

Kansas Judicial Council Bulletin

APRIL, 1962

SPECIAL REPORT

Recommendations as to Venue, Attachment and Garnishment, Mandamus, Injunction, Actions Relating to Real Property, Liens for Labor and Material, and Eminent Domain.



Preface

We are presenting in this bulletin recommendations as to Venue, Attachment and Garnishment, Mandamus, Injunction, Actions Relating to Real Property, Liens for Labor and Material, and Eminent Domain.

We have attempted to bring closely related matter under one section, and consolidate duplicating sections of the old code in order to reduce volume and for simplification.

It will also be noted that the Rules of Civil Procedure are made applicable to special proceedings. This makes it possible to eliminate a large part of the procedural provisions contained in the old code under each article.

Perhaps the greatest departure from the old code is the inclusion of eminent domain proceedings. Eminent domain is largely a procedural matter. There are now in the statutes some twelve different methods of procedure for condemnation. It has been recommended that one procedure for eminent domain be provided that will cover all cases.

We again suggest that perfection is not claimed. Undoubtedly, errors and omissions will appear which will need correction.

Suggestions in connection with the recommendations should be mailed to E. H. Hatcher, First National Bank Building, Topeka, Kansas.

The Advisory Committee.

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ARTICLE 6—VENUE

60-601. *Actions Concerning Real Property.* The term real property, as used in this section, includes any interest or estate created by an oil, gas or mineral lease, or an oil, gas or mineral royalty. Actions concerning real property must be brought in the county designated in this section.

(a) *Title or Possession.* The following actions must be brought in the county in which the real estate is situated, except if it be an entire tract situated in two or more counties, or if it consists of separate tracts situated in two or more counties, the action may be brought in any county in which any tract or parts thereof is situated:

(1) Eminent domain actions and actions in ejectment or for the recovery of real property or any estate or interest therein, or to determine adverse claims.

(2) Actions for the partition of real estate or any estate or interest therein.

(3) Actions for the sale of real property or any estate or interest therein, under a mortgage, lien or other encumbrance or charge.

(4) Actions to compel the specific performance of a contract for the sale of real property, or any estate or interest therein. Such action may also be brought in any county where the defendant or any one of the defendants may reside.

(b) *Transcript to Other Counties.* Immediately after final judgment the clerk of the district court in which the action was brought shall transmit a transcript of the proceedings to the clerk of the district court in any other county wherein any real property may be affected by such proceedings where the same shall be docketed and recorded. The cost of such transcript and recording shall be taxed as costs of the case.

COMMITTEE NOTES

This section incorporates the provisions of G. S. 60-501, 60-502 and 60-513 to 60-515.

Subsection (a) covers actions to recover possession and actions pertaining to title to real property. Such actions may be brought in any county in which any tract or any part of a tract is situated. This is, of course, subject to other provisions as to joinder of parties and actions.

Subsection (b) provides for the transmitting of the transcript to other counties where the entire tract is situated in more than one county for the purpose of supplying recorded notice. As this subsection provides for filing the transcript after final judgment the *lis pendens* statute as to notice at the time of filing the action should be observed.

60-602. *Local County Actions.* Actions for the following causes must be brought in the county in which the cause, or some part thereof arose:

(1) Actions for the recovery of a fine, forfeiture or penalty, other than against public utilities or common carriers, except if the act was committed on a road or river which forms the boundary of two or more counties the action may be brought in any one of the bordering counties opposite the place where the act was committed.

(2) An action against a public officer for an act done or threatened to be done by him by virtue or under color of his office, or for neglect of his official duties.

(3) An action on an official bond or undertaking of a public officer.

COMMITTEE NOTES

This section is the same as G. S. 60-504 except public utilities and common carriers are excepted from paragraph (1) as they are covered under new 60-606.

60-603. *Actions Against Residents.* An action against a resident of this state, other than an action for which venue is otherwise specifically prescribed by law may be brought in the county,

(1) in which the defendant resides, or

(2) in which the plaintiff resides if the defendant is served therein, or

(3) in which the cause of action arose, or

(4) in which the defendant has a place of business or of employment if he is served therein, or

(5) in which the estate of a deceased person is being probated if such deceased person was jointly liable with the defendant and a demand to enforce such liability has been duly exhibited in the probate court.

COMMITTEE NOTES

This section does not permit venue at any place defendant can be found. Clause (5) should be noted as a new provision.

60-604. *Actions Against Corporations.* An action against a domestic corporation, or against a foreign corporation which is qualified to do business in this state, other than an action for which venue is otherwise specifically prescribed by law, may be brought in the county,

(1) in which its registered office is located, or

(2) in which the cause of action arose, or

(3) in which the defendant is transacting business at the time of the filing of the petition.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-504. There would appear to be no reason for a savings clause for territorial laws. The provision by which venue was determined by a corporation charter is also out-moded. It will also be noted that a foreign corporation authorized to do business in the state is placed on the same footing as a domestic corporation for the purpose of venue.

60-605. *Actions Against Nonresidents and Nonqualified Corporations.* An action against a nonresident of this state, or against a corporation which is not qualified to do business in this state, other than an action for which venue is otherwise specifically prescribed by law, may be brought in the county,

(1) in which the plaintiff resides, or if the plaintiff is a corporation, in the county of its registered office or in which it maintains a place of business, or

(2) in which the defendant is served, or

(3) in which the cause of action arose, or

(4) in which the defendant is transacting business at the time of the filing of the petition, or

(5) in which there is property of the defendant, or debts owing to the defendant.

COMMITTEE NOTES

It should be noted that this section applies only to nonresidents, and foreign corporations not authorized to do business in the state.

60-606. *Public Utility, Common Carrier, or Transportation System.* Any action brought against a public utility, common carrier, or transportation system for any liability or penalty or forfeiture, may be brought in any county into or through which such public utility, common carrier or transportation system operates regularly.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-505 and 60-506. There would appear to be no reason for making a distinction between railroads and other common carriers and public utilities. Transportation systems are added to cover private pipelines and other nonpublic systems. G. S. 60-506 was a duplication as to railways.

60-607. *Actions Concerning Marriage.* An action for divorce, or to annul a contract of marriage, or for alimony, may be brought in the county in which the plaintiff is an actual resident at the time of filing the petition or where the defendant resides or is served.

COMMITTEE NOTES

This section is substantially the same as G. S. 60-508.

60-608. *Multiple Parties.* If there are several plaintiffs properly joined and venue is determined by the residence of one of them, it shall be necessary that such plaintiff's claim is a substantial part of the action. If there are several defendants properly joined, venue of the action may be determined at the election of the plaintiff as to any one of the defendants against whom a substantial claim exists. If, before trial of an action on the merits is commenced, a party with reference to whom venue was determined ceases to be a party and venue would no longer be proper as to the remaining parties, on the application of any remaining party promptly made, the cause shall be transferred to a county of proper venue. If there is more than one such county, the transfer shall be to a county selected by the plaintiff.

COMMITTEE NOTES

This section definitely covers venue where there are multiple defendants as was inferred by G. S. 60-509. The action does not fail because the venue is affected. The action is still commenced for the purpose of the statute of limitations.

60-609. *Change of Venue in District Court.* In all cases in any of the district courts of this state in which it shall be made to appear that a fair and impartial trial cannot be had in the county where the suit is pending, for reasons other than the disqualification of the judge, the court may, upon application of either party, change the place of trial to some county where the objection does not exist.

