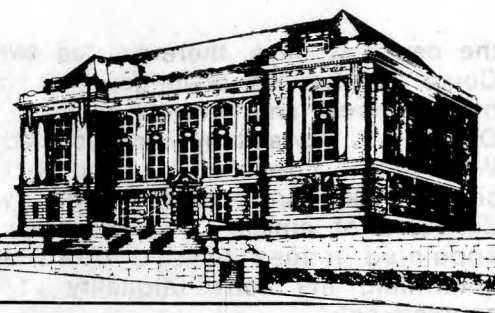


The Missouri Supreme Court Historical Journal

Published by the Missouri Supreme Court Historical Society



Vol. 1, No. 1

Spring 1986

Supreme Court Historical Society Organized

The Supreme Court of Missouri Historical Society was incorporated as a Not for Profit Corporation on July 21, 1983. Incorporators were William H. Leedy, William A. R. Dalton, William E. Tipton, Virginia Henwood Gottlieb, all children of former judges of the Missouri Supreme Court, and Stephen N. Limbaugh. Stated purposes included the following:

- (1) To establish, restore, preserve and maintain, with the consent of the State of Missouri, the interior furnishings and fixtures of the historical Supreme Court Building;
- (2) To establish and maintain therein, with the consent of the State of Missouri, such educational facilities for the general public as may prove desirable;
- (3) To acquire, by purchase, loan, lease or gift, such item or items as may be desirable for the enhancement, betterment or improvement of the Supreme Court Building;
- (4) To survey and evaluate the Supreme Court Building for the purpose of seeing to the preservation of that which is considered of worth historically and architecturally and to employ all legal means deemed advisable for such preservation;
- (5) To disseminate knowledge of and provide opportunity for research into the Missouri Supreme Court and its place in the history of Missouri and the United States;
- (6) To make the knowledge and materials acquired available to scholars, historians and the public as prescribed by the Board of Directors;

- (7) To accept contributions from the public in varying amounts in return for membership in the Society and the benefits derived therefrom, or any otherwise lawful contributions independent of membership;

Subsequently, by-laws were adopted and officers and trustees were elected. A Revenue Ruling establishing that dues and contributions to the Society are tax deductible was obtained.

Early activities of the Society include research necessary to the ultimate publication of a history of the Missouri Supreme Court, commencement of an oral history project, efforts to locate and obtain memorabilia of persons connected with the court, needed restoration of portraits of former judges, and efforts to increase the membership of the Society.

Annual Membership Meeting Scheduled

The first annual membership meeting of the Society will be held in the Banc Courtroom of the Missouri Supreme Court on Friday, April 25, 1986 at 2 p.m. This date was selected because many members will be attending Law Weekend at the UMC Law School and the date and time will permit those persons to attend the Society's meeting and then drive to Columbia in time for the Law School dinner on Friday evening.

The agenda will include election of officers and trustees, a report on activities of the Society during the past year, a discussion of future plans and activities, and presentation to the court of the Bingham print *Martial Law* and of the restored portrait of Judge Theodore Brace.

The Ousting of the Judges

By D.A. Divilbiss



he Civil War had recently ended, but its wounds were still festering. A special session of the Missouri Supreme Court had been called to order on June 12th, 1865 in St. Louis. James O. Broadhead was presenting his arguments to the court composed of Judges William V. N. Bay and John D. S. Dryden. Two prominent attorneys, David Wagner and Walter Lovelace, entered the courtroom and took a seat with the spectators. When Broadhead's arguments were finished, Wagner approached the bench to talk to Judge

Dryden. He told the judge he had with him a letter from Governor Fletcher appointing him and Lovelace as judges to the Supreme Court. He stated that the Governor was acting under the authority of the "Ousting Ordinance" passed by the Convention of 1865. Judge Dryden apparently chose to ignore the message. Wagner and Lovelace left the courtroom as arguments commenced for the second case docketed for that day.

Thus began one of the most turbulent periods in the history of the Missouri Supreme Court. Over

(continued on page 2)

the next few days, there existed two Supreme Courts with two sets of Judges. This was followed by the arrest and forceful removal of Judges Dryden and Bay as they were replaced by Judges Wagner and Lovelace. The end to this bizarre situation came in September when, with a total disregard of ethical considerations, the newly appointed judges handed down an opinion confirming the constitutionality of their own appointments!

This article examines the background leading up to these events, the action taken by the governor in enforcing the "Ousting Ordinance" and the legality of the ordinance. A brief biographical sketch of the judges involved is also provided.

Background

The events leading up to the problems of 1865 can be traced back to the State Convention of 1861, sometimes referred to as the "Gamble Convention." With the approach of the Civil War, the 21st General Assembly passed an act calling for a State Convention to convene on February 18, 1861. The delegates were to consider

"the then existing relations between the Government of the U.S. . . . and the Governor and people of the State of Missouri; and to adopt such measures for vindicating the sovereignty of the State, and the protection of its institutions as shall appear to them to be demanded."

At the first meeting held in Jefferson City, the members passed the following resolution, "That at present there is no adequate cause to impel Missouri to dissolve her connection with the Federal Union." Having reached this decision, they adjourned on March 22nd until December 3, 1861, but appointed a committee to recall the convention before that time if conditions in the state and country warranted it.

By July the convention was hastily reconvened in Jefferson City. It heard a report from James Broadhead explaining that since their adjournment in March, Governor Claiborne Jackson, all elected officials, and Sterling Price, who was then President of the Convention, plus a large majority of members of both Houses of the Legislature, had left the state and joined the Confederacy. By this action, the departing heads of government left the state without an effective governing body. Under the circumstances, the delegates to the Convention proceeded to form a provisional government.

In their first act, they elected the following officers: Hamilton R. Gamble, Governor; Willard P. Hall, Lieutenant Governor; and Mordecai Oliver, Secretary of State. Only the judicial branch was untouched by the convention at this point.

