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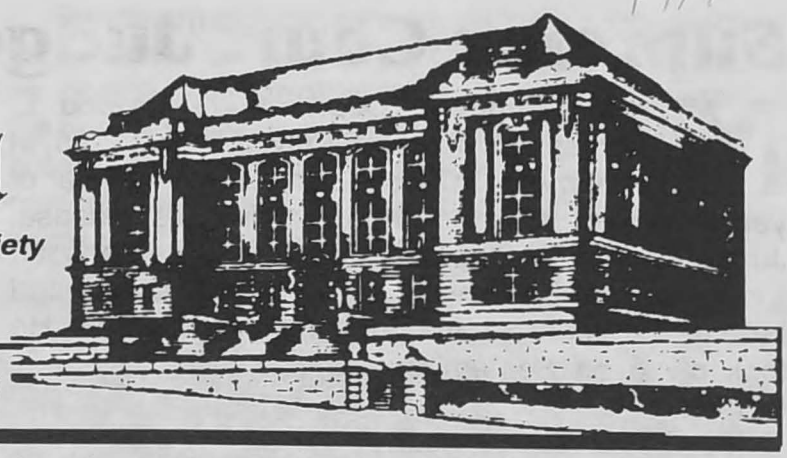

Vol. 6, No. 1 March, 1996

The Judicial System of Missouri: 1952-1996

By Charles B. Blackmar, Former Chief Justice, Supreme Court of Missouri

This article supplements the monograph of former Chief Justice Laurance M. Hyde, **Historical Review of the Judicial System of Missouri**, published in 1952 as the frontispiece of Volume 27, **Vernon's Annotated Missouri Statutes**. It is unfortunate that subsequent reprints of Volume 27 have not carried his article, which has been reprinted in pamphlet form by West Publishing Company, and also in segments in the **Journal of the Supreme Court Historical Society**. Bill L. Thompson, Staff Counsel to the Supreme Court, contributed invaluable editorial assistance in preparation of this article.

The present Article V of the Constitution of Missouri retains the basic mold into which it was cast in 1945, but there have been significant constitutional amendments and statutory changes in the intervening years. The "Missouri Plan" has been widely praised by students of judicature, and the essential structure has been adopted in several other states. In Missouri the court plan has been the subject of constant discussion, and numerous committees have considered problems of the judicial structure, making recommendations for revision. Although some express cynicism and others profess outright opposition, the plan has survived numerous test votes and challenges. The burden should be on those proposing substantial change to demonstrate a better system of selecting judges.

The basic plan applied only to the appellate courts and to the circuit courts in the City of St. Louis and Jackson County. The 1945 article provided that other circuits could adopt the plan for "nonpartisan selection of judges" by vote of the electorate. In 1950, however, the Supreme Court held, in the case of *State ex. rel. Millar v. Toberman*, 232 S.W. 2d. 904, (Mo. banc), that the constitutional provisions for so adopting the plan were not self-executing and that a proposal for adoption could not be presented to the voters without legislative authorization. Authorization

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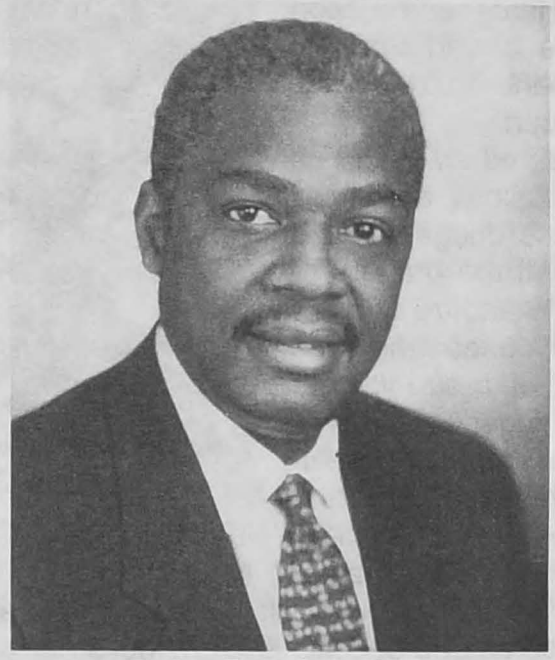
Judge Ronnie L. White Appointed to Supreme Court

On Monday, October 23, Missouri Governor Mel Carnahan made his first appointment to the Missouri Supreme Court when he named Judge Ronnie L. White, 42, of the Eastern District Court of Appeals in St. Louis to fill the vacancy created by the death of Judge Elwood L. Thomas. Judge White had been appointed to the Court of Appeals by Governor Carnahan in 1994. He is the first African-American to serve on Missouri's highest court and the first Democrat appointed to the Court since 1979.



Judge Ronnie L. White

Judge White was officially sworn in at a private ceremony in the chambers of Chief Justice John Holstein on November I. A formal swearing-in ceremony was held in the Old Courthouse in St.. Louis on January 22 when U.S. Appeals Court Judge Theodore McMillian administered the oath. In the ceremony, Judge McMillian, who was the first African-American to become a circuit judge in Missouri, called attention to the significance of the ceremony taking place in the same courthouse where the Dred Scott case was tried a century-and-a-half ago.

Governor Carnahan, who took part in the cere-

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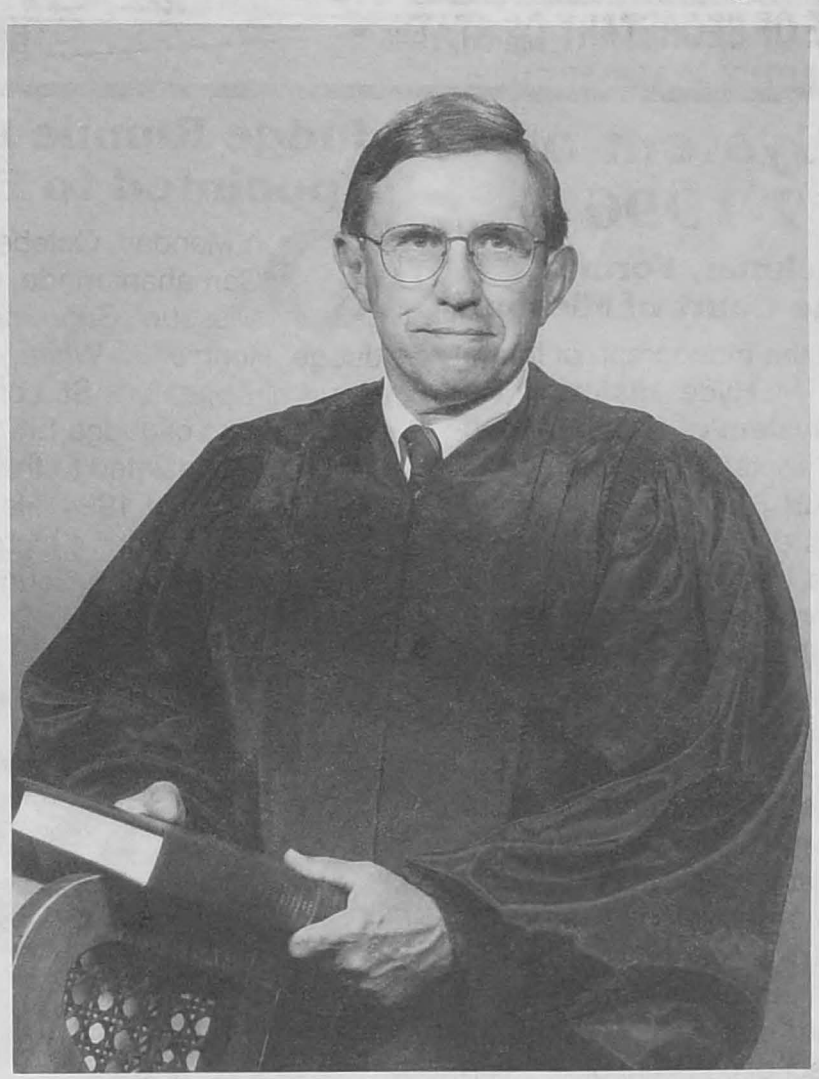
Supreme Court Judge Thomas Dies

Missouri Supreme Court Judge Elwood L. Thomas, 65, died Saturday, July 30, 1995, at his home in Jefferson City. For a number of years he had suffered from Parkinson's disease. Judge Thomas was appointed to the Supreme Court by Governor John Ashcroft to fill the vacancy created by the retirement of Judge Warren D. Welliver. He took office on September 5, 1991.

Judge Thomas, a graduate of Simpson University and Drake University School of Law in Des Moines, Iowa, was admitted to the bar in 1957. He practiced law in Iowa for eight years prior to joining the faculty of the University of Missouri-Columbia School of Law in 1965. He served on the faculty of UMC Law School until 1978 when he joined the Kansas City law firm of Shook, Hardy and Bacon where he stayed until his appointment to the Supreme Court.

Considered an expert on jury instructions and rules of evidence, Judge Thomas was one of the drafters of Missouri Standard Instructions for Juries and was co-editor of a two-volume guide to litigation. He was a popular lecturer on evidence and procedure and served on the faculty of the National Judicial College in Reno, Nev., the National Institute for Trial Advocacy and the Missouri Judicial College. He is also remembered as one of UMC Law School's outstanding professors by more than 2,000 Missouri lawyers he helped to train.



Supreme Court Judge Elwood L. Thomas

At Judge Thomas' funeral service, Professor Grant Nelson, a former colleague at the UMC School of Law, and Rich McLeod, a former student and an associate at the Shook, Hardy, Bacon firm, eulogized him at the funeral service. Also memorializing Judge Thomas was Supreme Court Judge and former Chief Justice Edward D. (Chip) Robertson. Judge Robertson's remarks follow:

"There is a curse we have all felt these last few days – the curse of words that do not do their work, words that are too shallow or too few or just not quite right to say what we feel about Elwood, what we knew of him, how he will be missed.

"And yet words are where we begin to tell each other the special place he lives within our hearts. But not just words.

