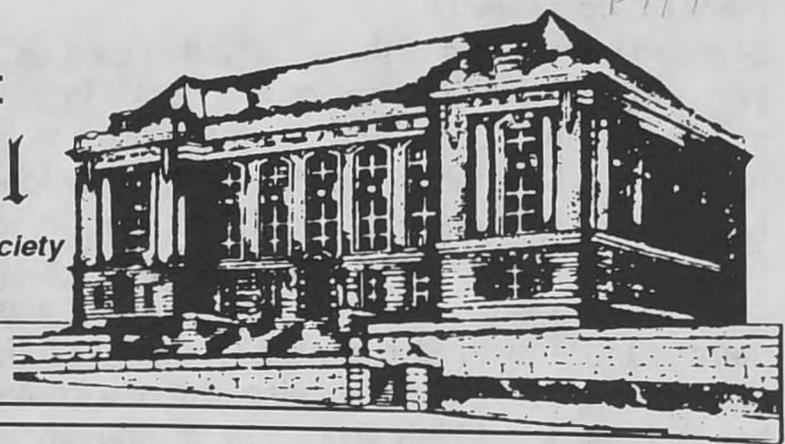


# The Missouri Supreme Court Historical Journal

Published by the Missouri Supreme Court Historical Society

Vol. 5, No. 4

OFFICE OF SECRETARY OF STATE  
MISSOURI STATE ARCHIVES  
July, 1995



## Holstein New Chief Justice for the Missouri Supreme Court

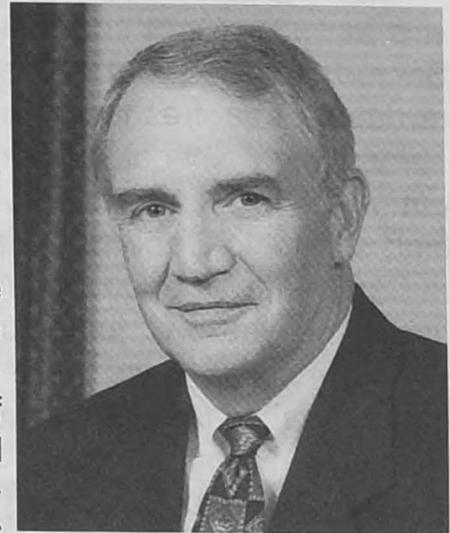
**J**udge John C. Holstein was unanimously elected to the position of Chief Justice of the Missouri Supreme Court on Thursday, March 16, 1995. He succeeded Ann K. Covington, the current Chief Justice, on July 1, 1995 for a two-year term.

A native of Springfield, Missouri, Judge Holstein received his bachelor of arts degree in political science from Southwest Missouri State University. In 1971 he received his juris doctorate degree from the University of Missouri-Columbia School of Law. He was awarded his L.L.M. earlier this year from the University of Virginia-Charlottesville. Judge Holstein served in the U.S. Army, the Army Reserves and the National Guard before going into private law practice in West Plains, Missouri.

In 1975, he was appointed Associate Circuit Judge of Howell County. After being reelected to that post, he was then named Circuit Judge of the 37th Judicial Circuit in 1982. In 1987, he was appointed to the Southern District of the Missouri Court of Appeals where he served as Chief Judge from 1988-1989. On October 11, 1989,

he was appointed to the Supreme Court by Governor John Ashcroft.

In his acceptance speech at his swearing-in ceremony December 1, 1989, Judge Holstein stressed the importance of continuing the tradition of judicial restraint and stare decisis established over the years by former members



*Chief Justice Holstein*

of the Court. He quoted several examples where both doctrines had been included and interpreted in decisions written by Judge Hamilton Gamble, a judge of the Supreme Court from 1851-1853. Judge Holstein concluded his remarks at that ceremony by saying "He (Hamilton Gamble) and ten thousand others like him have lit the lamps for me and the other judges of this court to show the way."

## Reminiscences of Judge Fred L. Henley

*(Editor's Note: Following is the transcription of an interview with Judge Henley made by D. A. Divilbiss, Librarian of the Supreme Court. The interview took place in September, 1985. Judge Henley had retired, but maintained an office in the Supreme Court Building. Judge Henley died December 31, 1994.)*

I was born October 25, 1911 in Caruthersville, MO. I am not Catholic, but I attended the Catholic school because my father's half-sister was Catholic after her marriage, and she influenced my father. This aunt lived in California. My

mother had died when I was eight years old. She was 27 when she died and this sister helped raise me and my brother. I started school when I was eight years old, which was about the time that children in this area started going to school. This was cotton country. Dad was a merchant in Caruthersville and he reared my brother and me. My grandmother on my mother's side was a money lender. She watched pennies closely. Someone who had been taking a correspondence course in law owed her \$20.00 or \$25.00.

*(See HENLEY, Page 2)*

*(HENLEY, from Page 1)*

She had heard me say that I wanted to be a lawyer, and she took that set of law books in part payment of the debt. There were 23 volumes in all. Anyway, I got that set and I read them before I got out of high school. In fact I think that I read them before I got out of grade school. I read more than anyone else in the family, until I was married to Bernice. She always read; she reads more than I do. Anyhow, I finished those books before I got out of high school. I read the whole set over three or four times.

Anyhow, I finished high school in Caruthersville in 1931. Eight years in grade school at the Sacred Heart School and one year at Cape Girardeau as a freshman in high school at St. Mary's High School. I intended to finish there, but we didn't have the money for me to finish high school in Cape Girardeau, so I came back to Caruthersville and finished high school there. I had three years of junior college in Caruthersville. The college was there for four or five years before it failed in 1933. Those were the only undergraduate courses that I had before going to the Cumberland University of Tennessee at Lebanon, Tennessee. They had a one-year law school.

At that time you didn't have to go to law school to take the Missouri Bar exam. Anyhow, I was admitted to the Bar in March, 1935. I took the Bar exam in Jefferson City, a three-day test at that time administered in the House chamber in the capitol building in July. It was February before I found out if I had passed because my license is dated March 28, 1935. It was after the first of the year. I was sworn in at Caruthersville by the circuit judge. They didn't have the swearing-in ceremony here that we do now; I went to a law day that they had there.