When the Convention reconvened in October, 1861, two ordinances were presented which set the stage for the new Provisional government's challenge to the Supreme Court. The first was offered by Broadhead requesting "That the offices of the judges of the Supreme Court . . . Circuit, Probate . . . and clerks of several courts of record . . ." be vacated. The amendment was defeated by a vote of 40-10. However, on October 16th an ordinance providing for an oath to test the loyalty of civil officers, did pass by a vote of 37 to 15.

This oath required that "each civil officer in the state within 40 days after the passage of this ordinance, take and subscribe an oath to support the constitution of the United States and this State; that he will not take up arms against the Government of the United States, nor the Provisional Government of this State, nor give aid or comfort to the enemies of either during the present civil war."

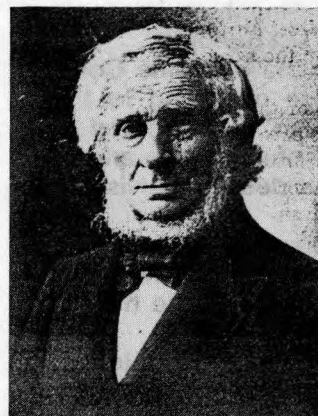
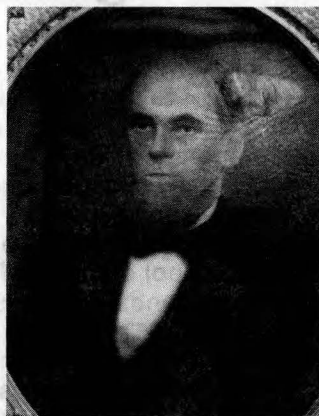
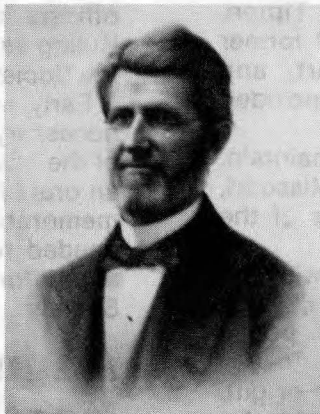
People failing to take the oath were required to vacate their office and their replacements were to be appointed by the Governor.

When the ordinance passed, the judges holding office on the Supreme Court were William Scott, William B. Napton, and Ephraim B. Ewing, all Southern sympathizers. All of the judges resigned rather than take the loyalty oath required by the ordinance and consequently their offices were vacated. Governor Gamble then appointed Barton Bates, William V. N. Bay

and John D. S. Dryden to the court. The judges were to hold office filling the unexpired term of the former judges until an election could be held.

The special election that was held in November, 1863 for the Supreme Court judges became a real political contest between the State's Conservative and Radical parties. The Radicals conducted an aggressive campaign in their effort to get control of the Supreme Court. The election was so close that it was several days before the final outcome was known. When all the votes were counted, the Conservatives had won by a slim margin. The winning judges were elected for a term of six years ending with the year 1869.

The untimely death of Governor Gamble on January 31, 1864, left the conservative party



Pictured are: Top, Judge Dryden, 1862-1865; Bottom Left, Judge Wagner, 1865-1877; and Bottom Right, Judge Holmes, 1865-1868.

devoid of its most important political figure. Without Governor Gamble's leadership the party, already experiencing dissension among its members, finally split into various factions over the question of the emancipation of the slaves. The largest group, calling for immediate emancipation, rallied around Charles D. Drake as their leader. In the 1864 election, they maintained for governor Colonel Thomas Fletcher who supported their platform of immediate emancipation. Their state-wide victory lead to control of both houses of the General Assembly and ultimate domination of all branches of state government.

State Convention 1864 — Drake Convention



With the Radicals in control of the General Assembly, it was easy to pass an act calling for another state convention. A majority of the voters having agreed to the act, the elected delegates assembled in St. Louis on January 6, 1865 to consider the following constitutional amendments:

"(1) Such amendments to the Constitution of the State as may be by them deemed necessary for the emancipation of slaves.

(2) Such amendments to the Constitution of the State as may be by them deemed necessary to preserve in purity the elective franchise to loyal citizens, and such other amendments as may be by them deemed essential to the promotion of the public good."

Although the first priority of the Radical members at the Convention was the passage of an emancipation amendment, on January 10th, just four days after they assembled, Moses P. Green, an attorney from Hannibal, offered the following resolution to reorganize the judicial system.

"That in the opinion of this Convention we would subserve the wishes of our constituents and promote the general good of the commonwealth by reorganizing our judicial system so as to meet the wants and interests of the progressive spirit of our people . . . it is further our opinion, that it would be best to declare vacant all judicial offices, from the Supreme bench down, and that all vacancies for the first term be filled by the Governor."

Several amendments were offered but did not pass and the entire matter was referred to the Committee on the Judiciary. On the following day, January 11, 1865, the amendment providing for the emancipation of slaves was passed.

On February 20, 1865, the committee on the Judiciary presented their report on the reorganization of the judicial system. Repeating that the primary purpose of the convention was "the emancipation of the slaves . . . and the preservation of the elective franchise . . ." the committee stated that

"If the Judicial Department of the State . . . be not in unison and harmony with the

executive and legislative department . . . the working of the social system will be harsh, discordant and indeed incapable of efficient and beneficial result and thereby may follow injustice, oppression and wrong to the citizens of the State."



he report further called attention to the "abnormal condition(s)" that prevailed at this time and asked the question, "are we to be governed by the rules of conduct and legislation which should prevail in ordinary times?"

As the following excerpt shows, the authors were uneasy about the drastic action they proposed and attempted to refute the arguments they anticipated the court might use to declare the emancipation amendment unconstitutional.

"Should the judicial department of the state government be held at liberty to impeach the entire lawfulness of this act? Property in man exists and has always heretofore been recognized in this state, and if rightfully existing at one time, it may always rightfully exist. The convention, or the majority of the people, have no right or lawful authority to deprive a citizen of property without compensation . . . The right or authority so to do is denied in the very nature of the social contract. Upon this plea, lawfulness of this act of the convention may be denied by the judges. Should it be permitted if it can be prevented?"

