

# KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1948

PART 2—TWENTY-SECOND ANNUAL REPORT



ALLEN B. BURCH, 1894-1948  
Justice Supreme Court of Kansas, 1945-1948

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## FOREWORD

Last month the entire state was saddened by the unexpected death on May 31, 1948, of Justice Allen B. Burch of the Supreme Court. In this issue, we have printed the portrait of Justice Burch on the cover of this BULLETIN, together with a memorial by Mr. W. F. Lilleston of the Wichita bar, with whom Justice Burch was at one time associated.

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Justice Burch was succeeded on the bench by Austin M. Cowan of Wichita, who was appointed by Governor Carlson on June 8. Justice Cowan will serve until the general election in November, 1948, at which time his successor will be elected for the remainder of the six-year term which will expire in January, 1951.

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Since the adjournment of the 1947 legislature, the Legislative Council has been actively working upon a number of proposals which are of great interest to the bench and bar of the state. We are glad to print in this issue an article by Richard L. Becker of Coffeyville, chairman of the judiciary committee of the Legislative Council, on the subject of the "Missouri Plan" for the selection of judges. This plan deserves the careful study of our readers, since it has reached the stage of drafting a resolution for submission of a constitutional amendment, which resolution will probably come up for action in the 1949 legislature.

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We are also indebted to the Legislative Council for the text of a proposed curative statute on defects in real-estate titles. This proposal has been finally adopted by the Legislative Council and is ready for submission to the 1949 legislature. We also call to the attention of those who are interested in this subject, the case of *Scott v. Kirkham*, 165 Kan. 140, in the May, 1948, Advance Sheets.

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For the information of our readers, we also print in this issue a copy of the proposed amendment to article 3, section 13, of the Kansas Constitution, relating to judicial salaries, etc., which will be voted on in the November, 1948, election. Since several of our members are judges who might be affected by its adoption or rejection, the Judicial Council is not advocating the approval or disapproval of this amendment, but is publishing the same for the information of judges, lawyers and public officials who will undoubtedly receive many inquiries as to its purpose and effect.

## ***In Memoriam***

**ALLEN B. BURCH**

By **W. F. LILLESTON**

Justice Allen B. Burch of the Supreme Court of Kansas passed away at Topeka on the evening of May 31. Thus, as a star goes out while it is in the ascendant, one of the luminaries of the Kansas bench and bar suddenly vanished from his high estate. Because he was too young to die, the pity of death becomes the more poignant by reason of its prematurity.

He was born in Carthage, Mo., fifty-three years ago, the son of a physician, and ever after the Judge was called "Doc" by his intimates. Both father and son shared a certain radiance of personality which endeared them to a large community of friends.

In his youth the Judge went with his father to Europe, whither he went again with his wife years afterwards. The fleeting glimpses of the art and culture of the old world during the first trip abroad left on the mind of the boy a lingering love of the beautiful which expressed itself in ways not generally known; for the Judge, experimenting at first as an amateur in oil painting, finally produced pictures that were excellent in symmetry, color and detail.

After graduating at the University of Kansas and being admitted to the Bar, he became associated with one of the old law firms of Wichita. But his beginning came to an abrupt ending at the advent of the first World War, in which he served with credit to himself and to his country. After returning to Wichita his persistent diligence gradually won for him an important clientele that remained loyal to him until his elevation to the Supreme Court of Kansas. Theretofore he had been known only as a lawyer, never as a politician, but the magnetism of his personality and the respect with which his force and industry had impressed the public were such that his decisive nomination and consequent election as a judge revealed another talent in this versatile man.

He had the rare advantage of a helpmate who was generous and fortunate in her wealth of friends and who adapted herself with easy grace to the vicissitudes of a man destined to such a career. In such a home and with such an heredity, it is natural that the three children of Judge and Mrs. Burch should reflect the charm, the force and the promise of their parents.

As a member of the Supreme Court, Judge Burch was humbly and keenly conscious of a new responsibility that had been elevated by his predecessors to a high level of efficient justice, sustained by the high expectations of the bar. He brought to that august tribunal the helpful attitude and the valuable experience of another active practitioner. As a member of the Supreme Court he came to his conclusions and wrote his opinions with the clarity of an in-

formed judgment. In the cloistered life of a judge he was ever eager to share with his colleagues on the bench the heavy labor necessary to the consistency of precedent and the certitude of the law.