COMMITTEE NOTES

This section covers G. S. 60-511 only in so far as it is made to appear that a fair and impartial trial cannot be had in the county where the suit is pending. Where the judge is disqualified provisions for his replacement are covered by G. S. 20-305 and 20-311a to 20-311c.

60-610. *Time for Objection to Venue.* Objection to the venue of an action shall not be allowed except on motion made and for grounds established before trial of the action is commenced on the merits.

COMMITTEE NOTES

Under discovery procedure a litigant has ample opportunity to find the facts on which venue rests before trial of the action is commenced on the merits. If he neglects to do so, the trial of the action should continue to judgment.

60-611. *Effect of Improper Venue.* If an action is commenced in good faith and a subsequent timely objection to the venue is

sustained, or if before trial on the merit commences, it is found that no cause of action exists in favor of or against a party upon whom venue was dependent, the action shall be transferred to any county of proper venue upon such terms as to costs as shall be fixed by the judge of the county from which the transfer is made. If there is more than one such county, the transfer shall be to a county selected by the plaintiff.

COMMITTEE NOTES

This section would not permit the action to fail because of improper venue, but would have the action transferred to the proper county. The action is still commenced insofar as the statute of limitations is concerned.

60-612. *Hearings Outside County.* Any hearing or trial without a jury may be held in any other county in the judicial district as may be agreed to by the parties in writing and approved by the judge, and the clerk of the court in which the action is pending shall transmit the papers in the action to the judge to hear the same, who shall return them after hearing.

COMMITTEE NOTES

This section is intended to cover the provisions of G. S. 60-512. The provisions are simplified and broadened for the benefit of litigants in judicial districts containing several counties. The transmittal of the papers to the judge is also very general. In most instances, particularly on motions, the clerk will no doubt transmit the papers in the case by the attorneys presenting the matter. A formal transmittal from clerk to clerk would destroy the purpose of convenience.

ARTICLE 7—ATTACHMENT AND GARNISHMENT

60-701. *Grounds for Attachment.* The plaintiffs at or after the commencement of any civil action may, as an incident to the relief sought, have one or more attachments against the property of the defendant, or that of any one or more of several defendants, when the defendant whose property is to be attached,

- (1) is a nonresident of the state or a foreign corporation, or
- (2) has absconded or concealed himself so that summons cannot be served upon him, or is about to move out of this state with the intent of changing his domicile, or
- (3) is about to remove his property or effects out of this state, or
- (4) is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors, or
- (5) has concealed, removed, assigned, conveyed or otherwise disposed of his property or effects so as to hinder or delay his creditors or is about to do so, or

(6) fraudulently contracted the debt or fraudulently incurred the liability, or

(7) is liable for damages for injuries arising out of the commission of some felony or misdemeanor, or the seduction of a female, or

(8) has failed to pay the price or value of any article or thing delivered which by contract he was bound to pay upon delivery.

COMMITTEE NOTES

An effort has been made to present complete and comprehensive provisions for attachment. Related subject matter has been placed under a single section, removing all question as to the applicability of the provisions.

Part of this section is substantially the same as G. S. 60-901. Paragraph (2) has been extended to cover situations where the defendant is about to become a nonresident. It should also be noted that this section does not limit the right of attachment to actions to recover money or suits for alimony. The relief is available in all civil actions if of assistance.

60-702. *Attachments on Demands Not Due.* An action may be commenced on a demand not yet due and an attachment may issue upon a bond being given in any of the cases mentioned in the preceding section 60-701, except those in clauses numbered (1) and (2), but no judgment shall be rendered against the defendant until maturity of the demand.

COMMITTEE NOTES

Except for the grounds mentioned in the first two paragraphs of 60-701, an attachment may issue on demands not yet due but judgment shall not issue until the demand has matured. Under such a provision there is no occasion to provide separate or additional methods of attachment as is done by G. S. 60-933 to G. S. 60-939. Attachment on demands not due shall follow the same procedure as on demands due. The section contemplates an existing debt and not a contingent claim.

60-703. *Attachments, How Obtained—Affidavit and Bond Required When—May be Issued and Served on Sunday or Holiday.* The order of attachment shall be issued by the clerk of the district court upon the filing of a petition stating the claim and the filing of an affidavit, or an affidavit and bond, as in this article required. The filing of an affidavit setting out one or more grounds of attachment is required in every case, and a bond is required except (1) in actions instituted on behalf of the state of Kansas or a county of the state, or (2) where the defendant is a nonresident of the state of Kansas or is a foreign corporation not qualified to do business in the state of Kansas and is not a common carrier or public utility. The order of attachment may be issued and executed on Sunday or on a legal holiday if the affidavit states that the party seeking the

attachment will lose the benefit thereof unless the writ be issued or served on such day.

COMMITTEE NOTES

This section is a general statement of how attachments may be maintained. The details as to affidavit and bond are covered in subsequent sections.

60-704. *Form of Affidavit, by Whom Made.* The affidavit shall be made by the plaintiff, or some person for him, and shall state that the plaintiff has a just claim against the defendant, and the amount which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, and that he has good reason to believe, and does believe, in the existence of one or more of the causes, specifying the same, which according to the provisions of Section 60-701 would entitle the plaintiff to an attachment.

COMMITTEE NOTES

This section provides for the necessary statements in the affidavit. It does not differ substantially from G. S. 60-902.

60-705. *Plaintiff's Bond. (a) Form and Contents.* When a bond is required, the bond shall be executed by the plaintiff and one or more sufficient sureties in a sum double the amount of the plaintiff's claim, or such lesser amount as shall be approved by an order of the judge, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment if wrongfully obtained, or from a wrongful levy thereof if such levy was directed by the plaintiff or his attorney. The bond shall be examined by the clerk as to its sufficiency and, if approved by the clerk, such approval shall be noted thereon.

(b) *Insufficiency.* If at any time it shall be made to appear to the judge that the bond given by the plaintiff is insufficient in amount, or that any surety therein has died, or has removed from the state, or has become or is likely to become insolvent, the judge on reasonable notice to the plaintiff may order another bond and such further security to be given as shall seem necessary. If the plaintiff shall fail to comply with such order, within the time prescribed by the judge, the attachment shall be dissolved at the plaintiff's cost.

COMMITTEE NOTES

This section covers all matters relating to plaintiff's bond for attachment. Paragraph (a) provides for the conditions of the bond. It is quite similar to G. S. 60-903. The provision permitting attachment against nonresidents without bond is covered in 60-702.

Paragraph (b) provides for new or additional bond when it is made to appear the bond is insufficient or questionable for the reasons stated.

attachment upon such person and in such manner as is provided for service of summons upon corporations in Article 3 of this chapter; and the shares of stock or interest of the defendant against whom the order of attachment was issued in such corporation shall be considered as seized on attachment when the order is so served, and shall be sold under order of the court in the same manner as if taken on execution in case the court by its judgment shall direct such sale. The officer of the company who is appointed to keep a record or account of the shares or interest of the stockholders therein shall, when the order of attachment is exhibited to him, deliver to the officer a certificate of the number of shares or amount of the interest of the attachment debtor against whom the order was issued; and if there be no such officer of the company within this state, then when the order of attachment is exhibited to him outside of this state, he shall forthwith prepare such certificate and transmit the same to the attachment officer.

COMMITTEE NOTES

This section is similar to G. S. 60-911, except the order is to be served upon such person as is provided for service of summons upon a corporation.