After law school and taking the Bar exam, I was broke and in debt. I went to work for what they called a relief office. Then I was called to active duty, was offered an opportunity to take active duty with the Civilian Conservation Corps, a CCC camp in Arkansas, as a second lieutenant, and I took it. I had a second lieutenant commission in the infantry reserves that I got at a CNTC camp, a citizens' training camp. It was something I started before I was 21. This was long before the war started. The CCC camp paid

better than the relief office, so I took that for six months and almost got out of debt

I came back to Caruthersville in the fall of 1935 and started practicing law in January of 1936. I started practicing law with an older man who had been a friend of my father's for a long time, by the name of Vaughn Mays. I had known him since I was a kid, went into his office to try to learn where the courthouse was, and what to do when you got there, what to do when you wanted to file a lawsuit. We didn't try very many things in those days, but I got a little experience. He didn't pay me any salary, understand; I just got what I was able to bring in. That was pretty common in those days; you worked for the experience. That was common practice, especially in the rural areas anyhow.

I served in the army during the war. A peculiar thing happened in connection to my going into the army. I had almost forgotten about my second lieutenant commission in the reserves. The war started in December, 1941, I had just turned 30, and Bernie and I had been married in August of 1939. Two years after we were married, the war started, and I was called back to active duty, remember with an infantry commission as a second lieutenant.

But I was called back to duty with the air force. I was 30 and a second lieutenant in the infantry had to be younger than that so, because of my age, I was assigned to the air force. I didn't fly a plane; I flew a desk all through the war. I spent the first three years, two-and-a-half years, stationed at Jefferson Barracks in an overseas replacement depot. I tried to avoid, and did successfully avoid, practicing law for the air force. I did have to sit on a few general courts, but I would say the most that I sat on was maybe three to six months the whole time I was in the service.

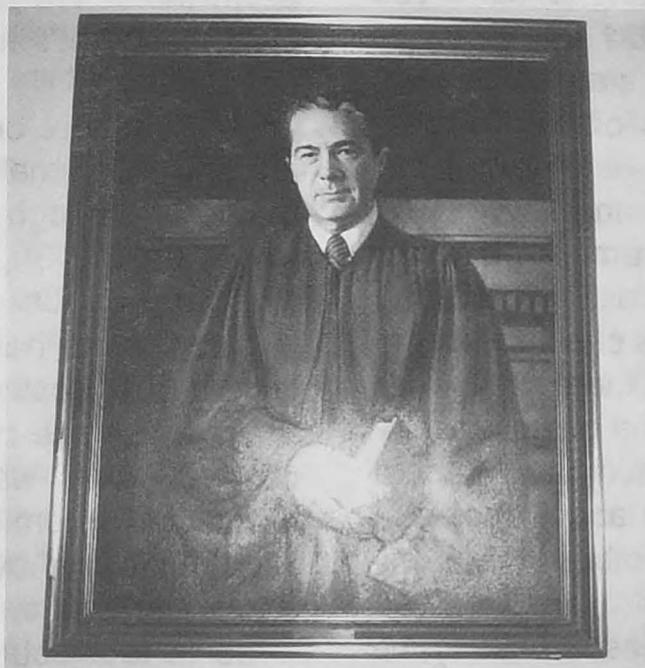
I wanted to try something else, and I had a friend in Chicago who was head of the personnel unit of the overseas replacement depot, and he was going to move up, and he persuaded me (and I was easily persuaded) to go into personnel. It was interesting, so that's what I did in the service. I spent the last year, about a year, year and a half, in Washington at the Pentagon. That is about the only place that the air force made any sense. I was part of operations analysis sec-

tion, which was one of the parts of management control headquarters for the air force. Our job was to get young geniuses and keep them out of the uniform and into civilian clothes doing such work as the effectiveness of bombing on Germany and France. My job was two-fold; one was to keep the young men that we got out of the service. One of the young men that we got was Martin Ernst from the family of CPA, Ernst and Ernst, and he developed a method of jamming the German radar, very simple, putting tin foil strips about 18 inches long and about one inch wide on a B-24. We had another fellow in the organization – he was a little too old to be available for the war – he discovered whatever it was that was causing the B-29 engines to blow up. They had a lot of trouble, lost a lot of men, had a lot of tests trying to get that thing ready for use during the later part of the war. He developed a motor for that thing.

It was while I was in Washington that I met John Marshall Harlan, later to become a justice on the United States Supreme Court. He was a member of a Wall Street firm in New York before he went into the service, and went in the service as a full colonel. He was head of the operation of the section of the 8th Air Force and when he was in Washington on leave, I had an opportunity to visit with him, a very interesting man. Anyhow, that was an experience.

After the war, I went back to Caruthersville where I opened a law firm and practiced law until I was appointed circuit judge in October, 1955. I was appointed by Phil Donnelly. A circuit judge from New Madrid died suddenly from diabetes. I served about four years as a circuit judge. I had to serve out his unexpired term, which I think was about a year and then ran again for a full term. Campaigning was not too expensive at that time; there was no opposition, at least during my two elections. The expense was the filing fee. I didn't serve for a full term, I think that I served for about five years, then I resigned and

went back to practicing law. We had two girls in college at the time; I knew that was going to happen, but I thought I could manage it. I could make more money practicing than I could on a circuit judge's salary. At that time, I think the salary was a little over \$11,000. We got a raise of \$1,000 during the time I was on the bench, so I resigned in February, 1960. Coming on the court could be a financial burden. I was exhibit A before the Judiciary Committee in the Senate having to do with all the circuit judges. After I resigned as circuit judge, I came up and testified before the committee to get the salaries raised. Judges' salaries are better now, but they still are not equal to what an attorney could make practicing law.



*Portrait of Judge Henley*

I have always been interested in politics, but not as a candidate for office. When I began to make money, I began to spend money for somebody else's elections. John Dalton and I were good friends. He practiced law next door in Kennett, just 20 miles away, while I was practicing law in Caruthersville. We both went to Springfield to the state Democratic Convention. I was always a supporter of John Dalton. I tried a lot of lawsuits with him and a lot of lawsuits against him, but we remained friends till

the day he died. We both went to a Democratic Convention in Los Angeles in 1968. Stuart Symington, for whom I had worked in 1952 when he ran for the Senate, and again in 1958, was a potential candidate for the nomination for President in 1960, so I spent a little time and a little money going around to Louisiana, Wyoming, Montana, Colorado, but mostly in Missouri.

John Dalton was elected governor in 1960. I had been very active in his campaign. I was trying to help him get a Caruthersville farmer, who was a wealthy man, to take the job as chairman of the State Highway Commission. It doesn't pay anything, just your expenses; it's more honorary than anything else. The vacancy would occur in

*(See HENLEY, Page 4)*

*(HENLEY, from Page 3)*

late 1961, but Dalton couldn't persuade him and I couldn't either. He didn't feel that he could spend the time he would have to do a good job. He was farming about 3,000 acres, had a cotton gin, was president of the First State Bank. He wouldn't have had to move to Jefferson City because they had a plane that would come down to get you and bring you back.