"Eyes, too. Eyes that glow with memory, and glisten with missing, and glance toward places we used to see him and find him gone.

"And touches – hugs and handshakes that celebrate his life by renewing the bonds between us and the commitment that we will not let his memory go from us.

"For all of us, Elwood was a teacher. A gentle teacher. Elwood knew that teaching is far more than passing information to another person. It is giving the soul; it is exposing the heart; it is eyes lit with experience and words colored with the excitement of seeing others take what is given for a useful purpose deep within themselves.

"Elwood taught all of us that giants sometimes come in unexpected packages. I had heard of Elwood Thomas – his name falling in reverence from the lips of his students – students who almost mocked those of us who had not spent time at his knee, from lawyers who called him for advice and got it, from judges who had finally figured out why they said 'sustained' or 'overruled' because of the clarity of understanding he had bestowed on them at a judicial college as a gift, unearned but sorely needed.

"Yes, I had heard of Elwood Thomas long before I met him.

"I met him on an elevator in the Supreme Court Building. It was a meeting orchestrated by chance. I was already a member of the Court. He had come to conduct an instruction committee meeting.

"From what I had heard of him, I expected six foot two, perfectly tailored clothing, silver hair, razor cut and perfectly in place. The elevator door opened on the second floor. He got in, deep in thought. Just the two of us there now as the doors slid closed. I had no idea who he was. I introduced myself. 'I'm Elwood Thomas,' he said. Fumbling for words, startled at the

shallowness of my expectations, concerned that I might say something stupid in the presence of this man so revered, I immediately started apologizing for an opinion I had written on comparative fault the previous year. He smiled. 'Nothing wrong with that one,' he said. But there was. And after Governor Ashcroft appointed him to the bench, he helped me correct it in another case.

"When vacancies occur on the Court, rumors begin to fly. People call. Names fly about like gnats circling at a picnic. 'Have you heard?' they say and offer a name.

"Most of the time the caller would say 'Do you really think he should?' But when Elwood's name came up, the conversation changed. 'Do you really think he would?' they'd say. 'Wouldn't that be great?'

"One member of the appellate judicial commission asked candidates, 'Who do you think should get the appointment to the Court?' Most of the supplicants would say they should. Or suggest someone dead who wouldn't be any competition – Moses or Hamurabi or Learned Hand. But one person answered 'Elwood Thomas.' That answer, along with other attributes, proved so true, so obvious, so revealing of both men that both were eventually appointed to the Court.

"For most of us, appointment to the Court meant standing a little straighter for a while, buying a new suit or two, and acting smart. Smart people don't have to act smart. They just are. That's another of Elwood's lessons.

"One day a former United States Senator and I flew into St. Louis. Starched shirts, silk ties, real dignitaries, I supposed. We started walking toward a waiting car that would whisk us to a meeting. An important meeting.

"Elwood had just been appointed to the Court.

"As we walked, I saw a herbicide ad on vacation standing against the wall at Lambert Field. Baggy overalls. Scruffy work boots. Shirt tail hanging out. Red seed corn hat right at home on hair that would, could not quite be tamed.

"And under the bill of the cap, those eyes. Soft. Brighter than they had any right to be. Inviting eyes, that told you the mind never rested but that you were welcome there. Elwood's eyes. The eyes we are all missing now. The eyes we will always miss.

"I introduced the Senator. Elwood laughed, explaining that he had a license to spread lawn fertilizer chemicals - nothing to do with practicing law for those of you making an obvious connection - and that he had to take continuing chemical education to keep the EPA license. He explained that he didn't want to look out of place with all the other people at the seminar who spread fertilizer for a living.

"I suppose that's why he wore a tie to work, too.

"I can see him now sitting around the conference table at the Court. Oddly, that same picture is the one the other judges with whom I have spoken keep of him.

"Gently arguing reasons for taking a case, wanting badly for the opinions of the Court to be as well done as possible, suggesting alternatives that maintained the peace where disagreements led us to the border of hostility, understanding that his expertise was not the only expertise around the table, listening carefully, wanting to learn, constantly wanting to learn.

"We have had a rare privilege, those of us who served with him as judges. He made us better than we were and his example will make us better than we are."

"And later frustrated as his motor skills began to diminish, but bearing the frustration with a courage that we shall remember and to which we shall turn for inspiration.

"I did not know Elwood Thomas before he had Parkinson's Disease, a disease I have come to hate. But it was my privilege to know him as he fought it, as the greatness of his character, the depth of his compassion, the tenacity of his spirit became obvious to everyone.

"In that struggle there was grace and beauty that disease could never humble. And never, ever did that wonderful mind flag. He knew the law and he knew the law until the end.

"And so we celebrate today a life. A teacher. A husband, father and friend. And for six of us, a colleague on the bench. Someone who treated us as equals though we could not have earned that place.

"Some of us called him Elwoodius Maximus. For that was what he was to us. The best, the highest. A goal for which we could reach.

"We have had a rare privilege, those of us who served with him as judges. He made us better than we were and his example will make us better than we are.

"And on nights when the moon sleeps and the stars crack the darkness open so that we can see the glory that lies beyond them, that old building in which Elwood worked and in which we will continue to work, will give a deep sigh and remember that for nearly four years, far too short a time, a gentle giant walked its halls, touching it with goodness and grace, with a commitment to the purpose for which it stands, and with footsteps that were born for the life he led shaping minds and the law.

"On those nights the building will call his name. For like us, the highest court will feel the hole left by his passing.

"For like us, it knows that it will be a long while before another like Elwood passes our way again.

"God Bless you, Elwood. And keep you."

Missouri Supreme Court Historical Society Holds 10th Annual Meeting

Henry P. Andrae with Dr. and Mrs. Leslie Anders. Dr. Anders was the speaker for the 10th Annual Meeting.

The annual meeting of the Supreme Court of Missouri Historical Society was held November 11 at the Jefferson City Country Club with 31 members attending.

After dinner, President Thomas A. Vetter opened the business meeting by introducing E. A. "Wally" Richter, editor of our **Journal** and D.A. Divilbiss, Assistant Secretary/Treasurer.

President Vetter explained that even though the Society had agreed to fund the refurbishing of the en banc court room, the court decided to use its own funds for this project. Instead the court requested, and the Society agreed, to obtain a copy of a portrait of the Honorable Hamilton Gamble, judge of the court prior to the civil war and author of the dissent in the Dred Scott case. President Vetter reported that Fred Stolts, an artist, had been employed to produce an oil copy of a portrait now located in the state capitol. President Vetter mentioned the Society had received a letter from Mr. Sid Larsen supporting the choice of Mr. Stolts as the artist to complete the portrait. To expedite the completion of the project, the Society will assume the cost of repairing the cracked glass on the current portrait.

President Thomas A. Vetter, Speaker Dr. Leslie Anders, Mrs. Avis Tucker, Judge Robert Welborn, and Mrs. Anders.

President Vetter announced that Judge Charles B. Blackmar had agreed to update the article **History of the Judiciary** written by Judge Laurance Hyde in 1952. This will appear in the next copy of the **Journal**.

Everyone attending the meeting received a copy of the Treasurer's report which was approved in a motion by Judge Andrew Higgins and seconded by Judge Robert Seiler.

President Vetter then asked that the renominations of all officers be approved. Judge Andrew Higgins moved the slate be accepted with a second by Ron Barker. Motion carried.

President Vetter introduced the speaker, Dr. Leslie Anders, Professor Emeritus, Missouri State University, Warrensburg, Mo., whose speech was titled "Missourians in the Civil War." Professor Anders' talk highlighted various lawyers in the Civil War with a focus on Hamilton Gamble's life both as Governor and Supreme Court judge.

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mony, referred to the occasion as "one of those moments when justice has come to pass." Chief Justice Holstein, master of ceremonies, spoke of the "sweet irony" of Judge White taking the oath of office of the Missouri Supreme Court on the same spot where, as late as 1860s, African-Americans were sold as slaves.

Prior to his appointment to the Court of Appeals, Judge White had served as City Counselor of the City of St. Louis, a position he took after resigning from the Missouri House of Representatives where he had served from 1989 to 1993. While in the legislature he chaired the House Judiciary and Ethics Committee and the Civil and Criminal Justice Committee. He was also in private practice of law as a member of the St. Louis law firm of Cahill, White and Hemphill from 1987 to 1993 and had served in the office of the St. Louis Public Defender.

Judge White has a degree in political science from St. Louis University and earned his J.D. at the University of Missouri-Kansas City School of Law. He served as an intern in the office of the Jackson County Prosecuting Attorney while in law school. He was admitted to the Missouri Bar in 1957.

Judge White's wife Sylvia and his seven-year old son will continue to live in St. Louis while he will commute to Jefferson City.

A Conversation with Judge Paul W. Barrett

By E. A. Richter

Note: The following conversation is based on a series of taped interviews I had with Judge Barrett prior to his death at the age of 87 in 1989. Judge Barrett had served as commissioner of the Missouri Supreme Court for 30 years. He was appointed a commissioner in 1941 after practicing law in Springfield since being admitted to the bar in 1927.

A published author and recognized historian, Judge Barrett saw many changes in Missouri's court system, serving, as he points out, on the court under both elected judges and those selected under the Missouri Non-Partisan Court Plan.

Our conversations, over coffee in the morning at his home, were rambling and undirected. They were not formal interviews but, as the title indicates, just "conversations" in which Judge Barrett roamed the pastures of his recollection, pointing out interesting highlights as he recalled them. Therefore, these conversations have been edited as to form, but not as to content. Because of their length, much of the recorded material has been necessarily deleted and other editorial license taken for the sake of continuity and readability. EAR

Richter: How did you come to be a commissioner of the Supreme Court?

Barrett: I was appointed by the judges in Division II. The commissioners sat in divisions. Three with Division I and three with Division II. There were always four judges in Division I and three in Division II. The judges in each division selected their own commissioners, subject to the approval of the whole Court.

Richter: Who was Chief Justice at that time?

Barrett: Judge Ernest S. Gantt.

Richter: When the judges sat in divisions, who presided?

