

# KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1939

PART 1—THIRTEENTH ANNUAL REPORT

THE  
KANSAS PROBATE CODE  
AND THE  
PROPERTY ACT

As enacted at the 1939 session of our legislature

Attorneys and Judges should become as familiar with these statutes as possible by their effective date, July 1, 1939

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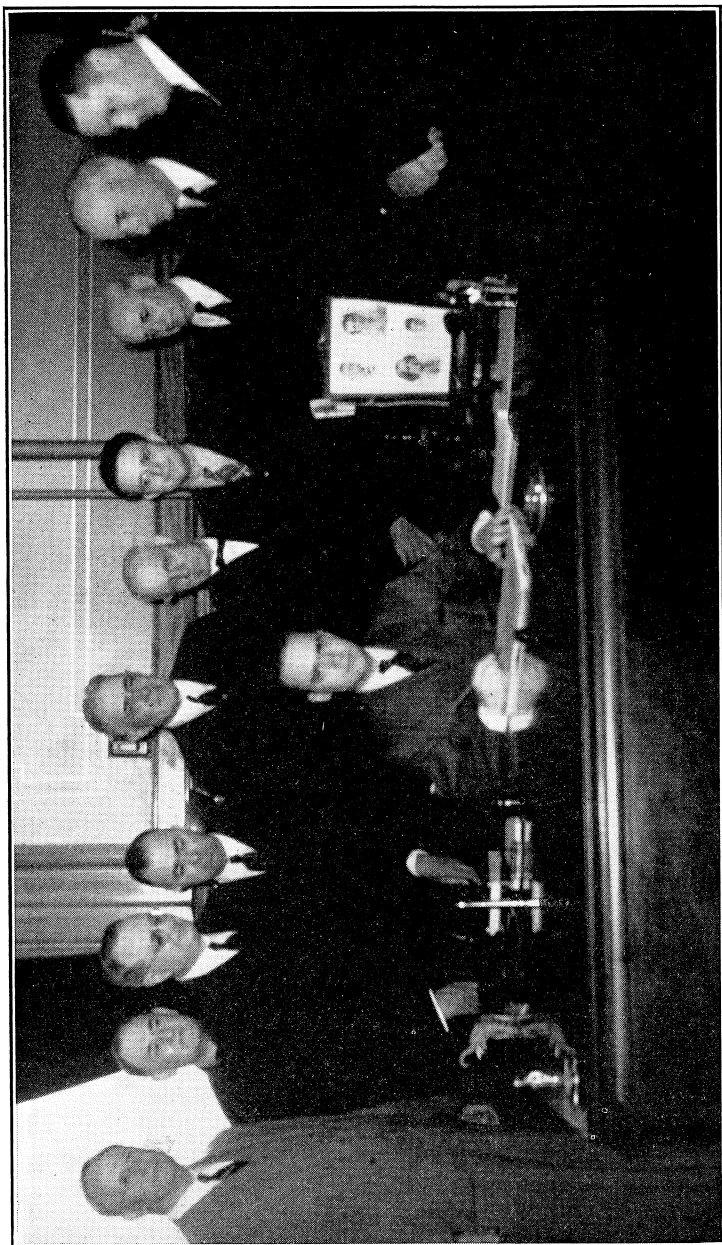
For the improvement of our Judicial System and its more  
efficient functioning.



GEORGE TEMPLAR

Hon. George Templar, of Arkansas City, succeeding Hon. Harry W. Fisher, of Fort Scott, has become a member of the Judicial Council by virtue of the fact that he is chairman of the Judiciary Committee of the House of Representatives. He is serving his fourth consecutive term as a member of the legislature.

Mr. Templar was graduated from the Washburn College School of Law, and was admitted to the practice of law in this state in June, 1927. Since then he has been engaged actively in the practice of law at Arkansas City, where his industry and ability have enabled him to build up a good general law business. He will bring to the work of the Council his legislative experience and the helpful viewpoint of a relatively young attorney engaged in the general practice, who is making good in his chosen profession.



GOVERNOR RATNER SIGNS THE PROBATE CODE

*Standing, left to right—Judge Fischer, Mr. Foulston, Mr. Bartlett, Senator Dale, Mr. Stevens, Judge Ruppenthal, Representative Templar. Justice Harvey, Mr. Hunt and Judge Bennett.*



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# THE KANSAS PROBATE CODE

## ARTICLE 1.—NAME AND DEFINITIONS

SECTION 1. *Name of act.* This act is named and may be cited as the Kansas probate code.

SECTION 1. This section is similar to 60-101 of the code of civil procedure, and 40-101 of the insurance code.

SEC. 2. *Definitions.* As used in this act the term "probate court" means judge of the probate court when that meaning is necessary to effectuate the general purpose of the provisions of this act. As used in this act, unless the context otherwise indicates: (1) the word "representative" includes executors, administrators, administrators with the will annexed, administrators *de bonis non*, and guardians; (2) the word "fiduciary" includes representatives, trustees, and surviving partners administering their trusts; (3) the word "person," as applied to fiduciaries, includes banks and other corporations authorized by law to act in a fiduciary capacity in this state; (4) the masculine gender includes the feminine; and (5) the singular number includes the plural.

SEC. 2. This section is new. Throughout the probate code the word "court" instead of "judge" is used wherever possible and the words "judge's office" are eliminated, because when the judge acts in his official capacity he is the court. First sentence: See *State, ex rel., v. Anderson*, 114 Kan. 297; *Young v. Lidrick*, 14 Kan. 92; *In re Johnson*, 12 Kan. 102. By use of "representative" and "fiduciary" much duplication is avoided. For limitation on power of corporate fiduciary to act, see section 131.

## ARTICLE 2.—PROBATE COURTS AND THEIR RECORDS

SEC. 3. *Election, term, and bond of probate judge.* There shall be elected in each county a probate judge. He shall hold his office for two years, and before he enters upon the duties of his office shall execute to the state of Kansas a bond, in a sum of not less than two thousand dollars nor more than twenty-five thousand dollars, with two or more sufficient sureties or with a corporate surety duly authorized to do business in this state, to be fixed and approved by the county commissioners, and filed in the office of county clerk, conditioned for the faithful performance of the duties required of him by law, and for the faithful application and payment of all moneys and effects that may come into his custody in the execution of the duties of his office.

SEC. 3. 19-1101. The legislature struck out the provision prescribing qualifications for probate judges.

SEC. 4. *Clerks, clerical assistants and reporters.* The probate judge shall be the clerk of the probate court, and shall have such clerical assistants as may be allowed by law. He may appoint in writing one of such assistants as deputy clerk. The probate judge may appoint a competent stenographer as reporter in any matter pending or to be heard in the probate court. The reporter shall have the same powers and duties and be subject to the same liabilities, in the matter for which he is appointed, as a reporter of the district court. He shall receive such fees as may be fixed by the court not exceeding the compensation allowed by law to reporters of the district court. Such fees shall be taxed as other costs.

SEC. 4. 19-1102. This section provides for deputy clerk and reporter when necessary. Fees and salaries unaffected by probate code. For fees and salaries, see 28-113 *et seq.* and 28-308 *et seq.* For shorthand reporters, see 20-901 *et seq.*



SEC. 5. *Selection of probate judge pro tem.* The probate judge may appoint some qualified person to act as probate judge pro tem during the absence or incapacity of the probate judge. When an affidavit of a party to a probate proceeding, or of his attorney of record, is filed with the clerk of the district court stating that the probate judge is insane, or that he is interested or has been counsel in the subject matter of the probate proceeding, the clerk of the district court shall appoint a probate judge pro tem, who shall be a member of the bar, to act as probate judge.

SEC. 5. 20-1108; 22-1307.

SEC. 6. *Qualification of probate judge pro tem.* The probate judge pro tem shall take and subscribe to the same oath as required of the probate judge. When such selection is made by the clerk of the district court, such oath, with a transcript of the proceedings for the appointment of such probate judge pro tem, shall be filed in the probate court.

SEC. 6. 20-1109.

SEC. 7. *Insanity of probate judge.* If the probate judge is duly and finally adjudged insane or incapacitated to act by reason of mental disability, the probate judge pro tem trying the case shall certify such adjudication to the governor, who shall thereupon declare the office of such probate judge vacant and fill the same by appointment. The probate judge pro tem trying the case of insanity or mental incapacity shall not be eligible for such appointment.

SEC. 7. 20-1110.

SEC. 8. *Vacancy and appointment.* If a vacancy occurs in the office of probate judge, the governor shall appoint some qualified person to fill such vacancy until a successor shall be elected according to law.

SEC. 8. 19-1103.

SEC. 9. *Not to deal in assets nor be counsel.* No judge, probate judge pro tem, clerk, deputy clerk, or employee of any probate court shall directly or indirectly invest or deal in any property or securities involved in any proceeding over which such court has jurisdiction; nor shall he be counsel or attorney in any action or proceeding for or against any devisee, legatee, heir, creditor, fiduciary, or ward, over whom or whose estate, claim, or accounts such court has jurisdiction. Except in matters relating to commitments, none of them shall give counsel or advice, nor shall any of them draw or prepare any paper relating to any matter which is or may be brought before such court, except orders, judgments, decrees, executions, attachments, warrants, certificates, commissions, citations, or subpoenas issuing out of such court.

SEC. 9. 22-819; see 21-1601, *Wheat v. Hilkey*, 148 Kan. 60.

SEC. 10. *Delivery and completion of records.* Whenever the term of office of any probate judge expires he shall deliver to his successor all books, records, and papers in his possession relating to his office. Willful failure to do so within five days after demand by his successor shall constitute contempt. Whenever the records, books, and papers, or any of them, belonging to the probate court, have been delivered to the judge by his predecessor in an unfinished or imperfect condition, and it shall be necessary for the business of his court that the same be completed, the said judge shall proceed at once

with the completion of said records, as far as possible; and his predecessor shall be liable on his official bond for the expense of the completion of such records for his term.

SEC. 10. 22-1306.

SEC. 11. *Seal.* Each probate court shall have a seal with which all process issuing therefrom shall be authenticated; which seal shall be provided by the county commissioners, and shall contain the following words, viz.: "Probate court, \_\_\_\_\_ county, Kansas"—naming the county for which such seal is provided.

SEC. 11. 20-1102.

SEC. 12. *Process.* All writs, orders, and other process of the probate court shall be issued and directed to the sheriff of the proper county where such process is to be served. In the absence or nonattendance of the sheriff, or where he is a party, the probate court may appoint any suitable person of the county and qualify him as a special sheriff for the service of any such process.

SEC. 12. 20-1105; 22-209.

SEC. 13. *No terms of court.* There shall be no terms of the probate court. It shall be open for the transaction of business at the county seat at all reasonable hours. Hearings may be had at such other places in the county as the court may deem advisable.

SEC. 13. 2-1103; see 20-1104, 20-1106. Fixed terms of the probate court are omitted, being unnecessary and without significance, as the court is open at all times so matters may be heard at any date previously set. The control of the court over its judgments, as of term time, is limited to thirty days by section 189.

SEC. 14. *Books of record.* The following books shall be kept by the probate court:

(1) An appearance docket, in which shall be listed under the name of the decedent, ward, insane person, or other person involved, all documents pertaining thereto and in the order filed. Such list shall show the nature of the document, the date of the filing thereof, shall give a reference to the volume and page of any other book in which any record shall have been made of such document, and shall state the charge therefor.

(2) A claims docket, in which shall be listed under the title of the estate all claims filed against such estate. It shall show the number of the claim, the date of the filing, the name of the claimant, the amount of the claim, and the date of the adjudication, and the amounts allowed and disallowed, and classification.

(3) A general index, in which files pertaining to estates of decedents shall be indexed under the name of the decedent, those pertaining to guardianships under the name of the ward, those pertaining to insane persons under the name of such person, those pertaining to adoption of children under both the name and adopted name of the child. After the name of each file shall be shown the file number, the book and page of the appearance docket in which the documents pertaining to such file are listed, and the date of filing of the first document.

(4) An index pertaining to wills deposited pursuant to section 56 under the name of the testator.

(5) An index to each book of record.

(6) Books of record, kept for that purpose, in which the following documents shall be recorded by the probate court: (1) All wills admitted to probate; (2) all elections filed; (3) all letters of appointment issued; (4) all certificates of appointment filed; (5) all bonds filed; (6) all orders, judgments, and decrees, including inheritance tax orders; (7) such other documents as the court may determine.

SEC. 14. Consolidation, amendment and revision of parts of 19-1102; 28-123; 20-1105; 20-1109; 22-219; 22-221; 22-227; 22-232; 22-246; 22-248; 22-252; 22-253; 22-271; 22-274; 22-708; 22-721; 22-722; 22-819; 22-822; 22-913; 22-1306; 22-1309; 22-1310; 22-1313; 38-211; 38-213; 76-1211; 76-1214; 76-1216.

SEC. 15. *Recordation in another county.* A duly certified copy of any probate proceedings or documents of record in the probate court of any county of the state may be filed and recorded in the probate court of any other county of the state, and when so filed shall have the same force and effect in such other county as in the county of origin.

SEC. 15. 22-220; 22-221; 22-227; 22-822; 22-904a; 38-213; 39-221.

SEC. 16. *Inspection and copies.* The books and records of the probate court shall be open to inspection by all persons at all times, except as provided in adoption proceedings. The court shall furnish a certified or authenticated copy of any document on file or of record upon payment therefor. The court, in making certified or authenticated copies of letters of appointment, is authorized upon request to certify further whenever such is the fact, that the letters so certified stand unrevoked at the date of the certificate; and such certificate shall be prima facie evidence of such fact.

SEC. 16. First sentence: 19-1102. Remainder of section is new. For adoption proceedings, see section 255.

### ARTICLE 3.—JURISDICTION AND POWERS

SEC. 17. *Jurisdiction.* The probate courts shall be courts of record, and, within their respective counties, shall have original jurisdiction:

(1) To admit last wills and testaments to probate.

SEC. 17. Subsection (1). 20-1101.

(2) To grant and revoke letters testamentary and of administration.

Subsection (2). 20-1101.

(3) To direct and control the official acts of executors and administrators, to settle their accounts, and to order the distribution of estates.

Subsection (3). 20-1101.

(4) Of partnership estates as provided in this act.

Subsection (4). 22-404.

(5) To determine the heirs, devisees, and legatees of decedents.

Subsection (5). 22-904.

(6) To appoint and remove guardians for minors and incompetent persons, to make all necessary orders relating to their estates, to direct and control the official acts of such guardians, and to settle their accounts.

Subsection (6). 20-1101; 39-210.

(7) To hear and determine cases of habeas corpus.

Subsection (7). 20-1101; const., art. 3, sec. 8.

(8) Of trusts and powers created by wills admitted to probate, and of trusts and powers created by written instruments other than by wills in favor of persons subject to guardianship; to appoint and remove trustees for such trusts, to make all necessary orders relating to such trust estates, to direct and control the official acts of such trustees, and to settle their accounts; but this provision shall not affect the jurisdiction of district courts in such cases.

Subsection (8). 20-1107; see article 16 herein, and the uniform trustees' accounting act prepared by the commissioners on uniform state laws.

(9) To appoint and remove trustees of estates of convicts imprisoned in the penitentiary under sentence of imprisonment for life, to make all necessary orders relating to their estates, to direct and control the official acts of such trustees, and to settle their accounts.

Subsection (9). 62-2001 *et seq.* Limited to estates of life convicts; see 21-134 (1905).

(10) To hold inquests respecting insane persons, and to commit insane persons to hospitals for the insane, or elsewhere, for their care and treatment.

Subsection (10). 76-1211.

(11) Such other jurisdiction as may be given them by statutes pertaining to particular subjects.

Subsection (11). See const., art. 3, sec. 8.

(12) And they shall have and exercise such equitable powers as may be necessary and proper fully to hear and determine any matter properly before such courts.

Subsection (12). 22-1207; see *In re Osborne's Estate*, 99 Kan. 227; *Dick v. Taylor*, 124 Kan. 646; *Bennett v. Arrowsmith*, 101 Kan. 143; *Eadie v. Hamilton*, 94 Kan. 214; *O'Neil v. Epting*, 82 Kan. 245; *Citizens Building and Loan Association v. Knox*, 146 Kan. 734.

SEC. 18. *Powers.* The probate courts, in addition to their general jurisdiction, shall have power:

(1) To compel the attendance of witnesses, to examine them on oath, and to preserve order during proceedings before such courts.

SEC. 18. Subsection (1). 22-213.

(2) To issue subpoenas, citations, executions, and attachments, to make orders and render judgments and decrees, and to enforce them by any process or procedure appropriate for that purpose.

Subsection (2). 22-720.

(3) To issue commissions to take depositions of witnesses either within or without the state in any matter pending before them: *Provided*, That in any contested matter notice of the taking of depositions shall be given as provided by law.

Subsection (3). 22-216; 22-716. See 60-2826.

(4) To compel throughout the state the performance of any duty incumbent upon any fiduciary appointed by or accounting to such courts.

Subsection (4). See *Stratton v. McCandless*, 32 Kan. 512; *Proctor v. Dicklow*, 57, Kan. 119.

(5) To adjourn any hearing with or without terms, but when objection is made the adjournment shall be only for cause.

Subsection (5). See *Clark v. Andrews*, 136 Kan. 23; *Smith v. Eureka Bank*, 24 Kan. 528.

- (6) To correct and amend their records to make them speak the truth.

Subsection (6). See *Aydelotte v. Brittain & Co.*, 29 Kan. 98; *Martindale v. Battey*, 73 Kan. 92; *Graden v. Mais*, 83 Kan. 481; *Plumber v. Ash*, 90 Kan. 40; *Faler v. Culver*, 94 Kan. 124; *Brooks v. Brooks*, 52 Kan. 562; *In re Shoupe*, 130 Kan. 53.

- (7) To vacate or modify their orders, judgments, and decrees.

Subsection (7). See 60-3016 and 60-3007.

- (8) To order any fiduciary to surrender and deliver property to his successor or to distribute it.

Subsection (8). See 20-1101.

- (9) To authorize and confirm contracts made by fiduciaries for the employment of attorneys, auditors, accountants, and experts.

Subsection (9). This subsection is new. The fiduciary may contract independently of the court and is personally liable. *Brown v. Quinton*, 80 Kan. 44. To protect the fiduciary in the allowance of his expense he may obtain authority prior to or confirmation after the contract.

- (10) To punish for contempt.

Subsection (10). See *In re Hanson*, 80 Kan. 783.

#### ARTICLE 4.—HOMESTEAD AND FAMILY ALLOWANCES

SEC. 19. *Homestead.* A homestead to the extent of one hundred and sixty acres of land lying without, or of one acre lying within, the limits of an incorporated city, occupied by the decedent and family, at the time of the owner's death, as a residence, and continued to be so occupied by the surviving spouse and children, after such death, together with all the improvements on the same, shall be wholly exempt from distribution under any of the laws of this state, and from the payment of the debts of the decedent, but it shall not be exempt from sale for taxes thereon, or for the payment of obligations contracted for the purchase thereof, or for the erection of improvements thereon, or for the payment of any lien given thereon by the joint consent of husband and wife. The title to the homestead property of a decedent shall pass the same as the title to other property of the decedent.

SEC. 19. 22-102; See 22-104; 22-107; 22-127. Last sentence is new. See *Newby v. Anderson*, 106 Kan. 477; *Hollinger v. Boatman's Bank*, 69 Kan. 519; *Dayton v. Donart*, 22 Kan. 256; *Mitchell v. Mitchell*, 69 Kan. 441; *Barbe v. Hyatt*, 50 Kan. 86; *Martindale v. Smith*, 31 Kan. 270.

SEC. 20. *Partition of homestead.* The homestead shall not be subject to forced partition unless the surviving spouse remarries, nor until all the children arrive at the age of majority.

