THE SUPREME COURT OF KANSAS.


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Other Organizations, and leading citizens generally throughout the state,
For the improvement of our Judicial System and its more efficient functioning.
FOREWORD.

This Bulletin is part three of our sixth annual report. The fourth and concluding part will be issued in December. That issue will contain, in appropriate form, recommendations to the legislature for the improvement of our judicial system and for improved methods of procedure, in so far as we have completed our study of those matters and to the extent we will feel justified in making definite recommendations concerning them, and a brief statement of the reasons which prompted each of the proposed measures. Our December issue also will contain general summaries of reports received from clerks of courts within the last five years. Some of these are prepared and could have been included in this issue, but we thought best to have them together in one issue, and we have for this issue an abundance of material on which we would like to have the views of the bar at an early date.

The Judicial Council was created by statute in 1927. Its members serve without pay, but an appropriation is made to pay their actual expenses to attend meetings and for clerical help, postage, and the like. Its duties, briefly, are to study our judicial system, the quantity of business therein, the procedure by which it is handled and the time consumed in doing so, and to suggest to the courts, to the governor and to the legislature changes deemed beneficial. It has made many such suggestions. The courts have adopted some of these, with the result that they are functioning, certainly more promptly, and we believe more efficiently, than at any time in the history of our state.

The legislature has been slow to respond to beneficial changes suggested by the Council, with the result that many of its recommendations which would make substantial improvements in our judicial system and its functioning, but which require legislative sanction, have not been put into effect.

Government as we have organized and endeavor to maintain it is designed to be beneficial to our people. The judiciary is a branch of the government. First and last every important controverted question which arises among our people in their business, personal and governmental relations finds its way into the courts for determination. They should be determined fairly and with reasonable promptness. How these things can be best accomplished are matters worthy of the best thought, not only of judges, lawyers and other court officials, but of citizens generally.

In this issue we print a group picture of the justices of the supreme court, the first such picture taken of the court with its present membership, and the first taken since the court adopted the practice of wearing robes while on the bench. While somewhat aside from the work of the Council, we feel justified in printing it because of the interest the members of the court have shown in

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the work of the Council and the many helpful suggestions they have given it from time to time, and because the chief justice appoints seven of the nine members of the Council and is to that extent responsible for its personnel, and because one of the justices is a member of the Council and has been its chairman from the beginning. We are confident that lawyers and others who receive the Bulletin will appreciate its publication.

In this issue we have a detailed summary of the work of the supreme court for the year ending June 30, 1932. This is the fifth consecutive year we have printed similar summaries of the work of the highest court of the state. So far as we are informed, this is the only state in which the work performed by the supreme court, and the time consumed in the progress of cases through such a court, have been detailed in a way available to lawyers and others interested in the work of the court.

The articles herein on the suggested changes in the judicial article of our constitution, the redemption of real property sold on execution or order of sale, procedure in eminent domain, and the proposed code of probate procedure, need not be enlarged upon in this foreword. It is sufficient to note that in undertaking these matters the Council has laid out for itself a lot of work in which it will need all the help it can get from all who are affected thereby. Each of these measures is important and far-reaching. That great improvement in present provisions relating to these subjects can and should be made is quite generally recognized. We sincerely trust that the bench and bar of the state will work actively with the Council in the study of these questions so the results obtained will be our best combined judgment.

We shall not take space here to mention other questions heretofore discussed in our bulletins and reports, many of which are still receiving consideration.
Summary of Work of Supreme Court.

The following is a summary of the work of the supreme court for the year ending June 30, 1932:

There were 522 appealed civil cases disposed of within the year ending June 30, 1932. Of this number 159 were dismissed without having been presented on the merits, and 363 were submitted on the merits and written opinions filed. Of the 363 submitted on the merits 267 were affirmed, 80 reversed, 7 affirmed and reversed, 6 affirmed and modified, and 3 modified.

The court also disposed of 74 criminal cases. Of this number 45 were dismissed without having been presented on the merits, and 29 were submitted on the merits and written opinions filed. Of this number 24 were affirmed and 5 reversed.

The court also disposed of 32 original cases, of which 6 were dismissed before having been presented on the merits and 26 were submitted on the merits, and written opinions filed.

This makes a grand total of 628 cases disposed of by the supreme court, of which 210 were dismissed without having been presented on the merits and 418 were submitted on the merits and written opinions filed.

Cases pending July 1, 1932: 292 appealed civil cases, 50 appealed criminal cases, and 15 original cases.

Progress of cases: The data with respect to the progress of cases through the court are grouped below under the headings of civil, criminal and original cases.

CIVIL CASES.

Progress of civil cases tried on the merits: In the 363 appealed civil cases which were tried on the merits and in which written opinions were filed, the interim between the date of the judgment appealed from and the date notice of appeal was filed in the trial court was as follows: Within 10 days, 75 cases; in 10 to 30 days, 70 cases; 1 to 2 months, 44 cases; 2 to 3 months, 48 cases; 3 to 4 months, 31 cases; 4 to 5 months, 36 cases; 5 to 6 months, 39 cases; more than 6 months, 16 cases; date not given, 4 cases.

The time between the date the notice of appeal was filed in the trial court and the date the same was filed in the supreme court was as follows: Within 5 days, 131 cases; 5 to 10 days, 63 cases; 10 to 20 days, 65 cases; 20 to 30 days, 43 cases; 1 to 2 months, 31 cases; 2 to 3 months, 10 cases; 3 to 4 months, 6 cases; 4 to 5 months, 6 cases; 5 to 6 months, 2 cases; more than 6 months, 2 cases; date not given, 4 cases.

The time between the filing of the notice of appeal in the supreme court and the date the docket fee was filed was as follows: Within 5 days, 95 cases; 5 to 15 days, 70 cases; 15 to 30 days, 73 cases; 1 to 2 months, 32 cases; 2 to 3 months, 17 cases; more than 3 months, 29 cases; date not given, 47 cases.

The time between the date the notice of appeal was filed in the supreme court and the date the bond for costs was filed was as follows: Less than 10 days, 75 cases; 10 to 30 days, 68 cases; 1 to 2 months, 30 cases; 2 to 3 months, 11 cases; more than 3 months, 21 cases; date not given, 158 cases.

The interval between the filing of the notice of appeal in the supreme court and the date appellant's abstract was filed was as follows: Less than 3
months, 112 cases; 3 to 4 months, 88 cases; 4 to 5 months, 47 cases; 5 to 6 months, 41 cases; 6 to 9 months, 36 cases; 9 to 12 months, 15 cases; more than 12 months, 2 cases; date not given, 22 cases.

The interval between the filing of the notice of appeal in the supreme court and the time appellant's brief was filed was as follows: Less than 3 months, 64 cases; 3 to 4 months, 29 cases; 4 to 5 months, 48 cases; 5 to 6 months, 50 cases; 6 to 9 months, 131 cases; 9 to 12 months, 25 cases; more than 12 months, 4 cases; date not given, 12 cases.

The time between the date the notice of appeal was filed in the supreme court and the date the case was submitted on its merits was as follows: Less than 3 months, 12 cases; 3 to 4 months, 9 cases; 4 to 5 months, 9 cases; 5 to 6 months, 40 cases; 6 to 9 months, 202 cases; 9 to 12 months, 50 cases; 12 to 15 months, 34 cases; 15 to 18 months, 6 cases; more than 18 months, 1 case.

The interval between the date the case was submitted to the supreme court and the date the opinion was filed was as follows: Before the first opinion day, 4 cases; first opinion day, 331 cases; second opinion day, 27 cases; third opinion day, 1 case.

Progress of civil cases dismissed: In the 159 appealed civil cases that were dismissed without being submitted on the merits, the interim between the date of the judgment appealed from and the date notice of appeal was filed in the trial court was as follows: Within 10 days, 39 cases; 10 to 30 days, 26 cases; 1 to 2 months, 27 cases; 2 to 3 months, 16 cases; 3 to 4 months, 11 cases; 4 to 5 months, 8 cases; 5 to 6 months, 18 cases; over 6 months, 11 cases; date not given, 3 cases.

The time between the date the notice of appeal was filed in the trial court and the date the same was filed in the supreme court was as follows: Within 10 days, 83 cases; 10 to 20 days, 20 cases; 20 to 30 days, 18 cases; 1 to 2 months, 24 cases; 2 to 3 months, 11 cases; 3 to 4 months, 3 cases; date not given, 1 case.

The time between the filing of the notice of appeal in the supreme court and the date the docket fee was filed was as follows: Within 5 days, 17 cases; 5 to 15 days, 19 cases; 15 to 30 days, 24 cases; 1 to 2 months, 20 cases; 2 to 3 months, 3 cases; more than 3 months, 2 cases; date not given, 74 cases.

The time between the date the notice of appeal was filed in the supreme court and the date the bond for costs was filed was as follows: Less than 10 days, 8 cases; 10 to 30 days, 14 cases; 1 to 2 months, 5 cases; 2 to 3 months, 2 cases; more than 3 months, 4 cases; date not given, 126 cases.

The interval between the date the case was filed in the supreme court and the date same was dismissed was as follows: Less than 1 month, 7 cases; 1 to 2 months, 21 cases; 2 to 3 months, 17 cases; 3 to 4 months, 26 cases; 4 to 6 months, 43 cases; 6 to 9 months, 27 cases; 9 to 12 months, 8 cases; more than 12 months, 10 cases.

Pending cases: There were 292 appealed civil cases pending July 1, 1932. The time between the date of the judgment appealed from and the date the notice of appeal was filed in the trial court was as follows: Within 10 days, 60 cases; 10 to 30 days, 55 cases; 1 to 2 months, 54 cases; 2 to 3 months, 26 cases; 3 to 4 months, 28 cases; 4 to 5 months, 17 cases; 5 to 6 months, 33 cases; after 6 months, 16 cases; date not given, 3 cases.

The interval from the date the notice of appeal was filed in the trial court
to the date same was filed in the supreme court was as follows: Within 5 days, 122 cases; 5 to 10 days, 46 cases; 10 to 20 days, 51 cases; 20 to 30 days, 33 cases; 1 to 2 months, 32 cases; 2 to 3 months, 3 cases; 3 to 4 months, 1 case; 4 to 5 months, 1 case; date not given, 3 cases.

The time between the filing of the notice of appeal in the supreme court and the date the docket fee was filed was as follows: Within 5 days, 62 cases; 5 to 15 days, 60 cases; 15 to 30 days, 68 cases; 1 to 2 months, 26 cases; 2 to 3 months, 17 cases; more than 3 months, 2 cases; date not given, 57 cases.

The time between the date the notice of appeal was filed in the supreme court and the date the bond for costs was filed was as follows: Less than 10 days, 3 cases; 10 to 30 days, 2 cases; 1 to 2 months, 1 case; date not given, 286 cases.

The interval between the filing of the notice of appeal in the supreme court and the date appellant's abstract was filed was as follows: Less than 3 months, 51 cases; 3 to 4 months, 24 cases; 4 to 5 months, 14 cases; 5 to 6 months, 11 cases; 6 to 9 months, 14 cases; 9 to 12 months, 1 case; date not given, 177 cases.

The interval between the filing of the notice of appeal in the supreme court and the time appellant's brief was filed was as follows: Less than 3 months, 12 cases; 3 to 4 months, 20 cases; 4 to 5 months, 22 cases; 5 to 6 months, 5 cases; 6 to 9 months, 14 cases; 9 to 12 months, 4 cases; date not given, 215 cases.

CRIMINAL CASES.

Progress of criminal cases tried on the merits: In the 29 appealed criminal cases which were tried on the merits and in which written opinions were filed, the interval between the date of the judgment appealed from and date the notice of appeal was filed in the trial court was as follows: The same day, 5 cases; within 10 days, 3 cases; 10 to 30 days, 12 cases; 1 to 2 months, 5 cases; 3 to 4 months, 2 cases; 4 to 5 months, 1 case; more than 6 months, 1 case.

The time from the date the notice of appeal was filed in the trial court to the date the notice of appeal was filed in the supreme court was as follows: Within 5 days, 9 cases; 5 to 10 days, 3 cases; 10 to 20 days, 6 cases; 20 to 30 days, 3 cases; 1 to 2 months, 3 cases; 2 to 3 months, 4 cases; more than 6 months, 1 case.

The interval between the date the notice of appeal was filed in the supreme court and the date the docket fee was filed was as follows: Within 5 days, 5 cases; 5 to 15 days, 7 cases; 15 to 30 days, 9 cases; 1 to 2 months, 2 cases; 2 to 3 months, 1 case; more than 3 months, 2 cases; date not given, 3 cases.

The interval between date notice of appeal filed in supreme court and date abstract of appellant was filed was as follows: One to 4 months, 6 cases; 4 to 6 months, 13 cases; 6 to 12 months, 9 cases; more than 12 months, 1 case.

The interim between the filing of appellant's brief and the filing of appellant's abstract was as follows: The same day, 12 cases; within 10 days, 6 cases; 10 to 30 days, 8 cases; 1 to 2 months, 1 case; more than 2 months, 2 cases.

The interim between the date the notice of appeal was filed in the supreme court to date counter abstract was filed was as follows: One to 3 months, 3 cases; 4 to 6 months, 3 cases; 6 to 9 months, 9 cases; 9 to 12 months, 3 cases; 12 to 15 months, 6 cases; date not given, 5 cases.
The time between the date the notice of appeal was filed in the supreme court and the date appellee’s brief was filed was as follows: One to 3 months, 3 cases; 3 to 4 months, 1 case; 4 to 6 months, 3 cases; 6 to 9 months, 11 cases; 9 to 12 months, 4 cases; 12 to 15 months, 6 cases; date not given, 1 case.

The interval between the date the notice of appeal was filed in the supreme court and date the case was submitted on the merits was as follows: One to 3 months, 1 case; 3 to 4 months, 1 case; 4 to 6 months, 5 cases; 6 to 9 months, 13 cases; 9 to 12 months, 4 cases; 12 to 15 months, 4 cases; more than 15 months, 1 case.

The interval between the date the case was submitted on the merits and date the opinion was filed was as follows: Before first opinion day, 1 case; first opinion day, 28 cases.

The nature of the offenses charged and their number are as follows: Violation of intoxicating liquor law, 11 cases; murder, 1 case; larceny, 3 cases; robbery, 2 cases; homicide, 3 cases; gambling, 1 case; perjury, 1 case; grand larceny, 1 case; manslaughter, 2 cases; fraud, 1 case; bond forfeiture, 2 cases; violation Sunday labor law, 1 case.

Of the 45 appealed criminal cases which were dismissed without having been submitted on the merits, the interval between the date of the judgment appealed from and date the notice of appeal was filed in the trial court was as follows: The same day, 9 cases; within 10 days, 9 cases; 10 to 30 days, 13 cases; 1 to 2 months, 7 cases; 2 to 3 months, 4 cases; 3 to 4 months, 1 case; 7 to 8 months, 1 case; 8 to 9 months, 1 case.

The time from the date the notice of appeal was filed in the trial court to the date the notice of appeal was filed in supreme court was as follows: Within 5 days, 14 cases; 5 to 10 days, 9 cases; 10 to 20 days, 6 cases; 20 to 30 days, 5 cases; 2 to 3 months, 3 cases; 3 to 4 months, 2 cases; 4 to 5 months, 4 cases; over 5 months, 2 cases.

The interval between the date the notice of appeal was filed in the supreme court and the date the docket fee was filed was as follows: Five to 15 days, 2 cases; 15 to 30 days, 8 cases; 1 to 2 months, 6 cases; 2 to 3 months, 2 cases; 3 to 4 months, 1 case; 4 to 5 months, 1 case; date not given, 25 cases.

The interval between the date the case was filed in the supreme court and the date same was dismissed was as follows: Less than 30 days, 3 cases; 1 to 2 months, 3 cases; 2 to 3 months, 9 cases; 3 to 4 months, 5 cases; 4 to 6 months, 11 cases; 6 to 9 months, 10 cases; 9 to 12 months, 4 cases.

The nature of the offenses charged and their number are as follows: Violation of intoxicating liquor law, 16 cases; murder, 2 cases; larceny, 2 cases; rape, 3 cases; robbery, 4 cases; arson, 2 cases; manslaughter, 1 case; assault and battery, 1 case; forgery, 1 case; theft, 1 case; bad check, 1 case; narcotic, 2 cases; blue sky law, 1 case; burglary, 1 case; embezzlement, 1 case; lottery, 1 case; confiscation, 1 case; perjury, 1 case; contempt, 1 case; fraud, 1 case; not stated, 1 case.