Barrett: Each division had a presiding judge. In Division II, in which I sat, Judge Earnest M. Tipton at the time was presiding judge. I don't remember who it was in Division I but I think maybe it was Judge Albert M. Clark.

Richter: This was in 1941?

Barrett: September, 1941, the first day after Labor Day.

Richter: Did you apply for the job?

Barrett: No, I didn't apply for the position. It's not a very smart thing to do! *(Laughing)*

Richter: How did you come to be appointed then?

Barrett: Well, I was hardly dreaming of such a thing. I was on my way to Fort Leonard Wood with a couple of briefcases full of files. I was practicing in Springfield, Missouri with Arthur Allen, who was my senior partner. We represented an insurance company, the insurer of the general contractor at Fort Leonard Wood. I was on my way there to settle a bunch of cases. I had stopped in Camdenton to settle a case with Jack Stottler. I was there in the old restaurant, the Nighthawk Cafe, and Lou Cunningham came over from the courthouse and told me to call my office in Springfield. I called and my partner, Art Allen, told me I'd better turn around and come home, and I said, "Well, what for? I just got started." And he said, "Well, they're looking for a commissioner on the Supreme Court and they're considering you and you'd better turn around and come back." And so I did.

Judge Paul W. Barrett

Richter: Did this come as a complete surprise to you ?

Barrett: Complete!

Richter: Did you have any second thoughts about accepting the appointment?

Barrett: (Laughing) No. I went back home and the next day Judge Tipton called and I came to Jefferson City and met with him and they immediately appointed me. I succeeded Judge James A. Cooley. He'd been a circuit judge at Kirksville and he was great friends with Judge Bill Frank. They both lived in the Supreme Court building.

Richter: Was Frank a commissioner, too?

Barrett: No, Judge Frank was a judge. He'd been a commissioner on the Kansas City Court of Appeals. I think maybe he was the first one.

Richter: How many commissioners were there on the Supreme Court at that time?

Barrett: Six. Three in each division. And Judge Cooley was my predecessor. He was a very marvelous man. He'd been there quite a while and when I succeeded him he was almost blind and had other problems.

Richter: You'd been practicing in Springfield for how many years?

Barrett: Fourteen. From 1927 to 1941.

Richter: Did you make the transition immediately?

Barrett: Yes. I moved in the latter part of August and early September, in fact on Labor Day.

Richter: You changed pretty fast then?

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was not forthcoming for many years, but in 1967 a procedure was prescribed by statute for voting on the plan in St. Louis County. The plan was rejected by the voters of that county in 1968 but was adopted in 1970. Legislative authorization for voting on the plan in Clay and Platte Counties was adopted in 1972, and both counties adopted it for their respective one-county judicial circuits. In the great majority of counties, however, judges are still nominated in party primaries and elected on partisan ballots at the general election.

By the late 1960s the work of the Supreme Court of Missouri had greatly increased, primarily because of that court's constitutional jurisdiction over all felony appeals. The civil docket, in particular, was often far behind. A select committee of The Missouri Bar and the Judicial Conference was formed to study the judicial article and to suggest revisions. There was some suggestion of making use of the initiative process, but in 1970 the legislature proposed a comprehensive revision of Article V of the Constitution, which was adopted by the voters so as to take effect on Jan. 1, 1972.

The 1970 amendment reduced the mandatory jurisdiction of the Supreme Court. The amendment also provided for reorganization of the courts of appeals so that there was, in theory, only a single court of appeals, with districts. The legislature was given the authority to establish additional districts, but none in addition to the original three has been authorized. The court of appeals was given jurisdiction that the several courts of appeals previously lacked, including felony cases, civil cases without limit as to amount, and cases involving the title to real estate. The Supreme Court can effectively expand its appellate jurisdiction by rule, but this authority has seldom been exercised. The revision provided for the phasing out of the commissioners of the Supreme Court and the courts of appeals, so that new judges were authorized for the court of appeals as each serving commissioner left office. The legislature was also empowered to establish additional court of appeals positions, which had previously been limited to three judges for each court. Commissioners and retired judges were authorized to serve as judges of trial and appellate courts. By another important change, the commission that existed to consider retirement of judges for disability was converted into a "Commission on Retirement, Removal and Discipline," with authority to hear charges of misconduct against judges and to recommend sanctions, including removal from office, to the Supreme Court. On two occasions prior to 1970 serious charges of misconduct had been presented against elected circuit judges, and the House of Representatives voted articles of impeachment. Both of the respondent judges resigned before their cases could be tried by the Supreme Court under the procedure established by the Constitution of 1945. There was a general feeling that the complications of the impeachment procedure discouraged the processing of charges of judicial misconduct, and that a simpler method could be provided for judicial discipline. The revision, finally, provided for mandatory retirement of circuit judges appointed pursuant to the court plan, in addition to appellate judges, and the retirement age was fixed at 70 for all judges except municipal judges. By statute, municipal judges were required to retire at age 75. Some circuit judges had stood for reelection at successive elections until they reached very advanced age, for the very good reason that the state provided no retirement benefits. With the provision of retirement pay, a mandatory retirement age was considered appropriate. In 1991 the Supreme Court of the United States held that the Missouri provisions for mandatory retirement of judges did not conflict with the federal statutes forbidding age discrimination. Gregory v. Ashcroft, 501 U.S. 452 (1991)

There was another substantial constitutional revision in 1976, effective January 1, 1979. The principal feature of this revision was the elimination of the probate and magistrate courts as separate courts and the establishment of the position of associate circuit judge. Judges presently serving as magistrates, including those elected in 1978, became associate circuit judges, and some probate judges were reclassified as circuit judges. Associate circuit judges could be authorized to hear and determine circuit court cases in addition to the matters previously heard by magistrates. The municipal courts were placed under the supervision of the circuit courts for their respective jurisdictions and were designated divisions of the circuit courts. By means of these provisions greater flexibility was introduced into the judicial system. There were problems of transition, partly because some of the new associate circuit judges were reluctant to part with the privileges they had enjoyed as magistrates, such as the authority to appoint and control the work of their own clerks and deputies. Judges elected as probate judges were permitted to retain their probate jurisdiction, rather than being subject to assignment by the presiding judge of the circuit, but newly elected judges did not succeed to their predecessors' privileges. At present a substantial proportion of the circuit court cases are heard and disposed of by associate circuit judges. The limit for cases that may be filed in associate circuit court divisions had been increased to $25,000, and the trial de novo of civil cases is now provided only for cases involving less than $5,000.

Another inportant constitutional provision was placed on the ballot in 1994 by initiative process, and adopted by the voters. This amendment provided for a salary commission to propose salaries for judges and other officials, subject to rejection by the legisla-

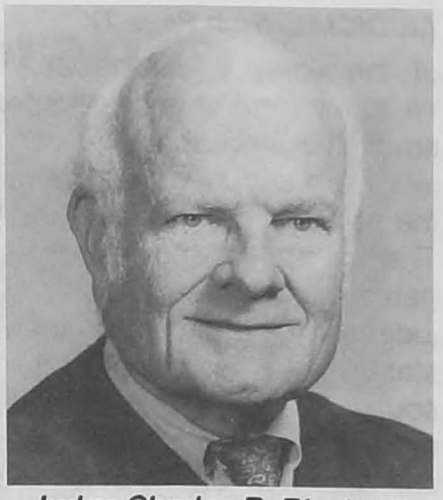
ture. The problem of judicial salaries has been a difficult one for the courts and for the General Assembly. Salaries paid to judges have not kept pace with comparable salaries in the private sector, nor with salaries for educational administrators and publicly employed health care providers. The judicial salary scale has inhibited some very capable lawyers, who feel that they cannot, with justice to themselves and their families, make themselves available for judicial appointments. Quite a few state judges have sought more lucrative positions on the federal courts, and some have been successful. State judges have also sought and obtained minor federal positions, such as United States Magistrate and administrative law judge. There was often tension between judges and legislators over proposals for salary increases. The General Assembly faced many other demands, and some legislators demonstrated overt hostility to the judiciary. It is to be hoped that the salary commission will be of assistance in providing salaries for judges that are reasonable and comparable to what might be available in other law centered employment.

Judicial Selection

The constitution refers to "nonpartisan selection of judges." Some observers have ridiculed this designation, pointing out that appointments by successive governors have come, overwhelmingly, from members of the governors' own political parties. The plan, none the less, is properly styled, "nonpartisan," because judges appointed in accordance with its terms are not nominated in party primaries and voted for on partisan tickets. Nonpartisan judges, furthermore, are prohibited from engaging in political activity and from making political contributions. Restrictions on political activity extend also to elected judges while in office. *Matter of Briggs*, 595 S.W. 2d. 270 (Mo. banc 1980). Some political diversity has been provided in that, in recent years, the governorship has shifted between the two major parties. It is to be hoped that future governors will give primary attention to judicial qualifications rather than to party affiliation.

For the first 25 years of the plan, no governor had more than three appointments to the Supreme Court. Then Governor Hearnes had four appointments during the eight years he served, and Governor Bond had four during his two non-consecutive terms. With Governor Bond's appointment of Judge Blackmar in 1992, the Court consisted entirely of lawyers who had completed their legal education after serving in World War II. The seven judges then comprising the Court were of approximately the same age, and so all had left the court in one way or another by 1992, and were replaced by appointees to Governor Ashcroft. Governor Carnahan made his first appointment in 1995.

Twenty-nine appointments have been made to the Supreme Court since the Missouri Plan became effective. At the time of appointment, eight appointees were appellate judges, five were Supreme Court Commissioners, three were circuit judges, one a state senator, two in appointive public office, one a law professor, and the remaining nine in private practice. Governors Donnelly, Dalton, Hearnes and Bond each appointed a member of the opposite political party. It would be interesting to assemble statistics of persons appointed as judges of the court of appeals, circuit judges, and associate circuit judges. Governor Hearnes took note of the provisions for appointment of additional appellate judges as commissioners left office and appointed court of appeals commissioners to judicial vacancies so as to create additional vacancies for the appointment of judges.