SEC. 20. See 22-105. Gives spouse with adult children same rights as spouse without children. See *Breen v. Breen*, 102 Kan. 766; *Campbell v. Durant*, 110 Kan. 30; *Parks v. Tuftt*, 148 Kan. 221. Provisions for allotment in probate court are omitted, because (1) the provisions are seldom if ever used; (2) they fail to give adequate relief in all cases, and cannot be made to do so without the incorporation of many of the provisions of the partition statute; and (3) an adequate remedy is afforded in all cases by partition in the district court.

SEC. 21. *Allowances to spouse and minor children.* When a resident of the state dies, testate or intestate, the surviving spouse shall be allowed, for the benefit of such spouse and the decedent's minor children during the period of their minority, from the personal property of which the decedent was possessed or to which he was entitled at the time of death, the following: (1) The wearing apparel, family library, pictures, musical instruments, furniture

and household goods, utensils and implements used in the home, one automobile, and provisions and fuel on hand necessary for the support of the spouse and minor children for one year. (2) Other personal property, not exceeding an appraised value of seven hundred fifty dollars. If the appraised value, above any liens thereon, of such other personal property does not amount to seven hundred fifty dollars, the balance shall be paid in money. The property shall not be liable for the payment of any of decedent's debts or other demands against his estate, except liens thereon existing at the time of his death. If there are no minor children, the property shall belong to the spouse; if there are minor children and no spouse, it shall belong to the minor children. The selection shall be made by the spouse, if living, otherwise by the guardian of the minor children.

SEC. 21. 22-511; 22-512; 22-513; 22-514. Makes allowances more uniform and more equitable; vests title in surviving spouse, if any, otherwise in minor children.

SEC. 22. *Effect of election by spouse.* The surviving spouse, by electing to take under the will of the decedent or by consenting thereto, does not waive the homestead right nor the right to such allowance, unless it clearly appears from the will that the provision therein made for such spouse was intended to be in lieu of such rights.

SEC. 22. See 22-246. Clarifies provision as to election. See annotation in 4 A. L. R. 393.

#### ARTICLE 5.—INTESTATE SUCCESSION

SEC. 23. *Definitions.* As used in this article, the word "children" means natural children, including a posthumous child, and children adopted as provided by law, and includes illegitimate children when applied to mother and child, and also when applied to father and child where the father has notoriously or in writing recognized his paternity of the child, or his paternity thereof has been determined in his lifetime in any action or proceeding involving that question in a court of competent jurisdiction. The word "issue" includes adopted children of deceased children or issue.

SEC. 23. See 22-121; 22-122; 22-123; 22-129.

SEC. 24. *Descent of property of intestate resident.* Subject to any homestead rights, the allowances provided in section 21, and the payment of reasonable funeral expenses, expenses of last sickness and costs of administration, taxes, and debts, the property of a resident decedent, who dies intestate, shall at the time of his death pass by intestate succession as provided in this article.

SEC. 24. See 22-101; 22-127; 22-130.

SEC. 25. *Descent of property of intestate nonresident.* Real estate situated in this state, owned by an intestate decedent who is a nonresident of this state at the time of his death, shall pass by intestate succession in the same manner as though he were a resident of this state at the time of his death. The personal property of such a decedent shall pass by intestate succession under the laws of the place of his residence at the time of his death.

SEC. 25. This section is new. See *Hartley v. Hartley*, 71 Kan. 691; *In re Rieman's Estate*, 124 Kan. 539; *Cooper v. Ines*, 62 Kan. 395; *McLean v. McLean*, 92 Kan. 326; *Wilcox v. Hollar*, 115 Kan. 27; *Martin v. Martin*, 93 Kan. 714; *Williams v. Wessells*, 94 Kan. 71. "Residence" means "domicile." See 77-201, twenty-third paragraph; *Modern Woodmen v. Hester*, 66 Kan. 129.

SEC. 26. *Surviving spouse.* If the decedent leaves a spouse and no children nor issue of a previously deceased child, all his property shall pass to the surviving spouse. If the decedent leaves a spouse and a child, or children, or issue of a previously deceased child or children, one-half of such property shall pass to the surviving spouse.

SEC. 26. 22-118; 22-119; 22-127.

SEC. 27. *Half of realty to surviving spouse.* Also, the surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing, or by a will, or by an election as provided by law to take under a will, except such real estate as has been sold on execution or judicial sale, or taken by other legal proceeding: *Provided*, That the surviving spouse shall not be entitled to any interest under the provisions of this section in any real estate of which such decedent in his lifetime made a conveyance, when such spouse at the time of the conveyance was not a resident of this state and never had been during the existence of the marriage relation.

SEC. 27. 22-108; 22-117; 22-127.

SEC. 28. *Surviving children or issue.* If the decedent leaves a child, or children, or issue of a previously deceased child or children, and no spouse, all his property shall pass to the surviving child, or in equal shares to the surviving children and the living issue, if any, of a previously deceased child, but such issue shall collectively take only the share their parent would have taken had such parent been living. If the decedent leaves such child, children, or issue, and a spouse, one-half of such property shall pass to such child, children, and issue as aforesaid.

SEC. 28. 22-118; 22-127; 22-128. Provision relating to "children of the half-blood" omitted as meaningless. See *Genschorck v. Blumer*, 136 Kan. 228, 232.

SEC. 29. *No spouse, child or issue, of the decedent.* If the decedent leaves no surviving spouse, child, or issue, but leaves a surviving parent or surviving parents, all of his property shall pass to such surviving parent, or in equal shares to such surviving parents, but if the decedent is an adopted child such property shall pass to his adoptive parent or parents in like manner including a natural parent who is the spouse of an adoptive parent.

SEC. 29. 22-119; 22-120; 22-127. See *In re Yates' Estate*, 108 Kan. 721; *Baird v. Yates* (Kan.), 200 Pac. 280. Changes the law to the effect that natural parents do not inherit from child adopted by others. See section 175.

SEC. 30. *No spouse, child, issue, or parents.* If the decedent leaves no surviving spouse, child, issue, or parents, the respective shares of his property which would have passed to the parents, had both of them been living, shall pass to the heirs of such parents respectively (excluding their respective spouses), the same as it would have passed had such parents owned it in equal shares and died intestate at the time of his death.

SEC. 30. 22-120; 22-127. The words "excluding their respective spouses" are new. See *Russell v. Hallett*, 23 Kan. 276; *Tays v. Robinson*, 68 Kan. 53; *Fuller v. Haynes*, 86 Kan. 37.

SEC. 31. *Limitation on descent.* In computing degrees of relationship by blood for the purpose of the passing of property of an intestate decedent, each generation in the ascending or descending line shall be counted as one degree.

None of such property shall pass except by lineal descent to a person further removed from the decedent than the sixth degree, as so computed. In all cases of intestate succession the right of a living person to have the property, or a share of it, pass to him, shall be determined as here provided, but the property shall pass immediately from the decedent to the person entitled to receive it.

SEC. 31. This section is new. See article by Justice Walter G. Thiele in *Kansas Judicial Council Bulletin*, December, 1937, pp. 209-212.

SEC. 32. *Advancements.* Property which has been given by an intestate decedent by way of an advancement to one to whom the decedent's property, or a part of it, would pass by intestate succession, shall be counted as a part of the distributive share of such property to such person, and to that extent shall be taken into account in determining the estate to be distributed among those to whom it passes by intestate succession, but if such advancement exceeds the amount to which such person would be entitled by the laws of intestate succession he shall not be required to refund any portion of the advancement. If such person receiving an advancement dies before the decedent, leaving heirs who take from the decedent, the advancement shall be allowed in like manner as if it had been made directly to them.

SEC. 32. 22-125; 22-126; last sentence added.

SEC. 33. *Rights of aliens.* All aliens eligible to citizenship under the laws of the United States may transmit and inherit real estate, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States. All other aliens may transmit and inherit real estate, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

SEC. 33. 67-701; 67-702; see 22-1315; 22-1316; 22-1317; 22-1318.

SEC. 34. *Sale when alien not permitted to take.* Whenever by reason of section 33 an heir or devisee cannot take real estate in this state, the probate court shall order a sale of said real estate to be made in the manner provided by law for probate sales of real estate, and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

SEC. 34. 67-706; see 22-1315; 22-1316; 22-1317; 22-1318.

SEC. 35. *Incapacity to take on conviction of killing.* No person who shall be convicted of feloniously killing, or procuring the killing of, another person shall inherit or take by will or otherwise from such other person any portion of his estate.

SEC. 35. 22-133 translated into English. See *Hogg v. Whitam*, 120 Kan. 341, 342. "Conspiring to kill" omitted, not a criminal offense in this state.

SEC. 36. *Escheat.* If an intestate decedent leaves no person entitled to take his property by intestate succession, as provided in this article, it shall escheat to and become the property of the state.

SEC. 36. See 67-707; 67-708. Section added to make the article complete.



## ARTICLE 6.—WILLS

SEC. 37. *Who may make will.* Any person of sound mind, and possessing the rights of majority, may dispose of any or all of his property by will, subject to the provisions of this act.

SEC. 37. 22-201. Changes "full age" to "possessing the rights of majority." See 38-101 and 38-108. See, also, uniform act on the execution of wills, section 2.

SEC. 38. *Limitation on testamentary power.* (1) Any devise of real estate located in this state, and any bequest of any personal property by a resident of this state, without regard to the time when the will containing such devise or bequest shall have been made, to any foreign country, subdivision thereof, or city, body politic, or corporation, located therein or existing under the laws thereof, or in trust or otherwise to any trustee or agent thereof, except devises and bequests to institutions created and existing exclusively for religious, educational, or charitable purposes, is hereby prohibited. Any such devise or bequest shall be void. (2) Either spouse may will away from the other half of his property, subject to the rights of homestead and allowances secured by statute. Neither spouse shall will away from the other more than half of his property, subject to such rights and allowances, unless the other shall consent thereto in writing executed in the presence of two or more competent witnesses, or shall elect to take under the testator's will as provided by law.

SEC. 38. Subsection (1) is a House amendment.

Subsection (2). 22-238. Clarified and made to conform to section 24 herein. See *Pellett v. Pellett*, 132 Kan. 427. See, also, section 22 herein.

SEC. 39. *Election of spouse.* The surviving spouse, who shall not have consented in the lifetime of the testator to the testator's will as provided by law, may make an election whether he will take under the will or take what he is entitled to by the laws of intestate succession; but he shall not be entitled to both. If the survivor fails to consent or to make an election, he shall take by the laws of intestate succession.

SEC. 39. 22-245.

SEC. 40. *Devise or bequest to witness.* A beneficial devise or bequest made in a will to subscribing witness thereto shall be void, unless there are two other competent subscribing witnesses who are not beneficiaries thereunder. But if such witness would have been entitled to any share of the testator's estate in the absence of a will, then so much of such share as will not exceed the value of the devise or bequest shall pass to him from the part of the estate included in the void devise or bequest. Such share shall be considered as a legacy or devise within the meaning of section 103.

SEC. 40. 22-212. Takes share of void devise or bequest. See, also, section 103 herein.

SEC. 41. *Preparation of will by principal beneficiary.* If it shall appear that any will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall affirmatively appear that the testator had read or knew the contents of such will, and had independent advice with reference thereto.

SEC. 41. 22-214. Eliminates procedural provisions.

SEC. 42. *Execution and attestation.* Every will, except an oral will as provided in section 44, shall be in writing, and signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party by two or more competent witnesses, who saw the testator subscribe or heard him acknowledge the same.

SEC. 42. 22-202.

SEC. 43. *Competency of witness.* If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the admission of such will to probate.

SEC. 43. 22-215.

SEC. 44. *Nuncupative will.* An oral will made in the last sickness shall be valid in respect to personal property, if reduced to writing and subscribed by two competent, disinterested witnesses within thirty days after the speaking of the testamentary words, when the testator called upon some person present at the time the testamentary words were spoken to bear testimony to said disposition as his will.

SEC. 44. 22-273. Eliminates procedural provisions. "Ten days" changed to "thirty days."

SEC. 45. *Will executed without state.* A will executed without this state in the manner prescribed by this act, or by the law of the place of its execution, or by the law of the testator's residence either at the time of its execution or of the testator's death, shall be deemed to be legally executed, and shall have the same force and effect as if executed in compliance with the provisions of this act: *Provided*, Said will is in writing and subscribed by the testator.

SEC. 45. 22-203. Revised in accordance with the latest draft of uniform law on the subject. See uniform act on the execution of wills, section 7.

SEC. 46. *Revocation by marriage and birth; divorce.* If after making a will the testator marries and has a child, by birth or adoption, the will is thereby revoked. If after making a will the testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked.

SEC. 46. 22-240. Marriage and birth or adoption revokes will. Last sentence is new.

SEC. 47. *Manner of revocation.* Except as provided in section 46, no will in writing shall be revoked or altered otherwise than by some other will in writing; or by some other writing of the testator declaring such revocation or alteration and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence by his direction.

SEC. 47. 22-241. Last sentence of 22-241 is omitted, as it is believed to be fully covered by section 46 and the rules of ademption and lapse.

SEC. 48. *Revocation of second will not revivor of first.* If the testator shall make a second will, the revocation of the second will shall not revive the first will, unless it appears by the terms of such revocation that it was his intention to revive the first will, or unless after such revocation he shall duly

republish his first will in the presence of two or more competent witnesses who shall subscribe the same in the presence of the testator.

SEC. 48. 22-242. Last clause requires that the republication be subscribed by the witnesses. See *Collins v. Collins*, 110 Oh. St. 105, 143 N. E. 561, 38 A. L. R. 230; *In re Stickney*, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246.

SEC. 49. *After-acquired property*. All property acquired by the testator after making his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention appears from the will.

SEC. 49. 22-257. Last clause changed to conform to present rules of construction. See *Compton v. Akers*, 96 Kan. 229; *Kinkaid v. Maxwell*, 75 Kan. 50; *Jameson v. Best*, 124 Kan. 633.

SEC. 50. *When devise passes whole*. Every devise of real estate shall pass all the estate of the testator therein, unless it clearly appears by the will that he intended a less estate to pass.

SEC. 50. 22-258.

SEC. 51. *Issue of relative*. If a devise or bequest is made to an adopted child or any blood relative by lineal descent or within the sixth degree, and such adopted child or blood relative dies before the testator, leaving issue who survive the testator, such issue shall take the same estate which said devisee or legatee would have taken if he had survived, unless a different disposition is made or required by the will.

SEC. 51. 22-259. Adopted children included to conform to *Dreyer v. Schrick*, 105 Kan. 495; "blood" inserted before "relative" to conform to the decisions generally. As illustrative of the rule, see *Elliott v. Fessenden*, 83 Me. 197, 22 Atl. 115; 13 L. R. A. 37. *Union Trust Co. v. Bingham*, 273 Mass. 287, 173 N. E. 435; *In re Spier's Estate*, 224 Mich. 658, 195 N. W. 430; *Schaefer v. Barnhardt*, 76 Oh. St. 443, 81 N. E. 640, 10 Ann. Cas. 919. See, also, *Lawrence National Bank v. Jacobs*, 145 Kan. 189. Relative limited to lineal descent, or sixth degree, in accordance with section 31 herein.

SEC. 52. *Probate essential*. No will shall be effectual to pass real or personal property unless it shall have been duly admitted to probate.

SEC. 52. 22-232.

SEC. 53. *Limitation on probate of written will*. No will of a testator who died while a resident of this state shall be effectual to pass property unless an application is made for the probate of such will within one year after the death of the testator.

SEC. 53. 22-232. "Three years" changed to "one year."

SEC. 54. *Liability for withholding will*. Any person who has possession of the will of a testator dying a resident of this state, or has knowledge of such will and access to it for the purpose of probate, and knowingly withholds it from the probate court having jurisdiction to probate it for more than one year after the death of the testator, shall be barred from all rights under the will and shall be liable for all damages sustained by such beneficiaries who do not have such possession of the will and are without such knowledge thereof and such access thereto.

SEC. 54. 22-233. See, also, General Laws of 1862, ch. 41, sec. 32.

SEC. 55. *Limitation on probate of oral will*. No oral will shall be admitted to probate unless an application is made therefor within six months after the death of the testator.

SEC. 55. 22-274.

SEC. 56. *Deposit of wills.* A will enclosed in a sealed wrapper, upon which is endorsed the name and address of the testator, the day when and the person by whom it is delivered, may be deposited in the probate court of the county where the testator resides. The court shall give a certificate of its deposit and shall retain such will. During the testator's lifetime, such will shall be delivered only to him or upon his written order witnessed by at least two subscribing witnesses. After the testator's death the court shall open the will publicly and retain the same. Notice shall be given to the executor and to such other persons as the court may designate. If the proper venue is in another court the will shall be transmitted to such court, but before such transmission a true copy thereof shall be made by and retained in the court in which the will was deposited.

SEC. 56. 22-204; 22-205; 22-206; 22-207.

SEC. 57. *Duty of custodian.* After the death of a testator the person having custody of his will shall deliver it to the court which has jurisdiction thereof. Every person who willfully neglects or refuses to deliver a will after being duly ordered to do so shall be guilty of contempt of court. He shall be further liable to any party aggrieved for the damages which may be sustained by such neglect or refusal.

SEC. 57. 22-208; 22-209; 22-211. Requires custodian to deliver will to court. In some cases it is to executor's advantage to conceal the will.

#### ARTICLE 7.—LETTERS TESTAMENTARY AND OF ADMINISTRATION

SEC. 58. *Letters testamentary.* Letters testamentary shall be granted to the executor, if any is named in the will, if he is legally competent and shall accept the trust; otherwise letters of administration shall be granted with the will annexed.

SEC. 58. 22-302; 22-307.

SEC. 59. *Minor as executor.* When a person appointed executor is a minor and without the rights of majority at the time of proving the will, administration may be granted with the will annexed during his minority or disability, unless there is another executor who will accept the trust, in which case the estate shall be administered by such other executor until the minor shall arrive at full age or shall possess the rights of majority, when he may be admitted as joint executor with the former.

SEC. 59. 22-308. If minor has rights of majority he may serve.

SEC. 60. *Executor of an executor.* The executor of an executor shall have no authority as such to administer the estate of the first testator.

SEC. 60. 22-310. Latter part of 22-310 is omitted, covered by section 65 herein.

SEC. 61. *Powers of executor before letters granted.* No executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay reasonable funeral expenses, nor to interfere in any manner with such estate, further than is necessary for its conservation.

SEC. 61. 22-311.

SEC. 62. *To whom administration granted.* Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, suitable and competent to discharge the trust, and in

the following order: (1) The surviving spouse or next of kin, or both, as the court may determine, or some person or persons selected by them or any of them. (2) If all such persons are incompetent or unsuitable, or do not accept, administration may be granted to one or more of the creditors, or to a nominee or nominees thereof. (3) Whenever the court determines that it is for the best interests of the estate and all persons interested therein, administration may be granted to any other person, whether interested in the estate or not.

SEC. 62. 22-312. Subsections (1) and (2) make some minor changes in law; subsection (3) is new.

SEC. 63. *When residence of executor and administrator required.* In case of domiciliary administration, letters testamentary or of administration shall in no case be granted to a nonresident of this state; and when a domiciliary executor or administrator shall become a nonresident, the probate court shall revoke his letters.

SEC. 63. 22-328. Nonresident may serve in ancillary administration. See section 136 for appointment of agent.

SEC. 64. *Effect of will on administration.* If, after the appointment of an administrator, a will is admitted to probate, the powers of such administrator shall cease, and he shall proceed to final accounting. The new executor or administrator with the will annexed shall continue the administration.

SEC. 64. 22-325; 22-326. Clarifies present law that the new executor or administrator continues the administration.

