

KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1933.

PART 1—SEVENTH ANNUAL REPORT.

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 THE LEGISLATIVE COUNCIL,
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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.

KANSAS JUDICIAL COUNCIL BULLETIN

Published Quarterly by the KANSAS JUDICIAL COUNCIL, Topeka, Kan.

APRIL, 1933.

FOREWORD.

Since our last Bulletin was issued there has been a change in the personnel of the Judicial Council. Hon. John W. Davis, state senator from the thirty-seventh senatorial district, who has been a member of the Judicial Council since it was organized, by virtue of the fact that he was chairman of the judiciary committee of the Senate, declined to be a candidate for reelection at the last general election. His place on the Council has been taken by Hon. Hal E. Harlan, of Manhattan, the present chairman of the judiciary committee of the Senate. Senator Harlan is engaged in the practice of law at Manhattan. He was a member of the House of Representatives in 1929 and was a member of the Tax Code Commission, which made an exhaustive study of the question of taxation in this state and submitted a report to the governor in December of that year. He was also a member of the House of Representatives in 1931 and the speaker of the House for that session. We hope to print his picture and publish an article by him on some phase of the Judicial Council work in our July BULLETIN.

Hon. George Austin Brown, of Wichita, a member of the Council by virtue of being chairman of the judiciary committee of the House for the session of 1931, declined to be a candidate for reelection last fall. He has been succeeded on the Council by Hon. Schuyler C. Bloss, of Winfield. Judge Bloss has had a long and varied experience in the practice of law as well as in legislation. He was a member of the House of Representatives for the sessions of 1929, 1931 and 1933. He is a student of law and procedure and the principles which underlie them. In this issue we print his picture and an article by him which we are sure will be of interest.

The legislature at its recent session enacted some, but not all, of the measures advocated by the Judicial Council. We regret, and in a sense are disappointed, that some of the measures on which we spent a great deal of time and which we sincerely believed would be beneficial did not receive legislative approval. But, all things considered, perhaps we have no just reason to complain. The legislature met at a time of extraordinary stress. Economic questions, as related to our government, pressed themselves for solution. How to conduct our government at less cost without seriously affecting its efficiency, and how to relieve our people of some of the burdens of taxation, presented problems uppermost in the minds of the legislators. On the whole it was a sincere, intelligent, hard-working group of men, desirous of doing the best they could for the people of our state under the conditions confronting them. Many meritorious measures could not be fully considered for lack of time. While some of the measures advocated by the Judicial

Council would have resulted in substantial economy, a point which in some instances seemed to be overlooked, for the most part they had to do with the more prompt and efficient administration of justice in our courts. We are confident that when a legislature has time to do so these measures, and others having a similar purpose, will receive more careful and more favorable consideration.

The legislature passed an act creating a Legislative Council and prescribing its powers and duties. It is composed of ten members of the Senate and fifteen members of the House. The president of the Senate is *ex officio* member and chairman, and the speaker of the House is *ex officio* member and vice-chairman. Lieutenant Governor Charles W. Thompson, president of the Senate, appointed as the members of the Legislative Council from the Senate the following: Senator Thale P. Skovgard, Greenleaf; Senator Harry Warren, Fort Scott; Senator Joseph S. McDonald, Kansas City; Senator Dallas W. Knapp, Coffeyville; Senator Ralph G. Rust, Parsons; Senator Clyde W. Coffman, Overbrook; Senator Claude O. Conkey, Newton; Senator Claud Hansen, Jamestown; Senator C. B. Dodge, Salina; Senator Jess C. Denious, Dodge City.

Hon. W. H. Vernon, speaker of the House of Representatives, appointed the following members of the House: Hon. C. V. Cochran, Topeka; Hon. Oscar P. May, Atchison; Hon. John O. Morse, Mound City; Hon. W. G. Fink, Fredonia; Hon. Charles H. Palmer, Parsons; Hon. S. C. Bloss, Winfield; Hon. Matt Guilfoyle, Abilene; Hon. John H. Riddle, Marion; Hon. R. A. Cox, Augusta; Hon. John W. Blood, Wichita; Hon. H. S. Buzick, Jr., Sylvan Grove; Hon. Edmund J. Kirchner, Atwood; Hon. W. A. Doerschlag, Ransom; Hon. Clarence G. Nevins, Dodge City; Hon. Ray Smith, Hoisington.

The Legislative Council is to meet at least once each quarter, and as often as it may be necessary to perform its duties, which, generally speaking, are to collect information concerning the government, examine questions of statewide interest and to outline a legislative program in the form of bills, or otherwise, for the next session of the legislature. This is a splendid move and should result in acquiring much information useful to a legislature which it cannot have time to collect and arrange during the session. We hope to cooperate with this body of workers to as full an extent as the nature of our respective duties will permit.

The Judicial Council will proceed with the study of measures tending to improve the judicial system of our state. We will collect from the clerks of the district courts data with respect to business transacted in those courts for the year ending July 1, 1933, and pending on that date. We will also collect some data from other courts. This will all be classified, tabulated and published in bulletins to be issued later this year. We are glad to report that the legislature did not repeal the statute providing for clerks of the district court to receive a small remuneration for compiling reports for the Judicial Council. While this item is first paid by the county, it is reimbursed by fees taxed to litigants and does not come from a property tax. The amount taxed in each case is small, and neither the litigants nor their counsel complain if it.

While other matters will receive our attention, the efforts of the Council primarily will be directed to two matters of real importance. First, the revision of our statutes concerning the exercise of the power of eminent domain.

We have heretofore pointed out that there were 110 sections of our statute dealing with that subject. The recent legislature has added a few more. Considerable confusion exists, with the result that in some instances it is difficult to know how to proceed. We think it possible to outline a general law pertaining to this subject which will simplify the procedure and tend to promote fairness in the exercise of this important power. We have already done considerable work on this question, but find it quite a task to formulate it in a way to make it as simple and as equitable as it should be.

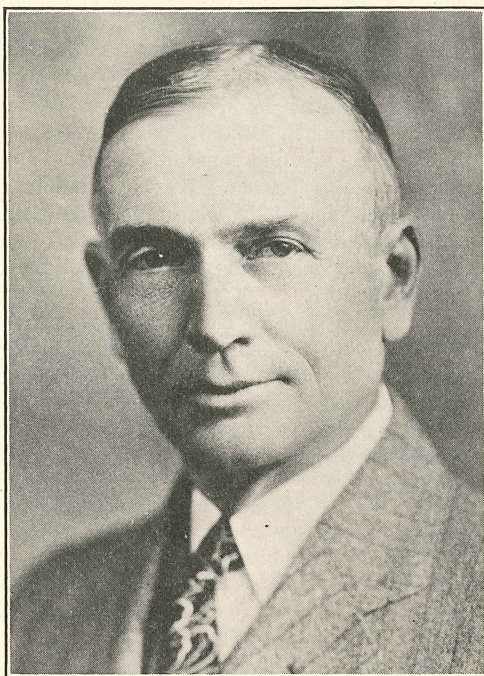
The second major question receiving our attention is the formulation of a code of procedure for our probate courts. The need of this is well recognized. The formation of such a code requires the rewriting of many of the sections of our statute dealing with the substantive law of the state, and that matter is being undertaken. In this the Judicial Council is being assisted by the officials and committees of the Northwestern and of the Southwestern Kansas Bar Association. We have heretofore published a tentative draft of the probate code of procedure. In this issue we publish a tentative draft of the measure, rewriting the substantive laws pertaining to estates. For this we are largely indebted to Samuel E. Bartlett, of Ellsworth, who has taken a keen interest in the subject. We find some other states confronted with the same problem we have in this respect. We have the final report of the special committee on the revision of the Ohio probate laws, also the proposed Florida probate act, published in the March, 1933, issue of the *Florida State Bar Association Law Journal*. These and other works will be considered in the final preparation of this measure.

The Bar Association of the state of Kansas will meet at Topeka on May 26 and 27. Every attorney in the state should be a member of the State Bar Association and receive its journal, which is now being published quarterly. On the two days preceding that meeting the Judicial Council will meet—May 24 and 25. We will be glad to have suggestions and communications by the bar, or others interested on the improvement of our judicial system, for consideration at that meeting.