Judge Charles B. Blackmar

Judges in the great majority of circuits are nominated in party primaries and voted for on partisan ballots in the general election. It is not unusual for a judge to be appointed to fill a vacancy on the circuit bench and then to run for several terms without opposition in the primary or general election. In other circuits, however, there are regular judicial contests. Some circuits have a dominant political party, and appointees from the other major party have often failed of reelection. Associate circuit court positions are regularly the subject of contested elections, and quite a few sitting associates have been displaced in either the primary or the general election. Judge Hyde expressed the thought that popular election was a dependable method of judicial selection in outstate areas, because the voters were familiar with the candidates. The writer is not so confident. Under modern conditions, running for office is expensive, and so elected judges face the problem of accumulating campaign funds. When money is raised, it is often used for advertising and promotional expenses, which have nothing to do with the qualifications of the candidates. There should be a study of expenditures in recent contested judicial elections, and of the sources of contributions.

One circuit judge in a circuit subject to the plan was defeated for retention in the 1940s. From that time until 1994 no candidate for retention was unsuccessful, but in 1994 another circuit judge was voted out of office. Most appellate judges won retention without great difficulty until 1990, when the three Supreme Court judges standing for retention had large "no" votes. One of the three received only 54 percent

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of the votes cast. In 1992 efforts were made to amass a fund to provide information about the Missouri Plan and about the records of the judges subject to retention votes. There was some criticism of the solicitation of lawyers and business for donations. The campaign showed objective success, and the percentage of retention votes was higher for most judges in 1992 and 1994 than in 1990. In some other states that have adopted the essentials of the Missouri Plan, there have been organized and well-financed campaigns against sitting judges. Those who criticize the efforts to obtain support for judges standing for retention would reflect on the problem of a judge who has no means of campaigning, and who may be subject to demeaning attacks by opponents to which the judge cannot respond personally.

A new equation was introduced into the Missouri Plan in 1966, when the constitution was amended to permit the governor to seek a second, successive term. Under the original plan, no governor would be able to appoint more than two lay members of the appellate judicial commission or one lay member of a circuit judicial commission, unless interim vacancies occurred, and the last appointment would come just as the governor was leaving office. By reason of this amendment it is possible that a governor will appoint all three lay members of the appellate judicial commission, and both lay members of the circuit judicial commission. Two governors, indeed, have been able to make all of these appointments. There have been suggestions to amend the plan to provide an alternate method of appointing lay members of the commissions, but no consensus has appeared.

Rule Making

The Constitution of 1945 gave the Supreme Court the authority to make rules of practice and procedure for all courts. Rules adopted pursuant to this authority could effectively amend existing statutes. The General Assembly has the authority to annul any rule of practice or procedure adopted by the Court, by a law "limited to the purpose." The Court has no authority to change the existing law with regard to juries, right of trial by jury, oral examination of witnesses, evidence, and the right of appeal. Rule changes pursuant to this authority require six months' notice. The Court also has rule-making authority free from some of the limitations of the rules applying to civil procedure, with respect to admission to the governance of the bar. The present procedural rules of court occupy 479 pages in the volume published annually by the West Publishing Company. The Court, indeed, has a substantial legislative function.

A comprehensive code of civil procedure had been adopted by the General Assembly in 1943, borrowing freely from the Federal Rules of Civil Procedure adopted in 1937. Shortly after the Constitution of 1945 went into effect, a committee was appointed under the chairmanship of Carl C. Wheaton, Professor of Law at the University of Missouri. The committee reported in the early 1950s, making substantial proposals for changes, many of which would depart from the model of the federal rules and the 1943 code. The court then appointed another committee under the chairmanship of William H. Becker, subsequently a judge of the United States District Court for the Western District of Missouri. After meetings in each of the districts of the Missouri Bar, the committee presented a comprehensive draft of Rules of Civil Procedure, replacing the 1943 code. The chairman was the principal draftsman. The committee opted for following the federal model, unless there were good reasons to depart from it. The code thus adopted, with some amendments, continues in force up to the present time.

In 1962, effective January 1, 1965, the Court, under the guidance of Professor John S. Divilbiss, adopted "Missouri Approved Instructions" for civil cases. This represented a major innovation. Under the prior practice instructions were drafted by attorneys. The drafters' zeal was restrained by the courts' insistence that instructions be legally correct, but many judgments were reversed because of error in instruction. MAI sought to limit the freedom of counsel and courts in preparing their own instructions and, hopefully, to minimize instructional error. Where an MAI instruction is available and suitable, counsel are obliged to use it literally and without linguistic embellishments. When no appropriate MAI instruction is prescribed, counsel are obliged to draft instructions consistent with the governing principles of MAI. There is a standing committee of the Supreme Court for the purpose of recommending new MAI instructions and correcting problems that have appeared in existing instructions. Three later editions of MAI have been published, and there are annual pocket supplements. The adoption of MAI has made the work of court and counsel easier, but still questions of correctness of instructions are often presented to appellate courts. In 1993 the Court promulgated a revised rule 70.03, requiring counsel to make specific objections to opposing parties' requested instructions that the court proposes to give, as a condition of asserting error on appeal. This rule modification brings Missouri into line with 41 states and with the federal courts in requiring that questions about instructions be presented at a time when the trial court can take corrective action.

The Court in 1952 adopted rules of criminal procedure. Following the adoption of a new criminal code by the General Assembly, the Court, with the assistance of a standing committee, approved standard forms for criminal instructions (MAICr) and approved charges (MACH). Rules have also been adopted for ordinance violations and traffic violations, procedure in juvenile courts, and small claims cases.

(To Be Continued in the Next Issue)

Allen Named Supreme Court Librarian

Tyronne Allen, Jefferson City, has been named Librarian of the Missouri Supreme Court Library. He assumed his new title in May, 1995, after serving on the library staff for 20 years. Since 1986 he has been Assistant Librarian. He succeeds D.A. Divilbiss, who retired in December, 1994.

Mr. Allen holds a Bachelor's Degree in sociology from Lincoln University and a Master's Degree in Library and Information science from the University of Missouri-Columbia. He is a veteran of the United States Air Force, serving from 1967 to 1970.

The new Supreme Court Librarian attended Lincoln University on a football scholarship. He is married and the father of two children. His wife, Saundra, is a teacher in Jefferson City's elementary schools.

Tyronne Allen

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Barrett: We sure did. We really moved.

Richter: How difficult is such a transition?

Barrett: Well, it's not too difficult. It's a fairly simple process. But it's not true I had no experience. My law partner's father, G. Allen, was elected to the Springfield Court of Appeals and while Art and I were still practicing together, Mr. Allen became senile and incapable of doing his work. We wrote his opinions for him.

Richter: You mean you actually wrote his opinions for him?

Barrett: Oh yes, They came out under his signature but we wrote them. I wrote 13 and my partner wrote a few. So I did have some experience.

Richter: How long did this go on?

Barrett: Oh, for two or three years.

Richter: In effect, you were then doing the work of an appellate judge?

Barrett: Yes. And then, in addition, I appealed and argued 30 or 40 more cases in the appellate and Supreme Courts. That's what I was best at. In some I represented other lawyers. E.L. Limms of West Plains turned cases over to me and I appealed them for him. Also John Moberly at Houston and several others. So I had some experience. I had that advantage.

Richter: Did you ever have any doubts or regrets after you got here?

Barrett: None whatever!

Richter: You enjoyed the work, then?

Barrett: Oh, I just love it!

Richter: And you did it for 30....

Barrett: Thirty years and three months and two or three days!

Richter: Who were the judges on the Court at that time?

Barrett: There was C.A. Leedy and Earnest M. Tipton. And George R. Ellison, Albert M. Clark, James M. Douglas and Ernest S. Gantt. And Charles T. Hays.

Richter: You went on the court as a commissioner about the time the Non-Partisan Court Plan went into effect?

Barrett: There were then no judges on the court who had been under the Non-Partisan Court Plan. However, I hadn't been there very long until the very first judge was appointed under the Plan. He was Judge William H. Killoran, a circuit judge from St. Louis. He'd been a circuit judge under the political system and a Republican in St. Louis, of all places. He happened to be a friend of Governor Forrest Donnell who appointed him. Judge Killoran was a very devout Catholic and typical Irishman. He was everyone's idea of what a circuit judge should look like and act like. He was wonderful! He was the first appointment under the Non-Partisan Court Plan.

Richter: Was this the term when Douglas resigned?

Barrett: No, no. He didn't resign for several years. He hadn't been there too long at that time. You see, he was the last judge elected before the Non-Partisan Court Plan.

Richter: Had Douglas been a circuit judge in St. Louis?

Barrett: Yes, he'd been a circuit judge and his father was a lawyer.

Richter: Was Douglas a pretty good judge?

Barrett: Oh, excellent. In my opinion – not to make odious comparisons or disparage anyone else – but I think that there were more things achieved during Douglas' Chief Justiceship than anybody that's ever been Chief Justice.

Richter: Really?

Barrett: In the almost 50 years that I've been acquainted with the Court, yes!

Richter: And yet he was elected under the old partisan system?

Barrett: Under the old system, yes!

Richter: Well, you had a chance to serve with judges who were elected and subsequently with judges

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who were appointed under the Non-Partisan Court Plan, so you had a good comparison. What's your....

Barrett: I don't think it makes a bit of difference on earth!

Richter: In the quality of judges you get?

Barrett: No, not on the Supreme Court.

Richter: It doesn't?

Barrett: It didn't at that time. That's my opinion and I may be in error. There were objections at the time, especially I would suppose from some quarters, because Judge Tipton was notoriously a Pendergast product, adherent and friend. Pendergast had to condone the election of most all the other judges at the time in one way or another, but he is directly responsible for Judge Tipton being there. And there were those who may have criticized him because Judge Tipton had represented Pendergast people, or people that Pendergast was interested in - he and Senator Keating both. They were not Pendergast's top lawyers, though, in Kansas City.

Richter: They weren't?