So we failed. One Sunday morning in November, 1961, Dalton called me and said "You can't afford to do this, and I don't have any business asking you, but I've got to have someone I can trust as chairman of the Highway Commission." He was right; I couldn't afford it. He said "I'm going to appoint you in the morning whether you want to or not. Will you take it?" I said "Yes, go ahead." I figured that I would stay for a year, maybe. So I became chairman of the Highway commission.

I had a partnership with a young lawyer who had been sharing an office with me for a while, John Fowlkes, who is still down there, and he made a living for me while I was chairman of the Highway Commission. I stayed there until I was appointed to the Court. It was one of the most interesting jobs I ever got in. I could have made a career out of it. I learned more about people in those three years than at any other time in my life. It was great.

I was appointed to the Missouri Supreme Court in April 27, 1964, by Gov. John Dalton. We were under the Non-Partisan Court Plan by this time. I would not have run for the office if I had had to put on a statewide campaign. From what I had seen from the time that I had become a lawyer and the time I was practicing law, an election could almost wipe out the Supreme Court. If you had three Democrats on the ticket, and you had a Republican being elected on a national ticket, a landslide would wipe them out along with the rest of them. This is what happened one time in St. Louis.

I was on a panel of three. When I came on the court it really wasn't much of a financial problem. I think that the salary was \$22,500 at that time. In actual dollars at that time there was \$1,000 between my salary and my law practice. I was getting to the point where I was going to start

making some money. There were three or four years between the time I resigned the circuit judgeship and started practicing law and accepted the chairman of the Highway Commission that I had begun to develop some sources of lifetime clients that couldn't help but grow as long as I took care of the business. We were going to get another young man in the office about a year before I came up here. I think that at that time we would have paid him about \$1,000. I had the expense of moving and I had to buy my library, had to buy the Southwestern Reporters both first and second series. Of course, I had a fine set, but I couldn't go off and take them with me. I still have an interest in that office building down there. We bought that after I resigned as circuit judge; it's right across the street from the courthouse.

I was up here on some kind of business when a friend called me from Cape Girardeau and said that I had enough IOUs in my pocket if I wanted to get on the Supreme Court and if I had any trouble at all just give him a call and he would give me some help. So I used some of the fellows he suggested that he had talked to in St. Louis who were on the Appellate Judicial Commission. One was a close friend of Stuart Symington whom I had known, so I called him. I went out to his house and talked to him out there and it just happened that he had received a call three or four hours before from Stu Symington, not about me but about something else. Stu said "You know Fred Henley, from Pemiscot County?" and he said yes, he did.

So I had a long visit with this man in his home. I had never seen him before. I didn't ask him to make any promises and he didn't, but I sort of felt that with my friends talking to him he was leaning in my direction. I saw all the members of the Appellate Judicial Commission; went all around the state. You have to do this if you are interested in the job. I thought I might be making a mistake going on the bench, but I thought that I would take a chance on it. It turned out to be no problem at all. As a matter of fact, two years after I came on the court, I had some interest in some land in southern Louisiana that produced some oil and gas that paid more than my salary. Made more money that I could have practicing law.

Henry Eager was Chief Justice when I came on the court and was Chairman of the Appellate Judiciary Commission. He was from Kansas City and I didn't expect him to be for me, and he wasn't; he was for Tom Stubbs, a man for whom I had a lot of respect. He would have made a great judge. One of the best trial lawyers in the state - Jim Ed Reeves - in Pemiscot County, kept the local bar association from recommending me.

I think the cases that had the most impact on the workload on this court were the decisions of the U.S. Supreme Court concerning the criminal cases. Like Miranda, Escobedo. Both of which I agreed with, but that loaded the Supreme Court of Missouri, just loaded us down because at that time our jurisdiction was that we had to hear all of the appeals that came up involving a felony and we were getting them by the hundreds. We were meeting in divisions then; we had thirteen men then, the commissioners were writing most of the decisions especially in the criminal field, but we were calling in judges from the courts of appeals and some trial judges. We were having five sessions a year at that time, starting in September, November, January, March and May. We would be here writing decisions of cases after May that we had heard back in November

I think that it was in 1970 or 1971 that the jurisdiction was changed. There was an amendment to Article 5 of the Missouri Constitution, the last full year that I was Chief Justice. I was Chief Justice in July, 1969 and that lasted through June 30, 1971. But the court of appeals didn't get all of the felony cases until the Constitution was amended again. That happened in 1978. They got a few in the 1971 change, but they didn't get all of them until 1978.

Another important U.S. Supreme Court case around that time was the Goldfarb case in which the court eliminated the recommended fee schedule charged by the lawyers in Missouri. That made quite a change in the way lawyers charged their clients.

We had a clerk, Marion Spicer, who was a fine man, but he was a pinch penny. It's fine to save money, but we didn't have anything to work with. Sometimes we had to go down and get two or three pencils at a time and not more than two or

three tablets at a time. I remember one time I could only get one tablet because that was all that they had. They kept them in the vault down there. I made a darn fool statement one time that we didn't have enough paper clips, and if I saw one on the sidewalk, I would reach down and pick it up and put it in my pocket and it got in the paper. That didn't hurt any, but it was a little embarrassing.

Before I became Chief Justice, Judge Laurence Hyde had been trying to get us a Court Administrator and some law clerks. When I became Chief Justice, the President Pro-tem, who was a friend of mine from Caruthersville, and I, started working on trying to get a Court Administrator and law clerks for the court. That was in 1969, but I wasn't having any luck. We couldn't get any money. Ted McNeal, Chairman of the Senate Appropriations Committee, called me one morning, and told me he could get us enough money for four law clerks. Of course, what we wanted was seven with a salary of \$12,000 for each one. He said all I can do is get you four; that's better than nothing. He said we can get you a Court Administrator, but we can only get you a total of \$20,000, and we were asking that much just for salary of the Court Administrator. So I said that we would have to take it if you can get it for us.

Tom Clark, retired U.S. Supreme Court Justice, had been here at one of our state Judicial conferences. He was working on a project for the U.S. Supreme Court for the state courts to correlate their rules with their statutes. He came by here and talked to us about it, and said that it would cost about \$5,000 to do what was needed to be done. We didn't know where we would get \$5,000 and he came up with a place where we could get the \$5,000. That is where we heard about LEAA. So, anyhow, Tom Simon was working with LEAA then and Jim Parkinson, too, and we got \$36,000 for the other three law clerks. We got an uncertain amount for supplies for expenses for a Court Administrator for the first year.