Pending cases: There were 50 appealed criminal cases pending July 1, 1932. The time between the date of the judgment appealed from and the date the notice of appeal was filed in the trial court was as follows: Same day, 10 cases; within 10 days, 12 cases; 10 to 30 days, 13 cases; 1 to 2 months, 6 cases; 2 to 3 months, 4 cases; 3 to 4 months, 3 cases; 5 to 6 months, 2 cases.

The interval from the date the notice of appeal was filed in the trial court to the date same was filed in the supreme court was as follows: Within 5
days, 26 cases; 5 to 10 days, 4 cases; 10 to 20 days, 6 cases; 20 to 30 days, 8 cases; 1 to 2 months, 3 cases; 2 to 3 months, 2 cases; more than 3 months, 1 case.

The interval between the filing of the notice of appeal in the supreme court and the date the docket fee was filed was as follows: Within 5 days, 3 cases; 5 to 15 days, 4 cases; 15 to 30 days, 12 cases; 1 to 2 months, 5 cases; 2 to 3 months, 4 cases; 3 to 4 months, 3 cases; over 4 months, 2 cases; date not given, 17 cases.

The time between the filing of the notice of appeal in the supreme court and the date appellant's abstract was filed was as follows: Less than 3 months, 2 cases; 3 to 4 months, 2 cases; 4 to 5 months, 1 case; 5 to 6 months, 2 cases; 6 to 9 months, 6 cases; 9 to 12 months, 1 case; more than 12 months, 1 case; date not given, 35 cases.

The time between the filing of the notice of appeal in the supreme court and the date appellant's brief was filed was as follows: Less than 3 months, 2 cases; 3 to 4 months, 1 case; 6 to 9 months, 7 cases; more than 9 months, 2 cases; date not given, 38 cases.

Of the 50 appealed criminal cases pending July 1, 1932, the nature of the offenses charged and their number are as follows: Violation of intoxicating liquor law, 9 cases; murder, 8 cases; larceny, 4 cases; robbery, 3 cases; bad check, 4 cases; manslaughter, 1 case; embezzlement, 6 cases; gambling, 1 case; perjury, 1 case; grand larceny, 1 case; auto theft, 1 case; blue sky law, 1 case; rape, 1 case; fraud, 1 case; chicken stealing, 1 case; bastardy, 1 case; confiscation, 1 case; theft, 1 case; not stated, 4 cases.

ORIGINAL CASES.

Progress of original cases submitted on the merits in which written opinions were filed, the time between the date petition or application was filed and the date the case was presented on its merits was as follows: Less than 1 month, 6 cases; 1 to 3 months, 4 cases; 3 to 6 months, 7 cases; 6 to 9 months, 2 cases; 9 to 12 months, 5 cases; 1 to 2 years, 1 case; after 2 years, 1 case.

The interval between the presentation on the merits and the date decided was as follows: Before the first opinion day, 6 cases; first opinion day, 18 cases; second opinion day, 2 cases.

The nature of the cases and their number are as follows: Mandamus, 11 cases; habeas corpus, 4 cases; quo warranto, 7 cases; disbarment, 2 cases; contempt, 2 cases.

Of the 6 original cases which were dismissed before having been presented, the time between the date petition or application was filed and the date case was dismissed was as follows: Less than 1 month, 2 cases; 3 to 6 months, 1 case; 6 to 9 months, 2 cases; 9 to 12 months, 1 case.

The nature of the cases and their number are as follows: Mandamus, 5 cases; habeas corpus, 1 case.

Pending cases: There were 15 original cases pending in the supreme court on July 1, 1932; 2 had been pending less than 30 days; 8 from 3 to 6 months; 5 more than 6 months.

The nature of the cases and their number are as follows: Mandamus, 11 cases; quo warranto, 3 cases; contempt, 1 case.

There were a total of 984 motions disposed of by the supreme court for the year ending June 30, 1932. Of which 782 were allowed, 200 denied, and 2 withdrawn. There were 86 motions pending July 1, 1932.
Some Changes in the Proposed Judicial Article of the
Kansas Constitution.

By Charles L. Hunt.

A draft of the proposed amendment of the judicial article of the Kansas Constitution, prepared by the Judicial Council, appeared in the July, 1932, Bulletin published by the Council, with some comments by the writer. The bench and bar were invited to offer criticisms and suggestions. Very few have been received.

The Council is much indebted to Arthur S. Humphrey, of the Junction City bar, for two meritorious and constructive suggestions. One was that section 3 was so phrased to admit a possible construction that the supreme court would have original jurisdiction in quo warranto, mandamus and habeas corpus only if questions of law solely were presented and the cases be submitted on a written statement of agreed facts. He also directed attention to section 8, voicing the fear that it might deprive district courts of the power in divorce cases to make a suitable order concerning the custody of children. Mr. Humphrey's views in these two instances appear to be sound.

The Judicial Council met on September 30 and October 1, and about one day was devoted to rewriting some of the sections as they appeared in the July Bulletin. A few minor changes in phraseology were made, and some unnecessary language was deleted. Appended hereto is the complete draft as revised at the last meeting, and the changes made will be apparent by a comparison of the appended draft with the one appearing in the July Bulletin. Some of the changes, including the revisions of sections 3 and 8 designed to meet the suggestions tendered by Mr. Humphrey, will be noted.

Section 3 was rewritten to clearly confer original jurisdiction on the supreme court in quo warranto, mandamus and habeas corpus, whether presenting questions of law or fact, and to exclude the limitation of submission on a statement of agreed facts.

After much debate the original jurisdiction of the supreme court was enlarged to include proceedings wherein injunctive relief only was sought, yet leaving it to the discretion of the court as to whether under the situation presented in each individual case it will or it will not assume jurisdiction. Situations are not infrequent where it is obviously necessary to obtain injunctive relief quickly and in the court of last resort, yet the court should not be burdened with applications for restraining orders and temporary injunctions where such relief is incidental to the principal relief sought. Therefore the jurisdiction is limited to cases wherein no relief except injunction is desired. It was felt even this additional jurisdiction might overburden the court, and accordingly the advisability of taking jurisdiction in injunction cases is left to the discretion of the court.

A slight change was made relating to the appellate jurisdiction of the supreme court. There appeared to be some question as to whether an appeal would lie to cases tried in the district court on appeal from inferior tribunals. The word "tried" was eliminated and the present provision is that appeals shall lie from the final decision of the district court.
An additional provision was inserted in section 3 to avoid the necessity of the appointment of a commissioner to take evidence and return findings of fact and conclusions of law in original proceedings. This practice has in some instances occasioned expense entirely out of proportion to the importance of the proceeding. The new provision permits the supreme court to direct a judge of a district court to perform this service, but it is not exclusive, and in proper cases a commissioner may be appointed as heretofore.

Section 8 confers exclusive original jurisdiction on the county court for the probate of wills and in all matters relating to the estates of decedents, minors and incompetent persons, whereas in the former draft this jurisdiction extended to the persons of minors and incompetent persons. The new provision leaves it to the legislature to confer jurisdiction in matters relating to the person of minors and incompetent persons.

A new provision was inserted in section 10. There appears to be a widespread disapproval of a judge becoming a candidate for congress or any other nonjudicial office. Section 13 of article 3 of the present constitution provides that no judge shall hold any other office of profit or trust under the authority of the state or the United States during the term for which he shall have been elected. This provision is nugatory so far as candidates for congress are concerned because it has been repeatedly held that the house of representatives in congress is the exclusive judge of the qualifications of its own members. It is believed, however, that the people of the state, speaking through their constitution, have a right to declare vacant the office of any judge when he becomes a candidate for or accepts an appointment to a nonjudicial office. This added provision is not dissimilar to section 5 of article 2 of the Kansas constitution regarding to eligibility to membership in the state legislature. It will be noted that nothing in the present draft of the constitution forbids any judge from becoming a candidate for another judicial office. The present barrier against the advancement of a district judge to the supreme bench is thus removed.

Again, the Council urgently invites suggestions and criticisms by the bench and bar.

A Proposition to amend article III of the constitution of the state of Kansas, relating to the judiciary.

Be it resolved by the Senate of the State of Kansas, the House of Representatives concurring therein:

Section 1. There is hereby recommended and submitted to the qualified electors of the state of Kansas, to be voted upon at the next general election for representatives, for their approval or rejection, a proposition to amend article III of the constitution of the state of Kansas, relating to the judiciary, so as to read as follows:

Article III.—The Judiciary.

Section 1. All of the judicial power of this state shall be vested in a system of courts composed of a supreme court, district courts, county courts, and such other courts, inferior to the supreme court, as may be created by law.

Sec. 2. The supreme court, district courts, and county courts shall be courts of record and each shall have a seal to be used in the authentication of all process and records.

Sec. 3. The supreme court shall be the highest in the judicial system of the state. It shall have original jurisdiction in proceedings in quo warranto, man-
damus, habeas corpus, and also shall have original jurisdiction in other actions and proceedings presenting questions of law only which are submitted on a written statement of agreed facts. The supreme court also shall have original jurisdiction in proceedings where injunctive relief only is sought, but shall assume jurisdiction in such cases only as it shall deem advisable, and shall have appellate jurisdiction from the final decision of the district court in all civil and criminal actions and special proceedings, and shall have such other appellate jurisdiction as may be provided by law. It shall consist of seven justices until the number shall be changed by law. It may make provision by rules for the practice and procedure in all state courts. It may temporarily transfer a district judge from one district court or division to another, when the condition of business, disqualification of the acting judge or his inability to sit makes such action advisable. Any judge so transferred, and the court over which he presides, shall have the same power and jurisdiction as a regular judge or court in civil and criminal cases and other proceedings. The supreme court may call a judge of any district court to sit on the supreme court in the event a member of that court be ill or disqualified. In original proceedings in the supreme court which involve controversies of fact the supreme court may direct a judge of a district court to hear the evidence and make findings of fact and conclusions of law and report them to the supreme court. The justices of the supreme court may sit separately in divisions with full power in each division to determine the cases assigned to be heard by such division. Three justices shall constitute a quorum in each division and the concurrence of three shall be necessary to a decision. Such cases only as may be ordered to be heard by the whole court shall be considered by all of the justices, and the concurrence of a majority shall be necessary to a decision in cases so heard. The justice who is senior in continuous term of service shall be chief justice, and in case two or more have continuously served during the same period the senior in years of these shall be the chief justice, and the presiding justice of each division shall be selected from the judges assigned to that division in like manner.

SEC. 4. Justices of the supreme court, judges of the district courts, and judges of county courts may be removed from office by resolution of both houses of the legislature if two-thirds of the members of each house concur. But no such removal by such proceeding shall be made except upon complaint, the substance of which shall be entered upon the journal, nor until the party charged shall have had notice and opportunity to be heard.

SEC. 5. The supreme court, not more than two justices voting in the negative, after a hearing, on complaint and due notice, may ask the resignation of, or by order remove, a justice of that court or a judge of any state court for the good of the service, and shall prescribe rules of procedure therefor; and by like vote, after notice and hearing, may retire on half pay any justice of the supreme court or judge of the district court who has served continuously as such justice or judge, or both, for as much as fifteen years, and who shall have attained the age of seventy years, or whose physical or mental infirmities have rendered such retirement advisable for the good of the service.

SEC. 6. The supreme court shall appoint a reporter and a clerk for that court who shall hold office during the pleasure of the court and shall prescribe their respective duties.

SEC. 7. There shall be a district court in each county, but several counties may compose one district, and there may be divisions of the district court as the business therein may require. Judicial districts consisting of one or more counties, and the divisions of each district court and the number of judges therein, as they may exist at the time of the adoption of this amendment, shall continue to exist until changed by law. The district court shall be a court of original general jurisdiction for the trial of all civil and criminal actions and proceedings, except as the exclusive jurisdiction of any civil or criminal action or proceeding is hereby vested in some other court, and shall have appellate jurisdiction in all civil and criminal actions and proceedings originating in courts inferior to the district court, and before boards, commis-
sions, officers and tribunals when exercising judicial functions, and such other jurisdiction as may be provided by law.

SEC. 8. There shall be a county court in each county, which shall have exclusive original jurisdiction for the probate of wills and in all matters relating to the estates of decedents, minors and incompetent persons, and shall have such jurisdiction in matters relating to the person of minors and incompetents persons, and in civil and criminal actions and proceedings, as may be provided by law. The board of commissioners of the county shall establish such divisions of the county court as the condition of business therein requires. The judge or judges of such court shall be examining magistrates in prosecutions for felonies. There shall be at least one judge of the county court in each county, and such additional judges as may be provided by law. At the first session of the legislature following the adoption of this article the legislature shall provide for the organization of county courts in accordance with this section, the transferring to such courts of the records and pending business of trial courts inferior to the district court, and for the election of judges for such courts at the next general election, so that such county courts may be fully organized and equipped to take care of such business on the second Monday in January following such general election.

SEC. 9. In each county there shall be a court clerk who shall be selected as provided by law and who shall act as clerk for both the district court and the county court in such county, and whose duties shall be prescribed by rule of the supreme court.

SEC. 10. To be eligible to hold the office of justice of the supreme court or judge of the district court a person must be duly admitted to practice law in this state, and shall be a citizen and resident of the state and district in which he is elected or appointed, and before taking such office must have been engaged in the active practice of law or shall have served as judge of a court of record, or both, in the aggregate as follows: For justice of the supreme court, ten years; for judge of the district court, five years. No person shall be ineligible to hold any judicial office in this state on account of his holding another judicial office therein at the time of his election or appointment. No person shall hold more than one judicial office concurrently. A justice of the supreme court, or a judge of the district court or county court, shall not be a candidate for a nonjudicial office, and in the event he files for or accepts a nomination for or an appointment to a nonjudicial office, his office of justice or judge shall immediately become vacant.

SEC. 11. Justices of the supreme court and judges of the district courts and county courts shall be elected at general elections as provided by law, and shall hold their respective offices for such terms as the legislature shall prescribe, which shall be not less than six years for justices of the supreme court, nor less than four years for judges of district courts and county courts.

SEC. 12. All appeals from county courts shall be to the district court, and all appeals from the district court shall be to the supreme court.

SEC. 13. The justices of the supreme court and judges of the district courts and county courts shall, at stated times, receive for their services such compensation as may be provided by law, but no such justice or judge shall receive any fee or perquisites, nor shall he practice law during his continuance in office.

SEC. 14. The several justices and judges of courts of record in this state shall have such jurisdiction at chambers as may be provided by rule of the supreme court.

SEC. 15. Provision shall be made by rule of the supreme court for the selection of a judge pro tem. of the district court or county court.

SEC. 16. In the event of a vacancy in the office of a justice or judge of any of the courts of record of this state the governor shall appoint some eligible person to fill such vacancy. No such appointment to fill a vacancy on the supreme court or the district court shall be valid without the written concurrence therein of a majority of the justices of the supreme court. The person so appointed shall hold office until his successor, elected for the balance of the
unexpired term, shall have qualified. A successor shall be elected at the next
general election which occurs more than four months after the vacancy.

Sec. 17. The style of all process shall be "The State of Kansas," and all
prosecutions shall be carried on in the name of the state. All process from
any of the courts of the state shall be executed by a sheriff, undersheriff or
deputy, or by the clerk of the district court if the sheriff be the party to be
served.

Sec. 2. This proposition shall be submitted to the electors of the state
of Kansas at the general election in 1934. The amendment hereby proposed
shall be known on the official ballot by the title, "The Judiciary Amendment
to the State Constitution," and the vote for and against such proposition
shall be taken as provided by law.

Sec. 3. This act shall take effect and be in force from and after its pub-
lication in the statute book.

The Redemption of Real Property Sold on Execution
or Orders of Sale.

By George Austin Brown.

Many requests have been made of the Judicial Council to prepare a pro-
posed bill relating to the sale of real property under a general execution or an
order of sale and carrying out the suggestion that the sale be made after the
end of the redemption period instead of at the beginning of it. Our April
Bulletin contained an article outlining some of the advantages, both to the
creditor and to the debtor, of the plan suggested.

We want to call your special attention to the fact that this bill does not
shorten the period of redemption in any manner, and the Council is not recom-
mending that the period of redemption be shortened. This bill provides for
the sale of the property after the end of the period of redemption, except the
debtor may redeem for the sales price at any time within ten days after the
sale. This extra ten-days period gives the debtor additional time and will
persuade the creditor to bid not less than the amount of the judgment and
costs.

The Council has spent considerable time in formulating its ideas and sub-
mit the same herewith for the consideration of the courts, lawyers, and other
persons interested. The Council solicits suggestions and criticisms and co-
operation for the passage of a new law, such as suggested, for the sale of real
property.