SEC. 65. *Administrator de bonis non.* If the authority of the sole or surviving executor or administrator terminates before the estate is fully administered, a new administrator shall be appointed to administer the estate not already administered. Such successor shall have the same powers and duties as his predecessor.

SEC. 65. 22-321; 22-323; 22-324; 22-325; 22-326; 22-521; 22-750; 22-825.

SEC. 66. *Notice of appointment.* An executor or administrator, except a special administrator, shall within thirty days after his appointment and qualification cause notice of his appointment to be published in some newspaper of the county authorized by law to publish legal notices, which notice shall be published once a week for three consecutive weeks. A new administrator shall give notice of his appointment in the same manner. If notice of appointment shall not be published within the time herein prescribed, the court shall order such notice to be published; but such order shall not exempt the executor or administrator or his sureties from liability which they would otherwise incur by reason of the failure to give notice within the time herein first prescribed.

SEC. 66. 22-329; 22-721; 22-732; 22-733.

SEC. 67. *Special administrator.* For good cause shown a special administrator may be appointed pending the appointment of an executor or administrator, or after the appointment of an executor or administrator without removing the executor or administrator. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts. The duties of a special administrator shall be stated in the order of appointment. He may be required to give bond in such sum as the court shall

direct. He shall make such reports as the court shall direct, and shall account to the court upon the termination of his authority.

SEC. 67. 22-315; 22-316; 22-317; 22-318; 22-319; 22-719; 22-831. Powers can be restricted in the order and letters to specified acts and only a small bond required. The proposed changes allows the special administrator, when authorized by the court, to do anything a general administrator might do.

#### ARTICLE 8.—ESTATES OF NONRESIDENTS

SEC. 68. *Wills proved elsewhere.* Authenticated copies of wills executed and proved outside of this state according to the laws in force in the place where proved, relative to any property in this state, may be admitted to probate and record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so admitted and recorded shall have the same validity as wills made in this state in conformity with the laws thereof.

SEC. 68. 22-227; 22-228; 22-832; 22-838; 22-835. The provisions of the present laws permitting foreign representatives to function in this state have been omitted or greatly curtailed, because (1) they are unfair to Kansas creditors; (2) our courts have practically no control over them; (3) the state is insufficiently protected as to inheritance taxes; (4) ancillary proceedings provided by the code require no more work and entail no greater expense than the present law requires or entails; and (5) uniformity in proceedings is thereby established.

SEC. 69. *Administration.* The estate of a nonresident decedent shall be administered in the same manner as the estate of a resident decedent. Upon the payment of the expenses of administration, of the debts and other items here proved and of the inheritance taxes, the residue of the personal property shall be transmitted to the domiciliary executor or administrator, to be disposed of by him; or the court may direct it to be distributed according to the terms of the will applicable thereto, or if the terms of the will are not applicable thereto, or if there is no will, it shall be distributed according to the law of the decedent's residence. The real estate not sold in the course of administration shall be assigned according to the terms of the will applicable thereto, or if the terms of the will are not applicable thereto, or if there is no will, it shall pass according to the laws of this state.

SEC. 69. 22-229; 22-320; 22-231; 22-832; 22-833; 22-835; 22-930. There may not be a foreign executor or administrator to whom the assets may be delivered. See, also, *Pickens v. Campbell*, 98 Kan. 518, 520.

SEC. 70. *Innocent purchaser from heirs.* The title of any purchaser in good faith, without knowledge of a will, to any real estate situated in this state, derived from the heirs of any person not domiciled in this state at the time of his death, shall not be defeated by the production of the will of such decedent unless an application shall be made for the probate of such will in this state within one year from the death of the testator.

SEC. 70. 22-254.

#### ARTICLE 9.—ESTATES OF INTESTATES WITHOUT HEIRS

SEC. 71. *Administration.* The estate of an intestate decedent without known heirs shall be administered in the same manner as the estate of any other intestate decedent, except as herein otherwise provided. The administrator shall as expeditiously as possible convert the personal property into money, and collect the rents, income, and profits from the real estate. If no one claims as heir, devisee, or legatee within one year after the appointment of the administrator, the administrator shall sell the real estate and close the

estate as other estates are closed and pay the net proceeds of the estate to the state treasurer.

SEC. 71. 22-1207; 22-1208.

SEC. 72. *Disposition of proceeds.* The state school-fund commissioners shall invest and handle this money as other moneys of the state school fund, except that it shall be kept as a temporary fund until ten years after it shall have been first received, at which time it shall be covered into the perpetual school fund of the state, provided no one in the meantime has established his right thereto as heir, devisee or legatee.

SEC. 72. 22-1209.

SEC. 73. *Claimants to estate.* Any person who claims as heir of such decedent shall present his claim to the probate court within ten years after the appointment and qualification of the administrator, or such claim shall be forever barred. If he establishes his claim it shall be allowed by the court. The court shall determine which of several claimants have established their claims and the share of the estate to which each is entitled. If at the time of such determination the estate is in the custody of the administrator, the same shall be paid or delivered to those adjudged entitled thereto, less claims previously allowed and prior demands and other items. If the proceeds of the estate have been delivered to the state treasurer, the school-fund commissioners shall pay to those entitled thereto the sum or share of the estate the court has adjudged they are entitled to receive. No interest shall be allowed or paid thereon.

SEC. 73. 22-1210.

SEC. 74. *Subsequent claimants.* If others later, but within ten years after the appointment and qualification of the administrator, claim as heirs of such decedent and are thereafter adjudged to be heirs of the decedent and entitled to the said estate or some part thereof, and the said estate or its proceeds or some part thereof shall have been delivered or paid to those whose claims were earlier adjudged, neither the state nor the school-fund commissioners shall be liable to such claimants for moneys previously paid to those adjudged to be heirs of the decedent; but the later claimants whose claims were duly established shall have a cause of action in the district court against the earlier claimants whose claims were established to determine the rights of the respective parties, subject to any prior determination of descent made pursuant to article 22.

SEC. 74. 22-1211; "subject to any prior determination," etc., added at end of section. See sections 225, 228 herein.

SEC. 75. *Duty of county attorney and attorney general.* The state shall be a party to all such proceedings. The county attorney shall represent the state. He shall diligently protect and conserve the estate for the benefit of the state school fund, scrutinize all claims against the estate, and diligently defend against all such claims. Claimants shall have the burden of proving their claims by clear and convincing evidence. The attorney general may appear and assist the county attorney, or take charge thereof in lieu of the county attorney. The state may institute any proceedings deemed necessary or proper in the handling of such estate, and defend any proceedings instituted by another. The attorney general may appoint such persons deemed necessary

to investigate, protect, conserve, defend or handle such estate, and any such estate now pending or hereafter commenced in any court of this state shall be liable in a reasonable amount for all obligations and expenses incurred by the county attorney or attorney general in protecting, conserving, investigating, defending or handling of such estate, and the same shall be allowed by the probate court as costs of administration upon application of the county attorney or attorney general and due proof.

SEC. 75. 22-1212. The draft of this section was changed by the legislature, the principal change being the last sentence.

#### ARTICLE 10.—PARTNERSHIP ESTATES

SEC. 76. *Management.* The property of a partnership dissolved by the death of any of its members shall be delivered to the surviving partner who may be disposed to undertake the management thereof agreeably to the conditions of a bond which he shall give as provided by law. Upon the giving of such bond he shall with due diligence close the affairs of the late partnership, apply the property thereof toward the payment of the partnership debts, render an account upon oath to the probate court, whenever by it required, of all the partnership affairs, including the property owned by the late firm and the debts due thereto, as well as what may have been paid by the survivor toward the partnership debts, and what may still be due and owing therefor, and pay within one year, unless a longer time be allowed by the probate court, to the executor or administrator his proportion of the net proceeds of the partnership estate.

SEC. 76. 22-401; 22-402; 22-403; 22-404.

SEC. 77. *When administrator takes charge.* In case the surviving partner, having been duly cited for that purpose, shall neglect or refuse to give the bond required by law, the executor or administrator of the estate of the deceased partner, on giving a bond as provided by law, shall take the whole of the partnership estate into his possession, and shall be authorized to use the name of the survivor in collecting the debts due the late firm if necessary, and shall with the partnership property pay the debts due from the late firm with as much expedition as possible, and return or pay to the surviving partner his proportion of the net proceeds of the partnership estate.

SEC. 77. 22-405; 22-406.

SEC. 78. *Exhibition and surrender of property.* Every surviving partner, on demand of the executor or administrator of a deceased partner, shall exhibit to such executor or administrator and the appraisers of the deceased partner's estate the property belonging to the partnership at the time of the death of the deceased partner, for inventory and appraisal and shall furnish him a verified written statement of such property described in the manner required for inventory; and in case the administration thereof shall devolve upon such executor or administrator the said survivor shall surrender to him, on demand, all of the property of such partnership, and shall afford him all reasonable information and facilities for the execution of his trust. Willful failure or neglect by the surviving partner thus to exhibit or surrender such property, on demand, shall constitute contempt of court.

SEC. 78. 22-407; 22-408.



SEC. 79. *Sale of assets.* An executor or administrator having the whole of the partnership estate in his possession, as herein provided, may sell the assets thereof at public or private sale as provided by law, and may without such possession sell the interest of the deceased partner therein in the manner aforesaid. The surviving partner shall be an eligible purchaser.

SEC. 79. 22-409; clarified.

SEC. 80. *Accounting.* The person executing the trust, whether surviving partner or executor or administrator, shall have the same duty to account and to have his account adjudicated as in the case of ordinary administration; and such person shall be subject to the same liabilities, remedies, and penalties with reference thereto as an ordinary administrator.

SEC. 80. 22-401; 22-404; 22-405.

#### ARTICLE 11.—BONDS

SEC. 81. *Requirement and condition.* Every fiduciary, except as otherwise provided in this act, before entering upon the duties of his trust shall execute and file a bond, with sufficient sureties, in such amount as the court directs, which amount shall not be less than 125 percent of the value of the personal property and the probable annual income from real estate which shall come into his possession, conditioned upon the faithful discharge of all the duties of his trust according to law.

SEC. 81. 22-270; 22-272; 22-303; 22-309; 22-313; 22-402; 22-403; 22-406; 22-909; 22-918; 22-1001; 22-1002; 22-1003; 22-1004; 38-203; 38-207; 39-206. Reduces the minimum bond required. Many separate provisions consolidated.

SEC. 82. *Approval and prosecution.* All such bonds shall run to the state of Kansas. They shall be subject to the approval of the probate court and shall not be approved until the court is fully satisfied as to the sufficiency of the sureties. In case of breach of any condition thereof, an action on any such bond may be prosecuted in the name and for the benefit of any person interested.

SEC. 82. 22-270; 22-272; 22-303; 22-309; 22-313; 22-402; 22-403; 22-1001; 22-1002; 22-1003; 22-1004; 22-1005; 38-203; 38-207; 38-221; 39-206. Requires court to satisfy itself as to sufficiency of bond. Many separate provisions consolidated.

SEC. 83. *Joint or separate bonds.* When two or more persons are appointed joint fiduciaries, the court may approve a separate bond for each or a joint bond for all.

SEC. 83. 22-270; 22-272; 22-314.

SEC. 84. *Request of testator or settlor.* When by the terms of any last will, or other written instrument creating a trust in favor of persons subject to guardianship, the testator or settlor shall express a wish that the executor, testamentary guardian, or trustee named therein shall execute the same, or the trust created thereby, or condition named therein, without giving bond, no bond shall be required unless the probate court, for sufficient cause, deems it proper to require it; but the court may, at any subsequent period, on the application of any party interested, or on its own motion, require bond to be given.

SEC. 84. 22-270; 22-272; 22-304; 38-203. Includes settlor of living trust for minors or incompetents.

SEC. 85. *Public or charitable corporation as beneficiary.* No bond shall be required from any public, religious, charitable, or educational corporation or society, unless the will provides otherwise, where devises or legacies are given to such corporation or society in trust for any of the purposes of such corporation or society.

SEC. 85. This section is new.

SEC. 86. *Increase or reduction of bond.* The court, on its own motion or upon application of any interested person, may for good cause require a fiduciary to file a new or additional bond. Thereupon his accounts shall be settled, and if approved the liability of the sureties on such new or additional bond shall be limited to the property then in the possession of the fiduciary, or thereafter acquired by him. Whenever the court shall find the bond of a fiduciary is larger than necessary, it may, by order, reduce the liability thereon to the proper amount. It may, by like order, cancel any bond found to be unnecessary.

SEC. 86. 22-270; 22-272; 22-1006; 22-1007; 38-203; 38-207; 38-222; 39-206. For procedure, see article 22, subdivision 1.

SEC. 87. *Discharge of surety.* The court shall, upon application of a surety and after notice, require a fiduciary to settle his account and file a new bond. If such account is approved, the surety shall be discharged from liability thereafter accruing. The fiduciary shall file a new bond, to be approved by the court, and if he fails or refuses to do so he shall be removed.

SEC. 87. 22-270; 22-272; 22-1007; 22-1008; 38-203; 38-207; 38-231. For procedure, see article 22, subdivision 1.

#### ARTICLE 12.—INVENTORY AND APPRAISEMENT

SEC. 88. *Inventory.* Within thirty days from the date of his letters of appointment, unless a longer time has been granted by the court, every representative shall make an inventory, verified by his affidavit, of all the estate of the decedent or ward which shall come to his possession or knowledge. Such property shall be classified therein as follows: (1) Real estate, with plat or survey description, and if a homestead, designated as such. (2) The statutory allowances, classified according to section 21, of the estate of a decedent leaving spouse or minor children; otherwise the furniture, household goods, and wearing apparel. (3) Corporation stocks, described by certificate numbers. (4) Bonds, mortgages, notes, and other written evidence of debt, described by name of debtor, recording data, and other identification. (5) All other personal property accurately identified. If the decedent was a member of a partnership, the inventory shall contain a separate inventory of the whole of the partnership estate and of the decedent's proportional share therein. The court may, for good cause shown, require an earlier inventory of any estate.

SEC. 88. 22-401; 22-501; 22-508; 22-509; 22-510; 22-513; 22-515; 22-517; 38-208; 39-208.

SEC. 89. *Appraisement.* The inventory and the property therein described shall be exhibited by the executor or administrator to the appraisers when they are appointed. If the inventory lists no property other than moneys of the United States, no appraisement shall be required; otherwise the property shall be appraised at its full and fair value as of the date of death or date of appointment of guardian, by three disinterested persons appointed by the court

within thirty days after the appointment of the executor or administrator. Within sixty days after their appointment, unless a longer time has been granted by the court, the appraisers shall state opposite each item contained in the inventory the value thereof, and forthwith deliver such inventory and appraisal, certified by them under oath, to the representative, who shall file it with the probate court. The court may, for good cause shown, require an earlier appraisal thereof.

SEC. 89. Supp. 22-504; Supp. 22-506; Supp. 22-507; 22-513; 22-515; 38-208; 39-208.

SEC. 90. *Supplementary inventory and appraisal.* Whenever assets of any kind, not mentioned in the inventory that has been made, come to the knowledge or possession of a representative, he shall make an inventory thereof and cause such assets to be appraised, and the inventory and appraisal to be returned within thirty days after the discovery thereof.

SEC. 90. 22-525; 38-208.

SEC. 91. *Debt discharged by will to be included.* The discharge or bequest, in a will, of any debt or demand of a testator against any person shall not be valid as against the creditors of decedent, but shall be construed only as a specific bequest of such debt or demand; and the amount thereof shall be included in the inventory of the assets of the decedent, and shall, if necessary, be applied to the payment of his debts, and other items, and if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies.

SEC. 91. 22-527.

SEC. 92. *Debt of executor to be included.* The naming of any person executor in a will shall not operate as a discharge or bequest of any just claim which the testator had against such executor, but such claim shall be included among the assets of the decedent in the inventory.

SEC. 92. 22-528. Majority rule adopted. See *In re Estate of Edgington*, 144 Kan. 478.

SEC. 93. *Annual crops to be included.* Annual crops, whether severed or not from the land of the decedent at the time of his death, shall be deemed personal assets in the custody of the executor or administrator and shall be inventoried and administered as such.

SEC. 93. 22-502.

SEC. 94. *Compensation of appraisers and advisers.* Appraisers shall each be paid, for services performed by them, the sum of two dollars per day. The appraisers may be authorized by the court to employ expert and technical advisers to aid them. Such advisers, when so employed, shall be paid such compensation as the court shall deem reasonable.

SEC. 94. 22-516; 22-815. Last two sentences are new.

#### ARTICLE 13.—CLASSIFICATION AND PAYMENT OF DEMANDS

SEC. 95. *Classification of demands.* If the applicable assets of an estate are insufficient to pay in full all demands allowed against it, payment shall be made in the following classified order: First class, the expenses of an appropriate funeral in such amount as was reasonably necessary, having due regard to the assets of the estate available for the payment of demands and to the rights of other creditors. Any part of the funeral expenses allowed as

a demand against the estate in excess of the sum ascertained as above shall be paid as other demands of the fourth class. Second class, reasonable sums for the appropriate and necessary expenses of the last sickness of decedent, including wages of servants, and for the appropriate and necessary costs of administration. Third class, judgments rendered against the decedent in his lifetime, but if any such judgments shall be liens on the real estate of the decedent and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid without reference to classification, except that the demands of the first and second classes shall have precedence of judgments. Fourth class, all other demands duly proved: *Provided*, That debts having preference by the laws of the United States and demands having preference by the laws of this state shall be paid according to such preference. No preference shall be given in the payment of any demand over any other demand of the same class, nor shall a demand due and payable be entitled to preference over demands not due.

SEC. 95. *Note*: 22-701; 22-722; 22-916; 22-917. This section has nothing to do with the allowance of demands against an estate. That is provided for by section 213, and under section 189 all demands must be established by proof. This section pertains to preference in payment of demands which have been allowed. It is of no real importance except in insolvent estates. Our reports collected from probate courts show that about nine percent of the estates administered upon are insolvent. The actual figures for the years ending June 30, 1936, 1937, and 1938, show that of the 11,797 estates of decedents closed within that time, in 10,733 of them the assets were sufficient to pay all demands in full, and in 1,064 of them the assets were insufficient. The purpose of this section, as above drafted, is to prevent unreasonable or unnecessary allowances as preferences under classes *first* and *second*, to the detriment of creditors in class *four*.

22-701; 22-722; 22-916; 22-917. The words "necessary funeral expenses" have a well-defined meaning. See *Samuel v. Estate of Thomas*, 51 Wis. 549; *Schneider v. Brier's Estate*, 129 Wis. 446, 109 N. W. 99. For debts due the United States, see 31 U. S. C. A., sec. 191, and cases therein cited, and note in 77 Law Ed. 757-796. Last sentence is new.

SEC. 96. *When payment to be made*. If any executor or administrator shall not, within nine months after having given notice of his appointment, have notice of demands against the estate of the decedent which will authorize him to represent it insolvent, he may, after the expiration of said nine months, proceed to pay the debts and other items due from the estate, according to their classification.

SEC. 96. 22-723; 22-724; 22-725; 22-726; 22-916; 22-917.

SEC. 97. *Secured demands*. When a claimant holds any security for his demand, it may be allowed, conditioned upon the claimant surrendering the security or upon the claimant exhausting the security; it shall be allowed for the full amount found to be due if the security has been surrendered, or for any remaining amount found to be due if the security has been exhausted.

SEC. 97. This section is new. The bankruptcy rule is adopted.

SEC. 98. *Encumbered assets*. When any assets of the estate are encumbered by mortgage, pledge, or otherwise, the executor or administrator may pay such encumbrance or any part thereof, whether or not the holder of the encumbrance has exhibited his demand, if it appears to be for the best interests of the estate and if the court shall have so ordered. No such payment shall increase the share of the devisee, legatee, or heir entitled to receive such encumbered assets, unless otherwise provided in the will.