Because the people are less gratefully aware than they should be of the onerous services rendered by our judges in the secrecy and seclusion of the judicial function, we lawyers are at pains to inscribe this memorial to the life of a man who fought the good fight, kept the faith and finished his course with honor to himself and to his generation.

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### **Proposed: A New Plan for Selecting Kansas Judges**

By RICHARD L. BECKER

The 1947 session of the Kansas legislature directed the Legislative Council to make a study of the problem of selection and tenure of judges. A proposal following the direction of the resolution of the legislature was introduced at the first session of the council and was referred to the judiciary committee of that body.

Immediately that committee began its study and the research department undertook the task of gathering and analyzing information. The interest of the committee quickly centered upon the "American Bar Association Plan" of selection of judges. This plan, which is substantially in effect in Missouri, is also commonly referred to as the "Missouri Plan."

The matter was briefly discussed before the council as a whole at previous meetings, but at the June, 1948, session of the council the judiciary committee recommended this plan and requested authority to draft a resolution for a proposed amendment to the Kansas constitution which would permit the adoption of a system of selecting judges in Kansas following the general principles of the American Bar Association Plan.

This article will discuss the Missouri system as it is in active operation and the experience of eight years in service makes judgment possible.

This system was adopted in Missouri by constitutional amendment in 1940. Two years later a proposed repeal of the system was submitted but it was retained by a vote of approximately double that of the vote originally adopting it. It was retained in the new constitution adopted in 1945.

This method of selecting judges is operative in the supreme court, the three courts of appeals and the circuit and probate courts of Jackson county (Kansas City) and the city of St. Louis. The plan is optional in the other circuits of the state but has not been adopted by any of them. It is the writer's understanding that the legislature has not made provision for a method of adoption in the other circuits.

The plan creates judicial commissions which nominate three candidates from which number the governor must make his selection. From the three nominees the governor appoints. The appointee serves until the first general election held more than twelve months after his appointment. At that election his name goes on a special "yes or no" ballot. If the voters approve the appointment and the judge's conduct of the court, the judge serves for a full term at the end of which he again goes before the voters on the "yes or no"

ballot. If the appointee is rejected the governor again appoints from a new list of three nominees.

The appellate judicial commission is composed of three lawyers who are elected, one from each court of appeals district, by a mail vote of the lawyers residing in each district; three laymen, one from each district, appointed by the governor; the seventh member is the then chief justice of the supreme court. This commission nominates the candidates for the supreme court and the courts of appeal.

The circuit judicial commissions for each of the two circuit courts have five members each. Two lawyer members are elected by the bar of the circuit; two lay members are appointed by the governor; and the fifth member is the presiding judge of the court of appeals of the district in which the circuit is located.

The members, other than the chairman, have six-year terms which are staggered so that no more than one term expires each year. Members are not eligible to succeed themselves, serving one term only. They cannot hold partisan political offices.

The judges on the bench at the time of the adoption of the plan continue to serve out their regular terms. If the judge desires to run for reelection he files his declaration and his name goes on the "yes or no" ballot.

Opponents of the plan point out that only one judge has been rejected under the plan. However, the usual comment is that the quality of the service of the incumbents has greatly improved.

That the caliber of the appointments has been good is universally conceded.

James M. Douglas, of the Supreme Court of Missouri, writing in the *American Bar Association Journal*,<sup>1</sup> states:

"The plan combines the best features of both the appointive and elective systems and adds new safeguards which assure better judges. The selection of nominees is made by a group which has no other function and whose only interest is to name the best available. The judicial commission is representative of the bench and the bar, and the people, for whom the courts are established. The fact that his choice must later be confirmed by the people would make a governor exercise caution in choosing the appointee from the three selected.

"Then the necessity of approval by the entire electorate of the appointee's record tends to insure faithful service on the bench. If a judge decides to make a career of the bench, the requirement of confirmation of his record from term to term likewise insures faithful service throughout his career."

Justice Douglas also commented upon the fact that the judge's politics seems to have little effect upon his approval, stating:

"In 1944 Judge Laurance M. Hyde of the Supreme Court and I both ran for reelection. He is a well-known Republican; I am a Democrat. . . . Yet Judge Hyde polled about the same vote as I did in our overwhelmingly Democratic counties known as Missouri's 'Little Dixie,' and I ran about even with Judge Hyde in the solidly Republican counties."<sup>1</sup>

At the 1948 annual meeting of the Kansas Bar Association, Judge Arthur J. Mellott, Judge of the United States District Court for Kansas, discussed the report of a committee of outstanding laymen appointed by him to view the

1. "Missouri Plan" Works Well in Actual Results. *American Bar Association Journal*, Dec., 1947, p. 1169.

courts and make recommendations. Let me emphasize that there was not a lawyer on this committee.