Acts of the Recent Legislature Relating to Powers of a Court of Equity in Confirming Judicial Sales in Mortgage Foreclosure Cases and Extending Certain Periods of Redemption on Account of the Bank Moratorium.

By SCHUYLER C. BLOSS.

When the legislature of 1933 convened early in January there were many reports of so-called mass meetings in various parts of Kansas for the purpose of preventing deficiency judgments upon mortgage foreclosure sales. In neighboring states such meetings were reported where neighbors assembled in



SCHUYLER C. BLOSS.

large numbers to prevent the purchaser at the mortgage sale from obtaining immediate possession of the property sold and conveyed.

Numerous bills were introduced, commonly called mortgage moratorium bills. In these bills, as introduced, provision was made for the court, upon the application of the defendant or upon its own motion, to continue the case, generally for a period of two years.

Confronted with the situation as above disclosed the committees on judiciary of the House and Senate began a consideration of the question generally of what legislation, if any, there should be in Kansas relating to mortgage fore-

closures. It appeared to many members of the committee that our eighteen months redemption statute—severely criticized by some lawyers in past years—was now a means of avoiding many of the uprisings reported in other states on account of the result of a foreclosure which put a borrower out of possession of a farm occupied by him as a home for many years, and which neither he nor his neighbors, on account of the value of the farm, had any thought of losing at the time the loan was made. No trouble was reported arising out of the loss of possession of a farm by reason of the expiration of the period of redemption, but it was considered by the committee that in some instances injustice might be claimed where a mortgage was foreclosed on property appraised for more than twice the value of the mortgage at the time it was made, and the property sold for much less than the mortgage debt and the sale confirmed, leaving a large deficiency judgment against the borrower.

It was recognized that in corporate foreclosures where railroad or utility properties were sold, usually under order of the federal courts, in the order of sale an upset price was fixed representing a fair value of the property to be sold. In some instances the fixing of an upset price was founded upon an agreement in the corporate mortgage. In other cases the fixing of the upset price was an exercise of an equity power of the court where it should appear that the property extended through numerous jurisdictions and where there was no market value for the property to be sold, nor probability, from the nature, value and extent of the property, that there would be no competitive bidding.

The committees considered decisions of our own court dealing with the power of the court to refuse to confirm a sale where made for a sum which the court might consider unfair either to the debtor or creditor, and as to the power to require a release of deficiency judgments.

In Pratt county a mortgage was foreclosed sometime prior to 1899, the real estate sold for a small part of the mortgage debt and the sale confirmed. Thereafter the district judge ordered a release of the deficiency judgment.

In *Whitmore v. Stewart*, 61 Kan., page 254, 59 Pac. 261, it was held that the order releasing the deficiency judgment was absolutely void. It will be noted that in this case the sale had been regularly confirmed and no question raised as to the fair value of the property sold at the time the order confirming the sale was entered. In the opinion by Mr. Chief Justice Johnston this significant language is used (page 256):

"If there had been gross inadequacy of price in connection with some irregularity in the sale proceedings the court might perhaps have refused to confirm the sale unless a fair price for the property was allowed and credited on the judgment; but no such claim was made, and the court specifically found that the sale was made in all respects in conformity to law."

In *Farmers Life Insurance Company v. Stegink*, 106 Kan., page 730, it is said in the syllabus:

"Where a sale of mortgaged property has been conducted in substantial conformity with law, but the sale price was greatly below its true value, the trial court is authorized to withhold confirmation of the sale and to set it aside as inequitable, under section 500 of the civil code—following *Bank v. Murray*, 84 Kan. 524, 528, 114 Pac. 847; *Robinson v. Kennedy*, 93 Kan. 514, 516, 144 Pac. 1002; *Anschutz v. Steinwand*, 97 Kan. 89, 90, 154, Pac. 252; *Norris v. Evans*, 102 Kan. 583, 590, 171 Pac. 606."

In the opinion by Mr. Justice Dawson (page 731) it is said:

"Prior to 1893, when the original code section 458 (Gen. Stat. 1868) was amended, this court had repeatedly held that mere inadequacy of price was not a sufficient reason for refusing to confirm a sheriff's sale under a mortgage foreclosure, nor sufficient to require that the sale be set aside. (*Capital Bank v. Humtoon*, 35 Kan. 577, 591, syl. ¶ 5, and citations, 11 Pac. 369; *Beverly v. Barnitz*, 55 Kan. 466, 484, 42 Pac. 725), yet even before that amendment very slight circumstances in addition to inadequacy of price were sometimes held sufficient to justify the trial court in setting aside the sale. (*Dewey v. Linscott*, 20 Kan. 684, syl. ¶ 3; *Means v. Rosevear*, 42 Kan. 377, syl. ¶ 1, 22 Pac. 319; *Fowler v. Krutz*, 54 Kan. 622, 38 Pac. 808; *Wolfert v. Milford Savings Bank*, 5 Kan. App. 222, 47 Pac. 175.)

"The revised code now provides:

"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 direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in this act." (Civ. Code, § 500; Gen. Stat. 1915, § 7404.)

"In later cases, where this subject has required this court's attention, due significance has been given to the broader equity powers which the revised code seems to indicate that the trial court should exercise. Thus in *Robinson v. Kennedy*, 93 Kan. 514, 516, 144 Pac. 1002, it was said:

"The court has a discretion whether to order the sale confirmed or not, but the discretion must be exercised upon equitable principles, and not arbitrarily. (*Bank v. Murray*, 84 Kan. 524, 114 Pac. 847.)"

"Again in *Anschutz v. Steinwand*, 97 Kan. 89, 90, 154 Pac. 252, it was said:

"Under the present statute a sale may be set aside, although regularly made in accordance with law, upon equitable grounds. (*Bank v. Murray*, 84 Kan. 524, 114 Pac. 847.)"

"In *Bank v. Murray*, just cited, the court said:

"Prior to 1893 the statute required confirmation when the sale had in all respects been made "in conformity to the provisions of this article." (Gen. Stat. 1868, ch. 80, § 458; Gen. Stat. 1889, § 4556.) But the legislature of 1893 amended this section and provided that the sale shall be confirmed if the court "finds the proceedings regular and in conformity with law and equity." (Laws 1893, ch. 109, § 26, Code 1909, § 500.)"

"In *Norris v. Evans*, 102 Kan. 583, 590, 171 Pac. 606, it was said:

"Since the procedure in confirmation of sales was amended in 1893 (Laws 1893, ch. 109, § 26; see Civ. Code, § 500), the trial court is not expected to close its ears to all equitable considerations and confirm a sale as a matter of course, merely because the record shows no irregularity in the movement of the judicial machinery by which the sale was accomplished."

"From this review of this court's decisions (which only cites a typical few), it may be said that, with the aid of the revised code, section 500, the law now is that a wide discretion is conferred on the trial court touching the confirmation or setting aside of sheriff's sale in foreclosure; and the old rule that mere inadequacy of price is insufficient to set aside a sale or withhold confirmation is largely abrogated by the later rule of the code which charges the

trial court, before confirming a sale, to determine whether the proceedings were not only regular but "in conformity with law and equity."

While the judiciary committees were considering what legislation, if any, there should be with reference to deficiency judgments, the supreme court of Wisconsin, on February 6, 1933, decided the case of *Suring State Bank v. Giese et al.*, now reported in 246 N. W. at page 556. In this case it was the contention of the plaintiff that it was entitled to a deficiency judgment as a matter of course. The opinion of the Wisconsin court contains an interesting discussion of the theory whereby under certain conditions the court may, in ordering the sale of real property upon a mortgage foreclosure under its general equity powers, fix an upset price. We quote the syllabi:

"EVIDENCE. Court judicially notices fact that present economic depression has affected realty values and caused almost complete absence of market for realty.

"MORTGAGES. Without statute, equity court may decline to confirm foreclosure sale where bid is inadequate and economic conditions prevent competitive bidding.

"MORTGAGES. Court in ordering foreclosure sale or resale may in its discretion take notice of economic emergency and fix minimum price at which premises must be bid in if sale is confirmed.