SEC. 98. *Supp.* 22-737. Payment of encumbrance based upon advantage to estate rather than upon advantage to the secured creditor. See *In re Estate of Hartley*, 148 Kan. 82.

## ARTICLE 14.—MANAGEMENT AND SALE OF ASSETS

SEC. 99. *Possession.* The executor or administrator shall have a right to the possession of all the property of the decedent, except the homestead and allowances to the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the heirs, devisees, and legatees. He shall keep in tenable repair the buildings and fixtures under his control and may protect the same by insurance. He may by himself, or with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same.

SEC. 99. 22-326; 22-503; Supp. 22-736; Supp. 22-738; Supp. 22-739. For construction of similar statutes, particularly of "right to the possession," see *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Rough v. Womer*, 76 Mich. 375, 43 N. W. 573; *McDaniels v. Walker*, 44 Mich. 83, 6 N. W. 112; *Footo v. Footo*, 61 Mich. 189, 28 N. W. 90; *Van Fleet v. Van Fleet*, 49 Mich. 612, 14 N. W. 566; *Edwards v. Evans*, 16 Wis. 193; *Jones v. Billstein*, 28 Wis. 221; *Flood v. Pilgrim*, 32 Wis. 376; *Marsh v. Waupaca*, 38 Wis. 250; *Curtis v. Herrick*, 14 Cal. 117, 73 Am. Dec. 632; *Jenkins v. Jensen*, 24 Utah 108, 66 Pac. 733, 91 Am. St. Rep. 783; *Estate of Higgins*, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116; *Waldo v. Waldo*, 52 Mich. 94, 17 N. W. 710; *McLeod v. Jones*, 105 Mass. 403; *Daniels v. Brown*, 34 N. H. 454; *Smith v. Park*, 31 Minn. 70, 16 N. W. 490; *Price v. Ward*, 25 Nev. 205, 58 Pac. 849, 46 L. R. A. 459; *Moranque v. Doe*, 143 Ala. 459, 39 So. 161, 5 Ann. Cas. 331, 111 Am. St. Rep. 52; *Moody v. Macomber*, 159 Mich. 657, 124 N. W. 549, 134 Am. St. Rep. 755; *Tullson v. Holloway*, 90 Neb. 481, 134 N. W. 232, Ann. Cas. 1913B 78. For procedure to procure order of delivery to heirs, devisees, and legatees before final settlement, see article 22, subdivision 1.

SEC. 100. *Continuation of business.* Upon a showing of advantage to the estate the court, with or without notice, may authorize a representative to continue and operate any business of a decedent or ward for the benefit of his estate, under such conditions, restrictions, regulations and requirements, and for such period of time not exceeding six months as the court may determine. No debts incurred or contracts entered into shall involve the estate or the representative beyond the assets used in such business immediately prior to the death of the decedent or the appointment of a guardian for the estate of the ward.

SEC. 100. This section is new. It may, in some cases, be advantageous to an estate to continue the decedent's business for a limited period in order to obtain the greatest amount in liquidating the business. This section is so drawn to provide as many safeguards against loss as are reasonable.

SEC. 101. *Foreclosure of mortgage.* An executor or administrator shall have the same right to foreclose a mortgage or collect the debt secured thereby as the decedent would have had if living and he may complete any such proceeding commenced by such decedent.

SEC. 101. 22-529.

SEC. 102. *Realty acquired.* When a foreclosure sale or a sale on execution for the recovery of a debt due the estate is had, or redemption is made, the executor or administrator shall receive the money paid and execute the necessary satisfaction or release. If bid in by the executor or administrator, the real estate shall be treated as personal property, but any sale or lease shall be made pursuant to article 23. If not so sold the real estate, and if so sold or leased the proceeds, shall be assigned or distributed to the same persons and in the same proportions as if it had been a part of the personal property of the decedent.

SEC. 102. 22-529; 22-530.

SEC. 103. *Order in which assets to be appropriated.* The property of a decedent, except as provided in sections 19 and 21, shall be liable for the payment of his debts and other lawful demands against his estate. When a will designates the property to be appropriated for the payment of debts or other items, it shall be applied to such purpose. Unless the will provides otherwise for the payment thereof, the property of a testator, subject to the payment of debts and other items, shall be applied to that purpose in the following order: (1) personal property not disposed of by will; (2) real estate not disposed of by will; (3) personal property bequeathed to the residuary legatee; (4) real estate devised to the residuary legatee; (5) property not specifically bequeathed or devised; (6) property specifically bequeathed or devised. Demonstrative legacies shall be classed as specific legacies to the extent of the payment thereof from the fund or property out of which payment is to be made, and as general legacies upon failure or insufficiency of the fund or property out of which payment was to be made to the extent of such insufficiency. The property of each class shall be exhausted before resorting to that of the next class; and all of one class shall contribute ratably if all the property of that class is not required for the payment of such debts or other items.

SEC. 103. 22-260; 22-261; 22-262; 22-264; Supp. 22-810. For reasons for specific bequests and specific devises being in same class, see *In re Martin*, (R. I.) 54 Atl. 589; *Baker v. Baker*, 319 Ill. 320, 150 N. E. 284, 24 A. L. R. 1514; *Farnum v. Bascom*, 122 Mass. 282; *O'Day v. O'Day*, 193 Mo. 62, 91 S. W. 921, 4 L. R. A., n. s., 922; *Hollowell's Estate*, 23 Pa. 223; *In re Woodworth*, 31 Cal. 595; *Manlove v. Gaut*, 2 Tenn. Ch. App. 410. The Ohio statute, like our 22-262, has been construed in that state. The court said: "As between specific legatees and devisees, where the property or money devised or bequeathed is taken to pay debts, and it cannot be otherwise replaced, contribution may undoubtedly be enforced." *Glass v. Dunn*, 17 Oh. St. 418.

SEC. 104. *Specifically bequeathed property.* Property specifically bequeathed may be delivered to the legatee entitled thereto upon his giving security for the redelivery thereof, on demand, to the executor or administrator; otherwise it shall remain in the custody of the executor or administrator, to be delivered or sold as may be required by law.

SEC. 104. 22-602.

SEC. 105. *Sale of personal property.* The executor or administrator shall, within such time as the court may direct, sell the personal property, or any part thereof, belonging to the estate: (1) When the sale of such property is necessary for the payment of debts and other items, or legacies; (2) when a division thereof cannot be made in kind to those entitled thereto; or (3) when the sale thereof is to the best interests of the estate.

SEC. 105. 22-131; 22-923; Supp. 22-601; Supp. 22-735.

SEC. 106. *Refund of legacies and distributive shares.* If after the payment of legacies or distribution it becomes necessary that the same or any part thereof be refunded for the payment of debts or other items, the amount necessary to be refunded shall be apportioned among the legatees and distributees according to their liability for payment as provided in section 103.

SEC. 106. 22-734; 22-921; 22-927.

SEC. 107. *Lease of property.* The executor or administrator may lease real estate in his possession for a term of not more than one year. He, together with the heirs and devisees having an interest therein, may lease such real estate for a term longer than one year and they may execute an oil and gas

or other mineral lease for such real estate. The income from any lease, by whatever name called, shall be received by the executor or administrator as income from such property.

SEC. 107. 22-6a01; Supp. 22-736.

SEC. 108. *Sale of realty.* The executor or administrator may sell real estate of a decedent whenever the sale thereof is necessary for the payment of reasonable funeral expenses, expenses of last sickness, wages of servants during the last sickness, cost of administration, taxes, debts, or legacies charged upon such real estate. The proceeds of any such sale which shall be available for distribution shall be distributed to the same persons and in the same shares as if it had remained real estate.

SEC. 108. 22-6a01; 22-801; 22-824.

SEC. 109. *When realty fraudulently conveyed to be included.* The real estate liable to be sold to pay debts of a decedent shall include, so far as necessary for that purpose, all real estate conveyed by him with intent to defraud his creditors; but no real estate so conveyed shall be taken from anyone who purchased it for a valuable consideration, in good faith, and without knowledge of the fraud, and no claim to real estate so conveyed shall be made unless within two years after the death of the grantor.

SEC. 109. 22-803.

SEC. 110. *Sale of part or whole.* Whenever a sale of some part of the real estate is necessary and by such sale the residue thereof would suffer manifest injury, the sale may be of the whole or such part thereof as necessity and the interests of the estate require.

SEC. 110. 22-808.

SEC. 111. *Sale under will.* If a will authorizes the executor to sell real estate, he, or an administrator with the will annexed, may exercise such power without any order of the probate court, unless the will provides otherwise.

SEC. 111. 22-826. Administrator with will annexed may exercise power unless the will provides otherwise.

#### ARTICLE 15.—ACCOUNTING AND DISTRIBUTION

SEC. 112. *Duration of administration.* Every executor and administrator shall have one year from the date of his appointment for the settlement of the estate. An administrator *de bonis non* shall have such time, not exceeding one year, as the court may determine. For cause shown the period herein limited may be extended by the court, not exceeding one year at a time. The executor or administrator shall not be disqualified thereafter in any way unless removed, but he shall not be relieved from any loss, liability, or penalty incurred by his failure to settle the estate within the time limited.

SEC. 112. 22-525; 22-907.

SEC. 113. *Duty to account.* Every executor or administrator shall present a verified account of his administration within the time limited and make application to the court to settle and allow his account and to assign the estate to the persons entitled thereto. He shall also account at such other times as the court may require.

SEC. 113. 22-901.

SEC. 114. *Time for distribution.* If upon any settlement it appears that there is sufficient money to satisfy all the demands against an estate, the executor or administrator may, on order of the court, make payment of legacies and distribution of shares, except that specific legacies shall be first satisfied; but no executor or administrator shall be compelled to pay legacies or make distribution within one year from the date of his qualification unless ordered to do so by the court nor until bond or security is given by the legatee or distributee to refund his due proportion of any demand which may afterward be established against the estate and the cost attending the recovery thereof.

SEC. 114. 22-734; Supp. 22-738; Supp. 22-739; 22-921; 22-922.

SEC. 115. *Compensation and expenses.* Whenever a decedent by will makes a provision for the compensation of his executor, that shall be taken as his full compensation, unless he files a written instrument renouncing all claim to the compensation provided for in the will. Whenever any person named as executor in a will or codicil defends it, or prosecutes any proceedings in good faith and with just cause, for the purpose of having it admitted to probate, whether successful or not, or if any person successfully opposes the probate of any will or codicil, he shall be allowed out of the estate his necessary expenses and disbursements in such proceedings, together with such compensation for his services and those of his attorneys as shall be just and proper.

SEC. 115. 22-317; 22-917; 22-920; 38-227; 62-2024.

SEC. 116. *Conditions precedent to discharge.* Whenever any bequest or devise is made to a testamentary trustee, the executor or administrator shall not be discharged, unless the will provides otherwise, until a trustee has qualified in a court of competent jurisdiction and until proof of such qualification has been made and a receipt by the trustee has been filed, except as otherwise provided. No executor or administrator who has received any funds for death by wrongful act shall be discharged until he has filed a certified copy of the order, judgment or decree of distribution of the court wherein such funds were recovered, and receipts from the persons entitled to such funds, or copies thereof certified by the clerk of such court.

SEC. 116. This section is new. As to liability of sureties on bond of executor or administrator, see *United States Fidelity & Guaranty Co. v. Decker*, (Ohio) 171 N. E. 333, 68 A. L. R. 1535; *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255; *Aetna Casualty & Surety Co. v. Young*, 107 Okla. 151, 231 Pac. 261.

SEC. 117. *Protection of remainderman's interest in personalty.* When by will the use or income of personal property is given to a person for a term of years or for life, and another person has an interest in such property as remainderman, the court, unless the will provides otherwise, may order such property to be delivered to the person having the limited estate, or to be held by the executor or some other person as trustee for the benefit of the person having the limited estate. Bond may be required of the person to whom the property is delivered or by whom it is held, in the first instance or at any time prior to the termination of the limited estate.

SEC. 117. This section is new. With the increasing popularity of investment in securities, a need has arisen for protection of the remainderman's interest in personal estates against waste by persons receiving the use or income for life from such estates, and this section should provide the court with power to deal fairly in all cases. The section makes an exception to the court's power, when the testator has made provision precluding the court from acting.



SEC. 118. *Summary proceedings.* Whenever it is established that the estate of a decedent, exclusive of the homestead and allowances to the spouse and minor children, does not exceed the amounts required for funeral expenses, expenses of last sickness, wages of servants during the last sickness, costs of administration, debts having preference under the laws of the United States or this state, and taxes, the executor or administrator may by order of the court pay the same in the order named, and present his account with an application for the settlement and allowance thereof. Thereupon the court, with or without notice, may adjust, correct, settle, allow or disallow such account, and if the account is allowed, summarily determine the heirs, legatees, and devisees, and close the administration.

SEC. 118. 22-726; 22-920. In many cases administration is commenced upon the assumption that there is a great deal of property and it later appears that there is little or no property. Under this section time and expense will be saved.

SEC. 119. *Unclaimed money.* If any part of the money on hand has not been paid over because the person entitled thereto cannot be found or refuses to accept the same, or for any other good and sufficient reason, the court may order the executor or administrator to deposit the same with the county treasurer for the benefit of the common schools of the county: *Provided*, If the person to whom said sum is ordered to be paid refuses to accept the same when it is tendered him by the executor or administrator, the court may, either before or after the sum has been deposited, order the same to be paid and distributed to those who would be entitled thereto had the refusing legatee or distributee not been entitled to it. Upon application to the probate court within ten years after such deposit, and upon notice to the county attorney and the county treasurer, the court may order the county treasurer to pay the same to the person entitled thereto. No interest shall be allowed or paid thereon, and if the deposit is not claimed within such time no recovery thereof can be had.

SEC. 119. 22-932. Holding fund for one year not required.

#### ARTICLE 16.—ACCOUNTING OF TRUSTEES

SEC. 120. *Testamentary trust inventory.* Within thirty days after it is the duty of the first qualifying testamentary trustee to take possession of the trust property he shall file with the probate court where the will was admitted to probate an inventory under oath, showing by items all the trust property which shall have come to his possession or knowledge, with an estimated value thereof.

SEC. 120. This is section 2 of the uniform trustees' accounting act prepared by the commissioners on uniform state laws, with the addition of the last five words. For a summary of the laws of the several states on the subject covered by this article, see Bogert on Trusts and Trustees, vol. 4, ch. 46.

SEC. 121. *Intermediate accountings.* Within thirty days after the expiration of the first year after the first qualifying testamentary trustee was under a duty to file his inventory as prescribed in section 120 the testamentary trustee then in office shall file with the probate court of the county where the will was admitted to probate an intermediate account under oath covering such year showing: (1) The period which the account covers; (2) a complete statement of the trust capital and income received and expended; (3) present investments and other trust property held; (4) the names and addresses of

the beneficiaries and which of them are minors or incompetents; (5) proposed distributions; (6) the payment of expenses, commissions, and counsel fees; and (7) such other facts as the court may require. Within thirty days after the end of each yearly period thereafter during the life of the trust the testamentary trustee then in office shall file with the same court an intermediate account under oath showing corresponding facts regarding the current accounting period.

SEC. 121. This is section 3 of the uniform trustees' accounting act, with a condensation of what the account shall show.

SEC. 122. *Final accounting.* Within thirty days after the termination of every testamentary trust the trustee, and in the case of the transfer of the trusteeship due to the death, resignation, removal, dissolution, merger or consolidation of a sole trustee, the successor in interest of the old trustee shall file with the probate court of the county where the will was admitted to probate a final account under oath, showing for the period since the filing of the last account the facts required by section 121 regarding intermediate accountings and, in case of termination of the trust, the distribution of the trust property which the accountant proposes to make.

SEC. 122. This is section 4 of the uniform trustees' accounting act.

SEC. 123. *Distribution accounting.* Within thirty days after the distribution of the trust property by the testamentary trustee he shall file in the court where the final account was filed a distribution account of the trust property which he had distributed and the receipts of the distributees.

SEC. 123. This is section 5 of the uniform trustees' accounting act.

SEC. 124. *Inventory by nontestamentary trustee.* Within thirty days after it is the duty of the first qualifying trustee of a trust created by written instrument, other than by will, in favor of persons subject to guardianship, to take possession of the trust property he shall file in the probate court of the county where the trust was created a notice of his appointment as trustee, a copy of the instrument creating the trust, a list of the names, addresses and dates of birth of the known living beneficiaries, and an inventory under oath of the trust property which shall come to his possession or knowledge, with an estimated value thereof.

SEC. 124. This is section 6 of the uniform trustees' accounting act, with the addition of the last five words, and the exclusion of living trusts other than those created in favor of minors and incompetents.

SEC. 125. *Accounting by nontestamentary trustee.* Every such trustee shall file intermediate, final, and distribution accounts with the probate court of the county where the trust was created, at the same intervals, under the same conditions, and with the same effect as herein provided with respect to the accountings of a testamentary trustee in the probate court.

SEC. 125. This is section 7 of the uniform trustees' accounting act.

SEC. 126. *Power of testator or settlor.* The testator or settlor of any trust affected by this article, may by provision in the instrument creating the trust, or by an amendment of the trust if a settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties which would otherwise be placed upon him by this article, or add duties to those imposed by this article on his trustee with regard to inventories and accountings: *Provided,*

That the court may, upon the application of any beneficiary or some person in his behalf, require the performance of the duties herein otherwise required. No expression of intent by any testator or settlor shall affect the jurisdiction of the courts of this state over inventories and accounts of trustees, insofar as such jurisdiction does not depend upon the provisions of this article.

SEC. 126. This is section 15 of the uniform trustees' accounting act with a minor change.

SEC. 127. *Power of beneficiary.* Subject to the approval of the court, any beneficiary, if of full age and sound mind, may, if acting upon full information, by written instrument delivered to the trustee, excuse the trustee as to such beneficiary from performing any of the duties imposed on him by this article or exempt the trustee from liability to such beneficiary for failure to perform any of the duties imposed upon the trustee by the terms of this article.

SEC. 127. This is section 16 of the uniform trustees' accounting act with a minor change.

SEC. 128. *Applicability of provisions.* Nothing in this article shall be construed to abridge the power of any court to require trustees to file an inventory, to account, to exhibit the trust property, or to give beneficiaries information or the privilege of inspection of trust records and papers, at times other than those herein prescribed; and nothing in this article shall be construed to abridge the power of such court for cause shown to excuse a trustee from performing any or all of the duties imposed on him by this article. Nothing in this article shall prevent the trustee from accounting voluntarily when it is reasonably necessary, even though he is not required to do so by this article or by court order. And nothing in this act shall require a trustee to qualify or to file an inventory or any accounting when the devise or bequest is to any governmental unit or department or solely for religious, charitable, or educational purposes, or for the maintenance of a cemetery or any part thereof or a place of burial, unless the court for good cause shown, or the will shall so require.

SEC. 128. The first part of this section is taken from section 17 of the uniform trustees' accounting act with a minor change. The purpose of the latter part is apparent. See *Harrison v. Brophy*, 59 Kan. 1.

SEC. 129. *Enforcement.* Any beneficiary may apply to the court for an order requiring the trustee to perform the duties imposed upon him by this article.

SEC. 129. This is section 18 of the uniform trustees' accounting act with a minor change.

SEC. 130. *Article not retroactive.* This article shall apply only to trusts the administration of which shall begin after the effective date of this act.

SEC. 130. This is taken in substance from the uniform trustees' accounting act.