This committee quoted with approval the summary of the work of a lay committee which met in Chicago. The first point in the program of the national committee was: "(1) The nonpartisan selection of judges and their tenure in office during faithful and efficient service."

Judge Mellott's committee specifically recommended the plan under discussion. I quote from its report: "Probably the best among the remedies suggested for improving the method of selecting judges is the plan cited in the article heretofore mentioned. It is the one your committee favors. It is commonly referred to as the Missouri Plan of Election of Judges."

The report further stated: "The legislative council of the state of Kansas has this and other plans under consideration. It is possible that they may have some recommendation concerning it to submit to the 1949 legislature."

Happily we here see a plan recommended by the American Bar Association receiving the endorsement of an outstanding group of Kansas laymen.

Will Shafroth, former Denver attorney, now head of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts in Washington, made a report to the Colorado Bar Association at its 1947 convention. His address stressed his report of an opinion survey he had conducted among Missouri and California lawyers as to the methods of selection of judges in those states.<sup>2</sup>

He inquired of twenty-five lawyers in Missouri, selected to get a representative cross section of the bar of that state. Twenty-two of these lawyers replied.

The first question he asked them was whether, after the seven years of experience, they would again vote for the plan. The answers were eighteen to two in the affirmative. Two were noncommittal. While some of those polled were lawyers who had been active in securing the adoption of the plan, one replied that although he had been opposed to the plan, he had changed his mind and that the plan had worked exceedingly well.

The second question had to do with the quality of the judges appointed. Fifteen rated them good, five very good, and one average. Comments were such as these:

"Very good—I would say outstanding, as compared with those selected to office prior to the adoption of the plan, when taken as a group."

"I do not believe anyone would raise any objection to the quality of these judges."

"The judges who have been appointed under the plan have been superior men and are making excellent judges."

The replies commented on the fact that the governors had in each instance appointed as judges men of their own political parties. However the comments almost without exception stated that even so, the appointments were good.

"However, the governors appointed good men in each instance because the judicial committees nominated good men in every instance. The governors could not go wrong. I mean no reflection on either governor, for they proved to be strong executives looking for the very ablest appointees."

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2. Forty Lawyers Appraise Operation of California and Missouri Methods of Selecting Judges. *Journal of the American Judicature Society*, April, 1948, p. 176.

One of the letters he received had this comment:

"So far the working of the plan has inclined against rejections. Conspicuous unfitness with organized attack by the press and probably the bar would be necessary to accomplish rejection. This means, I think, that the innovation cannot pay full dividends on a short term test, but belongs in the category of those constructive measures of statesmanship which look forward into the future. The two benefits definitely observable are these:

"(a) Improved attitude and independence of judiciary immediately.

"(b) Gradual replacement of judges selected under the ancient system of political partiality by men chosen one by one, through the years, by use of a mechanism which reduces political favoritism to a minimum and emphasizes temperamental and professional fitness."

After the Legislative Council had approved the action of its judiciary committee in reference to this proposal a newspaper writer commented favorably upon the council's action to the writer. He stated that he had been in newspaper work in Kansas City, Mo., at the time of the adoption of this plan and that an improvement in the attitude of the judges on the bench could be noted almost overnight.

A recent research report of the Illinois Legislative Council<sup>3</sup> on this subject has this to say, in part:

"The Missouri system has been widely acclaimed, and apparently in practice has lived up to the predictions made by its advocates, though some would say that the plan has not been in operation long enough to justify basic appraisals. As an indication of popular acceptance, a move to repeal it in 1942 resulted in almost twice as many votes in its favor as when it was originally adopted, and as already mentioned, it was carried over into the 1945 constitution."

Historically there have been the two basic methods of judicial selection: (1) Appointment by the executive, usually for life, as seen in Kansas in the federal courts; and (2) election of judges by the usual political machinery, the party primary and the general election, the method used in Kansas state courts.

Briefly we see in the appointive system: *Advantages*—Selection of the judge by the executive who can deliberately weigh the merits of one proposed as judge, dispassionately considering his qualifications; and the judge when in office because of the security of his appointment is freed from the worry of the outcome of a partisan personal campaign; *disadvantages*—The people who are to be judged have no voice in the control of the court and the judge can become a tyrant with no recourse in the voters.

