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FOREWORD

As the frontispiece of this issue we have the portrait of John S. Dawson, the chief justice of our supreme court. We are favored, also, with an article by him on the growingly important subject of “Administrative Government.” Few persons are better qualified than he to write upon that subject. Born, reared, and in part educated in Scotland, and having much first-hand knowledge of its laws and traditions, he has continued his interest and study of the laws and government not only of England, but of other European nations. When a young man he came to western Kansas, renounced his allegiance to the English sovereign and became a citizen of the United States and of Kansas; took up land, farmed and taught school, and became one of the community of industrious, home-making people. He has never lost interest in such people; his spare time is spent among them, and such money as he has been able to save is invested there. This was his background when he took up the study of law. Before he became a member of the court his services in such positions as a clerk in the state treasurer’s office, secretary to a governor, attorney for the state board of railroad commissioners, assistant in the office of two attorneys general and as the head of that office, constituted for him a school for the study of our laws, especially as they apply to the structure of our state and its various subdivisions and the duties of their respective officials, and as they apply to the normal enterprises and activities of our people. Naturally, he has observed the growth in the past forty years, and the more rapid growth in more recent years, of the creation by our state or federal government of boards or commissions of one type or another for the exercise of some particular governmental or semigovernmental function, and has given thought to their utility to our people and to how they fit into the plan of our governmental structure. The article is a timely one. We feel confident it will be read with interest.

Senator Kirke W. Dale, a member of the Council, has contributed an article on “Civil Appeals,” which we publish in this issue. It deals with appeals from the district court to the supreme court in civil actions, and specifically treats the recent act of the legislature, House bill No. 421, now chapter 268, Laws 1937. Attorneys appealing civil cases to the supreme court should examine this statute with care and follow it. This article gives us the purpose of the new statutes and should prove of practical value to the profession.

Judge Beals, a member of the Council, encountered a problem in the trial of a case which caused him to write an article on “Sale of Mineral Rights Under Direction of the Probate Court.” In view of the many mineral deeds in this state, particularly in that large part of it where there are oil developments, and the many questions arising with respect to the rights of the parties under such instrument, this article should be timely and helpful.

Judge Ruppenthal, a member of the Council, with a bent for historical lore, has compiled our constitutional and statutory provisions relating to
judicial districts, with the changes made in the statutes from time to time, and embodied these in an article entitled "Judicial Apportionment," which we print in this issue. In view of the resolution passed by the House of Representatives at our last legislative session, in which the Judicial Council was requested to make a survey of the work of the district courts of the state and "to report to the 1939 House of Representatives the survey so made and a plan of redistricting the judicial districts of the state," this article should prove to be of more than ordinary interest.

In order that it may be distributed to the about 3,500 people in the state who receive this BULLETIN, we print herein the "Report of Judicial Council" made by its chairman to the State Bar Association at its meeting in Topeka, May 28, 1937. This gives a general idea of the work of the Council since its creation ten years ago; also of its purposes and of its plans for the near future.

We are now collecting detailed reports from clerks of the district courts and probate judges throughout the state respecting the business transacted in their respective courts within the year ending June 30, 1937; also of the business pending July 1, 1937. These reports are being sent to us more promptly than ever before, for which we are all thankful. We plan to publish in our October BULLETIN summaries and tables compiled in our office from the reports of the clerks of the district court, and in our December BULLETIN similar summaries and tables compiled from reports of the probate judges. We are also outlining our plan of study for compiling a probate code, with such rewriting of our law of estates as may be necessary to accomplish that purpose. We have thus outlined quite a task, but it is an interesting work; we hope it will prove to be worth while.
ADMINISTRATIVE GOVERNMENT

JOHN S. DAWSON

A noted French philosopher, Baron Montesquieu, who flourished in the first half of the eighteenth century (1689-1755), devoted much of his life to a comparative study of systems of government. During his lifetime most governments were depraved and tyrannical. That of England, in Montesquieu's opinion, was so much less vicious than its contemporaries that the learned baron commended it in various essays which he later incorporated in his great work, "The Spirit of the Laws." Montesquieu discovered seeming excellencies in the English system of government of which Englishmen themselves were unaware—particularly its supposed arrangement into three coordinate departments—legislative, executive and judicial.

In the restless years which preceded the American War of Independence, Montesquieu's essays, like Blackstone's Commentaries, were widely read on this side of the Atlantic. Those works formed the basis of the legal and political education of our Patrick Henrys, the Adamses, and the other revolutionary lawyers whose names are enrolled in the pantheon of American history. The teachings of Montesquieu and Blackstone supplied the legal arguments to justify the War of Independence.

Whether or not the English governmental system then or later could be rationalized into three coordinate departments, it is certain that the constitution of the United States is fundamentally constructed on that theory. So, too, are the constitutions of most of the states; and in none of them is this idea of Montesquieu more clearly discernible than in the constitution of Kansas.

Recent years, however, have seen the creation of many official boards and commissions, both national and state, clothed with broad powers, the nature of which does not precisely fall into either of the three coordinate departments of government so greatly admired by Baron Montesquieu. The judicial department, which of necessity has always been dominated by law-trained men, has measurably held fast to the Montesquieu idea—that its exclusive function is to interpret and apply the law, not to make it. But in this iconoclastic era one does not have to look far into current political literature to discover that the molders of public opinion do not appreciate the self-restraint of the courts to stay within the limits of their constitutional competence.

The Kansas supreme court has steadfastly held to the principle that a judicial tribunal cannot be endowed with legislative or executive attributes; but the supreme court of the United States has declared that if the people of a state see fit to vest both legislative and judicial power in one department of their state government, no principle of the federal constitution is thereby violated.

At almost every session of the Kansas legislature some new official board is created to serve a more or less urgent need for regulating the commerce and industry of this state. And nothing is more common than the vesting of additional powers in boards and commissions which already have a long official history. Nobody is to blame for this. Every year modern business becomes more intricate, more a matter of public interest and less a matter of purely
private concern. It is this fact which prompts our lawmakers, in no mere spirit of meddlesomeness, to subject so-called private business to governmental regulation.

In this state the courts have not been inclined to draw critical lines on the vesting of legislative and executive (administrative) power in the same official body. When the legislature vested the state board of agriculture with power to supervise and regulate the business of commission merchants dealing in farm produce, many and various were the objections raised against the statute, but the court said the act—

"... Merely confers administrative power such as has become common in this state. The state charter board is given similar power to grant or withhold a charter for a bank. The insurance commissioner is authorized to grant, withhold and revoke licenses to transact insurance business in Kansas. The public utilities commission is authorized to grant or deny permits to conduct a public-service business. The state board of medical registration and examination is authorized to grant, deny or revoke licenses to practice medicine."

The Kansas supreme court has repeatedly sought to calm the fears of thoughtful men at the growth of government by administrative boards. In a notable case of that sort, it said:

"We recognize that officers of public service corporations have viewed with great misgiving the extension of governmental power over their business which has come about in recent years. But this extension of governmental power, this public supervision by state and interstate commissions, has probably come to stay. Public service companies will have to reorder their affairs accordingly. These official commissions have entered a new field of governmental activity. With time and experience they will take a broad and rational view of their duties and responsibilities. In time the public service companies will learn to trust these commissions as fully as they do the courts. Indeed, these commissions are equipped for the expeditious dispatch of business in a manner which will be of great service to the public utility companies, and will supply a field which courts never were designed to fill." (State, ex rel., v. Postal Telegraph Co., 96 Kan. 298, 306-307.)

In another case where regulation of rural telephone lines was the subject of judicial review, the court said:

"Moreover, in passing under the jurisdiction of the state commission the defendants are not going to be subjected to some malignant influence. The commission may require some more formality in the conduct of their business, but there are compensations. It will be defendants' duty to give adequate service at reasonable rates, but in return their business will be protected from wasteful and ruinous duplication and competition." (State, ex rel., v. Telephone Co., 112 Kan. 701, 705.)

It is no part of the writer's present purpose to write a brief on the power of the Kansas legislature to create official boards, nor to review the many cases where the supreme court has considered and commonly upheld the statutes which created them. During the last thirty years the decisions of the Kansas supreme court have built up a considerable body of administrative law; and in the same interval a slowly increasing number of Kansas lawyers have accepted the existence of these statutory tribunals in good faith—greatly to their clients' advantage and with satisfactory compensation to themselves. And why not? The perplexed business man, in his efforts to conduct his business in conformity with the regulations promulgated from time to time by these various official boards, is not looking for a lawsuit to challenge the validity of those regula-
tions. But he will often need a lawyer to interpret them for him. Frequently it is only the official board which promulgated those regulations which can say with certainty how they are to be applied to individual instances. The regulations may need to be modified to fit unforeseen situations. Nothing remarkable about that. Our unrivaled heritage of the common law is the net result of centuries of judicial exposition and adaptation to innumerable individual cases. It has been amplified, qualified, modified, and occasionally its rules have been abrogated, to serve the needs of justice down through the ages.