60-709. *Compensation of Officer.* When property is seized on attachment, the court may allow to the officer having charge thereof such amount as will reimburse him for his expense in keeping the same, and such amount will be charged as costs in the action.

COMMITTEE NOTES

This section simply states what has been the Kansas practice without statutory authority.

60-710. *Sale of Perishable Property.* When property shall be actually seized which is likely to perish or to materially depreciate in value before the probable termination of the suit, or the keeping of which would be attended with unreasonable loss or expense, the judge of the county where the suit is pending or where the property is located may order the same to be sold on such terms and conditions as the judge may direct, by the officer having charge of the property, and a return of the proceedings thereon shall be made by the officer at a time to be fixed by the judge. The return of the officer shall be filed with the clerk of the court in the county in which the suit is pending.

COMMITTEE NOTES

This section providing for sale of perishable property is in lieu of G. S. 60-920.

60-711. *Appointment of Receiver.* The judge may appoint a receiver in aid of attachment subject to the provisions of Article _____ of this chapter.

COMMITTEE NOTES

This section provides for a receiver for attached property referring to the article on receivers generally without repetition. It is in lieu of G. S. 60-915 to G. S. 60-919.

60-712. *Dissolution of Attachment.* (a) *Motion to Dissolve, How Made.* In all cases where property, effects or credits shall be attached, any interested person may file a motion to dissolve the attachment, verified by affidavit, putting in issue the sufficiency of the proceedings or the truth of the facts alleged in the affidavit on which the attachment was sued out. The burden of proof shall be on the party seeking the attachment.

(b) *Amendments.* The judge may in the interest of justice, permit amendments to the petition or the affidavit, including the specification of additional grounds for attachment.

COMMITTEE NOTES

This section is in lieu of G. S. 60-931 and 60-932. It has rather liberal provisions for amendment.

60-713. *Settlement of conflicting claims.* Any person claiming an interest in any property attached shall be permitted in accordance with section 60-224 (a), and in the discretion of the judge any creditor of a party if the creditor's claim is liquidated in amount may be permitted, to intervene in the attachment proceedings, or may be joined as a party thereto in accordance with section 60-219 (b), and the court shall adjudicate their respective rights in accordance with the following rules:

(a) *Process.* Process shall be served on parties joined under this section in the same manner and with the same effect as is provided in article 3 of this chapter.

(b) *Multiple attachments.* An officer having several orders of attachment subject to being levied on the same property shall levy the same in the order in which they were received by him. If there are several attachments issued out of different courts, all questions arising under this section shall be determined by the court out of which there was issued the first attachment served, except that jurisdiction shall be in a court of general jurisdiction in preference to one of limited jurisdiction regardless of the time of service. The clerk of the court which determines such questions shall promptly

certify the proceedings to any other court in which proceedings are affected thereby.

(c) *Representation of passive parties.* If any party to the proceedings, whether an original party or one who has been subsequently joined, fails to assert a right or a defense available to him, and such failure is prejudicial to the rights of some other party, the latter may assert the same for the protection of his own interest.

(d) *Fraudulent conveyances.* The grantee of any interest in attached property, which interest was received fraudulently, may be joined for the purpose of barring such interest, setting aside such conveyance, or obtaining such other relief as justice may require.

COMMITTEE NOTES

This section permits the settlement of all controversies between multiple attaching creditors; settlement of conflicting claims to interest in the property, and the contesting of fraudulent conveyances. It also gives attaching creditors the right to assert defenses available to defendant, where defendant does not defend. The section covers the limited provisions of G. S. 60-908, G. S. 60-928 and G. S. 60-929.

Garnishment Proceedings

60-714. *Nature and Right of Garnishment.* *Nature.* Garnishment is either (1) a form of or an aid to attachment, or (2) in lieu of or in aid of execution.

COMMITTEE NOTES

Garnishment proceedings have been approached as a form of attachment where the property or assets are in the hands of a third party. It will be understood that this article applies only to proceedings in the district court and does not affect proceeding in inferior courts covered by Civil Procedure before justices.

60-715. *When Garnishment Available Before Judgment.* An order of garnishment before judgment may be obtained and shall be issued by the clerk of the court where the action is pending, upon the filing of an affidavit showing a ground or grounds of attachment and the giving of a bond, if required, by this article for the procurement of an order of attachment. The order of garnishment may be in lieu of, or in addition to, the order of attachment, as designated by the written direction of the party seeking the order.

COMMITTEE NOTES

An order of garnishment before judgment is to be obtained under the same terms and conditions as an order of attachment.

60-716. *When Garnishment Available After Judgment.* As an aid to the enforcement of the judgment, an order of garnishment may

be obtained and shall be issued by the clerk of the court from which execution is issuable, either in connection with an execution or independently thereof as designated by the written direction of the party entitled to enforce the judgment. No bond is required for an order of garnishment issued after judgment.

COMMITTEE NOTES

No restriction is placed on garnishment proceedings as an aid to execution.

60-717. *Order of Garnishment. (a) Form.* An order of garnishment issued independently of an attachment shall be in substantially the following form:

"In the District Court of _____ County, Kansas, A. B., Plaintiff, vs. C. D., Defendant, and E. F., Garnishee. The State of Kansas to said Garnishee: You are hereby ordered as a garnishee to file with the clerk of the above named court, within 20 days after service of this order upon you, your answer under oath stating whether you are at the time of the service of this order upon you, and also whether at any time thereafter but before you file your answer, indebted to the defendant, or have in your possession or control any property belonging to the defendant, and stating the amount of any such indebtedness and description of any such property. You are further ordered to withhold the payment of any such indebtedness, or the delivery away from yourself of any such property, until the further order of the court.

"Failure to file your answer as aforesaid shall entitle the plaintiff to judgment against you for the full amount of his claim and costs.

"Witness my hand and seal of said court at _____ in said county, this _____ day of _____, 19____, _____, Clerk of said court, _____ County."

If said order of garnishment is part of an order of attachment, the foregoing language shall be preceded by words in substantially the following form:

"If the officer serving this order of attachment upon you declares to you that he attaches any funds or property in your hands, you are hereby made a garnishee in the above entitled matter."

(b) *Service and Return.* The order of garnishment shall be served on the garnishee and returned by the officer making service in the same manner as an order of attachment. If the order is served prior to a judgment on the plaintiff's claim, said order shall also be served on the defendant, if he can be found, but failure to serve the defendant shall not relieve the garnishee from liability under said order.

(c) *Effect.* The order of garnishment shall have the effect of attaching (1) all property of the defendant which is in the possession or under the control of the garnishee, and all credits and indebtedness due from the garnishee to the defendant at the time of service of the order, and (2) all property coming into the possession or control of the garnishee and belonging to the defendant, and all credits and indebtedness becoming due to the defendant

between the time of the filing of the order of garnishment and the time of the filing of the answer of the garnishee.

COMMITTEE NOTES

Subsection (a) is to the same effect as G. S. 60-943. The service and return are to be made in the same manner as in proceedings for attachment by subsection (b).

Subsection (c) fixes a definite time as to the effectiveness of the garnishment order, and attaches all property or credits up to the time the answer is filed.

