential that trial lawyers and judges get in the habit of conforming to these rules. One who engages in a game of chess, or of football, to attain success finds it necessary to learn the rules of the game and conform to them. So it is in the practice of law. Trial lawyers and judges are recognizing that important fundamental fact, are familiarizing themselves with these rules and their application, and are conforming to them better as they realize their importance and the merits of their results. A few instances of nonconformity to some one of the rules, with results disastrous to the rights of the litigants, are occasionally called to our attention. We recently were advised of a flagrant instance in which rights of litigants on both sides of the controversy were affected to their detriment by the failure of a trial court to decide within thirty days a matter taken under advisement. While these instances are rare, the few that occur should not exist. We have heretofore refrained from pointing out the details of such instances and shall do so this time. The instance referred to causes us to wonder if in fairness to other trial courts and attorneys, as well as for other reasons, it would not be best for us to state and publish the entire details.

The matter of procedure in probate court is receiving attention of the Council. Attorneys throughout the state recognize the importance of this question. At the recent meetings of the bar associations of northwestern and southwestern Kansas the subject formed the principal topic of discussion, as will be seen from the quotations contained in the article by Judge Ruppenthal in this issue of the Bulletin. It is not necessary to repeat here any of that discussion. It is sufficient to say that those who have given serious consideration to the matter appear to have reached the conclusion that our present probate procedure is entirely inadequate. The importance of this matter is shown by the fact that on July 1, 1930, the gross value of estates in process of administration, including guardianships, amounted, in round numbers, to $90,000,000.

This did not include the value of real property in intestate estates. Under our present procedure in many instances claims are allowed, distribution made or property disposed of without notice to parties affected and without a fair opportunity for them to be heard. Lack of adequacy, uniformity, and simplicity are apparent in our probate procedure. It should be thoroughly revised. In our proposed measure for the reorganization of courts inferior to the district court, by creating a probate and county court, it is provided that the procedure shall be by rules of court. If that bill should be enacted into law, as growing sentiment in its favor tends to indicate that it may be, a revised procedure for probate courts could be provided by rules of court. In the absence of that there should be a rewriting of our statute concerning estates of decedents and those under guardianship, separating the substantive law from the procedural provisions, and providing a simple, uniform, adequate procedure. The Judicial Council would appreciate hearing more from attorneys, probate judges and other on this question.

Our proposed measure (set out pages 191 to 193 of our 1931 report) for the reorganization of our judicial system inferior to the district court is receiving the attention of the Judicial Council. The more this measure has been studied and given serious consideration by attorneys and others throughout the state the more favorably it has been received. The temporary commission, provided by chapter 287, Laws 1931, have considered it in connection with its work and has approved it, and some of its members have written articles and made addresses favorable to its adoption. It has received favorable comment, either specifically or inferentially, by numerous attorneys at recent bar meetings. The fact that people no longer elect them in most localities demonstrates the lack of utility of justices of the peace. The fact that more than twenty counties in the state have taken advantage of the county-court act, and that in about a dozen of the larger cities of the state city courts have been created under special acts, or the general law, show the need of the people for a local, adequately equipped court for the transaction of business which ordinarily does not find its way into the district court. The need of such a court as is outlined by our proposed measure is demonstrated by an incident which recently came to light. In Arkansas City a few years ago the people, growing weary of the inefficiency of justice-of-the-peace courts and desiring a judicial tribunal at home for controversies which ordinarily would not reach the district court, adopted the provisions of the city-court act by an appropriate ordinance of the governing body of the city. This necessarily created a new court for that locality, with a full complement of officers—judge, clerk and marshal. At the time it was created enthusiasts for the court anticipated fees charged litigants in cases would take care of the expense of conducting the court, including the salaries of its officials, or substantially so. After the court was conducted two or three years it was found that the fees were entirely inadequate to meet that expense, and the city was confronted with the necessity of paying approximately $4,000 a year for the maintenance of this court by funds raised from taxation. Not wishing to carry that burden, the governing body of the city passed an ordinance by which it attempted to dissolve the city court and return to justices of the peace. The supreme court was compelled under the law to hold that the governing body of the city had no authority to pass such an ordinance (*Brown v. Arkansas City,* 135 Kan. 453). The result is the city has an unduly expensive court. Had our proposed

measure been in effect, the judge of the probate and county court could sit at Arkansas City as a division of the court. There would be no necessity of an additional judge. The sheriff would serve the process of the court, hence there would be no necessity for a marshal. Perhaps a deputy clerk would be in charge of the Arkansas City division, but that is all that would be needed in additional clerical force. What is more, the people of Arkansas City would have had a better court than is now provided, for the division of the probate and county court would have jurisdiction in probate matters, guardianships, juvenile business, etc., which its present city court does not have. Altogether it would provide a simpler, less expensive and more adequate judicial structure. Other specific instances of the merits of the proposed measure might be pointed out.

Other questions receiving the attention of the Judicial Council are treated in separate articles in this issue, or are mentioned in our April BULLETIN or our 1931 report. We shall not take the space to enlarge upon them here. Some of the questions under consideration are far-reaching in their importance. What is finally done about them should be the result of the combined judgment of lawyers and jurists of the state formed after thorough consideration.

A Proposal to Amend the Judicial Article of the Kansas Constitution.*

By C. L. HUNT.

The last revision by the Judicial Council of the proposed amendment of the judicial article of the Kansas constitution is not a mere thoughtless expectoration of words. It is the product, however imperfect, of much studious labor by members of the Council. An historical sketch with the merit of brevity will suffice as a demonstration.

In 1928 the Council, in its effort to recommend correctives to some procedural defects, found constitutional impediments. The idea of rewriting the judicial article of the constitution was that of Justice W. W. Harvey, the chairman. Other members were easily convinced. The reasons for the movement were clearly stated by Justice Harvey in his report to the State Bar Association at its November, 1929, meeting (Proceedings 1929, pp. 23, 24, 25). The subject received treatment by his hands in a report to the same body in 1930 (Proceedings 1930, p. 37 *et seq.*), and again in 1931 (Proceedings 1931,

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*A PROPOSITION to amend article III of the constitution of the State of Kansas, relating to the judiciary.

Be it resolved by the Senate of the State of Kansas, the House of Representatives concurring therein:

SECTION 1. There is hereby recommended and submitted to the qualified electors of the state of Kansas, to be voted upon at the next general election for representatives, for their approval or rejection, a proposition to amend article III of the constitution of the state of Kansas, relating to the judiciary, so as to read as follows:

ARTICLE III.—THE JUDICIARY.