At this season of the year, when great numbers of young men and women come before the supreme court armed with diplomas from the law schools, seeking to be admitted to the practice of law, we oldsters are prone to ask, Where are all these competent young people to find a field for their talents? May it not be that the vast growth of these novel administrative boards and commissions furnishes a situation as if made to order to enlist the talents and absorb the energies of a considerable quota of the choicest of these recruits of our profession? Certain it is that these administrative boards and commissions will have to be staffed with law-trained men and women if they are to give the public the sort of service intended in their creation. And there will be a demand not only as officers and employees of these boards and commissions, but for well-trained, well-informed lawyers to practice before those boards, vast numbers of them, to present the cases and the perplexities of clients who want light, not litigation.

The Kansas supreme court in recent years has had to deal with intricate cases involving utility rates, insurance rates, income and inheritance taxes, and the like, where capable general practitioners of the law have been of little assistance to the court. But the court listens with pleasure and profit to lawyers who can analyze a balance sheet, to whom the words "capital account," "maintenance and depreciation," "treasury stock," "preferred stock," "non-par stock," "transfer of securities," "distributive shares," "allocable income," etc., are not weird terms of a foreign language. Lawyers equipped to handle such matters before the various administrative boards authorized to deal with them will not wait long for clients. And they will be able to render such competent service that their clients will usually get justice at the hands of the administrative functionaries, and thus the expense and delay attendant upon appeals to the courts will be avoided. Most of this sort of legal work will be blazing a new trail in the law. There will not be many precedents; but there are principles of justice to be invoked and applied to the new problems; and there will be the satisfactions which result from doing good work, and in helping to make precedents in a new field to guide the course of those who will come hereafter.
CIVIL APPEALS

Kirke W. Dale

Since the adoption of the present code in 1909 there have been few legislative changes in appellate procedure in civil actions—that is, until 1937, when House bill 421 was passed and signed by the governor.

Kansas for years has led the march in a simple, but effective, method of appeal. Long ago this state discarded the lengthy and laborious procedure required in some of the other jurisdictions to have a civil cause reviewed by the court of last resort. As a result, appeals have been expeditiously decided in this state.

The 1937 act will further step up the disposition of cases appealed. This legislation will in a large measure prevent unreasonable delays. The existing statutes are clarified and, when once in operation, the new statutory provisions should prove very beneficial to litigants and attorneys.

The new act makes no change in the appellate jurisdiction of the supreme court, in the definition of a final order, in the amount in controversy upon appeals to the supreme court or the exceptions thereto. All these remain the same.

The method of taking and perfecting an appeal, by proper notice filed with the clerk of the trial court, is unchanged, and likewise the manner of serving the notice upon adverse parties sought to be affected.

Under the existing statutes and under the new act it is the duty of the clerk of the trial court, when the appeal is perfected and proof of service or affidavit is filed, to forthwith make a certified copy of the notice of appeal and proof of service or affidavit and forward same to the clerk of the supreme court, together with a certified copy of the journal entry of judgment or order appealed from.

Under the present procedure no penalty is attached if the clerk of the trial court fails to obey the statute. In some few cases an attempt has been made to dismiss an appeal when the clerk of the trial court failed literally to follow the wording of the statute. The supreme court has, however, refused to harass or punish the appellant for any procrastinating custom displayed by the clerk. It has held that where the appellant has complied with all that the law requires of him in order to perfect an appeal, his rights cannot be prejudiced nor can the jurisdiction of that court be defeated by a failure of the clerk of the trial court to perform a duty which the statute imposes upon him.

The new act carries a penalty which is applicable to the clerk of the trial court. In the future a failure of such clerk without just cause to make and transmit the required and specified copies to the clerk of the supreme court within ten days after the appeal is perfected, will be grounds for his removal from office. Thus the clerk will no doubt perform these duties quite promptly.

By reason of the penalty placed upon the clerks of trial courts it may pay attorneys to be reasonably prompt in preparing and filing journal entries of judgments or orders from which appeals are contemplated. If attorneys fail in this the clerks may of necessity be required to prepare same as best they can and some attorney may become sorely embarrassed and out of sorts.

It might be said that in addition to the transmittal of the certified copies by the trial clerk, it was further necessary for appellant to comply with the rule of the supreme court with reference to security for costs before the ap-
peal should be completed in that court. Such a situation is implied by G. S. 1935, 60-3307. It seems improbable, however, that the giving of security for costs would raise a jurisdictional question. The new act omits any specific reference to security for costs before a case is docketed in the supreme court, but certainly, under the inherent power of the supreme court, that matter can and will be adjusted by proper rule.

Difficulties may arise by reason of one change. Some attorney undoubtedly will face a rude awakening. For years we have been given six months from the rendition of the judgment or order within which to perfect an appeal. No such time limit will prevail under the new law. After this act becomes effective only two months will be allowed. The act does contain a saving clause in that it provides that appeals from judgments and appealable orders of a date within four months prior to the taking effect of the act may be perfected within two months after the effective date of the act.

Substantial changes will probably be necessitated in relation to abstracts filed on appeals. Under the present practice the abstract of record is due at least forty days before the case is set for argument. It shall contain and be an abstract of so much and such parts of the pleadings, record, evidence and proceedings as the appellant deems necessary. The appellee may within thirty days thereafter serve a counter abstract containing any other matter deemed essential. The appellee may also challenge the correctness of any matter contained in appellant's abstract. If such challenge is made the court or any justice may direct that any or all of the record be sent by the clerk to the trial court to the clerk of the supreme court and the costs incident to the determination of any question as to the correctness of the abstract shall be taxed against the party in the wrong. The abstract must be printed unless otherwise ordered by the court or any justice. It may be bound separately or with the brief. The court or any justice may by order allow a typewritten abstract to be served and filed, may direct the number of copies to be furnished the court, may dispense with the making of the abstract and require the entire record or any part thereof to be furnished.

So much for the present practice. Now note carefully the changes provided by the new law. In all cases in which a transcript of the evidence is not necessary in order to review the questions presented on appeal, the abstract of appellant must be served and filed in the supreme court within forty days after the notice of appeal is filed with the clerk of the trial court. When a transcript is necessary the abstract must be served and filed within four months after the notice is filed with the clerk of the trial court.

The abstract of the appellant "shall contain a synopsis of so much and of such parts of the pleadings, record, evidence and proceedings in the case as appellant deems necessary for the consideration of the court."

What is the significance of the use of the word "synopsis" in the new act? Does the act really contemplate what the word indicates? Does it mean that under the new act it will be improper to set out pleadings, orders, judgments, rulings, etc., in full in the abstract? Does it mean that it will be improper to quote evidence or parts thereof verbatim?

Reference to Webster's great work indicates that by using the word "synopsis" it would be necessary for the abstract to give a general view of the whole, a general survey or a sketch or outline of the case. The supreme court may eventually, by rule or otherwise, be forced to give attorneys a course of in-
structions in the method of properly preparing an abstract under the new act. No doubt the language used was for the purpose of condensing and shortening the abstracts filed, and the word in question was not used literally as a guide post. However, this remains to be determined.

Under the new act the appellee, if the abstract is deemed insufficient, may file a counter abstract within thirty days after service upon him of appellant's abstract. The counter abstract must be filed with the clerk of the supreme court and served within this thirty-day period.

If appellant's abstract is not challenged by the appellee it is deemed sufficient. In the event a challenge is made the court is permitted to make such an order as the nature of the case and justice warrant.

The abstracts must be printed separately or with the brief, unless upon application and good cause shown the court orders that they be presented otherwise.

At the present time it is not necessary for the appellee, in order to have a review of rulings and decisions of which he complains, to give notice by way of cross-appeal. The appellee may, at any time before the case is assigned, serve upon the appellant a notice stating in what respect he asks a consideration and review of any part of the judgment or of any order, and a review will be had. Such notice and proof of notice must be served and filed with the clerk of the supreme court.

Watch out if you, as appellee, want a cross-appeal under the new law. In the event you desire a review of any rulings and decisions, you must, within twenty days after the appellant's notice of appeal is filed with the clerk of the trial court, give notice of your cross-appeal and file the same with the clerk of the trial court, who shall forthwith forward a duly attested copy to the clerk of the supreme court. Service of the notice of a cross-appeal is just as necessary as the service of the notice of appeal.

The new act liberalizes the scope of appeal in one noteworthy respect. Since the adoption of the present code our supreme court has consistently held that a trial court's ruling on a pleading or any intermediate appealable order is not subject to review unless an appeal is taken therefrom within six months. An attempted review from many rulings has been thwarted by the application of this rule. The correctness of the rule is not open to question, but many disappointments have been occasioned thereby.

The new act is quite specific on this point. It provides that when a party appeals, after a final judgment against him, the fact that some ruling of which he complains was made more than two months before he perfected his appeal shall not prevent a review of that ruling. Thus, when an appeal is taken, every appealable order or ruling throughout the proceedings will be subject to review, and intermediate appeals will not be an absolute necessity. This should lighten the work of the supreme court and members of the bar and it will also expedite the final disposition of many cases.