An Act relating to the sale of property on general execution, special execution,
and order of sale and the redemption thereof, and amending sections 60-3408,
60-3416, 60-3438, 60-3455, 60-3456, 60-3457, 60-3459, 60-3460, 60-3461, 60-3462,
60-3465, and 60-3466 of the Revised Statutes of 1923 and sections 60-3430
and 60-3443 of the 1931 Supplement to the Revised Statutes of 1923, and
repealing sections 60-3408, 60-3416, 60-3438, 60-3440, 60-3441, 60-3442, 60-3444,
60-3445, 60-3446, 60-3447, 60-3448, 60-3449, 60-3450, 60-3452, 60-3455, 60-3456,
60-3457, 60-3459, 60-3460, 60-3461, 60-3462, 60-3463, and 60-3466 of the Re-
vised Statutes of 1923, and sections 60-3439 and 60-3443 of the 1931 Supple-
ment to the Revised Statutes of 1923.

Be it enacted by the Legislature of the State of Kansas:

Section 1. That section 60-3408 of the Revised Statutes of 1923 be and
the same is hereby amended to read as follows: Section 60-3408. The officer
to whom a writ of execution is delivered shall proceed immediately to levy the
same upon the goods and chattels of the debtor; but if no goods and chattels can be found the officer shall indorse on the writ of execution "No goods," and forthwith levy the writ of execution upon the lands and tenements of the debtor which may be liable to satisfy the judgment; the officer shall make a return showing the lands and tenements of the debtor levied upon and the judgment creditor shall file an application with the court describing the lands and tenements levied upon and the court shall fix the date of sale, and the court may make an order making known and unknown persons parties claiming or having an interest in the property levied on and determine the interest owned by the execution debtor, and if any of the lands and tenements of the debtor which may be liable shall be encumbered by mortgage or any other lien or liens such lands and tenements may be levied upon and sold subject to such lien or liens.

Sec. 2. That section 60-3416 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3416. Lands and tenements taken on execution or sold on order of sale shall not be sold until the expiration of the time fixed by the court for the sale and not until the officer cause public notice of the time and place of sale, to be given for at least thirty days before the day of sale, by advertisement in some newspaper regularly printed and published and having a general circulation in the county, to be designated by the party ordering the sale, or in case no newspaper be printed in the county, in some newspaper in general circulation therein. All sales made without such advertisement shall be set aside on motion by the court to which the execution is returnable. And no greater sum shall be taxed as costs for advertising in any case than the amount received or to be received by the publisher, printer, or editor of the paper doing the printing, and which shall not exceed the amount prescribed by law for such publication.

Sec. 3. That section 60-3430 of the 1931 Supplement to the Revised Statutes of 1923 is hereby amended to read as follows: Section 60-3430. The defendant owner may redeem any real property sold under execution, special execution, order of sale, for the amount sold for, together with interest, cost and taxes as provided in this act at any time within ten days from the day of sale as provided herein, and shall in the meantime be entitled to possession of the property, and the date of sale of the real property shall not be fixed at less than eighteen (18) months from the date of the judgment or date of levy, except where the court or judge shall find that the lands and tenements have been abandoned or not occupied in good faith then in that event the court may fix the date of sale not less than six months from the date of judgment or date of levy; provided, that oil and gas leases or oil and gas leasehold estates may be sold immediately after judgment or levy and in all sales of oil and gas leases under order of sale or levy the property shall be appraised and sold for not less than two-thirds of its appraised value, and provided further that any contract and any mortgage or deed or trust agreement to the sale of the real property within any period less than eighteen (18) months from the date of the judgment or waiving the ten-days period of redemption after the sale shall be null and void, except that any corporation organized under the laws of the United States, the District of Columbia or any state of the United states, may, as mortgagor, agree in the mortgage instrument to a sale being made at a shorter period than eighteen (18) months after the date of judgment or may consent to a sale of the property being made immediately after the judgment as against said corporation mortgagor owner, and all such agreements when so made shall be fully binding on such mortgagor.

Sec. 4. That section 60-3443 of the 1931 Supplement to the Revised Statutes of 1923 is hereby amended to read as follows: Section 60-3443. During the period allowed between the date of judgment or the date of levy and the ten-day period for redemption of real property sold under execution, special execution, or order of sale, the judgment creditor may pay the taxes on the land and tenements ordered sold or levied on, the insurance premium on the
buildings thereon, and interest or sums due upon any prior lien or encumbrance thereon; and the same shall be a judgment upon such real property in favor of the judgment creditor paying the same, and the judgment creditor paying the same shall be entitled to repayment of all sums thus paid by him together with interest thereon, and before the judgment debtor shall clear his property of said judgment, the judgment creditors shall be reimbursed all sums paid by them for taxes, insurance premiums, and interest or sums due as shown by receipts or vouchers to be filed in the office of the clerk of the district court with interest at the rate of 6 per cent per annum together with costs, approved by the court; except, however, if the property is sold, the debtor shall have the right to redeem the property at any time within ten days after the sale by paying to the clerk of the district court the sum for which the property was sold and the property shall not be subject to further sale to satisfy said judgment or any sums allowed herein.

Sec. 5. That section 60-3455 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3455. That the lands and tenements levied on or sold on order of sale may be sold or transferred by the defendant owner, and the transferee may have the same rights as the defendant owner, but the property levied on or ordered sold shall not be subject to levy or sale on execution after the date of judgment or after the court fixes the date for sale on execution, and the defendant owner or his transferee shall be entitled to possession and all the rents and profits therefrom after the date is fixed for sale until expiration of the ten-day period of redemption and the rents and profits therefrom shall be exempt from levy or sale on execution after the date of judgment or after the time is fixed for the sale of the property on general execution.

Sec. 6. That section 60-3456 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3456. The holder of the legal title at the time of the issuance of the execution or order of sale shall have the same right to pay the judgment and other sums due the judgment creditor upon the same terms and conditions as the defendant in execution, and also shall be entitled to the possession of the property the same as the defendant in execution as herein provided.

Sec. 7. That section 60-3457 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3457. If the defendant in execution or order of sale or his transferee or the owner of the legal title, fail to redeem the sheriff shall, at the end of the period of redemption herein provided upon the confirmation of the sale by the court, execute a deed to the purchaser. If the person entitled to the deed be dead, the deed shall be made to his heirs; but the property will be subject to all liens or to the payment of all debts of such deceased purchaser in the same manner as if acquired during his lifetime.

Sec. 8. That section 60-3459 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3459. The purchaser or party entitled to a deed under sale as herein provided, may, after the deed is made to him by the sheriff, recover damages for any injury or waste permitted upon the property purchased after date of judgment or after the time is fixed for sale on execution and before possession is delivered under the conveyance.

Sec. 9. That section 60-3460 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3460. The land and tenements once sold upon order of sale, special execution, or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold or any judgment or lien inferior thereto; provided, however, if the real property sells for more than enough to satisfy the judgment or decree, any inferior judgment or lien shall be a lien upon the excess proceeds.

Sec. 10. That section 60-3461 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3461. After the date
of judgment or after the time fixed for the sale on execution the judgment creditor shall be entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction; or, when required to protect said premises against waste appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed and shall be entitled to rent and control and manage the same; but the income during said time, except what is necessary to keep up the repairs and prevent waste, shall go to the owner or defendant in execution or the owner of its legal title.

Sec. 11. That section 60-3463 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3463. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same and shall direct that the clerk make an entry on the journal that the court finds that the sale has in all respects been made in conformity with law, and order, and that the sheriff make to the purchaser a deed provided for herein.

Sec. 12. That section 60-3466 of the Revised Statutes of 1923 be and the same is hereby amended to read as follows: Section 60-3466. Whenever a lien shall be given for the purchase price of any real estate, and default shall be made in the conditions of the mortgage or instrument giving such lien before one-third of the purchase price of said real estate shall be paid by the purchaser thereof such purchase money lien may be foreclosed by the legal holder thereof in the manner now provided by law for the foreclosure of other mortgages, and such real property may be sold on judgment of foreclosure as now provided by law: Provided, That whenever any such purchase-money lien is foreclosed the court shall fix the date of sale six months from the date of judgment, and if said property is not redeemed as herein provided within ten days after the date of sale the purchaser shall be entitled to a deed.

Sec. 13. That sections 60-3408, 60-3416, 60-3438, 60-3440, 60-3441, 60-3442, 60-3444, 60-3445, 60-3446, 60-3447, 60-3448, 60-3449, 60-3450, 60-3452, 60-3453, 60-3455, 60-3456, 60-3457, 60-3459, 60-3460, 60-3461, 60-3462, 60-3463, and 60-3465 of the Revised Statutes of 1923, and sections 60-3438 and 60-3443 of the 1931 Supplement to the Revised Statutes of 1923, are hereby repealed.

Sec. 14. That this act shall take effect and be in force from and after its publication in the statute book.

Suggestions for Amendment of the Proposed Code of Procedure Involving Eminent Domain.

By Chester Stevens.

In the April Bulletin appeared an article dealing with the confusion existing in the present statute law of Kansas involving the exercise of the power of eminent domain. The article was necessarily brief and was limited to a general definition of eminent domain, some of its characteristics, the method of invoking it, and the numerous statutes providing for its exercise, many of which contained no procedure, and therefore left the condemnor in a state of uncertainty as to how to proceed.

In the July Bulletin of the Judicial Council a proposed code of procedure was set forth in the form of a suggested act of the legislature to bring uniformity and remove the ambiguity in the various statutes of the state.

The proposed code of procedure is intended to simplify the exercise of this attribute of sovereignty by such persons and corporations as are engaged in business necessitating the use or appropriation of private property for public purposes. It proposes to give the condemnor an expeditious method of pro-
curing the private property needed for the use, and to fix a uniform tribunal throughout the state of Kansas to which he should be directed to go for the purpose of making the condemnation. It is also designed to enable the condemnor to have the immediate possession of the property sought to be taken and not suffer the delays incident to the giving of a reasonable notice to the owners of the lands to be condemned. The proposed act avoided naming the purposes for which the power might be exercised, it being regarded as more practical to require as the foundation for the exercise of the power that it be for "public purpose," and vested in the district court, subject to the right of appeal, the power to determine whether the use stated by the condemnor in the application was a public use.

In the proposed act no attempt was made to define or prescribe when the proceedings could be abandoned by the condemnor. It might be preferable to leave that question to the courts to determine upon the particular circumstances of each case. It is difficult to always foresee the conditions which may and frequently do arise in such proceedings. Should the legislature undertake to prescribe when the proceedings could be abandoned, meritorious cases might arise not within the statute but which would fully justify the abandonment of the proceedings. However, this question has been suggested, and suggestions from the bench and bar will be gladly received by the Council touching this important question. Of course, provision could be made for the abandonment of the proceedings by the condemnor at any time preceding the actual occupancy of the land. However, if the condemnor had taken actual possession and commenced to convert the same into the use for which condemnation had been sought, it would be extremely difficult to make adequate provision by legislative enactment for abandonment.

Three very important suggestions have been made. The first is that the act in section 5 seems to require an immediate appeal in case the judge of the district court shall deny the application. It was not the intention to require an immediate appeal, although there is no question but what a limitation within which an appeal could be taken would be advisable so that the owner would not be deprived of the advantages of lease or sale of the land by an unreasonable delay on the part of the condemnor as to whether he would proceed with the appeal.

The second suggestion was with reference to section 7, requiring a deposit of the amount of the award with the clerk of the district court and the filing of a bond in a sum equal to the allowance or award made by the commissioners. As drawn, section 7 would require the state and all of its municipal subdivisions to execute the bond. The discussion along this line assumed a broad scope. Whether the state and its municipal subdivisions should be required to make a deposit of the award before entering into possession was suggested. However, it is a fundamental conception that private property shall not be taken from the owner without just compensation having first been made before he is deprived of his property. No good reason appears why the state or its municipal subdivisions should be permitted to take possession of the land until it has paid to the owner or deposited with the clerk of the court the amount of the award. Certainly the landowner, being forced to surrender his land, should not be compelled to accept any delay in the payment of the award or be put to any expense in enforcing the payment of the same. As to the question of bond, many obstacles can be seen which would
seriously interfere with the state or the county or the city giving such a bond, and no doubt the section should be amended so as to except these municipalities from this requirement.

The third suggestion deals vitally with the whole structure of the proposed bill, and instead of allowing an application to be filed by the condemnor the whole proceeding would take on the aspect of a civil action. The condemnor would appear in the rôle of a plaintiff, filing his petition with the clerk of the court, giving security for costs, and causing summons to be issued for all of the owners or persons owning any interest in the land, including holders of liens thereon, who would be named in the petition as defendants. Summons would be served as in other cases, and where service could not be had within the state, notice would be published and the defendants so served would be given forty-one days from the date of the first publication in which to answer. The case would proceed just as a civil action under the code of civil procedure, except that time for pleading and for hearing might be accelerated. Plaintiff’s allegation that the property is being taken for a designated public use would be taken as true unless issues were joined on that question, in which event the court could first hear and determine that issue. Commissioners could be appointed to make appraisement of damages, and on their report being filed judgment could be rendered in accord with it, unless exceptions were taken within a fixed time. In that event there would be trial to a jury on the question of damages, as now, except that a judgment would be rendered as distinct from an award found. Among other things adjudged at some stage of the proceedings would be whether plaintiff gets title to the property condemned, or an easement only. Provision could be made outlining under what circumstances or stage of the proceedings, or upon what terms, if the situation were such as to justify the imposing of terms, the proceedings might be abandoned. There could be determined in the same action the ultimate disposition of the amount of the judgment between owners or holders of liens upon the property as the facts might appear, although plaintiff would not be concerned in that question and it need not interfere with his taking possession of the property.

This last suggestion has many commendable features. It would insure the bringing into court all of the persons interested in the land sought to be taken, and no question could afterwards be raised as to the jurisdiction of the court concerning the subject matter of the action and of the parties and the binding force of the judgment. Converting the award into a judgment would facilitate the collection of the same, as execution could be issued and levied as in other cases involving a money judgment. Such a proceeding would bring to issue in a court of competent jurisdiction all questions involved and they would be tried and determined in accordance with the code of civil procedure with which the bench and bar are thoroughly familiar.

On the other hand, there are some meritorious objections to treating the proceeding as a civil action. The exercise of the power of eminent domain by private corporations, such as railroads and pipe-line companies, and by municipal subdivisions of the state, frequently involves a number of different tracts of land owned by different individuals. If the entire proceeding was allowed to take its course as a single civil action there would be as many lawsuits involved in the one case as there were different owners of the respective tracts of land, and much confusion would necessarily result. Each
action could be treated as a separate action and so filed, but this would involve large expense and costs. Under the proposed act the condemnor would file his application in the district court for the appropriation of as many separate and distinct tracts of land in the particular county as was desired, and the commissioners would appraise and award as to each tract. In many instances the majority of the owners accept the appraisement and award, and there are no further proceedings. Occasionally an owner will feel that the award is inadequate, and therefore seek redress by appeal to the district court. In this respect the application method for appointment of commissioners is more expeditious and much less expensive.

The Judicial Council hopes the bench and bar will give the subject of eminent domain careful investigation and study and report their views to them, and that the proposed act will result in a simple, complete and expeditious method for the exercise of this power.

The previous articles in our Bulletin have brought out the fact that lawyers throughout the state recognize the confusion which now exists in our statutes on this question and the need of a statute simplifying our procedure with respect thereto. Realizing, as we do, that sometimes the legislature passes an important bill without being thoroughly familiar with existing statutes and decisions of our courts relating to the subject, we thought best to have a synopsis of those prepared. For this purpose we sought the assistance of A. Harry Crane, revisor of statutes, and some weeks ago he put his assistant, Franklin Corrick, to work on the matter. Mr. Corrick has prepared a synopsis of our statutes concerning eminent domain and proceedings thereunder. We deem this compilation important enough to print herein. An examination of it discloses the confusion which exists in our statutes on the subject, and demonstrates quite thoroughly, not only the need of an act providing for uniform procedure for the exercise of the right of eminent domain, but indicates also the need of some changes in the substantive law relating to that matter. This last probably would consist largely of a revision of those sections of the statute conferring the right of eminent domain, stating the purpose for which it is granted, and eliminating such procedural provisions as are contained in the disconnected sections.

SYNOPSIS OF STATUTORY PROVISIONS RELATING TO RIGHT OF EMINENT DOMAIN AND CONDEMNATION PROCEDURE.

By Franklin Corrick.

Constitutional Provision. Kansas constitution, article 12, section 4: "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

[Sectional References are to Revised Statutes of 1923, except where followed by word "Supp." which means: 1931 Supplement to Revised Statutes.]

2-135. Supp. County fairs. Any county fair association operating under R. S. 1931 Supp. 2-125 to 41 has the right of eminent domain as provided in R. S. 26-101 to 2.

3-115. Supp. Airports. All cities given same right of eminent domain in regard to airports and fields as for property now located within city limits.