Section 1. All of the judicial power of this state shall be vested in a system of courts composed of a supreme court, district courts, county courts, and such other courts, inferior to the supreme court, as may be created by law.

Sec. 2. The supreme court, district courts, and county courts shall be courts of record and each shall have a seal to be used in the authentication of all process and records.

Sec. 3. The supreme court shall be the highest court in the judicial system of the state. It shall have original jurisdiction in proceedings in quo warranto, mandamus, habeas corpus, and such other actions and proceedings presenting questions of law only and which are submitted on a written statement of agreed facts; and appellate jurisdiction in all civil and

pp. 26, 27). Frequent references to the subject appear in the annual reports of the Council.

Briefly, and not comprehensively stated, the purposes of rewriting the article were to convert presently existing bodies having judicial powers, disconnected in operation, working independently, yet with conflicts in and overlapping of jurisdiction, into a unified interworking system of courts, constituting altogether a judicial department of the state. The practice and procedure were deemed more advantageous if conducted under rule than by a legislatively created code. It was thought best to enlarge the original jurisdiction of the supreme court to include actions and proceedings presenting questions of law only submitted on a statement of agreed facts. A check against uncontrolled and sometimes political appointments of justices and judges by the governor to fill vacancies was deemed advisable, as was also a method of removing such an officer for the good of the service without the stigmatizing process of impeachment. Life tenure was a debatable subject. The justice of the peace, who now holds office by constitutional endowment, is generally conceded to now have no such important place in a modern scheme of jurisprudence as necessarily makes his office a constitutional mandate.

With these and other views in mind, the Council set about redrafting the Judicial article. No one task has even approximately commanded as much

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criminal actions and special proceedings tried in the district court, and shall have appellate jurisdiction in such other actions and proceedings as may be provided by law. It shall consist of seven justices until the number shall be changed by law. It may make provision by rules for the practice and procedure in all state courts. It may temporarily transfer a district judge from one district court or division to another, when the condition of business, disqualification of the acting judge or his inability to sit makes such action advisable. Any judge so transferred, and the court over which he presides, shall have the same power and jurisdiction as a regular judge or court in civil and criminal cases and other proceedings. The supreme court may call a judge of any district court to sit on the supreme court in the event a member of that court be ill or otherwise disqualified to sit and a full bench is needed. The justices of the supreme court may sit separately in divisions with full power in each division to determine the cases assigned to be heard by such division. Three justices shall constitute a quorum in each division and the concurrence of three shall be necessary to a decision. Such cases only as may be ordered to be heard by the whole court shall be considered by all of the justices and the concurrence of a majority shall be necessary to a decision in cases so heard. The justice who is senior in continuous term of service shall be chief justice, and in case two or more have continuously served during the same period the senior in years of these shall be the chief justice, and the presiding justice of each division shall be selected from the judges assigned to that division in like manner.

Sec. 4. Justices of the supreme court, judges of the district courts, and judges of county courts may be removed from office by resolution of both houses if two-thirds of the members of each house concur. But no such removal by such proceeding shall be made except upon complaint, the substance of which shall be entered upon the journal, nor until the party charged shall have had notice and opportunity to be heard.

Sec. 5. The supreme court, not more than two justices voting in the negative, after a hearing, on complaint and due notice, may ask the resignation of, or by order remove a justice of that court or a judge of any state court for the good of the service, and shall prescribe rules of procedure therefor; and by like vote, after notice and hearing, may retire on half pay any justice of the supreme court or judge of the district court who has served continuously as such justice or judge, or both, for as much as fifteen years, and who shall have attained the age of seventy years, or whose physical or mental infirmities have rendered such retirement advisable for the good of the service.

Sec. 6. The supreme court shall appoint a reporter and a clerk for that court who shall hold office during the pleasure of the court and shall prescribe their respective duties.

Sec. 7. There shall be a district court in each county, but several counties may compose one district, and there may be divisions of the district court as the business therein may require. Judicial districts consisting of one or more counties, and the divisions of each district court and the number of judges therein, as they may exist at the time of the adoption of this amendment, shall continue to exist until changed by law. The district court shall be a court of original general jurisdiction for the trial of all civil and criminal actions and proceedings, except as the exclusive jurisdiction of any civil or criminal action or proceeding is hereby vested in some other court, and shall have appellate jurisdiction in all civil and criminal actions and proceedings originating in courts inferior to the district court, and in boards, commissions and tribunals when exercising judicial functions, and such other jurisdiction as may be provided by law.

Sec. 8. There shall be established in each county in this state a county court which shall have exclusive original jurisdiction for the probate of wills, in all matters relating to the estates of decedents and the persons and estates of incompetent persons and minors, and which shall have such original jurisdiction in civil and criminal actions and proceedings as

time and study. Several drafts were prepared, rewritten and revised before a rough and certainly tentative draft was in form which the members thought might be presented to the Bar Association to draw criticism and helpful suggestions. This was done at the June, 1930, meeting, and the subject drew some fire. (Proceedings 1930, pp. 38-42.) Life tenure of justices of the supreme court and district-court judges was a high point in that first tentative draft. Thereafter the Council held many sessions devoted almost exclusively to changes and revisions, and finally worked out the draft appended hereto.

As all other organic acts, it is a document of compromises. Life tenure was reluctantly abandoned by some. Other modifications so worked out will be noted.

In section 3 original jurisdiction of the supreme court was enlarged in the respects already mentioned.

Section 7 of the present draft gives to district courts appellate jurisdiction in proceedings of boards, commissions and tribunals when exercising judicial power. After much debate this provision was added to the first tentative draft.

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may be provided by law. The board of commissioners of the county shall establish such divisions of the county court as the condition of business therein requires. The judge or judges of such court shall be examining magistrates in prosecutions for felonies. There shall be at least one judge of the county court in each county, and such additional judges as may be provided by law. At the first session of the legislature following the adoption of this article the legislature shall provide for the organization of county courts in accordance with this section, the transferring to such courts of the records and pending business of trial courts inferior to the district court, and for the election of judges for such courts at the next general election, so that such county courts may be fully organized and equipped to take care of such business on the second Monday in January following such general election.

Sec. 9. In each county there shall be a court clerk who shall be selected as provided by law and shall act as clerk for both the district and county courts in such county, and whose duties shall be prescribed by rule of the supreme court.

Sec. 10. To be eligible to hold the office of justice of the supreme court or judge of the district court a person must be duly admitted to practice law in this state, and shall be a citizen and resident of the state and district in which he is elected or appointed, and before taking such office must have been engaged in the active practice of law or shall have served as judge of a court of record, or both, in the aggregate as follows: for justice of the supreme court, ten years; for judge of the district court, five years. No person shall be ineligible to hold any judicial office in this state on account of his holding another judicial office therein at the time of his election or appointment. No person shall hold more than one judicial office concurrently.