60-718. *Answer of Garnishee.* Within twenty days after service upon him of the order of garnishment the garnishee shall file his verified answer thereto with the clerk of the court stating the facts with respect to the demands of the order. The clerk shall cause a copy of the answer to be mailed promptly to the plaintiff and the defendant. Within twenty days after the filing of the answer the plaintiff or the defendant or both of them may reply thereto controverting any statement in the answer. If the garnishee fails to answer within the time and manner herein specified, judgment may be taken against him for the amount of the plaintiff's judgment or claim against the defendant, but if the claim of the plaintiff has not been reduced to judgment, the liability of the garnishee shall be limited to the judgment ultimately rendered against the defendant. If the garnishee answers as required herein and no reply thereto is filed, the allegations of the answer are deemed to be confessed. If a reply is filed as herein provided, the court shall try the issues joined, the burden being upon the party filing the reply to disprove the sworn statements of the answer, except that the garnishee shall have the burden of proving offsets or indebtedness claimed to be due from the defendant to the garnishee, or liens asserted by the garnishee against property of the defendant.

COMMITTEE NOTES

This section is in lieu of G. S. 60-946. It will also be understood that all defenses are to be made by answer rather than by affidavit as provided in G. S. 60-945. It will be noted that the clerk rather than the garnishee mails a copy of the answer.

60-719. *Effect of Offsets Claimed by Garnishee.* When the garnishee claims that he is not indebted to the defendant for the reason that the defendant is indebted to the garnishee, or that the indebtedness due to the defendant is reduced thereby, the garnishee is not discharged unless and until he applies the amount of his indebtedness to the defendant to the liquidation of his claim against the defendant.

COMMITTEE NOTES

This section is for the purpose of preventing a garnishee from carrying a continuous offset against a defendant for the purpose of avoiding garnishment.

60-720. *Trial. (a) Transfer for Hearing.* If the garnishee is a resident, or has his principal place of business, in a county other than that where the action is pending, the judge may on motion transfer the garnishment proceedings to such other county for trial of the issues joined between the garnishee and any other party.

(b) *Stay Pending Trial on Merits.* The court may stay the trial of the issues joined in a garnishment proceeding until after the claim of the plaintiff has been adjudicated.

(c) *Right of Defendant to Contest Garnishment.* The defendant may, in addition to controverting the statements in the answer of the garnishee, defend the proceedings against the garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment; and he may participate in the trial of any issue between the plaintiff and the garnishee for the protection of his interests.

(d) *Right of Garnishee to Defend the Action.* The garnishee in his answer may, on behalf of the defendant, state any claim of exemption from execution or attachment which the defendant may have, or any other objection known to him that the defendant might have or assert. The garnishee may at his option defend the principal action for a defendant who defaults, but he is under no obligation to do so.

COMMITTEE NOTES

The provisions of this section are self-explanatory and require no comment.

60-721. *Judgment in Garnishment Proceedings.* Upon determination of the issues, either by admissions in the answer or reply, or by default, or by findings of the court on controverted issues, judgment shall be entered fixing the rights and liabilities of all the parties in the garnishment proceedings by (1) discharging the garnishee, or (2) making available to the satisfaction of the claim of the plaintiff any indebtedness due from the garnishee to the defendant or any property in the hands of the garnishee belonging to the defendant, including ordering the payment of money by the garnishee into court, or the impoundment, preservation and sale of property as provided for the disposition of attached property, or (3) rendering judgment against the garnishee for the amount of his indebtedness to the defendant or for the value of any property of

the defendant held by the garnishee, and (4) if the answer of a garnishee is controverted without good cause, the court may award the garnishee judgment against the party controverting such answer damages for his expenses, including reasonable attorneys' fees, necessarily incurred in substantiating the same.

COMMITTEE NOTES

The purpose of this section is to point out the numerous alternative judgments that may be rendered. It will be noted that if the answer of the garnishee is controverted without good cause expenses and attorney fees may be allowed.

60-722. *Bond of Defendant for Payment of Judgment.* The defendant may at any time after the proceeding is commenced file with the clerk of the court a bond, to be approved by the clerk, in double the amount of the claim or such lesser amount as shall be approved by order of the judge, and thereupon the garnishee shall be discharged and any money or property paid or delivered to any officer shall be delivered to the person entitled thereto.

COMMITTEE NOTES

This section is in lieu of G. S. 60-957. In view of the fact that the claim may be substantially greater than the funds garnisheed the judge is given authority to reduce the amount of the bond.

60-723. *Application to Public Officers and Employees.* All provisions, requirements, conditions and exemptions of the garnishment laws of the state of Kansas shall apply to all state, county, city, township and school-district officers and employees, as well as to all officers and employees of all municipal corporations, to the same extent and effect as such laws apply under the existing statutes of the state of Kansas to officers and employees of private corporations. Consent is hereby given for garnishment suits and proceedings to be brought against the state and such counties, townships, cities, school districts and other municipal corporations in the same manner and under the same procedure as is now provided by law for bringing such suits and proceedings against private corporations.

COMMITTEE NOTES

This section follows the language of G. S. 60-902.

60-724. *Exceptions.* No judgment shall be rendered in garnishment by reason of the garnishee:

(1) having drawn, accepted, made, endorsed, or guaranteed any negotiable bill, draft, note, or other security, or

(2) holding monies on a claim not arising out of contract and not liquidated as to amount, or

(3) holding monies or property exempt by law, or the proceeds therefrom.

COMMITTEE NOTES

This section is in lieu of G. S. 60-955. It will be noted that this section does not except money due the defendant in the hands of a public officer.

ARTICLE 8. MANDAMUS

60-801. *Nature of Mandamus.* Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the official station of the party to whom the order is directed, or from operation of law.

COMMITTEE NOTES

Although mandamus is not defined in the old code, a definition may be helpful in view of the change in procedure.

60-802. *Procedure for Relief. (a) Generally.* Relief in the form of mandamus shall be obtained under the same procedure as relief in other civil actions. If it be desired in connection with any mandamus proceeding to stay any proceedings or acts pending determination of the mandamus proceeding, the plaintiff may combine therewith an application for relief under Article 9 of this chapter. The judgment in mandamus shall specify with particularity the act or acts which the defendant is compelled to perform or enjoined from performing.

(b) *Peremptory Order.* When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory order of mandamus may be allowed in the first instance.

COMMITTEE NOTES

Under modern practice there is no logical reason why relief in the form of mandamus should not be granted by petition, service of summons and answer. The word "writ" has lost its original meaning under modern usage. This section replaces G. S. 60-1701 to 60-1712. No substantive rights are affected.

Subsection (b) is in lieu of G. S. 60-1704.

60-803. *Penalty for Disobedience.* Disobedience of any judgment in mandamus may, in addition to other appropriate remedies or damages be punished as for contempt.

COMMITTEE NOTES

It will be understood that various civil remedies may grow out of the disobedience of a judgment rendered in mandamus. They need not be enumerated here. This section simply gives the judge the right to punish.

ARTICLE 9. INJUNCTION

60-901. *Nature of Injunction.* Injunction is an order to do or to refrain from doing a particular act. It may be the final judgment in an action, and it may also be allowed as a provisional remedy.

COMMITTEE NOTES

This section serves the purpose of G. S. 60-1101.

60-902. *Provisional Remedies. When Granted.* When it appears by a verified pleading or affidavit that a party is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to a party; or when during the litigation it appears that a party is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of a party's rights respecting the subject of the action, or tending to render the judgment ineffectual, an order may be granted to restrain such act. In the absence-disability or disqualification of the judge of the district court, the probate judge may grant a restraining order.

COMMITTEE NOTES

This follows the first sentence of G. S. 60-1102 and G. S. 60-1103 with four exceptions. "Plaintiff" has been changed to "party." "Defendant" has been changed to "party." "Petition" has been changed to "pleading." The defendant may seek injunctive relief as a provisional remedy.