In the purely elective system we find: *Advantages*—The people themselves select the judge who will try their controversies and an arbitrary or weak judge can be easily removed by the voters; *disadvantages*—The ordinary voter has not the training to determine the qualifications of a candidate for judge and does not have the means to easily learn of the merits or demerits of the candidate; a judge realizing the necessity of entering into a partisan personal campaign will ever be conscious of the political repercussions of his every judicial act.

The proposed plan utilizes the best features of both the appointive and the elective systems and provides safeguards lacking in either.

3. Selection of Judges. Illinois Legislative Council, Pub. No. 87, April, 1948, pp. 12-15.



The commission which nominates, made up of lawyers and outstanding laymen, can and will deliberately and carefully consider the qualifications of the candidates they submit; this group will have the ability to select. The choice is theirs, they know that a poor selection would be their responsibility. As this plan tends toward permanency in office for the qualified man, the judge, knowing that he would not be required to enter into a personal partisan campaign, would have little concern with the political aspects of the decisions he is called upon to make. Here, then, are the advantages of the appointive system, improved upon.

Yet retained with the public is the right, by their votes, to pass upon the judicial actions of the judge. If the conduct of the judge is bad or his inability to perform his duties is demonstrated, the voters can remove him. Periodically he must submit his record to the people, and therefore knows that he can be removed from office. Here, then, is retained to the voter his right to control the courts. The elective system is improved upon by having the judge first selected by that group which is more skilled in determining the qualifications of one to fill the important position of judge, a group not to be swayed by the hysteria of the demagogue.

Perfection is not claimed for this proposed method for selecting judges in Kansas. It is believed, however, that it is improvement. We should not fear change, just because it is change. If real merit is in the change, it should be made.

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### Proposed Curative Statute—Title Defects

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#### BILL No. 2

By COMMITTEE ON JUDICIARY—LEGISLATIVE COUNCIL  
(To carry out Proposal No. 18)

AN ACT relating to the title to real estate, and limiting the time in which actions may be brought to establish any lien or claim in or to the title thereto, and providing penalties for violation thereof.

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

SECTION 1. No action by any person who is out of possession to recover real estate or to establish any interest therein or lien thereon, which ownership, interest, or lien arose or existed more than twenty-five years prior to the commencement of said action, shall be maintained either at law or in equity against the holder or holders of the record title to said real estate, in possession, when such holder of the record title or his

8 grantors, immediate or remote, are shown by the record to have  
9 held chain of title to said real estate for more than twenty-five  
10 years, unless such claimant or some one on his behalf shall  
11 within twenty-five years from the date of the recording of the  
12 instrument upon which the claimant bases his claim or within  
13 one year from the date this act takes effect, file in the office of  
14 the register of deeds of the county in which such real estate is  
15 situated, a statement in writing which shall be duly acknowl-  
16 edged, definitely describing the real estate involved, the nature  
17 and extent of the right or interest claimed, and stating the facts  
18 upon which the claim is based.

SEC. 2. For the purpose of this act, any person who holds  
2 title to real estate by will or descent from any person who held  
3 the title of record to said real estate at the date of his death,  
4 or holds title by decree or order of any court, or under any tax  
5 deed, trustee's, receiver's, guardian's, executor's, administra-  
6 tor's, sheriff's or master's deed, shall be deemed to hold chain  
7 of title the same as though held by direct conveyance between  
8 individuals; and a chain of title extending more than twenty-  
9 five years shall be deemed to be complete, regardless of whether  
10 the first grantor in such chain held any record title whatsoever  
11 in said real estate prior to said twenty-five-year period.

SEC. 3. For the purpose of this act, the possession of such  
2 real estate may be established by the affidavit of the owner of  
3 the chain of title as defined herein, which affidavit shall de-  
4 scribe the real estate and state that the affiant and his pred-  
5 ecessors in the chain of title have been in the possession of  
6 the real estate described in the affidavit for more than twenty-  
7 five years. Such affidavit, when filed and recorded in the office  
8 of the register of deeds in the county in which the real estate

9 is situated, shall be received by all courts as establishing prima  
10 facie such possession.