Sec. 11. Justices of the supreme court and judges of the district courts and county courts shall be elected at general elections as provided by law, and shall hold their respective offices for such terms as the legislature shall prescribe, which shall be not less than six years for justices of the supreme court nor less than four years for judges of district courts and county courts. Elected

Sec. 12. All appeals from county courts shall be to the district court, and all appeals from the district court shall be to the supreme court.

Sec. 13. The justices of the supreme court and judges of the district courts and county courts shall, at stated times, receive for their services such compensation as may be provided by law, but no such justice or judge shall receive any fee or perquisites, nor shall he practice law during his continuance in office.

Sec. 14. The several justices and judges of courts of record in this state shall have such jurisdiction at chambers as may be provided by rule of the supreme court.

Sec. 15. Provision shall be made by rule of the supreme court for the selection of a judge *pro tem* of the district court or county court.

Sec. 16. In the event of a vacancy in the office of a justice or judge of any of the courts of record of this state the governor shall appoint some eligible person to fill such vacancy. No such appointment to fill a vacancy on the supreme court or the district court shall be valid without the written concurrence therein of a majority of the justices of the supreme court. The person so appointed shall hold office until his successor, elected for the balance of the unexpired term, shall have qualified. A successor shall be elected at the next general election which occurs more than four months after the vacancy. Vacancy:-

Sec. 17. The style of all process shall be "The State of Kansas," and all prosecutions shall be carried on in the name of the state. All process from any of the courts of the state shall be executed by a sheriff, undersheriff or deputy, or by the clerk of the district court if the sheriff be the party to be served.

SEC. 2. This proposition shall be submitted to the electors of the state of Kansas at the general election in 1934. The amendment hereby proposed shall be known on the official ballot by the title, "The Judiciary Amendment to the State Constitution," and the vote for and against such proposition shall be taken as provided by law.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

In the present draft a more comprehensive provision appears in section 8 concerning the organization and jurisdiction of county courts.

In section 10 the three-year requirement for eligibility for judges of county courts has been eliminated.

Tenure of office for county-court judges has been changed from two to four years. Life tenure for supreme-court Justices and district-court judges having been abandoned, the legislature is given power to fix the length of the terms with a minimum of six years for justices of the supreme court and four years for judges of the district courts. Under the present constitution these terms were definitely fixed. As now proposed, the legislature would have power to extend the terms for periods longer than the minimum fixed in the proposed amendment, but not to shorten them.

It removes what is now practically a prohibition against a district judge becoming judge of the supreme court. It provides for the transfer of a district judge temporarily from one district or division to another, when special conditions exist making such action advisable, and also for calling a district judge to sit on the supreme court for the determination of any cause if a member of that court is ill or otherwise disqualified to sit and a full bench is needed. It provides that salaries of judicial offices shall be fixed by law, thus giving the legislature the same power to increase or decrease salaries of judicial offices that it has of the salaries of other state offices.

When the first tentative draft was presented to the Bar Association in 1930, ex-Chief Justice Doster offered the criticism that the amendment went too far into detail and contained too much legislative matter. The same sentiment was voiced by Senator Benjamin F. Hegler, of the Wichita bar. In this respect perhaps the present draft is no particular improvement over the one then presented; but even so, is the criticism directed to anything harmful? The present draft contains 310 words more than the existing constitutional article. Much of this can be charged to provisions concerning county courts. In any event, it may be well doubted whether the present draft is any more legislative than the existing article. As an example, what could be more legislative than section 4 of the existing article with reference to the appointment of a reporter and clerk of the supreme court? Examinations made of the constitutions of other states show no fewer phrases of a legislative character than does the proposed draft. It seems necessary to inject some features which smack of legislative grants. The purely organic act has yet to be penned.

At the same meeting Judge Doster challenged the new provision relating to the removal of judges for the good of the service, and reaffirmed his belief that impeachment proceedings were alone proper. The old section with reference to impeachment is preserved, but an added method is provided for removing a justice or judge for the good of the service. The new provision was ably defended by Justice Harvey in his report at the 1929 proceedings, and his remarks on that occasion are here quoted.

"There should be a provision by which authority is placed somewhere to ask a judge to resign, or to remove him, for the good of the service. The only methods now of removing a judge are by impeachment (§§ 27, 28, art. II, const.), or joint resolution of the legislature (§ 15, art. III, const.), or perhaps in some instances by the ouster statute (R. S. 60-1609 *et seq.*); but before any of these can be invoked there must be a violation of some penal statute, or

serious misconduct. The occasion seldom arises when they can be, or are, applied. But we need something more than that. Under our present system anyone (having the statutory qualifications [R. S. 20-105], where the statute prescribes qualifications) who desires to run for a judicial office, and who succeeds in getting enough votes, is elected, and for a definite term. The result is, we frequently have one elected whose ability as a jurist proves to be mediocre, and occasionally one is chosen who proves to be thoroughly unsuited for the work. It is peculiarly true that whatever may be a person's success in the practice of law or in other vocations of life, he may or may not have qualities which make him an efficient jurist. Whether he is, or becomes, efficient as a jurist can in fact be determined only by observation of him after he has undertaken to perform the duties. If it developed that one who had been appointed or elected to a judicial position did not have the qualities or the ability of transacting the business of the court efficiently and promptly there should be authority placed somewhere to ask him to step aside for the good of the service, and that should be done without any reflection on his integrity or honor."

To this may be added the observation that the instances where district judges, especially, have perpetuated themselves in office by methods other than a demonstration of judicial ability are sufficiently numerous to challenge the attention of the student of jurisprudence to a method of removing a justice or a judge without ascribing to him any illegal or immoral act, without besmirching his honored name by debates in the legislature, and without retiring him to private life with the black mark of impeachment upon him. This additional remedy is needed, and there is no official body better qualified for this important function than the supreme court.

Members of the bar have some voice in the nomination and election of judges, and why should they be ignored in cases of appointment? Appointments are now made by the governor, who is usually not a lawyer. The appointments, as a rule, have been good, but there have been exceptions, and there may be more. Federal judges are appointed by the President of the United States, but confirmation by the United States senate is required. Obviously, this method cannot be pursued in a state where legislative sessions are infrequent. The Council cast about in a search for some confirming body. The Senate is not available. Obviously, the body which knows best the qualifications and temperament of the bench and the bar of the state is the supreme court, and so the present draft was written requiring confirmation of appointments by the supreme court.