Note.—R. S. 26-201 gives a city the right of eminent domain as to private property for any purpose whatsoever, and R. S. 26-208 relates to procedure for taking lands outside cities.
12-622 to 3. Sewer works outside any city. Right of eminent domain granted and (12-623) may proceed to condemn the necessary lands or right of way.

Note.—No provision as to what procedural statute shall apply. (See R. S. ch. 36, art. 2.)

12-632 to 4. Change of grade, second and third class cities. (12-632) Pass ordinance changing grade, (12-633) appoint appraisers to assess damages and make report to governing body. (12-634) Governing body fixes time for hearing objections to the appraisers report. Appeals may be taken to the district court. If no appeal, city shall within thirty days reestablish grade by ordinance or rescind all the proceedings relating thereto.

12-635 Supp. Flood control in any city. This section is an amendment to an act which includes sections 12-636 to 46 and now provides that a city may “acquire by condemnation and eminent domain, or purchase, within or without said city limits, within five miles therefrom any lands and easements.” Sections 12-636 to 38: City declares necessity by resolution; engineer makes survey and cost estimate and report which must be approved by the public service commission’s engineer; thereupon contracts are let for the work. Sections 12-639 to 43: (12-639) The governing body appoints three disinterested householders who appraise and assess all damages to any property, taking into consideration the benefits. They shall personally view and examine all property liable to be damaged and file written report with city clerk. (12-640) The governing body fixes a time and place for hearing objections to the appraisers’ report and gives notice by publication once in the official city paper ten days before the hearing. (12-641) Hearing on the report by governing body; damages determined. (12-642) Written objections to appraisers’ report must be filed with city clerk forty-eight hours prior to such hearing. (12-643) Any person who has filed objection may appeal to the district court upon giving bond conditioned as in civil cases from justice courts, and also, if amount recovered on appeal is not greater than damages allowed by city they shall pay damages caused by the delay. 12-645 Supp.: This section was amended in 1927 so as to provide for appraisal of special benefits to property condemned under R. S. 12-635 to 46. The procedure to be the same as provided in R. S. 12-639 to 43.

12-663. Public feed lots in any city. May acquire title to lands by purchase, gift or condemnation “in manner provided by law for park purposes.”

12-809 to 10. Land for waterworks by any city. (12-809) Petition to district court setting forth necessity for appropriation of lands and water for waterworks. Thereupon “necessary real estate shall be condemned as provided by law.” City has right to perpetual use of same. (12-810) Foreign corporation may condemn land and rights therein for water “as provided by law.”

12-811. Acquisition of corporate utility plants by any city. In cities where corporation franchise has expired the city may acquire water, gas, street railways or power plants. City passes resolution; then makes application to district court in writing. Court appoints one of three commissioners to determine value of utility. One is selected by the city. The other by the owner of the plant. The three determine value and make report and file with clerk of district court. The court gives notice of hearing on the report and the court’s decision modifying, confirming or rejecting the report is final, from which an appeal may be taken. The section then provides for an election and if a majority of the electors vote in favor of it the city by ordinance issues bonds to pay the award. Upon payment of the award the title and possession vests in the city.

12-820. Water plants outside of any city. This section is hardly broad enough to confer the right of eminent domain. It provides that a city may “acquire title” to plants outside a city.

12-844 to 7. Pipe lines, water or sewer systems, second and third class cities. May proceed to condemn same as provided by law.
12-1306. Public parks in any city. After survey by competent engineer is made and filed with city clerk, the governing body makes order declaring necessity for the appropriation with description as shown by the survey. All other condemnation proceedings shall be the same as provided by law.

12-1401. Cemeteries in cities or in city and townships. When requested by twenty-five or more taxpayers a township, trustee or trustees may institute proceedings to condemn land for cemeteries as provided by law. Any city may condemn land for cemeteries and may join with one or more townships.

12-1633 to 4. Viaducts or tunnels, first and second class cities. The city may cause construction of viaducts or tunnels under or over railways when deemed necessary and provide for appraising, assessing and determining the damages, if any, as provided by law for changing grade in any street; except the railway company or companies shall pay the damages. (12-1634) This section is a supplementary act and applies to first and second class cities in counties of over 90,000. Both sections provide that the damages shall be a lien against the railway, which may be collected by suit.

13-404. Cities of the first class. The governing body of first-class cities has power “to condemn private property for the use of the city as provided by law.”

13-414. Hospitals, workhouses, houses of correction and workhouses in first-class cities. City has power to condemn for these purposes as provided by law; city must pay all damages.

13-443. Reopening of streets or alleys, first-class cities. When a street is reopened after being vacated, and there have been improvements erected on same, the city shall pay to the owner of the improvements their value, which shall be ascertained by three disinterested appraisers. The city selects one appraiser; the owner one; the two appraisers then select a third. The award of the appraisers is binding on both parties and the value of the improvements must be paid by the city before such street or alley is reopened.

13-1014 to 6. Right of way for sewers, first-class cities. Right of way for sewers may be condemned “as provided by law.” All costs and expenses to be assessed against the land in the district.

13-1018c to d Supp. Sewage-disposal works, cities between 50,000 and 85,000. City has power to condemn or acquire lands by purchase for such purpose. The costs shall be paid by the city.

13-1018f Supp. Sewage-disposal works, cities of 85,000 or over. Such cities have the power to condemn or acquire by purchase lands for sewage-disposal plants.

13-1020 to 2. Change of street grade, first-class cities. After a resolution declaring necessity to change any grade, the governing body appoints three appraisers who assess damages and deduct the benefits and report the remainder of the total damages, if any, to the governing body. (13-1021) The report is filed with the city clerk. The governing body fixes a time for considering the report and hearing objections. Notice must be given to interested persons three consecutive days before the hearing. After it has approved the report the governing body orders the report spread upon the journal and the order is final and conclusive evidence of the validity, correctness and fairness of the appraisement and benefits. Thereupon the city must act within thirty days or rescind all the proceedings. No provision made for appeal.

13-1023. Purposes for which private property may be condemned, first-class cities. “Private property may be purchased or condemned for streets, alleys, levees, market houses, market places, depot grounds, bridges or approaches thereto, public buildings, sewers, to acquire stone quarries or other material for the improvement of the streets and alleys, or other public improvements, and for public parks within or without the city, as may be hereafter needed or required for the use of the city.”

13-1025a Supp. Viaducts and tunnels, cities between 45,000 and 65,000. Any such city having power to require railroads to construct or reconstruct passage-
way over or under tracks may when deemed necessary abandon such passageways and construct same at new location. "All proceedings . . . including the appraisement, assessment and determination of damages . . . shall be governed by existing law in so far as it does not conflict with this act."

13-1025b to j Supp. Interstate bridges, first-class cities. Complete procedure is provided for acquiring bridge and land for approaches by condemnation or otherwise. (13-1025e) If land cannot be purchased, the governing body may petition the district court for appointment of commissioners (no number stated) "to appropriate said structure and the land and easements . . . and determine the value" thereof. Said commissioners must give twenty days' notice to owners of bridge and land by registered mail or otherwise. Owners file claims for value within thirty days. Depositions may be taken as to facts. Commissioners may make partial reports and upon completion of their duties shall make final report and file with clerk of district court. (13-1025f) Appeal may be had from the commissioners' award to the district court. (13-1025g) The city may also appeal, but is not required to make deposit of money, nor has it the right of possession, but must make final judgment, pay awards before right of occupancy. Instead of appealing the city may, within ten days after filing of commissioners' report, abandon the proceedings. (13-102h) The city must pay the award within ninety days after final determination. (13-1025i) The city may condemn necessary land after the bridge has been built.

13-1045 to 53. Bridge or viaduct, cities over 85,000. Condemnation proceedings "as in this act provided" for bridges, viaducts and approaches thereto. (13-1048) City passes ordinance declaring public necessity. Thereupon files application in district court praying for appointment of commissioners (no number stated) to appropriate said structure and lands and determine value. Commissioners shall give 20 days' notice to owners of record. They may make partial reports and upon completion shall file their final report with clerk of district court. (13-1049) City may pay award within ninety days of filing of the report and full title thereupon vests in the city. (13-1050) Owner may appeal, but the only question shall be as to damages and shall not affect the city's right to possession upon deposit of award. (13-1051) City may by resolution adopted within ten days after filing of report abandon the proceedings or may appeal from the award.

13-1055. Storm drainage, cities over 50,000. The proceedings for securing land for outlets for drainage of storm waters in such cities and the construction of same shall be the same as provided by law for cities in exercising the right of eminent domain.

13-1060. Market houses, cities over 40,000. Additional lands may be condemned for market houses in such cities. No provision as to procedure.

13-1311. Parks and boulevards, cities over 65,000. The board of park commissioners in such cities may purchase, condemn or otherwise acquire lands for parks, squares and boulevards and to establish, change or reestablish the grade of same. (13-1316) Such cities must maintain at least one park and may acquire land by purchase, condemnation or otherwise for parks, parkways and boulevards. 13-1326 to 8. Change of grade; appeal. The board of park commissioners shall ascertain and determine the damages to land affected by change of grade for park and boulevards, and shall file report thereof with city clerk. Board shall give notice of time for consideration of the report by publication for ten days. The board shall thereupon consider and decide same and its decision shall be final except claimants may appeal from the amount of damages. (13-1327) Board appoints three assessors to assess benefits to land or lots. (13-1328) Board gives notice of filing of assessors' report and fixes time to hear complaints, and its decision is final and conclusive.

13-1355 Supp. Park lands outside cities, first class. The board of park commissioners of any first-class city may acquire park lands by purchase, gift, condemnation or otherwise, not to exceed one mile from city limits; except that cities between 80,000 and 110,000 may go not to exceed five miles from the corporate limits.
13-1354. Effect of above act. This section saves the right of appeal from awards heretofore made by condemnation by boards of park commissioners.

13-13a13 Supp. Municipal universities, cities between 70,000 and 110,000. The board of regents of such universities has the same rights of securing land and other property by condemnation procedure as are vested in boards of education of cities of the same class.

13-1903. Viaducts over or tunnels under streets; cities under commission government. "The proceedings for such purpose shall be the same as provided by law for the purpose of determining damages to property owners by reason of the change in grade of a street, and such damage shall be paid by said railway companies."

13-2501. Parks and parkways; commission government. The board of commissioners has power to purchase and condemn land for such purposes "in the manner provided by law."

13-2502a, 13-2502c Supp. Parks, parkways and playgrounds; cities between 40,000 and 75,000; commission government. City commissioners may purchase and condemn lands for public parks, parkways and playgrounds and (13-2502c) all lands necessary for their improvement.

13-2504 to 5. Land in annexed territory for parks, playgrounds and boulevards; commission government; cities under 58,000. The city commissioners may purchase and condemn all lands in such territory for such purposes. (13-2505) After resolution declaring public necessity and description, the commission shall proceed to appropriate such land in the manner provided by law; except that in addition to duties imposed by law, the commissioners appointed by the judge shall assess the damages to land taken and damages to land not taken and fix the benefits to the remainder and to the city at large and fix the special benefits to lots and tracts and apportion the same separately.

13-2519. Parks, parkways and boulevards, cities over 50,000; commission government. City commissioners may acquire land for parks, parkways and boulevards by purchase or condemnation.

13-2527 to 9. Same, change of grade. The city commissioners shall determine the damages to lots and tracts affected, file report in city clerk's office, specifying the damages, fix time for consideration of the report and give notice by publication. The board's decision shall be final as to the proceedings, except an appeal to the district court is allowed as to amount of damages. (13-2528 to 9) Costs are then assessed against property benefited.

13-2536. Same. When property is to be appropriated for parks, parkways or boulevards, the city commission shall have competent engineer make survey and description and file same with city clerk, and thereupon makes order declaring necessity for the appropriation. They shall then proceed as provided by law for condemnation of lands in cities.

14-423. Widening, opening, extending or vacation of streets; cities second class. Before the city council shall open, widen or extend any street or alley it shall proceed to condemn the necessary lands as provided by law. Vacated streets shall revert to the adjacent owners.

14-428. Hospitals and waterworks; cities second class. The council may purchase or condemn lands for hospitals and waterworks within or without the city, but not to exceed twenty miles from the city limits. The condemnation of land outside the city shall be regulated in all respects as provided by law.

14-435. Railroad right of way; markets; cities second class. Private property may be taken for public use for the above purposes; "but in every case the city shall make the person or persons ... injured adequate compensation to be determined in the manner provided by law." Benefits resulting to landowners shall be considered except in condemnation of rights of way for private corporations.

14-607. Hospitals, second-class cities. Land may be condemned for hospital purposes in the name of the city by the city attorney "under the provisions of the law in similar cases."
14-701 to 14-701j Supp. Watercourse improvements; cities second class. City may acquire by gift, purchase or condemnation proceedings lands for water supply and watercourse improvements within or without the city limits not to exceed five miles. Condemnation of property outside city limits must be done in manner provided by law. (14-701a) Provision for surveys, estimates, election, etc. (14-701b) Governing body appoints three appraisers who determine benefits to be assessed against property owners. (14-701c) For property taken within city, the city appoints three assessors to assess the damages after deducting the benefits. (14-701d to j) Notice and hearing of objections; appeal to district court by landowner from the award of damages by governing body.

14-1007a Supp. Lands for cemetery; cities second class. Lands may be acquired by purchase or condemnation for cemeteries in the manner “as now provided by law for the appropriation of private land for public use.” A petition must first be signed by 10 per cent of the legal voters. Notice shall be given to the landowners the same as service of summons in civil cases. Appeal may be had as to value of cemetery or any other damages in same manner as “provided by law in connection with the appropriation of land for public use by the exercise of the right of eminent domain.”

15-427. Street improvements; third-class cities. Damages sustained by property owners by the opening, widening, extending or otherwise improving streets or alleys “shall be ascertained in the manner provided by law.”

15-439. Lands for railroad right of way, market places, or any other necessary purpose; cities third class. Eminent domain authorized for the above purposes. The city to make adequate compensation “to be determined in the manner provided by law, and appeals may be taken from such determination as provided by law.”

17-618. Sundry corporations. Lands may be appropriated by certain corporations for certain uses set out in this section “in the same manner as is provided . . . for railway corporations so far as applicable.” The corporations enumerated are: hospitals, hydraulic, irrigation, manufacturing, mills, oil and gas, pipe lines, plank roads, telegraph and telephone, macadam roads, and electrical and power transmission lines.

17-1315. Cemetery corporations or associations. Cemetery corporations or associations of individuals owning or holding burial grounds not in first-class cities may condemn lands for enlarging same “as provided by law.”

17-1903. Telegraph and telephone corporations. Such companies may enter lands to make surveys and examinations and may appropriate so much of the land as may be necessary, and “may proceed to obtain the right of way, and to condemn lands . . . in the manner provided by law in case of railway corporations.”

17-2103. Waterworks corporations; dams. A complete method of procedure is provided in this section for exercising right of eminent domain by water companies for erecting dams across watercourses for furnishing water to cities and towns except in counties between 12,000 and 14,000. The company first files a plat together with a petition in the district court. Bond must be filed to pay all costs of the proceedings, after which the court appoints three commissioners who shall publish a notice in a newspaper four weeks, stating when they will view the premises to make awards of damages. Right of appeal to district court is given to persons aggrieved as to awards of damages.

19-223. Appeal from board of county commissioners. This general section allowing appeal from decisions of the county board may sometimes prove of importance in condemnation proceedings. (See Shurtleff v. Chase County, 63 K. 645, 66 P. 654; also, R. S. 24-804.)

19-1501. County buildings. Board of county commissioners in any county authorized to condemn land or additional land for courthouse, jail or other county buildings “according to law.”
19-1806. Hospitals; counties under 40,000. Any property for hospital purposes may be condemned by the county commissioners "under the provisions of the law in similar cases."

19-1825 Supp. County tuberculosis hospitals in certain counties. Any property for a tuberculosis hospital in certain counties where lead and zinc are produced may be condemned under the provisions of law in similar cases.

19-2628. Right of a corporation to condemn land for water mains along highway or other property; counties. A corporation which has been granted the right by a county to lay water mains may condemn any land, easement, railroad right of way, public highway or any property upon which it may be necessary to lay, maintain and operate water mains, laterals and equipment. "Said persons, partnerships or corporation shall follow the procedure that is now provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad rights of way."

19-2707 and 19-2715 Supp. Sewers; in counties between 21,000 to 70,000. The county commissioners authorized to acquire property, both real and personal, by purchase or condemnation as may be necessary to provide adequate sewer system. (19-2715) Proceedings to be prosecuted "under the provisions of the law in similar cases."