We were waiting for Wayne Buckner to take over as Court Administrator. We had interviewed him in Denver. He was in that institute for Court Administrators at the University of Denver Law School. He graduated in December and we got

(See HENLEY, Page 6)

*(HENLEY, from Page 5)*

him then. There was a little cubbyhole down under the stairs; that's where he started to work. Wayne started the Executive Committee at the beginning of my tenure as Chief Judge. The Legislature had accused us of not having any continuity in the Chief Justice office. We were determined to do something about that.

There was a real simple answer to it. The Chief Justice and the next two men up in rotation which, at that time, turned out to be Finch and Donnelly, perfect as far as I was concerned. I knew Finch better than I knew Donnelly; we had practiced law in the same neck of the woods. It worked out fine. It continued after I left, for a few years anyhow, the so-called Executive Commission. We didn't make any decisions; we talked about money and the budget and how much to ask for and how to handle the people across the street.

The law clerks took a lot of pressure off of the judges. At first it was hard because they didn't know what to do, but it got better as time went on. We didn't have any constitutional or statutory authority to employ law clerks or court administrators, so we included a provision in the next amendment to the constitution to authorize that, but we did it through our inherent power. I wrote the first rule on hiring both a Court Administrator and the law clerks. We were asked what authority we had to use this money we got from LEAA, so we pointed to the constitution. We had established long ago under our inherent power that the court could employ the necessary people for the normal function of the court and the normal function of the court includes a court administrator and law clerks. We were one of five state supreme courts that didn't have law clerks and the same was true of court administrators. On the east and west coasts, they all had court administrators.

On Bar Committees, the only one that I have a recollection of is the Cosgrove Committee that was concerned with amending the Judicial article. We worked for a couple of years, what we did had some influence, the article that we drafted didn't become a part that was submitted to the legislature, because we were going around by the initiative petition so we had a lot of

drastic things in there that the legislature would not have bought and didn't buy. That is the only committee that I recall. I did serve on other committees, but I don't remember what they were. We did work on some suggestions to the ABA Code of Judicial Conduct while I was Chief Justice. We were prompted by the ABA to do that; they had been working on it for several years and they had just presented their ideas to us. We wanted someone to take a look at it and see what Missouri should do. We felt we probably would make some changes. We didn't think that we would buy all of it, and we didn't, but we did accept most of it..

While I was Chief Justice, we censured a circuit judge in St. Louis County. We had been checking on what the trial courts were doing, the shape of their dockets. We got the court administrator involved, and we ran into a heck of a problem. That judge and some others had some cases that had been submitted two years before and still were not decided. We were a little anxious about doing anything about it because some of us were guilty of doing the same thing, not that bad, but we weren't up to date. There wasn't much being said about it. Our first knowledge of what was happening came from some lawyers in St. Louis County about what this judge had been doing about postponing cases, some he had just lost.

Anyhow, we issued an order requiring him and several others at the same time to get their docket cleared within a certain time period. They all did except this judge and so we censured him; issued an order and I think suspended him until such a time as he got his docket cleaned up. No more cases were to be assigned to him. It wasn't suspension without pay or anything like that. We probably had the authority to do it, inherent authority that is, but we didn't. It wasn't long after that he got his cases caught up, but I think that it was about a year after that he resigned and not long after that he died.

The Court had always had authority to supervise the lower courts, but only through extraordinary writs. The Bar Disciplinary Committee in Sedalia felt like it was questionable whether they had any authority over a judge. If something had happened and the judge had violated some law

# Federal Justice in Western Missouri

*Federal Justice In Western Missouri: The Judges, the Cases, the Times, by Lawrence H. Larsen (304 pages; University of Missouri Press). Reviewed by D. A. Divilbiss, Former Missouri Supreme Court Librarian*

**T**he historian's job is never an easy one. Bringing back to life people who lived hundreds of years ago, restoring excitement to events centuries old requires not only dates and facts but a great storyteller. The task is even more daunting when the history to be written, and the stories to be told concern a court, a federal court at that. Federal judges are not easy to please as any lawyer will testify. Dr. Lawrence H. Larsen, History Professor at the University of Missouri-Kansas City, accepted this challenge in 1988 and 6 years and 5000 research hours later has written an excellent and very readable history of the court in his book *Federal Justice In Western Missouri; The Judges, The Cases, The Times*.

Covering the period beginning in 1822 and ending with 1961, Dr. Larsen notes that the court had a some what inauspicious beginning, since the Western District Court originally sat in St. Louis, which is now the Eastern District, and the first judge, James Hawkins Peck, managed to survive an impeachment trial.

The portraits Dr. Larsen draws of each judge are fascinating. The biographical sketches present intelligent energetic real people. The majority are from large families, raised in small rural towns, attend local public schools and read law in law offices before passing the Bar Exam. Judge Merrill E. Otis, sworn in to office in 1925, was the first judge to receive a law degree from a law school. All are portrayed as the educated men of their time with a feeling of responsibility to use their education for the benefit of the public to create a judiciary with the highest standards possible.

The cases discussed cover a wide range as imagined in the formation of the state. Starting with the land grant cases to settle the disputes of land awarded by the Spanish rulers, Dred Scott, the slavery issue, Cummings v. Missouri, restoring civil rights of the Confederates, the Weeks case, dealing with illegal search and seizure, established the current "Exclusionary" rule, and the Gaines case, dealing with segregation of the

Missouri University Law School, established the "separate but equal" doctrine in Missouri.

One entire chapter is devoted to the problems encountered in breaking the Pendergast machines hold on Kansas City. Starting in 1933, through a series of vote-fraud cases (280,000 voters in a population of 400,000) and income-tax invasion proceedings, the stage was set that lead to Tom Pendergast's downfall and sentence to jail. He was a powerful boss who had ruled city, state and federal government for over six years.

The last cases discussed are the Judith Coplon spy trial, the Greenlease kidnapping trial and the Kansas City Star monopoly case where the paper was found guilty and fined 1 million dollars.

During the time period Dr. Larsen has selected, we see how the judiciary dealt with the formation of the state, the problems of a divided state during the Civil War, World War I, the Kansas City Massacre, the criminal problems associated with the Prohibition era, the Depression, the effect of Roosevelt and his New Deal and finally World War II. It is also the history of Kansas City growing from a town to a city.