The office of probate judge is now a constitutional office. It is generally recognized that the law and procedure of probate courts, not only with reference to estates of decedents, but in handling the affairs of incompetents and minors, need drastic changes. The subject has received some attention by the Council, and more attention is now being given it by members of the bar. This is evidenced by the programs of the Northwest Kansas Bar Association and the Southwestern Kansas Bar Association at their recent 1932 meetings. The discussions in both associations were devoted almost exclusively to this important branch of our jurisprudence, and in that section of the state, at least, there is a widespread and growing conviction that the easiest and most wholesome remedial method is by amending the judicial article of the constitution, and providing that the practice be regulated by rules promulgated by the supreme court. Undoubtedly much of the labor which will otherwise be attendant upon redrafting the substantive law relating to these subjects

and preparing a code of procedure for legislative approval can be obviated by the proposed amendment to the constitution and the regulation of the practice and procedure by rule.

The bench and bar of Kansas may as well be preparing for the era of practicing by rule instead of by code. It is coming, and it will soon be here.

England long struggled under a cumbersome and technical procedure before efforts were made to throw off the yoke. The movement came from the bar, as it should, and the result has been a gradual working out of a system of practice, simple, shorn of time-killing devices, aimed only at a fair disclosure of the facts and the rendition of judgment in conformity with justice.

The late Prof. William E. Higgins, one time of the Kansas University Law School, one time president of the Kansas State Bar Association, and later a member of the American Judicature Society, spent one year in England in thoughtful study and observation of the English practice. Some of the observations contained in his report to the latter society will be noticed. He says:

"The prime quality of the English procedure is flexibility, by which its rules may be easily and quickly changed to meet new conditions or to remedy their defects as these are discovered, flexibility to meet the needs of individual actions, flexibility of adjustment by the transfer of its judges from one department to another to meet the needs of the judicial business."

Even under our own code, of which we are somewhat proud, we encounter sections which impede our progress. We find the absence of provisions which would accelerate proceedings in our courts. Corrective measures may be applied at a session of our legislature, and they may not, but if we practice by rule instead of by code and these impediments appear, remedial action may be had through the rule-making powers of the supreme court. This will result, as observed by Professor Higgins, in elasticity in procedure, which, after all, is the basic secret of a speedy and satisfactory administration of justice.

Our constitution now requires the election of two justices of the peace in each township of the state. The Council learned in 1928 that this constitutional provision requires the election of 3,258 justices of the peace in Kansas. Strangely enough, we have a statute which penalizes one who is elected as a justice of the peace for his failure or refusal to qualify. Nevertheless, it was found in 1928 that only 982 justices were qualified. Of these only 297 reported that there was any business in their courts. It would seem obvious that justice-of-the-peace courts, being the most numerous branch of our present judicial system, have outgrown their usefulness. Improved highways and speedy methods of transportation have directed the traffic of litigation into the county seats. The proposed amendment omits all reference to justices of the peace, but is sufficiently elastic to enable the legislature to create such courts inferior to the supreme court, district and county courts as may be found necessary for the transaction of such business as would for reasons of convenience and economy fall to such few magistrates as might be necessarily located in various points in the county, without the necessity of having two of them in each township.

This discussion does not pretend to go into every detail of the proposed amendment, the changes which will result by its adoption, or to recite in detail every comparison which might be made between the present article and that proposed. It is not claimed that the present draft is perfect, but some

such measure will be presented at the coming session of the legislature. Members of the bar and judges have not heretofore responded to any large degree to the invitation of the Judicial Council to submit their own ideas as to whether this article should be amended at all, or if so, what the amendment should contain. There remain several months during which the Judicial Council may see fit to revise the appended draft. During that period suggestions from judges and members of the bar are urgently solicited.

Eminent Domain: A Proposed Code of Procedure.

By CHESTER STEVENS.

Following the publication in our April BULLETIN of the article on "Confusion in Condemnation Procedure" and the general interest shown in the question, the Judicial Council asked me to draft a bill outlining a code of procedure for the exercise of the power of eminent domain, and here it is. Naturally, it has been prepared with some haste. As yet it has not received the careful study of all members of the Council. Doubtless it will need modification in some particulars. We do not have now a clear, easily understood procedure for condemnation cases. There are obscure and conflicting provisions, even omissions in some instances. These can be corrected by an appropriate act of the legislature. It is a measure in which the public generally, as well as individual owners of real property, are vitally interested. We desire that the measure we ultimately recommend to the legislature be fair in its provisions, comprehensive in its scope, and readily understood and applied. To enable the Council to so frame the measure we invite its careful consideration and its free criticism by letters directed to the Judicial Council or some one of its members. The measure as now prepared is as follows:

AN ACT concerning the power of eminent domain and providing a code of procedure for the exercise thereof.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Any person, copartnership, corporation and the state, including its municipal subdivisions, may exercise the power of eminent domain only in accordance with the provisions of this act.

SEC. 2. No right of way shall be appropriated to the use of any corporation until full compensation therefor first be made in money or secured by a deposit of money to the owner irrespective of any benefit from any improvement proposed by such corporation.

SEC. 3. The right to take private property shall depend solely upon the public use of the property sought to be taken, and if the use will be beneficial to the public the power may be invoked in accordance with the provisions of this act.

SEC. 4. Any person, copartnership, corporation, the state or any of its municipal subdivisions shall file in the office of the clerk of the district court of the county in which the land proposed to be taken is located an application in writing, duly verified, stating the name of the petitioner, and if the state or municipality is the petitioner, a certified copy of the resolution, ordinance or other proceedings authorizing the same, a description of the lands involved and the exact boundaries of the part sought to be taken and the extent and character of the use to which the petitioner proposes to subject the land.

SEC. 5. Said application shall be presented to the judge of the district court of said county, and in his absence or inability to act the same may be presented to the probate judge of such county, who shall examine said application,

and if said proposed purpose is impressed with public use or benefit the district judge or probate judge, as the case may be, thereupon shall appoint three competent disinterested householders of such county as commissioners, upon actual view, to proceed to lay off and condemn the lands sought to be taken as described in the application. If the judge shall deny said application the petitioner forthwith may file with the clerk of the district court a notice of appeal, and thereupon the clerk forthwith shall certify the same to the supreme court for immediate decision.

SEC. 6. The appointment of the commissioners shall be in writing and signed by the judge and filed with the clerk of the district court. The commissioners forthwith shall take an oath honestly and faithfully to discharge their duties as such commissioners and thereupon shall proceed to an actual view of the lands sought to be taken and shall appraise the same at its actual cash value and shall assess the damages to those parts, portions and parcels not taken, the valuation and assessment of damages to be alloted to the respective owners of such lands. Except in cases of condemnation of rights of way for corporations, the commissioners shall offset against the damages allowed to those portions of the several tracts, portions or parcels not taken such benefits as they shall determine will result to the owner or respective owner of the lands affected, but in no event shall the allowance of benefits exceed the amount of damages. The commissioners shall embody their doings in a written report to which their oath shall be attached, sign and file the same with the clerk of the district court.

