THE FOURTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MISSOURI

TO THE MEMBERS OF THE SIXTIETH GENERAL ASSEMBLY OF MISSOURI:

The Judicial Council was created under the rules of the Supreme Court to study the judicial system and procedure of the State, with a view to the recommendation of improvements therein. These rules require the Council to report to the General Assembly,—to the end, no doubt, that statutory and constitutional changes deemed expedient by the Council may be brought to the consideration of those responsible for the provisions of our statutes as well as for the submission of proposed constitutional changes to the voters of the State.

Since its creation several years ago, the Council has been engaged in a study of our judicial system with respect to its efficiency for the prompt disposition of litigation.

It has been found that in the main the Circuit Courts of the State have been able to respond fairly well to the increased demands of increasing litigation; but not so our Appellate Courts. This, we hasten to say, is not due to any more persistent devotion to duty on the part of the Circuit Judges than has been manifested by those of the Appellate Courts. It is due we think to the elasticity of the one system as compared with the rigidity of the other. As the needs of the State require from time to time, the General Assembly have been constitutionally able to and have, by rearranging the circuits and increasing the number of Circuit Judges, enabled those Courts to keep pace with the demands of increasing litigation. But this is not true of our appellate system. There can be no corresponding changes or increases in personnel in that system except through the medium of constitutional amendment.

After much study and revision in the light of conferences with various members of the bar throughout the State, who have interested themselves herein, the Council have the honor to submit to the General Assembly a proposed amendment to the Constitution, dealing with our Appellate Courts, in order that the members of the General Assembly may consider whether this proposal should be submitted to the voters of the State. This proposed amendment is printed as an appendix hereto. It seems unnecesarry to say that it is, of course, subject to such alterations and emendations as the General Assembly may deem expedient before its submission to the voters.

It appears proper that as briefly as possible the Council should point to the changes proposed in our appellate system and the reasons which have led them to advocate such changes.

1. *Unification of Appellate Courts.*

Instead of three Courts of Appeal, two Divisions of the Supreme Court, and a Supreme Court en banc, each acting independently and, particularly as to the Courts of Appeal at least, without immediate knowledge as to what the others are doing and saying, the plan proposes one Supreme Court consisting of (a) the Judges of the Court as a whole for the performance

of administrative duties; (b) a central division called, as at present, the Court en banc, consisting of not less than seven Judges, in which the supreme judicial authority of the State is lodged; and (c) divisions of the Supreme Court, taking the place of the present Courts of Appeal and the present divisions of the Supreme Court itself, and sitting where the Court may direct from time to time for the hearing of causes ordered assigned thereto by the Court at large. Any Judge of the Court may sit anywhere as directed by the Court at large. This it is believed will serve to equalize the work and prevent one Judge from being overworked while another has not enough to do to fully occupy his time, as is the case at present in some instances. The ideal situation for the prompt disposition of litigation is the utilization of the services of a Judge where his services are most needed for the time being.

A committee of the American Bar Association, after extended study, reported to that Association recently, with the approval of the Association, that a Supreme Court composed of such divisions as are necessary, will ordinarily dispose of litigation with more celerity and certainty than will a judicial system composed of a Supreme Court and a number of independent inferior Appellate Courts with final jurisdiction. Some States which, like ourselves, have tried the latter have abandoned it. And in those States which, like our own, maintain a system of independent inferior Appellate Courts, inquiry of members of the bar develops a strong dissatisfaction therewith.

Under our present system the Courts of Appeal, acting independently as they do, arrive with more or less frequency at conflicting conclusions. If they were but arms of a single judicial body, filing their opinions at the same place, and if these were examined regularly by a Chief Justice of the Court as they come in, such inconsistencies ought to be ascertained and remedied before it is too late.

2. *Uncertainty of Jurisdiction.*

There arise with us, with some frequency, cases where it is uncertain whether the jurisdiction of the appeal is in the Supreme Court or one of the Courts of Appeal. In those instances there is often unavoidable but regrettable delay in disposing of the appeal. If such a case is lodged with the wrong Court it perforce lies on the docket of that Court until reached in its order and is then transferred where it is believed to belong. Here again it must await its turn on the docket. If the transfer chances to be by a Court of Appeals to the Supreme Court, the latter Court, having the final responsibility on the question, may, on reaching the case in its turn, decide that the transfer was erroneous and send the case back to the Court of Appeals where again it must await its turn on the docket.