Dr. Larsen has included an "essay on sources" and an extensive valuable bibliography. The Forward by Harry A Blackmun, Associate Justice, U. S. Supreme Court, 1970-1994, sets the stage for this most informative record of the tradition and formation of the federal judiciary in Missouri



# In the matter of the Impeachment of Judith K. Moriarty, docket #77363

Preparing for a historic trial is never easy but it becomes doubly challenging when an appellate court room is transformed into a trial court room and appellate judges become both trial judges and jury. Both challenges were met on the morning of December 4, 1994, when, for the first time in the history of the court, an impeachment trial of an elected state official began. The impeachment trial of Secretary of State Judith Moriarty took place in what is officially designated as the En Banc courtroom of the Missouri Supreme Court building.

Even before a person entered the building that morning, it was evident something different was taking place. Surrounding the building were huge television trucks ready to relay the proceeding of the impeachment trial to television stations all over the state. At one point, one of the trucks parked on Washington Street's steep hill broke from its moorings and went careening down the hill. Luckily no one was hurt.

This was the first time the court had been called on to fill its role in conducting an impeachment trial of an elected official. The state constitution passed in 1945 had mandated that the Missouri Supreme Court assume this responsibility. Previous constitutions has assigned this role to the state senate.

Inside the building, it was obvious there were a lot of changes. The Division 2 courtroom, located on the west end of the second floor, was given over to the media and was full of modems, wires, television monitors and members of the press from about 20 stations and newspapers from around the state. The court had appointed a media coordinator to process applications and to insure that each television and newspaper arranged and paid for all the necessary equipment that they would need.

Security was much in evidence. People leaving the elevator or taking the stairs to the second floor were limited to the main hallway. The side hallway leading to the judges' conference room and to the private offices of Judge Elwood Thomas were cordoned off with gray velveteen rope hung between heavy metal stands, thus restricting access to these areas. These had been borrowed from the capital security for the dura-



*Television satellite trucks outside the Supreme Court Building transmit live broadcast of Moriarty trial.*

tion of the trial. A large table had been placed at the end of the hall at the entrance to the courtroom. Two guards were present at all times; one who normally worked at the capital was on loan to the court for the week. Everyone entering the courtroom was subjected to hand-held metal detector searches. Briefcases and purses were also inspected. Only one door was available for entrance into the courtroom.

Witnesses were confined in what was normally referred to as the lawyers' room. The door from that room into the courtroom was kept locked at all times. When witnesses were called to testify, they were escorted to the witness box by the Supreme Court marshal into the courtroom through the single entry door.

Inside the courtroom, a "bar" had been installed to separate the public from the area used by the lawyers and Mrs. Moriarty. This was done by moving the mahogany wooden barrier that usually separated the area where the recording equipment was located from the lectern where the lawyers normally present their arguments. By bringing in the identical barrier from the Division 2 courtroom, the area was divided off for the prosecutor, defense lawyer and witness box, as well as being separated from the public interested in viewing the proceedings. A member of the clerk's office sitting in this area and monitoring the recording equipment acted as bailiff and

*(See MORIARTY, Page 9)*

# Honorable James Harvey Birch

*(Editor's Note: This biographical sketch of Judge James Harvey Birch is taken from remarks of Missouri Supreme Court Judge William H. Leedy made at the presentation of the portrait of Judge Birch to the Court.)*

James Harvey Birch was the son of a clergyman and was born in Montgomery County, Virginia, on March 27, 1804. The family removed to Kentucky while James Harvey Birch was still a boy, and located at or near Cynthiana in that state. The father died in 1821, so that the son was then about 17 years of age. Thereafter, James Harvey Birch studied medicine, to which he soon developed a dislike and abandoned it, and commenced the study of law in the office of Honorable John Trimble, then one of the judges of the Supreme Court of Kentucky. He was apparently admitted to the bar in Kentucky as soon as he became of age.

In 1825, Mr. Birch married a daughter of Daniel Halstead of Lexington, Kentucky, and for about a year thereafter resided at Louisville. In the latter part of 1826, he removed to St. Louis and was employed in the editorial department of

the St. Louis Enquirer, a Democratic paper which had been started and for sometime edited by Senator Thomas Hart Benton. He remained in St. Louis only a short time, and in July of 1827, removed to Fayette, in Howard County, Missouri, and there established the Western Monitor, a weekly newspaper which at that day was said to have been "the most western paper published in the Union."

His first office was that of Clerk of the House of Representatives in the Missouri General Assembly in 1828-29. At the next session, he was made Secretary of the Senate, and in 1832 he was elected to the State Senate from the district composed of Howard and Randolph counties, in which, though the youngest member, he was made Chairman of the Joint Committee to Revise the Statutes, which then, as now, was a very responsible and laborious position. He served during one session of the Senate, but before the expiration of his term he resigned to enable himself to devote more time to his

*(See BIRCH, Page 10)*

*(MORIARTY, from Page 8)*

swore in each witness. The witness box, built specially for the trial, had been stained dark brown to match the color of the mahogany wood in the room. This was placed in front of the portrait of the Honorable William Williams, a former judge of the court. The court's marshal sat next to the witness box with a two-way phone used to call witnesses who were then escorted in to the room to testify.

As the trial started, there were a few objections voiced by both lawyers during the opening statements. These were dealt with by Chief Justice Ann Covington in agreement with the other judges. At the end of each witness's testimony, Chief Justice Covington asked if any judges had questions. The judges did have questions for Nadine Barrows, whose testimony was conflicting with earlier accounts of her actions concerning the filing of Mrs Moriarty's son, Tim Moriarty, for a seat in the House of Representatives. They also questioned the computer expert from St. Louis called by the defense who testified a file had been deleted from the computer on the day Tim Moriarty was sup-

posed to have filed for office.

The trial lasted for an entire week ending around noon on Friday, December 8. The unanimous decision finding Mrs. Moriarty guilty of an impeachable offense was handed down on December 12, 1994, thus bringing to a close the first time the Supreme Court had acted like a trial court.



*The Supreme Court Division II courtroom was equipped with numerous computers and served as newsroom for print and broadcast media covering the trial.*

*(BIRCH, from Page 9)*

profession and to the publication of his paper. In 1843, he was appointed by President Tyler as Register of the Land Office at Plattsburg. He later that year established that office and removed to Plattsburg, where he continued to maintain his residence the rest of his life.

He was appointed Judge of the Supreme Court in 1849 by Governor Austin A. King, who was the 11th Governor. It would appear that Judge Birch was either the 12th or 13th person appointed to occupy the position of Judge of the Supreme Court.