#### ARTICLE 17.—PROVISIONS APPLICABLE TO ALL ESTATES

SEC. 131. *Corporate fiduciaries.* No bank or other corporation, unless it is organized under the laws of and has its principal place of business in this state, or is a national bank located in this state, shall be appointed or authorized directly or indirectly to act as a fiduciary in this state, except in ancillary proceedings; and no officer, employee or agent of such bank or corporation shall be permitted to act as a fiduciary in this state, whether such officer, employee or agent is a resident or a nonresident of this state, when in fact such

officer, employee or agent is acting as such fiduciary on behalf of such bank or corporation; nor shall any bank or other corporation be appointed guardian of the person of a ward.

SEC. 131. This section is new. For statutory provisions relating to corporate fiduciaries, see 17-2001 *et seq.*

SEC. 132. *Qualification of fiduciary.* Every fiduciary, before entering upon the duties of his trust, shall take and subscribe to an oath that he will faithfully and impartially and to the best of his ability discharge all the duties of his trust according to law and that he is acting on his own behalf and not on behalf of any bank or corporation organized and having its principal place of business outside this state. The oath on behalf of a corporate fiduciary shall be taken and subscribed by a duly authorized officer thereof.

SEC. 132. 22-303; 22-309; 22-313; 38-207; 39-206; 39-218; 62-2004. Last sentence taken from uniform trustees' accounting act.

SEC. 133. *Duties of fiduciary.* No fiduciary shall make a profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the estate, and he shall account for the excess when he sells for more than the appraisement and shall not be responsible for the loss when he sells for less, if such sale appears to be beneficial to the estate. He shall not be responsible for any loss happening by the insolvency of any purchaser, or his sureties, for any sale duly made according to law, if he proceeded with due caution in taking surety, and has used due diligence to collect thereon. He shall not be accountable for debts due the decedent or ward which remain uncollected without fault on his part, but where he neglects or unreasonably delays to raise money by collecting debts or selling property, or neglects to pay over the money in his hands and by reason thereof the value of the estate is lessened, or unnecessary costs, interest, or penalties accrue, or the persons interested suffer loss, the same shall be deemed waste and the fiduciary shall be charged in his account with the damages sustained. He shall not purchase any claim against the estate nor shall he purchase directly or indirectly or be interested in the purchase of any property sold by him.

SEC. 133. 22-606; 22-909; 22-910; 22-911; 22-1001; 22-1003; 22-1004.

SEC. 134. *Liability for conversion.* If any person embezzles or converts to his own use any of the personal property of a decedent or ward, such person shall be liable for double the value of the property so embezzled or converted.

SEC. 134. 22-912. Extends present law to any person.

SEC. 135. *Notice to consular representative.* When it appears in the administration of an estate of a decedent or a ward that subjects, citizens or nationals of any foreign country are or may be interested as heirs, devisees, legatees, or otherwise, the court before whom the matter is pending shall give notice by mail to the consular representative of such country for this state of the pendency of such matter and the probable interest of such foreign citizens, subjects, and nationals therein, if such consular representative has filed his name and address in such court. The failure to give such notice shall not affect the validity of any proceeding.

SEC. 135. 22-331.

SEC. 136. *Appointment of agent.* Every nonresident appointed fiduciary in this state shall, before entering upon the duties of his trust, appoint in writing

an agent residing in the county where the appointment is made, and shall by such writing consent that the service of any notice or process when made upon said agent shall have the same force and effect as if made upon the fiduciary personally within said county and state. Such writing shall state the correct address of such agent and shall be filed in the probate court where such appointment is made. Service of notice or process upon such agent shall have the same force and effect as personal service upon the fiduciary.

SEC. 136. This section is new. Taken in substance from the Oklahoma statutes. See Oklahoma Statutes, 1931, sec. 1073.

SEC. 137. *Powers of nonresident fiduciaries.* Upon the filing for record in the probate court of the proper county of an authenticated copy of his letters or other record of his authority and a certificate that the same are still in force, a fiduciary appointed by a court of competent jurisdiction in another state or country may assign, extend, release, satisfy, or foreclose any mortgage, judgment, or lien, or collect any debts secured thereby belonging to the estate represented by him. The sale, lease, or mortgage of any real estate acquired on execution or judicial sale by a foreign representative shall be made pursuant to article 23.

SEC. 137. 22-231; 22-832; 22-833; 22-835; 22-224; 22-225; 39-218.

SEC. 138. *Nonresident fiduciary may sue and be sued.* A fiduciary duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of fiduciary, in like manner and under like restrictions as a nonresident may sue or be sued.

SEC. 138. 22-1308; 38-232.

SEC. 139. *Accounting on resignation.* A fiduciary may resign his trust at any time, but his resignation shall not be effective until the court shall have examined and allowed his final account and shall have made an order accepting such resignation.

SEC. 139. 22-321; 38-222; 38-229; 39-223; 39-229.

SEC. 140. *Effect of resignation.* The acceptance of the resignation of a fiduciary and the appointment of another shall not affect the liability of such former fiduciary, or his sureties, previously incurred.

SEC. 140. 22-322.

SEC. 141. *Removal and penalties.* Whenever a fiduciary is or becomes insane or otherwise incapable of performing the duties of his trust, he may be removed. Whenever a fiduciary fails or refuses to perform any of the duties imposed upon him by law or by any lawful order of the court, he may be removed and his compensation may be reduced or forfeited, in the discretion of the court.

SEC. 141. 22-323; 22-520; 22-533; 22-903; 22-922; 38-221; 38-222; 39-229; 62-2005; see uniform trustees' accounting act.

SEC. 142. *Accounting on death or disability.* Whenever a sole or the last surviving fiduciary dies, or is adjudged insane or otherwise mentally incompetent, his representative, upon appointment, shall file an account and application for the settlement and allowance thereof and, if proper, for distribution. If the estate has not been fully administered, the surety shall not be discharged

until a successor has been appointed and qualified and receipted for the unadministered property.

SEC. 142. This section is new. Provides a method of accounting in case of death or insanity.

SEC. 143. *Termination of authority not to invalidate acts.* All the acts of a fiduciary as such, before the termination of his authority, shall be as valid to all intents and purposes as if such fiduciary had continued lawfully to execute the duties of his trust.

SEC. 143. 22-327; 22-825.

SEC. 144. *Compromise with debtor.* Whenever it appears for the best interests of the estate, the fiduciary may, on order of the court, effect a fair and reasonable compromise with any debtor or other obligor.

SEC. 144. 22-532.

SEC. 145. *Authorizing conveyance or lease.* When any person legally bound by a written instrument to make a conveyance or lease dies before making the same, or when any ward is likewise bound to make a conveyance or lease, the representative of the estate may, upon order of the court and with its approval, make the conveyance or lease to the person entitled thereto.

SEC. 145. 22-234; 22-827.

SEC. 146. *Platting real estate.* Whenever it is for the best interests of the estate of a decedent or ward, real estate may, with the approval of the court, be platted by the fiduciary.

SEC. 146. 22-1311; 38-211; 38-214.

SEC. 147. *Compensation and expenses.* Every fiduciary shall be allowed his necessary expenses incurred in the execution of his trust, and shall have such compensation for his services and those of his attorneys as shall be just and reasonable. At any time during administration the fiduciary may apply to the court for an allowance upon his compensation and upon attorneys' fees.

SEC. 147. 22-317; 22-917; 22-920; 38-227; 62-2024. Provides application may be made for fees of fiduciaries and attorneys during administration. See, also, section 116 herein, applicable only to decedents' estates.

SEC. 148. *Discharge.* Whenever any fiduciary has paid or transferred to the persons entitled thereto all of the property of the estate, paid all taxes required to be paid by him and has filed proof thereof, and has complied with all the orders and decrees of the court and with the provisions of law, and has otherwise fully discharged his trust, the court shall finally discharge him and his sureties.

SEC. 148. 22-906; 22-931.

#### ARTICLE 18.—GUARDIANSHIP

SEC. 149. *Definition.* As used in this article, the term "incompetent person" includes insane person, lunatic, idiot, imbecile, distracted person, feeble-minded person, drug habitué, or an habitual drunkard, who is incapable of managing his person or estate.

SEC. 149. 39-240.

SEC. 150. *Natural, testamentary, and probate guardians.* The father and mother are the natural guardians of the persons of their minor children. If either dies, or is incapable of acting, the natural guardianship devolves upon

the other. The survivor may, by last will, appoint a guardian for any of his children, whether born at the time of making the will or afterwards, to continue during the minority of the child, or for a less time; and every such testamentary guardian shall have the same power and shall perform the same duties with regard to the person and estate of the ward as natural guardians, subject to the provisions of the will. If without such will both parents are dead or disqualified to act as guardian, the probate court may appoint one. Although the parents are living and of sound mind, yet if the minor has property not derived from either of them, a guardian shall be appointed to manage such property.

SEC. 150. 38-201; 38-202; 38-205. See *Denton v. James*, 107 Kan. 729, 733, 734.

SEC. 151. *Persons subject to guardianship.* When it is necessary, the probate court shall appoint one or two persons suitable and competent to discharge the trust, as guardians of the person or estate, or both, of any person who is a minor, or any incompetent person. When a person is of full age by the laws of his residence, but would, if residing here, be a minor by the laws of this state, a guardian of his estate may be appointed. No guardian of the person of any minor shall be appointed while proceedings for his care and custody are pending in any court of this state.

SEC. 151. 38-204; 38-205; 38-235; 38-237; 39-201; 39-241.

SEC. 152. *Guardian's duties.* A guardian shall be subject to the control and direction of the court at all times and in all things. A guardian of the person shall have charge of the person of the ward. A guardian of the estate shall (1) prosecute and defend for his ward; (2) sell assets of the estate when the interests of the ward and his estate require the sale thereof; (3) pay the reasonable charges for the support, maintenance, and education of the ward in a manner suitable to his station in life and the value of his estate; but nothing herein contained shall release parents from obligations imposed by law as to the support, maintenance, and education of their minor children; (4) pay all just and lawful debts of the ward and the reasonable charges incurred for the support, maintenance, and education of his spouse and children; (5) possess and manage the estate, collect all debts and claims in favor of the ward, or with the approval of the court compromise the same; and (6) invest all funds, except such as may be currently needed for the debts and charges aforesaid and the management of the estate, in such securities as are proper for the investment of trust funds, including securities approved by the comptroller of the currency of the United States for the investment of trust funds by national banks.

SEC. 152. 38-209; 38-210; 39-207; 39-209; 39-210; 39-230; 39-231; 62-2005; 62-2006; 62-2007; 62-2009; 62-2010; 62-2011; 62-2014; 62-2020. Guardian may, with court approval, sell bonds, stocks, wheat without further appraisal. For investments proper for national banks, see Reports of Comptroller of Currency.

SEC. 153. *Original assets.* A guardian may retain, until maturity, any security or investment which was a part of the trust estate as received by him, even though such security or investment is not of the class considered as proper for the investment of trust funds, unless circumstances are such to require the guardian to dispose of such security or investment in the performance of his duties according to law. A guardian entitled to a distributive share of the assets of an estate or trust shall have the same right as other dis-

tributees or beneficiaries to accept or demand distribution in kind, and may retain any security or investment so distributed to him as though it were a part of the original estate received by him.

SEC. 153. This section is new. It permits guardians, subject to limitations, to retain original assets and to accept distribution in kind.

SEC. 154. *Power to lease for three years or less.* A guardian of the estate may, subject to the approval of the court, lease for three years or less the possession or use of any real estate of his ward whenever it appears to be for the best interests of the ward and his estate.

SEC. 154. 39-211; 62-2008. A property lease for three years or less may be made with court approval.

SEC. 155. *Sale, lease, mortgage.* A guardian of the estate may, pursuant to article 23, sell, lease for more than three years, or for oil and gas or other minerals, or mortgage any real estate of a ward subject thereto to provide for the support, maintenance, and education of the ward, his spouse and children, or whenever the personal property is insufficient to pay his debts and other demands against the estate, or whenever it shall be determined by the court that such sale, lease, or mortgage is for the best interests of the ward and his estate.

SEC. 155. 38-211; 39-211; 62-2008. A property lease for more than three years, and a mineral lease may be made in the same manner as real estate is sold or mortgaged. See article 23 herein.

SEC. 156. *Sale of inchoate right.* The guardian of the estate of a spouse may, with or without notice, upon order of the probate court, sell, convey, lease or mortgage, any real estate, except the homestead, the title to which is in the other spouse; but no guardian's deed or other instrument executed by virtue of such order shall be valid unless the other spouse, or if insane his guardian, shall join therein as one of the grantors thereof.

SEC. 156. 39-211; 39-221; 62-2008. Provision of present law authorizing alienation of homestead unconstitutional. *In re Barnell Estate*, 141 Kan. 842.

SEC. 157. *Extension of mortgage.* A guardian may, subject to the approval of the court, make an extension of an existing mortgage, or of a prior extension thereof, for a period of five years or less, if the extension agreement contains the same prepayment privileges and the rate of interest does not exceed the lowest rate in the mortgage extended.

SEC. 157. 39-211; 62-2008. Mortgage may be extended for five years at a time, with court approval.

SEC. 158. *No personal liability on mortgage note.* No guardian shall be personally liable on any mortgage note or by reason of the covenants in any instrument of conveyance duly executed by him in his representative capacity.

SEC. 158. This section is new. The ward is not personally liable. *Eureka Building & Loan Association v. Schultz*, 139 Kan. 435. The guardian is personally liable at common law. Personal liability of guardian avoided.

SEC. 159. *Accounting and settlement.* Except where expressly waived by the court, every guardian shall annually present a verified account covering the period from the date of appointment or the last account. At the termination of the guardianship, or upon the guardian's removal or resignation, he or his surety, or in the event of his death or disability, his representative or surety, shall present a verified final account with an application for the settle-



ment and allowance thereof; and such guardian or his estate shall not be discharged from liability until such account is presented, settled, and allowed.

SEC. 159. 38-222; 39-223; 39-227; 39-228; 62-2015; 62-2021 62-2022. Guardian settles with the court. See *Fitzpatrick v. National Surety Co.*, 148 Kan. 303.

SEC. 160. *Termination of guardianship.* A guardianship of a minor shall terminate upon his death or upon his attainment of legal age. The marriage of a ward, under guardianship as a minor only, shall terminate the guardianship of his person, but not of his estate unless by such marriage the rights of majority are thereby conferred. The guardianship of a ward, other than a minor, shall terminate upon his death or upon his restoration to capacity. Whenever there is no further need of any guardianship the court may terminate it.

SEC. 160. 38-222; 38-229; 39-228; 76-1225. Guardianship may be terminated when no further need of it.

SEC. 161. *Estate of less than five hundred dollars.* If the estate of a ward is less than five hundred dollars, and the ward is a minor, the court may in its discretion, without the appointment of a guardian, or the giving of bond, authorize the deposit thereof in a savings account of a bank, payable to the legal guardian when appointed or to the ward upon his attaining the age of majority; or the court may authorize the payment or delivery thereof to the natural guardian of the minor, or to the person by whom the minor is maintained, or to the minor himself.

SEC. 161. This section is new. When the minor is industrious and frugal, and the amount is small, it seems unnecessary to subject the fund to the expense of guardianship.

#### ARTICLE 19.—ESTATES OF CONVICTS

SEC. 162. *Appointment of trustee.* The probate court may appoint a trustee of the estate of any person imprisoned in the penitentiary under a sentence of imprisonment for life, to manage and administer his property.

SEC. 162. See 62-2001 to 62-2024. Descent of property is not cast. *Smith v. Becker*, 62 Kan. 541; *Preston v. Fyfe*, 81 Kan. 906. Present law has no provision for trustee of estate of convict imprisoned for life. Such convict is civilly dead. 21-118. Hence, the provision for trustee in such cases. Convicts imprisoned for less than life may make contracts for the sale, lease, mortgage, and management of their property. 21-134. Hence, no trustee is necessary, and 62-2002 to 62-2024 are obsolete.

SEC. 163. *Provisions applicable to convicts' estates.* The provisions of law relating to the estates of incompetents, guardians thereof, and their powers, duties, and liabilities in connection therewith, shall govern in the administration and management of the estates of such convicts, trustees thereof, and their powers, duties and liabilities in connection therewith.

SEC. 163. Law pertaining to guardianship of estates of incompetents is made applicable.

SEC. 164. *Termination of trusteeship.* Upon the death of such imprisoned convict, or the commutation of his sentence to a sentence of less than life, or his lawful release from his imprisonment by parole or otherwise, the trustee shall settle his accounts as required of a guardian upon the death or restoration of an incompetent person.

SEC. 164. Provides for termination of trusteeship.

## ARTICLE 20.—COMMITMENT AND CARE OF INSANE PERSONS

SEC. 165. *Definitions.* As used in this article, unless the context otherwise indicates: (1) The term "insane person" means any person who is so far disordered in his mind as to endanger health, person, or property; or any person who is so far disordered in his mind as to render him a proper person for care and treatment in a hospital for insanity or mental disease: *Provided*, That no person idiotic from birth or whose mental development was arrested prior to the age of puberty, and no person afflicted with simple epilepsy shall be regarded as insane, unless the manifestations thereof are such as to endanger health, person, or property. (2) The word "patient" means any person for whose commitment as an insane person proceedings have been instituted or completed. (3) The term "state hospital" includes the Topeka state hospital for the insane, the Osawatomie state hospital for the insane, the Larned state hospital for the insane, the Parsons state hospital for epileptics, and the Winfield state training school.

SEC. 165. 39-232; 39-238; 76-1203.

SEC. 166. *Temporary detention.* No person who has not been adjudged insane shall by reason of his insanity be restrained of his liberty; but he may be temporarily detained for a reasonable time, not exceeding ten days, pending a judicial determination of his mental condition.

SEC. 166. 76-1204. For procedure, see article 22, subdivisions 8 and 9.

SEC. 167. *Admission to hospital.* Any person adjudged to be insane may be committed to a state hospital. In case of commitment the probate court shall make an application in the manner prescribed by the state board of administration for the admission of the patient to a state hospital and shall furnish the board with a transcript of the proceedings. The state board shall determine whether the patient shall be admitted and, in case of admission, shall designate the hospital to which admission shall be made. Thereupon the court shall issue to the sheriff or any other person a warrant in duplicate committing the patient to the custody of the superintendent of the proper state hospital. The probate court, at the time of the inquest, shall inquire into the pecuniary condition of the patient and those bound by law to support him, and shall transmit to the superintendent a statement showing the assets and liabilities of the patient and of those bound by law to support him. The patient committed shall be designated as either a private or a county patient.

SEC. 167. 39-238; 76-1212; 76-1213; 76-1217.

SEC. 168. *Release before commitment.* Before the delivery of the warrant of commitment, the court may release an insane patient to any person who files a bond to the state in such amount as the court may direct, conditioned upon the care and safekeeping of the patient; but no person against whom a criminal proceeding is pending, or who is dangerous to the public, shall be so released.

SEC. 168. 76-1214.

SEC. 169. *Detention at hospital.* Upon delivery of an insane patient to the state hospital to which he has been committed, the superintendent thereof shall retain the duplicate warrant and endorse his receipt upon the original, which shall be filed in the court of commitment. After such delivery, the

patient shall be under the care, custody, and control of the board of administration until discharged by it or by a court of competent jurisdiction. Whenever a patient is paroled, discharged, transferred to another institution, dies, escapes, or is returned, the hospital having charge of the patient shall transmit notice thereof to the probate court of the patient's residence. Whenever a patient in a state hospital is duly adjudged not to be insane he shall be discharged therefrom.

SEC. 169. This section is new.