Barrett: No. You can read *State vs. Narcello* and other cases and see that Judge Tipton and Senator Keating defended those fellows in those criminal cases, and that was part of the Pendergast operation.

Richter: When you went on the Court, the Pendergast machine was still a power?

Barrett: Oh, yes. Yes. It was waning but it was still an empire.

Richter: Did you ever see or hear or get hints of the Pendergast machine trying to influence anything the Supreme Court did?

Barrett: Not a thing on earth. Not a word!

Richter: Never did try to....

Barrett: Not that I knew of. No!

Richter: Well, you were in a position so if something like that happened you'd have seen some kind of an indication?

Barrett: If there had been anything, yes, I would have heard of it, I'm sure. But I know of nothing.

Richter: You served on the Court for over 30 years. Was there any difference in the way the Court operated in administration or things like that before the Non-Partisan Court Plan went into effect and after it? In other words, was there any apparent effect?

Barrett: Well, on the daily operations of the Court, no effect. It only had to do with the selection of judges and had nothing to do with them after they got on the Court.

Richter: You mentioned the other day that you had been a big supporter of the Non-Partisan Court Plan and worked hard to have it adopted.

Barrett: Yes.

Richter: Why were you so strongly in favor of having the Plan adopted?

Barrett: Well, you must remember, back at that time when it was adopted it only applied to the appellate court judges and the circuit judges in St. Louis and Kansas City. It had no application to outstate Missouri, to all the other circuits, and that was a very important feature. It would never have been adopted had it been applicable statewide to all circuit judges. At that time, for instance, Greene County had only two circuit judges and the Non-Partisan Court couldn't possibly have improved it at all. Judge Guy Kirby and Judge Warren White, both Democrats; one of them elected six times served for 36 years.

Richter: Wasn't Greene County traditionally Republican?

Barrett: That's what Democrats always say but there isn't a thing on earth to it!

Richter: You mean that Greene County has not traditionally been a Republican county?

Barrett: No, sir! It's a tough, tough close county and during all those years, Judge Kirby and Judge White were both Democrats, Kirby was elected five times and he was a unique character and a great judge. And so was Warren White. They were two of the finest circuit judges Missouri ever had!

Richter: Where were they from?

Barrett: They were both from Springfield; both born in Springfield. And White served for 36 years, six terms, and Kirby for 30 years, five terms! Kirby was defeated in the Hoover landslide and was the highest man on the Democrat ticket. Even so, he lost by, as I recall, about 2,300 votes.

Richter: Well, getting back to the reason you were so strongly in favor of the Non-Partisan Court Plan.

Barrett: Well, I was imbued with the idea that circuit judges in St. Louis and Kansas City both needed improvement – could be improved – and I at least was willing to experiment with the selection. The trouble with the election of judges not under the Non-Partisan Court Plan, as typical today, would be the Court of Appeals with their numerous judges. There isn't a way on earth that a man could be chosen on his merits under an elective system.

Richter: So people didn't or wouldn't know who....

Barrett: Who they are and could have cared less! That was even true in the days when the Supreme Court judges were elected. The Supreme Court judge just had to trail along with his ticket. There was no effective way he could come out and campaign, though they all did. But it's doubtful that their own campaigns produced many voters. People didn't know who or what a Supreme Court judge was and cared less. They'd never had any contact or any experience with one and didn't know anything about him. That was the main purpose of the Plan - to select people on the appellate Court level on their merits or qualifications. I don't believe there was ever a judge elected to the Supreme Court of Missouri, at least since 1900, on his merits because he was an

outstanding judge.

Richter: Was Douglas defeated?

Barrett: No. Douglas resigned years afterwards, years later. What you've got in mind, I imagine, is another thing that contributed to the immediate adoption of the Plan. That was the Billings-Douglas primary contest. That was in the primary election and it was a bitter, dirty election.

Richter: Both Billings and Douglas were Democrats?

Barrett: Both Democrats!

Richter: And Douglas was from St. Louis and Billings was from....

Barrett: The bootheel. He was the present Chief Justice's father (William H. Billings 1982-1991).

Richter: You say it was a bitter fight. What kind of a platform did each have? How did it get bitter?

Barrett: Well, Judge Billings had the support of the state Democratic organization.

Richter: Which was basically the Pendergast organization?

Barrett: Well, Pendergast dominated it, but the Democratic state committee people were everywhere and I was especially familiar with it in Springfield. The leading Democrats like Senator Ed Barber, regular people who ran the Democrat party by and large in Greene County, were for Billings. And the chief backers of Judge Douglas at the time were the **St. Louis Post-Dispatch** and, I think all the newspapers in St. Louis.

Richter: At that time there were three St. Louis newspapers.

Barrett: Yes, and all the so-called "reformers" and "do-gooders," they were all for Douglas. And they conducted a bitter campaign. It developed into a terribly bitter campaign!

Richter: Was it a name-calling type of campaign? What kind of issues did they bring up?

Barrett: Yes. They tried to pin Billings with the Pendergast label and Judge Douglas was the other way. In Greene County the only strong Democrat that favored Judge Douglas was Judge Arch Johnson, who'd been a circuit judge and was another outstanding character. He was largely responsible for President Truman becoming a Grand Master in the Masonic Lodge. He led the fight in Greene County and southwest Missouri in favor of Douglas and conducted a rough, tough campaign.

Richter: That was in 1940?

Barrett: Yes, in 1940. And, as I recall it, Douglas carried Greene County by a small margin. It was a tough race, and bitter. And I think that campaign, the bitterness of it, had more to do with the immediate adoption of the Non-Partisan Court Plan than anything else. I think we're confused about the dates though. It must have been '38 that Douglas was a candidate.

Richter: You mentioned that one of the reasons you were for the Plan was because you felt it would improve the quality of judges in the city of St. Louis and Jackson County. What made you think there was something wrong then with the quality of the judges there?

Barrett: You mean on the appellate level?

Richter: No. The circuit judges.

Barrett: Well, they were pretty bad; some of them pretty bad. And certain lawyers in Kansas City had undue influence with some circuit judges.

Richter: Were these basically Pendergast-type lawyers?

Barrett: Yes, they were. All of us that had any business in Kansas City ran into that and experienced it with respect to insurance clients. Art Allen and I had several such experiences in Kansas City. We had cases in Kansas City and we were notified almost immediately that so-and-so was going to be associated with us in the case.

Richter: You had to employ specific local counsel?

Barrett: Yes. Jimmy Sullivan, for example, was one, and another lawyer who became a circuit judge, John Cook. Cook was a very smart, brilliant man, but ....

Richter: He was tied in with the machine?

Barrett: Yes. And the only person ever defeated under the Non-Partisan Court Plan was one of the Waltners, who had lived here in Jefferson City. He was a circuit judge in Jackson County.

Richter: Waltner was from Jefferson City?

Barrett: Well, actually there were two Waltners. And this one moved to Kansas City from Jefferson City and became a circuit judge.

Richter: Had he practiced law in Jefferson City?

Barrett: No. He held some public position but I've forgotten what it was. He was Marion Waltner.

Richter: Did you have any similar experiences with the circuit judges in St. Louis?

Barrett: Not personally. I was a defendant in a civil suit and a witness in one that was tried in St. Louis but I never had a case there.

Richter: I was just wondering. If the Pendergast machine controlled the judges in Kansas City, who was controlling them in St. Louis?

Barrett: I just don't remember, but it was a different set-up. The St. Louis Democratic organization went along with the Pendergast regime and all the governors going back, even to Stark, who wouldn't have been elected without the endorsement and consent of the Pendergast machine and whole Democratic organization. There's no doubt about that!

Richter: You mentioned that in spite of the political influence, Missouri had good qualified judges on the appellate level...the Supreme Court to be specific. What do you think, then, was the overall effect of Pendergast's influence on the court system? Was

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it really depressing or was it sort of a benevolent dictator type of situation?

Barrett: Well, in the first place, I'm not qualified....

Richter: But you lived through it!

Barrett: I lived through it but I was a Republican, of course, and he (Pendergast) was always a target for whatever happened. But his influence? There isn't any doubt about that. He had influence and he exercised it! But not on the appellate judiciary as far as I know.

Richter: Not on the appellate level?

Barrett: On the appellate level, Pendergast had nothing to do with that. But he did have to do with election of Judge Tipton especially, and he had endorsed all the judges that were on the Court when I was there.

Richter: Where most of the judges on the Supreme Court Democrats?

Barrett: They were all Democrats!

Richter: They were all Democrats and yet they picked you, a young Republican lawyer, to be a commissioner?

Barrett: That's because there was a law, a statute that the commissioners had to be bipartisan.

Richter: Do you have any idea why they chose you?

Barrett: Well, I don't know except that they were looking for a Republican and someone they thought could do the work. That's the main thing.

Richter: You mentioned earlier that your name might have come to their attention because when you were an assistant prosecutor....

Barrett: Well, that just had to do with the people that were judges on the court, especially Tipton and Ellison and Leedy, largely Tipton and Ellison. They would call people that they thought knew me and knew what it was all about and they called Gene McNatt at Aurora and Sam Wear in Springfield and Senator Ed Barber and a large number of lawyers in Springfield. This I was told after the fact, not before, and they, of course, were all my friends or people that knew me well or thought they did, anyway. What I mentioned was that Judge Tatlow and I were appointed by Judge Kirby – Judge Tatlow was a Democrat – to investigate the prosecuting attorney of Greene County, Nat Benton, Thomas Hart Benton's brother, and Harry Durst, the mayor. Murchison Lightfoot was a political gadfly and an opportunist. He had run in the city election, against Durst, the mayor, and was defeated. He claimed that the slot machine distributors and operators had undue influence with the prosecuting attorney.

Richter: Were these gambling operations in the open? Was it a big business?

Barrett: It was a big business and it was well known that it was being done! Since Nat Benton was prosecuting attorney, he was disqualified to investigate himself. So, Judge Kirby appointed Judge Tatlow and me to conduct the grand jury investigation which we did for about a week. It turned out that there was no basis for the charges. So we made a report to Judge Kirby that there was no basis for any kind of a charge against either the mayor or the prosecuting attorney. So, as I've indicated, that may have been one basis on which a good many Democrat lawyers accepted me.