If there were but the one Court with jurisdiction of all appeals, all this uncertainty and consequent delay would be eliminated. The time and talents of our Appellate Judges ought to be directed to the consideration of the ultimate merits of litigation before them to the exclusion, as far as possible, of questions having no relation to the merits of the cause.

As an illustration of the delay which can occur in the disposition of

litigation under our present system, reference is made to Breit vs. Bowland. This litigation originated in Andrew County and judgment was rendered in the Circuit Court of that County November 20, 1933. An appeal was taken to the Supreme Court and the case was there reached on the docket and heard January 14, 1936. On examination of the record the Supreme Court determined that the appeal should have gone to the Kansas City Court of Appeals, and, accordingly, on March 21, 1936 the Supreme Court transferred the case to the Court of Appeals. It was docketed and heard in the Kansas City Court of Appeals on the 6th day of October, 1936, and decided by that Court December 7, 1936. An application was made to the Supreme Court for a writ of certiorari on the only ground available, to wit, that the opinion of the Kansas City Court of Appeals was contrary to controlling decisions of the Supreme Court. The Supreme Court allowed the writ, and the cause was docketed and heard in that Court on this question May 20, 1937. The Supreme Court in due course decided that the opinion of the Kansas City Court of Appeals was contrary to its own prior decisions and set the Appellate Court opinion aside. The Supreme Court did not, and could not, under the present system, deal with or express any opinion as to the ultimate right and merit of the lawsuit. This left the case pending in the Kansas City Court of Appeals for decision, where it now lies awaiting its turn on the docket. Information from the Clerk of that Court is that it will be on the docket of the March Term, 1939, and therefore it should be disposed of sometime before the summer adjournment of 1939. This delay, it must be understood, is no fault of the Judges of the two Courts, but of the system to which they owe allegiance, and which they must enforce. Under the system proposed by the Council this case would probably have been determined in the first instance by a Division of the Supreme Court; and if the Court en banc, on examining the opinion on applications of the losing litigant, proved to be of opinion that the decision of the Division was wrong, it would itself have reviewed the case and pronounced final judgment as to the right of the parties, and the litigation would have been thereby terminated at a much earlier date than will now prove to be the case.

3. *Review by Court en banc.*

Under our present system the decisions of the Courts of Appeal are final with only two exceptions, to be presently noted. It not infrequently happens that a Court of Appeals finally disposes of a particular lawsuit on a particular theory of the law, which at an uncertain period thereafter the Supreme Court in some other litigation pronounces to have been erroneous. The result is that some citizen has lost his lawsuit on principles of law which the highest judicial authority of his State has said to be erroneous, but has said it too late to do him any good.

If a Judge of a Court of Appeals believes the decision of that Court to be contrary to a decision of the Supreme Court, he can ask that the cause be transferred to the Supreme Court for determination. But of late years this is a power which is seldom exercised. And if the Supreme Court itself believes that a decision of an Appellate Court is contrary to some decision

of its own, it can issue a writ of certiorari and determine that question. But on such a writ it cannot consider the ultimate right or wrong of the decision, or what ought to be done with the case.

The Council are convinced that this limitation on the review of Appellate Court decisions by the Supreme Court is entirely too narrow. There are constantly arising in the State, in cases within the final jurisdiction of the Courts of Appeal, questions of the gravest importance, on which the Supreme Court has never spoken, but which, in the interests of the citizens of the State, ought to be determined and set at rest at the earliest possible moment by the highest judicial authority of the State.

The plan submited by the Council therefore broadens the power of the Court en banc to review divisional opinions under such regulations as the Court at large may prescribe. The plan proposed is to be roughly likened at this point to review by the Supreme Court of the United States of decisions of the Federal Courts of Appeal.

4. *Man Power.*

There are now sixteen Appellate Judges in the State. By the proposed amendment these and their successors are made Judges of the Supreme Court to sit en banc or division as assigned by the Court, by the action of at least a majority of all the Judges.

We also have now ten Commissioners appointed under Acts of the General Assembly. The plan of the Council was not intended to and does not interfere with the continued power of the General Assembly to provide for Commissioners as may be thought best from time to time.