24-201 to 16. Township drainage works. Complete procedure is provided for drainage within a township or through two or more townships. (24-201 to 2) A ditch, drain or watercourse may be established upon filing a petition with township clerk setting forth necessity and describing same, with a bond to pay expenses in case petition is refused by township trustee. Petitioner must notify landowners of time and place of hearing petition. (24-203) Landowners may file written claims for damages to lands appropriated, and failure to do so amounts to a waiver. (24-204) Hearings on petition are had before township trustee, who may view the premises and determine amounts of claim for damages. The clerk shall keep a full record of the proceedings. (24-205) Cost of the work is assessed against the property of those benefited. (24-207) Appeal from the award of damages may be taken to the probate court by giving written notice to the township clerk within five days after the trustee's decision on the petition and filing bond to pay all costs if defeated in the probate court. Transcript of the proceedings must be filed with the probate court. (24-208) A jury of six is provided for. Appellant must notify resident landowners and the probate judge notifies nonresidents by publication. Two or more appeals may be consolidated, in which event any one of the appellants may give said notices. (24-209) The jury act as viewers and determine the necessity, amounts of compensation, etc., and file their report within five days, which may be extended by the judge. (24-210) If the jury report favorably to the appellants the judge apportions the costs or damages to the several interested in the drainage project. (24-212) The proceedings are stayed on appeal to the probate court, but if no appeal taken the trustee shall proceed to let contracts for the work. (24-210) The widening or deepening of such drainage works is done by the same procedure as outlined above.

24-301 to 17. County drainage of swamps or low lands. A complete procedure is provided for in substantially the same manner as provided in R. S. 24-201 to 16 outlined above.

24-407 (6th cl.) Supp. Drainage district within counties or cities. Drainage districts authorized to condemn rights of way over railways and other railway lands to maintain levees along same "in the manner hereinafter provided" (see R. S. 24-438 to 46).

24-438 to 46. Same; procedure. The district may appropriate private property by filing a survey and description of such lands with the secretary of the drainage board. Thereupon the board may petition the district court or court of common pleas, describing the land and setting forth the necessity and asking for appointment of three commissioners to appraise and assess damages. (24-439) The commissioners must give ten days' notice to railroad and other
property owners of time and place of assessment of damages. The commissioners may make partial reports, but upon completion shall make a final report and file with the county clerk which (24-440) shall describe the lands appropriated and make separate appraisements of each landowner’s damages. (24-441 to 2) Upon deposit of money with county treasurer within ninety days after report filed and filing of report within ten days with register of deeds the right to perpetual use of the lands shall vest in the district. (24-443) Appeal on the question of damages alone may be taken to the district court by the landowner and such district may take possession upon depositing amount of awards. (24-444) The district may also appeal from the awards. (24-445) Title to land and wrongful obstruction may be determined upon appeal as affecting right to compensation. (24-446) The commissioners are allowed $3 per day.

24-463 to 7. Enlargement of district. This act is supplementary to the one shown above. Section 24-467 provides for condemnation of land for additional ditches, etc., in the same manner as provided in R. S. 24-439 to 46 outlined above.

24-470 to 80. Same; harbor lines. This act is supplemental to the procedure in R. S. 24-439 to 46 given above. It relates to the appropriation by a drainage district of land at harbor lines. It relates to a drainage district having $40,000,000 of taxable property, which has deposited sufficient money for payment of claims of owners along harbor lines. The title upon proclamation of the governor vests in the state, but the governor may designate the drainage district as agent of the state to take and hold possession for the state. Section 24-474 provides an action by the attorney-general to ascertain ownership of and compensation of the land. Other sections provide concurrent remedies as to payment of damages and costs assessed, etc.

24-512 (5th cl.) Drainage districts in valley of natural watercourse. District has power “to condemn and take possession of all lands necessary to the construction of cut-offs, spillways, and auxiliary channels provided for in this act, upon proper compensation to the owner.”

24-519 to 24. Same; benefits and damages commission. The benefits and damages commission appraises the amount of damages done and the value of land taken in making the improvements and apportions the benefits. Appeal may be made to the board of directors within twenty days after date of filing such awards and assessments with the county clerk. Section 24-524 provides for hearing of complaints. The board of directors fix time and place, and give complainants five days’ notice of same. Their report of same is recorded with the county clerk and becomes an amendment of the report of the benefits and damages commission provided in R. S. 24-523.

24-612. Drainage district in one or more counties; land for right of way. Real estate, easements or franchises may be condemned for rights of way. Petition to district court describing lands needed praying for appointment of three appraisers. “Upon filing said petition the same proceedings for condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable . . .” District cannot enter until damages paid, and if not paid within two years the proceedings abate at cost of district. The district is given the additional right to condemn artificial or natural obstructions in any existing watercourse in the same manner as outlined above.

24-705 to 6. Drainage on petition to court. Section provides for paying damages to easements held by railroads or other corporations, including lands, rights or water power injuriously affected. It provides for a remonstrance in writing against the report of the drainage commissioners which shall be heard by the court as soon as possible after ten days from filing of the report. The court may set aside the report and refer the matter to the commissioners for a new report. 24-706 allows appeal to the supreme court.

24-801 to 7; 24-814. Construction of levies by counties. (24-801 to 7) A majority of the acreage owners may present petition to county commissioners
with a bond to pay costs of proceedings if disallowed. The county commissioners may act as viewers or may appoint three disinterested householders to act as such. The county commissioners fix a day for the view and notify landowners in writing of the time and place. The viewers mark and determine the boundaries of land to be taken and determine damages to owners claiming such. Benefits to remainder of land may be deducted. Appeal may be taken to district court as provided in R. S. 19-223. Section 24-814 provides for compensation for viewers and persons assisting.

24-1017 to 18 Supp. Conservancy act. The sections grant drainage districts under the conservancy act a "dominant right of eminent domain" over certain other public utilities. It provides that instead of having appraisals and assessments of the property by the board of appraisers, as provided in R. S. 1931 Supp. 24-1026 to 34, that the procedure may be as "provided by law for the appropriation of land or other property taken for railroad purposes." The entire act has been held unconstitutional. (See Verdigris Conservancy District v. Objectors, 131 K. 214, 289 P. 966.)

26-101 to 2. Corporations: general procedure law. General procedure provided for exercise of the right of eminent domain for all corporations except railroad and interurban railway corporations. Petition to district court giving purpose and description of land to be taken and names of record landowners. The court determines right and necessity of such condemnation as to whether it is for its lawful corporate purpose. Three appraisers are appointed to view the lands and make a sworn report and file with clerk of district court. Upon deposit of appraised amount and payment of court costs and fees of appraisers within thirty days, the petitioner is entitled to title and possession. Appeal from the appraisement may be taken by either party. Written notice thereof and bond for costs must be filed within thirty days.

26-201 to 10. Condemnation in cities. (26-201) Governing body authorized to condemn property or easements for city use for street or for any city purpose whatsoever. A survey and description of the property is made by competent engineer and filed with city clerk. Order is made by city setting forth the condemnation and for what purpose. Where property is specially benefited same is by ordinance designated a benefit district. After such order the city files a petition in district court describing land and praying for appointment of three appraisers, called commissioners. (26-202) The commissioners must give ten days' notice in writing to landowners of time and place of hearing at which lands are viewed, damages assessed, special benefits to all property apportioned. (26-203) Their reports shall be filed with city clerk and shall describe land, purpose of taking, name of owner and his damages. (26-204) After recording report of commissioners, the city may deposit amount of award and take possession. In case of parks and boulevards the title vests in city upon publication of the resolution of taking. The deposit of awards is with the city treasurer, who pays all parties so entitled. Awards are also deposited for benefit of unknown landowners. (26-205 to 7) The city may abandon the proceedings by resolution within ten days after the filing of the appraisers' report. Either party may appeal from the award by filing notice within thirty days after filing of the report and giving bonds for costs. Such appeal shall only affect amount of compensation, although (26-207) the city may contest the landowner's title on such appeal or show that the land is a street or way. Land outside city limits (26-208) is within scope of this act. The act is applicable to all city boards and commissions (26-210) having the power of eminent domain.

26-301 to 6. Land of unusual historical interest. Land of unusual historical interest to the state may be taken for its use and benefit by a joint resolution of the legislature declaring a specifically described tract of land to be of a certain described historical interest. A petition is filed by the attorney-general in the name of the state. Appraisers are appointed by the district court and notice by summons is given to landowners for a hearing on report of appraisers. The district court may approve, disapprove or modify the report. In other
respects the procedure and rules of practice conform to railway condemnation proceedings under chapter 66, article 9, of the Revised Statutes. The court enters an order that the proceedings are according to law. After a final order the clerk sends a certified transcript of all the proceedings to the auditor of state which, upon approval by the attorney-general, is filed by the auditor. The cost of the proceedings and damage claims are paid by legislative appropriation. (See R. S. 1931 Supp. 76-2008 to 11 for an exercise of this power.)

26-401 to 2. Stone quarries. The state may appropriate stone from quarries for public works in the same manner as condemnation of lands by railroad companies (R. S. 1923, ch. 66, art. 9). All assessed damages to be paid by the contractor.

27-101 to 2 Supp. Federal acquisition of state land. State consent is given to federal government to purchase or condemn land for governmental purposes in manner prescribed by law.

32-213 to 4 Supp. Land and water rights: forestry, fish and game commission. The same rights of eminent domain are given to the commission "as are conferred by law upon cities in the acquisition of land or water for waterworks." The attorney-general proceeds upon request of the commission. Private fish lands and waters are exempted as are private recreational grounds.

32-221 to 2 Supp. Same; additional lands adjoining state lakes and parks. Additional lands for the protection of state lakes and parks may be purchased or condemned as in R. S. 1931 Supp. 32-213, except that no provision is made for action by the attorney-general. The act provides for zoning the land taken by restrictions on its use in deeds of resale.

42-109 to 18. Taking of water; irrigating-ditch and canal corporations. Complete procedure for taking of water rights by all irrigating-ditch and canal corporations for irrigation purposes. (42-110) Petition to district court setting out miles of ditches to be built, depth and width, amount of water to be taken, and from where, and asking for appointment of three commissioners. (42-111 to 14) Commissioners give notice by publication of time and place to hear claims for damages. Claims presented in writing are then heard and awards made. Report of commissioners filed within twenty days after hearing showing damages allowed and refused and number of inches of water condemned. (42-115 to 18) Right of appeal to district court from decision of commissioners upon filing appeal bond is given all parties. Trial de novo as to damages only. If no appeal the petitioner shall file a certified copy of report within sixty days after report of commissioners filed and pay the damages awarded. Order of condemnation or right to take water becomes absolute unless appeal taken.

42-120 (3d cl.) Canal corporations; taking of land. This clause grants a canal corporation power "to take as much more land as may be necessary for the proper construction and security of the canal or any of its branch ditches."

Note.—See, also, R. S. 17-618.

42-301 to 9. Irrigation and industrial uses; waters west of 99th meridian. Act provides that waters may be diverted for irrigation and industrial purposes west of 99th meridian, but that no vested right of appropriation shall be divested without "due legal condemnation of and compensation for the same." Section 42-309 provides that such rights may be condemned "in the same manner and under the same restrictions and regulations as govern the condemnation of other private property."

42-317 to 19. Irrigation, domestic or industrial purposes; lands for site or way. Lands for site or way or machinery may be condemned in the "manner prescribed by the laws regulating the exercise of the right of eminent domain, which are or may hereafter be in force, and shall be entitled to all rules, orders and other proceedings whatsoever prescribed by such laws.

42-320. Same. On abandonment of such right of way or site for two years, the same shall revert to the owners at the time of such reversion.
59-101 to 16. Mills and power plant dams. Any person, corporation or city desiring to erect a milldam or power-plant dam upon own land across any water may do so by petition (59-102) to the district court showing description of land, height of dam, names of owners and acres of land to be overflowed, the purposes and other facts necessary. (59-103) The court appoints three commissioners to meet at place of proposed erection on day named by the judge. The commissioners shall (59-104) take oath and (59-105) give notice to all persons named in the petition or whose land will be damaged and (59-108) shall within thirty days make a full report and return of their proceedings to the clerk of the district court. Section 59-109 prescribes the manner in which the damages shall be paid. Appeal (59-110) from the awards may be made to the district court as in civil cases. The (59-111) erection of the dam will not be delayed by appeal if bond to pay judgment is filed. An (59-112) appeal bond must be filed to pay costs, but no exemplary damages shall be allowed. All (59-114) actions for damages must be brought within two years after erection of dam. Section 59-116 sets out acts of omission which may entail forfeiture of rights. The order of condemnation or judgment on the verdict (59-113) is effected upon judgment entered, declaring that upon payment of award and costs, the right to erect the dam shall pass to and remain in the petitioner forever.

60-3823. Application of code of civil procedure to eminent domain proceedings. This section provides that the code of civil procedure shall not apply to condemnation proceedings unless the legislature so provides.

66-159 to 61. Railroads; spurs, switches or tracks. Section 66-159 provides that upon permission of the public service commission, land for spurs, switches or tracks may be condemned "to the same extent as is now enjoyed by railroad companies." (66-160) Necessity of switch connections and (66-161) crossings or uniting tracks with other railroads is determined by the public service commission. In the case of crossings and uniting tracks, application is made to the public service commission, which fixes a day for hearing testimony and, after a personal examination of the locality, determines the necessity and fixes terms. Either party may appeal, but only the question of compensation shall be affected and shall not delay the making of the crossing or connection.

66-403 to 4. Railroads; map and profile of route; notice to occupants of lands. The provisions contained in these sections as to maps, profiles and notice to land occupants are preliminary to but not absolutely essential to valid condemnation proceedings.

66-501 (5th cl.) Railroads; crossings and connections. This clause provides that a railroad may make crossings and connections, sidings, switches, etc., with other railroads, and if the two cannot agree as to the damages the same shall be determined by three commissioners appointed by the district court.

66-502. Railroads; relocation of right of way. Provision is herein made for change in right of way so long as the general route or terminus of the road is not changed. No provision as to procedure but presumably ch. 66, art. 9 of the Revised Statutes would apply. (See Ritchie v. A. T. & S. F. Rly., 128 Kan. 637, 642, 279 Pac. 15, where railroad was held to have power to make appropriation for change of roadbed.)

66-901 to 11. Railroads; condemnation of lands. (66-901) Any duly chartered and organized railroad corporation may apply to the county commissioners of the county, or (66-907) to the district court, for a right of way and necessary lands and to conduct water by aqueducts and the making of proper drains. (66-902) The commissioners (appraisers), after notice of time and place of hearing, shall lay off the right of way by having a survey made, and shall appraise the value and assess the damages of the land taken and file a written report with the county clerk. (66-903) Ninety days after a copy of such report is filed by the county clerk in the county treasurer's office, and payment of the amount of the appraisement, the persons entitled to such damages are paid upon making demand to the county treasurer. (66-904) The
railroad company has the right to occupy land within ten days after recording copy of certified report in the register of deed’s office and has perpetual use over such land where the railroad is constructed. (66-903) The company pays for the services of the commissioners. (66-906) Notice of the time and place of hearing by the commissioners is given thirty days prior to such hearing by publication. A copy of such notice is mailed to the owners of record, but in case of resident owners, personal service by summons is made as in civil cases before district court ten days before the hearing. Appeal from decisions of the commissioners on questions of compensation may be taken in the same manner as appeals from justices of the peace. (66-907) In lieu of applying to the county commissioners, the railroad may petition the district court for appointment of three commissioners to appraise and determine damage, who shall perform their duties as provided in case of application to county commissioners; and appeal may be taken in the same manner. (66-908) In 1903 an act was passed authorizing chartered and authorized railroads the same right to condemn unused state lands as they have for condemning private property. (66-909 to 10) The only change in procedure is that thirty days’ notice of the time and place of meeting of the commissioners, including description of lands, be served upon the secretary of state; and the governor may appeal from the award. (66-911) In 1905 the legislature granted electric railways the same right of eminent domain as is allowed steam railways, including the same procedure.

68-102 to 68-102a Supp. Laying out, opening and vacating roads. (68-102) Applications for viewing, laying out, altering or vacating roads shall be by petition to the county commissioners and signed by twelve householder and upon filing a bond by one or more of such persons to pay costs and expenses in cases of failure of the proceedings. The 1931 amendment excepts certain vacation proceedings, as where the road has ceased to be a public utility. (68-102a) Proceedings for the award of damages and appeal therefrom without a petition, as provided in section 68-102, is made in the same manner as provided in R. S. 68-107. Applications for damages must be made within twelve months.