Richter: You served under both elected and appointed judges of the Supreme Court?

Barrett: Yes, and except for me, there wasn't a change in personnel in Division II for 20 years after 1941.

Richter: No changes for 20 years?

Barrett: Well, that's roughly correct, starting from several years before I came there were no changes for about 20 years. But, you see, the first change occurred in 1955, at which time I'd been there for 14 years. That was the year that both Judge Ellison and Judge Tipton died.

Richter: Both died the same year?

Barrett: Yes, and that was when Clem S. Storckman and Henry I. Eager came to the court.

Richter: Who were the commissioners on Division I with you?

Barrett: Walter H. Boling from Sedalia and Judge Henry Westhues from Jefferson City.

Richter: Westhues went on the court as a judge in 1951 or 1952, didn't he?

Barrett: I've forgotten the exact year he was appointed by Phil Donnelly, a Democrat. Westhues was a Republican. He had been a circuit judge in Cole County and Donnelly had practiced before him and knew him very well. There was a lot of pressure put on Donnelly by Democrats to not appoint Westhues, but he did anyway.

Richter: Was this a good appointment?

Barrett: Selection couldn't have been better! It was an attribute both to Governor Donnelly and to Westhues that he was appointed! As I said, Westhues was a Republican and a few years earlier he had served as circuit judge here in Cole County where the Republicans had always been a power in running the county until the coming of the Ku Klux Klan. Judge Westhues was a Catholic and the last time he ran, he ran solely because of the Klan and got elected in spite of it! Phil Donnelly had known Westhues as a circuit judge. There was a lot of pressure put on him not to appoint Westhues, but he nevertheless did and it was just a wonderful appointment! Judge Westhues was a man of very great integrity and couldn't be improved! And the other fellow that sat with us was a Democrat, Walter Bohling from Sedalia. Walt served almost 28 or 29 years.

Richter: Commissioners seemed to serve long terms.

Barrett- Most of them served quite a while but you named about all of them that served long terms.

Richter: What about the commissioners who didn't

serve long terms? What did they do?

Barrett: Some of them died, but others went back into private practice. Frank Aschmeyer, for example. He was here a short time and he went back as a general counselor for American Life Insurance Company. And Cullen Coil. And Judge Douglas – we referred to his quitting. Well, he'd served several years before he quit *(Note: Douglas was a judge, not a commissioner.)* and I think what he did was the right thing. He got so burned out with it...he no longer carried the flaming torch for it in his work...so he resigned and went back to St. Louis and practiced law. No retirement benefits, no nothing!

Richter: So he had to start his practice all over again?

Barrett: Oh yes, and he stumbled a good deal to start out with!

Richter: How old a man was he?

Barrett: I'll tell you he was in his late fifties. He was rather young when he came here. But he did the right thing when he was burned out. Most of us of don't.

Richter: Did you ever get to feeling like you were bored with the job? Maybe not really burned out, but bored?

Barrett: Not I. No!

Richter: You like research, don't you?

Barrett: Yes. Oh I never had a day that I was bored with it. No! I wouldn't have been even now.

Richter: Who were the commissioners on the other Division?

Barrett: When I came it was Judge Laurance M. Hyde, Judge John H. Bradley and Judge Paul Van Osdol.

Richter: Was Van Osdol from Kansas City?

Barrett: No, he was from the bootheel. He was Senator John Noble's father-in-law. He'd been a judge on the Springfield Court of Appeals...and there was an interesting case. You want to see political connections of a case it's the case of Cox against Bradley! Cox was a Republican and had been on the Court of Appeals. Bradley ran against him and it resulted in an election contest between Bradley and Cox and it turned on one county; I've forgotten which one. It seems to me it was Iron. Anyway, as you can see in the official reports, all the prominent Republicans and Democrat lawyers represented one or the other of them. There was a judge who was probably more politically motivated than anybody that ever sat on the Court, may have run the Democrat party from his office. He was Judge Ludwig Graves. He wrote the concurring opinion in that case. It's interesting to read!

Richter: He didn't recuse himself?

Barrett: No! No one was going to recuse themselves from that case! (laughing) It's the one case that, especially if you're a Republican, you have the feeling that politics may have had something to do with it! Judge Cox went to his grave complaining that he was robbed! (laughing) But Judge Bradley, he enjoyed telling about it! He'd smile and talk about it when he was here as a commissioner. Do you remember Judge Graves?

Richter: No.

Barrett: He was a utility lawyer in Kansas City and a prominent leading politician. His brother was involved in Pendergast things, and I believe he was removed from office as prosecuting attorney in Jackson County for some reason or other. I've forgotten (what).

Richter: When did they begin having commissioners on the Supreme Court?

Barrett: Well, there were actually two periods. The first began back in the 1880s. However, the period in which I served began in 1911. Prior to that time there were commissioners but they had been discontinued. Judge John F. Phillips was the best known of the earlier period. He had been a commissioner but took a leave of absence from the court to defend Frank James in his trial in Gallatin.

Richter: How did the Court handle the circulating opinions when they had only hand-written copies?

Barrett: I don't know.

Richter: That would really slow things down, wouldn't it?

Barrett: Oh, yes, it would. For instance, in this case I just looked up, a case in which President Truman was involved, it was tried in 1907, in Shannon County, appealed in 1912 and the Supreme Court opinion was written in 1917.

Richter: Five years later?

Barrett: Yes.

Richter: When you went on the Court, was there a big backlog?

Barrett: Not anything like that. Nothing like that. I was a practicing lawyer before I came here, and you could be assured, if you appealed a case, it would be a year-and-a-half to two years. They are more expeditious today.

Richter: How long was the backlog when you went off the court?

Barrett: We were current. Judge Hyde was always making speeches about the improvement in the court, especially under the Non-Partisan Court Plan, and one of the things people were always talking about was whether the court was current with its docket. They had a salary bill over in the legislature and an old gentleman, a Representative, I can't think of his name now though I thought I'd never forget it, an old German fellow from Frankfurt, Germany. And he was against pay raises, especially for judges. So Judge Tipton decided the best thing to do was to have Westhues (Westhues was born in Germany) go talk to this old gentleman from Franklin County who spoke broken English. Westhues had lost his accent but he was still German and was a Catholic. So he

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went over and just talked to this old man – his name was something like Kruetchmeir – and Judge Westhues went through his rigmarole about Judge Hyde's speeches and how current they were with the docket and such. The old man sat there and listened to him and never said a word all the way through. At the end the old fellow said "Well, you is catched up with your work, ain't you?" And Westhues had no acceptable retort for that!

Richter: Of course, the work load has dropped and the judges have law clerks now.

Barrett: Yes, but the other appellate courts are supposed to take it up. And instead of having six commissioners now you've got 30-some odd judges.

Richter: Each with a law clerk?

Barrett: Each with a law clerk; most of them with two law clerks.

Richter: Getting back to Judge Douglas and his innovations on the court, which you mentioned earlier. You said that one of his innovations was alternating civil and criminal cases between the two Divisions. Prior to that, all criminal cases were heard in Division II.

Barrett: Yes.

Richter: Any other important things that he did?

Barrett: Yes, they were all important. He did all sorts of things, like changing the operation of the Clerk's office in the Court, and it was during his regime, for the first time, that the Supreme Court rooms were redecorated. They hadn't been redecorated for 50 years!

Richter: At that time, when you came up here, did most of the judges live in the chambers in the Supreme Court building?

Barrett: No. However, during that time there were at least two...Judge and Mrs. Clark lived in one of those small rooms for six years, and Judge Hays, who was not well, and his wife lived in that second floor office. Some of the judges who were single, like Judge Ellison, also lived in the building. But it's really not equipped for that.

Richter: What was the idea of having chambers?

Barrett: It started back in the days when they didn't live here. They came down from St. Louis and Kansas City or wherever, and held court. That's the way it started. And in the earlier days, you know, the Court held court elsewhere – in St. Louis, St. Charles and other places.

Richter: Hasn't there been a recent proposal to do that again; to live wherever they want to, and to have their office set up there?

Barrett: Yes, there has been some such suggestion. But experience will teach that it's best to have the seven judges on the Supreme Court of Missouri here at hand. If one of them lives down at the Lake and one in St. Louis and another in Kansas City when something important comes up, it's next to impossible to get in touch with them, get them all together. It's best, more convenient, to have all of the judges living right here in Jefferson City.

Richter: You hear a lot about the "collegiality" of the court. Does their living here have anything to do with that and its importance?

Barrett: Yes. Collegiality is important, very important that they get along. You read the stuff the other day about Blackmon (U.S. Supreme Court Justice Blackmon) here in Missouri speaking at the Eighth Circuit. What he said may be true but it wouldn't promote the best relations.

Richter: He was pretty plain-spoken about a number of the (U.S. Supreme Court) judges.

Barrett: I'm sure everything he said was true, but I don't know how he is going to get along with his colleagues after this. However, he is a man of great integrity and attempts to decide every case on its merits the very best way he knows.

Richter: On that point, do judges decide a case on its merits?

Barrett: Yes!

Richter: Let's talk about that a bit. It seems to me that's so important, the thing that's on people's minds all the time

Barrett: Yes, it is.

Richter: Does it ever happen that a Supreme Court judge does not decide a case on its merits but lets personal bias or business connections or pressures from some other source...?

Barrett: No, I don't think so. I believe I have it right. A man comes on the Court; his past life can't be forgotten. That's all a part of him and always will be. But, by and large, any lawyer who becomes a judge wants to make a good record and do a good job and most men try their very best. But your question of whether one's past or present enter into a decision is a difficult pattern to know and determine. But there are a few cases in which that could occur. As I told you earlier, deciding cases becomes a way of life. I don't think anything like that ever consciously entered into my life.

Richter: How do you go about writing an opinion? When you got a case, what was the procedure you went through to arrive at your final opinion?