The above is a hasty review of the new law relating to civil appeals and a somewhat cursory comparison of the provisions of the new act with the present one.

The new act becomes effective upon its publication in the statute book or 1937 Session Laws. If you should have an appeal governed by the provisions of the new act, it would be advisable for you to consult the statute and not rely upon the statements made in this article.
SALE OF MINERAL RIGHTS UNDER DIRECTION OF THE PROBATE COURT

RAY H. BEALS

Can the probate court, in settling an estate, direct a sale of the mineral rights, or part of the mineral rights in land, separate from the sale of the fee, for the payment of debts, if in the opinion of the court the same would be more advantageous to the estate?

There is no statute specifically authorizing an executor to sell either a mineral interest or royalty interest owned by a decedent, either for the payment of debts or other purposes. G. S. 1935, 22-6a01, et seq., authorizes an executor to lease for oil and gas. This section, however, is not sufficient to authorize a sale of the minerals. G. S. 1935, 72-801, is authority for the executor or administrator to sell the real estate of the deceased, or any interest that he may have in any real estate situated within this state, and G. S. 1935, 22-807 and 22-808, authorize an order of the court to sell real estate or any part thereof. In my judgment, the executor, if he has authority to sell the mineral rights for the payment of debts, should proceed in the same way as if he were selling the land. G. S. 1935, 79-420, recognizes a divided ownership of surface and mineral rights for the purpose of taxation. All gas and other mineral rights in and under the real property are part of the real estate. The first paragraph of the syllabus in the case of Zinc Co. v. Freeman, 68 Kan. 691, reads as follows:

"Petroleum and gas are minerals. As long as they remain in the ground they are part of the realty. They belong to the owner of the land, and are a part of it as long as they are on it, or in it, or subject to his control."

The cases of Belpport v. Harrison, 123 Kan. 310, and Burden v. Gypsy Oil Company, 141 Kan. 147, and cases there cited, show that oil and gas in the ground is real estate, and in my judgment, the mineral rights in land constitute sufficient interest in real estate to authorize the sale thereof by an executor for the payment of debts of the deceased. So far as I have been able to ascertain, the supreme court of Kansas has never passed upon this question. However, in the case of Nevell v. McMillan, 139 Kan. 94, the Kansas court cites the case of Wilson v. Yost, 43 W. Va. 826, 39 L. R. A. 292, which apparently holds that a guardian may sell the oil underlying a tract of land. Cases relative to guardians, and the statutory authorizations relative to sale of real property, are analogous to sales by an executor. In the case of Webb v. Webb's Guardian, (Ky.) 198 S. W. 736, the court approved the sale by a guardian of the minerals, leaving to the infant the surface of the land. In the case of Hays v. Wicker, (Ky.) 171 S. W. 447, the court held that the probate court could authorize the guardian to sell coal without selling the surface. In the case of Hope v. Haddock, (Okla.) 271 Pac. 652, the court held that a guardian's sale of an undivided interest in the land was valid. There are several cases where guardians have sold mineral interests upon application to the proper court, which sales were conceded to be valid. (Apple v. Given, (Okla.) 235 Pac. 867; Matheus v. Myers, (Tex.) 42 S. W. 2d 1099.) The probate court has the power to order sale of the minor's fractional interest or future interests. (28 C. J., par. 291, p. 1171.) Also, in 24 C. J., 562 and 563, par. 1469, it provides that the
court may, in settling an estate, direct a sale of a mineral leasehold separate from a sale of the fee, if that course would be more advantageous to the estate; citing, Baker v. Royal Lead Co., 107 S. W. 704, 707; 32 Ky. L., 982, and the case of Ames v. Ames, 160 Ill. 600, 43 N. E. 583. There is authority to the contrary, however. In Oberstein v. Oswalt, 47 Mich. 254, 10 N. W. 360, the executor had sold an undivided one-half interest in a piece of land owned by deceased. In its opinion the court said:

"In our opinion, the statute providing for a settlement of the estates of deceased persons and a sale of the real estate thereof by virtue of an order of the probate court for the payment of the debts of the deceased, does not authorize or justify a sale of an undivided interest, or the interest of some of the heirs . . . . The statute authorizes the sale of the whole, or of such part of the real estate as may be judged necessary. . . . These provisions do not authorize or contemplate the sale of an undivided interest in the estate, in case it is unnecessary to sell the whole. Whatever part or parcel of the estate is to be sold, it must be the entire interest which the deceased had therein, the interest of the estate as a whole, that must be sold. . . . These statutes do not contemplate a carving up of estates and sales of undivided interests, less than the whole title thereon, and the machinery of the probate court, ample though it is, is not adequate to the settlement of equities among heirs, and enforcing contribution between them in this way."

Again in Daley's Appeal, 47 Mich. 443, 11 N. W. 262, the same court says:

"The executor made it impossible to sell the whole interest of which the decedent died seized, and we held in (case cited above) that the statute would not authorize the sale of a different interest. We came to the conclusion that if the decedent at his death was seized of the entire interest it would not be competent to license his representative under the statute to sell an interest of smaller quantity."

In LeBoeuf v. Webre, 40 La. Ann. 380, 4 So. 223, the administratrix caused an undivided one-half interest in the land left by deceased to be advertised for sale. In its opinion the court says:

"Obviously, if the whole of this real estate belongs to the succession as alleged, the sale of an undivided half of it would be both improper and illegal."

Hewitt v. Durant, 78 Mich. 186, 44 N. W. 318, follows the rule laid down by the Michigan court in the cases cited above. See, also, 24 C. J. 570, p. 570, par. 1484.

In the case of Jones v. Stevens, 76 A. L. R. 591, the fourth division of the syllabus reads:

"A grant of right of way over remaining lands to a parcel conveyed is not in excess of the powers conferred by a license to an executor to sell and convey so much of the decedent's real estate as will produce a stated sum."

On page 595 of the opinion it is stated:

"It is contended by the petitioner that the grant of a right of way by the executor of Samuel Tucker was in excess of his powers. The license was in general terms 'to sell and convey so much of the real estate of the said deceased as will produce said sum ($79.38) with incidental charges.' The sale made under the license was valid. R. S. 1826, C. 71 Yeomans v. Brown, 8 Metc. 51, 58, Norton v. Norton, 5 Cush. 524, and the conveyance of lot C with a right of way was not broader than the powers conferred by the license. In Baker v. Willard, 171 Mass. 220, 50 N. E. 620, 40 L. R. A. 754, 68 Am. St. Rep. 443, the license empowered the executor to sell only a specific parcel of real estate."
In Church on New Probate Law and Practice, vol. one, p. 893, you will find the following:

"(1) Sales of mines and mining interests. No sale of a decedent's estate is authorized, except when it is necessary: (1) To pay family allowance; (2) Debts of the decedent; (3) Expenses of administration; or (4) Legacies. But mines and mining interests belonging to estates of decedents are an exception to this rule. Such interests may be sold when it is expedient to do so, for the benefit of the estate, although the proceeds are not needed to pay debts, expenses, etc.; and where it is sought to sell mining property for the benefit of the estate, it is not required that the petition shall set forth the condition of any property except that which is to be sold. The manifest reason of this is, that the expediency of such sales is in no wise dependent upon the condition of other portions of the estate: Smith v. Biscailuz, 83 Cal. 344, 349; 21 Pac. Rep. 15; 23 Pac. 314.

"(2) Sale of property subject to lease. The executor may sell property held under a lease, where there is no provision in the lease itself prohibiting a sale of the property during its term, and where the sale is made subject to such lease; Estate of Brannan, (Cal.) 51 Pac. Rep. 320."

Referring to G. S. 1935, 22-819, where it says that the deed shall convey to the purchaser all the right, title and interest of the deceased in the premises sold, the words, "premises sold" in the case of the selling of an undivided interest in oil, gas and mineral rights, would be the undivided interest in the oil and gas and other minerals, which the administrator or executor sold. The statute provides that the administrator shall convey the right, title and interest of the deceased in the premises sold, and this wording of the statute is evidently on the theory that the administrator does not warrant, and cannot warrant any title, because he has nothing to back up the warranty. Therefore, as in a quitclaim deed, he simply sells all the right, title and interest which the deceased had. The rule of caveat emptor applies to all judicial sales, and the purchaser gets what the deceased owned, without any warranty from the administrator, and buys at his own risk. There probably is no difference in principle between selling oil and gas in place, or coal in place.

It is my opinion that the probate court has ample jurisdiction to authorize an executor to sell mineral interests, or any part thereof, of any land owned by the deceased for the payment of debts, no question of homestead rights being involved.
JUDICIAL APPORTIONMENT

J. C. Ruppenthal

In the legislature of Kansas for 1937, on March 8, the House of Representatives adopted H. R. No. 35, "A resolution requesting the Judicial Council to make a survey and report relating to the redistricting of judicial districts in this state." It follows:

"WHEREAS, There is reason to believe that a redistricting of the judicial districts of this state would more evenly distribute the judicial work of the various district courts; and

"WHEREAS, The legislature at the present time is without sufficient information to adequately and intelligently enact a judicial apportionment act: Now, therefore,

"Be it resolved by the House of Representatives of the State of Kansas: That we respectfully request the Judicial Council of this state to make, or to have made, a survey concerning the business and amount of work in the various judicial districts of this state, and based upon such survey to make a plan of redistricting the judicial districts of the entire state.