The proposed "Ousting Ordinance" now stated the following provisions.

"That the offices of the Judge of the Supreme Court, Circuit Courts, county courts and all special courts of record in the State, and of the clerks of all said courts, and of all county recorders, and of circuit attorneys and their assistants, be and the same are hereby vacated on the ____ day of _____ 1865, and the Governor of the State is hereby empowered and directed to fill all said offices, so vacated, by his appointment;"



he final version of the ordinance that was passed by the convention on March 17, 1865, by a vote of 43-5, called for the "ouster" of all sheriffs and county recorders as well as all judges, clerks and circuit attorneys. The date for the offices to be vacated was set for May 1, 1865. Appointment by the governor was to be for the unexpired term of each office. The major addition was the requirement that every person appointed should take the loyalty oath "prescribed in the second section of the 'Ordinance defining the qualifications of voters and civil officers in this State,' adopted June tenth, one thousand eight hundred and sixty-two . . ."



ith the final passage of the "Ousting Ordinance", one of the convention's members, Moses L. Linton, wrote the following poem:

"Disloyal judges, all agree,
Should be decapitated;
So just is this that such a point
Should not have been debated.
And those who are good Union Men,
Unflinching, firm, and hearty,
Should be turned out, that Radicals
May harmonize their party."

Effect of the Ousting Ordinance

While the Convention was considering the Ousting Ordinance, Judge Barton Bates resigned from the Supreme Court effective February 1, 1865, leaving only Judges John D. S. Dryden and William V. N. Bay on the bench.

With the passage of the Ordinance, Governor Thomas C. Fletcher appointed David Wagner, Walter L. Lovelace, and Nathaniel Holmes as Judges of the Supreme Court. Judges Wagner and Lovelace were to succeed Judges Bay and Dryden. On April 29th, Governor Fletcher also reappointed Andrew W. Mead, whose office had also been vacated by the ordinance, as the Clerk of Supreme Court.

The first act of the new judges was to issue an order calling for a special session to be held in St. Louis on Monday, June 12, 1865. They also directed the clerk of the court to deliver to them the records and papers of the court. At the same time Judges Dryden and Bay also issued an order for a special term to be held in St. Louis on the same Monday, June 12, 1865 and proceeded to hold court that day as they had ordered.



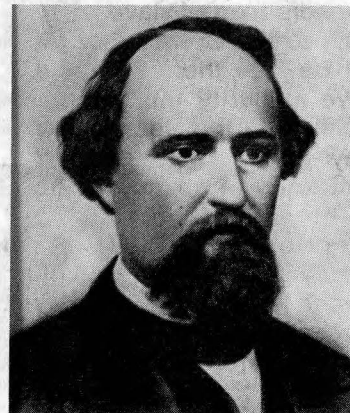
n the following day, June 13th, Governor Fletcher had Brig. Gen. D. C. Coleman, Adjutant General of the State, deliver a letter to Judges Bay and Dryden, while they were sitting in court, restating the events that had led up to his authority in appointing three new judges to the Supreme Court. The last sentence of the letter shows the Governor's determination to enforce the Ordinance.

"The ordinance referred to is the supreme law on that subject, and it is my imperative duty to enforce it, which duty I shall pursue in the most summary course in performing, and will treat as they deserve any acts on your part done in furtherance of a design to intrude yourselves into and usurp the powers of the office of a Judge of the Supreme Court."

The judges refused to surrender their office so General Coleman left and returned the next day, June 14th, with the following special order addressed to them from the Governor. This order, signed "Governor and Commander-in-Chief" stated the following provisions:

- I. The usurping Judges of the Supreme Court will be compelled to submit to the ordinance of the State Convention vacating certain offices.
- II. David Wagner, Walter L. Lovelace, and Nathaniel Holmes will be put in possession of the Supreme Court room in the Court House at St. Louis, with all the records, seals, furniture, books and papers of the office of the Clerk of the Supreme Court.
- III. Brig. Gen. D. C. Coleman is charged with the execution of this order, and will employ such force for that purpose as he may deem necessary and arrest all persons who may oppose him."

Another letter addressed to General Coleman from the Governor directed him to deliver the above letter to Judges Bay and Dryden. General Coleman was further instructed to take an officer of the police force with him. If Judges Bay and Dryden refused to surrender their office, he was to have the police arrest them and take them before the City Recorder. The Governor asked the General to "avoid the use of violent means," but added "if in your judgment necessary, do not hesitate to employ all the force it may require."



Thomas C. Fletcher
Governor 1865-1869

There is a very detailed account of what actually happened inside the courtroom reported in a pamphlet entitled an "Address to the People of Missouri in Vindication of the Independence of the Judiciary" signed by Messrs, Gantt, Glover, Broadhead, etc. This address was delivered at a protest

meeting held three days later at the St. Louis Court House on Saturday evening, June 17th.

The authors describe a scene where General Coleman enters the courtroom with a squad of city police, interrupting an oral argument by an attorney, and demanding that the judges leave their seats. Upon their refusal, the General then ordered the police, who were armed, to remove them from their chairs. As the police advanced, the judges did not leave their seats. The General then ordered the police to arrest the judges. When the judges demanded to see his warrant the General showed them his special orders from the Governor. The judges explained to the General that his order did not contain the authority to arrest them, so the General left. However, he ordered the police to stay and not let the judges leave the room. When he returned, he had a warrant for their arrest for a breach of the peace. The police then arrested them and escorted them on foot to the office of the City Recorder. Here the following complaint, signed by Governor

(continued on page 5)

Fletcher, was filed against them: "I complain of Wm. V. N. Bay and John S. Dryden for disturbing the peace by interfering with the Supreme Court. Please summon as witnesses David Wagner, Walter L. Lovelace, Thos. C. Fletcher, D. C. Coleman, A. R. Bowman."