Barrett: In those days – it has changed today – but 30 years ago, one had no law clerks. And we hadn't heard a thing on earth about the case. Here it is on the docket, as I'm going to show you later, and you hear the arguments of counsel and vote tentatively when you get the case. You take the file to your office. Everybody has a different approach; that's another thing that happens to you. You evolve a method or approach to being a judge assigned to a case. The first thing to do is to read the appellant's statement, brief and argument and the other side's brief, the reply briefs. Then the only thing to do,

there's no substitute for it, although it's not being done as commonly now, is to read the record. And in the process of reading that record you've got in mind the general background from the briefs.

Richter: You mean the record of the trial?

Barrett: Everything that happened in the trial! You've stumbled onto something that's quite persuasive with you. Maybe the testimony of some witness or some document or something. And then you start reading the cases, or I did. I read every case they cited, and you do your own independent research. And then you just sit down and start writing when you've made up your mind which way you're going to go.

Richter: Would a lawyer preparing an appellate case go through more or less the same procedure as the judge in reviewing it?

Barrett: No. He is an advocate!

Richter: But would he review the record first?

Barrett: Oh, yes! He would have to, to prepare a statement, brief and argument. Yes! And he's supposed to, according to the rules. He quotes the record, he puts in parentheses the page number where you can find that. If he doesn't, you'd better look at it again!

Richter: What do you think of the quality of appellate briefs? I've heard some really derogatory statements about them from appellate judges.

Barrett: It depends on who the lawyer is. Some of them are terrible and some are excellent. The greatest one was by Cardoza, and the most interesting thing to me (about the case in which Cardoza was the lawyer) was the resulting opinion. You'll see it in the back of that red book that Thomas Law Book put out. A stockbroker in New York had bilked an old lady out of her funds, and the lawyer tried the case in the lower court and lost it. He employed Cardoza to handle the appeal. And his brief in that case is a masterpiece. If you read the opinion, the opinion just tracks his brief and he stated the facts like most of us. If there was a fact against him, he put it down. To this day you can read the opinion that the Court wrote and see that he – his brief – did it. But some of them are just terrible. It's just like in your business. Some reporters are good and some of them aren't. Some of them stick to the facts and some of them don't know exactly what they are doing.

Richter: How about judicial opinions? How about the quality of judicial opinions that you've seen come down over the years?

Barrett: It's entirely the same thing. Some of them are excellent; some of them are terrible. Some of them are too long. Again, the best place to read a critique of opinions is in Cardoza's **Essays, Law and Literature.** He analyzes all types of opinions from the time that Marshall wrote as Chief Justice. Majestic, he calls that one. And he discusses the use of humor, whether that should be in an opinion or not...every facet of opinion writing. It's a masterpiece. That's why he's such a great man.

Richter: A number of years ago we published a reprint in the **Journal of the Missouri Bar** that dealt with whether a judge should attempt to do justice, as he sees it, or whether he should stick with interpreting the law. This man's argument was that if a judge attempts to do justice, as he sees it, then he is allowing his personal biases to influence him. Do you have any comment concerning this?

Barrett: By and large, I wouldn't buy that. Deciding cases is hard work. But you'll always find something that persuades you without any doubt. But within the confines of the cases the Supreme Court of Missouri gets, they don't deal with these great constitutional problems so much as the Supreme Court of the United States. But it all hinges on facts and what those facts are. If it involves contracts, then contract law governs, or whatever the subject. No, I don't buy that kind of stuff very much.

Richter: You don't think this is a great problem? A judge thinks, "This is the law but if I insist on deciding it according to the law, this poor person is going to suffer a great injustice?"

Barrett: That's correct. I remember a case I had. I didn't want to decide it that way, but I had no choice. Bob Brady, who was on the Court of Appeals and is a lawyer in St. Louis, was on one side and Paul M. Bantu, a former congressman, was on the other side. He was from that area. Sometimes what the public is talking about is what's called "fireside equities" – chimney corner law as a famous teacher I had, Meacham – called it.

Richter: Why was this case difficult for you to decide?

Barrett: Well, it involved this woman who had lived with a man for years. He was an automobile mechanic and so was she. She worked right along with him. And his wife and children lived less than 50 miles from him. This man died and this woman, pretty plainly, had made the man whatever he was and contributed to whatever he had. I can't recall all the details but under the law, even though he'd had nothing to do with his wife and children for years and years, she (the woman with whom he lived) had no standing whatever and it was quite painful to decide against her. But I didn't see any way out of it. Today I might have been able to find a way to do it.

Richter: I take it this doesn't happen too often.

Barrett: No, not too often. However, I remember another workman's comp case. That was another one. I lost that one. It was reassigned.

Richter: You say you lost it?

Barrett: Yes, I wrote an opinion that was not adopted.

Richter: Does it hurt when you work hard on a case, you get interested in it and dedicated to your opinion,

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and then the judges come along and say "no?"

Barrett: Well, I've had four or five "originally incomparable masterpieces," I call them, (laughing) but this one didn't get a single vote! I think the commissioners concurred in it, but by the time it got to the conference, the judges turned it down!

Richter: What do you think caused that? You and the commissioners had really studied the thing and researched it and you were so convinced. What would cause the judges to think differently?

Barrett: Difference of opinion. That's just the way she goes.

Richter: Is it because they hadn't done as much research on the thing, maybe?

Barrett: Well, I'm sure they hadn't, but then, you don't have to have done as much research to come to the conclusion that the opinion shouldn't be adopted and should be rewritten. It might have been that some of them just didn't like the details of some of the things that were drawn into it and they thought it was an attempt to be a little too learned. An interesting facet – the relationship of the judges among themselves, not only with commissioners – but I never had the experience of judges being arrogant or overbearing. But some of them, Judge Ellison, for example, the greatest gentleman I ever knew, would come and talk to you. Judge Ellison, you would discover, would have read all the cases and would have had a pile of notes, and it was kind of boring sometimes because it took him an hour or an hour and half to go back and bring all of it down to date and talk to you, persuade you, to change your opinion, or tell you politely, that he wasn't going to agree with you. He was going to dissent. But others were a little more blunt. Some of them would just say "I dissent and I don't agree with it." And that's all they needed to say and then the case was reassigned to somebody else.

Richter: Who would do the overruling, the Court en banc?

Barrett: Oh no. In divisions. The judges would do the overruling.

Richter: What about the relationship of judges and commissioners? Was there any 'lording it over' of the commissioners by the judges?

Barrett: No. I never had that feeling. I was very close and intimate friends with Judge Tipton. For some strange reason he often confided in me. He was an appointee of one of the boondoggles that existed in those days to the Right of Way Adjustment Board. They had brought in state court judges to hear these railroad cases, these claims. He got on that list.

Richter: Railroad claims were not heard in trial courts?

Barrett: Oh no. This was a labor union deal! They were claims of railroad employees against the railroad. Labor and Hours and clerkships and what not. He'd come back from sessions with 50 or 60 cases and he'd do trial practice on me. Most of them were decided in favor of the employees. One was a clerk's case and it was pretty plain to me that the clerk should not win that case. So I finally said, "Well, did you ever decide one of these in favor of the railroad?" He didn't ask me anymore! But the judges and commissioners were generally friendly until the Gantt feud came. After that Gantt feud....

Richter: What was the Gantt feud?

Barrett: Well, that's too long.

Richter: Who was the feud between?

Barrett: Judge Gantt and the rest of the court. Just the members of the court. He had Judge Hays on his side. Judge Hays was sick. They call it Alzheimer's today. And Judge Gantt controlled his load. Professor Gerold T. Dunne's book has a lot about this in it. I guess I was the only person to save all the clippings about it from all the papers. and I gave them to the Supreme Court Library when I left. I think D.A. Divilbiss, the court librarian, has turned them over to Professor Dunne.

Anyway, this was about 1942 and it lasted about two years. During that period, you see, most of us lived in the east end of town: Judge Hyde, Judge Gantt, Judge Boling and myself lived out there and we rode the bus to town. Judge Gantt was a very loud-talking man and very interesting. He was fascinating and very friendly but I was unfortunate enough in that first or second term to draw one of these bank cases. I wrote my opinion before anyone else did and circulated it. They held it up for a long time until the court en banc heard it. Well, after Judge Gantt read that opinion, he never spoke to me again.

Richter: He took it personal?

Barrett: Oh, yes. It was bitter. You have no idea how bitter. And this is what was the saving grace of the Non-Partisan Court Plan. It did away with things like that. Judge Tipton, Ellison and Leedy had been against the Non-Partisan Court Plan. They were regular old line Democrats. And there was a wariness between them and Judge Douglas because he knew they had all been against him. But the good thing that came out of the Gantt feud was that it had the effect of annealing the rest of the court. They understood one another better because they were on the same side in this horrible feud in which everything on earth happened. But that was the good thing that came of it. And so, that's all I need to say on that, I guess!

Richter: Did this have any effect on the opinions of the court?

Barrett: No. None at all. Judge Gantt had been Chief Justice. He resigned as Chief Justice and never sat again with the court en banc. He only sat in Division until his term expired. While it's on my mind, we were talking the other day about (Judge) Waltner being the only judge that was defeated under the

Non-Partisan Court Plan. He was a circuit judge and, like all circuit judges and everybody else in Kansas City, it has to do with Pendergast. Well, Kansas City papers carried on a vicious campaign against Waltner. He wasn't the greatest lawyer and judge that ever happened, but he was a very, very nice man and, in my opinion, basically honest. He's the only judge that's been defeated under the Non-Partisan Court Plan. There have been several various machinery proposed to correct this deficiency to remove a judge if he, you know, becomes mentally incompetent. You take Judge Hays who was on the court when I came. There's no question about his illness. He was senile.

And we had the judge – I'm reluctant to use his name – but we had a man who ran for reelection on the Springfield Court of Appeals at a time when he didn't know whether he was in the Woodward Building or in Jefferson City or Jericho. He was that bad!

Richter: How could he run a campaign for reelection?