"Court may after proper hearing fix minimum or upset price at which premises must be bid in if sale is to be confirmed; this being a power that courts of equity ordinarily exercise in cases of foreclosure of corporate property which is of such size and character as to preclude establishment of fair price by competitive or cash bidding.

"MORTGAGES. On application to confirm foreclosure sale, court may establish property's value and require that it be credited on judgment, giving mortgagee option to accept or not.

"If court has not previously fixed an upset price, and, on application to confirm sale, adopts procedure of conducting hearing and establishing value of property and, as condition to confirmation, requiring that fair value of property be credited on foreclosure judgments, mortgagee should be given option to accept or reject it, and, in event of its rejection, resale of property should be ordered."

It is also said in Ruling Case Law, volume 19, at page 670:

"If mortgaged property is of sufficient value to pay the mortgage debt, and the mortgagee permits the property to be sold under foreclosure in order that his representative may purchase it for less than its fair market value, such mortgagee is equitably estopped from recovering the balance due on the mortgage note."

The committees on judiciary concluded that the Wisconsin case was sound law and, in fact, did nothing more than amplify and apply to the present emergency in Kansas, with reference to the sale of real property, the principles heretofore enunciated by our own supreme court in the cases above cited and in numerous other cases dealing with the subject.

As the judicial council was in session the matter of deficiency judgments was considered during the course of the day by this body. It was considered that for the purpose of making the equity power of the court to appear more plainly with reference to the power of district courts to deal with the present emergency, a new section should be added to our real-estate mortgage-fore-

closure act. Following this conclusion such a section was drafted, approved by the committees on judiciary of the Senate and House, and is now in effect.

It was deemed that a separate section was advisable, for the reason that if it should be held unconstitutional the mortgage foreclosure act as a whole would not be affected. The new section is as follows:

"The court in determining whether or not the proceedings in judicial sales are regular and in conformity with law and equity as expressed in section 60-3463 of the Revised Statutes of Kansas of 1923, may decline to confirm the sale where the bid is substantially inadequate, or in ordering a sale or a resale may, in its discretion, if conditions or circumstances warrant and after a proper hearing, fix a minimum or upset price at which the premises must be bid in if the sale is to be confirmed, or the court may, upon application for the confirmation of the sale, if it has not theretofore fixed an upset price, conduct a hearing to establish the value of the property, and as a condition to confirmation require that the fair value of the property be credited upon the judgment, interest, taxes and costs. A sale for the full amount of the judgment, taxes, interest and costs shall be deemed adequate. This act is intended as declaratory of the equity powers now existent in the courts under section 60-3463 of the Revised Statutes of Kansas of 1923."

AS TO THE EXTENSION OF THE PERIOD OF REDEMPTION.

When, during the first days of March, the banking situation throughout the United States became such that it was deemed necessary for the Kansas legislature to place within the power of the governor and banking commission the declaring of a "bank moratorium," and when the legislature had also provided for a moratorium upon the payment of life insurance premiums and the making of loans upon life insurance policies, or, in other words, what was commonly called an insurance company moratorium, it was considered that the real-estate owner holding the property under right of redemption, and where the redemption period should expire during the bank moratorium, was also entitled to some relief. The legislature deemed it necessary to consider the case where the period of redemption expired and the purchaser had a right to a deed and a writ of assistance for possession. It was considered that even though the money was in the bank to make redemption, on account of the bank moratorium the redemption could not be made, nor if arrangements for refinancing the loan had been made, such arrangements, on account of the bank moratorium, could not be carried out. Live stock or other property could not be marketed or funds procured to make redemption. Inasmuch as the legislature had given the banks a moratorium, the land owner was justly entitled to an extension during the term of the bank moratorium and a reasonable time thereafter in order to make or exercise his right of redemption.

After consideration of this question by the committees on agriculture and of the judiciary of the Senate and House, a measure was agreed upon which declared a moratorium upon all periods of redemption from judicial sales which were running at the beginning of the bank moratorium for a period of six (6) months from March 4th, 1933. The constitutionality of this joint resolution, or its applicability under the constitution to existing contracts, was not long debated or considered by the committees. It was an emergency measure intended to prevent wide dissatisfaction if some owner should be dispossessed through no fault of his own on account of the failure of banks or other public or quasi public agencies to function.

The joint resolution is as follows:

"SECTION 1. A moratorium is hereby declared upon all periods of redemption from judicial sales which were running at the beginning of the present emergency created by the bank moratorium under federal and state orders and which expire during the moratorium as defined in section 2 hereof. All such periods of redemption as provided by law shall be extended until the conclusion of said moratorium and no writ of assistance shall be issued or served, and no sheriff's deed shall be issued or delivered during such moratorium.

SEC. 2. Said moratorium shall extend for six months from and after the 4th day of March, 1933: "Provided, In case at or before the expiration of the six-months period, it shall in the judgment of the governor of the state of Kansas, be necessary for the preservation of the public peace, health and safety so to do, and in case in his judgment said emergency still exists, then the governor of the state of Kansas is hereby authorized to extend said moratorium for a period of not exceeding six months.

"SEC. 3. Wherever a receiver has heretofore been appointed or may hereafter be appointed in a proceeding to foreclose any lien upon real estate, such appointment shall be set aside during said moratorium, except that a receiver, at the discretion of the court having jurisdiction thereof, may be appointed in cases of waste or where necessary for the preservation of the property.

"SEC. 4. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist by reason whereof this resolution shall take effect and be in force from and after its publication in the official state paper."

New Legislative Acts Relating to Attorneys, Courts, and Procedure.

The recent session of the legislature passed a number of acts relating specifically to attorneys, to our courts and to the procedure therein. We set these out herewith in the order of the sections of the statute referred to, where that is shown by the legislative act, with a brief statement of the measure, where that is deemed sufficient, but otherwise setting it out in full.

R. S. 7-110, requiring the supreme court to enter an order disbarring an attorney convicted of a felony or of a misdemeanor involving moral turpitude, was repealed by House bill No. 468, effective on publication in the statute book.

R. S. 1931 Supp. 9-130 was amended by House bill No. 730, effective on publication in the official state paper, and relates, among other things, to receivers for failed banks and to the performance of their duties under the supervision of the district court, upon proper application.

By Senate bills Nos. 310, 311, 322 and 613 the Corporation Commission was created, which took over the duties of the Public Service Commission and the administration of the securities act, with special reference to the provisions of R. S. 1931 Supp. 17-1229, 17-1236 and 17-1238, which sections were amended.

House bill No. 352 amends R. S. 1931 Supp. 19-246, effective when published in the official state paper, so as to authorize the board of county commissioners of any county having a population of 137,000 to appoint a county counsellor.

Senate bill No. 573 amended R. S. 19-1102, effective when published in the statute book, so as to read:

"The probate judge shall be his own clerk, except in counties where additional clerical assistants may be allowed him by law and provided by the board of county commissioners; he shall keep a record of all business done by or before him, which record shall be open to inspection by all persons, without charge. He shall receive only such compensation as may be provided by law."

Senate bill No. 65 amended R. S. 20-111, relating to syllabi of the supreme court, so as to omit from the section the following:

"And it shall be the duty of the clerk, at the close of each term, or oftener if convenient, to publish the syllabus of each case so delivered, in some paper of general circulation in the state, not to exceed three times."

In compliance with this amendment the syllabi of the supreme court is no longer being published in the official state paper.

House bill No. 241 amended R. S. 20-306, 20-309 and 20-311, effective when published in the official state paper, relating in selection of judge *pro tem*, so as to read as follows:

"SECTION 20-306. Such selection shall be made by the members of the bar of this state present, and shall be by ballot, under the direction of the judge, or, in his absence, of the clerk. Any member of the bar of this state, or the judge or any other judicial district of this state, may be selected as judge *pro tem*.

"SECTION 20-309. The judge *pro tem*. shall have the same power and authority as the regular judge while holding court, and in respect to cases tried before him, or in which he may have been selected to act and in case the judge shall be sick or absent at the commencement of the term, or shall be sick or absent himself during any term and thus by reason thereof be unable to serve, a judge *pro tem*. selected as hereinbefore provided, shall have the same authority with respect to all cases pending and at issue, or which shall be at issue during said term as the regularly selected judge of said court would have. In the event there shall be a vacancy in the office of judge by reason of the death of the regularly selected judge, a judge *pro tem*. shall be selected as hereinbefore provided who shall have the same authority as a judge *pro tem*. selected because of the illness or absence of the regularly selected judge. The judge selected for the term as herein provided, if not already holding the office of district judge, shall receive as compensation, while actually holding court the sum of ten dollars per day to be paid by the county in which said term of court is held.