"Be it further resolved: That the Judicial Council be requested to report to the 1939 House of Representatives, the survey so made, and a plan of redistricting the judicial districts of this state.

"Be it further resolved: That the chief clerk of the House of Representatives be directed to transmit a copy of this resolution to the chairman of the State Judicial Council."

At least once before, a problem, persistent and recurring for seventy years past, has been approached somewhat similarly. Thus House concurrent resolution No. 9 was approved January 27, 1920, at the special session of the legislature:

"WHEREAS, There has been for several years a demand for the redistricting of the state for judicial purposes; and

"WHEREAS, It is difficult for the legislature, during a session, to secure the necessary information for a reapportionment of the judicial districts of the state fairly and equitably: Therefore, be it

"Resolved by the House of Representatives, the Senate concurring therein, That a committee of three be appointed, consisting of one member to be appointed from the Senate by its president, and one member to be appointed from the House of Representatives by the speaker, and the third, who shall act as chairman, to be appointed by the governor, to serve without compensation, whose duty it shall be, between now and the next regular session of the legislature, to procure all the data and information available, and make a report to the next session of the legislature as to what changes can be made, and what reapportionment might justly be affected, of the judicial districts of the state. Laws, Spec. Sess. 1920, ch. 76."

An examination of the history of judicial apportionment will disclose features of the problem, the persistent recurrence of the need, the views of executives, and of bar committees, and the manner of meeting the situation on part of the legislature, and also the extent, effectiveness and permanence of the statutory provisions.

The Organic Act of Congress, March 30, 1854, establishing the Territories of Kansas and Nebraska, provided:

"Sec. 27. The judicial power of said territory (Kansas) shall be vested in a supreme court, district courts, probate courts and justices of the peace. The said territory shall be divided into three judicial districts . . .
“Sec. 35. Until otherwise provided by law, the governor of said territory may define the judicial districts of said territory and assign the judges who may be appointed for said territory to the several districts . . . but the legislative assembly, at their first or any subsequent session may organize the judges, . . .”

The first legislature of the territory of Kansas, assembled at Shawnee Mission, its acts effective at the end of the session, August 30, 1855, by chapter 91, apportioned the territory (Gen Stat. 1855, Ty. Kan., ch. 91):

“Section 1. The counties of Doniphan, Atchison, Jefferson, Calhoun, Douglas and Leavenworth shall compose the first judicial district.

“Sec. 2. The counties of Johnson, Lykins, Linn, Bourbon, Allen, Anderson, Franklin, and Shawnee shall compose the second judicial district.

“Sec. 3. The counties of Nemaha, Marshall, Riley, Breckenridge and Madison shall compose the third judicial district.

An act of February 11, 1857, recast boundaries as follows:

First district: Counties of Leavenworth, Jefferson, Riley, Marshall, Nemaha, Brown, Doniphan, Atchison and Arapahoe, and all that portion of territory lying between the counties of Marshall, Riley, Davis, Wise, Butler and Hunter, and the said county of Arapahoe.


Third district: Counties of Linn, Bourbon, McGee, Dorn, Allen, Anderson, Coffey, Woodson, Wilson, Godfrey, Greenwood, Madison, Butler and Hunter. (Laws 1857, p. 71, being the 35th chapter, but not numbered.)

Laws 1858, chapter 40, made slight changes in part by inclusion of new counties:


This delimitation was further defined by General Laws 1860, ch. 77, that:

“All territory within the respective boundaries of the Ottawa, Chippewa and Sac and Fox reserves in said territory, and all Indian reservations, and so much thereof as lies within the defined limits of Jefferson county, and also all that portion of the Pottawatomie and other Indian reservations within the defined limits of Jackson county are attached to the second judicial district.”

For a fourth time, the entire territory of Kansas was redistricted. This was by General Laws 1860, chapter 78:

“Section 1. The counties of Leavenworth, Atchison, Doniphan, Jefferson, Wyandotte and Arapahoe shall constitute the first judicial district.


“Sec. 3. Johnson, Lykins, Linn, Bourbon, Cherokee, Dorn, Allen, Anderson and Franklin shall constitute the third judicial district.

“Sec. 10. The whole of the Delaware Indian reservation is attached to the first district as well as all Indian Territory within the county of Arapahoe.
"Sec. 11. The Pottawatomie, Kaw, Otoe, Chippewa, Ottawa, Sac and Fox, and Kickapoo Indian reservations are attached to the second judicial district.

"Sec. 12. The New York Indian reservation is attached to the third judicial district."

The act of Congress, January 29, 1861, admitting Kansas as a state of the Union, under the Wyandotte constitution of 1859 and the schedule attached to the latter, made no mention of districts. But the constitution, by several sections of article III, judicial, established present boundaries of judicial districts and left to the legislature future demarkation.

"Sec. 5. The state will be divided into five judicial districts.

"Sec. 14. Provision may be made by law for increase of the number of judicial districts whenever two thirds of the members of each house shall concur. Such districts shall be formed of compact territory and bounded by county lines.

"Sec. 18. Until otherwise provided by law, the first district shall consist of the counties of Wyandotte, Leavenworth, Jefferson and Jackson. The second district shall consist of the counties of Atchison, Doniphan, Brown, Nemaha, Marshall and Washington. The third district shall consist of the counties of Pottawatomie, Riley, Clay, Dickinson, Davis, Wabaunsee and Shawnee. The fourth district shall consist of the counties of Douglas, Johnson, Lykins, Franklin, Anderson, Linn, Bourbon and Allen. The fifth district shall consist of the counties of Osage, Coffey, Woodson, Greenwood, Madison, Breckinridge, Morris, Chase Butler and Hunter.

"Sec. 19. New or unorganized counties shall, by law, be attached for judicial purposes, to the most convenient judicial district."

The United States census of 1860 showed a population of 143,643 within Kansas Territory, including 34,242 in the Pike's Peak region. With the latter cut off at the 102d meridian upon admission to statehood, the state enumeration of 1865 showed 140,179 inhabitants in 38 counties, there having been 35 counties named in the state constitution. The progress of population thereafter is not readily traced, but the federal census of 1870 gave credit for 362,307 inhabitants in upwards of sixty counties.

Meantime the legislature had more than doubled the number of districts, each with a single judge. Four districts were created in 1867 (Laws 1867, ch 53): The sixth of the counties of Miami, Linn, Bourbon, Crawford and Cherokee; the seventh of the counties of Anderson, Allen, Neosho, Labette, Woodson and Wilson; the eighth of the counties of Riley, Clay, Shirley, Dickinson, saline and Ottawa; the ninth of the counties of Chase, Marion, Butler, Howard, Cowley, McPherson, Sedgwick, Sumner, Rice, Reno, Hayes, Stafford, Pratt and Barber. The tenth district was created in 1869 of Wyandotte, Johnson and Miami counties (Laws 1869, ch. 34). The eleventh district in 1870 of Crawford, Cherokee, Labette, Montgomery and Howard counties. (Laws 1870, ch. 69.)

The act of 1869, besides creating the tenth district, defined new judicial boundaries as: Sixth district, Linn, Bourbon, Crawford and Cherokee counties; seventh district, Allen, Neosho, Labette, Woodson and Wilson counties; fourth district, Douglas, Franklin and Anderson counties; tenth district, Wyandotte, Johnson, and Miami counties. (Laws 1869, ch. 34.)

In 1871 the twelfth district was created, of the counties of Marshall, Washington, Republic, Jewell, Mitchell, Cloud, Clay, Smith and Osborne. (Laws 1861, ch. 67.) The same legislature detached Cowley and Sumner counties from
the ninth district and made them part of the eleventh district, which had been created of five counties in 1870.

By this time, if not earlier, judicial apportionment had attracted serious attention. Gov. J. M. Harvey, in his message to the legislature at its opening session in 1872, said:

"I think that most of the district judges need more work, as well as more pay; consequently I recommend that, instead of augmenting the number of districts as the population of the state increases and spreads over new territory, you adopt the policy of redistricting the state, so as to make an equitable division of the business between the existing number of judges, and increase their salaries sufficient to justify them in holding court throughout the year."

(House Journal, 1872, p.—.)