SEC. 7. If the petitioner desires immediately to occupy the lands proposed to be taken, he thereupon shall pay to the clerk of the district court the respective sums allowed to the respective owners as compensation for the land taken, and damages, if any, to the lands not taken, and shall execute and file with the clerk, to be approved by the clerk, a good and sufficient bond in a sum equal to the allowance made by the commissioners to indemnify the respective landowners for additional compensation and all damages which may be allowed in the event of an appeal, as hereinafter provided, and thereupon the petitioner may enter into the possession of the land.

SEC. 8. Upon the filing of the report of the commissioners the clerk of the district court shall issue a summons to each of the owners of the property affected by the condemnation proceedings, if their residence is within the state of Kansas and known, such summons to be directed to such owner and delivered or sent to the sheriff of the county of such owner's residence to be served by such sheriff and return made thereof as in case of summons in civil actions. If service of summons cannot be made upon such owners within the state of Kansas, or if their whereabouts or residence is unknown, such owners and all nonresident owners of the state of Kansas thereupon shall be notified of said condemnation by said clerk by publication of a notice once each week for four consecutive weeks in some newspaper published and of general circulation in such county, or if none be published therein then one of general circulation in such county, which notice shall state the name of the petitioner, a description of the several tracts and parcels of land owned by such unknown or nonresident owners, and an accurate description of the several parts thereof sought to be taken, together with the amount of compensation allowed for the part or parts taken, the amount of damages assessed and the amount of benefits, if any, deducted, and which notice further shall notify such owners that unless they shall appeal from the award of said commissioners on or before a certain date therein specified, which shall be twenty days after the last publication, said award will become binding and final on them. Proof of publication shall be made and filed as in other cases.

SEC. 9. Any owner affected by such condemnation proceedings upon whom service of summons has been made by the sheriff as in the last preceding section provided within ten days after the return day of said summons may appeal to the district court of the county wherein said lands are situated by filing with the clerk of the district court a written notice, stating his name, a description of the land which he claims to own and which is affected by said condemnation proceedings, and stating that he appeals to the district court

from the award of the commissioners, and thereupon the clerk shall docket the appeal as in other cases.

SEC. 10. If the petitioner shall feel aggrieved by the award of the commissioners as to any particular tract or parcel of land affected by the condemnation proceedings, he may enter into the occupancy of the land by complying with the provisions of section 7, and filing with the clerk of the district court within twenty days after the filing of the report of the commissioners with said clerk, a notice of appeal, stating his name, the name of the owner or owners of the tract or tracts affected, and stating that he appeals to the district court from such award, and the clerk shall thereupon docket said appeal as in other cases.

SEC. 11. All such appeals shall be tried as other civil actions.

SEC. 12. Either party may appeal from the district court to the supreme court as appeals are taken in civil cases under the code of civil procedure.

SEC. 13. In all proceedings in the district court the code of civil procedure shall govern the same.

SEC. 14. All costs and expenses of filing the application and appointment of the commissioners, of the report, and of all summons issued and served and all notices published, as in this act provided, and the fees of the commissioners to be fixed by the judge, shall be paid by the petitioner and in all appeals from the award of the commissioners the party appealing shall make security for costs as provided in the code of civil procedure.

SEC. 15. Upon final payment of the award or in case of appeal, on final judgment, the petitioner thereupon shall become vested with the fee-simple title to the lands taken under the condemnation proceedings.

SEC. 16. All statutes relating to condemnation proceedings now in force in this state are hereby repealed; provided, however, that any and all condemnation proceedings instituted or commenced and not completed before the publication of this act shall be in accordance with the statutes now in force.

SEC. 17. This act shall take effect and be in force from and after its publication in the official state paper.

Economy in Jury Trials: More Capable Jurors.

By E. L. FISCHER.

Following the publication in our April BULLETIN of the article on "Economy in Jury Trials" the Judicial Council asked me to prepare appropriate bills authorizing the trial of civil actions and misdemeanor cases by juries of six, when the parties are willing to do so. To accomplish that result requires a change of but one section of our civil code, and one section of our criminal code. Appropriate bills for such changes are as follows (new matter added to the old sections is printed in italics):

AN ACT relating to civil procedure, amending section 60-2903 of the Revised Statutes of Kansas of 1923 and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That section 60-2903 of the Revised Statutes of Kansas of 1923 be and the same is hereby amended to read as follows: 60-2903. Issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury trial is waived or a reference be ordered as hereinafter provided. All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury or referred as provided in this code. *Unless a jury of twelve be demanded by either party within ten days after the issues are joined the trial shall be by six jurors.*

SEC. 2. That section 60-2903 of the Revised Statutes of Kansas of 1923 and all acts or parts of acts in conflict herewith, are hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

AN ACT relating to criminal procedure, amending section 62-1401 of the Revised Statutes of Kansas of 1923, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That section 62-1401 of the Revised Statutes of Kansas of 1923 be and the same is hereby amended to read as follows: 62-1401. The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in cases of felonies. All other trials shall be by jury, to be selected, summoned and returned as prescribed by law. *In all misdemeanor cases, unless a jury of twelve be demanded by the defendant or complainant or prosecuting attorney before the case is called for trial, they shall be tried by six jurors.*

SEC. 2. That section 62-1401 of the Revised Statutes of Kansas of 1923, and all acts and parts of acts in conflict with this act, are hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

In connection with the matter of jury trials by six jurors, there is another thought that should receive serious attention. It is as to the raising of the standard of the jurors selected to try and determine the cases submitted to them. There is too much of the feeling that jury service is a mere trifling and unimportant matter, to be avoided by those who, by one pretext or another, are excused from that high duty.

It has occurred to me, and no doubt to every trial judge, that a careful, systematic effort should be made to elevate the mental attitude of the citizen toward jury service, and such service should not be intrusted to any person who does not show himself to be at least fairly well mentally equipped to grasp the points and issues involved, and, also, to appreciate the seriousness and importance of the duty and power involved: the duty to decide whether or not the money or property of one should be taken from him and given to another, or whether one's liberty should be taken from him upon the charge of another.

Why would it not be a good thing to require by law, or at least request, by jury commissioners and other proper officers who have the duty of selecting names for jury service, that before making final lists all prospective jurors make answers to a written questionnaire pertaining to their qualifications, substantially as follows:

Questionnaire for Prospective Juror.