"SECTION 20-311. In any civil or criminal case before a district court of this state, if any attorney of record is related, by blood or marriage to the district judge before whom the same is pending, as near as cousins of the first degree, the adverse parties shall be entitled, on making application therefor, to have all proceedings in such case heard by a *pro tem*. judge upon filing written consent either that said judge *pro tem*. may be selected by the judge of said district or by the chief justice of the supreme court, from the district judges of any of the judicial districts of this state, and upon the filing of such application and such consent the district judge so related to such attorney shall be disqualified from trying any such cases, over the objection of said adverse parties."

House bill No. 600, effective on publication in the official state paper, amends R. S. 20-2001, 20-2015, 20-2016, 20-2017 and R. S. 1931 Supp. 20-2018, pertaining to city courts in certain cities. It relates to the officers, their terms of office, and their salaries and duties.

House bill No. 601, effective on publication in the statute book, relates to city courts in certain cities and amends R. S. 20-2101.

Senate bill No. 73, effective on publication in the official state paper, repealed R. S. 22-526 and 22-531, relating to the compromise and settlement of claims due estates, and enacted the following:

"SECTION 1. Whenever it shall appear to any executor or administrator that it is to the best interest of the estate represented by him that a compromise of any debt due the estate represented by him, whether maturing before or after the death of the person whose estate is in administration, should be made, said executor or administrator may make and file, under oath, in the probate court having original jurisdiction of the administration of said estate, an application for authority to compromise such debt. Upon the filing of such application the probate court shall, without delay, inquire into the facts and circumstances with reference to such proposed compromise, and if the court finds that such proposed compromise is to the best interest of the estate, shall make an order authorizing the executor or administrator to compromise such debt upon such terms and conditions as the court may direct.

"SEC. 2. Any person interested in said estate may appeal from the decision of the probate court approving or disapproving such proposed compromise, within thirty days from the date of the order of the probate court, to the district court of the county. Any such appeal shall be determined by the judge of the district court without a jury, and the judge of the district court shall have authority to approve or disapprove the order of the probate court. If no such appeal is taken within said time the order of the probate court shall be final, and no executor or administrator or his bond shall be liable for any loss or damage to any person on account of such compromise."

Senate bill No. 76 amended R. S. 22-702, effective when published in the statute book, so as to read:

"All demands against the estate of persons deceased not exhibited as set forth in Laws 1925, chapter 161, section 1, within one year shall be forever barred, including any demand arising from or out of any statutory liability of decedent as surety, guarantor or indemnitor; saving to infants, persons of unsound mind, imprisoned or absent from the United States, one year after the removal of their disabilities."

House bill No. 125 amends R. S. 60-942, relating to bond in garnishment proceedings, so as to read:

"The order of garnishment shall not be issued by the clerk until an undertaking on the part of the plaintiff has been executed by one or more sufficient sureties, approved by the clerk and filed in his office, in a sum not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of such garnishment if the order be wrongfully obtained; but no undertaking shall be required where the party or parties defendant are all nonresidents of the state or a foreign corporation, or when garnishment is issued on a judgment rendered in that action."

House bill No. 152 amends R. S. 60-1502, effective when published in the statute book, relating to residence of plaintiff in an action for divorce, by adding to the section as it now stands the following:

"*Provided*, That any person who has been a resident of any United States army post or military reservation within the state of Kansas for one year next preceding the filing of the petition may bring an action for divorce in any county adjacent to said United States army post or military reservation."

House bill No. 197 amended R. S. 60-3332, effective when published in the statute book, relating to the stay of execution upon appeal, so as to read:

"No appeal from any judgment or final order rendered in any court from which an appeal may be taken except as provided in the next section and

the fourth subdivision of this section, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the appellant to the adverse party, with one or more sufficient sureties, as follows:

"First. When the judgment or final order sought to be reversed directs the payment of money, the written undertaking shall be in double the amount of the judgment or order, to the effect that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the mandate from the supreme court in the office of the clerk of the court from which the appeal is taken, judgment may be entered, on motion of the appellee in his favor, against the sureties, for such amount together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

"Second. When it directs the execution of a conveyance or other instrument, the undertaking shall be in such a sum as may be prescribed by any court of record in this state or any judge thereof, to the effect that the appellant will abide the judgment if the same shall be affirmed, and pay the costs.

"Third. When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by any court of record in this state or any judge thereof, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and if the judgment be affirmed he will pay the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession pursuant to the judgment, and all costs. When the judgment is for the sale of mortgaged premises and the payment of a deficiency arising from the sale, the undertaking must also provide for the payment of such deficiency.

"Fourth. When it directs the assignment or delivery of documents, they may be placed in the custody of the clerk of the court in which the judgment was rendered, to abide the judgment of the appellate court, or the undertaking shall be in such sum as may be prescribed as aforesaid, to abide the judgment and pay costs, if the same shall be affirmed."

Senate bill No. 583 defines the powers of the court of equity under R. S. 60-3463. It is published in the article herein by Judge Bloss.

House bill No. 47, relating to laying out and the opening of roads, allowing damages and awarding benefits, amends and repeals R. S. 68-107. It is important here only as it relates to the procedure in eminent domain.

Senate bill No. 39, effective on publication in the statute book, amended R. S. 73-126, relating to appeal in soldiers' compensation cases, by adding to the original section the following:

"Provided, That in any case in which the board has disallowed a claim previous to the taking effect of this act, notice of appeal shall be filed within ninety days after the taking effect of this act."

House bill No. 117 amends R. S. 79-2901, relating to the payment, under certain circumstances by the mortgagee, of taxes on the real property mortgaged and his right to recover the taxes paid with eight per cent interest in the event of foreclosure.

Senate bill No. 62, effective when published in the statute book, amended

R. S. 80-205, relating to bonds of justices of the peace, so as to read as follows:

"Every justice of the peace before he enters upon the duties of his office, and within the time limited by law for filing his oath of office, shall give a bond to the state of Kansas in a sum not exceeding \$5,000, nor less than \$500, such bond to be signed by two or more sureties residing in the proper township, or by some surety company authorized to do business in the state of Kansas, the amount and sufficiency of the bond to be approved by the board of county commissioners, conditioned for the safekeeping and paying over to the proper person or authority all moneys which may be collected or received by him, or which may otherwise come into his hands by virtue of his office, and for the due, honest and faithful discharge and performance of all and singular his duties as such justice of the peace according to law during his continuance in office, which bond shall be filed in the office of the county clerk."

House bill No. 115 relates to judicial districts in certain counties and abolishes the second division therein and repeals article 4, chapter 20, of the Revised Statutes of 1931 and of the 1931 Supplement to the Revised Statutes. Perhaps it affects the district court only in Crawford county.

Senate bill No. 202 revised the statute relating to city courts in cities of the first and second class with less than 18,000 population. Perhaps this applies only to city courts in Pittsburg and Arkansas City.

Senate bill No. 265 provides for the convening of a grand jury each year. It applies only to counties having more than 130,000 population and an assessed valuation of less than \$160,000,000.

House bill No. 289, effective on publication in the statute book, provides for aid in carrying out court decrees for the distribution of water for irrigation, by the Division of Water Resources of the State Board of Agriculture under the direction of its chief engineer and its other officers and employees.

Senate bill No. 351 authorized counties having a population of more than 135,000 and an assessed valuation of less than \$160,000,000 and cities of the first and second class in such counties to install radios to aid in the suppression of crime.

House bill No. 506, effective on publication in the statute book, providing for the dissolution of corporations under certain circumstances, reads as follows:

"SECTION 1. Any coöperative corporation, company or association heretofore organized under article 15, chapter 17, of the Revised Statutes of Kansas of 1923, and chapter 150 of the Laws of 1931, which has for a period of three years ceased to engage, in good faith, in the primary business for which said corporation or association was organized, shall be dissolved by order of the district court having jurisdiction, on petition of the attorney-general, supported by affidavit, and if the court shall find the petition is true, it shall appoint a receiver to wind up the affairs of said corporation and decree its dissolution."