But the power to hear and decide appeals cannot constitutionally be conferred on the Commissioners. They can only write reasons for decisions arrived at by the Judges, for approval or rejection by the Judges themselves. In the opinion of the Council there is need for elasticity in the personnel of the Court with respect to power to hear and determine litigation. This we undertook to provide by authorizing the Court at large to call selected Circuit Judges to sit as Divisional Judges when and as often as necessary, dependent on the amount of work needed to be done at the time. It is the view of the Council that this provision will provide sufficient elasticity to enable the Court to keep up with the work, particularly in view of the power of the General Assembly to increase the number of Circuit Judges, from time to time, as experience shall show to be necessary in view of this added duty which some of them will be called on to perform. It seems unnecessary for the Council to point out to members of the General Assembly that we have many Circuit Judges in the State entirely capable of serving as Judges of the proposed Divisions of the Supreme Court with honor to themselves and credit to the State.

5. *Terms of Court.*

The Constitution now provides for two terms of the Supreme Court annually. Appeals are returnable to a given term and no matter what the exigency or the permissive state of its docket, the Court cannot deal with an appeal until that term arrives. Except for that useless technicality, terms of the Court have in actual practice ceased to mean anything, as

the Court is practically always kept open. Accordingly the Council have drawn this proposal so as to abolish the unnecessary and hampering terms and to provide that the Court shall be deemed always open. Power is conferred upon the Court to provide by rule when an appeal shall be returnable.

6. *Selection of Judges.*

For many years the Constitution of the State has provided for the election of Judges by popular election. Recognizing this as the existing method, the proposed amendment makes no change therein except to provide that three shall be resident in and elected by the voters of each of the present Appellate Court Districts. The purpose of this provision is to insure local representation on the bench, which the Council have regarded as desirable.

The Council have been informed that representatives of the State Bar Association intend to submit to this session of the General Assembly a proposed constitutional amendment providing for a different method of selection of Judges. The Council have endeavored to so word the amendment submitted herewith as not to interfere with what the General Assembly may see fit to submit to the voters of the State in that respect.

7. *Compensation of Judges.*

The Council have taken the view that the salary of a Judge of the Supreme Court ought to be sufficient to compensate him for yielding his practice at the bar, probably for all time, and for the arduous mental labors of dealing with the varied litigation of a populous and wealthy State. The Council also believe it ought to be sufficiently large to attract the very best talent available. In such a position of responsibility as a Judge of the Supreme Court, the people of the State are entitled to the best. No man ought to have to make the financial sacrifice which many of our Judges now make as the price of serving the public on the Supreme Bench. Accordingly the proposal submitted carries an increase in the compensation of the Judges of the Court.

While, under the present Constitution the compensation of the Judges may be increased by the General Assembly, it can only be done for the future and cannot be made applicable to existing incumbents. Since all of the Judges of the Court do not go out of office at the same time, the result of this provision, in case of such an increase, is to require one Judge to serve for less money than the man who sits beside him on the bench and equally shares his labors and responsibilities. This is manifestly unfair. Consequently the proposed amendment confers power on the General Assembly to increase the compensation of the Judges to keep pace with the progress and increase in wealth of the State, by enactments applying uniformly to all the Judges at the same time.

Conclusion.

The Council are asking the General Assembly to consider the submission of this proposal to the voters of the State. It has been found impossible to set down on paper, with any detail, all the reasons which have led the Council to this recommendation without going beyond readable limits. The members of the Council will be glad, on notice, to attend upon the proper

committee of either or both houses, or a joint session of these committees and make further explanation as desired, as well as assist, as far as lies in their power, in making the proposal conform to the views of the General Assembly.

Respectfully submitted,
E. L. ALFORD,
JOHN R. BAKER,
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FRANK C. MANN,
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FRANK H. SULLIVAN,
Chairman.

Proposed Amendment to the Constitution of Missouri Relating to the Judiciary

Be It Resolved by the General Assembly of the State of Missouri,

That at the general election to be held in this State on the first Tuesday after the first Monday in November in the year 1940, or at a special election to be called by the Governor in his discretion prior to such general election, there shall be submitted to the qualified voters of the State, for adoption or rejection, the following amendment to the Constitution of Missouri concerning the judicial department:

SECTION 1. Effective January 1, 1942, the St. Louis, Kansas City and Springfield Courts of Appeal are abolished and all causes then pending before those Courts shall be transferred to the Supreme Court, in which shall vest all appellate and original jurisdiction now vested by law in the Supreme Court and the Courts of Appeal.