Please fill in blanks in your own handwriting:

Name..... Age..... Place of residence.....
Street No..... City..... R. F. D.....
Married..... Number of children, if any.....
Nationality..... Race.....
Citizen of United States?..... (*a*) Native born?.....
(*b*) Naturalized..... (*d*) If naturalized, when?.....
Education: (*a*) Grade schools?..... What grade?..... (*b*) High school?..... What grade?..... (*c*) Junior college..... What grade?..... (*d*) College or university..... (*e*) Professional school?.....
Business, profession or occupation.....
How long have you followed same?.....

Employed or unemployed?.....
Are you willing to serve as a juror?.....
(*a*) If not, state why not.....
Did you ever serve?..... (*a*) If so, how often and when?.....
Do you have any conscientious or religious scruples against jury service? ..... If so, what.....
Do you believe in a trial by jury?..... If not why not?.....
If you do not believe in jury trials, please state briefly your idea as to how a trial should be conducted?.....
.....

These and numerous other questions might be asked. Possibly some of these should not be asked. They are only tentative suggestions. All questions might be condensed so as to take only the space on one side of a moderately sized card, which might be used in a card index, alphabetically arranged, and divided into eligibles and ineligibles.

After the final list is made, there might well be some beneficial educational effort to assist prospective jurors in learning the duties and responsibilities of jury service. An effort along this line was made a few years ago by one of our trial judges, who prepared and published a small booklet called "Primary Instructions to Jurors," which was mailed to prospective jurors. The preface follows:

"TO EACH JUROR: You have been selected by the regular processes of our law to appear and serve as a juror. While it may be a sacrifice from a financial consideration, so is most of the public duties we are called to do, but it is none the less a very fine and honorable part of good citizenship, and a part which most citizens perform willingly if it is not virtually impossible. Experience has conclusively demonstrated, however, that the best juror is the one that from experience or otherwise has become familiar with the exact duties of the jury and is not confused by the enactment of the many details of a trial and left with a vague notion of just the duties that abide with a juror throughout a trial.

"That you as a juror may approach your duty better advised as to your duty and to enable you to readily separate your duties from that of other officers of the court, I am sending you the following pages of practical instructions with serious recommendation that you read and study it carefully. In making such use of these instructions as I have indicated, I am convinced you will approach your duties fully prepared to discharge your duty with intelligence and increased rapidity."

This was followed by questions and answers, simply and comprehensively covering the matters involved. Lack of space forbids quoting, except a few questions and answers to convey the idea:

"Q. What does the jury do?

"A. The jury decides the disputed questions of fact. The jurors are the sole judges of the facts. Their decision, if it has on any reasonable view the support of the believable evidence, is final and cannot be disturbed. It is very important, therefore, that the jury decide the facts honestly and correctly."

"Q. Upon what does the jury base its decision on the facts?

"A. The jury may base its decision on the facts only upon the evidence received from the witnesses, and any exhibits that may have been received in evidence. The jury must not decide any questions of fact upon anything outside of the evidence in the case. The jury is not to decide any question of fact upon any statement of fact made by the judge or the lawyer for either of the parties to the dispute unless such statement of fact is based upon evidence in

the case, which the jury accepts as being true. The jury's recollection of the facts and not the recollection of either lawyer or the judge is to control."

"Q. What does the judge do in the trial?

"A. The judge decides the question of law, among others, as to what evidence should or should not be admitted. The judge's rulings are based upon the results of hundreds of years of experience in courts in the determining of questions of fact. The fact that one side or another objects to a particular question should not and may not be made the basis of any inference for or against that person's side. Under the law each side has a perfect right to object to any question asked a witness or to any other evidence offered. Whether the judge decides that the question or the evidence is proper or improper does not concern the jury because that is a question of law for the judge to decide. The judge is the sole source of the law in the case. The jury, by their oaths, are required to apply the law as the judge gives it to them, whether they approve of it being the law or not. If they fail to do that, the jurors violate their oaths and destroy the basis for the impartial administration of the law and are faithless to their high trust and duty."

"Q. Why should the jury be required to accept the law from the judge and no one else?

"A. If this were not required there would be utter confusion in the administration of the law. If each juror applied his own ideas of the law or what he thinks it should be, you might have twelve different standards of law in a case, and those standards would vary in every case. . . ."

"Q. When testimony is stricken out by the judge, how should jurors give effect of such action?

"A. By ignoring the testimony stricken out, as if they had never heard it uttered."

The booklet closes with this paragraph:

"Jurors should realize it is to their personal interest to see to it that the verdict registers the truth in the case they are trying. They themselves may find it necessary to come to court any time to enforce rights or defend them. Every juror and every jury should therefore stand as an example as an intelligent, honest effort to ascertain and express the truth in their verdict."

Other district judges have addressed communications relating to their duties to persons selected for jury service or letters of instructions to officials whose duty it is to select persons for such service. I regret to say that this practice has not been followed in the twenty-ninth district. One good reason has been the lack of the financial provision to make it possible. It is not unreasonable to believe that such an effort universally put forth by the judges of the state in time, possibly a long time, would bear fruit in the form of a higher and keener sense on the part of the average citizen as to his duty and responsibility with respect to jury service.

The above and other suggestions were before the Judicial Council when it prepared the proposed bill, "An Act relating to the selection of jurors, creating a board of jury commissioners," etc., set out on page 188 of our 1931 report. This proposed measure should receive more consideration than it has heretofore received. We believe it would produce beneficial results.

Northwestern Kansas Bar Meeting.

By J. C. RUPPENTHAL.

The members of the bar of northwestern Kansas, at their fourth annual meeting, held June 15, 1932, at Colby, gave over the day program to matters relating to the probate courts. No effort was made to discuss every part of the field into which the probate court jurisdiction ramifies, nor the duties, whether judicial or ministerial, cast by statute upon the probate judges in relation to probate duties or juvenile courts, county courts, election contest courts, nor as to duties in place of the district judge in the latter's absence from the county.

The Judicial Council, soon after organizing June 11, 1927, included in its first questionnaire sent out shortly thereafter: "What, if anything, do you find wrong with our judicial procedure, or practice: . . . (c) Probate? . . . What do you suggest as a remedy?" At the annual meeting of the Bar Association of Kansas that year Charles L. Hunt, a member of the Judicial Council, narrated the start made in the few months preceding, and added:

"There are yet to be explored the workings of the probate court, and recommendations to the Council are numerous that the entire statute relating to the practice and procedure in probate courts and the method of administration of decedents' estates should be rewritten, and that such court should be presided over by a duly admitted practitioner."