68-103 to 7. Same; procedure on petition. (68-103) The petition must give place of beginning, intermediate points and termination of road. (68-104) If the county commissioners find the petition a legal one and that proper bond has been filed, they shall appoint three commissioners to view the road with them. The county clerk publishes notice of petition for two weeks, and all parties shall be heard, the viewing and hearing not to be more than twenty days after the second publication. The county surveyor meets with the viewers. Where petition states the proposed improvement is upon or along a section line, the survey and viewing may be dispensed with upon agreement of landowners. (68-105) Six days’ notice in writing to be given and served upon the landowners and county surveyor; also upon guardians and incompetents, if residents of the county. Copies of said notices and affidavits to be filed with county clerk before establishment of the road. (68-106) The commissioners or viewers shall only assess or award damages to owners notified and have presented written claims. Persons not notified may file claims within twelve months after location of road. Otherwise all claims are barred. The commissioners may direct surveyor to make survey and plat and deliver certified return to county clerk. The commissioners sign a certified opinion, and if they decide it is a public road they record the plat and survey in surveyor’s office; but if they decide it is not, the bond is forfeited for costs. (68-107) If their decision is favorable on the certificate of view, they at same time make separate certificate of amount of damages assessed, stating to whom awarded, and submit also the written claim of applicant. Appeals from the awards may be made the same as appeals from justices of the peace in civil cases.

68-109. Establishment of road on city or county line. The procedure is practically the same as provided in §§ 68-102 to 7 outlined above.

68-110. Same; compensation of viewers and assistants. The viewers receive $3 per day; chainmen and markers $2 per day.
68-111 to 13. State roads. (68-111 to 12) Power given to vacate and alter state roads located under laws 1874, ch. 113, the same as other public highways. (68-113) May establish roads along state line as in laying out other public highways.

68-114. Proceedings for changes in roads. (68-114) When the county commissioners find it necessary to make changes to improve roads, or for extension of bridges or culverts, they shall determine the amount and location of land to be taken and publish notice in official county paper not more than twenty-five days nor less than fifteen days before date of view, and shall serve similar notice on actual occupants of land or agent of owner. If land is not already surveyed or located, the county engineer meets with them at the time and place stated in the notice. The county commissioners view the land, appraise its value and assess damages and file a copy of their findings with the county clerk, and also cause a plat of the changed road to be filed. Damage claims must be filed on or before the next regular session of the county commissioners. Whereupon they determine the damages to be paid. The right of appeal from such awards is the “same as is now provided by law in other road cases, but such appeal shall not delay any work upon or in relation to said roads.”

68-115 to 17. State, county, township, and semiprivate roads; opening. (68-115) The county engineer shall open all state and county roads and the township trustees shall open all mail routes and township roads which have been laid out, first giving notice to owners of closed or cultivated lands and guardians of minor and incompetents to open such roads within ninety days after service of notice. Provision is made that such opening shall not be required during the busy season. If the persons notified do not open the road, the county engineer and township trustee shall respectively enter and open said roads and do all things to keep same in repair. The owner of land and gravel or other road materials taken, or the owner of lands through which ditches are made, or owners of crops thereon, are to be allowed fair and reasonable compensation for damages. Such claims are “allowed and paid in the same manner as other ordinary claims and the same right of appeal as is now provided by law in similar cases.”

Section 68-116 provides that the viewers shall determine the width of county roads, taking into consideration the least damages to be caused to hedges and other improvements.

Section 68-117 makes provision for “roads” for access to public highways surrounded by adjoining lands. In such cases the county commissioners “proceed in accordance with the provision of the sections of the act to which this is amendatory to lay out such road, make returns of plats, and allow damages.” The owners for whose benefit the road is established must pay all damages and expenses and forever keep same in repair.

68-137 to 8. Condemnation of road materials from lands. If the county commissioners are unable to purchase from the landowners sand and gravel and other road materials, they may condemn same and open necessary roads to such material. Notice of hearing shall be served upon landowners fifteen days before. If owners are nonresidents of the county the notice shall be served upon the occupants. On the day named the county commissioners shall view, appraise the value and assess the damages and file with the county clerk written report of findings. Claims for damages must be in writing and filed on or before the next regular session of the commissioners. Whereupon the damage claims are passed upon and amounts allowed to be paid out of special improvement fund or road fund. Right of appeal from awards same as provided by law in other cases.

Section 68-138 makes special provision for the county commissioners to appeal by resolution to state highway commission when such road materials are located in another county. Thereupon the state highway commission proceeds under R. S. 68-137 outlined above. The county to pay all expenses and damages.

68-413 Supp. State highway system; lands, materials or interests therein; procedure. The state highway commission may acquire title or interests or
right to land, water, gravel, stone, sand and other materials for its highway work in the manner provided in R. S. 26-101 to 2, "and in addition to the notice required therein, all lienholders of record of the condemned land must be notified." Provision is made for disposition of lands or interests so acquired.

68-502 (2d cl.) Diversion of watercourses. This clause, which authorized the county engineer to do "anything pertaining to rivers, streams or watercourses, for which the county pays any part of the cost thereof," confers power to acquire land, to divert a stream, and the landowner's remedy is to appeal from the award. (See Breedlove v. Wyandotte County Comm'rs, 127 Kan. 754, 275 Pac. 379.)

68-509. Elimination of grade crossings. It is the duty of the county commissioners to eliminate all grade crossings and other dangerous places on the highways. When the owners refuse to sell or donate land for this purpose, the county commissioners determine the nature of the change, the amount of land required and its location. Notice shall be published in the official county paper not less than fifteen days nor more than twenty-five days before the view and a similar notice served on the landowners. If owners are nonresidents the occupants or agents of owners are so served. If road is not already surveyed and located the county surveyor meets at such time and place with the commissioners. Thereupon the commissioners proceed to view all lands required, appraise the value, assess the damages and file a written report of their findings and a plat of the changed road with the county clerk. Written claims for damages must be filed on or before the next regular session of the commissioners. Whereupon the damages are determined and shall be paid from the general fund or road fund of the county. Right of appeal is "the same as is now provided by law in other road cases, but such appeal shall not delay any work upon or in relation to said road."

Other provisions are made for the appropriation of land to avoid railroad crossings and payment of part of the cost by the railroad, as determined by the state highway commission. (See, also, R. S. 1931 Supp. 68-414.)

68-703 Supp. Land for changes in benefit-district roads. The county commissioners, after finding proposed improvements in benefit-district roads to be of public utility, may condemn land in the following manner: Determine nature of changes required and amount of land to be taken and time and place for viewing; then publish a notice in official county paper not less than fifteen nor more than twenty-five days before the view, serving similar notice on the landowners, but if the landowners do not reside in the county, notice to be served on occupants of land or agent of owner. The notice shall set out the time and place of view and give all a hearing. If road has not already been located and surveyed the county engineer shall meet with the commissioners at the view. Whereupon the commissioners shall view all the land required, appraise the value, assess the damages and file their report and a plat of such changed road with the county clerk. Claims for damages must be in writing filed with the county clerk on or before the first day of the next regular session of the county commissioners. Claims to be paid from a special fund provided. Right of appeal is the same as in other road cases, but no appeal shall delay the road work.

68-730 Supp. Improvement of certain roads in counties over 20,000 in benefit districts. The county commissioners in counties over 20,000 population may condemn land or rights of way over the same or any kind of property necessary for construction and maintenance of certain roads. The "proceedings shall be instituted by the board of county commissioners and prosecuted in the name of the county under the provisions of the law in similar cases."

68-733 Supp. Improvement of certain roads in townships of over 6,000 in counties between 25,000 and 40,000 in benefit districts. The county commissioners may condemn a right of way or easement for the improvement of certain roads in townships of over 6,000 located in counties between 25,000 and 40,000 and apportion the cost to the abutting landowners. The county commissioners must proceed as provided in R. S. 1931 Supp. 68-730, "in the name of the county under the provisions of the law in similar cases."
68-905. Damming watercourses on public highways by counties. Where a county has adopted the provisions of R. S. 68-901 to 8, it is provided that in the construction of a dam "condemnation proceedings may be had as is now provided by law in establishing roads and highways in this state, and the land so condemned shall be paid for out of the road fund of said county." This provision applies to the damming of watercourses as provided in R. S. 68-902 and 68-904.

72-503. Condemnation of schoolhouse sites. Any school district which cannot purchase schoolhouse sites or additional grounds for same at a reasonable rate "may proceed to condemn and acquire title to such real estate as provided by law."

Note.—See, also, R. S. 72-4702.

72-4110. State school book commission; land for additional building for printing textbooks. Under this section (included in Revised Statutes of 1923 by reference) the state school book commission was given the right to condemn land for additional buildings for printing textbooks. "Such proceedings may be initiated and carried to completion as nearly as may be, in the mode provided by article 9, chapter 23, Statutes of 1909" (R. S. 66-901 to 7).

72-4701 to 2. Boards of education and school districts in cities. The right of eminent domain is conferred upon boards of education of cities of the first and second class and upon any school district in which is located a third-class city to (72-4702) appropriate private property for building sites, playgrounds, agricultural, industrial or athletic purposes or additions thereto. After a survey, description and plat of the land has been filed with its clerk and an order made declaring the necessity of the appropriation and the purpose, such land "may be condemned according to law."

73-409. War memorial sites. The county commissioners or governing body of any city or township may acquire a site for war memorials by applying to the district court, asking for condemnation, and describing the same. Thereupon they "shall exercise the right of eminent domain in the manner provided by law."

Note.—This act originally directed the proceedings to be as provided in Laws 1889, ch. 110, which was repealed by the 1923 revision with the exception of R. S. 19-1501.

76-147. Lands for state institutions. The state board of administration or any board or commission in charge of any state institution may condemn lands or easements therein for erecting buildings and maintaining water mains, sewers, roads or any other necessary purpose "in the manner provided by law, said proceedings to be in the name of the state of Kansas. . . ."

Note.—This section originally was Laws 1881, ch. 46, § 1, and provided that the procedure should be the same as provided for railroads in condemning lands for rights of way and other purposes (R. S. 66-901 to 11).

76-2010 Supp. Old Shawnee Mission. Land constituting Old Shawnee Mission "taken for the use and benefit of the state of Kansas by condemnation as provided by law."

Note.—For procedure, see R. S. 26-301 et seq.

76-2433. Coal lands at state penitentiary. The board of administration may condemn the fee or right of user of coal lands adjoining state penitentiary land. The board, after giving notice of the proceedings, shall appraise the value, assess the damages to the residue of the tract; file written report, including the statement whether the fee or right to user only is taken, with the county clerk and register of deeds of the county. The board shall proceed "as near as may be," as is provided by law for appropriation of land by railway corporation, and shall be allowed the same right of appeal. The board, upon depositing the amount of award may take possession, notwithstanding pendency of any appeal. The state auditor draws his warrants to the board and the board pays the damaged landowner.

80-919. Township cemetery chapels. Any township board, after petition and election in favor of a cemetery chapel, may condemn not to exceed one
acre of land for a site, and pay for same by a tax levy. No provision is made for procedure.

82a-203 Supp. State condemnation of new channels in navigable waters. The state auditor may obtain title in fee to new channels of an altered navigable stream by condemnation "in the manner provided by law for condemning lands for public uses." The auditor shall pay for same out of proceeds from sale of the old channel. If such proceeds are insufficient the auditor shall abandon the condemnation proceedings.

THE PROPOSED CODE OF PROBATE PROCEDURE.

Continuing our study of a code of procedure for probate courts we are printing herewith the tentative draft of a proposed bill providing for such a code. This tentative draft is largely the work of Judge Roscoe H. Wilson, who has given it considerable study. His duties have prevented his giving time to its preparation to the extent that he feels like offering it as a completed work, but in its present form it well may be the basis for the study of the draft of such a code. The principal features of the tentative draft may be summarized as follows:

The proceeding to administer upon the estate of a decedent, whether he left a will or not, or for the appointment of a guardian and handling the estate of an incompetent, shall be by an action in probate court begun by the filing of a petition by a party plaintiff and getting service of summons upon all necessary or proper parties to the proceeding, substantially the same as an action would be brought in district court. The provisions of the code of civil procedure relating to the issuance and service of summons or other process are incorporated in the code of probate procedure for that purpose. In passing a bill providing for the probate code the legislature, of course, in one short section, may incorporate all the appropriate provisions of the civil code relating to summons or other process by reference and without setting them out in full. They are set out in full, however, in the tentative bill here published in order that the bar may see their application. On being brought into court by a process any party may plead, raising such an issue as he desires the court to pass upon. When the issues are formed a time for hearing is to be set, for which the parties shall have notice. Hearings are before the court without a jury. The rulings of the court, except on the final disposition of the case, are referred to as orders. Any party aggrieved by an order of the probate court may appeal to the district court, where there is a trial de novo on the issue. Creditors or others claiming an interest in the estate, or some part thereof, not originally made parties to the action, may make themselves parties by filing their claim and a motion for its allowance in the action in court, such claims to be set for hearing, notice to interested parties given, and orders made thereon. On any hearing in the probate court the rules of evidence as outlined by the sections relating thereto in the code of civil procedure are to be applied. These are set out in full in the tentative draft for convenience of study, but the act of the legislature providing for the code may adopt them by reference. The provisions for appeal are simple, and it is provided that changes or additions may be made to the code by rules of the supreme court.
This general outline of probate procedure has the merit of simplicity. No one should have difficulty in becoming familiar with it. It has the further merit of getting everyone into court who can be affected by its orders and judgments and giving them an opportunity to be heard. This will avoid the many ex parte proceedings now so objectionable. It also has the merit of finality of decisions on orders and judgments of the court. Many of them now are tentative only, and that of itself causes much confusion.

In the preparation of this tentative draft Judge Wilson has carefully avoided including anything in the nature of the substantive law pertaining to estates. The sections of our present statute dealing with the substantive law should be rewritten, if for no other purpose than to eliminate from them provisions therein relating to procedure, and the procedural sections should be repealed.

It is a task to go through this entire subject thoroughly and prepare bills relating to the substantive law, and separately as to procedure, as should be done. We hope, with the aid of the attorneys and of judges, particularly probate judges, throughout the state to be able to do this in time to incorporate such bills in our December Bulletin. To assist us in doing that we shall be glad to have the views of lawyers and judges on the question.

AN ACT concerning the code of probate procedure.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. This act shall be known as the code of probate procedure of the state of Kansas.

SEC. 2. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object, and assist the parties in obtaining justice.

SEC. 3. The proceedings for the appointment of an administrator, and all matters necessary for the full and final administration of the estate of a decedent, shall constitute one action. The proceedings for the admission of a will to probate, the appointment of an executor or administrator thereunder; the distribution of property under the terms of such will, and all proceedings necessary for the full and final administration of the property of the testator, whether disposed of under the terms of the will or not, shall constitute one action. The proceedings for the appointment of the guardian of an incompetent person, and all matters connected with such guardianship, shall constitute one action.

SEC. 4. There shall be but one form of action under this code, which shall be called a probate action. In such action the party complaining shall be known as the plaintiff, and all other parties as defendants.

SEC. 5. A probate action may be commenced in the probate court by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.

SEC. 6. A copy of the petition need not accompany the summons, but the defendant or plaintiff shall be entitled to a copy of the petition, or any other paper filed in the action, upon application to the clerk thereof; and the costs of such copy shall be taxed among the costs in the action.

SEC. 7. An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and
diligently endeavors to procure a service; but such attempt must be followed
by the first publication or service of the summons within sixty days.

Sec. 8. Every action must be prosecuted in the name of, and by, some
person having a substantial interest in obtaining the relief demanded in the
petition.

Sec. 9. The action of an incompetent person must be brought by his
guardian or next friend. When the action is brought by his next friend the
court has power to substitute the guardian, or any person, as the next friend.

Sec. 10. In any proper case service may be made on minors, insane and
other incompetent persons by a summons personally served or by publication
notice as provided in this code, the same as upon other persons defendants in
action. If there be a natural or legally appointed guardian for such minor,
insane or incompetent person, service shall also be made in the same manner
upon such guardian. If there be no legally appointed guardian for such
minor, insane or incompetent person, or if such guardian fail to appear and
answer in the action within the time fixed by the summons or publication
notice, the court shall appoint a guardian ad litem for such minor, insane or
incompetent person and such guardian ad litem shall file proper pleadings in
such cause, which shall include a general denial of the plaintiff’s petition, as
shall put the plaintiff to proof of his cause of action. Such guardian ad litem
shall receive such reasonable compensation as the court or judge before whom
the action is pending, or tried, may order, the same to be taxed and collected
as costs in the action. The appointment cannot be made until after the service
of the summons in the action, and no default judgment shall be rendered
against such minor, insane or incompetent person.

Sec. 11. The appointment may be made upon the application of the infant,
if he be of the age of fourteen years, and apply within twenty days after the
return of the summons. If he be under the age of fourteen, or neglect so to
apply, the appointment may be made upon application of any friend of the
infant, or on that of the plaintiff in the action.

Sec. 12. All persons having an interest in obtaining the relief demanded
may be joined as plaintiffs.