But the governor's message did not meet the judicial needs, nor satisfy economic wants or official ambitions. Eight bills relating to judicial apportionment were introduced in the House, and two of them reached the stage of approval by the governor, creating the thirteenth and fourteenth judicial districts, and two others changed boundaries. These bills, with their objectives and course, were: House bill No. 77, to amend an act to create the twelfth judicial district, recommended for passage by 69 to 2, but indefinitely postponed in the Senate; House bill No. 155, to create the thirteenth district, recommended 67 to 3, approved by the governor; House bill No. 195, to create the fourteenth district, recommended 67 to 4, amended by the Senate, approved in conference, and signed by the governor; House bill No. 358, to create the thirteenth and define the eighth district, referred to committee; House bill No. 363, to attach Crawford and Cherokee counties to the sixth judicial district, indefinitely postponed; House bill No. 393, to create the —— judicial district, referred to Committee on Judiciary; House bill No. 459, to attach certain counties to the ninth district, passed 71 to 0, approved; House bill No. 520, to define the eighth judicial district, passed 59 to 0, approved.

The measures enacted in 1872 are: The eight district shall consist of the counties of Riley, Davis, Dickinson, Ottawa and Morris (Laws 1872, ch. 120); the counties of Rice, Reno and Harvey are made part of the ninth and Butler county is made part of the thirteenth district (Laws 1872, ch. 118); the thirteenth district was created of the counties of Howard, Greenwood, Cowley, Sumner, Reno and Sedgwick (Laws 1872, ch. 112), and within a day or two later Butler was added as above set out (Laws 1872, ch. 118); the fourteenth district was created of the counties of Saline, McPherson, Lincoln,Ellsworth, Ellis, Russell, Wallace, Trego, Ness, Rush, Barton and Pawnee (Laws 1872, ch. 113).

The legislature of 1873 had two bills to create the fifteenth district. Senate bill No. 22 was replaced by substitute, recommended in committee of the whole, and then rejected, but House bill No. 36 became a law, making the counties of Mitchell, Jewell, Osborne, Smith, Phillips, Norton, Rooks and Graham, and the undefined territory of the state lying west of Graham and Norton, the fifteenth judicial district. (Laws 1873, ch. 76.)

The same session, in three acts, altered district boundaries. The twelfth district was declared to consist of the counties of Marshall, Washington, Republic, Cloud and Clay (Laws 1873, ch. 78); the ninth district was to consist of the counties of Chase, Marion, Harvey, Reno, Rice, Barton, Pawnee, Ford, Hodgeman, Kingman, Harper, Barber, Comanche, Kiowa, Clark, Pratt and
Stafford, and all that portion of the state lying south of the fourth standard parallel and west of the counties of Hodgeman, Ford and Clark (Laws 1873, ch. 79); Greenwood county was detached from the thirteenth district and attached to the fifth district (Laws 1873, ch. 81).

In 1874 Linn county was detached from the sixth and made part of the tenth district (Laws 1874, ch. 65), and Harper, Barber and Comanche counties were included in the ninth district (Laws 1874, ch. 66).

Wallace county was placed in the fourteenth district in 1875 (Laws 1875, ch. 87). In 1876 Linn county was detached from the tenth and added to the sixth district (Laws 1876, ch. 68).

After eight years of abstention, the creation of new judicial districts began again in 1881 and was continued in five successive sessions, each of which added from one to six new districts.

In 1881 the sixteenth and seventeenth districts were created; in 1883 the eighteenth, nineteenth and twentieth; in 1885 the twenty-first; in 1886 the twenty-second, twenty-third and twenty-fourth; in 1887 the twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth; in 1889 the thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-fifth. In 1895 there was a recession in which six districts were wiped out. But in 1899 the thirty-sixth was created; in 1901 a new fourteenth; in 1903 the thirty-seventh; in 1905 the thirty-eighth; in 1907 a new sixteenth. There was then a respite until 1925, when the thirty-ninth was created, and in 1927 the new twenty-fifth. For ten years thereafter, to date, no new district has been created nor bounds changed.

In 1881 Jefferson and Jackson counties were taken from the third district and added to the first, which also had Leavenworth county. Riley county was taken from the eighth, and it was enacted that Shawnee, Pottawatomie, Riley and Wabaunsee should compose the third. Davis, Morris, Dickinson and Ottawa constituted the eighth. (Laws 1881, ch. 91.) Trego was included in the fourteenth. (Laws 1881, ch. 98.)

The sixteenth district was created from the counties of Barton, Stafford, Pratt, Barber, Comanche, Edwards, Pawnee, Rush, Ness, Hodgeman, Ford, Clark, Meade, Foote, Buffalo, Lane, Scott, Sequoyah, Arapahoe, Seward, Stevens, Grant, Kearny, Wichita, Greeley, Hamilton, Stanton and Kansas. (Laws 1881, ch. 99.)

The seventeenth was created from the organized counties of Phillips, Rooks, Ellis, Trego, Graham, Norton, Decatur and Sheridan and the unorganized counties of Gove, Wallace, Thomas, Sherman, Rawlins and Cheyenne. (Laws 1881, ch. 100.)

In 1883 the eighteenth district was created from the counties of Butler, Sedgwick, Kingman, Harper and Barber (Laws 1883, ch. 102).

In 1885 Sumner, Harper, Barber and Comanche counties were erected as the nineteenth district (Laws 1885, ch. 137); Rice, Barton, Stafford and Pratt counties became the twentieth district (Laws 1885, ch. 138); Pottawatomie, Riley, Wabaunsee and Osage became the twenty-first district (Laws 1885, ch. 139).

The special session of 1886 created three districts—Doniphan, Brown and Nemaha counties as the twenty-second (Laws 1886, ch. 118); Rush, Ness, Ellis, Trego and the unorganized counties of Gove, St. John, Wallace, Lane,
Scott, Wichita and Greeley as the twenty-third (Laws 1886, ch. 120); and Barber, Comanche, Clark, Meade and the unorganized county of Kiowa as the twenty-fourth (Laws 1886, ch. 121).

In 1887 the boundaries of the fifth district were defined anew to embrace the counties of Lyon and Coffey (Laws 1887, ch. 147, sec. 1). The twenty-fifth district was created of McPherson, Marion and Chase counties (Laws 1887, ch. 147, sec. 3); the twenty-sixth of counties of Butler and Greenwood (Laws 1887, ch. 147, sec. 5); the twenty-seventh of counties of Finney, Hamilton, Seward, Morton, Scott, Wichita and the unorganized county of Greeley (Laws 1887, ch. 147, sec. 7); the twenty-eighth of counties Kingman, Pratt and Kiowa (Laws 1887, ch. 147, sec. 9); the twenty-ninth of Wyandotte county (Laws 1887, ch. 147, sec. 11).

In 1889 twelve existing districts took on new form, and six new districts were created. The sixth district was constituted of Linn, Bourbon and Crawford counties; the eighth district of Davis, Dickinson and Morris counties; the eleventh district of Cherokee, Labette and Montgomery counties, the twelfth of Cloud, Republic and Washington counties; the fourteenth of Lincoln, Russell and Ellsworth counties; the sixteenth of Pawnee, Edwards, Hodgeman and Garfield counties; the seventeenth of Phillips, Norton, Decatur, Rawlins and Cheyenne counties; the nineteenth of Sumner; the twenty-first of Marshall, Riley and Clay; the twenty-third of Ellis, Trego, Gove, Logan and Wallace; the twenty-fourth of Harper and Barber; the twenty-seventh of Ford, Gray, Finney, Kearny and Hamilton; the thirtieth of Ottawa and Saline; the thirty-first of Comanche, Clark and Meade; the thirty-second of Seward, Stevens, Morton, Haskell, Grant and Stanton; the thirty-third of Rush, Ness, Lane, Scott, Wichita and Greeley; the thirty-fourth of Rooks, Graham, Sheridan, Thomas and Sherman; the thirty-fifth of Pottawatomie, Wabaunsee and Osage. The last six districts, thirtieth to thirty-fifth, inclusive, were created in 1889. (Laws 1889, ch. 118.)

At this very time the boom of the ’80’s was breaking. The cycle of drought years was returning. Harvests declined; prices of farm products fell. Mortgages came due, and most court dockets were choked with actions in foreclosure. This passed in a few years, so that counties where 250 to 300 foreclosures had been on the docket in a single term, there were now perhaps 50 cases filed in an entire year. No change of districts was made for several years, but in 1895 official deflation—the only instance in 75 years of Kansas history—began. As a consequence of legislation, but with no direct mention of the abolition of districts (though inferentially recognized in section 18 of the act), six were eliminated, leaving 31 in existence. (Laws 1895, ch. 106.)

The legislature of 1895 declared the sixteenth district to be constituted of the counties of Edwards, Pawnee, Rush, Hodgeman, Ness, Lane, Scott, Wichita and Greeley. (Laws 1895, ch. 98.) The twenty-third district was enlarged by the addition of Russell to Ellis, Trego, Gove, Logan and Wallace. (Laws 1895, ch. 99.) The grouping of counties for eight districts was rearranged. Coffey, Lyon and Chase counties composed the fifth district; Geary, Dickinson, Morris and Marion the eighth; Reno, Harvey and McPherson the ninth; Chautauqua, Elk, Greenwood and Butler the thirteenth; Sumner and Cowley the nineteenth; Harper, Barber, Kingman and Pratt the twenty-fourth; Comanche, Clark, Meade, Gray, Ford and Kiowa the thirty-first; Seward,
Stevens, Morton, Haskell, Grant, Stanton, Finney, Kearny and Hamilton the thirty-second.