The annual report of the Council, 1927, briefly summarized the letters and other responses to its inquiry:

"As to probate courts, complaint is made from some sections of the state of the failure to keep proper records of business transacted, especially in matters of adoption, insanity hearings, and the like. There are many suggestions that such changes be made in the law as would permit the clerical work of the office to be performed by clerks, and that the judicial matters be handled by a qualified judge of the law, and that this be accomplished by having qualified lawyers as probate judges, or, in counties where the business is not sufficient to justify that, to have the judicial duties transacted in district court."

The Northwestern Bar made at Colby a substantial contribution of fact and of reasoning to the data accumulated in the survey by the Judicial Council. A helpful introduction was an annotated paper by Roscoe E. Peterson, of Larned, on "Origin and History of Probate Practice." The evolution of the law of wills and of administration in England was traced from antiquity to the vesting of such jurisdiction in 1857 in probate courts and the divesting thereof in ecclesiastical and manorial courts by the same enactments. The separation of church and state necessarily hastened constitutional and statutory provision for probate matters in the United States at the time of and following the Revolution.

Whether the code of civil procedure of Kansas should be made to apply to all judicial matters in the probate court was the subject of a debate between Samuel E. Bartlett, of Ellsworth, and C. L. Hunt, of Concordia. The paper of the former maintained with modifications the affirmative. The paper of the latter asserted need of a wholly new code of procedure for the probate courts.

Mr. Bartlett noted that by statute the code of civil procedure does not apply to "proceedings under the statutes for the settlement of estates of

deceased persons, nor proceedings under the statutes relating to apprentices; . . . but such proceedings may be prosecuted under the code whenever it is applicable." (R. S. 60-3823.) Describing conditions, he said:

"What we have in Kansas to-day is a collection of statutes, enacted at different times for different purposes, from which one may glean the substantive and the adjective law relating to probate matters. The 1931 report of the Judicial Council states: 'Our present probate code is not a system of procedure, but is simply a patchwork of various statutes which have been enacted to meet various conditions arising in probate practice.' It is apparent to any lawyer and to anyone who has had experience in probate matters that Kansas should have a code of probate procedure. An essential feature of the system ought to be the requirement of such notice as would give the probate court jurisdiction of the property and of the necessary or proper parties. The proceedings ought to be adversary. Under such proceedings one cannot attend the funeral in the morning, obtain the necessary information from the obituary, prepare the papers at the noon hour and probate the will at one o'clock. There must of necessity be a slowing up at the beginning, but it is more than likely to be offset by speed at the close. . . . Estates of decedents, incompetents, minors, and similar probate matters could be settled and determined by actions, as that term is defined in the civil code. The Judicial Council states in its 1931 report: 'Such investigation as we have made has not disclosed any proceeding under the probate practice which could not be handled under the code of procedure.' . . . I realize that under constitutional limitations in Kansas probate courts may not determine interests between those claiming by virtue of the estate and those claiming adversely (Const., Art. 3, § 8; *Byerly v. Edie,* 95 Kan. 400; *Lindholm v. Nelson,* 125 Kan. 223, at 231). That is not the proposition. Our probate courts, under their present constitutional limitations, may be given power and authority to determine who have interests in the estate and what those interests are. There can and ought to be an adjudication as to who are the heirs, devisees and legatees of the deceased, binding against all who may claim as such. It will be noted that in each special proceeding governed by the code specific provision is made for notices or the means of acquiring jurisdiction; and specific provision is made for much of the procedure. If it were determined that the probate practice should be governed by the code, it should be determined whether actions should be introduced into the probate practice. It should be further determined what courses may be pursued by special proceedings; and specific provision should be made for them. What has been said about adversary proceedings, notice, jurisdiction, and final adjudication applies, and ought to apply, with equal force, to such special proceedings. There should be adequate provision for everything that is peculiar to probate jurisprudence. Much of the substance that is contained in our present probate statutes would undoubtedly be retained. In any event, whatever the detail of the procedure, when the whole business is concluded, as sound a judgment as is possible should be procured as to the ownership and the rights of all the parties that could possibly have any interest in the estate that is administered.

"A brief enactment that the civil code shall apply to probate matters, or that the supreme court may extend the civil code to probate matters will not solve the problem; such a course would only add to the confusion. If we are to have a commendable code for probate practice we cannot escape the labor of drafting it and the responsibility of specifically determining the exact extent and in what respect the civil code shall be made to apply.

"In determining these questions it should be remembered that in so far as the code of civil procedure is made to apply or made a part of the new probate code, the new code will give all parties interested an opportunity to be heard. It will produce a final adjudication, and it will have the advantage of having already been interpreted and of being understood."

To the foregoing and other argument of Mr. Bartlett, Mr. Hunt responded. He expressly limited the scope of his paper to estates of decedents, ignoring the county courts, the matters of estates of minors, insane and other incom-

petents, etc., though conceding the importance of all these if time permitted discussion.

Mr. Hunt noted that much of the civil code is definitely substantive and not procedural. Only a few sections of the code could be made to apply to procedure in the probate courts with reference to estates of decedents. Even the disputes of lawyers over this would be productive of litigation that should not be, and would not if a separate code be designed for probate courts.

But in chapter 22, relating to decedents' estates, of 341 sections 221 are either procedural purely or nearly so. Now we have more procedure than substantive law for estates of deceased persons and to this would be added 868 sections of the civil code. In detail Mr. Hunt named articles and parts of articles of the civil code that could have no applicability to decedents' estates. However, the "general provisions" could well be used by probate courts with reference to keeping a journal entry of judgments, indorsement of papers, making files, custody of papers and records, duties of the sheriff and adjournment of hearings, since reference to records in chapter 22 is meager.

"My conclusion is," said Mr. Hunt, "that an attempt to make the code of civil procedure applicable to proceedings in the probate court is awkard, unworkable and provocative of disputes and litigation. . . . Can we do better by building a separate code of procedure for the probate court? In view of the fact that the probate court has no equitable jurisdiction, that its powers are greatly limited by constitution and statute, and that it has yet the exclusive original jurisdiction over so many of our vital parts of jurisprudence, it cannot be gainsaid that a procedural code should be written for this important branch of judicial activity.

"There being 221 procedural sections in chapter 22, no argument seems to be necessary to demonstrate that we are overloaded with technical conflicting procedural requirements sadly lacking in that uniformity needed for a certain and reasonably speedy administration of justice in the probate court. There are twenty-two situations arising in the administration of the estate of a decedent where notice or citation is required, and, astonishing as it may seem, no two of this number are identical as to four essentials of notice: The kind of notice, the length of time, the manner of service and the persons who must be served. Surely there can be and should be more uniformity in provision as to notice and citations. Properly written these 22 provisions with reference to giving notice could be combined into two or three sections which would govern every instance where notice is now required or should be given.