House bill No. 561, effective on publication in the official state paper, concerning the power of irrigation districts, authorizes them, among other things, to exercise the right of eminent domain, "according to the procedure provided by law for the appropriation of land or other property taken for railroad purposes."

House bill No. 752, effective May 1, 1933, relating to the transportation of liquid fuels, provides, among other things, that all motor trucks and other vehicles used for the unlawful transportation of liquid fuel are declared to be common nuisances and contraband, and shall be seized, confiscated and sold

in the same manner and under the same procedure as now provided by law for such vehicles used in the unlawful transportation of intoxicating liquor.

House joint resolution No. 18, relating to a moratorium in mortgage foreclosures, is set out in Judge Bloss' article herein.

Suggested Redraft of Probate Law.

(Comments by SAMUEL E. BARTLETT.)

GENERAL PROVISIONS.

SECTION —. Every executor, administrator (except special administrator), and guardian appointed in a probate action shall, within thirty days from the time of his appointment and qualification as such, cause notice of his appointment to be published for three consecutive weeks in some newspaper of the county authorized by law to publish legal notices.

SECTION —. In all public sales of real property by an executor, administrator or guardian appointed in any probate action, such executor, administrator or guardian shall give notice containing a particular description of the real estate to be sold, and stating the time, terms, and place of sale, by advertising the same in the manner prescribed by law for the sale of real estate upon execution, but without equity of redemption.

SECTION —. Where any other notice by publication of any hearing is required, the person required to give such notice shall cause the same to be published for — days before the day of hearing in some newspaper of the county authorized by law to publish legal notices.

SECTION —. Such publication shall be proved by the affidavit of the printer or other person knowing the same; and such affidavit shall be filed in said cause.

COMMENT: On hearings to sell real property to pay debts of the deceased there should be a general notice of the hearing. On hearings to sell real property of minors or incompetents, the registered mail notice would afford little protection, and there should be a general notice of the hearing. The foregoing sections will solve this problem, eliminate repetitions, and procure uniformity.

SECTION —. All proceedings had under R. S. 22-101 to 22-1318, both inclusive, and amendments thereto, and — shall be governed by the code of probate procedure of the state of Kansas.

COMMENT: It should be made certain as to what part of the probate practice the proposed probate code is to apply, and in what cases it shall govern.

In later comments, the words "probate code" are often used. They refer to the proposed code of probate procedure as published in the Kansas Judicial Council Bulletin (October and December, 1932).

CHAPTER 22—DECEDENTS' ESTATES.

22-101 to 22-110. Retained.

22-111. Revised to read:

"The court shall fix the time for making the allotment, and direct that notice thereof be given by publication to all parties interested."

COMMENT: I have revised this section to make the provision for notice conform to the general provisions. I take it that notice by publication or

other notice prescribed may be given as the court directs under the circumstances.

COMMENT on 22-108 to 22-116: These sections contain provisions that are procedural in their nature, but they are not inconsistent with the probate code. They supplement it, and are desirable. The application, if made after the estate is closed, would constitute a probate action. 22-110 provides: "The application for such allotment by commissioners may be made at any time after twenty days, and within five years after the death of the husband. . . ." If the application is made while the probate action (for the probate of the will or appointment of administrator) is pending, it would of course be made on motion with the usual notice. But the application may be made at any time within five years. The original probate action is likely to be ended in a year. Then the application would be made in another probate action brought for that specific purpose, with the usual notice (summons).

22-112 to 22-114. Retained.

22-115. Revised to read:

"Such confirmation, after the lapse of ten days, unless appealed from according to law, shall be binding and conclusive as to the allotment; and she may bring suit to obtain possession of the land thus set apart for her."

COMMENT: "Ten days" is substituted for "thirty days," to conform to the provisions of the probate code relating to appeals.

22-116 to 22-133. Retained.

22-201 to 22-212. Retained.

COMMENT on 22-207 to 22-211: These sections contain provisions that are procedural in their nature, but they should be allowed to stand. Such action as herein contemplated might constitute a separate probate action, and might be necessary before a probate action for the probate of the will could be instituted. An action under these provisions might be combined with and constitute a part of the probate action for the probate of the will. These sections define the powers of the court and are desirable.

22-213. Repealed.

COMMENT: This section, and other sections following, provide for the preservation of the testimony. The probate court has no official reporter. A question arises whether this section and similar sections ought to be retained. In view of the fact that the proceedings are adversary, they might be omitted. Ample provision is made in the proposed probate code for the taking of testimony, and I have omitted them.

22-214 to 22-215. Retained.

22-216. Repealed.

COMMENT: This section should be repealed. It is fully covered by the probate code. Section 72 provides: "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."

22-217 to 22-219. Retained. (22-219. *Recording of will.* Omit "together with the testimony.")

COMMENT on 22-218: It seems that there ought not to be an admission of a will to probate by default. This section prevents such, and solves that problem.

22-220. Repealed.

COMMENT: This section is a duplication and is unnecessary. It is covered by section 100 of the probate code.

22-221. Retained.

22-222 (1931 Supp.). Retained.

22-223 (1931 Supp.). Retained.

22-224. Retained.

COMMENT: When the probate code was being drafted I raised this question as to section 13 of the proposed code: How will this provision affect the law relating to the contest of wills? It occurred to me that the question might be *res adjudicata*. I presume these sections would prevent it from so becoming until the expiration of a year. If 22-223 relating to the contest of wills is retained, 22-224 should also be retained.

22-225. Repealed.

COMMENT: This section is covered by the probate code and the general rules of evidence. Under the section, as it stands, testimony taken in an *ex parte* proceeding may be used in an adversary proceeding. This part of the section is rendered obsolete by the use of actions to probate wills, such proceedings being adversary.

22-226 to 22-227. Retained.

COMMENT: 22-226 protects the rights of persons under legal disability. I presume it gives the right to contest a will if the action is brought one year after the legal disability is removed, and for that reason have retained it.

22-228. Revised to read:

"A will executed, proved and allowed in any state or country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state."

COMMENT: The last line of the original section, "in the manner and for the purpose mentioned in the following sections," is omitted. The following sections prescribe a special procedure, which is omitted.

22-229. Revised to read:

"A copy of the will and probate thereof, duly authenticated, shall be attached to the petition and such action shall be brought in the probate court of the county in which there is any estate upon which the will may operate."

COMMENT: The provision for a special procedure is omitted.

22-230 to 22-249. Retained.

COMMENT on 22-245 to 22-248: These sections prescribe the manner in which an election may be made by the widow, are consistent with the probate code, and supplement it. They are desirable.

22-250. Repealed.

COMMENT: This section prescribes the procedure, including notice, to establish a lost will. It is governed by the probate code, including summons. The section is therefore omitted.

22-251. Repealed.

COMMENT: See 22-213.

22-252. Revised to read:

"If the court upon proof shall be satisfied that such last will and testament was duly executed in the mode provided by the law in force at the time of its execution, that the contents thereof are substantially proven, and that the same was unrevoked at the death of the testator, and has been lost, spoliated or destroyed subsequently to the death of such testator, such court shall find and establish the contents of such will as nearly as the same can be ascertained." (See Probate Code on Records.)

COMMENT: The words "such" and "and the testimony taken in the case" are omitted.

22-253 to 22-264. Retained.

22-265. Revised to read:

"All cases arising under this act in which a devisee or legatee may be required to contribute to make up the share of any child born after the execution of the will, or of a child absent and reported to be dead, or of a witness to a will, or in which contribution is to be made among devisees, legatees and heirs, or any of them, may be heard and determined by the court."

COMMENT: The procedural part and provisions for appeal in the last two lines are omitted.

22-266 to 22-271. Retained.

22-272. Revised to read:

"The said probate court may, when necessary, appoint a trustee to carry into effect a trust created by a foreign will, which trustee, before entering upon his trust, shall give bond with such security and in such amount as such court shall direct."