60-903. *Restraining Order. (a) No Notice or Bond Required.* A restraining order may issue without notice or bond, except as provided in section 60-904(b), but if it appears to the judge that a restraining order may result in damage to the party restrained, a bond to secure payment of any damages sustained may be required. An application for a restraining order shall also be considered as an application for a temporary injunction and either party may give notice of hearing thereon. The order shall remain in force until the hearing on the application for a temporary injunction unless vacated on application of the party restrained.

(b) *Service.* Where a restraining order is issued without notice it shall be served upon each party restrained in the manner prescribed for serving a summons.

COMMITTEE NOTES

A restraining order is a most extreme provisional remedy. It should only be used when time is of the essence. Where time is material its purpose might be destroyed if notice were required. It should be understood that a restraining order issues only at the discretion of the judge.

60-904. *Disputes Concerning Employment.* (a) *Notice.* No restraining order shall be issued growing out of any labor dispute until after reasonable notice to the party or parties to be restrained and an opportunity to be heard, unless the judge finds that irreparable injury is likely to occur to the person or property of the plaintiff before notice could be served or a hearing held, and such order shall not be granted for a period in excess of five days.

(b) *Bond.* No restraining order issued under subsection (a) of this section shall operate unless the party obtaining the same shall give an undertaking as provided in section 60-905 (b) of this article.

(c) *Restraint Prohibited in Certain Cases.* No restraining order or injunction shall prohibit any person or persons, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means to do so; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto, or from any activity over which the federal authority is exercising exclusive jurisdiction.

COMMITTEE NOTES

G. S. 60-1104 to G. S. 60-1107 covers injunctions in labor disputes. The extended detail of G. S. 60-1104 and G. S. 60-1107 tend to restrict rather than extend the application of the special provisions. The phrase "labor dispute" is used in the new section, which would appear to be all-inclusive. Under this section attention need be given to restraining orders only, as temporary injunctions are sufficiently covered under new 60-905.

Subsection (c) covers prohibited restraints as set out in G. S. 60-1107. It

should also be noted that under subsection (b) of this section a restraining order cannot become effective without a bond.

60-905. *Temporary Injunction—Notice, Hearing, and Bond.*

(a) *Notice and Hearing.* No temporary injunction shall be granted until after reasonable notice to the party to be enjoined and an opportunity to be heard.

(b) *Bond.* Unless otherwise provided by statute, no temporary injunction shall operate unless the party obtaining the same shall give an undertaking with one or more sufficient sureties in an amount fixed by the judge and approved by the clerk of the court, securing to the party injured the damages he may sustain including attorney fees if it be finally determined that the injunction should not have been granted.

COMMITTEE NOTES

A restraining order should only extend until such time as notice can be given and the application for a temporary injunction heard. A distinction having been made between restraining orders and temporary injunctions, this section takes care of G. S. 60-1108 to G. S. 60-1115. It must be kept in mind that all injunctive relief lies in the discretion of the court. It may be refused or granted on such terms as the judge may direct.

60-906. *Form and Scope of Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise. The order may be issued and served on Sunday or on a legal holiday.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1106, although following the language of the Federal Rule.

60-907. *Illegal Acts of Public Officers.* (a) *Illegal Tax, Charge or Assessment.* Injunctive relief may be granted to enjoin the illegal levy of any tax, charge or assessment, the collection thereof, or any proceeding to enforce the same.

(b) *Unauthorized Contracts.* Injunctive relief may be granted to enjoin any public officer, board, or body from entering into any contract or doing any act not authorized by law that may result in the creation of an additional levy of a tax, charge or assessment.

(c) *Joinder*. Any number of persons whose property is or may be affected or whose taxes may be increased by the illegal acts mentioned in subsections (a) and (b) of this section may join in the petition for injunction.

(d) *Bond*. Where it is shown to the judge that continued procedure under the illegal acts may render the proceedings moot, he may, in his discretion grant a temporary injunction without bond being required.

COMMITTEE NOTES

This section follows the provisions of G. S. 60-1121 except that the provisions have been paragraphed for clarity. Subsection (e) has been added to prevent public officials from rendering the proceedings moot by completing their illegal acts when the amount involved is so large that a taxpayer cannot make bond.

60-908. *Abatement of Common Nuisance*. A private party may enjoin the continuance of a common nuisance affecting his personal rights, and in addition thereto, an injunction may be granted in the name of the state to suppress the keeping or maintenance thereof. The petition may be verified on information and belief, and such an action may be brought either by the attorney general, or by a county attorney for enjoining such a nuisance within his county, or by a city attorney for enjoining such a nuisance within his city.

COMMITTEE NOTES

This section covers the last two sentences of G. S. 60-1121. It has been placed under a separate section because it has no relation to the other subject matter of the section. It will be noted that the authority to bring the action is also given to a city attorney.

60-909. *Penalty for Disobedience*. Disobedience of any restraining order or injunction may, in addition to other appropriate remedies, or damages, be punished as a contempt.

COMMITTEE NOTES

This section is in lieu of G. S. 60-1116. It will be understood that civil remedies are also available.

60-910. *Vacating or Modifying Order*. (a) *Before Final Judgment*. At any time before the judgment the party restrained or enjoined may apply to the judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the petition and affidavits upon which the restraining order or injunction is granted, or upon affidavits on the part of the party restrained, with or without answer.

(b) *After Final Judgment.* Any interested party, including a party subsequently acquiring an interest in the subject matter of the injunction, may file a petition in the same action to have a judgment of permanent injunction vacated or modified. The petition shall be verified, filed in the court from which the judgment issued, and shall state that there has been a change in conditions rendering the injunction unnecessary or partially unnecessary and that petitioner's interests are being adversely affected. The changed conditions shall be stated in reasonable detail. The procedure pertaining to original civil actions shall be followed. If the judge, after hearing, finds that the petition was not filed in good faith, he shall assess the expenses and reasonable attorneys' fees against the petitioner for those parties who have defended against the application, the same to be collected as costs in the action.

COMMITTEE NOTES

Subsection (a) is intended to cover the provisions of G. S. 60-1118 and 60-1119.

Subsection (b) is to enable relief from a permanent injunction which because of changed conditions is no longer necessary in whole or in part.

ARTICLE 10. ACTIONS RELATING TO PROPERTY

Comment Generally

Actions in the nature of ejectment, quieting or determining title to real property, partition, or the rights of occupying claimants are so closely related that simplification of procedure may be promoted by covering them under a single article.

60-1001. *Actions for Possession—Ejectment.* (a) *Petition.* In any action to recover possession of real property, including an oil or gas lease or mineral interest, it shall be sufficient if the petition state that the petitioner has a legal or equitable interest therein and the right to possession.

(b) *Tenants in Common.* In an action against a tenant in common the petition must state that the defendant either denied plaintiff's right, or did some act amounting to such denial.

(c) *Judgment. When Plaintiff Prevails.* If plaintiff prevails the judgment shall be for possession and damages for the loss of rents and profits, if any, and execution to enforce the same shall be issued to the sheriff by the clerk at the written request of the party entitled thereto.

(d) *When Action Becomes Moot.* If the right of the plaintiff to the possession of the premises expires after the commencement of the suit and before the trial, the judgment shall be for the damages and costs.

COMMITTEE NOTES

Subsection (a) covers the provisions of G. S. 60-2001.