Sec. 13. In all actions for the appointment of an administrator and the
administration of an estate, and in all actions for the admission of a will to
probate and the administration of an estate, all persons who would inherit
the property of the decedent, under the law of descents and distribution of this
state, together with all persons named as legatees or devisees in such will,
shall be made defendants, except such of them as may be plaintiffs in the ac-
tion. Any person who enters an appearance in any action shall be a party to
such action for the purpose of determining his rights therein. In all actions
for the appointment of a guardian for an incompetent person, the incompetent
person shall be made the defendant. Any person may be made a defendant
who has, or claims, an interest in any matter connected with the action, or
who is a necessary party to its complete determination or settlement of all
matters connected with the action.

Sec. 14. Actions for the appointment of an administrator, or for the ad-
mission of a will to probate, must be brought in the county in which the dece-
dent was a resident at the time of his death. Actions for the appointment of a
guardian for a minor must be brought in the county in which the minor is
domiciled.

Sec. 15. The pleadings are the written statements by the parties of the
facts constituting their respective claims and defense; the only pleadings al-
lowed are the petition by the plaintiff; the answer by the defendant; the reply
by the plaintiff.

Sec. 16. The petition must contain: First, the name of the court and the
county in which the action is brought, and the names of the parties plaintiff
and defendant, followed by the word “petition.” Second: A statement of the
facts constituting the cause of action in ordinary and concise language and
without repetition. Third: A demand for the relief to which the party supposes he is entitled.

Sec. 17. The answer shall contain: First: a general or specific denial of each material allegation of the petition controverted by the defendant. Second: A statement of any new matter constituting a defense; the defendant may set forth in his answer as many grounds of defense as he may have.

Sec. 18. The guardian of an incompetent person, or attorney for a person in prison, shall deny in the answer all of the material allegations of the petition prejudicial to such defendant.

Sec. 19. When the answer contains new matter the plaintiff may reply to such new matter, denying generally, or specifically, each allegation controverted by him. A defendant may, in his answer, request that he be given notice of any motions filed in said action, specifying particularly the matters regarding which he desires notice to be given, and in such event it shall be the duty of the clerk of said court to notify such defendant regarding such motions in the manner hereinafter provided for the giving of notice of motions.

Sec. 20. A motion is an application for an order addressed to a court or judge by any party to a suit or proceeding, or one interested therein, or affected thereby. All orders in probate actions subsequent to the appointment of an administrator or executor of the estate of a decedent, or subsequent to the appointment of a guardian for a minor, shall be made upon motion.

Sec. 21. Where notice of a motion is required it must be in writing and shall state the names of the parties to the action or proceeding in which it is made, the place where and the day on which it will be heard, and the nature and terms of the order or orders applied for. Such notice shall be served by depositing the same in the post office, not less than ten days before the time fixed for the hearing of said motion, addressed to the party to be notified, shall be sent by registered mail, and the receipt of the postmaster for such registered mail shall be prima facie evidence of service of such notice.

Sec. 22. The answer by the defendant shall be filed within twenty days after the day on which the summons is returnable. The reply to the answer shall be filed within thirty days after the day on which the summons was made returnable. The court or any judge thereof may, in his discretion and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this act, or by an order to enlarge such time.

Sec. 23. Every pleading and motion must be subscribed and verified by the party or his attorney.

Sec. 24. All allegations contained in the petition shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent, or attorney.

Summons.

(In an act by the legislature, Sections 25 to 47 as here printed, may be adopted by reference to the civil code.)

Sec. 25. The summons shall be issued by the clerk, upon a written precept filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true and judgment rendered accordingly.

Sec. 26. Where the action is rightly brought in any county, a summons shall be issued to any other county against any one or more of the defendants, on the plaintiff's precept.

Sec. 27. The style of all process shall be: "The state of Kansas." It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it is issued.
Sec. 28. The summons shall be served and returned by the officer to whom it is delivered, except when issued to any other county than the one in which the action is commenced, within ten days from its date; and, when issued to another county, shall be made returnable in not less than ten or more than sixty days from the date thereof, at the option of the party having it issued.

Sec. 29. When a writ is returned "Not summoned," other writs may be issued until the defendant or defendants shall be summoned; and when defendants reside in different counties, writs may be issued to such counties at the same time.

Sec. 30. The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service. It may be also served by any person not a party to the action, appointed by the officer to whom it is directed. The authority of such person shall be indorsed on the writ. When the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of the state, the return shall be verified by oath or affirmation.

Sec. 31. The service shall be by delivering a copy of the summons to the defendant, personally, or by leaving one at his usual place of residence, at any time before the return day.

Sec. 32. In all cases the return must state the time and manner of service.

Sec. 33. An order for any process, in an action wherein the sheriff is a party or is interested, the process shall be directed to and executed by a person appointed, as provided in the next section.

Sec. 34. The court or judge, or clerk in the absence of the judge from the county, for good cause, may appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has. The person may be appointed on the application of the party obtaining the process or order, and the return must be verified by affidavit. He shall be entitled to the same fees allowed to the sheriff for similar services.

Sec. 35. The officer to whom the summons is directed must return the same within the time therein stated.

Sec. 36. An acknowledgment on the back of the summons, or the voluntary general appearance of a defendant, is equivalent to service.

Sec. 37. When a summons is issued to another county than that in which the action or proceeding is pending, it may be sent and returned by mail, and the sheriff shall be entitled to the same fees as if the summons had issued in the county of which he is sheriff.

Sec. 38. All and every process and notice whatever, affecting any city, shall be served upon the mayor, or, in his absence, upon the clerk of such city.

Sec. 39. A summons against a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof.

Sec. 40. In addition to the methods of service of summons now provided by law upon corporations or joint-stock companies organized under the laws of any other state or country and doing business in this state, if such corporation or joint-stock company have no office or place of business within this state, and service cannot otherwise be had upon it within the state, service of summons upon such corporation or joint-stock company may be made in any county of this state by the delivery by the sheriff thereof of a copy of such summons to any officer, agent or employee thereof who may be found by such sheriff actually engaged in the business of such corporation or joint-stock company within his county.

Sec. 41. Where the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent.
Sec. 42. Service may be had by publication in either of the following cases:
In all probate actions brought under this code against the unknown heirs, executors, administrators, devisees, legates, trustees, creditors, or assigns of the decedent, or any or all unknown persons who claim as heirs, executors, administrators, devisees, legates, trustees, creditors, or assigns of the decedent. In all probate actions brought under this code where any or all of the defendants reside out of the state, or where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the state. In all probate actions against a foreign corporation, or against a domestic corporation which has not been legally dissolved, where the officers thereof have departed from the state or cannot be found. In any of the actions mentioned in this section wherein the unknown heirs, executors, administrators, devisees, legates, trustees, and assigns, or any of them, of any deceased person, or the unknown successors, trustees, or assigns, if any, of any dissolved corporation, are made defendants; or wherein the plaintiff upon diligent inquiry is unable to ascertain the whereabouts of a person named as a defendant or whether he is living or dead, and if dead, is unable to ascertain who are his heirs, executors, administrators, devisees, legates, trustees, or assigns, if any, or their whereabouts; or wherein the plaintiff upon diligent inquiry is unable to ascertain whether a corporation, domestic or foreign, named as a defendant, continues to have legal existence or not, or has officers or not, or their names and whereabouts, and if dissolved, is unable to ascertain the names or whereabouts of the successors, trustees, or assigns, if any, of such corporation; or wherein the plaintiff cannot ascertain whether a person named as defendant is living or dead, or, if dead, the names of his heirs, executors, administrators, devisees, legates, trustees, or assigns, if any; or cannot ascertain whether a corporation has been dissolved or not, or if dissolved, the names of its successors, trustees, or assigns; publication service may be upon such unknown party or in the alternative upon such person, if living, or corporation, if existing, and in the alternative if the person be dead, or the corporation dissolved, upon the unknown heirs, executors, administrators, trustees, devisees, legates, and assigns, if any, of such deceased person, or the unknown successors, trustees and assigns of such dissolved corporation.

Sec. 43. Before service by publication can be made upon the unknown heirs, executors, administrators, devisees, legates, trustees, creditors, or assigns of the decedent, or upon any unknown persons who claim as heirs, executors, administrators, devisees, legates, trustees, creditors, or assigns of the decedent, an affidavit must be filed, stating that the plaintiff does not know and with diligence is unable to ascertain the names or whereabouts of any such heirs, executors, administrators, devisees, legates, trustees, creditors, and assigns of the decedent, and of any such persons who claim as heirs, executors, administrators, devisees, legates, trustees, creditors, and assigns of the decedent. Before service by publication can be made an affidavit must be filed stating the residence, if known, of the defendant or defendants sought to be served, and if not known, stating that the plaintiff has diligently inquired as to the residence of such defendant or defendants and has been unable to learn the place of such residence and that the plaintiff is unable to procure actual service of summons on such defendant or defendants within this state, and showing that the case is one of those mentioned in the preceding action. When such affidavit is filed the party may proceed to make service by publication. In actions against unknown heirs, executors, administrators, devisees, legates, trustees, and assigns of any deceased person, or in the alternative against a person or his unknown heirs, executors, administrators, devisees, legates, trustees, and assigns, or against a corporation or its unknown successors, trustees, and assigns, the affidavit shall state that the plaintiff does not know and with diligence is unable to ascertain the names or whereabouts of any such heirs, executors, administrators, devisees, legates, trustees, or assigns or successors, trustees, or assigns, of a corporation, or with diligence is unable to ascertain whether a person named in the alternative is living or dead, or his whereabouts, and if he be dead, is unable to ascertain the names or where-
abouts of his heirs, executors, administrators, devisees, legatees, trustees, or assigns, or is unable to ascertain whether a corporation named in the alternative is legally existing or dissolved, and if not in existence is unable to ascertain the names or whereabouts of its officers, successors, trustees, or assigns, if any. When such affidavit is filed the party may proceed to make service by publication. Statements as to any and all kinds of defendants, natural or corporate, known or unknown, may be united in one affidavit for service by publication, and notice to all of them may be included in one publication notice.

Sec. 44. The publication must be made three consecutive weeks, in some newspaper authorized by law to publish legal notices, printed in the county where the petition is filed, if there be any printed in such county, and if there be not, in some such newspaper printed in this state of general circulation in that county. It shall state the court in which the petition is filed, the names of the parties, or where unknown shall describe them as the unknown heirs, executors, administrators, devisees, legatees, trustees, creditors, or assigns of the decedent, or the unknown persons who claim as heirs, executors, administrators, devisees, legatees, trustees, creditors, and assigns of the decedent, or the unknown heirs, executors, administrators, devisees, legatees, trustees, and assigns of such corporation, and must notify the defendants thus to be served that he or they have been sued and must answer the petition filed by the plaintiff on or before a time to be stated (which shall not be less than forty-one days from the date of the first publication), or the petition will be taken as true, and judgment, the nature of which shall be stated, will be rendered accordingly.

Sec. 45. Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer, or his foreman or principal clerk, or other person knowing the same. No judgment by default shall be entered on such service until proof thereof be made, and approved by the court, and filed.

Sec. 46. In all cases where service by publication is proper, personal service of a summons may be made out of the state by the sheriff, a deputy sheriff, or, in case there be no sheriff or deputy, then by the coroner of the county in which the defendant to be served may be found. Such summons shall be issued by the clerk under seal of the court, and directed to the defendant or defendants to be served, and shall notify him or them that he or they have been sued by the plaintiff or plaintiffs, naming him or them, and requiring the defendant or defendants to answer the petition filed by the plaintiff in the clerk's office of the court, which shall be named, within forty-one days from the day of service, or that the petition will be taken as true and a judgment rendered accordingly. Such service may be proved by the affidavit of the person making the same, before a clerk of a court of record, or other officer holding the seal thereof, or before some commissioner appointed by the governor of this state under an act providing for the appointment of commissioners to take depositions, etc.: Provided, That such service, when made and proved as aforesaid, shall have the same force and effect as service by publication in a case in which such service is authorized, and no other or greater force or effect.

Sec. 47. A party against whom a judgment or order has been rendered, without other service than publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and to make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good
faith shall, after expiration of six months, not be affected by any proceedings under this section, nor shall they after the expiration of six months affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense.

EVIDENCE.
(In an act by the legislature, sections 48 to 127 may be adopted by reference to the civil code.)

(a) Competency of Witnesses.

Sec. 48. No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility.

Sec. 49. Any party to a civil action or proceeding may compel any adverse party or person for whose benefit such action or proceeding is instituted, prosecuted or defended, at the trial or by deposition, to testify as a witness in the same manner and subject to the same rules as other witnesses.

Sec. 50. No person shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, where either party to the action claims to have acquired title, directly or indirectly from such deceased person, or when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death, in behalf of his executors, administrators, heirs at law, next of kin, assignee, surviving partner or joint contractor, the other party, or the assignor, shall be competent to testify as to any and all matters to which the testimony so taken relates.

Sec. 51. The following persons shall be incompetent to testify: First: Persons who are of unsound mind at the time of their production for examination. Second: Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Third: Husband and wife, for or against each other, concerning any communication made by one to the other during the marriage, whether called while that relation subsisted or afterward. Fourth: An attorney, concerning any communications made to him by his client in that relation, or his advice thereon, without the client's consent. Fifth: A clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession. Sixth: A physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, defect, or injury, or the time, manner or circumstances under which the ailment was incurred, or concerning any knowledge obtained by a personal examination of any such patient, without the consent of the patient.

But if a person without objection on his part testifies concerning any such communication, the attorney, clergyman, priest or physician communicated with may also be required to testify on the same subject as though consent had been given within the meaning of the last three subdivisions.
(b) Means of Producing Witnesses.

Sec. 52. The clerks of the several courts and judges of the probate courts shall, on application of any person having a cause or any matter pending in the court, issue a subpœna for witnesses, under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by the sheriff, coroner, or any constable of the county, or by the party or any other person. When subpœna is not served by the sheriff, coroner or constable, proof of service shall be shown by affidavit; but no costs of service of the same shall be allowed except when served by an officer.

Sec. 53. The subpœna shall be directed to the person therein named, requiring him to attend at a particular time and place to testify as a witness; and it may contain a clause directing the witness to bring with him any book, writing or other thing under his control which he is bound by law to produce as evidence.

Sec. 54. When the attendance of the witness before any officer authorized to take depositions is required, the subpœna shall be issued by such officer.

Sec. 55. The subpœna shall be served either by reading or by copy delivered to the witness, or left at his usual place of residence; but such copy need not contain the name of any other witness appearing on the original.

Sec. 56. A witness may be required to attend for examination on the trial of a civil action or for the purpose of taking his deposition in a county other than that in which he resides by tendering him the mileage allowed by law and the fee for one day's attendance; but the cost of witnesses attending from outside the county shall not be taxed against the opposing party unless by order of the court.

Sec. 57. A witness may demand his traveling fees and fee for one day's attendance, when the subpœna is served upon him; and if the same be not paid the witness shall not be obliged to obey the subpœna. The fact of such demand and nonpayment shall be stated in the return.

Sec. 58. Disobedience of a subpœna, or refusal to be sworn or to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required.

Sec. 59. When a witness fails to attend in obedience to a subpœna (except in case of a demand and failure to pay his fees) the court or officer before whom his attendance is required may issue an attachment to the sheriff, coroner or any constable of the county, commanding him to arrest and bring the person therein named before the court or officer, at a time and place to be fixed in the attachment, to give his testimony and answer for the contempt. If the attachment be not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking, with surety, for his appearance; such sum shall be indorsed on the back of the attachment; and if no sum is so fixed and indorsed it shall be one hundred dollars. If the witness be not personally served the court may, by a rule, order him to show cause why an attachment should not issue against him.

Sec. 60. The punishment for the contempt mentioned in section 59 shall be as follows: When the witness fails to attend, in obedience to the subpœna (except in case of a demand and failure to pay his fees) the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases the court or officer may fine the witness in a sum not exceeding fifty dollars, or may imprison him in the county jail, there to remain until he shall submit to be sworn, testify or give his deposition upon any competent and material matter. The fine shall be paid into the county treasury. The witness shall also be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, testify or give his deposition.

Sec. 61. A witness so imprisoned by an officer before whom his deposition is
being taken may apply to a judge of a court of record, who shall have power
to discharge him, if it appears that his imprisonment is illegal.

Sec. 62. Every attachment for the arrest or order of commitment to prison
of a witness by a court or officer, pursuant to this code, must be under the
seal of the court or officer, if he have an official seal, and must specify, particu-
larly, the cause of the arrest or commitment; and if the commitment be for
refusing to answer a question, such question must be stated in the order. Such
order of commitment may be directed to the sheriff, coroner or any constable
of the county where such witness resides or may be at the time, and shall be
executed by committing him to the jail of such county, and delivering a copy
of the order to the jailer.