By these several groupings, aided by chapter 119, Laws 1899, the fourteenth, sixteenth, twenty-fifth, twenty-sixth, twenty-seventh and twenty-eighth districts went out of existence. Lincoln and Ellsworth of the fourteenth went into the thirtieth; Russell of the fourteenth went into the twenty-third; from the dismembered twenty-fifth, Chase went to the fifth, Marion to the eighth and McPherson to the ninth; the twenty-sixth, Greenwood and Butler, went bodily into the thirteenth; of the twenty-seventh, Gray and Ford were placed in the thirty-first, Finney, Kearny and Hamilton in the thirty-second; the twenty-eighth was distributed Kingman and Pratt to the twenty-fourth, and Kiowa to the thirty-second. (Laws 1895, ch. 98.) In 1897, the counties of Edwards, Pawnee, Rush, Hodgeman, Ness, Lane, Scott, Wichita and Greeley were constituted the thirty-third district. (Laws 1897, ch. 119.)

Four years after the judicial purge of 1895, the thirty-sixth district was created of Jefferson and Jackson counties. (Laws 1899, ch. 123.)

In 1901 the eleventh district was reformed to contain Cherokee county only. The same act created Labette and Montgomery counties as a new fourteenth district, 150 miles distant from the nearest point of the original fourteenth. (Laws 1901, ch. 157.)

In 1903 Allen and Woodson were created as the thirty-seventh, being taken from the seventh, while Neosho and Wilson remained as the seventh district. (Laws 1903, ch. 209.)

In 1905 Crawford county was taken from the sixth and erected into the thirty-eighth district. Bourbon and Linn were made to comprise the sixth. (Laws 1905, ch. 199.) In 1907 the new fourteenth was halved, Montgomery remaining the fourteenth, and Labette being the new sixteenth, far from the former sixteenth. (Laws 1907, ch. 171.)

In 1923 lines were reformed to have Wabaunsee and Osage counties compose the thirty-fifth, and Jefferson, Jackson and Pottawatomie counties the thirty-sixth district. (Laws 1923, ch. 130.) In 1925 the thirty-ninth district was created out of Haskell, Grant, Stanton, Seward, Stevens and Morton counties that had been in the thirty-second district. Lane, Scott, Wichita and Greeley were transferred from the thirty-third to the thirty-second, which continued to have Finney, Kearny and Hamilton. The diminished thirty-third continued with the counties of Rush, Ness, Pawnee, Hodgeman and Edwards. Thus eighteen counties of the southwest quarter of the state, strung out in two districts, were more compactly arranged in three districts. (Laws 1925, ch. 152.) The new twenty-fifth district was created in 1927 of Sumner county, while Cowley was left to constitute the nineteenth district, from which Sumner was then detached. This was a hundred miles from the district originally numbered 25.

Through the years while the legislature was usually creating districts and offices, and once remade the judicial map so that six judges ceased to have territorial jurisdiction, other civic agencies, such as executives and bar associations, were neither idle nor silent. Governor Harvey's advice in 1872 has been noted. In 1883 Gov. Geo. W. Glick, himself already for more than twenty years a member of the bar of the supreme court, in his message to the legislature, said:
"I recommend that the legislature redistrict or remodel the judicial districts so that work in each may be equalized, that business of the courts may be disposed of with less delay than at present . . . the only sure and practical remedy . . . is the creation of at least three more judicial districts, in addition to equalizing the territory and business of present ones." (Senate Journal 1883, p. —.)

The only legislative response, if it were such, was the creation of the eighteenth district. Four years later, Gov. J. A. Martin in his message of 1887, said:

"Two years ago, I called the attention of the legislature to the necessity for an equal division of the state into judicial districts. We now have twenty-four district judges, and if their labors were fairly apportioned, not one of them would be overburdened, and all the legal business of the state could be promptly and fairly dispatched. But as the judicial districts are now formed, several of the judges have abundant leisure, while others, holding courts every month, are unable to keep their dockets clear. A general redistricting of the state would avoid the necessity of creating new districts, and thus prevent an increase of judicial expenditures. Such redistricting is advisable for very many other reasons, equally apparent and urgent." (House Journal 1887, p. 42.)

After this solemn admonition the legislature considered House bill No. 2 to define the eighteenth district, House bills Nos. 86, 330 and 337 to create a twenty-fifth district, House bill No. 260 to create a twenty-sixth, and finally by House bill No. 446 as substitute, created districts twenty-five, twenty-six and twenty-seven. In 1889, in the House alone, ten bills to create districts were presented. (House Journal 1889, House bills Nos. 18, 127, 129, 131, 133, 156, 179, 191, 300 and 523.)

On the part of the legal profession John Guthrie, chairman of the judiciary committee, reported to the Bar Association of Kansas, at Topeka, January 4, 1888:

"As the state is now divided into judicial districts, the work is unequally distributed. In some of the courts the dockets are overburdened, while in others the judicial work is light, and this must continue so long as we have our present system. . . ." (Proceedings 1888, p. 9.)

Again, in 1907, the judiciary committee of the state bar, on January 30, reported by its chairman, C. A. Smart:

"The recent bill before the legislature to increase the salaries of judicial offices of this state brought prominently before our minds that which we knew and have thought of many times before; that in many counties of this state the litigation is extremely light. One or two days will suffice to try out a term's work in some counties of this state while in other counties the dockets are full and the judges are worked ten or eleven months out of the year and worked hard. To make the districts in the sparsely settled communities larger is impractical because of the great distances judges would have to travel in passing from one county to another. . . . What sufficient reason can be urged why a judge in one portion of this state, having considerable idle time upon his hands may not be asked by the chief justice of the supreme court to go into another district where the judge is overworked, and there hold court and relieve the congested condition of the docket in such district? That two courts of equal jurisdiction may be held in the same county at the same time is demonstrated in Wyandotte county. We believe that this method could be adopted, the work could be more equally distributed among the judges of the state, more work could be accomplished with the same expense." (Proceedings, Bar Association of Kansas, 1907, page 16.)
At the annual meeting of the State Bar January 30, 1917, the chairman of the judiciary committee, B. S. Gaitskill, called a conference of the chief justice, one associate justice, two district judges and one practicing attorney. A bill that had been drawn and presented to them as to complete redistricting of the state was discussed. After debate on the floor of the association, 500 copies of the bill were ordered printed and distributed among the members by the new judiciary committee, which was ordered to report at the meeting of 1918. (Proceedings Bar Association of Kansas 1917, p. 39.)

The bill was entitled: "An Act concerning district courts, and dividing the state into judicial districts." (Proceedings 1918, pp. 13-15.) In substance it provides:

SECTION 1. The state shall be divided into five judicial districts about equal in size (constitution, art. 3, sec. 5) of contiguous counties and compact territory (constitution, art. 3, sec. 14) by consolidating the several present districts.

Sections 2 to 6 name the existing districts and the counties composing them. Section 2 combines nine existing districts with their 22 counties, being districts, 1, 2, 8, 12, 15, 21, 22, 29 and 36, with an area of 15,790 square miles, or one fifth of the state.

Section 3 consolidates thirteen districts, with their 26 counties, and area of 14,594 square miles, being districts 3, 4, 5, 6, 7, 10, 11, 13, 14, 16, 35, 37 and 38.

Section 4 unites five districts of sixteen counties covering 14,915 square miles, being districts 9, 18, 19, 24 and 31.

Section 5 merges three districts of twenty-one counties, with an area of 16,446 square miles, being districts 20, 32 and 33.

Section 6 combines four districts of twenty counties, with 17,400 square miles, being districts 17, 23, 30 and 34.

The territory of the former districts is made into "divisions" of the enlarged districts, respectively. The incumbent judges are continued in their several districts as divisions of the new district. The senior judge in point of service is preserving judge of the judicial conference to be called from time to time in each district.

The presiding judge, at first at his discretion, and later under rules of the judges' conference of his district, assigns judges from less congested dockets to more congested dockets of the district until a balance is restored.

Automatic increase and decrease of judges with the fluctuations of litigation is provided. Section 14 adds another judge whenever in one calendar year one thousand more cases are filed in the entire district than were filed in 1916. Such judge shall then be elected. If the total of cases filed drops off 1,000 in a year, one judge fewer shall be elected at the next election—the division with smallest number of cases ceasing to exist.

Nominations for judge are limited to the area of the division, but the entire district votes on such divisional nominations. Judges may sit in bane if the conference deems such for the best. (Proceedings 1918, p. 13.)

Upon meeting January 30, 1918, the judiciary committee reported that they took the bill under consideration. J. D. Houston, chairman, said:

"It is quite apparent that a radical change of the present judicial districts of Kansas, and of the Kansas judicial system, is provided for and contemplated in the proposed bill. The members of this committee do not feel justified in recommending the bill for endorsement, or in attempting to draft a substitute therefor at this time." (Proceedings, Bar Association of 1918, p. 12.)