Subsection (b) covers the last sentence of G. S. 60-2002. The first two sentences of the old section have been omitted. The defendant should answer as in any other civil action and should inform plaintiff of the defenses.

60-1002. *Quieting or Determining Title or Interest in Property.*

(a) *Right of Action.* An action may be brought by any person claiming title or interest in personal or real property, including oil and gas leases, mineral or royalty interests, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim.

(b) *Action to Bar Lien Claim, When.* When a lien on property has ceased to exist, or when an action to enforce a lien is barred by a statute of limitation or otherwise, the owner of the property may maintain an action to quiet his title.

COMMITTEE NOTES

The chief difference between subsection (a) and G. S. 60-1801 is the elimination of the necessity for possession in actions to quiet title.

Subsection (b) is in lieu of G. S. 60-1802. G. S. 60-1802 to 60-1806 are covered under the first section of Article 5, Limitation of Actions.

60-1003. *Partition.* (a) *Petition.* (1) When the object of the action is to effect a partition of personal or real property or an estate or interest created by an oil, gas or mineral lease or an oil or gas royalty, the petition must describe the property and the respective interests of the owners thereof, if known.

(2) If the number of shares or interests is known, but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty.

(3) Persons claiming or having a specific or general lien upon all or any portion of the property, may be made parties.

(b) *Answer.* The answers of the defendants shall include allegations of the nature and extent of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants.

(c) *Procedure.* (1) *Order of Partition.* The judge shall first determine and make an order specifying the interest of the respective parties and directing partition.

(2) *Commissioners.* Upon making an order of partition, the judge shall appoint three commissioners to partition the property among the parties according to their respective interests, but if such partition cannot be made without manifest injury, or is for any

reason impracticable, the commissioners shall appraise the value of the property, valuing each tract separately, if more than one, and report their conclusions to the court.

(3) *Exceptions to Commissioners' Report.* Any party may file exceptions to the commissioners' report and the judge may, after hearing with reasonable notice to all parties affected approve or disapprove the same, or make such modifications as justice and equity may require, including an order requiring specific portions of the property to be awarded to specific parties, or direct such further proceedings as he deems equitable, but if no exceptions are filed to the commissioners' report as to division in kind the judge shall so enter judgment.

(4) *Election.* Where the property is not subject to partition in kind, any one or more of the parties may elect to take the property or any separate tract at the appraised value, but if none of the parties elect to so take the property or two or more elect to so take, the judge shall order the sheriff to sell it in the manner provided for sale of real estate on execution.

(5) *Costs and Fees.* The court making partition shall tax the costs, attorney fees and expenses, including an allowance for preparation or bringing up to date of an abstract of title or title insurance to the real estate involved in the action, which may accrue in the action, and apportion the same among the parties according to their respective interests, and may award execution therefor, as in other cases.

(d) *General Powers of Judge.* The court shall have full power to make any order not inconsistent with the provisions of this article that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests, or may refuse partition if the same would result in extraordinary hardships or oppression.

COMMITTEE NOTES

This section simply attempts to put in plain and concise language the provisions of G. S. 60-2101 to G. S. 60-2114. Provisions covered by other general procedure have not been repeated. It will be noted that subsection (d) clarifies the equitable power of the court to deny partition.

60-1004. *Occupying Claimants.* (a) *Right to Reimbursement.* Where any person while peacefully occupying realty, including mineral leases, has in good faith made improvements thereon or paid obligations in connection therewith, he shall not be dispossessed by a party, establishing a superior right claim or title until he is fully compensated therefore.

(b) *Procedure.* If in any action the judge concludes that the occupying claimant should be dispossessed, he shall before entering final judgment determine the compensation due the occupying claimant under the provisions of Section 1 of this Article or if requested by either party he shall submit the question to a jury for determination.

COMMITTEE NOTES

This section contains a general provision protecting an occupying claimant making improvements in good faith. It is in lieu of G. S. 60-1901 to 60-1913.

ARTICLE 11. LIENS FOR LABOR AND MATERIAL

60-1101. *Liens and Priorities.* Any person furnishing labor, equipment, material or supplies used or consumed for the improvement of real property, under a contract with the owner or with the trustee, agent or spouse of the owner, shall have a lien upon the property for the labor, equipment or material furnished, and the lien shall be preferred to all other liens or encumbrances which are subsequent to the commencement of the furnishing of such labor, equipment, or material.

COMMITTEE NOTES

There has been no attempt to change the right or procedure pertaining to liens for improvement of real property. In some cases the volume has been reduced for the purpose of clarity such as in this and the next three sections covering G. S. 60-1401 to G. S. 60-1404.

60-1102. *Filing and Recording of Lien Statement.* (a) *Filing.* Any person claiming a lien on real property, under the provisions of section 60-1101 of this article, shall file with the clerk of the district court of the county in which property is located, within four months after the date material, equipment or supplies, used or consumed was last furnished or last labor performed by the claimant a verified statement showing:

1. the name of the owner,
2. the name of the claimant,
3. a description of the real property,
4. the amount of the claim, but if the amount of the claim is evidenced by a written instrument it may be attached to the claim in lieu of the itemized statement.

(b) *Recording.* Immediately upon the receipt of such statement the clerk of the court shall enter a record in a book kept for that purpose, to be called the mechanic's lien docket, which docket shall be ruled off into separate columns, with the headings as follows: "When filed," "Name of owner," "Name of claimant," "Amount

claimed," "Description of property," and "Remarks"; and the clerk shall make the proper entry in each column.

60-1103. *Liens of Subcontractors and Others.* (a) *Procedure.* Any subcontractor or other person furnishing labor, equipment, material or supplies, used or consumed at the site of the property subject to the lien, under an agreement with the contractor, or a subcontractor of the contractor, may obtain a lien for the amount due in the same manner and to the same extent as the original contractor except the lien statement must be filed within sixty days after the date material or equipment was last furnished or labor performed by the claimant. The clerk shall enter the filing in the same docket as in the preceding section provided. The claimant shall mail a copy of the lien statement to the owner of the property and to any party obligated to pay the same by restricted registered or certified mail.

(b) *Rights and Liability of Owner.* The owner of the real property shall not become liable for a greater amount than he has contracted to pay the original contractor, except for any payments to the contractor made prior to the expiration of the sixty-day period for filing lien claims. The owner may discharge any lien which the contractor fails to discharge under this section and credit such payment against the amount due the contractor.

60-1104. *Assignment.* All claims for liens and rights of action to recover therefore under this act shall be assignable so as to vest in the assignee all rights and remedies herein given, subject to all defenses thereto that might be made if such assignment had not been made. Where a statement has been filed and recorded as herein provided, such assignment may be made by an entry, on the same page of the mechanic's-lien docket containing the record of the lien, signed by the claimant or his lawful representative, and attested by the clerk; or such assignment may be made by a separate instrument in writing.

60-1105. *Limitations and Amendment.* (a) *Limitations.* Such action shall be brought within one year from the time of filing the lien statement.

(b) *Amendment.* Where action is brought to enforce a lien, the lien statement may be amended by leave of the judge in furtherance of justice, except as to the amount claimed.

COMMITTEE NOTES

This section differs from the old section in that the limitation period is not extended by the giving of a promissory note.