Reaction to Arrest of Judges

The reaction to the arrest of the Supreme Court judges was immediate. Three days after the arrest the Conservatives held a meeting on Saturday, June 17th at the St. Louis Courthouse. It was at this meeting that the opponents delivered the "Address to the People of Missouri" already referred to. In this address, the Convention delegates are attacked for transcending their power and attempting to do something which the "people have not authorized them to do." They insisted that such unauthorized acts should be declared null and void.

They state that the Ousting Ordinance is not an amendment to the Constitution "but a mere sentence against certain designated officials, inflicting upon them, without charge or trial, a deprivation of office." Thus it was not within the authority of the convention and is "therefore a usurpation of power." They argued that the ordinance could not be construed as a constitutional amendment since it had not been submitted to a vote of the people.

To refute the argument that the Provisional Government had acted in a similar fashion in 1861, they reminded the audience that at that time the executive officers of the government and a large majority of the General Assembly had left the state to conduct a war against both the state of Missouri and the United States. In order to deal with the emergency situation that existed at that time, the delegates in 1861 were given much broader powers than the present delegates possessed. The Convention of 1861 was charged "to adopt such measures for vindicating the sovereignty of the State and the protection for its institutions as should appear to them to be demanded."

In addition, the judges appointed by Governor Gamble in 1861 were to hold office until they could stand for an election that was held in November, 1863. At that time all were elected. The evening ended with the speaker describing Governor Fletcher as the "Chief Criminal in Missouri" for his act "of subjecting to false imprisonment . . . the most exalted magistrates of the Judiciary in Missouri" and urging those in attendance to impeach the Governor.

The arguments of the Radical proponents are best presented in a letter from their chief spokesman, Charles D. Drake, addressed to his fellow citizens and reported in an article entitled "The Missouri Supreme Court Judgeship."

Drake argues that the court had acknowledged the legality of the Ousting Ordinance by accepting

the reappointment of Andrew Mead by Governor Fletcher as the Clerk of the Supreme Court. He cites an entry in the court's record as accepting Mead's commission and bond "in conformity with the provisions of an ordinance of the Missouri State Convention entitled 'an Ordinance providing for the vacating of certain civil offices . . . ' passed the 17th of March, 1865 . . . approved by the court." Drake concludes that by this act the court admits that Mead's term had been "cut short" and that he had been reappointed by another authority. He further contends that on the 29th of April, the actions of the two judges in auditing the accounts of the Clerk, Marshall and others, indicate that this was the end of the March term as this was traditionally done at the end of each term.

As a result, Drake reasons that the court was adjourned until its next regular term in October. He finds this curious in that the court usually continued the March term till some time in July, plus the fact, there were still over two hundred cases to be heard. He assumes the reason for this action is that the judges "considered their functions at an end, and did not attempt to resume their seats as judges." He infers that the order calling for a special term to be held on June 12th was only issued by the newly appointed judges, not by Judges Bay and Dryden, because such order could not be located in the Clerk's Office. Finally, he questions the decision of Judges Bay and Dryden to open court at 9:00 a.m. instead of the traditional 10:00 a.m. starting time.

The Legality of the Ousting Ordinance

The first case involving the Supreme Court judges in a test of the legality of the Ousting Ordinances was filed in the St. Louis Circuit Court June 13, 1865 by Andrew W. Mead, Clerk of the Supreme Court. He asked the court to issue an injunction against Judges Wagner and Lovelace to keep them from taking the Supreme Court's books, records and seal away from him. Judge James C. Moody complied with the request and issued a restraining order. Judges Wagner and Lovelace ignored the injunction so Mead filed a contempt of court petition against the judges for disobeying the injunction.

This case was set for a hearing at the September term of the Circuit Court. Judges Wagner and Lovelace applied to the Supreme Court for a writ of prohibition and the case was then accepted by the Supreme Court to be heard at a Special Session in September, thus creating the most unusual situation of the judges accepting to hear a case in which the validity of their own appointments were in dispute. Few doubted that the decision would uphold the appointments.

Arguments were heard before Judges Holmes and Lovelace, Judge Wagner not sitting. Judge Holmes was assigned to write the opinion. In his

(continued on page 6)

decision, he found Andrew Mead at fault for failing to respond to an order from the judges to relinquish to them the court records, books and seal. He also found it presumptuous of Mead to file an injunction against the court and the members of the executive branch and states, "There was not the shadow of an equity in the petition . . . on which to grant an injunction at all." Judge Holmes proceeds to accuse the Circuit Court of exceeding its authority "to reach by injunction a subject matter over which the Circuit Court has no jurisdiction by injunction or otherwise namely, the control of the court's own records, books and papers."

In discussing the Ousting Ordinance Judge Holmes assumes that the defendants believed the ordinance was null and void and that public officials appointed under it and the Governor enforcing it were acting without legal authority. Finally, he reaffirms the authority of the Supreme Court as the highest court in the state with the power to interpret the constitution, issue original writs, and exercise control over the lower courts. In handing down this opinion, Judge Holmes disregarded all ethical considerations and ruled in a case in which he and the other two judges certainly had a strong vested interest, to say the least.



Several other cases which involved the vacating of other civil offices under the Ousting Ordinance were heard by the Supreme Court. In each case, the Ordinance was upheld. In *State ex rel. Conrad v. Bernoudy*, 40 MO. 192 (1868) the legality of the Ordinance was finally presented to the court. The court declared that the convention represented the people in their sovereign capacity and that the act calling for the convention contained no limitations on the convention's power.

Finally, in *State v. Neal*, 42 MO. 119 (1868), the court answered the question originally posed as to the constitutionality of the ordinance because it had not been ratified by a vote of the people. The court said the convention had the power to declare it in force without an election because "as representative of the people, clothed with an authority as ample as that, certainly its (the convention's) power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters upon that instrument cannot be seriously questioned." 42 MO. 119, 123 (1868).



Before this whole episode ended, in July, 1865, Judge Dryden filed suit against Governor Fletcher for \$50,000 in damages. In the fall of that year both Dryden and Bay officially resigned from the Supreme Court. The following April, 1866, when Judge Dryden's case came to trial, the judge of the court of common pleas upheld the Ousting Ordinance, thus ending Judge Dryden's case.