A change in committee system abolished the judiciary committee, leaving no successor, but before this, at Salina, November 27, 1922, at the annual meeting of the State Bar, the judiciary committee of the association, on motion of Judge Thomas E. Elcock, approved a law by which the supreme court may assign district judges to do work in other districts of the state than their
own in case of congestion of work in such other districts. (Proceedings, Bar
Association of Kansas, 1922, p. 89.)

The factors for working out the problem of judicial apportionment have
been inconstant. Besides those already indicated, there have always been
several others. The hundreds of justices of the peace courts, two in each civil
township, have varied and may vary the litigation of district courts by reason
of concurrent jurisdiction. A number of auxiliary courts to help in district
court congestion have been organized from time to time, and have lasted from
a year or two up to twenty years or more. The first of these was the criminal
court of Leavenworth county, established in 1862, with criminal jurisdiction
with the district court, and having the district clerk as criminal clerk ex officio.
(Gen. Laws 1862, ch. 25.) This court was abolished in 1875. (Laws 1875, ch.
88.) Next came the superior court of Shawnee county, expressly limited in
existence to two years ending April, 1887, and having concurrent civil jurisdic-
tion with the district court. (Laws 1885, ch. 140.) The constitutionality of such
court was upheld. (A. T. & S. F. R. R. Co. v. Rice, 36 Kan. 593.) Similar
temporary relief was sought by the court of common pleas of Sedgwick county,
having concurrent jurisdiction with the district court and expressly limited so
as to terminate December 31, 1891. (Laws 1889, ch. 117.)

Two such expedients were sought in 1891. The circuit court of Shawnee
county, with a term of four years only, was created, with concurrent civil
jurisdiction. (Laws 1891, ch. 83.) This was held constitutional. (Morris v.
Bumpen, 58 Kan. 210.) The court of common pleas of Wyandotte county,
with concurrent civil jurisdiction, and with provisions that the crime cases
filed in one half of each year should also be tried therein, was created with its
existence set to last only to December 31, 1903. (Laws 1891, ch. 92.) This
court persisted until it merged into division three of the twenty-ninth district
in 1913.

In 1898 a common pleas court for Crawford and Cherokee counties, with
concurrent jurisdiction, was created, subject to referendum in 1899 of the voters
of the two counties. (Laws 1898, Sp. Sess., ch. 16.) It appears to have had a
constructive existence for about three months. (Laws 1903, ch. 9.) A circuit
court of Wyandotte county, making a third court of concurrent jurisdiction,
was prescribed by Laws 1908, special session, chapter 52. Out of this effort to
provide ample court facilities grew the system of divisions of district court.
The divisional system which has since been applied to five districts, but
abolished in one of them, began in 1909, by a general statute providing for
organization of a second division in counties above 100,000 population, and
for a third division after the termination of the court of common pleas
(Wyandotte county) which was to continue to January, 1913. (Laws 1909,
ch. 112.) This approach to the problem of court organization was sustained
as constitutional. (State, ex rel., v. Meek, 86 Kan. 576.)

Under this act, after the common pleas court became, in 1913, the third
division, a fourth division was added in 1925 for Wyandotte county. Sedgwick
county made a second division in 1911, a third in 1920 and a fourth in 1925.
Shawnee county added a second division in 1911, and a third in 1925. The
legislature of 1920 had authorized three divisions in counties of 80,000 to
120,000 population. (Laws 1920, Sp. Sess., ch. 31.) Crawford county made a
second division in 1921. (Laws 1911, ch. 151.) After one ineffectual effort by
the legislature, it successfully abolished the second division, effective January, 1934. (Laws 1933, ch. 169.)

In 1923, by general law, the organization of county courts at the will of the board of county commissioners, was authorized. Slowly these courts have come into being, until there are now perhaps thirty counties with such tribunals. As far as do justice of the peace courts, the county courts act concurrently with the district courts, and in addition have civil jurisdiction up to controversies of $1,000. (Laws 1923, ch. 131.)

There have been approximate data of population from the beginnings of settlement in the territory of Kansas. Considerable divergence has been noted between the federal decennial census and annual state enumerations. These figures serve for rough estimates of needs of court service. But not until the Judicial Council of Kansas, immediately after its organization, in June, 1927, had there been anywhere a semblance of data on actual litigation in the courts of the state. Seven times since then reports have been obtained from the 105 counties, and published as to actual numbers of cases in the several district courts.
REPORT OF JUDICIAL COUNCIL

(Report made by Chairman W. W. Harvey to the State Bar Association, at its meeting in Topeka, May 28, 1937.)

Mr. President and Members of the State Bar Association:

On the 11th of next month the Judicial Council will have been in existence ten years. It was created, you will recall, by the activities of this association which in 1926 passed a resolution favoring the organization of such a body, and appointed a committee which framed the bill creating the Judicial Council and outlining its duties, and piloted the passage of the bill through the legislature (Chapter 187, Laws of 1927). This action was prompted by the thought that our judicial system was not as efficient as it might be, and that there is at times unnecessary delay in the dispatch of judicial business. By this statute it was made the continual duty of the Judicial Council to study the judiciary department of the state, the volume and condition of business in the courts, the methods and rules of procedure therein, the time elapsing between the initiation and conclusion of litigation, and the condition of dockets as to unfinished business. It was directed to collect data from court officials, to receive and consider suggestions from jurists, lawyers and laymen concerning faults in the administration of justice, to outline methods of simplifying and expediting the transaction of judicial business, and to recommend to the courts and to the legislature changes deemed beneficial in judicial procedure, and to make an annual report to the governor.

The legislature made a small appropriation to pay for secretarial work and actual expenses of members attending meetings (Chapter 85, Laws of 1927). The members receive no pay for their time. The statute requires them to meet semiannually, or oftener. They have met oftener. In the ten years they have held fifty-eight meetings of one or two days each.

There have been three deaths in its membership, Hon. Arthur C. Scates, at first chairman of the House judiciary committee; Senator John W. Davis, at first chairman of the Senate judiciary committee; and Judge Roscoe H. Wilson. One member, C. W. Burch, resigned after about four years of service because of his desire to reduce his duties and to be out of the state much of the time. Other changes in membership were those made necessary by changes in the chairmen of the judiciary committees of the legislature.

For the first five years annual reports were printed. Since then we have made our reports in the form of quarterly bulletins. We find the more frequent bulletins keep us in closer touch with the judges, court officials and attorneys throughout the state, and at times enable us to treat some specific subject more fully than could be done in an annual report. One of our bulletins consists of the compilation and classification of our statutes and decisions pertaining to the law of eminent domain, compiled by Franklin Corrick, Revisor of Statutes. Another contains a similar treatise on the Kansas law of homesteads, compiled by James W. Taylor, under the direction of the Council. We have had many calls for these bulletins. Others contain specially prepared articles by the chief justices of our supreme court, by presidents of this association, or by attorneys who had made special study of subjects under consideration by the Council. They have also contained summaries and tables
compiled in our office from data collected, discussions of problems being considered and measures recommended, and special articles by its members pertaining to specific features of its work. Four thousand copies of each bulletin are printed. They are sent to all judges, attorneys, members of the legislature, and to most court officials and newspapers of the state, and to others who have evinced an interest in our work. Our out-of-state mailing list exceeds three hundred, and a few go to foreign countries.

This set-up discloses that the Judicial Council is not a legislative nor a judicial body. It makes no laws; it decides no controversies. It is a clearing house of ideas. Its function is the collection of data and the consideration of ideas and suggestions pertaining to the judiciary, and making recommendations to the judicial, legislative and executive departments of the state deemed proper for the prompt and efficient administration of justice. The members of the Judicial Council are not "reformers," as that word sometimes is used; neither do they entertain individual ideas which dogmatically they seek to force upon others. They endeavor to approach the consideration of suggested faults in the operation of our judicial machinery with an open mind, to determine, first, whether the fault really exists; if so, what measure would remedy or improve it, and how that can be put into operation. Our tentative conclusions are published in our Bulletin. Criticisms are invited. They are discussed with judges, lawyers, and at bar meetings, and considered at one or several of our meetings before a specific measure designed to improve the condition is definitely formed and specifically recommended.