Barrett: He didn't campaign. Nobody ran against him. He could find his way to the building and he'd go through the motions but everybody who knew him knew that he was utterly, totally incompetent. And he ran and was reelected! And stayed on the court until he died! And now with this proliferation of judges on the courts of appeals and the circuit courts, there's going to be more and more of that. And, in the second place, there are some judges now on the circuit court level that have gotten there, some of them young women, that have no damn business being on a court of any kind! But they're there! I told you at the beginning how Tipton and Leedy were against the Non-Partisan Court Plan until they ran for reelection under it. They liked that. That was easy. That was duck soup. Nobody running against them!

Richter: Without mentioning any names, I've heard rumors that there have been judges on the Supreme Court who didn't do their work and other judges had to do it. Is this true?

Barrett: Well, in the Gantt feud, he wrote a suppressed opinion against one of the judges. It was a dissent and the court voted five to two to suppress it. But Gantt leaked it to Boyd Carrol of the **Post-Dispatch**. Boyd was a great reporter. The best. He knew what he was doing and understood everything that happened. And the **Post-Dispatch**, in order not to get into cross-purposes with the court, didn't print the opinion but every day they wrote a story in which they'd quote a sentence or two out of Gantt's opinion. And the next day they'd write an editorial and put in a sentence or two until it was finally all there!

But back to the problem of removing a judge. You see what's happening here is that the machinery to remove judges – this committee to discipline judges – they don't do it. They're not using it. It's a bitter – a dangerous thing, and it's a very tough thing to do. Here's a judge. A wonderful person and a fine judge and all at once he's inflicted, as I am, with sporadic senility. What do you do? What are you going to do with him? And that's also a weakness of the federal system!

The good thing about our system is, and it's been challenged by some misadvised people, appellate judges, that you have to retire at age 70. This ought to be an ironclad rule!

Richter: What do you think of the United States Supreme Court? There are judges in their eighties serving on it.

Barrett: Well, I'm not capable of passing on that but I'm of the firm opinion that all judges should be compelled to retire at age 70.

Richter: Both trial and appellate?

Barrett: Yes. I don't think it makes any difference. If they've served 20 or 30 years they get into a routine and there's no way to change it or improve it. It takes a long period of time to learn how to become a judge, how to adjust to it. It's not only hard work; it has to become a way of life. And after 20 or 30 years there's not much likelihood of your adapting to changing conditions or new things.

Richter: Do you think judges should go through a training period?

Barrett: Well, it would help if they could have a little preliminary training and experience. The trouble is if you appoint people who have had no experience, regardless of their qualifications, you cannot tell what kind of judge they're going to be until you try them out. And then it's too late under either the Non-Partisan Court Plan or the elective system!

Richter: Is there any solution to the problem?

Barrett: Not that I know of. Education helps but the main thing is it just requires common sense and that' about it.

Richter: Getting back to the problem of the judge who doesn't work as hard as the other judges. In your 30-some years on the court, did you see this as a real problem?

Barrett: Oh, almost always there's one or two laggers on every court. They're always behind. That's in their nature and there isn't a thing that can be done about it.

Richter: There's nothing the other judges can do about it?

Barrett: Nothing except use kind words! After all, he's your equal any time, any place. And he's liable to tell you where to go!

Richter: Can't the Chief Justice do anything about it?

Barrett: Oh, no. And he'd better not try it either because the other one's going to be a Chief Justice in his turn!

Richter: What do you think of the system by which the Chief Justice position rotates?

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Barrett: Excellent. I like it. It's an equalizing factor, I've seen some of the finest people I ever knew made perfect damn fools by becoming Chief Justice!

Richter: Did they recover when their two years were up?

Barrett: No! Never! Never! One of them was not only a personal friend but I'm the person who thought of him as becoming a judge. And I once saw him strut as he walked past the post office. And he was built like a plow jockey and was a plow jockey! He was a country boy but by becoming Chief Justice, and especially after he had been to an American Bar meeting in London and visited the Inns of Court, he was a perfect fool. He never recovered and did less work all the time.

Richter: Well, being Chief Justice is a pretty high position.

Barrett: It's like all other positions of great power. It takes a lot of character to handle it without becoming a fool or a pompous ass. It's marvelous to have the change and especially today since there's so much administrative work – just piles and piles of that stuff falls on the C.J.'s shoulders – routine matters , general correspondence, supervising the clerk, the dockets and what not. I think the present Chief Justice has a conference most every morning with the clerk who is in charge of the en banc docket. He goes over it with her just to keep things current and to draw orders and decrees and all those things. And the Clerk initials and handles all those. In the end, the court en banc, after their monthly conference, approves them.

Richter: Is there any one Chief Justice who stands out in your mind as the very best of those you knew?

Barrett: Yes, and that was Judge James M. Douglas, especially when he became C.J. after the Gantt feud was over. As I told you before, there was a little bit of ill-at-ease feeling between Douglas and, at least, the judges of Division II – Tipton, Leedy and Ellison who had backed Billings in the Douglas-Billings election battle. But the Gantt feud had the effect of annealing those six remaining judges so when Douglas became C.J. he was able to get along, He knew how to deal with the other six in routine matters. There were more innovations during his time – his two years – than any other time.

Richter: One of the changes you mentioned earlier had to do with circulating opinions.

Barrett: Yes. Opinions were circulated to all judges and commissioners in each Division when the court sat en banc. Mind you, in 1940 a typewriter that reproduced more than seven copies of an opinion was pretty good. So every opinion had to be typed at least twice to get enough copies since there were no copying machines. If lawyers wanted a copy they had to buy them from the clerk. And during Douglas's time he made the innovation that a copy would be sent to the lawyers on both sides, so that required more copying!

Richter: What happened before they had the typewriter?

Barrett: All opinions were written in long hand. In the archives you'll see that cases from the 1870s and even up in the 1890s were all written in long hand.

Barrett: You know, one thing I thought of this morning. You go to a bar meeting. Some lawyers would say "that was a great opinion you wrote in Love against White," And you would look at him and say, "What? Who in the hell is that?" You can't even remember the name. (Laughing) And you'd think, "I wonder what in the hell he is talking about." Well, if you'd keep on talking he'd finally tell you some facts....

Richter: That you connected with the case? In other words, you don't remember them by the name of the case. I've often wondered about that.

Barrett: I didn't know who they were and I didn't care! You know that case I was telling you about. That woman and the fellow she lived with, Bob Brady's case. The name of it will come to me after a while. But no. If somebody came up and said you wrote a great opinion, he'd finally tell me the facts and, oh, yes, then it comes back to you. You don't connect the law. It's seldom, seldom if ever. Now I remember Booth against the Railroad. That was a case I drew, and affirmed the first judgment for $50,000. in a personal injury case. Mark Eagleton was the lawyer in that case. That was one of half-a-dozen I remember out of 800, over 800!

Richter: In each one you heard oral arguments?

Barrett: If it was argued, yes. But some were submitted on brief: S.O.B.

Richter: What I was trying to get at was the amount of time it took.

Barrett: Well, you see that day there were one, two, three four, five cases argued. (He pointed this out on an old docket in his files.)

Richter: Each side had how much time?

Barrett: The appellant had 40 minutes, the respondent, 30.

Richter: That's a long day!

Barrett: Right. We sat there till 5 o'clock every day. Some days – here's two, three, four – we got off pretty easy that day.

Richter: When you retired who were the judges?

Barrett: Henry I. Eager, Robert T. Donnelly, Fred L. Henley, J.P. Morgan, Clem F. Storckman...(pauses to look at dockets).

Richter: Who was C.J. then?

Barrett: Let's see. Yes. It was Henley.

Richter: You retired because you reached the mandatory age of 70, didn't you?

Barrett: Yes.

Richter: I've talked to a great number of lawyers over the years and many of them have no idea of

Supreme Court of Missouri Historical Society
Treasurer's Report, Nov. 1995

Balance on Hand, Oct. 1994		
Checking Account		$ 2,803.57
Money Market Account		67,358.63
		$ 70,162.20
Income, Oct. 1994-Nov. 1, 1995		
Membership Dues	$ 7,944.00	
Interest on Money Market Account	2,766.38	
	$ 10,710.38	
Expenses, Oct. 1994-Nov. 1, 1995		
U.S. Postmaster – Postage and bulk rate permit	$ 180.82	
Modern Litho-Print – Invitation, copies of the JOURNAL	2,428.85	
Brown Printing – Letterhead and envelopes	332.32	
Professor Lawrence Larson – Expenses and honorarium for speaking at 9th Annual Meeting	643.80	
Jefferson City Country Club – Dinner 9th Annual Meeting	1,853.02	
Jane Vetter – Flowers for 9th Annual Meeting	105.00	
Janet Musick – Preparing camera-ready copy for the JOURNAL	560.00	
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E.A. "Wally" Richter – Trip to interview Rush Limbaugh, Sr., Jan. 1994	177.28	
D.A. Divilbiss – Expenses for Trustees' Meeting in Springield, 1995	152.79	
The Flower House – Flowers for Swearing-In Ceremony, Oct. 1995	180.00	
Fred Stolts – Partial payment for painting portrait of Honorable Hamilton Gamble	250.00	
	$ 7,129.50	
Balance on Hand Nov. 1, 1995		
Checking Account		$ 618.57
Money Market Account		73,125.01
		$ 73,743.58
Allocation of Funds on Hand		
Herman Huber Memorial Fund		$ 525.00
Unrestricted Funds		73,218.58
		$ 73,743.58

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what goes on in the Supreme Court. They don't even know who the judges are.

Barrett: Oh, no! When you're sitting on the bench, once in a while you can see one lawyer whisper to another and you know he's saying, "Who's that son-of-a-bitch on the end?" Or, "Who's that son-of-a-bitch in the middle?" (Laughing) And then some judges once in a while whisper to one another on the bench. And the lawyers wonder what the hell they are talking about. I've told you, my favorite is when Lawrence Holman was sitting between Higgins and somebody else, he turned to the fellow on the left and says, "Do you think Higgins eats onions for breakfast?" (Laughing)

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