60-1106. *Parties.* In such actions all persons whose liens are filed as herein provided, and other encumbrancers of record, shall be made parties, and issues shall be made and trials had as in other cases. Where such an action is brought by a subcontractor, or person other than the original contractor, such original contractor shall be made a party defendant, and shall at his own expense defend against the claim of every subcontractor, or other person claiming a lien under this act, and if he fails to make such defense the owner may make the same at the expense of such contractor; and until all such claims, costs and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay. If the sheriff of the county in which such action is pending shall make return that he is unable to find such original contractor, the court may proceed to adjudicate the liens upon the land and render judgment to enforce the same with costs.

COMMITTEE NOTES

There has been no material change in this and the next five sections.

60-1107. *Stay of Proceedings.* If the building or other improvement is still in course of construction, the judge on application of any party engaged in furnishing labor or materials for such building or improvement, may stay the trial thereof for a reasonable time to permit the filing of a lien statement by such party under the provisions of this act.

60-1108. *Action by Landowner for Adjudication, Cancellation.* If any lien or liens shall be filed under the provisions of this article and no action to foreclose any of said liens shall have been commenced, the owner of the land may file his petition in the district court of the county in which said land is situated, making said lien claimants defendants therein, and praying for an adjudication of said lien or liens so claimed, and if any such lien claimant shall fail to establish his lien, the court may tax against said claimant the whole or such portion of the costs of such action as may be just. If no action to foreclose or adjudicate any lien filed under the provisions of this article shall be instituted within the time provided in section 60-1105 (b) the clerk of the district court shall enter under the head of "Remarks," in the mechanic's-lien docket hereinbefore named, that said lien is canceled by limitation of law.

60-1109. *Pro Rata Distribution.* If the proceeds of the sale be insufficient to pay all the claimants, then the court shall order them to be paid in proportion to the amount due each.

60-1110. *Bond to Secure Payment of Claims.* The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, with good and sufficient sureties, to be approved by, and filed with, the clerk of the district court, and when such bond is so approved and filed no lien shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on said bond by any person interested.

COMMITTEE NOTES

The language in this section has been clarified but the substance remains the same as the old section.

60-1111. *Public Works Bond.* (a) *Bond by Contractor.* Whenever any public official shall, under the laws of the state, enter into contract in any sum exceeding \$1,000 with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take, from the party contracted with, a bond to the state of Kansas with good and sufficient sureties in a sum not less than the sum total in the contract, conditioned that such contractor or the subcontractor of said contractor shall pay all indebtedness incurred for labor furnished, materials, equipment, or supplies, used or consumed in connection with or in or about the construction of said public building or in making such public improvements.

(b) *Approval, Filing and Limitations.* The bond shall be approved by and filed with the clerk of the district court of the county in which such public improvement is to be made. When such bond is filed, no lien shall attach under this article, and if when such bond is filed liens have already been filed, such liens shall be discharged. Any person to whom there is due any sum for labor or material furnished, as stated in the preceding section, or his assigns, may bring an action on said bond for the recovery of said indebtedness but no action shall be brought on said bond after six months from the completion of said public improvements or public buildings.

COMMITTEE NOTES

This section covers the same subject matter as G. S. 60-1413 and G. S. 60-1414.

ARTICLE 12. EMINENT DOMAIN

60-1201. *Scope of Proceedings.* The power of eminent domain, inherent or conferred, shall be exercised only in judicial proceedings in the manner prescribed in this article.

COMMITTEE NOTES

It is intended that there shall be but one procedure for exercising the power of eminent domain.

60-1202. *Contents of Petition.* A petition shall include allegations of (1) the authority for and the purpose of the taking, (2) a description of each lot, parcel or tract of land and the nature of the interest to be taken, (3) the name of the owner of the fee title, (4) the name of any lessee, (5) the name of any holder of mineral rights or mineral leases, (6) the name of any holder of any lien, and (7) the name of holder of any easements, insofar as all such interests are shown by public record. The petition shall also state the name of the party in possession and the name of any party holding an easement apparent by observation.

COMMITTEE NOTES

This section simply states the information necessary to be stated in the petition.

60-1203. *Determination of Right to Condemn.* (a) *Time for Hearing.* After the filing of the petition the judge shall fix a time for hearing on the questions as to whether (1) the plaintiff has the power of eminent domain, (2) the purpose of the taking is lawful, (3) the nature of the interest taken, and (4) the taking is reasonable and lawful.

(b) *Notice and Hearing.* The plaintiff shall cause to be published once in a newspaper of general circulation in the county where the lands are situated a notice of the hearing at least ten days in advance thereof, and shall at least seven days before such hearing mail to each interested party, by restricted registered or certified mail, whose address is known a copy of the publication notice and petition insofar as it relates to his interest.

COMMITTEE NOTES

This section gives the interested parties an opportunity to make a timely challenge as to the power, purpose and necessity. The right to and the method of making the challenge is quite indefinite under the present law.

60-1204. *Findings and Order.* (a) *Appointment of Appraisers and Their Duties.* If the judge finds (1) the plaintiff has the power

of eminent domain, (2) the purpose of the taking is lawful, and (3) the nature of the interest taken, and (4) the lands described are reasonably necessary in whole or in part for such lawful purpose, he shall enter an order appointing three disinterested householders of the county to view and appraise the value of each separate interest of record of the lots and parcels of land found to be necessary, and to determine the damages to the interested parties resulting from the taking. The order shall also fix the time for the filing of the appraisers' report, and such time may be extended only by further order of the judge.

(b) *Review.* A petition for review may be filed by any interested party with the Supreme Court within ten days after the filing of the findings and order appointing the appraisers and the Supreme Court may without hearing grant or deny the petition. If the petition is granted the same procedure shall be followed as in other cases on appeal.

COMMITTEE NOTES

The land to be appraised is that which the judge finds to be necessary, which may or may not include all of the land described in the petition. As time may be an important element, the right to appellate review is left to the discretion of the Supreme Court.

60-1205. *Appraisers' Oath, Instructions and Report.* After the appraisers are appointed they shall take an oath to faithfully discharge their duties as appraisers. The judge shall instruct them to the effect that they are officers of the court and not representatives of the plaintiff or any other party, that they are to receive their instructions only from the judge, and he shall instruct them as to the nature of their duties and authority, and as to the basis, manner and measure of ascertaining the value of the land taken and damages resulting therefrom. The instructions shall be written or oral and stenographically recorded. Upon the completion of their work the appraisers shall file their report in the office of the clerk of the district court.

COMMITTEE NOTES

The basis for determining the value of the land taken is covered in a subsequent section.

60-1206. *View of Lands by Appraisers.* (a) *Notice, Time, Place and Manner of Hearing.* The appraisers shall, after they have been sworn, and instructed by the judge, make their appraisal and assessment of damages, giving due consideration to the measure of damages and factors set out in section 60-1214 of this Article, by actual view of the lands to be taken and of the tracts of which they

are a part, and by hearing of oral or written testimony from the plaintiff, the defendants, or any other qualified persons. Such testimony shall be given at a public hearing held in the county where the action is pending at a time and place fixed by the appraisers. Notice of the hearing shall be mailed at least fifteen days in advance thereof to the plaintiff, and to each party named in the petition if their address is known, and by one publication in a newspaper of general circulation in each county where the lands are situated at least 15 days in advance of the hearing. In case of failure to meet on the day designated in the notice, the appraisers may meet on the following day without further notice; but in case of failure to meet on either of said days, a new notice shall be required. A hearing begun pursuant to proper notice may be continued or adjourned from day to day and from place to place until the hearing with respect to all properties involved in the action has been concluded.

(b) *Form of Notice.* The notice of hearing shall be in substantially the following form:

In the District Court of _____ County, Kansas.