The records and files of the Courts of Appeal shall be transferred to and become records and files of the Supreme Court.

SECTION 2. The seat of the Supreme Court shall be and remain at the seat of Government. The State shall provide offices for the Clerk of the Supreme Court at the seat of Government and elsewhere as the Court may order, and offices and court rooms for the Judges thereof at such place or places as the Court shall from time to time direct.

SECTION 3. The Supreme Court shall be composed of sixteen Judges. As to the effective date of this amendment the then Judges of the Supreme Court and of the Courts of Appeal shall become Judges of the Supreme Court for their respective terms. The General Assembly shall provide for the payment of the expenses of the Court and of the Judges and officers thereof while in the performance of their respective official duties. The compensation of the Judges shall be $10,000.00 per annum, which the General Assembly may increase by provisions applying uniformly and without reference to the terms of the respective Judges.

SECTION 4. The successors to the Judges of the Supreme Court as hereby

constituted shall be chosen as provided by law. And if and so long as chosen by popular election three thereof shall be resident in the territory now comprising the District of the St. Louis Court of Appeals, which shall be known as the First Supreme Court District; three in that now comprising the District of the Kansas City Court of Appeals, which shall be known as the Second Supreme Court District; and three in that now comprising the District of the Springfield Court of Appeals, which shall be known as the Third Supreme Court District; and these shall be chosen by the qualified voters of such districts respectively, and the remainder of the Judges of the Court, without reference to their places of residence within the State, shall be elected by the voters of the State at large; and for the purpose of determining whether vacancies shall be filled at large or from the districts aforesaid, the present Judges of the Courts of Appeal shall be deemed to have been elected Judges of the Supreme Court for their respective terms and from their respective districts, and the other Judges of the Court shall be deemed to have been elected at large.

SECTION 5. A majority of the Judges of the Court shall constitute a quorum for the performance of administrative duties now or hereafter provided by law.

The Court shall from time to time elect one of the Judges to be Chief Justice for such term as the Court shall from time to time, by general rule or order direct.

The Supreme Court en banc shall consist of the Chief Justice and such additional Judges of the Court, not less than six in number, as the Court may by general rule or order direct. The Court shall assign Judges thereof to sit in the Court en banc for such periods as the Court may by rule or order direct. Sessions of the Court en banc shall be at the seat of Government.

SECTION 6. The Court shall by general rule or order provide for such Divisions of the Court, composed of not less than three Judges thereof assigned thereto by the Court to sit at such times and places and in such numbers as the Court may by general rule or order direct, for the hearing of such causes as the Court shall direct to be assigned thereto, having regard to the convenience of the parties. The Court may by general rule or order provide for the hearing of causes in the first instance by the Court en banc; and on its own motion, or on application under such rules and regulations as the Court may prescribe, the Court en banc may order a rehearing before itself of any cause heard and determined by a Division. All opinions of the Divisions and of the Court en banc shall be filed and promulgated at the seat of Government.

SECTION 7. Terms of the Supreme Court and of the Divisions thereof are abolished, and the Court shall be deemed always open. The Court shall by rule prescribe when appeals shall be returnable and when judgments of the Court en banc and of the Divisions shall become final.

SECTION 8. On order of the Court the Chief Justice shall designate a Circuit Judge or Judges from lists prepared and approved by the Court to act as a special Judge or special Judges of any Division of the Court

for the hearing and determination of causes in such Division. Judges so selected shall be paid their necessary expenses and such additional compensation as will make their total compensation during the period of such service equal to that of Judges of the Supreme Court.

SECTION 9. Any Circuit Judge called to service on a Division of the Supreme Court as herein provided may call any other Circuit Judge to act in his stead as Circuit Judge during the period of such service, and the Judge so called shall be paid his expenses during the period of such service.

SECTION 10. All provisions of the Constitution of the State, and all laws thereof not consistent with this amendment, shall, upon its adoption and as of its effective date, be forever rescinded and of no effect.

NOTE. This Report of the Judicial Council of Missouri, as well as others to follow, is carried as a service to our readers. The WASHINGTON UNIVERSITY LAW QUARTERLY professes no connection with the Judicial Council and assumes no attitude toward the reports other than that of making them promptly and accurately available to members of the bar.