SEC. 170. *Duty to support patient.* The following shall be bound by law to support persons adjudged to be insane: Spouses, parents, and children. The maintenance, care, and treatment of such person shall be paid by the guardian of his estate, or by any person bound by law to support him, or by the county. In case of payment by the county it may recover the amount paid by it from the estate of such person or from any person bound by law to support such person. The state may recover the sum of five dollars per week, to be applied on the maintenance, care, and treatment of a patient in a state hospital, from the estate of such person, or from any person bound by law to support such person. The state shall annually make written demand upon the spouse, parents, and children liable for the support of the patient for the amount claimed by the state to be due for the preceding year, and no action shall be commenced by the state against such spouse, parents, or children for the recovery thereof unless such action is commenced within three years after the date of such written demand.

SEC. 170. 39-232; 39-233. Puts a limitation on recovery of claims by the state.

SEC. 171. *Discharge from hospital.* Authority to discharge patients from state hospitals for the insane is vested in the board of administration, but may be delegated to the superintendent, under such regulations as the board shall adopt. Discharges may be made for any of the following reasons: (1) The patient is not insane. (2) He has been restored to capacity. (3) He is capable of caring for himself. (4) Friends of the patient request his discharge and in the judgment of the superintendent no evil consequences are likely to follow his discharge. (5) There is no prospect of further improvement and the room occupied by him is needed for others. Authority is also vested in the board to release patients on parole. No patient who is violent, dangerous or unusually troublesome or filthy shall be released or returned to any county not provided with suitable facilities for the proper care of the patient. No patient who has not been restored to capacity, or who is charged with a criminal offense, shall be released until at least ten days after notice that he is to be released has been transmitted to the probate court of patient's residence. The probate court on receipt of such information shall transmit the information to the county attorney.

SEC. 171. 76-1224.

SEC. 172. *Penalty for unlawful acts.* Whoever for a corrupt consideration or advantage, or through malice, shall make or join in making, or advise the making of any false petition, report, or verdict, in any proceeding for the commitment of a patient, or shall knowingly or willfully make any false representation for the purpose of causing such petition, report, or verdict to

be made, shall be guilty of a misdemeanor, and punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than one year.

SEC. 172. 76-1229.

#### ARTICLE 21.—ADOPTION OF CHILDREN

SEC. 173. *Who may adopt.* Any adult, or husband and wife jointly, may adopt any minor or adult as his child in the manner herein provided; but one spouse cannot do so without the consent of the other.

SEC. 173. 38-105; 38-118. Residence of child in home of adopter required; this provision is found in most late revisions. For procedure, see article 22, subdivision 10.

SEC. 174. *Written consent required.* Before any minor child is adopted, consent must be given to such adoption: (1) By the living parents of such child. (2) By the mother of an illegitimate child: *Provided*, If the father of such illegitimate child has acknowledged paternity and has assumed the duties of a parent, his consent shall also be required. (3) By one of the parents if the other has failed or refused to assume the duties of a parent for two consecutive years or is incapable of giving such consent. (4) By the legal guardian of the person of the child if both parents are dead or if they have failed or refused to assume the duties of parents for two consecutive years. (5) By the proper authority of any charitable institution or child welfare agency authorized by the laws of this state to place children for adoption when such institution or agency has acquired custody and legal control of the child for the period of minority. In all cases where the child sought to be adopted is over fourteen years of age and of sound intellect, the consent of such child must be given. Consent in all cases shall be in writing, acknowledged before an officer authorized by law to take acknowledgments. Minority of a parent shall not invalidate his consent.

SEC. 174. 38-106; 38-117. Consent of divorced parent to whom custody is not awarded is required because (1) upon death of parent having custody, custody goes to surviving parent, (2) right of natural parent to inherit from child adopted by another is cut off. Section makes it clear that minority of parent giving consent shall not invalidate it. Adults may be adopted.

SEC. 175. *Effect of adoption.* Any child adopted as herein provided shall assume the surname of the person by whom the child is adopted, and shall be entitled to the same rights of person and property as a natural child of the person thus adopting the child. The person so adopting such child shall be entitled to exercise all the rights of a natural parent and be subject to all the liabilities of that relation. Upon such adoption all the rights of natural parents to the adopted child, including their right to inherit from such child, shall cease, except the rights of a natural parent who is the spouse of the adopting parent.

SEC. 175. 38-105; 38-107. Spouse of natural parent may adopt without natural parent relinquishing rights. "Heirs at law" omitted. *Nemo est haeres ventis*.

SEC. 176. *Report of adoption.* The probate court shall report the adoption to the state registrar of vital statistics.

SEC. 176. This section is new. Found in most late revisions.

## ARTICLE 22.—PROBATE PROCEDURE

1. *General Provisions*

Sec. 177. *Pleading.* Every application in a probate proceeding, unless made during a hearing or trial, shall be by petition signed and verified by or on behalf of the petitioner. No defect in form shall impair substantial rights; and no defect in the statement of jurisdictional facts actually existing shall invalidate any proceedings.

Sec. 177. 22-208; 22-265; 22-301; 22-709; 22-710; 22-810; 22-828; 22-1312; 38-212; 39-201. The theory and practice of probate procedure in ordinary matters may be summarized as (1) application or petition to the court; (2) citation or notice of hearing; (3) hearing or trial; (4) order or decree; and (5) enforcement by execution or other proceedings. The numerous specific procedures in which the present statutes abound could not be converted into a general and uniform one without material changes. The foregoing citations to them and those to follow are in many instances to specific procedures while the draft provides for a general procedure.

Sec. 178. *Contents of petition.* Every petition in a probate proceeding shall state: (1) The name, residence, and address of the petitioner; (2) the interest of the petitioner and his right to apply to the court; (3) the jurisdictional facts; (4) the facts, in ordinary and concise language, showing that the petitioner is entitled to the relief sought; and (5) a prayer for relief.

Sec. 178. 22-301; 22-6a02; 22-804; 22-1312. This section refers to all petitions and provides for a concise statement of all necessary facts. The residence and address are important for the purpose of service of notice or citation. This section should be considered in connection with other sections relating to petitions for particular purposes.

Sec. 179. *Venue.* Proceedings for the probate of a will or for administration shall be had in the county of the residence of the decedent at the time of his death; if the decedent was not a resident of this state, proceedings may be had in any county wherein he left any estate to be administered. Proceedings for the appointment of a guardian of the person may be had in the county of the ward's residence or where he may be found. Proceedings for the appointment of a guardian of his estate shall be had in the county of the ward's residence; if he resides without this state, proceedings may be had in any county in which any of his property is situated. Proceedings for the administration of a partnership estate by the surviving partner shall be had in the county of the residence of the deceased partner at the time. If the deceased partner is a nonresident of the state the proceedings may be had in any county in which any of the partnership property is situated. Such proceedings first legally commenced shall extend to all of the property of the decedent or ward in this state. If proceedings are instituted in more than one county, they shall be stayed except in the county where first commenced until final determination of venue. If the proper venue is determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. Proceedings by a person seeking to adopt a child shall be had in the county of the residence of such person if he is a resident of the state. If such person is a nonresident of the state such proceedings shall be had in the county in which the child to be adopted resides, except that if the child is in the custody of an institution or agency authorized

by the laws of this state to place children for adoption such proceedings shall be had in the county in which such institution or agency is located.

SEC. 179. 22-208; 22-301; 38-236; 39-201; 62-2002. Venue, rather than jurisdiction, is the proper term. See *In re Davidson's Estate*, 168 Minn. 147, 210 N. W. 40; *In re Martin's Estate*, 188 Minn. 408, 247 N. W. 515. This section in connection with provisions for notice and hearing avoids the difficulties that arose in *Ewing v. Mallison*, 65 Kan. 484; *Dresser v. Bank*, 101 Kan. 401; *Edington v. Stine*, 135 Kan. 173; and other cases. The matter is determined at the beginning before complications arise or loss results.

SEC. 180. *Commencement of proceeding.* A probate proceeding may be commenced in the probate court by filing a petition and causing it to be set for hearing. When a petition is filed the court shall fix the time and place for the hearing thereof. When a petition is filed for the appointment of a representative, the court may appoint the proposed representative or some other suitable person, with or without bond, to conserve the estate until a hearing is had and a representative is appointed.

SEC. 180. 22-301; 22-315; 22-316; 22-318; 22-319. Every application to the court, except as stated, is a separate proceeding. See *In re Murphy*, (Ohio) 29 Nisi Prius, n. s., 183. Thus a proceeding to probate a will is a separate proceeding from one to sell real estate in the same estate.

SEC. 181. *Persons under disability.* The petition of a person under legal disability shall be by his guardian or next friend. When it is by his next friend the court may substitute the guardian, or any person, as the next friend. The court may appoint a guardian *ad litem* in any probate proceeding to represent and defend a party thereto under legal disability.

SEC. 181. See 60-406. The appointment of a guardian *ad litem* is discretionary; unnecessary in merely formal matters. If a contest is imminent or substantial rights are affected, one should be appointed.

SEC. 182. *No abatement.* No probate proceedings commenced by a representative shall abate by reason of the termination of his authority.

SEC. 182. This section is new. No abatement where representative dies, resigns, or is removed. New representative begins where the old one left off.

SEC. 183. *Venue of actions against fiduciaries.* Any fiduciary of any estate or ward may be sued in the district court of the county in which he was appointed, or in which he resides. If the fiduciary does not reside in the county of his appointment, service may be had upon him by serving a summons in the county of his residence.

SEC. 183. Supp. 22-1009.

SEC. 184. *Notice to be fixed by court.* When notice of any probate proceedings is required by law or deemed necessary by the court and the manner of giving the same shall not be directed by law, the court shall order notice to be given to all persons interested, in such manner and for such length of time as it shall deem reasonable. Any required notice may be waived in writing by any competent person or by any fiduciary.

SEC. 184. This and the following three sections cover the subject of notice in ordinary matters; the sections are so drawn as to displace the present "twenty-two situations arising in the administration of estates of decedents where notice or citation is required, no two of which number are identical as to the four essentials of notice; the kind of notice, the length of notice, the manner of service, and the persons who must be served." (Charles L. Hunt, in 1 Kan. Bar. Assn. Journal 228, February, 1933.) They also displace similar situations in the estates of wards. Judgments and decrees will be as free from collateral attack as judgments of the district court. Under this section the court may require notice to be given pursuant to section 185.

SEC. 185. *Notice by publication and mailing.* When notice of hearing is required by any provision of this act, by specific reference to this section,

such notice shall be published once a week for three consecutive weeks in some newspaper of the county authorized by law to publish legal notices. The first publication shall be had within ten days after the order fixing the time and place of the hearing; and within seven days after first published notice the petitioner shall mail or cause to be mailed a copy of the notice to each heir, devisee, and legatee whose name and address are known to him. The date set for the hearing shall not be earlier than seven days nor later than fourteen days after the date of the last publication of notice.

SEC. 185. The substance of this section is taken from the Minnesota laws. See Minnesota Probate Code, sec. 188. Sections 223, 227, and 259 require notice of hearing petition for final settlement, decree of descent, and for sale, lease (for more than three years or for mineral lease) to be given as required by this section. Section 198 requires notice of hearing for probate of domestic will or for administration to be given as required by this section unless the court makes an order to the contrary. Under section 222 the court may require notice of hearing for partial distribution to be given as required by this section. In all other cases, except notice of appointment (section 67), sale of realty at public auction (section 263), and sale of personalty at public auction (section 219), where notice is required, it shall be given in such manner and to such persons as the court directs. The court may direct notice in such cases to be given pursuant to this section. Notice by mail is made obligatory by this section, as notice by publication of itself in the larger cities is practically no notice at all.

SEC. 186. *Form of notice.* Notice of any hearing, if such is required, shall be in substantially the following form:

*State of Kansas, ..... County, ss.* In the probate court of said county and state. In the matter of the estate of (name of decedent or person under disability, with a specific designation which it is). Notice of Hearing. The state of Kansas to (names of persons to whom notice is given), and all other persons concerned:

You are hereby notified that a petition has been filed in said court by (name of petitioner and capacity in which he appears), praying for (state nature of petition and the nature of the judgment, order or other relief sought), and you are hereby required to file your written defenses thereto on or before the ..... day of ....., 19 ....., at ..... o'clock ..... m. of said day, in said court, at which time and place said cause will be heard. Should you fail therein, judgment and decree will be entered in due course upon said petition. Witness my hand in the city of ..... in said county and state this ..... day of ....., 19.....

....., *Petitioner.*

SEC. 186. The substance of this section is taken from the Florida laws. See Florida Probate Act, sec. 46. The form is so drawn that it may be used in all probate proceedings requiring notice, whether by publication, mailing, or personal service. Uniformity is procured.

SEC. 187. *Proof of service and effect.* In all cases of notice by publication the newspaper shall be selected by the petitioner or other person required to give such notice. Proof by affidavit of service in all cases requiring notice, whether by publication, mailing, or otherwise, shall be filed before the hearing. No defect in any notice nor in the service thereof, not affecting the substantial rights of the parties, shall invalidate any proceedings after such notice and the proof of service thereof shall have been approved by the court.

SEC. 187. First sentence: See *John Hancock Mutual Life Insurance Co. v. Heinzl*, 141 Kan. 540. Last sentence: See *Thompson v. Bale*, 23 Kan 88; *Johnson v. Clark*, 18 Kan. 157.

SEC. 188. *Hearings and rules of evidence.* Trials and hearings in probate proceedings shall be by the court unless otherwise provided by law. The determination of any issue of fact or controverted matter on the hearing of any probate proceeding shall be in accordance with the rules of evidence provided for civil cases by the code of civil procedure.

SEC. 188. 22-216. Rules of evidence prescribed by civil code apply.



SEC. 189. *Judgments and their vacation.* No judgment or decree shall be rendered in a probate proceeding without proof. The court shall have control of its orders, judgments, and decrees for thirty days after the date of the rendition thereof. Thereafter such orders, judgments, and decrees may be vacated or modified as provided by section 605 of the code of civil procedure.

SEC. 189. 22-915; see 22-222. *First clause:* One reason assigned by the courts for allowing collateral attacks upon probate decrees is that "the question may be decided by default, although the practice is a bad one, without hearing and without any actual notice," *Bank v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894, cited in *Ewing v. Mallison*, 65 Kan. 484. *Second clause:* Terms are abolished by section 13 herein, and the court has control over its judgments, as of term time, for thirty days. The two-year statute of limitations applies as to vacation for fraud. See 60-8016.

SEC. 190. *Taxation of costs.* In all probate proceedings relating to the estate of a decedent or ward, the court shall tax the costs thereof against the estate unless otherwise provided by this act, or unless it appears that it would be unjust and inequitable to do so, in which event the court shall tax such costs or any part thereof against such party as it appears to the court is just and equitable in the premises.

SEC. 190. 22-701; 22-707; 22-716; 22-718; 22-720; 22-806; 22-811; 22-824.

SEC. 191. *Remission of court costs in small estates.* When the total assets of the estate of a decedent or ward do not exceed the sum of five hundred dollars in value, the court may remit the court costs or any part thereof to said estate.

SEC. 191. 22-905.

SEC. 192. *Disclosure proceedings.* Upon the filing of a petition by a representative or any person interested in the estate, alleging that any person has concealed, converted, embezzled, or disposed of any property belonging to the estate of a decedent or ward, or that any person has possession or knowledge of any will or codicil of a decedent, or of any instruments in writing relating to the property of such decedent or ward, the court, upon such notice as it may direct, may order such person to appear before it for disclosure. Refusal to appear or submit to examination, or failure to obey any lawful order based thereon shall constitute contempt of court.

SEC. 192. 22-208; 22-211; 22-1301; 22-1302.

SEC. 193. *Citation and attachment.* If any person neglects or refuses to perform an order or judgment of a probate court, other than for the payment of money, he shall be guilty of contempt of court; and the court shall issue a citation requiring him, at an early day therein to be appointed, to appear before the court and show cause, if any he has, why he should not be punished for contempt. If, after personal service of citation by an officer or other person, such person shall not on the day appointed appear before the court, or if it appears to the court that he is secreting himself to avoid the process of the court or is about to leave the county for that purpose, the court may issue an attachment commanding the officer to whom it is directed to bring such person before the court to answer for contempt.

SEC. 193. 22-208; 22-210; 22-319; 22-518; 22-519; 22-533; 22-610; 22-903; 22-908; 22-922; 38-221; 39-230; 62-2023. Punishment for contempt for failure to pay money might in some cases violate constitutional provisions against imprisonment for debt. See, for example, the early cases of *In re Bingham*, 32 Vt. 329; *Golson v. Holman*, 28 S. C. 53, 4 S. E. 811; *In re Blair*, 4 Wis. 522; *Hosack v. Rogers*, 11 Paige (N. Y.) 603.



SEC. 194. *Executions.* Orders for the payment of money may be enforced by execution, or otherwise, as judgments in the district court are enforced.

SEC. 194. 22-720; 22-918; 22-922; 22-938; 22-1305; 39-230; 62-2023. For executions in the district court, see G. S. 1935, ch. 60, art. 34.

## 2. *Proceedings for Probate and Administration*

SEC. 195. *Petition for administration.* A petition for administration shall state: (1) The name, residence, and date and place of death, of the decedent; (2) the names, ages, residences, and addresses of the heirs of the decedent so far as known or can with reasonable diligence be ascertained; (3) the general character and probable value of the real and personal property; (4) and the name, residence and address of the person for whom letters are prayed.

SEC. 195. 22-301. Present law does not require petition, but it is the usual and better practice to file one.

SEC. 196. *Petition for probate of will.* A petition for the probate of a will, in addition to the requirements of a petition for administration, shall state: (1) The names, ages, residences, and addresses of the devisees and legatees so far as known or can with reasonable diligence be ascertained; and (2) the name, residence, and address of the person, if any, named as executor. The will shall accompany the petition if it can be produced. A petition for the probate of a lost or destroyed will shall contain a statement of the provisions of the will.

SEC. 196. 22-208; 22-249; 22-301.

SEC. 197. *Who may petition for probate or administration.* Any person interested in the estate, after the death of the testator or intestate, may petition for the probate of his will or for administration.

SEC. 197. 22-208; 22-301.

SEC. 198. *Notice for probate or administration.* When a petition for the probate of a will or for administration is filed, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to section 185 unless the court shall make an order to the contrary. If notice is by order of the court not required to be given pursuant to section 185, the court shall order notice thereof to be given, unless waived, by personal service on all persons interested as heirs, devisees, and legatees, at least ten days before the date of hearing. When the state is a proper party the notice shall be served upon the attorney general and the county attorney of the county.

SEC. 198. 22-250.

SEC. 199. *Waiver of notice.* When a petition is filed for the probate of a will or for administration, if all the parties interested as heirs, devisees, and legatees enter their appearance in writing, waive the notice otherwise required, and consent to an immediate hearing, a hearing may in the discretion of the court be had as if notice had been given.

SEC. 199. 22-250.

SEC. 200. *Hearing for probate of will.* On the hearing of a petition for the probate of a will at least two of the subscribing witnesses shall be examined if they are within the state and competent and able to testify. Otherwise the court may admit the testimony of other witnesses to prove the capacity of the testator and the due execution of the will; and as evidence of such execution

may admit proof of the handwriting of the testator and of the subscribing witnesses. Any heir, devisee, or legatee may prosecute or oppose the probate of any will. If the instrument is not allowed as the last will and if the estate should be administered, the court shall grant administration to the person or persons entitled thereto.

SEC. 200. 22-213; 22-217; 22-218; 22-251. Provision for contest by separate action in the district court omitted; for reasons, see article by Judge Robert T. Price in 7 Kan. Bar Assn. Journal 42-45, August, 1938.

SEC. 201. *Hearing on will in opposition.* If, after a petition for the probate of a will has been filed, another instrument in writing purporting to be the last will or codicil shall be presented, proceedings shall be had for the probate thereof and thereupon the hearing on the petition theretofore filed shall be adjourned to the time fixed for the hearing of the subsequent petition. At such time proof shall be had upon all of such wills, codicils, and all matters pertaining thereto, and the court shall determine which of such instruments, if any, should be allowed as the last will.