COMMENT: The procedural part is omitted. The appointment should require an action and not be *ex parte*. See R. S. 20-1107 relating to jurisdiction of probate courts over trusts in favor of minors.

22-273 and 22-274. Retained.

22-301 to 22-311. Retained.

22-313 to 22-328. Retained.

COMMENT on 22-319 and 22-323: These sections provide for citation and attachment. They are auxiliary proceedings in connection with the probate action. The sections are desirable and should be permitted to stand.

22-329 and 22-330. Repealed.

COMMENT: The provisions of these sections are included in a general provision relating to the publication of notice by executors, administrators and guardians.

22-331 (1931 Supp.). Retained.

22-401 to 22-408. Retained.

22-409 (1931 Supp.). Retained.

22-501 to 22-611. Retained.

COMMENT ON 22-504: This section should be revised, but it is no part of the procedural problem, and no attempt is being made in this restatement to restate the substantive law. It is also modified by R. S. 79-1510.

22-6a01 (1931 Supp.). Retained.

22-6a02 (1931 Supp.). Revised to read:

"That in order to obtain such authority the executor or administrator shall file his application in the court which issued his letters testamentary or of administration. The application shall set forth the amount of debts due from the deceased, as nearly as they can be ascertained, and the amount of charges of administration, the value of the personal estate and effects and a description of the real estate to be leased for oil and gas purposes."

COMMENT: The word "application" is substituted for the word "petition" in this section and other sections following. The probate code gives the word "petition" a specific and definite meaning. It is the first pleading filed in the probate action. Section 20 of the probate code states: "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."

"Application" is a general term, and the application may be contained in the petition, in an answer, or in a motion. "Application" therefore seems to be the proper term to be used here, and it is for that reason substituted.

22-6a03 (1931 Supp.). Revised to read:

"That the court shall require notice of the application and of the time and place of hearing the same to be given by publication."

COMMENT: "Application" substituted for "petition." Notice by publication to conform to the general provision.

22-6a04 (1931 Supp.). Retained.

22-6a05 (1931 Supp.). Revised to read:

"That if the court finds at the time of hearing that it is necessary to lease said real estate for oil and gas purposes for the payment of debts, and further that interest of said estate will be promoted thereby, it shall order the real estate described in the application to be leased by the executor or administrator for cash in hand."

COMMENT: "Application" substituted for "petition."

22-6a06 (1931 Supp.) and 22-6a07 (1931 Supp.). Retained.

22-701 (1931 Supp.) and 22-702 (1931 Supp.). Retained.

22-703 to 22-706. Retained.

22-707 (1931 Supp.). Retained.

22-708 to 22-712. Retained. (22-708. Revised.)

COMMENT ON 22-712: This section seems to be a duplication, but I have permitted it to stand.

22-713 (1931 Supp.). Repealed.

22-714. Retained.

22-715 to 22-718. Repealed.

COMMENT: These sections relate to the manner of hearing claims, and are supplanted by the general provisions of the probate code.

22-719. Retained.

22-720. Repealed.

COMMENT: This section relates to costs. All the provisions relating to costs should be gathered together in one section in the probate code or otherwise.

22-721 to 22-724. Retained.

22-725. Repealed.

COMMENT: This section is rendered obsolete by 1931 Supp. 22-702.

22-726. Retained.

22-727 (1931 Supp.) to 22-729 (1931 Supp.). Retained.

22-730 and 22-731. Retained.

22-732 (1931 Supp.). Retained.

22-733. Retained.

22-734 (1931 Supp.). Retained.

22-801. Retained.

22-802. Revised to read:

"In order to obtain such authority the executor or administrator shall file his application in the court which issued his letters testamentary or of administration."

COMMENT: "Application" substituted for "petition."

22-803. Retained.

22-804. Revised to read:

"The application shall set forth the amount of debts due from the deceased, as nearly as they can be ascertained, and the amount of charges of administration, the value of the personal estate and effects, and a description of the real estate to be sold."

COMMENT: "Application" substituted for "petition."

22-805. Revised to read:

"The court shall require notice of the application, and of the time and place of hearing the same, to be given by publication."

COMMENT: "Application" substituted for "petition." Notice by publication to conform to the general provisions.

22-806. Revised to read:

"An order for the sale of the real estate shall not be granted if any of the persons interested in the estate shall give bond to the executor or administrator, in a sum and with sureties to be approved of by the court, with condition to pay all the debts mentioned in the application that shall eventually be found due from the estate, with the charges of administering the same so far as the personal estate of the deceased shall be insufficient therefor."

COMMENT: "Application" substituted for "petition."

22-807. Revised to read:

"If the court is satisfied that it is necessary to sell real estate of the deceased to pay his debts, it shall order the real estate described in the application, or so much thereof as may be necessary for the payment of the debts, to be sold at public or private sale, as the court may direct, by the executor or adminis-

trator, for cash in hand, or upon deferred payments not exceeding two years with interest, as shall be ordered by the court."

COMMENT: "Application" substituted for "petition."

22-808. Revised to read:

"If it shall be represented in such application, and shall appear to the court, that it is necessary to sell some part of the real estate, and that by such partial sale the residue of the estate, or some specific part or piece thereof, would be greatly injured, the court may order the sale of the whole of the estate, or such part thereof as the court shall think necessary and most beneficial to the interest of all concerned therein."

COMMENT: "Application" substituted for "petition."

22-809. Retained.

22-810. Revised to read:

"If there should be in the last will of the deceased any disposition of his estate for the payment of his debts, or any provision that may require or induce the court to distribute the assets in any manner different from that which the law would otherwise prescribe, such devises or parts of the will shall be set forth in the application, and a copy of the will shall be exhibited to the court unless filed or recorded therein; and the assets shall be distributed accordingly, so far as it can be done consistently with the rights of the creditors."

COMMENT: "Application" substituted for "petition."

22-811. Repealed. (Relates to costs.)

22-812 to 22-815. Retained.

22-816. Repealed.

COMMENT: This is covered by a general provision relating to the public sale of real property.

22-817 to 22-826. Retained. (22-819. Revised.)

22-827. Revised to read:

"If any testator or intestate shall have entered in to a contract in writing for the conveyance of any real estate, and shall not have executed the same in his lifetime, nor given power by will to execute the same, the other party wishing a specific execution of such contract may file an application to the probate court setting forth the facts, and praying that an order may be made that the executor or administrator execute such contract specifically by executing to him a deed for the same."

COMMENT: "Application" substituted for "petition."

22-828. Revised to read:

"Such applicant shall annex to his application an affidavit to the truth thereof, and stating that no part of such contract has been satisfied, except as stated in the application."

COMMENT: "Applicant" substituted for "petitioner" and "application" for "petition."

22-829. Revised to read:

"A notice of such application and a copy thereof shall be served upon the executor or administrator, stating the time and place of the hearing thereof."

COMMENT: "Application" substituted for "petition" and section made to conform to general provision for notice.

22-830 to 22-903. Retained.

22-904. Revised to read:

"The court shall determine who are the heirs, devisees, and legatees of the deceased. (See records in probate code.)

22-904a (1931 Supp.). Retained.

22-905 and 22-906. Retained.

22-907 (1931 Supp.) and 22-908 (1931 Supp.). Retained.

22-909 to 22-914. Retained.

22-915. Repealed.

COMMENT: The provision in the probate code for the opening of a judgment applies here. (See section 47 of probate code.)

22-916 to 22-920. Retained.

22-921 (1931 Supp.). Retained.

22-922 and 22-923. Retained.

22-924. Repealed.

COMMENT: They are all parties to the suit and have been duly notified. This provision is unnecessary.

22-925 to 22-1006. Retained.

22-1007 (1931 Supp.). Revised to read:

"It shall be lawful for any probate court, for good cause shown, to reduce the amount of the bond of any executor or administrator of any deceased person, or to release the surety of the executor or administrator of any such surety from the bond with such executor or administrator, and it shall be lawful for the principal on any executor's or administrator's bond of any deceased person, or for the executor or administrator of any such principal, or for any surety of any executor or administrator of any such surety, at any time to make application to the probate court to reduce the amount of such bond with such executor or administrator by filing his written application therefor with the court and giving notice, in writing, to such principal or executor or administrator; and when such court is of the opinion that there is good reason therefor, it shall reduce the amount of such bond or release such surety; and if such executor or administrator fail to give a new bond as by such court directed, he shall be removed and his letters revoked; but such original surety shall not be released until such executor or administrator so gives bond, and such original surety shall be liable only for the acts of such executor or administrator from the time of the execution of the original bond to the filing of the second bond. The cost of such reduction of such bond or of the release of such surety shall be paid by the person applying for the reduction of said bond or the release of the surety therefrom, unless it shall appear to the court that the administrator or executor is insolvent, incompetent or is wasting the assets of the estate."