Judges of the Supreme Court had theretofore been appointed for terms during their good behavior, but in 1849 a change was effected, as thus described by Honorable John O. Broadhead of the St. Louis Bar in his "Reminiscences of Fifty-years of Practice": "By an amendment to the Constitution, proposed by the General Assembly in 1847 and ratified on the 11th of January, 1849, the offices of the Supreme Court Judges became vacant on the 1st of March, 1849, and the Governor was authorized to appoint the Judges of the Supreme Court to hold their offices for terms of twelve years."

Judge Birch was appointed under the provisions of this amendment, his term being designated as a 12-year term. The record in our Clerk's office shows that at the March Term, 1849, which was held in the City of St. Louis, "on Monday, March 19 \*\*\*\* personally appeared Honorable John F. Ryland and James H. Birch, Judges of said court, and presented their commissions with the oath of office endorsed thereon from the Governor of the State of Mis-

souri authorizing them and empowering them to act as such judges." The same record further shows that Honorable William B. Napton appeared and presented his commission on March 22.

But the matter of judges' tenure was abruptly changed at about this time, as will appear from further portions of the Broadhead article, viz., "At

the same session of the General Assembly another amendment was proposed and voted for by a majority of two-thirds of both houses, making the Judges of the Supreme Court elective for the term of six years, the first election to take place on the first Monday of August, 1851.

This amendment was ratified by the General Assembly by a like vote of two-thirds of both houses as required by the Constitution, and the offices of the incumbents were vacated by the terms of the amendment. \*\*\*\* At

the election provided to take place on the first Monday of August, 1851, Hamilton R. Gamble, John F. Ryland and William Scott were elected \*\*\*\*," James Harvey Birch not having been a candidate.

From the biographical material I have been able to gather, there is unanimity of opinion that Judge Birch was not content in the role of judge, but wanted a more active participation. He had a strong desire to go to Congress, and several times was a candidate, but, as described by chroniclers of that day, he suffered defeat.

Honorable W.V.N. Bay, in his "Reminiscences of the Bench and Bar of Missouri", said of Judge Birch in this connection, "His mind was of that sort which required the stimulus of excitement to



*Portrait of Judge James Harvey Birch*

develop his resources, and had he succeeded in obtaining a seat in Congress, and retained it for a sufficient time, he would doubtless have made his mark, and, in all probability, secured a national reputation, which others of far less ability have done."

This reference to Judge Birch's taste for public life and his Congressional aspirations is found in "The Supreme Court of Missouri" by L.C. Krauthoff, as taken from "The Green Bag" (Boston, April, 1891) : "Evidently his tastes were for a public life, for he was of an affable disposition, a ready writer, and an orator of no mean ability. \*\*\* Judge Birch's ambitions were for Congressional honors. He felt that his abilities would be in their appropriate sphere in Congress, but was not successful in his candidacies for the seat."

Judge Henry Lamm in "The Pettis Bar" as contained in "The Bench and Bar of Missouri", published in about 1895, quotes Judge Birch on the subject of his political career, as follows: "He (Judge Birch) said, 'I have had, sir, in my long and eventful life, the devoted services of faithful and intelligent friends. No man ever had more enthusiastic and loyal followers than I, but the trouble with me, sir, has been that I have not had enough of them.'"

In the same article, Judge Lamm writes interestingly of the first session of the Circuit Court of Pettis County, at which session Judge Birch was in attendance. "Judge Birch was a man of noticeable dignity of manners and person. It has been related to me that to the day of his death he affected the courtly blue coat and brass buttons and high stock of the old-time gentlemen, and the dignified and impressive forms of speech belonging to the times of the stately minuet. When the son of an old-time friend called on him shortly before his death, he said with great courtliness, 'I am delighted, sir, to greet the distinguished son of my cherished friend, and on your return you will do me the kindness, sir, to make my compliments altogether acceptable to your father.'"

Other biographical references to him follow: "He was a lawyer of eminence, an orator of merit and a pungent and caustic writer; versatile and finished in composition, refined and elegant in diction, and enriched his speech and writings with copious and trite quotations of Latin and from the

classics. \*\*\* He was tall, erect, commanding in person, polished in manner, fluent in speech, facile and sarcastic with pen, vain of his learning, influential in his party, a leader of Democracy, restless and impatient with ambition, and vindictive and intolerant in disputation. Through all the vicissitudes of an active and eventful life, he retained unimpaired his vigorous constitution and robust health. 'Chastened by time, undimmed by age.' 'A combination and a form, indeed, where every God did seem to set his seal to give the world assurance of a man.' He died at an advanced age on his ample and beautiful estate amid his books, surrounded by his devoted household, venerated and beloved by his neighbors." (Banton G. Boone, in "Bench and Bar of Missouri", p.377)

In the same work, Thomas Shackelford, a prominent Central Missouri lawyer of earlier times, said of Judge Birch: "As a boy I remember him as one of the most eloquent men I ever heard. He was afterwards Judge of the Supreme Court, and wrote the first opinion on that subject, and the one which settled the law with regard to the manner of calculating interest in this state." (p. 399)

Upon the death of Judge Birch, the **Jefferson City Daily Tribune** of January 13, 1878, reprinted an extensive article from the **St. Louis Times** in which his career was reviewed at some length. Among other things, the article pointed out that "In the canvass of 1828 he supported Jackson for Presidency, as he did again in 1832. But Democratic as he always was in sentiment, he inconsistently, as his political associates charged, voted against Van Buren in 1836. The Jackson-Calhoun quarrel probably had much to do with this, as he was always known as an ardent admirer of the latter. In 1840 he was again out of line with the Democracy, as he supported Harrison for the Presidency that year. Excepting in these two diversions, however, he was a warm and earnest, as he was an able supporter of Democratic men and Democratic measures."

Judge Birch was a member of the House of Representatives (Missouri General Assembly) in 1849 when appointed as Judge of the Supreme Court.

(See **BIRCH**, Page 12)

*(BIRCH, from Page 11)*

During that session of the Legislature he found his position as Representative one of convenience and utility in furthering the movement to defeat Senator Thomas Hart Benton for re-election. That movement ultimately succeeded in 1851 when the General Assembly, after a prolonged and bitter contest, elected Henry S. Geyer as Benton's successor.

Judge Birch held his judicial post until the election of 1851 (or, as some of the references say, 1852) when he declined to become a candidate to succeed himself. Shortly after leaving the bench, he was again appointed Register of the Land Office by President Pierce, and thereafter re-appointed by President Buchanan, and he held such office until the end of the term of the latter.