The Judges



With such a turbulent entry to the court system, it is interesting to examine just what type of judges had been appointed to the court.

Nathaniel Holmes was born January 2, 1815 in Peterboro, New Hampshire. He acquired an amazing amount of education as a boy. He studied Latin at Chester Academy in Vermont and English in New Ipswich, New Hampshire. His attendance at Exeter in New Hampshire prepared him for college at Harvard which he entered in 1833, graduating in 1837. He returned to Harvard the following year and entered law school, graduating in 1839. After graduation he moved to St. Louis where he was admitted to the Bar and entered into the practice of law.

During the twenty-five years he lived in St. Louis he served as attorney for the city and county of St. Louis and was counselor for the St. Louis public school board.

A year after his appointment to the court in 1865, he wrote the book "The Authorship of Shakespeare's Plays" which was published in 1866. In this book he attempts to prove that Shakespeare's plays were actually written by Francis Bacon. He was the author of two more works, "Realistic Idealism in Philosophy Itself," published in two volumes in 1888, and later "The Philosophy of the Universe."

During his tenure on the court, the Board of Curators of the University of Missouri, in June, 1867, appointed Judge Holmes as Professor of Law at the newly established law school on the campus at the University of Missouri. However, he did not serve in this capacity.

In 1868 he resigned as judge of the Supreme Court to accept the Royal Professorship of Law at Harvard Law School. Upon his resignation from Harvard in 1872 he moved back to St. Louis where he again practiced law until 1883 when he moved to Boston where he died February 27, 1901.

Of the three judges appointed in 1865, Judge David Wagner stayed on the court longer than the other two. He was elected in 1868 and served on the court for twelve years.

He was born in Luzerne County, Pennsylvania, December 31, 1826 and moved with his family to Lewis County, Missouri in 1842. Not much is known of his early education, but as a young man he read law with Judge James Ellison in Monticello. He was admitted to practice in 1848.

In 1861 he raised a company of state troops and served as their captain. The following year he successfully ran for the State Senate, where he served until 1864, when he resigned to become the judge of the 4th Judicial Circuit.

In 1870, while still serving on the Supreme Court, he compiled and edited a revision of the Missouri statutes commonly referred to as Wagner's Statutes, which were adopted and recognized as law by the legislature. He died on August 4, 1902 at Canton, Missouri.

Missouri's First Supreme Court



The Constitution of 1820 created a Supreme Court consisting of three judges appointed by the governor with the advice and consent of the Senate. The only qualification was that the person appointed should be thirty years old. The court was required to hold two sessions annually at Jackson, St. Louis, St. Charles and Franklin. Other provisions in the Constitution stated that the judges would receive an annual salary of \$2,000.00, were to hold office during good behavior and could be removed from office only on a proposal voted by two-thirds of each house of the General Assembly.

The members of the first Supreme Court were Mathias McGirk, John Dillard Cook and John Rice Jones. Judge McGirk was appointed November 14, 1820, Judge Cook on November 16th and Judge Jones on the 27th. Rules promulgated by the court state that "the oldest judge in commission is President of the Supreme Court," thus Mathias McGirk became the first President of the court.

The three judges came to Missouri from various backgrounds. Mathias McGirk was born in Tennessee in 1790 where he studied law and was admitted to the bar. Exactly when he moved to Missouri is not clear, but in 1813 he was nominated to fill a vacancy on the Territorial Council where he remained until 1817. In 1816, while a member of the Council, he authored and introduced the "Act Declaring What Laws Shall Be In Force In This Territory" which established that the common law of England should be the law in Missouri. Judge McGirk was just 31 when he was appointed to the court, where he stayed until he retired in 1841.

John D. Cook, the second judge appointed to the court, was born in Virginia in 1790. He was raised in Kentucky where he studied law and was admitted to the bar. He moved to Missouri between 1815 and 1816 settling in Ste. Genevieve where he opened a law office. He was a member of the Territorial Council and a delegate from Ste. Genevieve to the Missouri Constitutional Convention of 1820. Like Judge McGirk, he was 31 when he was appointed to the court. He resigned in 1823 and shortly thereafter he accepted appointment as judge of the 4th Judicial Circuit headquartered in Jackson. During his 24 year tenure in this position, he was a real circuit riding

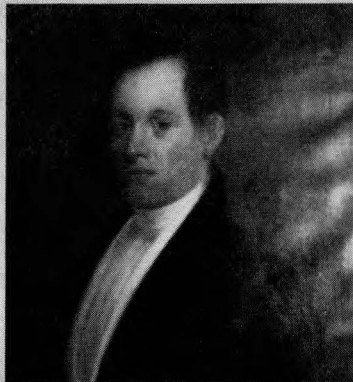
judge holding court in numerous Southeast Missouri counties. In 1848 he resigned the judgeship and accepted an appointment from the President of the United States as Federal Attorney for the Eastern District of Missouri. He held this position for two years, resigning in 1850 to return to private practice in Cape Girardeau where he died in 1852.

John Rice Jones, the third judge appointed to the court, was quite different then the other two. He was born in Merionethshire, Wales in 1759. He was a graduate of Oxford and was 61 at the time of his appointment to the court. He came to the United States during the Revolutionary War and fought with George Rogers Clark in the capture of Vincennes. It is believed he came to Missouri around 1804 after practicing law in Illinois and Kentucky. He originally settled in Ste. Genevieve, but later moved to Potosi. Like Judges McGirk and Cook, he was a member of the Territorial Council

and a delegate to the Constitutional Convention of 1820. Judge Jones authored 140 opinions during his brief tenure on the court. In his last opinion, *Brown v. Ward*, 1 MO. 209, he apologized for the brevity of his opinion because of the "weak state of his health." He died February 18, 1824.