SEC. 201. This section is new; provides a convenient method of consolidating hearings.

SEC. 202. *Will presented after probate of will.* If, after a will has been admitted to probate, a later instrument in writing purporting to be the last will or codicil shall be presented, proceedings shall be had for the probate thereof, but notice of the hearing thereof shall be given to the devisees and legatees named in the will admitted to probate in addition to the heirs, and the devisees and legatees named in the will or codicil presented for probate. If the court admits the later will or codicil to probate, the order so admitting such will or codicil shall operate as a revocation of the order admitting the earlier will to probate so far as is necessary to give effect to the later will or codicil.

SEC. 202. This section is new. The decisions of other states are in conflict on this question. See Freeman on Judgments, 5th ed., sec. 816, pp. 1734, 1735. The section will settle the question in this state. The substance of the section is taken from Ohio. See Ohio General Code, sections 10504-27 and 10504-28.

SEC. 203. *Granting of letters.* Upon admission of the will to probate, the court shall appoint an executor or administrator with the will annexed and fix the amount of his bond as required by law, if such is required. If any person appointed does not qualify within ten days, the court may, with or without notice, grant letters to another or others. Upon filing of the oath and bond as required by law, letters shall issue.

SEC. 203. 22-302; 22-307. Subscribing to the oath is an acceptance of the trust.

SEC. 204. *Hearing for probate of lost will.* No lost or destroyed will shall be established unless it is proved to have remained unrevoked, nor unless its provisions are clearly and distinctly proved. When such will is established the provisions thereof shall be distinctly stated, certified by the court, and filed and recorded. Letters shall issue thereon as in the case of other wills.

SEC. 204. 22-249; 22-252; 22-253. Clarified in accordance with the decisions. See *Craig v. Craig*, 112 Kan. 472.

SEC. 205. *Petition for admission of will probated elsewhere.* When a copy of a will executed outside this state and the probate thereof, duly authenticated, shall be presented by the executor or any other person interested in the will, with a petition for the probate thereof, the court shall fix the time and place

for the hearing of the petition, notice of which shall be given to such persons and in such manner as the court shall direct.

SEC. 205. 22-229; 22-230. See section 2 of uniform foreign probated wills act.

SEC. 206. *Hearing for admission of will probated elsewhere.* If, upon the hearing, it appears to the satisfaction of the court that the will has been duly proved and admitted to probate outside this state, and that it was executed according to the law of the place in which it was made, or in which the testator at the time resided or in conformity with the laws of this state, it shall be admitted to probate, which probate shall have the same force and effect as the original probate of a will.

SEC. 206. 22-230. See section 3 of uniform foreign probated wills act.

SEC. 207. *Record of order setting aside will probated elsewhere.* If such will shall later be set aside according to the law of the place where it was originally proved and admitted to probate, a duly authenticated copy of the final decree setting said will aside may be admitted to record in this state in the same manner and with like notice as the authenticated copy of said will was admitted to probate, and when so admitted to record shall have the same force and effect as a like order as to domestic will, unless the heirs, devisees, and legatees thereunder shall have been determined under the provisions of section 225.

SEC. 207. 22-255.

SEC. 208. *Hearing for administration.* On the hearing of a petition for administration and proof thereof, the court shall appoint an administrator and fix the amount of his bond, as required by law. If the person appointed neglects for ten days after written notice of such appointment, served as the court may direct, to file the oath and bond required by law, such neglect shall be deemed a refusal to serve and the court, with or without notice, may appoint such other person or persons as may be entitled to administer such estate.

SEC. 208. 22-313.

### 3. Election and Selection

SEC. 209. *Election.* When a will is admitted to probate the court shall forthwith transmit to the surviving spouse a certified copy thereof. If such spouse has not consented to the will, as provided by law, such spouse shall be deemed to have renounced and refused to elect to take under the will unless he shall have filed in the probate court an instrument in writing to accept the provisions of such will within six months after probate of the will. If the said spouse files an election before the appraisal of the estate is filed, the said election shall be set aside upon application of the spouse made within thirty days after the filing of the appraisal. For good cause shown, the court may permit an election within such further time as the court may determine, if an application therefor is made within said period of six months.

SEC. 209. 22-246; 22-247. Eliminates provision requiring probate judge to give an *ex parte* construction of the will. The receipt of a copy is as beneficial as the reading of the will by the judge. Election should not be filed until after the appraisal. If it is filed before the appraisal it may be recalled. In case of contest, or for other reasons, extension of time may be had if promptly asked for.

SEC. 210. *Election in case of incapacity.* If the surviving spouse shall be insane or incapacitated to act by reason of mental disability, it shall be the

duty of the court to appoint some suitable person as commissioner, who shall ascertain the value of the provision made by will in lieu of the rights in the estate secured by statute and the value of the rights secured by statute. The commissioner shall make his verified written report to the court. Notice of the time and place of the hearing of the petition for the appointment of a commissioner and of the hearing on his report shall be given to the surviving spouse and his guardian, if any, and all other persons interested in such manner and for such length of time as the court shall direct. After the hearing on the report the court shall make such election for such spouse under disability as is more valuable or advantageous to the spouse, which election shall be deemed as effectual as if made by the spouse when fully competent.

SEC. 210. 22-248. Provides for notice to interested parties. The words of present law "more valuable and advantageous" changed to "more valuable or advantageous." Reasons for the change are found in the very able opinion in *Van Steenwick v. Washburn*, 59 Wis. 483. See, also, the companion case of *In re Washburn*, 32 Minn. 336, 20 N. W. 324.

SEC. 211. *Selection of homestead and allowances.* After the inventory and appraisal have been filed, the surviving spouse, or in case there is none, the children, may petition the court to set apart the homestead, and the personal property allowed in section 21. Such petition shall show the names, ages, and relationship of the parties, a description of the homestead claimed and of the personal property selected, and the appraised value thereof. The petition may be heard with or without notice. Upon proof of the petition, the court shall set apart such homestead and personal property. The property so set apart shall be delivered by the executor or administrator to the persons entitled thereto, and shall not be treated as assets in his custody, but the title to the homestead shall be included in the final decree of distribution.

SEC. 211. 22-103; 22-512; 22-514. A simple and inexpensive procedure for setting aside homestead and family allowances. The title of the homestead is included in the decree of final settlement. See sections 225 and 227.

#### 4. Allowance of Demands

SEC. 212. *Notice to creditors.* The notice of appointment to be published by an executor or administrator shall be to the creditors, heirs, devisees, legatees, and all others concerned. It shall state the date of appointment and qualification, and shall notify the creditors to exhibit their demands against the estate within nine months from the date of the first published notice as provided by law, and that if their demands are not thus exhibited they shall be forever barred.

SEC. 212. 22-329. See section 67 herein. Nonclaim statute (section 215) begins to run from date of first published notice rather than administration bond; there may be no administration bond.

SEC. 213. *Exhibition of demands and hearing thereon.* Any person may exhibit his demands against the estate of a decedent by filing his petition for its allowance in the proper probate court. The petition shall contain a statement of all offsets to which the estate is entitled. The court shall from time to time as it deems advisable, and must at the request of the executor or administrator, or at the request of any creditor having exhibited his demand, fix the time and place for the hearing of such demands, notice of which shall be given. Upon the adjudication of any demand, the court shall enter its judgment allowing or disallowing it. Such judgment shall show the date of adjudication, the amount allowed, the amount disallowed, and classification if

allowed. Judgments relating to contingent demands shall state the nature of the contingency.

Sec. 213. 22-705; 22-708; 22-709; 22-712; 22-713; 22-714; 22-715; 22-727; 22-913. Present elaborate procedure simplified. All applications are by petition (see section 177) and the claimant files his petition with the account attached for its allowance. The reasons for the last sentence will be found in the following cases: *Hantzsch v. Massott*, 61 Minn. 361, 63 N. W. 1069; *Land & Improvement Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974; *State, ex rel., v. Probate Court*, 66 Minn. 246, 68 N. W. 1063; *Berryhill v. Peabody*, 72 Minn. 232, 75 N. W. 220. For claims against estates of wards, see section 243 herein.

Sec. 214. *Exhibition by revivor of action.* Any action pending against any person at the time of his death, which by law survives against the executor or administrator, shall be considered a demand legally exhibited against such estate from the time such action shall be revived. Any action commenced against such executor or administrator after the death of the decedent shall be considered a demand legally exhibited against such estate from the time of serving the original process on such executor or administrator. The judgment creditor shall file a certified copy of the judgment in the proper probate court within thirty days after said judgment becomes final.

Sec. 214. 22-703; 22-704; 22-707. The last sentence is new.

Sec. 215. *Nonclaim statute.* All demands, including demands of the state, against a decedent's estate, whether due or to become due, whether absolute or contingent, including any demand arising from or out of any statutory liability of decedent or on account of or arising from any liability as surety, guarantor, or indemnitor, and including the individual demands of executors and administrators, not exhibited as required by this act within nine months after the date of the first published notice to creditors as herein provided, shall be forever barred from payment: *Provided*, That the provisions of the testator's will requiring the payment of a demand exhibited later shall control. No creditor shall have any claim against or lien upon the property of a decedent other than liens existing at the date of his death, unless an executor or administrator of his estate has been appointed within one year after the death of the decedent and such creditor shall have exhibited his demand in the manner and within the time herein prescribed. In any estate in the process of administration at the time of the taking effect of this act in which any executor or administrator has not been discharged, all demands, including demands of the state, whether due or to become due, whether absolute or contingent, including any demands arising from or out of any statutory liability of decedent or on account of or arising from any liability as surety, guarantor or indemnitor, and including the individual demands of executors and administrators, not exhibited as required by this act within nine months after the taking effect of this act shall be forever barred from payment by any such executor or administrator unless a provision of a will requires payment of any such demand exhibited later. This section applies to both domiciliary and ancillary administration.

Sec. 215. Supp. 22-702; 22-724; 22-725; 22-726; 22-727. Claims of the state included; see section 170. A complete bar if no administration within one year, except as to liens of record prior to death. Time reduced to nine months that estate may be closed at end of year. A special nonclaim statute applicable to pending estates has been included.

Sec. 216. *Demands not due.* The court may allow demands, which are payable at a future day, at the then present value thereof, or the court may order the executor or administrator to retain in his hands sufficient funds to satisfy the same upon maturity; or if the heirs, devisees, or legatees offer to give bond

to a creditor for the payment of his demand according to the terms thereof, the court may order such bond to be given in satisfaction of such demand.

SEC. 216. 22-718; Supp. 22-729.

SEC. 217. *Hearing on contingent demands.* Contingent claims or demands against an estate shall be heard and determined by the court in accordance with the rights of the parties respecting such claims and in such manner as not to delay the closing of the estate, if that can be done with justice to the parties.

SEC. 217. Supp. 22-719.

### 5. Sale of Personal Property

SEC. 218. *Sale of personal property.* A petition for the sale of personal property of a decedent may be heard with or without notice. The order of sale shall describe the property, and direct whether it shall be sold at private sale or public auction. No sale of personal property shall be made at private sale for less than three-fourths the appraised value.

SEC. 218. 22-603.

SEC. 219. *Notice of sale at public auction.* In all sales at public auction the executor or administrator shall give notice containing a description of the property to be sold, and stating the time, terms, and place of sale, by publication for ten days in some newspaper, authorized to publish legal notices, of the county where the sale is to be had.

SEC. 219. 22-603. Same as execution sales in the district court. See 6-3412. For construction of "ten days" see 64-102.

SEC. 220. *Credit may be given.* In all sales of personal property, the court may authorize credit to be given by the executor or administrator not exceeding one year from the date of his appointment and qualification. When such credit is given, notes or bonds with approved sureties shall be taken by the executor or administrator.

SEC. 220. 22-604; 22-605. Time limited to period of administration to prevent delay in closing estate.

SEC. 221. *Report of sale.* Within thirty days after any public or private sale of personal property the executor or administrator shall make due report thereof verified by his affidavit to the probate court. Such report shall include proof of proper notice of such sale, if at public auction, and, if a clerk was employed for such sale, shall be accompanied by a sale bill signed by such clerk.

SEC. 221. 22-609.

### 6. Settlement and Determination of Descent

SEC. 222. *Partial distribution.* A petition for partial distribution may be heard without notice, or the court may require notice to be given pursuant to section 185. When such notice is required or given, a decree of partial distribution shall be final as to the persons entitled to such distribution and as to their respective proportions of the whole estate, unless such decree includes only specific legacies.

SEC. 222. 22-924. In some cases it is safe to make partial distribution without an adjudication; in others it is not. This section is a protection to the heirs, devisees, and legatees as to expense, and to the executor or administrator as to liability for erroneous distribution.

SEC. 223. *Petition and notice of final settlement.* The petition of an executor or an administrator for a final settlement and accounting, and a determination of the persons entitled to the estate of a decedent, shall, in addition to other requirements, contain: (1) a statement of the account; (2) the names, residences, and addresses of the heirs, devisees, and legatees; (3) a description of the real estate and the interest of the decedent therein at the time of his death; and (4) the nature and character of the respective claims of the heirs, devisees, and legatees of the decedent. Notice of the hearing thereof shall be given pursuant to section 185.

SEC. 223. 22-904; 22-924.

SEC. 224. *Determination of advancements.* All questions as to advancements made, or alleged to have been made, by the intestate to any heir shall be heard and determined by the court at the time of settlement, and every such advancement shall be specified in the decree distributing and assigning the estate. For the purpose of determining what proportion any one who has received an advancement is entitled to receive from the estate, the court shall ascertain the value of the entire residue of such estate, by ordering an appraisalment or in such other manner as it may deem best.

SEC. 224. 22-125; 22-126. Provides method of determining advancement, including when there is realty and advancement amounts to more than share of personality. See *White v. White*, 41 Kan. 556.

SEC. 225. *Hearing and final decree.* On the hearing, unless otherwise ordered, the executor or administrator shall, and other persons may, be examined relative to the account and the distribution of the estate. If all the taxes payable by the estate have been paid so far as there are funds to pay them and the account is correct, it shall be settled and allowed; if the account is incorrect, it shall be corrected and then settled and allowed. Upon such settlement and allowance the court shall determine the heirs, devisees, and legatees entitled to the estate and assign the same to them by its decree. The decree shall name the heirs, devisees, and legatees, describe the property, and state the proportion or part thereof to which each is entitled. Said decree shall be binding as to all the estate of the decedent, whether specifically described in the proceedings or not. In the estate of a testate decedent, no heirs need be named in the decree unless they have, as such, an interest in the estate. No final decree shall be entered until after the determination and payment of inheritance taxes. When the final decree includes real estate, such decree, or a certified copy thereof, may be entered on the transfer record of the county clerk of the proper county.

SEC. 225. Supp. 22-739; 22-904; 22-906; 22-925. See 22-109 to 22-116, inclusive. Provides for determination of heirs, devisees, and legatees. See *McVeigh v. First Trust Co.*, 140 Kan. 79; *First Colored Baptist Church v. Caldwell*, 138 Kan. 581, 139 Kan. 45. For transfer record, see 67-239.

SEC. 226. *Proceedings to determine descent.* Whenever any person has been dead for more than one year and has left real estate or any interest therein, and no will has been admitted to probate nor administration had in this state, or in which administration has been had without a determination of the descent of such real estate, any person interested in the estate or claiming an interest in such real estate may petition the probate court of the county of the decedent's residence or of the county wherein such real estate

or any part thereof is situated, to determine its descent and by decree of court to assign it to the persons entitled thereto.

SEC. 226. This section is new. Provides a simple and inexpensive method of determining heirship where no administration is had. Practically all the late revisions, and many other jurisdictions, have a similar provision.

SEC. 227. *Decree of descent.* Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to section 185. Upon proof of the petition, the court shall allow the same and enter its decree assigning the real estate to the persons entitled thereto pursuant to the law of intestate succession, in force at the time of the decedent's death. No decree shall be entered until after the determination and payment of inheritance taxes.

SEC. 227. This section is new. See note to section 226 herein.

SEC. 228. *Opening judgment.* A party against whom a judgment or decree has been rendered in proceedings to determine the persons entitled to the real property of a decedent, without other service than publication in a newspaper, may at any time within one year after the date of the judgment or decree have the same opened or set aside and be let in to defend. Before such judgment or decree shall be opened or set aside the respondent shall give notice to the adverse party of his intention to make such application, and shall file a full answer to the petition or other pleading, pay all costs of such proceeding if the court require them to be paid, and shall make it appear to the satisfaction of the court, by affidavit, that during the pendency of the proceeding 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 decree sought to be opened or set aside, which in consequence of said judgment or decree shall have passed to a purchaser in good faith, shall not, after the expiration of six months, be affected by any proceedings under this section. The adverse party, on the hearing of an application to open or set aside such judgment or decree as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of such proceeding the respondent had notice thereof in time to appear in court and make his defense.

SEC. 228. 22-915. See 60-2530, after which this section is patterned.

#### 7. Trustees' Accounting Proceedings

SEC. 229. *Petition and notice of hearing on account.* When any intermediate account of a trustee is filed without a petition of the trustee for a hearing thereon, a copy of the account shall be transmitted to each known beneficiary and proof of such transmission shall be filed with the court. The trustee or any beneficiary may file a petition for the approval of the account, and any beneficiary may file a petition for the disapproval thereof. The trustee shall, subject to the provisions of sections 126 and 127, file a petition for the approval of a final account. When any such petition is filed, notice of the hearing shall be given to the trustee and each known beneficiary, other than the petitioner, for such time and in such manner as the court deems reasonable.

SEC. 229. See article 16 herein. Taken from uniform trustees' accounting act and modified to conform to general procedure of article 22 herein.

SEC. 230. *Representation.* Any beneficiary who is a minor or otherwise incompetent, and also all possible unborn or unascertained beneficiaries may



be represented in a trust accounting by living, competent members of the class to which they do or would belong, or by a guardian *ad litem*, as the court deems best.

SEC. 230. Taken from uniform trustees' accounting act.

SEC. 231. *Hearing on account.* The court shall, after hearing the petition, act upon the account, and discharge the trustees if the account is an approved distribution account. The court may disapprove any account and surcharge the trustee for loss caused by a breach of trust committed by him.

SEC. 231. Taken from uniform trustees' accounting act.

SEC. 232. *Effect of court approval.* The approval by the court of a trustee's account after due notice or representation as provided in this act, shall relieve the trustee and his sureties from liability to all beneficiaries then known and in being, or who thereafter become known or in being, for all the trustee's acts and omissions which are fully and accurately described in the account, including the then investment of trust funds.

SEC. 232. Taken from uniform trustees' accounting act.

### 8. Guardianship Proceedings

SEC. 233. *Petition for guardianship.* A petition for the appointment of a guardian shall state: (1) The name, residence, and address of the person for whom a guardian is sought; (2) the date and place of his birth; (3) if he is a minor, the names, residences, and addresses of his parents, or if the parents are dead or have abandoned the minor, the names, residences, and addresses of his custodians and of any person named as testamentary guardian; (4) if he is unmarried and not a minor, the names, residences and addresses of his nearest kindred; (5) if he is married, the name, residence, and address of his spouse; (6) the reasons for the guardianship; (7) the general character and probable value of his real and personal property; (8) whether the proposed appointment is for his person or estate, or both; and (9) the names, residences, and addresses of the proposed guardians.

SEC. 233. 39-201; 62-2003.

SEC. 234. *Who may petition for guardianship.* Any person may petition for the appointment of a guardian for the person or estate of any person believed to be subject to guardianship; but the petition of any of the following shall have priority in the order named over that of any other person: (1) A minor over the age of fourteen years, if of sound intellect; (2) natural guardians; and (3) testamentary guardians.

SEC. 234. 39-201; 62-2002.