Sec. 63. A person confined to any prison in this state may, by order of any
court of record, be required to be produced for oral examination in the county
where he is imprisoned, but in all other cases his examination must be by
deposition.

Sec. 64. While a prisoner's deposition is being taken he shall remain in the
custody of the officer having him in charge, who shall afford reasonable
facilities for the taking of the deposition.

(c) Taking Depositions.

Sec. 65. The deposition of any witness may be used only in the following
cases: First: When the witness does not reside in the county where the
action or proceeding is pending, or is set for trial by change of venue, or is
absent therefrom. Second: When from age, infirmity or imprisonment, the
witness is unable to attend court, or is dead. Third: When the testimony is
required upon a motion, or in any other case where the oral testimony of the
witness is not required.

Sec. 66. Either party may commence taking testimony by deposition at any
time after service upon the defendant of summons or the date of first publica-
tion of notice.

Sec. 67. In any action now pending or hereafter instituted in any court of
competent jurisdiction in this state, any party shall have the right to take
the deposition of the adverse party, his agent or employee, and in case the
adverse party is a joint-stock association, corporation or copartnership, then of
any officer, director, agent or employee of any such joint-stock association,
corporation or copartnership, when such adverse party, or officer, director,
agent or employee of such adverse party is without the jurisdiction of the
court or cannot be reached by the process of the trial court; and in case said
adverse party, when duly served with notice of the taking of such deposition,
as provided by the code of civil procedure for the taking of depositions, shall
fail to appear at the place fixed in said notice, which place shall be in the city
or county of the usual place of residence or place of business of said witness,
and testify and produce whatever books, papers and documents demanded
by the party taking such deposition, or shall fail to produce at the time and
place specified in such notice such officer, director, agent or employee, the
court before whom such action is pending may, upon application of the party
seeking to take such deposition, and upon notice to the adverse party of such
application, and upon hearing had to the trial court, strike the pleadings of
such adverse party from the files and render judgment in favor of the party
so seeking to take such depositions, in whole or in part, as prayed for in his
pleadings.

Sec. 68. The provisions of this act shall be cumulative of all the laws of
this state, and shall not be construed as repealing any other law relating to
the taking of testimony or evidence, and shall be construed as providing an
additional means of securing evidence.

Sec. 69. Depositions may be taken in this state before a judge or clerk
of a court of record, before a county clerk, justice of the peace, notary public,
mayor or chief magistrate of any city or town corporate, or before a master
commissioner, or any person empowered by a special commission; but depositions taken in this state, to be used therein, must be taken by an officer or person whose authority is derived within the state.

Sec. 70. Depositions may be taken out of this state by a judge, justice or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, a commissioner appointed by the governor of this state to take depositions, or any person authorized by a special commission from this state.

Sec. 71. The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding, or clerk or stenographer of either party or attorney of either party.

Sec. 72. Any court of record of this state, or any judge thereof, before whom an action or proceeding is pending, is authorized to grant a commission to take depositions within or without the state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same; and depositions under it must be taken upon written interrogatories, unless the parties otherwise agree.

Sec. 73. Prior to the taking of any deposition, unless taken under a special commission, a written notice specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of residence. The notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sunday and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day.

Sec. 74. At the close of each day's session a witness may demand his fees for the succeeding day's attendance in obedience to a subpoena; and if the same be not paid he shall not be required to remain.

Sec. 75. Before testifying the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding on the conscience of the witness. An interpreter may be sworn to interpret truly, whenever necessary.

(d) Mode of Taking Testimony.

Sec. 76. The testimony of witnesses is taken in three modes: First, by affidavit; second, by deposition; third, by oral examination.

Sec. 77. An affidavit is a written declaration under oath, made without notice to the adverse party.

Sec. 78. An affidavit may be made in and out of this state, before any person authorized to take depositions, and must be authenticated in the same way, except as provided for the verification of pleadings.

Sec. 79. A deposition is a written declaration under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine, or upon written interrogatories.

Sec. 80. An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

Sec. 81. An affidavit may be used to verify a pleading, prove the service of a summons, subpoena, notice or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, or in any other case permitted by law. Affidavits may also be used on the trial of an action subject to the following conditions: The affidavit shall be filed in the office of the clerk of the court and a copy thereof served on the adverse party or his attorney of record at least ten days before the day of trial. If within five days after such service the adverse party gives notice in writing that he desires to cross-examine the witness whose affidavit has been filed, or that he denies the truth of the matter stated
in such affidavit, such affidavit shall not be admitted in evidence but the testimony of the witness must be given orally or by deposition. If such notice be not given the affidavit may be read in evidence at the trial. The court may tax the cost of the attendance or deposition of any witness against a party who needlessly or unreasonably causes such costs.

Sec. 82. When the party against whom the deposition is to read is absent from or nonresident of the state, and has no agent or attorney of record therein, he may be notified of the taking of the deposition by publication. The publication must be made three consecutive weeks in some newspaper printed in the county where the action or proceeding is pending, if there be any printed in such county, and if not, in some newspaper printed in this state of general circulation in the county. The publication must contain all that is required in a written notice, and may be proved in the manner prescribed for service by publication at the commencement of the action.

Sec. 83. The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness or some disinterested person, and subscribed by the witness.

Sec. 84. The deposition so taken shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and addressed and transmitted to the clerk of the court where the action or proceeding is pending. It shall remain under seal until opened by the clerk by order of the court, or at the request of a party to the action or proceeding, or his attorney.

Sec. 85. The depositions taken pursuant to this article shall be admitted in evidence on the trial of any civil action or proceeding pending before any justice of the peace, mayor or other judicial officer, arbitrator or referee.

Sec. 86. When a deposition has been once taken, it may be read in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this article.

Sec. 87. Depositions taken pursuant to this article by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this state or elsewhere, shall be admitted in evidence, upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal; and no further act of authentication shall be required. If the officer taking the same have no official seal, the deposition, if not taken in this state, shall be certified and signed by such officer, and shall be further authenticated either by parol proof adduced in court, or by the official certificate and seal of any secretary or other officer of the territory keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was at the time of taking the same duly qualified and acting as such officer. But if the deposition be taken within this state by an officer having no seal, or within or without this state under a special commission, it shall be sufficiently authenticated by the official signature of the officer or commissioner taking the same.

Sec. 88. The officer taking the deposition shall annex thereto a certificate showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition was reduced to writing by some proper person, naming him; and that the deposition was written and subscribed in the presence of the officer certifying thereto; and that the deposition was taken at the time and place specified in the notice.

(c) When Depositions May Be Read.

Sec. 89. When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that, for any cause specified in section 67, the attendance of the witness cannot be procured.

Sec. 90. Every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial.
SEC. 91. The following fees shall be allowed for taking depositions in this state: Swearing each witness, ten cents; for each subpoena, attachment, or order of commitment, fifty cents; for each hundred words contained in such deposition and certificate, fifteen cents, and no more; and such officer may retain the same until such fees are paid; such officer shall also tax the costs of the sheriff or other officer who shall serve the process aforesaid, and fees of the witnesses, and may, also, if directed by the person entitled thereto, retain such deposition until the said fees are paid.

SEC. 92. Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed with the papers in the cause.

SEC. 93. No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial.

SEC. 94. The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial.

(f) Documentary Evidence.

SEC. 95. Either party may exhibit to the other or to his attorney, at any time before the trial, any paper or document material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission in writing within four days after the request, and if the party exhibiting the paper or document be afterward put to any costs or expense to prove its genuineness, and the same be finally proved or admitted on the trial, such costs and expenses to be ascertained at the trial shall be paid by the party refusing to make the admission, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal.

SEC. 96. Either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper or document in his possession or under his control containing evidence relating to the merits of the action, or defense therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it; and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in his discretion order the adverse party to give to the other within a specified time an inspection and copy or permission to take a copy of such book, paper, or document; and on failure to comply with such order the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume it to be such as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness.

SEC. 97. Either party or his attorney if required shall deliver to the other party or his attorney a copy of any deed, instrument or other writing wherein the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required the party so refusing shall not be permitted to give in evidence at the trial the original of which a copy has been refused. This section shall not apply to any paper a copy of which is filed with a pleading.

SEC. 98. Printed copies in volumes of statutes, codes or other written law, enacted by any other state or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such state, territory or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other state, territory or foreign government may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law.
Sec. 99. Copies of records and proceedings in the courts of a foreign country may be admitted in evidence, upon being authenticated as follows: First: By the official attestation of the clerk or officer in whose custody such records are legally kept. Second: By the certificate of one of the judges or magistrates of such court that the person so attesting is the clerk or officer legally intrusted with the custody of such records, and that the signature to his attestation is genuine.

Sec. 100. Copies of all papers authorized or required by law to be filed or recorded in any public office or of any record required by law to be made or kept in any such office duly certified by the officer having the legal custody of such paper or record under his official seal, if he have one, and the record of all papers authorized or required by law to be filed or recorded in any public office, may be received in evidence with the same effect as the original without proof that the original is not in the possession or is not under the control of the party desiring to use the same, but nothing in this act shall prevent the production of the original, and when produced the original shall prevail over the record or copy.

Sec. 101. The printed statute books of this state or of the territory of Kansas printed under authority shall be evidence of the private acts therein contained.

Sec. 102. Copies of any act, law or resolution contained in the printed statute books of the states and territories of the United States, purporting to be printed by authority, and which are now or may be hereafter deposited in the office of the secretary of this state and required by law to be kept there, certified under the hand and seal of office of the secretary of this state, shall be admitted as evidence.

Sec. 103. The printed books containing the acts of congress of the United States purporting to be published by authority of congress or by authority of the United States shall be evidence of the laws, public or private, general, local or special, therein contained.

Sec. 104. Public documents, purporting to be edited or printed by authority of congress, or either house thereof, shall be evidence to the same extent that authenticated copies of the same would be.

Sec. 105. Copies of proceedings before justices of the peace, certified by the justice before whom the proceedings are had, shall be evidence of such proceedings.

Sec. 106. Copies of proceedings had before a justice of the peace, where such justice is out of office, certified by the justice who is in possession of the docket and papers of such justice, shall be received in evidence in any court in this state.

Sec. 107. Printed copies of the ordinances, resolutions, rules, orders and by-laws of any city or incorporated town in the state, published by authority of such city or incorporated town, and manuscript copies of the same, certified under the hand of the proper officer, and having the corporate seal of such city or town affixed thereto, shall be received as evidence.

Sec. 108. When, by ordinance or custom of any religious society or congregation in this state, a register is required to be kept of marriage, births, baptisms, deaths or interments, such register shall be admitted as evidence.

Sec. 109. Copies of the register referred to in the preceding section, certified by the pastor or other head of such society or congregation, or by the clerk or other keeper of such register, and verified by his affidavit, shall be received in evidence.

Sec. 110. Whenever any written evidence in a cause shall be in a language other than the English, a written translation thereof in the English language, made by a competent translator, and verified by his affidavit, may be read in evidence instead of the original, if such original be competent evidence.

Sec. 111. The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate
of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of the title equivalent to a patent against all but the holder of an actual patent.

Sec. 112. Copies of all papers and documents lawfully deposited in the office of the United States within this state, and copies of any official letter or communication received by the register or receiver of any such land office from any department of the government of the United States, when duly certified by the register or receiver having the custody of such paper, document, letter or other official communication, shall be received in evidence in the same manner and with like effect as the originals.

Sec. 113. Exemplifications from the books of any of the departments of the government of the United States, or any papers filed therein, shall be admitted in evidence in the same manner and with like effect as the originals, when attested by the officer having the custody of such originals.

Sec. 114. The signature of the officer to any certificate or document hereinafter mentioned shall be presumed to be genuine until the contrary is shown.

Sec. 115. Entries in books and other writings intended as records of sales, purchases, receipts, payments, deliveries, weights, measures, time, transactions or events, made in the regular course of business of any person, firm, corporation or public officer, as a record of the matters to which they relate, at or near the time of the transaction or occurrence, shall be admissible in evidence on proof that they were so made. Where such entries are in the possession of the adverse party they shall be produced at the trial on reasonable notice, unless the court or judge excuse such production for good cause, and allow the substitution of a sworn copy thereof. Entries in possession of strangers to the suit, which are kept without the county in which the action is triable, may be proven by sworn copies.

Sec. 116. The books and records required by law to be kept by any probate judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge, or other public officers, may be received in evidence in any court; and when any such record is of a paper, document, or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original; but no public officer herein named or other custodian of public records shall be compelled to attend any court, officer or tribunal sitting more than one mile from his office with any record or records belonging to his office or in his custody as such officer.

(g) Proceedings to Perpetuate Testimony.

Sec. 117. The testimony of a witness may be perpetuated in the manner hereinafter provided.

Sec. 118. The applicant shall file in the office of the clerk of the district court a petition, to be verified, in which shall be set forth, specially, the subject matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees, aliens or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be plaintiff.

Sec. 119. The court, or a judge thereof in vacation, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified.

Sec. 120. When it appears satisfactory to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross-interrogatories to those contained therein. The witnesses shall be examined upon
the interrogatories of the applicant, and upon cross-interrogatories where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some one of them. The attorney filing the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

Sec. 121. Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the office of the clerk of the court in which the petition was filed.

Sec. 122. The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party, where the witnesses are dead or insane, or where attendance for oral examination cannot be obtained or required; but such depositions shall be subject to the same objections for irrelevancy and incompetency as may be made to depositions taken pending an action.

Sec. 123. The applicant shall pay the costs of all such proceedings.

Costs.

Sec. 124. On the filing of a petition plaintiff shall give security for costs, to be paid by him if the petition be not sustained.

Continuances.

Sec. 125. The court may for good cause shown continue an action at any stage of the proceedings upon such terms as may be just. When a continuance is granted on account of the absence of evidence, it shall be at the cost of the party making the application, unless the court otherwise order.

Sec. 126. A motion for a continuance on account of the absence of evidence can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and if it is for an absent witness the affidavit must show where the witness resides, if his residence is known to the party, and the probability of procuring his testimony within a reasonable time, and what facts he believes the witness will prove, and that he believes them to be true. If thereupon the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, or that the facts in relation to other evidence shall be taken as proved to the extent alleged in the affidavit, no continuance shall be granted on the ground of the absence of such evidence.

Trials.

Sec. 127. Immediately after the issues are made up in any probate action the court shall set such action for trial at a time not less than ten days nor more than thirty days after such time, and shall give notice to all parties to such action in the manner herein prescribed for the giving of notice of the hearing of the motions.

Sec. 128. After a date has been fixed for the trial or hearing of a matter, and on or before such date, the court may, for good cause shown and upon such terms as it deems proper, continue the trial or hearing to some future date.

Sec. 129. All trials and hearings under the provisions of this code shall be by the court without a jury.

Sec. 130. The court shall, on timely request of any party, make findings of fact and conclusions of law, in writing, in any trial or hearing.
JUDGMENTS AND ORDERS.

Sec. 131. A judgment is the order entered in an action which finally determines the rights of all the parties thereto.

Sec. 132. Every direction of a court or judge, made and entered in any action and not included in a judgment, is an order.

APPEALS.

Sec. 133. Every judgment in a probate action, and every order which affects the substantial rights of a party, are appealable by a notice of appeal.

Sec. 134. All appeals from the probate court in probate actions shall be by notice of appeal, specifying the order, ruling, decision, or judgment complained of, and shall be filed in the court from which the appeal is taken within ten days from the date of such order, ruling, decision, or judgment.

Sec. 135. The party appealing shall file a good and sufficient bond in the court from which the appeal is taken to secure the costs of the appeal, unless, by reason of his poverty, he is unable to give security for costs, which fact shall be shown by affidavit filed in such court at the time the appeal is taken, and thereupon the appeal shall be deemed perfected.

Sec. 136. The judge from whose court the appeal is taken shall forthwith make up a complete transcript of all proceedings before him regarding the matter, or matters, appealed from, and transmit the same, together with all the papers in the case, to the clerk of the district court of his county. The district court shall try and determine the same as if originally filed therein, and may, in its discretion, order further or amended pleadings to be filed therein.

Sec. 137. The taking of the appeal provided for in this act shall not stay proceedings for the enforcement of the judgment or order appealed from unless the party appealing shall, within ten days from the date of the judgment or order, enter into an undertaking with at least one good and sufficient surety, to be approved by the judge of the probate court, and not less than double the amount of the judgment and costs, conditioned that he will prosecute the appeal without unnecessary delay and satisfy the judgment which may be rendered against him.

Sec. 138. The supreme court is authorized to change, modify, or add to any of the provisions of this code by rule of court.

Sec. 139. This act shall take effect and be in force from and after its publication in the statute book.