It is necessary, of course, for us to have in mind something of the nature of an appropriate judicial system for our state and a proper procedure therefor. We take it our views as to those matters do not differ materially from the views of others who have given them thought and they may be stated broadly thus: Our government, as we have organized and endeavor to maintain it, is designed to be of benefit to our people; our judicial system is a branch of our government; therefore it should be so constructed and operated as to be as beneficial to our people as it is reasonably possible to make it. Every controverted question of consequence arising among our people respecting their domestic relations, their relations with other people and with the government and its several subdivisions, with respect to their contracts, their business transactions, their ownership, use, disposition of property, and its devolution, eventually find their way into the courts. An adequate judiciary requires a system of courts consisting of one or more trial courts in each county, open and available to the people at all times, presided over by a competent jurist, with adequate quarters and equipped with court officials, appropriate to enable it to transact the business presented to it with reasonable promptness. If there is more than one class of local courts their jurisdiction and functions should be clearly defined. The chief appellate function of a supreme court is to construe and interpret the law so that it may not be interpreted differently in different parts of the state, to see that trials have been conducted in harmony with established rules of procedure, and that correct principles of law are applied to the facts found by the trial court. All controversies presented to courts should have some substantial basis for their existence. No state is under the duty, nor should it be asked, to maintain courts to determine false controversies—those involving false claims or
defenses and supported by false testimony. Courts should not be regarded as forums for the display of chicanery. It never should be said of any of our courts that dishonesty prevails therein over fair dealing and truth.

At the beginning of our work we considered what was being done by the Judicial Councils of other states, two of which—those in Massachusetts and California—appeared to be functioning in a manner worth while. We found some of the improvements sought to be brought about in those states had been the law of this state for several years. Others appeared to have application local to the state, while others had a broader aspect suitable for consideration by us. We began our work by preparing a letter, of which about 5,000 copies where sent out, to judges, attorneys, court officials, legislators, editors, and leaders of farm, labor, business and financial groups, in which we asked the recipients to write us frankly what in their view were the faults, either generally or specifically, with the judicial machinery and its operation in this state. We received many replies. Numerous suggestions were made, quite a few of which we found to be worthy of careful attention.

Upon consideration we found three methods by which our recommendations might be put into effect: First, by rules promulgated by the supreme court applicable to the procedure in that court or in courts inferior to it; second, through legislative enactment; and third, by calling to the attention of judges, attorneys and court officials, omissions or derelictions in conforming to existing procedural provisions, where such omissions or derelictions existed.

With respect to rules of court. At that time, and shortly before, much was being said in bar associations, law magazines, and elsewhere, to the effect that formulating rules of procedure is a judicial rather than a legislative function, and that the courts have inherent power to formulate and promulgate such rules irrespective of what the legislature may have done concerning the matter. We found this view to be prevalent, though not unanimous, in this state. One practical difficulty of applying it fully in this state arose from the fact that as early as 1859 our territorial legislature enacted a code of civil procedure and a code of criminal procedure for district courts (Chapter 25, Laws Kan. Ter. 1859) and in 1860 (Chapter 87, Laws Kan. Ter. 1860), a code of civil procedure for justice of the peace courts; that these were retained by the state on its admission into the Union, and later reënacted, modified or changed by our state legislature from time to time, and in that way have been in force throughout our entire state history; and the authority of the legislature to enact statutes containing such procedural provisions frequently has been recognized and upheld by the decisions of our supreme court. We declined to ask the supreme court to brush all that aside and to assert and exercise its sole authority to make such procedural rules. Such action would have been regarded by many persons as a usurpation of authority by the supreme court. Neither the Judicial Council nor the court desired to subject itself to such a charge, even though it might be said with reason that the charge was ill-founded. We found, however, in each of the existing codes enacted by the legislature one or more provisions to the effect that the supreme court might supplement the legislative codes of procedure by rules of court. There existed, therefore, a clear, though narrow, field in which our supreme court has unquestioned authority to promulgate rules of procedure applicable to inferior courts. When this conclusion was reached we sought to determine what rules
supplementing the codes of procedure might be promulgated with benefit. We found the supreme court might change its own rules to advantage, and recommended changes which it put into effect. These have resulted advantageously in several respects and have actually effected a financial saving to the state in excess of fifty percent of the sum appropriated by the legislature for the expenses of the Judicial Council. After much consideration we suggested from time to time, and there have been promulgated by the supreme court at our suggestions, thirteen specific rules pertaining to practices or procedure in the district courts. I shall not discuss these *seriatim*. They have been set out, discussed, and reasons for them given in our reports and bulletins from time to time. They are also printed, with their history and effective dates, in the General Statutes of 1935 under section 60-3827. After these rules were promulgated experience disclosed that the wording of a few of them should be modified in certain respects, whereupon those rules were amended by orders of the court. The facility with which desirable changes can be made in rules of procedure promulgated by the court demonstrates the superiority of that method of prescribing procedural rules over having them prescribed by the legislature. We feel confident in asserting that greater improvement in the functioning of our district courts has resulted from these few rules promulgated by the supreme court than has resulted from all the changes made in codes of procedure by the legislature in many years.

**Legislative action.** The legislature has enacted into law twelve measures specifically prepared and recommended by the Judicial Council. We shall not discuss these in detail here, since they have been printed in our bulletins (April, 1935; April, 1937) and their purposes outlined. It is sufficient here to say that each of them has made a substantial change in the functioning of our judicial system, with a result beneficial to our people. In addition to that, a score or more of measures have been enacted into law, which, while not formulated by the Judicial Council, either were suggested by something we had published in our bulletins, or which the Council, or some member of it, assisted to prepare. Some measures proposed by us were not enacted into law for one reason or another, which need not be stated here. Doubtless most of them eventually will be so enacted, for we are confident they have merit. Two of these are of more than ordinary importance. One is our proposed redraft of the judicial article of our constitution. This was not submitted at the recent session of the legislature for the reason, among others, that there was a disposition throughout the session not to submit any constitutional amendment. It has been discussed heretofore in our bulletin and will receive further consideration. The other is our proposed probate and county court bill. It is designed to reorganize the structure and functioning of the courts of this state inferior to the district court. There has been a constant growth of sentiment in favor of this measure since it was first suggested a few years ago. It makes quite a change in the present set-up, a fact which necessarily requires and justifies time for its consideration. Two years ago the House judiciary committee considered it at length and recommended its passage too late in the session. This year, after extended consideration, it was passed in the Senate, together with its companion bill creating magistrate courts. Both were recommended for passage by the House judiciary committee, but got into a legislative jam late in the session and were stricken from the calendar.
It will be presented again if sentiment favorable to it continues, as now seems certain.

In this field lies the principal work of the Judicial Council planned for the immediate future. We have been urged repeatedly to prepare a code of probate procedure. To do this we find it necessary to rewrite the law of estates, if for no other reason than to take procedural provisions out of the provisions dealing with substantive law. This is a task which cannot be done in a few hours, or a few days. The members of the Council are busy men. Three of them are members of active courts; the others are busy lawyers. They have found it impossible to take time to do the detailed work necessary in such a project. The legislature was good enough to increase our appropriation, available July 1st, so we might employ for a time someone capable of doing this work under our direction. We plan to go forward with this work so we can have it completed and in shape for the next legislative session. Tentative drafts of it will be published in our Bulletin as soon as possible. We shall invite and hope to receive criticism, whether favorable or adverse, from jurists and members of the bar throughout the state. We much prefer to have defects in our proposal pointed out before rather than after they have been submitted to the legislature. We want to work with the lawyers of the state and others who may take an interest in the matter, so that the final product of the work really may be beneficial.

*The personal element.* The functions of courts, like those of all departments of our government, must be performed by individuals possessing human characteristics. They do not function with mathematical precision. It is possible to have a suitable court structure and an ideal court procedure prescribed by rules of court or legislative enactment, and yet not have as good results as should be attained because of indifference or lack of care of those who perform the functions of the court. Perhaps it is too much to expect of any of us always to do our best. But lack of care, indifference and favoritism in performing judicial duties impair the efficiency of courts. These should be avoided as much as possible, for it is rare that such conduct affects the actor alone. It usually operates to the detriment of some other party concerned in the proceeding. There is more of this in some localities of the state than in others. Much depends on the attitude of the presiding judge. Much has been and is being done to correct these faults by associations such as this, and by district and local bar associations throughout the state, and by the editors of our bar journal, and by individual jurists and lawyers. Constant attention to this feature and cooperation among jurists, lawyers and court officials will aid greatly in overcoming defects from this source.

A substantial part of the work of the Judicial Council is collecting data from the courts in order that we and members of the bar and legislators may have definite information on which to act. Each year we have collected data from the supreme court with respect to cases disposed of and pending therein, and from this compiled summaries showing the length of time cases pended in the court, and other pertinent facts. So far as we know, similar reports never have been compiled with respect to the supreme court of any other state. We have collected similar data from the clerks of the district courts on seven different occasions and from probate courts on three occasions, and compiled and published summaries and tables from such reports. This year
we are collecting data from all of these courts, summaries and tables from which will be published in our bulletins. We find that the very fact these reports are asked for is itself a stimulant to good work in the courts.

This résumé of our ten years' work, while longer than I would like to have made it, omits many important details. Perhaps it demonstrates that the work is worthwhile. As the years pass we find more active, earnest coöperation, which we hope will continue. At least four committees of this association have spent time with us at our meetings on some of the problems being considered, and the association itself has been helpful in many respects. Similar assistance has been given by district and local bar associations and by individual attorneys. The press has been free to note and commend our worthwhile achievements. We hope our work may merit continued coöperation and encouragement.