COMMENT: "Application" substituted for "request;" "at least five days" eliminated.

22-1008. Retained.

22-1101 to 22-1108. Repealed.

COMMENT: Sections 133 to 137 of the probate code cover all appeals; and these provisions should be omitted.

22-1201 to 22-1206. Retained.

22-1301 to 22-1318. Retained.

COMMENT on 22-1307: This section should be revised, but it is no part of the procedural problem. See R. S. 20-1108 *et seq.*

ADOPTION OF MINORS.

(R. S. 38-105 *et seq.*; 1931 Supp. 38-117 to 38-119.)

SECTION —. The proceedings for the adoption of a minor child or minor children, and all matters connected with such adoption shall constitute one action.

SECTION —. Such action may be brought in the county where the plaintiff or plaintiffs reside or where the minor child is domiciled.

COMMENT: The foregoing section does not state the law as it now exists. An accurate statement of the law of venue, as it now exists, would be: "Such action shall be brought in the county where the plaintiff or plaintiffs reside: *Provided*, That such action may be brought in the county in which the state orphans' home is located or in the county in which the principal office of any orphans' home, children's society, or association incorporated under the laws of the state of Kansas and under supervision of the state board of administration of the state of Kansas, having authority to place out children in private homes for adoption, is located, for the adoption of any minor child or children, for the adoption of which the consent of the superintendent or chief executive officer of any such institution is required." This statement of venue is cumbersome, and may be confusing. What we desire is simplicity. I can see no objection to the simpler statement and prefer it.

SECTION —. All persons from whom consent in writing is or may be necessary for the adoption of any minor child shall be made defendants.

SECTION —. The petition shall state:

1. The name, age, and residence of the plaintiff or plaintiffs.
2. The name, age, and domicile of the minor or minors to be adopted.
3. The consent of the parent or parents, or other person or persons, or institution, from whom consent is necessary for adoption.
4. The consent of the plaintiff or plaintiffs to adopt such minor or minors.
5. That the plaintiff or plaintiffs are fit and financially able properly to assume the relation of parent or parents to such minor or minors.
6. The relationship, if any, existing between the plaintiff or plaintiffs and the child.
7. And generally, all facts which should appear or which indicate that the adoption is for the best interest of the child.

COMMENT: Section 16 of the probate code may be sufficient to cover all matters that should be stated in the petition for adoption, and the foregoing may be unnecessary.

Service of summons may be had by publication in the case of nonresident parents and parents that have disappeared and cannot be found by diligent search. Section 42 of the probate code is sufficient to cover this.

38-105. Revised to read:

"Any parent may, with the approval of the court, relinquish all right to his or her minor child or children to any other person or persons desirous of adopting the same, and shall not, after such adoption, exercise any control over such child or children so relinquished; and the person or persons so adopting such child or children shall exercise all the rights relative thereto that they would be entitled to were such child or children the legitimate offspring of said person or persons so adopting the same."

38-106. Revised to read:

"The court shall investigate the matter, and may require the minor to appear or be brought before the court. If the court on investigation finds that the person offering to adopt such minor child is unfit, or financially unable, properly to assume the relation of parent to such minor, such court shall refuse to permit such adoption to be made. Before judgment shall be rendered for the adoption of any minor, consent thereto in writing, duly executed and freely and voluntarily given, shall first be obtained, and filed in said cause, from the said minor's parents, if living and having the legal custody of said minor, from the guardian (if any) of the said minor, or from such institution or corporation as may have the legal custody thereof, and a relinquishment thereto as provided by statute. If either parent be dead, proof thereof shall be duly made. If the parents of the minor child have been divorced, the consent of the parent to whom custody of such child shall have been awarded shall be necessary to authorize an order of adoption, but the consent of the other parent, though desirable, shall not be necessary. No probate court shall permit the adoption of any minor child sent into this state by or through or under the auspices of any association, society or organization incorporated or having its headquarters in any other state, until, in addition to all the other requirements of this section, all provisions of section 15 of chapter 106, Laws of 1901, shall have been fully complied with. Adoptions may also be permitted where ample proof is made that parents have disappeared for more than two years and cannot be found by diligent search. Such person so adopting such minor child shall be entitled to exercise any and all rights of a parent, and be subject to all the liabilities of that relation."

38-107. Retained.

38-112. Retained.

38-113. Retained.

38-114. Revised to read:

"Such corporations shall have the legal custody of all children which have heretofore been received into such home, or as shall hereafter be committed to it by the legal or natural guardian or guardians of such children, or by any magistrate of any county in which such home is located, with the consent of the board of directors of such home; and in any of the above cases such corporation, through its directors or president, shall have and possess over such children all the rights appertaining to the natural or legal guardians; and the board of directors of such corporation may, in their discretion, make any suitable or proper provision for the care and custody of such children for a term of years, or until such children reach their majority; and the president of the board of directors of any such corporation may appear in the probate court of any county, without the consent of either parent or guardian, and consent to the adoption of such children conformably to the laws of the state."

38-117 (1931 Supp.). Retained.

38-118 (1931 Supp.). Repealed.

ESTATES OF MINORS.

(R. S. 38-201 to 38-234.)

SECTION —. The action of an infant 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 of the infant, or any person, as the next friend.

SECTION —. The proceedings for the appointment of a guardian of the estate of a minor, or of the estate and person of a minor, and all matters connected with such guardianship, shall constitute one action.

38-201 to 38-210. Retained.

38-211. Revised to read:

"When a minor owns property in this state such property, or any interest of the minor therein (when not in contravention of the terms of a will), may be sold or mortgaged, either when such sale or mortgage is necessary for the minor's support or education or when his interest will be promoted by the sale thereof because of the unproductiveness of the property or its being exposed to waste or other peculiar circumstances making it to the interest of the minor to have the property sold or mortgaged. If upon the hearing the court is satisfied that it is necessary and to the best interest of the minor that the property or any part thereof or the interest of the minor therein be sold or mortgaged as prayed for, the court shall order such property or any part thereof or any interest of the minor therein sold at public or private sale for cash in hand or upon deferred payments for such time and upon such security with interest as the court may direct, or mortgaged for such sum and upon such terms and for such time as the court may by order direct. When it shall be made to appear to the satisfaction of the probate court that the real estate of a minor or in which the minor has an interest or any part thereof will be materially benefited by having the same platted and laid out as a town site, or as an addition to any city or town, said court shall order the guardian of such minor to make, acknowledge and file for record a plat for that purpose in all respects as provided in G. S. 1868, chapter 78, and Laws 1872, chapter 160 and amendatory acts, concerning the plats of cities and towns."

COMMENT: The procedural parts have been omitted. "For cash in hand or upon deferred payments" is not sufficient. It often happens that it is desirable to take property in exchange—especially as undivided interest in property in which the minor also has an undivided interest in exchange for the interest the minor is giving up and in which the purchaser has an undivided interest. Probate courts have held that this may be done, but the substantive law should be revised to remove the doubt. I have not undertaken to revise it, but point out the defect.

38-212. Revised to read:

"The application for that purpose must state the grounds of the application, must be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served, and notice of such application shall also be given by publication."

38-213. Retained.

38-214. Retained.

38-215. Revised to read:

"The court in its discretion may direct a postponement of the matter, and may order notice by publication or otherwise, as it may deem expedient."

38-216 and 38-217. Retained.

38-218. Repealed. (Relates to costs.)

38-219 to 38-221. Retained.

38-222 (1931 Supp.). Retained.

38-223 and 38-224. Retained.

38-225. Revised to read:

"He shall file an authenticated copy of the order for his appointment; and he shall thereupon qualify like other guardians, except as in the next succeeding section is prescribed."