SEC. 4. In all cases where the holder of the legal or equitable  
2 title to any real estate has conveyed the said real estate or  
3 any interest therein by deed, mortgage, or other instrument,  
4 and his spouse has failed to join therein, the said spouse and  
5 her successors in interest shall be barred from commencing  
6 any action to recover her interest in said real estate unless  
7 an action is brought within twenty-five years after the date  
8 of recording such conveyance, or within one year after the  
9 date this act takes effect: *Provided, however,* If the inchoate  
10 right of such spouse shall not have matured by the death of the  
11 spouse executing the instrument, then the spouse not joining  
12 therein may preserve his right by filing in the office of the  
13 register of deeds of the county where the real estate is situated,  
14 a notice, verified by affidavit, stating that he claims and re-  
15 serves his inchoate right in the real estate so conveyed, which  
16 notice shall be filed within twenty-five years from the date of  
17 recording of such conveyance or within one year after the date  
18 this act takes effect.

SEC. 5. No action shall be maintained to foreclose or en-  
2 force any mortgage, bond for deed, trust deed, extension agree-  
3 ment, or contract for sale or conveyance, after twenty-five  
4 years from the maturity date thereof as shown of record or,  
5 where no maturity date appears of record, no action shall be  
6 maintained after twenty-five years from the date of recording;  
7 unless, in either case, an extension agreement duly executed  
8 by the debtor or present owner of the real estate has been  
9 recorded, or unless the holder or holders thereof shall have  
10 filed in the office of the register of deeds an affidavit stating  
11 that the said mortgage or other instrument is still in effect

12 and the amount due thereon. Such affidavit shall not con-  
13 stitute notice of the existence of the lien for more than five  
14 years from the date of its filing, nor shall such affidavit in  
15 itself extend the time for filing suit upon the indebtedness se-  
16 cured by such lien.

SEC. 6. Nothing in this act shall affect pending litigation  
2 nor operate to revive rights or claims previously barred nor  
3 to permit an action to be brought or maintained upon any  
4 claim or cause of action which now is or may hereafter be  
5 barred by any other statute of limitations: *Provided*, That the  
6 limitations set out in this act shall apply to all claimants, not-  
7 withstanding incompetency, disability or nonresidence.

SEC. 7. Any person who shall knowingly swear falsely to  
2 any material fact in any affidavit provided for in this act  
3 shall be guilty of perjury and shall be punished as provided  
4 by law.

SEC. 8. This act shall take effect and be in force from and  
2 after July 1, 1949, and its publication in the statute book.

## Proposed Amendment to Kansas Constitution Relating to Judicial Salaries, etc., To Be Submitted at November, 1948, Election

In the general election of November, 1948, there will be submitted to the voters a proposition to amend section 13 of article 3 of the constitution of the state of Kansas, to read as follows:

"SEC. 13. The justices of the supreme court and judges of the district courts shall receive for their services such compensation as may be provided by law, which law shall become effective on the second Monday in January of the next odd-numbered year after its enactment, and such justices or judges shall receive no fees or perquisites nor hold any other office of profit or trust under the authority of the state, or the United States, nor practice law in any of the courts in the state during their continuance in office."

The present wording of this section of the Constitution is as follows:

"The justices of the supreme court and judge of the district court shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be increased during their respective terms of office: *Provided*, Such compensation shall not be less than fifteen hundred dollars to each justice or judge, each year, and such justices or judges shall receive no fees or perquisites nor hold any other office of profit or trust under the authority of the state, or the United States, during the term of office for which such justices and judges shall be elected, nor practice law in any of the courts in the state during their continuance in office."

If the proposed amendment should be adopted, it would affect the present status of supreme court justices and district judges in several particulars:

- (1) It would permit their compensation to be increased during their term of office, and would equalize compensation of each of the justices and each of the judges, an impossibility under the section as it now exists.
- (2) It would remove the disqualification from holding other offices during the term for which they are elected, leaving the disqualification to apply only during their continuance in office. Among other things, this would make a district judge eligible for appointment to the supreme court to fill a vacancy, even though his term as district judge had not expired.
- (3) It would remove the constitutional minimum salary for justices and judges. This change is probably of little importance.

However, the proposed amendment provides that the statutes to increase such salaries shall become effective on the second Monday in January of the next odd-numbered year after their enactment. This would prevent any salary increases from becoming effective for two years unless enacted at a special session.

## MEMBERS OF THE JUDICIAL COUNCIL

---

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Judge Twenty-third Judicial District.	
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ROBERT H. COBEAN. (1947-)	Wellington

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**PAID**

Topeka, Kansas

Permit No. 421.

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PRINTED BY  
FERD VOILAND, JR., STATE PRINTER  
TOPEKA, KANSAS  
1948



22-3988