The first session of the Supreme Court was probably held in the St. Charles district. The first decision is published as a "per curiam" opinion since no one judge signed the opinion. The second opinion, authored by John Cook, questioned the authority of the Territorial Legislature to create a corporation. A brief overview of the cases brought before the court that first year shows that laws passed by the Territorial Legislature were frequently questioned. Except for cases dealing with slaves, the subjects were as varied as those appearing before the present court. The decisions are much shorter, but this may be due in part to the lack of reference material available to the court at the time.

The state was fortunate to have three such outstanding men accept the appointment to the court. Judge McGirk's 20 years on the bench brought stability to the Supreme Court in its formative years. Though Judges Cook and Jones only stayed on the court for a few years, they showed the dedication and continuing commitment of the best educated citizens in the state to actively participate in the formation of the legal system in Missouri.



John D. Cook
Governor 1820-1823



John Rice Jones
Governor 1820-1824

Society Plans Publication of Supreme Court History

A research project, the end-product of which will be publication of a history of the Missouri Supreme Court, has been undertaken as a cooperative project by the Supreme Court Historical Society and the Missouri Cultural Center of the Graduate School of the University of Missouri-Columbia. Preliminary work on the project is being funded by The Missouri Bar Foundation.

Research and compilation of materials for this long-range project, being done by Kristen Morrow, a graduate history student at UMC, has been funded to date by a \$5,000 and a \$15,000 grant from the Foundation. Work on the project was begun in September, 1985. Present funds will sustain the research through the second semester of the 1986-87 school year after which additional funding for completion of the project will be sought.

Following is a report by Ms. Morrow on her work to date.

Research Methodology



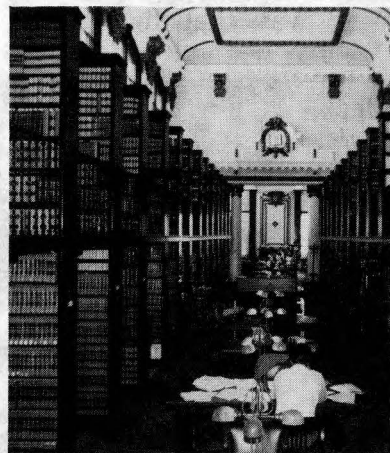
My first semester's research involved compiling an extensive bibliography of secondary sources useful for the writing of a Missouri Supreme Court history. It proceeded in two phases. First, I located history and government texts related to the Court's history. Second, I examined the state's bar journals and law reviews for related materials. This research was done in Ellis Library, University of Missouri-Columbia; the State Historical Society of Missouri, Columbia; and the UMC Law Library. Initial examination revealed no specific Court histories, fortifying our belief that an institutional history of the Court is needed.

In Ellis Library, the Court-related materials surfaced primarily in state history and government texts. Unfortunately, an examination of their content revealed little of substance. A random sampling of nineteenth and twentieth century state histories and government texts indicated general information explaining Court organization and function but little else. An examination of state histories dealing with specific time periods and events, in some instances, proved more useful as sources for Court history. For example, William Parrish's *Missouri Under Radical Rule, 1865-1870* recounts the Court "imbroglio" during the volatile era of Radical Republicanism. Overall, the Ellis Subject catalogue search revealed little in regard to Missouri Supreme Court History.

My search for secondary sources, particularly in the Missouri State Historical Society, unveiled several primary sources of value. Several Supreme Court reports on proceedings surfaced along with seven memorials to former judges.

Phase two of my research was the most time-

consuming, but also the most productive as far as uncovering secondary sources valuable to a better understanding of Missouri Supreme Court history.



I examined six of the state's major bar journals and law reviews. Included in my examination were the *Washington University Law Quarterly*, 1915 to the present (originally the *St. Louis Law Review*); the *Journal of the Missouri Bar*, 1930 to the present (originally the *Missouri Bar Journal*); the *University of Missouri-Kansas City Law Review*, 1932 to the present (originally the *Kansas City Law Review*); the *Missouri Law Review*, 1936 to the present; the *St. Louis University Law Journal*, 1949 to the present; and the *St. Louis Bar Journal*, 1950 to the present.

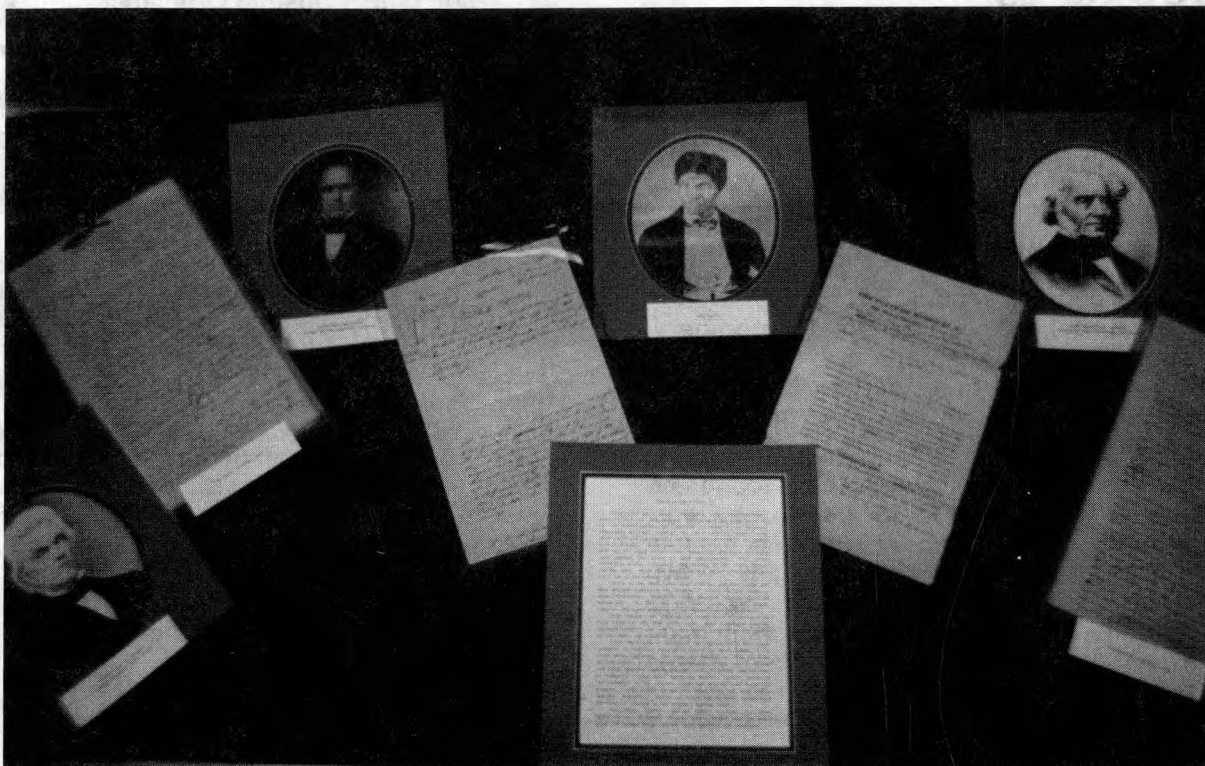
During perusal of the journals and reviews, I discovered a great unevenness. Though I collected bibliographic citations from all six, the *Journal of the Missouri Bar* proved the most valuable by far in producing articles related to Missouri Supreme Court history. Sample selections from the *Journal* include "As We See It" (March 1930), a defense of current Court practices by Judge John Turner White; "Jurisdiction of the Missouri Supreme Court Under the New Constitution" (May 1946); and "Mathias McGirk: The First Chief Justice" (August 1963).