"There are many sections with reference to limitation of time in which proceedings can be instituted or orders made. They are not uniform. The act is sadly deficient in placing no limitation of time for some important proceedings. There appears to be no time limitation within which a will may be proved and admitted to probate if the will be properly executed and attested in due form. . . . Why should there not be a reasonable limitation on the time for presenting any will for probate, and indeed why should not there be a limitation of time within which letters of administration may be granted for the handling of estates of intestates? Why should not notice be given of a hearing to probate a will?"

Mr. Hunt then proceeded to present numerous practical, concrete instances of doubt and of apparently conflicting court decisions.

"Why not," he asked, "consolidate the three sections into one relating to the inventory and appraisement of personal property? . . . The substantive law relating to estates of decedents, juveniles, minors, insane and incompetent persons should be restated and printed in one chapter. Then there should be a procedural chapter dealing with all phases of proceedings in the probate court concerning these matters. These are no small tasks, but must

be undertaken if we are to improve the administration of justice in these departments. If the legislature can be pursuaded to adopt the county court bill in the form prepared and presented by the Judicial Council, the situation will be somewhat remedied. . . .

"I wish to urge upon you a thorough and painstaking study of the judicial article of the constitution of Kansas as rewritten by the Judicial Council and published in its reports. If that amendment should ever be adopted, many of the troubles we are discussing to-day would vanish. The time will come, I believe, when instead of by codes of procedure we will practice law in accordance with rules promulgated by the supreme court. You may as well be thinking about it because it will come sooner or later. We will then have a much more workable and elastic procedure, which after all is the basic secret of a speedy and satisfactory administration of justice. We encounter sections of codes which impede our progress. We find the absence of provisions that would accelerate proceedings in trial courts. Corrective measures may be applied at a session of the legislature, and they may not be. But if we practice by rule instead of by code, and these defects and impediments appear, remedial action can quickly be had through the rule-making power of the supreme court."

In general discussion following the papers of Messrs. Bartlett and Hunt, David Ritchie, of Salina, supported strongly the principle of having rules of practice from the supreme court rather than codes from the legislature.

The general topic which was the chief feature of the Bar Association's program was presented further by E. E. Euwer, of Goodland. His paper was entitled "Desirable Amendments and Revision of our Substantive Law Relating to Wills and Administration of Estates of Deceased and Incompetent Persons."

Mr. Euwer set out in detail a long series of defects, doubts and gaps in probate law in Kansas. He said:

"Most of our laws relating to administration were passed in 1868 when conditions were vastly different from what they now are. Kansas has now reached an age where the older generation of people who have accumulated considerable property are rapidly dying, and estates are now common in probate court that are quite complicated and large in amount, and where earlier they were small in amount and value they are now large, and the administration is not a simple matter.

"It appears that matters affecting incompetent persons are not treated alike when any provision at all is made. No main principle runs through any of them. The matter of gaining jurisdiction, notice, publications, hearings. rulings, decisions, sales, notices of sale, have no common course, and the substantive law is laking in these kinds of estates. There is still a broad field that might be covered by laws affecting the rights of incompetent persons such as convicts, insane persons and minors, which time does not permit herein to be discussed. And in this connection I refer you to questions concerning adoption of minors, the suspension of rights of incarcerated persons, the conflict of laws where a person is minor in one state and considered of full age in another. . . . The present probate law is fragmentary and uncertain, in some particulars deficient, and needs general revision."

C. A. Spencer, of Oakley, offered the last formal paper. It was entitled "A Better Court System for Probate Matters." Mr. Spencer held that all the bar agree to the need of improvement in our probate-court system. To abolish the present probate court and confer the jurisdiction on another court takes too much time. "To establish a definite and uniform procedure would bring the quickest and surest results." A better and uniform system of records should be required to be kept by probate courts. Time of hearings should be fixed. Qualified judges are at times needed. Cases are begun and then for

want of system are forgotten, perhaps for years. County courts should be established to hold court over the county wherever required by litigation. It should sit from time to time in each incorporated city, and the city clerk should be, by virtue of his office, the clerk for such city division of the county court. Record at the county seat should be made only on demand.

For estates assurance should be given that all interested would have notice. For this the proceedings need be adversary. To apply the civil code and let the supreme court prescribe rules for any further needs would make the system uniform.

General discussion, which before had been limited in time, now brought out extended comments by several of the bar. O. O. Osborn said that lawyers must improve probate procedure. R. W. Hemphill, of Norton, cited the fact that probate jurisdiction is an adjunct of the court of general jurisdiction in Iowa, Indiana and other states. B. W. Brooke described the Iowa system. D. H. Postlethwaite suggested that every decedent's estate be probated.

Southwestern Kansas Bar Meeting.

By ROSCOE H. WILSON.

The Southwestern Kansas Bar Association held its sixteenth semiannual meeting at Garden City on June 22. About eighty lawyers were in attendance at this meeting, it being one of the best-attended summer meetings in the history of the association. The meetings were held in the new American Legion building and were all well attended.

Matters heretofore suggested by the Judicial Council formed the principal topic of discussion, especially suggested improvement in probate procedure. The morning session included an address of welcome by Fred J. Evans, mayor of Garden City, with a response by Roland H. Tate, of Lakin, and a most interesting paper on "Early Probate Law and Procedure" by Roscoe E. Peterson, of Larned. Dean Harry K. Allen, of the Washburn College School of Law, delivered a very fine address in the afternoon on the development and growth of the various systems of law. This was followed by a discussion on the subject of the adoption of the code of civil procedure for probate practice. Robert Garvin, of St. John, had the affirmative of the question and Judge G. L. Light, of Liberal, presented the negative side of the argument. This was followed by a general discussion which showed a very genuine interest in the matter of probate procedure and indicated an almost unanimous opinion that probate matters, to a considerable degree at least, should be made adversary and some logical system of procedure adopted. The arguments made on the subject of a revised procedure for probate courts were similar to those contained in the papers read at the meeting of the Northwestern Kansas Bar Association. Since Judge Ruppenthal has made extensive quotations from these papers they will not be reproduced here. A considerable time was spent in considering the question of fees in the probate court.

The evening banquet was held at the American Legion building with A. M. Fleming as toastmaster. The principal speakers at the banquet were E. C. Flood, of Hays, formerly president of the Northwestern Kansas Bar Association, and Judge Edgar Foster, of Garden City.

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