_____ Plaintiff vs. _____ Defendant,
Case No. _____.

Notice is hereby given that the undersigned appraisers appointed by the court, will, in accordance with the provisions of Section 60-1207, hold a public hearing on all matters pertaining to their appraisal of compensation and the assessment of damages for the taking of the lands or interests therein sought to be taken by the plaintiff in the above entitled matter. Such hearing will commence at _____ o'clock ____ M. on the _____ day of _____, 19____ at _____, or on the following day without further notice, and may be continued thereafter from day to day or place to place until the same is concluded with respect to all properties involved in the action. Any interested party may present either oral or written testimony at such hearing.

You are further notified that the court has set the _____ day of _____, 19____ for the filing of the awards of these appraisers with the clerk of the court, and any party dissatisfied with the award may appeal therefrom or by law permitted within thirty days from said date of filing.

_____ Appraisers.

COMMITTEE NOTES

This section gives some dignity to the determination of value and damages by the appraisers and should do much to eliminate appeals.

60-1207. *Payment of Award and Vesting of Rights; Abandonment.* (a) *Payment of Award; Vesting of Rights.* If the plaintiff desires to continue with the proceeding it shall, within fifteen days

from the time fixed for filing the appraisers' report, file its intention to proceed with the clerk of the district court, and within thirty days from the time fixed for filing the appraisers' report, pay to the clerk of the district court the amount of the appraisers' award. The payment shall be without prejudice to plaintiff's right to appeal. Upon such payment being made the title, easement or interest appropriated in the land condemned shall thereupon immediately vest in the plaintiff, and it shall be entitled to the immediate possession of the land to the extent necessary for the purpose for which taken and consistent with the title, easement or interest condemned. The plaintiff shall be entitled to all the remedies provided by law for the securing of such possession.

(b) *Abandonment.* If the plaintiff does not, within fifteen days, file such intention, the condemnation is abandoned, and judgment for costs, including the appraisers' fees, shall be entered against the plaintiff. After such intention is filed by the plaintiff with the clerk of the court, as provided in subsection (a) hereof, the proceedings can only be abandoned by the mutual consent of the plaintiff and the parties interested in the award.

COMMITTEE NOTES

This section gives the petitioner the right to abandon or take title and immediate possession if it desires to continue with the condemnation proceeding. If the petitioner does not file its intention within fifteen days the proceedings are abandoned and all parties know where they stand. Its right to appeal will not be affected by the filing of the intention or the payment made to the clerk.

Subsection (b) may appear harsh. However, the condemner has fifteen days to decide if it wishes to continue the proceedings. This avoids the harm done by a threat of condemnation which is abandoned at a later stage of the proceeding.

60-1208. *Appeal From Award.* If the plaintiff, or any defendant, is dissatisfied with the award of the appraisers, he may, within thirty days after the date fixed for filing the report, appeal from the award by filing a written notice of appeal with the clerk of the district court. The appeal shall affect only the interest of the party appealing. Each appeal shall be docketed as a separate action and tried as any other civil action, and the issue shall be only that of compensation for the land or right therein taken at the time of the taking and for any other damages allowable by law.

COMMITTEE NOTES

The petitioner or any party interested in the award may appeal. However, the appeal shall carry with it and affect only the interest of the party appeal-

ing. The only issue shall be the compensation for the land taken and for damages.

60-1209. *Trial on Appeal.* In an action on appeal the court may, in its discretion, assign the case for trial to a jury, or to the court without a jury, or to a master in accordance with Section 253 (b). The compensation for the land taken on the interests therein shall be determined from all of the evidence without reference to which party offered such evidence, but as to all other damages the burden shall be upon the defendant to establish the same by a preponderance of the evidence.

COMMITTEE NOTES

A jury is not made a matter of right, but a master can only be appointed with consent of the parties. There is no burden of proof as to compensation for the land taken.

60-1210. *Withdrawal of Payment.* The defendants may by order of the judge and without prejudice to their right of appeal withdraw the amount paid to the clerk of the court as their interests are determined by the appraisers' report.

COMMITTEE NOTES

The right to withdraw the deposit is permitted regardless of, and without prejudice to the right to appeal.

60-1211. *Final Judgment; Interest.* If the compensation finally awarded on appeal exceeds the amount of money previously paid to the person entitled thereto the judge shall enter judgment against the plaintiff for the amount of the deficiency with interest thereon at the rate of six percent per annum from the date of the payment to the clerk to the date of payment of the deficiency judgment. If the compensation finally awarded on appeal is less than the amount paid to the clerk of the court by the plaintiff the judge shall enter judgment in favor of the plaintiff for the return of the difference, with interest at the rate of six percent per annum from the time payment was made to the clerk to the date of the judgment.

COMMITTEE NOTES

This section attempts to lay a simple foundation for the judgment and interest on appeal. If the interested parties recover more than they have received they should have the balance with interest. If the interested parties receive less than has been paid to the clerk the plaintiff should receive its interest on such difference.

60-1212. *Making Surveys and Location.* The prospective condemner or its agents may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute

no cause of action in favor of the owners of the land, except for actual damages thereto.

COMMITTEE NOTES

The prospective condemner must have the right to make surveys for locations. In entering upon the land for such purpose its liability should be limited to the actual damages sustained.

60-1213. *Compensation.* (a) *Necessity.* Private property shall not be taken or damaged for public use without just compensation.

(b) *Taking Entire Tract.* If the entire tract of land or interest therein is taken, the measure of compensation is the value of the property or interest at the time of the taking.

(c) *Partial Taking.* If only a part of a tract of land or interest is taken, the compensation and measure of damages are the difference between the value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.

(d) *Factors to be Considered.* In ascertaining the amount of compensation and damages as above defined, the following factors, without restriction because of enumeration, shall be given consideration if shown to exist:

1. The most advantageous use to which the property is reasonably adaptable.

2. Access to the property remaining.

3. Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.

4. Productivity, convenience, use to be made of the property taken, or use of the property remaining.

5. View, ventilation and light, to the extent that they are beneficial attributes to the use to which the remaining property is devoted or to which it is reasonably adaptable.

6. Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land needed to make the change in the improvement.

7. Loss of trees and shrubbery to the extent that they affect the value of the land taken, and to the extent that their loss impairs the value of the land remaining.

8. Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.

9. Destruction of a legal nonconforming use.

10. Damage to property abutting on a right of way due to change of grade where accompanied by a taking of land.

11. Proximity of new improvement to improvements remaining on condemnee's land.

12. Cost of removal of landowner's personal property to another site, if the cost of such removal is established.

13. Where an owner whose land is mortgaged at the time of acquisition by the plaintiff, and such owner desires to refinance such mortgage on another property in a price range and class or property similar to the property taken, the cost incident to such refinancing, including the total interest cost of such new financing over that of the former financing for the term of the new loan, computed on the prevailing rate charged by the larger lending institutions doing business in the community, with prepayment assumed at the end of 7 years if the loan term is longer, shall be a recoverable element of damages in the case of a total taking, or where in the case of a partial taking the mortgagee has and exercises the legal right to demand prepayment of the mortgage.

14. Loss of or damage to growing crops.

15. Damages for loss of business, established by clear and convincing evidence to be the direct result of the taking.

16. Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

COMMITTEE NOTES

It is the purpose of this section to eliminate any doubt as to elements of damage. Several factors of actual damage have been added which have not been allowed under the interpretation of the existing statutes.

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