In 1861, he was elected to his last official position, that of delegate to the Missouri State Convention, which had really been designed as a secessionist movement, but to which Union adherents elected a majority of the delegates. In commenting on his services as a member of this convention, the Jefferson City Tribune's article above mentioned said that he there "took a firm and leading position on the side of the Union. In the unfortunate dissensions and divisions which grew up among the Unionists in 1862, he took sides with the better element and ranked himself among the Conservatives.

Owing to his determined and unyielding adhesion to whatever he deemed the right, naturally and necessarily, in his section of the state, he suffered no little annoyance equally from the Radicals and Confederates, as one or the other held sway. In these complications he was often accused, several times arrested, but never tried. In fact, it may be truly said there was never anything in his sentiments, his conduct, or his action worthy of accusation." The concluding sentence of the article is this: "For more than thirty years he has resided on a large and highly improved farm near Plattsburg, which he aptly designated as 'Prairie Home', and there, with a fine library, unostentatious yet elegant surroundings, he passed his declining years, taking his final departure at the age of 74, leaving a more than ordinarily distinguished name, and honored by a

very large circle of no less distinguished friends."

W. M. Paxton, in his monumental local history "Annals of Platte County, Missouri" took note of the passing of Judge Birch in this language (p.652): "Jan. 10, 1878 - Judge James H. Birch died at Plattsburg. He was a son of Thos. E. Birch and was born in Virginia, March 27, 1804. He was a tall, handsome, and urbane gentleman, cordial and condescending in his address, and discreet in his words and actions. As an editor, register of the Plattsburg land office, an earnest Union advocate, judge of the Supreme Court of the State, and candidate for Congress, he was well known and much admired by our people. But his political career was erratic, and he was often defeated in his aspirations. He never resided in our county, and we can only refer to him as a good, true, and intelligent Christian gentleman \*\*\*"

Judge Birch was twice married; first to the daughter of Daniel Halstead of Lexington, Kentucky; his second wife was the daughter of Fitzhugh Carter of Fairfax County, Virginia. Of his four children, one (Sally) became the grandmother of the donors of this portrait, the Frosts, and another one of whom, a son, James H., became a leading lawyer of Plattsburg, and served a term in the State Senate from that district. He was the author of the bill by which State Hospital No. 2 at St. Joseph was created.

This court was a three-judge court in Judge Birch's day. It may be that on that account the individual responsibilities of the judges were correspondingly greater. On that I express no opinion. Judge Birch's opinions are reported in Volumes 12, 13, and 14 of the Missouri Reports, thus antedating the Southwestern Reporter. In recent days I have hurriedly scanned some of his opinions, and I was impressed by his clarity of expression and the logic of his conclusions. The cases then were of a different type than presently encountered on our dockets. A great many of them had to do with slaves. In a quick glance, I failed to find a single personal injury action. As the only appellate tribunal in those days, some cases of insignificant monetary value found their way here. I recall reading one of his, I believe, in which a controversy concerned re-

*(See BIRCH, Page 13)*

*(HENLEY, from Page 5)*

while he was still a lawyer, before he became a judge, they could go after him about that, but not something that he did as a judge. We were anxious to get that article in the constitution amended, so in the 70s, early 71, we got the Commission on the Retirement, Disability and Removable of Judges. Before that we had a committee that could retire a judge, but didn't have any real authority to discipline. They could retire a judge for incompetency or illness. The trial courts were a law unto themselves; that's where all the work was. That's where the public sees the court.

I would like to see the Non-Partisan Court Plan extend down to more of the circuit courts. I don't know how the public would accept it; today I don't think that it would carry in an election, there is too much opposition to it. It would have to be done by an amendment to the constitution.

The present clerk's office takes a more active part in the court than it did when Marion Spicer was Clerk; Tom Simon is the best thing that ever happened to the Supreme Court of Missouri. I don't always agree with all that he does, but I wouldn't want to see him go some place else.

The Judicial Conference has changed considerably. When I started going to the conference back in the mid-1950s, very few judges or lawyers took their wives to the conference. They weren't welcome. Before I resigned as circuit judge, that had changed. I didn't have anything to do with it. The judges did attend; it was mandatory then as it is now. I'd say about 90 percent attended. There was always a big crowd, but it wasn't anything like the number that they have today. Today they have all the magistrates and the probate judges too who have become associate circuit judges. That's the way it should be and all of them take their wives. I think that it is important that judges take their wives to places like this so the wives will have an idea of what's going on. I think most of them enjoy it.

I think that having women coming into the profession is making a difference in the profession. I had Debbie Daniels as my law clerk. Women are taking their place in the profession, and there are going to be some outstanding lawyers among them. There will be a different influence, not only on the profession, but also on the judiciary. We will have a woman on this court one of these days.

Concerning a decision about wearing robes, you've heard that story about S.P. Dalton. Dalton was opposed to it. It was after I went on the court that we decided to wear robes. There may have been a few of the judges in the trial courts who were wearing robes. Dalton died in 1965, and I would say that it was less than a year after that we donned the robes. I kinda think that Judge Henry Eager was opposed to it a little bit; I'm not sure. The only opposition was that they never had done it. I don't remember seeing a picture of the judges on the bench where the judges weren't wearing suit coats. However, I once wore a sport coat. I still have the coat. I would not have worn a sport coat, but we were going to have a short session and I had forgotten that we were. I had on a sport coat so I wore it. I wasn't going up there without a coat. Anyhow, we did get the robes, and then the trial courts began to do it. At the Judicial Conference, we started encouraging the trial judges to start wearing robes. We figured they ought to wear robes; they were doing all the work. Sometimes we could use the Judicial Conference to influence changes in the trial courts. It's nice where you have everyone sitting around at a meeting; everyone is congenial when you are outside of the business meetings, you are sitting around visiting, you get some things done like that.

---

*(BIRCH, from Page 12)*

pairs to a steamboat, aggregating \$106.00. There were relatively few local precedents to follow in those days, contrasted to this. I think what a joy it would be to have only ten volumes of reports from which to work. In consequence, cases in those days were decided upon principle rather than precedent. Many, if not most of the cases I examined, involved questions of statutory construction. A critical examination of the quality of Judge Birch's work as a jurist will attest the luster which attached to his name, and which, in turn, is reflected upon his progeny.

We are grateful to the Frost family for this unique contribution to the gallery of the court; to have had presented the portrait of one who served 110 years ago is, indeed, unique, and the court is exceedingly grateful for your kind and generous tender of this handsome likeness of one of our former members. It will take its place among the others that grace these walls.