38-226 and 38-227. Retained.

38-228. Repealed. (Relates to appeals.)

38-229. Retained.

38-230. Revised to read:

"Such discharge shall not be made unless the guardian appointed in another state or territory shall apply to the probate court in this state which made the former appointment, and file therein an exemplification of the record of the court making the foreign appointment, containing all the entries and proceedings in relation to his appointment, and his giving of bond, with a copy thereof and of the letters of guardianship, all authenticated as required by the act of congress in that behalf; and before such application shall be heard or any action taken therein by the court, notice shall be served on the guardian appointed in this state, specifying the object of the application and the time when the same will be heard: *Provided further*, That the court may in any case deny the application unless satisfied that the discharge of the guardian appointed in this state would be to the interest of the ward."

COMMENT: Special notice is eliminated, to conform to the general provision of the probate code.

38-231. (1931 Supp.). Revised to read:

"Sureties upon the bond of any guardian may be released upon the application of either guardian or of the surety filing a request therefor with the court and giving notice in writing to the other party; and when the court is of the opinion that there is good reason therefor he shall release such surety: *Provided*, Such guardian shall have filed a new bond to be approved by the court, but such original surety shall not be released until such new bond has been filed and approved by the court. The cost of such release shall be paid by the party applying for the same."

COMMENT: Special provision as to notice omitted.

38-232. Retained.

38-233. Retained.

38-234. Retained.

20-1107. Retained.

"That probate courts shall have jurisdiction over trusts created by deeds of trust, declarations of trust, wills, or otherwise, in favor of minors, and shall have jurisdiction of the accounts of trustees for minors; and such trustees for minors shall be subject to the existing provisions of law relative to guardians. The same proceedings may be had with reference to such trustees as may now be had relative to guardians of minors. Nothing in this act shall be construed to impair or affect the present jurisdiction of the district court in such cases."

COMMENT: The foregoing section is set forth in connection with this restatement of the statutes relating to minors for the reason that the appointment and accounting of trustees for minors is governed by the statutes relating to guardians of minors.

ESTATES OF INCOMPETENTS.

(R. S. 39-201 to 39-239.)

SECTION —. In all actions for the appointment of a guardian for an incompetent person, such person shall be made the defendant.

SECTION —. Actions for the appointment of a guardian for an incompetent person must be brought in the county in which such person is a resident.

COMMENT: An action for the appointment of a guardian for an insane or other incompetent person should be provided for in this code. The action should be brought in the county where the incompetent person is a resident. R. S. 76-1201 *et seq.* should remain intact except that 76-1215 should be modified to conform to the provisions of the probate code.

It often happens that the patient, a resident of the state, is in a private sanitarium, and the proceedings under R. S. 76-1201 *et seq.* are had in the probate court where the patient is at the time located instead of the county of the residence of the patient. It is not clear whether the guardian should be appointed in such cases by the probate court where such proceedings are had or in the county where the patient resides. *Trust Co. v. Allen*, 110 Kan. 484, does not seem to settle this question.

We understand the practice to be to file a duly authenticated copy of the proceedings had under R. S. 76-1201 *et seq.* in the probate court of the county of residence and procure the appointment there. We believe that the action should be governed by this code, and that the procedural parts of R. S. 39-201 *et seq.* and R. S. 76-1215 relating to the appointment of such guardians should be supplanted by the probate code. A duly authenticated copy of the proceedings in which the person is adjudged insane and by which such person is confined to a state hospital should be attached to the petition; and the question of insanity need not be again adjudicated.

39-201. Repealed.

39-202. Repealed.

39-203. Revised to read:

"When the probate court shall find that anyone in its county is insane, a lunatic, an idiot, an imbecile, a distracted person, a feeble-minded person, a drug habitue, or an habitual drunkard, and for any of these reasons is incapable of managing his affairs, and that it is necessary that a guardian be appointed for his person or estate, or both, a guardian shall be appointed."

39-236. Revised to read:

"It may also direct a reference to a commission of two qualified physicians, or one qualified physician and one clinical psychologist, to be chosen by the court on account of their known competency and integrity, who shall make a personal examination of the person whose condition is to be inquired into, and shall file with the probate court a report in writing, verified by affidavit, of the results of their inquiries, together with their conclusions and recommendations."

COMMENT: This section properly belongs here. The commission should not be confined exclusively to cases of feeble-mindedness.

39-204. Repealed.

COMMENT: There should be a section in the probate code covering all questions of costs in all probate actions. The sections on costs should be repealed and the subject fully covered in the code. Appeals are provided for in the probate code.

39-205. Repealed.

39-206 to 39-210. Retained.

39-211 (1931 Supp.). Retained.

39-212. Revised to read:

"The application shall set forth the particulars of the amount of the estate,

real and personal, of such person, and of the debts by him owing, accompanied by a full, true and perfect account of the guardianship of the applicant, showing the application of the funds which may have come into his hands. Notice of the filing of such application, of the nature of the order applied for, describing the lands to be sold, and specifying the time and place of hearing, shall be given by publication."

39-213. Retained.

39-214. Retained.

39-215. Revised to read:

"No real estate, nor any title or interest therein, shall be sold at private sale for less than three-fourths of its appraised value, to be ascertained by three disinterested householders of the county in which it lies."

39-216 and 39-217. Retained.

39-218. Revised to read:

"The foreign guardian of any such nonresident person may be appointed the guardian of such person in any county wherein he may have any property, for the purpose of selling or otherwise controlling any property of such person within this state. He shall thereupon qualify like other guardians, except as hereinafter prescribed. Upon the filing of any authenticated copy of the bond and the inventory rendered by the guardian in the foreign state, if the probate court is satisfied with the sufficiency of the amount of security, it may dispense with the filing of an additional bond; and such guardian so appointed shall have and exercise the same rights, powers, and duties as are prescribed by law in cases of resident guardians of the estate."

39-219 and 39-220. Retained.

39-221 (1931 Supp.). Retained.

39-225. Revised to read:

"On judgment against such person, or his guardian as such the execution shall be against his property only, and in no case against his body, nor against the body or estate of such guardian, unless he shall have rendered himself liable thereto."

39-226. Revised to read:

"If any person shall make application, verified by oath or affirmation, that any such person for whom a guardian has been or may be appointed under the provisions of this act, has been restored to his right mind or to temperate habits, the court by which the proceedings were had shall cause the facts to be inquired into."

39-227. Revised to read:

"If the court finds that any such person for whom a guardian has been or may be appointed under the provisions of this act has been restored to his right mind or to temperate habits, he shall be discharged from care and custody, and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to him."

39-228 to 39-231. Retained.

39-232 (1931 Supp.). Retained.

39-233. Retained.

39-234. Repealed. (Relates to appeals.)

39-235. Retained.

COMMENT: An additional clause should be added to the foregoing section, reading: "Provided, such appointment shall be made by the court of the county in which such incompetent person is a resident."

39-236. (Revised and placed as the second section in this restatement).

39-237 to 39-239. Retained.

ESTATES OF IMPRISONED CONVICTS.

(R. S. 62-2001 *et seq.*)

This provision may be added to the code: "The proceedings for the appointment of a trustee for the estate of an imprisoned convict, and all matters connected with trusteeship, shall constitute one action."

In view of the interpretation of 62-2001, 62-2002 should be revised to read as follows:

"Whenever any person shall be imprisoned in the penitentiary, a trustee to take charge of and manage his estate may be appointed by the probate court of the county in which said convict last resided, or if he have no known place of abode, then by the court of the county in which the conviction was had."

COMMENT: "For a term less than life" is omitted; and anyone who can qualify under the probate code may bring the action.

62-2003 may be repealed.

62-2004 to 62-2007 may be retained.

The following may be substituted for the remainder of the article:

"The laws relating to the estates of incompetents, guardians thereof, and their powers, duties and liabilities in connection therewith, are hereby adopted for and shall govern in the estates of imprisoned convicts, trustees thereof, and their powers, duties and liabilities in connection therewith. Upon the death of the imprisoned convict or his lawful discharge from his imprisonment the said trustee shall make a final report and accounting as required of guardians upon the death or restoration of such incompetent person."