Interestingly, when applicable, the journals and reviews could be divided into two periods. First, those published *before 1940* emphasized nineteenth-century legal history. State interests, for the most part, superseded national concerns. Finally, they reflected strong desires toward streamlining State Court proceedings, modernizing and improving the legal profession, and integrating the state bar.

Second, *after 1940* journals and reviews were more profession-oriented and more devoted to specific cases and procedure. The proliferation of the journals themselves suggests the growing desire to professionalize within the legal ranks and to seek judicial reform. Greater emphasis was placed on federal cases and issues. As far as the Missouri Supreme Court was concerned, a number of articles evaluating the pros and cons of the Missouri Non-Partisan Court Plan appeared as did a number of articles explaining and evaluating specific Court cases.

History as a subject of interest, however, was not completely ignored. For example, Hugh P.

(continued on page 9)



The original, handwritten Missouri Supreme Court decision in the Dred Scott case is now on display in the Missouri Supreme Court Library. The display was made possible through the cooperation of the Young Lawyers Section of The Missouri Bar and the Court.

The historic documents, resurrected some years ago during renovation of the Supreme Court Quarters, have been flattened, cleaned and repaired by Ms. Claudia Powell, Western Historical Manuscripts preservation expert, at UMC. Each page of the decision and briefs has been encapsulated in mylar plastic. The photos are of judges who wrote the decision. A brief explanation of the facts in the case and its historical importance has been written for the display by Bill Thompson, Supreme Court Staff Counsel.

Williamson wrote a series of articles on former judges and cases for the *Journal of the Missouri Bar* during the late fifties and early sixties.

Emerging Periods and Themes

During my search for secondary sources, several important historical periods and themes emerged. First, both historians and lawyers have written extensively on the history of Missouri's colonial, territorial, and early statehood periods. This includes the development of law, jurisprudence, bench and bar, and the emergence and importance of certain individuals. Hence, there appears to be sufficient data for writing a history of the early Court, the legal foundations it rested on, and its predecessors.

Second, the Missouri Supreme Court was

directly involved in one of America's most famous and tragic cases — the Dred Scott decision. I discovered that the Dred Scott case was preceded by at least two similar cases in which Missouri slaves took their masters to court. One example was the case of *Mary Charlotte v. Gabriel and Auguste Chouteau* (1845). It is certainly possible other determined slaves seeking retribution paved the way for plaintiff Scott.

Third, the notorious attempt by the Radical Republicans to pack the Missouri Supreme Court immediately after the Civil War should not be ignored. It is one period of Court history well-documented and well-developed by Professor William Parrish and others.

Fourth, I discovered that the period of Court history between 1875 and 1925 appears to be sparsely documented. I uncovered little of significance about this period. Further research may well fill this gap.

The Ousting of the Judges

(continued from page 6)



Unfortunately, Judge Lovelace's tenure on the court was cut short by his untimely death at the age of 35. He was born in Charlotte County, Virginia, October 1, 1831. At the age of three, his father died and his mother moved the family to Montgomery County. His early education was obtained at a country school. By 1850 he was a teacher at a district school in Montgomery County. In 1853, after attending several terms at the University of Missouri, he started studying law under Ben Sharp, a prominent lawyer in Danville, and was admitted to the Bar in 1854.

In 1862 he was elected to the House of Representatives and again in 1864 where he was chosen speaker of the House. He served on the Supreme Court a little more than a year from his appointment in June, 1865 till his death August 5, 1866. Ironically, the best biographical sketch of

Judge Walter Lovelace is written by former Judge William V. N. Bay whom Judge Lovelace replaced as a result of this Ousting Ordinance.

It is apparent that these three men appointed to the court under the most questionable circumstances were well educated members of the Bar who had won the admiration and respect of their professional contemporaries.

Conclusion

In retrospect, it is hard to judge former events and the men who participated in them. However, it is impossible to condone the actions of the Radicals in their takeover of the Supreme Court. It is also impossible to understand how well educated men could disregard all ethical considerations and willingly participate in a plan that helped the Radicals achieve their objectives. If securing the abolition of slavery in Missouri was the primary object of the Drake Convention, surely it could have been obtained without sacrificing the benefits of an independent judiciary.

Publication of Supreme Court History

(continued from page 9)

Fifth, the period from 1930 to the present I found to be particularly intriguing in relation to the Court. This is a period devoted to professionalizing lawyers and judges and to modernizing state jurisprudence. Voices in the thirties, particularly as expressed in the law reviews and journals, demanded court reform and the modernization of the legal profession. Expression turned to action in the form of the precedent-setting *Non-Partisan Court Plan for the Selection and Tenure of Judges*.