# Annual Meeting of the Supreme Court of Missouri Historical Society



*Dr. Lawrence N. Larsen, speaker for the evening.*

The ninth annual meeting of the Supreme Court of Missouri Historical Society was held October 29th, 1994, at the Jefferson City Country Club in Jefferson City, MO. Forty-four members attended the reception starting at 6:00 p.m. followed by a dinner at 7:00.

After dinner President Thomas A. Vetter gave a review of the activities of the Society for the past year. He mentioned that the Society had funded the cost of repairing a hole in the canvas of the portrait of Judge John C. Brown. In April, President Vetter and D. A. Divilbiss conducted a tour of the Supreme Court building in connection with the spring meetings of the Missouri Bar. The tour included visiting the Clerk's office, the offices of the Attorney General, the Library, the En Banc courtroom and the private offices of

Judge Duane Benton. President Vetter announced that a membership drive was to be launched in November and that 12 new members has joined after attending D. A.'s retirement party.

President Vetter then called on Mr. David Brydon to give the report of the Nominating Committee. The following officers and trustees have agreed to serve for another year:

- ❑ Chairman of the Board William H. Leedy
- ❑ President Thomas A. Vetter
- ❑ 1st Vice President Mrs. Sinclair S. Gottlieb
- ❑ 2nd Vice President William A. R. Dalton
- ❑ Secretary-Treasurer David Brydon
- ❑ Asst. Secty.-Treas. D. A. Divilbiss

Trustees (Three-year-terms) Ronald K. Barker, Avis G. Tucker, John S. Black, Senator Emory Melton

Mr. Brydon then read the Treasurer's report, copies which were distributed to those present, and also printed elsewhere in this copy of the JOURNAL.

President Vetter turned the meeting over to our speaker for the evening, Dr. Lawrence N. Larsen, Profession of History at the University of Missouri-Kansas City. Dr. Larsen spoke of his forthcoming book titled **Federal Justice in Western Missouri: The Judges, the Cases, the Times**. The book covers the history of the court from 1821 to 1961. Dr. Larsen said that he started working on this project in 1987 and estimated that he has more than 5,000 hours of research involved in producing the book.

He mentioned several highlights covered in the book, such as the court's first judge was impeached, but not removed from the court, the problems in bringing down Boss Tom Pendergast, the "Bald Knobbers" defeat by the Federal agents, and how Judge Van Valkenbaugh's decision in 1911 upholding a warrantless search was reversed by the U.S. Supreme Court establishing the "Exclusionary rule" that states evidence obtained in an illegal search can not be used in court. A review of the book appears in this issue of the JOURNAL.



*President Thomas A. Vetter shares a light moment with Chief Justice Ann K. Covington (center) and Mrs. Henry Andrae.*

SUPREME COURT OF MISSOURI HISTORICAL  
SOCIETY TREASURER'S REPORT OCT. 1994

BALANCE ON HAND - OCT. 15, 1993

|                      |                  |
|----------------------|------------------|
| Checking Account     | 2,753.11         |
| Money Market Account | <u>63,460.99</u> |
|                      | 66,214.10        |

INCOME, OCTOBER 15, 1993 TO SEPTEMBER, 1994

|                                  |                 |
|----------------------------------|-----------------|
| Membership dues                  | 6,630.25        |
| Royalties from sale of Book      | 714.40          |
| Interest on Money Market Account | <u>1,731.96</u> |
|                                  | 9,076.61        |

EXPENSES, OCTOBER, 1993 TO OCTOBER, 1994

|   |               |
|---|---------------|
| James J. Fisher - Mileage and honorarium  | 575.00        |
| Brown Printing - Letterhead   | 100.00        |
| Holiday Inn - Annual Meeting  | 1,189.56      |
| U. S. Postmaster - Postage and Bulk Mail Permit   | 305.47        |
| University of MO. Press - Books sold at Bar meeting<br>and four books given as gifts to the four law schools. | 283.05        |
| Jane Vetter - Flowers for D. A.'s retirement reception  | 27.97         |
| Colonial Printing - Printing envelopes for D. A.'s retire-<br>ment reception                                  | 36.50         |
| Jefferson City Country Club - D.A.'s retirement recep-<br>tion  | 389.00        |
| Modern Litho - Printing JOURNAL Vol.5 #2 and Annual<br>meeting invitations                                    | 1,369.99      |
| Secretary of State - Registration Fee   | 1.00          |
| Sidney Larson - Repair portrait of Judge John C.<br>Brown   | 1,400.00      |
| Madison Cafe - Lunch meeting - Tom, Wally and<br>D. A.  | 25.00         |
| D. A. - Reimbursement for printers ribbon   | 11.67         |
| D. A. - Expenses for attending Trustees Meeting in K.C.   | <u>184.84</u> |
|   | 5,899.05      |

BALANCE ON HAND, OCTOBER, 1994

|                      |                  |
|----------------------|------------------|
| Checking Account     | 2,803.57         |
| Money Market Account | <u>67,358.63</u> |
|                      | 70,162.20        |

ALLOCATION OF FUNDS ON HAND

|                            |                  |
|----------------------------|------------------|
| Herman Huber Memorial Fund | 525.00           |
| Unrestricted Funds         | <u>69,637.20</u> |
|                            | 70,162.20        |

# The Missouri Supreme Court Historical Journal

Published periodically by the Missouri Supreme Court Historical Society

P.O. Box 448

Jefferson City, MO 65102

**Editor:** E.A. Richter

**Associate Editor:** Mrs. D.A. Divilbiss

## Officers

|  |                           |
|--|---------------------------|
| <b>Chairman of the Board</b> .....     | William H. Leedy          |
| <b>President</b> .....                 | Thomas A. Vetter          |
| <b>First Vice-President</b> .....      | Mrs. Sinclair S. Gottlieb |
| <b>Second Vice-President</b> .....     | William A.R. Dalton       |
| <b>Secretary Treasurer</b> .....       | David Brydon              |
| <b>Asst. Secretary-Treasurer</b> ..... | Mrs. D.A. Divilbiss       |

## Trustees

Warren D. Welliver  
David E. Blanton  
Ilus W. Davis  
John S. Black  
Senator Emory Melton  
Stuart Symington, Jr.

Richard S. Brownlee III  
William G. Guerri  
Ronald K. Barker  
Avis G. Tucker  
June P. Morgan  
Robert G. Russell

---

|   |
|---|
| Nonprofit Org.<br>U.S. Postage<br>PAID<br>Jefferson City, MO.<br>PERMIT NO. 181 |
|---|

---