The state's highest court also achieved greater autonomy during this period. Attempts to streamline judicial procedure also proved successful when the Codes of Civil and Criminal Procedure were adopted in 1945 and 1953 respectively.

Certain vignettes and episodes in Missouri's legal history, such as "the Baldknobbers" episode and the "Old Drum" case, are celebrated in Missouri's cultural heritage. They are the source of rich bodies of oral tradition today. Professor Howard Marshall and I hope that the interviews to be recorded and later research can gather relevant information. Such episodes and certain "sidelights of history" would be of great interest in whatever exhibitions and publications for general audiences are to be prepared as end-products of this project.

Transition to 1986



Currently my bibliography contains 420 selections. Presently I am in the process of placing each selection into content categories. Sample categories include "The Colonial Period," "The Territorial Period," "Dred Scott," "1865 Constitutional Convention," and "Procedure" among others.

My immediate work for the new semester will be to refine two tasks begun in the previous semester. First, I need to further examine the index of the *Missouri Historical Review* for any articles pertinent to the Supreme Court. Second, I need to begin the search for primary sources. Most of my time will be spent in the Western Historical Manuscripts Collection, Columbia and the Missouri Historical Society, St. Louis. Both repositories contain an abundance of information on the Court and its members. I have already scanned MHS's catalogue for personal papers of and references to all past and present Supreme Court judges. As I suspected, there is a wealth of nineteenth century materials such as W.B. Napton's diaries.

I look forward to another productive semester. I anticipate completion of the growing bibliography. I shall continue to gain insights into the history and evolution of Missouri's highest court, and I appreciate being part of this significant project.

Kristen Morrow

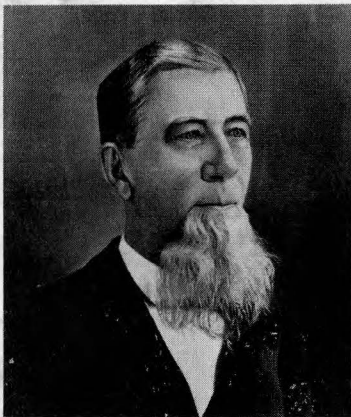
Judge Brace Portrait Restored



A recent inspection of the portrait of Judge Theodore Brace, who served on the Supreme Court from 1887 to 1907, disclosed that some of the paint was flaking off and that prompt restoration should be undertaken.

The Society had advised the Court that it will pay for the work on the portrait and the Court has contracted with Sidney Larson to do the needed restoration and protective measures. Professor Larson, a member of the faculty of Columbia College, worked with Thomas Hart Benton during his lifetime and has done extensive renovation on art work in the state capitol.

The restored portrait will be presented to the court at the Society's annual membership meeting on Friday, April 25, 1986.



Oral History Project Underway



An oral history project has been commenced by the Supreme Court Historical Society. Its objective is to interview and record the knowledge and recollection of people who have been members of the Supreme Court or have played significant roles in cases or events involving the court. Such recorded recollections provide a valuable primary source of knowledge of past events and will be of assistance in understanding and writing about those earlier events and people.

Some of the oral histories taken to date are from Judges Henry Eager, Paul Barrett and Fred Henley. Interviews with other retired judges and members of the families of former judges are to be scheduled.

In addition, histories have been or will be taken from lawyers involved in events such as the establishment of the Missouri Non-Partisan Court Plan and particularly unusual and significant cases such as the proceedings involving the seating of Governor Forrest Donnell in 1941.

If members know of persons who ought to be interviewed as a part of the oral history project, they are invited to send those suggestions to D. A. Divilbiss, Assistant Secretary/Treasurer, P.O. Box 448, Jefferson City, MO 65102.

Bingham Print Gift to Supreme Court



This proof copy of the engraving of George Caleb Bingham's famous historical painting, *Martial Law, or Order No. 11*, is a gift to the Supreme Court by James Sidney Rollins III, Columbia. The painting was Bingham's answer to the military order of Union Brigadier General Thomas Ewing, issued August 25, 1863, during the Civil War.

Ewing, who commanded the District of the Border in Western Missouri, issued the order after the raid and massacre at Lawrence, Kansas, by William Quantrill's Missouri guerrillas. It was devised to rid the border of Quantrill's men by removing the friendly population that supported, fed and hid them. Under the provisions of Ewing's order, all citizens residing in Jackson, Cass, Bates and half of Vernon Counties had to leave their rural homes, regardless of their guilt in supporting the guerrillas. The order, and the ruthless way it was enforced by Kansas Redleg militia, outraged Bingham who was an ardent supporter of the Union and an officer in the United States Volunteers. He protested to General Ewing without success and then reportedly said: "If you persist in executing that order, I will make you infamous with pen and brush as far as I am able."

In 1971-72, with the financial backing of Major



James Sidney Rollins and Robert Beverly Price, both of Columbia, Bingham, still pursuing his feud with General Ewing, engaged internationally famous engraver John Sartain to make a line and mezzotint engraving of his painting. Copies did not sell well and a number ended up in the hands of the Rollins family.

This proof copy was presented to the Supreme Court by Mr. Rollins in memory of his great-grandfather, James S. Rollins, the "father of the University of Missouri," and his father, Senator James S. Rollins II. Both men were prominent Missouri attorneys.

Missouri's Present Supreme Court



There are seven judges on the Missouri Supreme Court. They are from left to right: Edward D. Robertson, Jr., Robert T. Donnelly, William H. Billings, Andrew J. Higgins, Charles B. Blackmar, Warren D. Welliver, and Albert L. Rendlen.

**The Missouri Supreme Court
Historical Journal
Missouri Supreme Court
Jefferson City, MO 65101**

BULK RATE
U.S. Postage
PAID
Jefferson City, Mo.
PERMIT NO. 181