SEC. 235. *Notice for guardianship.* If a petition for guardianship is made by the person for whom guardian is sought, or by a parent, custodian, or testamentary guardian, the court may hear the same with or without notice. In all other cases, personal service shall be made upon the ward in such manner and for such period of time as the court shall direct. If he has a spouse, custodian, testamentary or natural guardian, notice shall be given to such persons and to such of the nearest kindred and in such manner as the court may direct. If he is an inmate of any hospital, notice by mail shall be given to the superintendent thereof. If he is a nonresident of the state, notice shall be given in such manner and to such persons as the court shall deem reasonable.

SEC. 235. 39-202.

SEC. 236. *Counsel essential.* At the hearing of a petition for the commitment of an insane person and the appointment of a guardian of such person or his estate, or for the appointment of a guardian of an incompetent person or his estate, such person shall have the right to be present and shall be represented by counsel. If none is selected in his behalf, the court shall appoint suitable counsel to represent him. The hearing shall not proceed until the person is represented by counsel.

SEC. 236. 39-203; 76-1207; 76-1211.

SEC. 237. *Trial by jury.* Trial by jury, if a demand therefor is made by an interested party or on his behalf prior to the hearing, shall be had in a proceeding for the commitment of an insane person and the appointment of a guardian thereof, or for the appointment of a guardian of an incompetent person. The jury shall consist of six persons, one of whom shall be a duly licensed doctor of medicine to be selected by the court. The other members of the jury shall be selected, and the jury shall be empaneled and sworn, and the trial shall proceed until a verdict is returned, in accordance with the rules prescribed by the code of civil procedure, except that no peremptory challenges shall be exercised as to the doctor of medicine.

SEC. 237. 39-203; 76-1207; 76-1211.

SEC. 238. *Form of verdict of insanity.* The verdict in insanity proceedings shall be in substantially the following form:

We, the undersigned jurors, having heard the evidence, find that said..... is insane and a fit person to be sent to the state hospital for the treatment of the insane; that he is a resident of the state of Kansas, county of.....; that..... disease is of .....duration, dating from the first symptoms of this attack; that the cause is supposed to be.....; that the disease is.....hereditary; that he is.....subject to epilepsy; that he does.....manifest homicidal or suicidal tendencies.

SEC. 238. 76-1211.

SEC. 239. *Form of verdict of incompetency.* The verdict in incompetency proceedings shall be in substantially the following form:

We, the undersigned jurors, having heard the evidence, find that said..... is (here say insane, a lunatic, an idiot, an imbecile, a distracted person, a feeble-minded person, a drug habitué, or an habitual drunkard, as the case may be), and incapable of managing his affairs, and that it is necessary that a guardian should be appointed (here say for his person or estate, or person and estate, as the jury may find).

SEC. 239. 39-203.

SEC. 240. *Hearing by commission.* Unless a jury shall have been demanded, the court shall appoint a commission of two duly licensed doctors of medicine to assist at the hearing. The commissioners and the court shall make and file a report of their findings. In case the hearing is for the commitment of an insane person, the report shall be in duplicate and on such forms as may be prescribed by the state board of administration, one of which shall be filed with the court and the other shall be transmitted to the board of administration.

SEC. 240. 39-203; 39-236; 76-1208; 76-1209.

SEC. 241. *Judgment and appointment.* The court may render judgment on the verdict or findings, set them aside, order another trial or hearing or dismiss the proceedings. If the court adjudges that the person is insane or in-

competent and that a guardian ought to be appointed, the court shall appoint one or two suitable persons as guardians of the person, or of estate, or of both. Upon the filing of a bond in such amount as the court may direct and an oath according to law, letters of guardianship shall be granted. If there is no property, the court may waive the filing of a bond, but if the guardian receives or becomes entitled to any property, he shall immediately file a report thereof and a bond in such amount as the court may direct. If a guardian dies, resigns, or is removed, the court, with or without notice, may appoint a successor.

SEC. 241. 39-203; 39-205; 76-1208; 76-1209. Provides for a waiver of bond if there is no personal property.

SEC. 242. *Transfer of venue.* When the residence of a ward shall have been changed to another county in the state and it is for the best interest of the ward or his estate, the venue may be transferred to such other county. Upon the filing of a petition by any person interested in the ward or in his estate, the court shall fix the time and place for the hearing thereof, notice of which shall be given to such persons and in such manner as the court shall direct. Upon proof of the petition and that a transfer of venue is for the best interest of the ward or his estate, and upon the settlement and allowance of the guardian's accounts to the time of such hearing the court, after making and retaining a true copy of the essential files, not previously recorded, shall transmit the original file to the court of such other county in which all subsequent proceedings shall be had.

SEC. 242. This section is new. A parent with his child (under guardianship) moves from Cheyenne to Cherokee county; this section furnishes a convenient court. See *Connell v. Moore*, 70 Kan. 88. 94; *Foran v. Healy*, 73 Kan. 633, 637-639. The court to which the guardianship is transferred should not be required to go over accounts for the period when it was under the supervision of the first court. A court in many cases knows more than is shown by the record.

SEC. 243. *Allowance and payment of demands.* Any person having a demand, other than tort, against the estate of a ward, or against his guardian as such, may present it to the probate court for determination, and upon proof thereof procure an order for its allowance and payment.

SEC. 243. This section is new. A simple permissive method for the presentation, allowance, and payment of claims. Compare *Harter v. Miller*, 67 Kan. 468, with *Hill v. Honeywell*, 65 Kan. 349.

SEC. 244. *Restoration to capacity.* Any person who has been adjudged insane or incompetent as herein provided, or his guardian, or any other person interested in him or his estate may petition the court in which he was so adjudicated or to which the venue has been transferred to be restored to capacity: *Provided*, A petition for the restoration to capacity of a patient committed to a state hospital shall not be filed within six months after the patient's admission thereto nor oftener than once every six months. Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given to the superintendent thereof if the patient is under the control of or has been discharged from a state hospital, and to such other persons and in such manner as the court may direct. Any person may oppose such restoration. Upon hearing of the petition and proof that such person has been restored to capacity and is capable of managing his person and estate, the court shall adjudge him restored to capacity. If the

venue has been transferred no proceedings need be had in the court from which the venue was transferred.

SEC. 244. 39-226; 39-227; 76-1225; 76-1226.

SEC. 245. *Notice for accounting.* The court may on its own motion and shall upon the petition of the guardian or any person interested in the ward or his estate fix the time and place for the hearing of any account, notice of which shall be given to such persons and in such manner as the court shall direct. Whenever any funds have been received from the veterans' administration, notice by mail shall be given to the regional office having charge thereof.

SEC. 245. See 62-2005; 62-2015. Section made general.

SEC. 246. *Hearing on accounting.* On the hearing, unless otherwise ordered, the guardian shall, and other persons may, be examined. If the account is correct, it shall be settled, and allowed. The order of settlement and allowance shall show the amount of the personal property remaining. Upon settlement of the final account, and upon delivery of the property on hand to the person entitled thereto, the court shall discharge the guardian and his sureties.

SEC. 246. 39-227; 39-228.

#### 9. Proceedings for Commitment of Insane Persons

SEC. 247. *Institution of proceedings.* Any reputable citizen may file in the probate court of the county of the patient's residence or presence a petition for the commitment of the person as an insane patient to the state hospital. The petition shall state the name, residence, and address of the patient and of his nearest relatives, the reasons for the application, and the names of two witnesses by whom the truth of the petition may be proved. The court may appoint a duly licensed doctor of medicine to make an examination of the patient.

SEC. 247. 76-1205.

SEC. 248. *Notice and process.* The trial or hearing shall be held at such time and place and upon notice to such persons and served in such manner as the court may determine. Unless the patient shall be brought before the court without a writ, or it appears to the court that the condition of the patient is such as to render it manifestly improper that the patient be brought before the court, the court shall issue a writ directed to the sheriff, or any proper person, commanding the patient to be brought before the court for the hearing. In no case shall the hearing be had until the patient shall be notified as the court may determine.

SEC. 248. 76-1206; 76-1210.

SEC. 249. *Appointment of guardian.* If the patient is adjudged insane, the court may appoint a guardian of his estate; provided (1) such proceedings are had in the county having venue of appointment, (2) such appointment is within the terms of the application made by the petition, and (3) the notice required therefor has been duly given.

SEC. 249. 76-1215. Section clarified.

SEC. 250. *Transmission of transcript to county of residence.* Whenever the residence of the patient is found to be in another county, the court of commitment shall transmit to the probate court of such county a transcript of the proceedings, including the return of the warrant from the superintendent, and

all subsequent proceedings relating to the case shall be in the probate court of said county. The court of commitment shall also transmit to such court a statement of the expenses of the inquest, confinement, commitment, and conveyance of the patient to the place of detention. If the probate court to which such claim is transmitted shall deny the same, it shall transmit the claim to the state board of administration, which shall determine the question of residence and certify its findings to each court. If the claim is not paid within thirty days after such certification, an action may be maintained thereon by the claimant county in the district court of the claimant county against the debtor county.

SEC. 250. See 76-1229. Sets up machinery for enforcing claim of one coun'y against another.

SEC. 251. *Costs.* In each proceeding the court shall allow and order to be paid as a part of the costs thereof: (1) The sum of five dollars to the examining physician for his services; (2) the sum of five dollars per day to each commissioner for his services; and (3) the actual and necessary traveling expenses of each of the above named. The court shall fix the fee of patient's counsel when counsel is appointed by the court, and tax the same as a part of the costs of the proceeding. Other fees shall be allowed and paid as are allowed by law for similar services in other cases. In case of a private patient, the costs shall be paid from his estate or by those bound by law to support him, as the court may determine. If the patient is found to be sane, and the court finds that such proceedings were instituted without probable cause and not in good faith, it may tax the costs thereof against the petitioner.

SEC. 251. 76-1211; 76-1229.

SEC. 252. *Order of restoration.* When notice is received from the superintendent of a state hospital by the court of the patient's residence that a patient has been discharged as restored to capacity, the court shall make an order that the patient has been restored to capacity.

SEC. 252. 76-1225.

#### 10. Adoption Proceedings

SEC. 253. *Petition for adoption.* A petition for adoption shall be filed by the person desiring to adopt the child, and shall state: (1) The name, residence, and address of the petitioner. (2) The name of the child, the date and place of his birth if known, and place at which the child resides. (3) The facts showing the financial ability of the petitioner to assume the relationship. (4) Whether one or both parents are living; and the name, residence and address of those living, so far as known to the petitioner: *Provided*, The names of parents may be omitted if the child is under the custody and legal control for the period of its minority of an institution or agency established or authorized by the laws of this state to place children for adoption. (5) If the consent of either or both parents is not obtained, the facts relied upon as eliminating the necessity therefor.

SEC. 253. 38-106; 38-117; 38-118. Revised in accordance with modern adoption laws. See, particularly, the late laws of Alabama, Wisconsin, and Minnesota.

SEC. 254. *Procedure after petition filed.* The written consents required shall be filed with the petition. Upon the filing of the petition the court shall fix

the time and place for the hearing thereon, which shall not be less than thirty days nor more than sixty days from the filing of the petition, which time may be extended by the court for cause. Pending the hearing the court may make an appropriate order for the care and custody of the child. Promptly upon the filing of the petition the court shall send to the state board of social welfare a copy thereof and of the consents. The state board of social welfare, without cost to the natural parents or to the petitioner, shall make an investigation of the advisability of the adoption and report its findings and recommendations to the court as much as ten days before the hearing on the petition. In making its investigation the state board of social welfare is authorized to make an appropriate examination of the child as to its mental development and physical condition so as to determine whether there are obvious or latent conditions which should be known to the adopting parents, and shall also make such investigation of the adopting parents and their home and their ability to care for the child as would tend to show its suitability as a home for the child, and if requested to do so by the court, may inquire whether the consents to the adoption were freely and voluntarily made. Upon the hearing of the petition the court shall consider the report of the state board of social welfare, together with all other evidence offered by any interested party, and if the court is of the opinion the adoption should be made it shall make an interlocutory order of adoption, which cannot be made final for six months, and may deliver the child to the petitioner, if that has not already been done. Within six months after the interlocutory order the state board of social welfare, as often as it deems prudent, may investigate the condition of the child in the home of its temporary adoption, and before the expiration of the six months' period shall make a report to the court of its findings and of the advisability of the making of a final order of adoption. After the expiration of six months from the interlocutory order the court shall fix the time and place for the hearing upon the petition for a final order of adoption, notice of which shall be given to all interested parties, including the state board of social welfare. If upon this hearing the court finds it to be for the best interests of the child that the petition for the adoption be allowed, it may make a final order of adoption. Prior to the making of the final order of adoption, upon the application of any interested party, or the state board of social welfare, or upon its own motion, the court, after hearing, at which all parties have been given notice, may set aside its interlocutory order and dismiss the petition for adoption. In any event the costs of the adoption proceedings, other than those caused by the state board of social welfare, shall be paid by the petitioner.

SEC. 254. 38-106. Includes features of late revision laws. See Memorandum of Problems to be Considered in Adoption Legislation as Illustrated by the Laws of the United States, October, 1938, issued by The Federal Children's Bureau.

SEC. 255. *Files and records of adoption.* The files and records of the court in adoption proceedings shall not be open to inspection or copy by other persons than the parties in interest and their attorneys, and representatives of the state board of social welfare, except upon an order of the court expressly permitting the same.

SEC. 255. 38-106. A desirable feature found in many modern statutes.

## ARTICLE 23.—PROCEEDINGS FOR SALE, LEASE AND MORTGAGE OF REALTY

SEC. 256. *Definitions.* As used in this article, the word "lease," unless the context otherwise indicates, means a lease for more than three years, or an oil and gas or other mineral lease; the word "mortgage" includes an extension of an existing mortgage, subject to the provision of section 157.

SEC. 256. The provisions of chapters 22, 38, 39, and article 20 of chapter 62, relating to the sale, lease, and mortgage of real estate, are combined in article 23.

SEC. 257. *Lease for three years or less.* A petition for the lease of the real estate of a decedent, or of a ward, for a term of three years or less, may be heard with or without notice. The court may direct the representative to execute the lease whenever it appears to be for the best interests of the estate or the persons interested in such real estate.

SEC. 257. 22-6a02; 22-6a03; 39-212.

SEC. 258. *Petition to sell, lease, or mortgage.* (1) An executor or administrator may file a petition to sell real estate of a decedent. The petition shall state the facts constituting the reasons for the application and describe the real estate to be sold. It may include all the real estate of the decedent subject to sale, or any part or parts thereof. (2) A guardian may file a petition to sell, lease, or mortgage real estate of a ward. The petition shall state the facts constituting the reasons for the application and describe the real estate to be sold, leased, or mortgaged. It may include all the real estate of the ward subject to sale, lease, or mortgage, or any part or parts thereof. It may apply in the alternative for authority to sell, lease, or mortgage.

SEC. 258. 22-6a02; 22-802; 22-804; 38-211; 38-212; 39-212. Subsection (1) deals with realty of decedent; subsection (2) deals with realty of ward. This section makes it possible to obtain a sale, lease, or mortgage of realty of ward, or any one, two, or three of them, as to one, some, or all of the tracts of real estate, if the petition prays for relief in the alternative and the notice so states. The present provision requiring the assets listed in the inventory to be set forth in the petition is omitted.

SEC. 259. *Notice and hearing.* Notice of the hearing shall briefly state the nature of the application made by the petition and shall be given pursuant to section 185. At the hearing and upon proof of the petition, the court shall have full power to order the sale, lease, or mortgage of all the real estate described in the petition, or to order the sale, lease, or mortgage of one or more tracts thereof, if such order shall be within the terms of the application made by the petition. The probate court, with the consent of the mortgagee, may order the sale of real estate subject to the mortgage, but such consent shall release the estate of the decedent or ward, should a deficit later appear.

SEC. 259. 22-6a03; 22-6a05; 22-805; 38-211; 38-212; 38-215; 39-210; 39-212; 39-213.

SEC. 260. *Order.* (1) In all cases the order shall describe the real estate to be sold, leased, or mortgaged, and may designate the sequence in which the several tracts shall be sold, leased, or mortgaged, subject to the provisions of this act. (2) An order for sale shall direct whether the real estate shall be sold at private sale or public auction. If at private sale it shall direct that the real estate shall not be sold for less than three-fourths of the appraised value. If at public auction it shall direct the place or places of sale. It shall direct that the sale be for cash, for cash and deferred payments, or deferred payments: *Provided*, That in decedent's estates the payment shall not be deferred for more than one year from the date of the appointment and qualification of the ex-

ecutor or administrator making the sale. In all cases the order shall specify the time of payment, the interest on deferred payments, and the manner in which the payments shall be secured. (3) An order to lease shall not be made for less than three-fourths of the appraised value of the leasehold interest. The order shall direct that the lease be for cash, for cash and deferred payments, or deferred payments, and shall specify the time of payment, the interest on deferred payments, and the manner in which the payments shall be secured. (4) An order to mortgage shall fix the maximum amount of principal, the maximum rate of interest, the earliest and latest date of maturity, and shall direct the purpose for which the proceeds shall be used. (5) An order for sale, lease, or mortgage shall remain in force until terminated by the court, but no private sale or lease shall be made after one year from the date of the order, unless the real estate or the leasehold interest therein shall have been reappraised under order of the court within three months preceding the sale or lease.

SEC. 260. 22-6a03; 22-807; 22-817; 38-211; 39-214; 39-215.

SEC. 261. *Additional bond of representative.* The court may require any representative, if it deems it necessary before such sale, lease, or mortgage, or before the confirmation thereof, to give an additional bond to secure the further assets arising from the sale, lease, or mortgage of such real estate.

SEC. 261. 22-809; 22-825; 38-217; 39-205. If general bond is sufficient, no further bond need be filed. Provision preventing sale by giving bond omitted because (1) it is seldom used; (2) it may unduly delay closing estate even to extent of suit on bond, execution on judgment, and right of redemption as to realty sold; and (3) delay can be had by proper showing of prospective payment and by appeal.

SEC. 262. *Appraisement.* Before any representative shall sell any real estate at private sale he shall have it appraised by three disinterested persons appointed by the court and of the county in which at least part of it lies. Before he shall lease any real estate, he shall in like manner have the leasehold interest therein appraised. The appraisers shall appraise the said real estate, or leasehold interest therein, as the case may be, at its full and fair value, and forthwith deliver such appraisement certified by them under oath to the representative.

SEC. 262. 22-6a06; 38-812; 22-813; 22-814; 39-215. Appraisers appointed by the court. See *Fleming v. Bale*, 23 Kan. 88, 94, for construction of 22-812.

SEC. 263. *Sale at public auction.* In all sales at public auction the representative shall give notice thereof containing a particular description of the real estate to be sold, and by stating the time, terms, and place of sale, by publication once a week for three consecutive weeks in some newspaper, authorized to publish legal notices, of the county in which the real estate is situated. The date set for the sale shall not be earlier than seven days nor later than fourteen days after the date of the last publication of notice. If the tracts to be sold are contiguous and lie in more than one county, notice may be given and the sale made in either of such counties.

SEC. 263. 22-816; 22-818; 39-215. See 22-822. Clarifies law where land is situated in more than one county.

SEC. 264. *Report and confirmation.* (1) The representative shall make a verified report of his proceedings to the court, with the certificate of appraisement in case appraisement is required, and with proof of publication in case sale is made at public auction, which report shall state that he did not directly or indirectly acquire any beneficial interest in the said real estate, or the lease



thereof, or the mortgage thereof, as the case may be, and that he is not interested in the property sold, leased, or mortgaged, except as stated in his report. (2) The court, after having duly examined the report and being satisfied that the sale, lease, or mortgage has been in all respects made in conformity to law and ought to be confirmed, shall confirm the same and order the representative to make a deed, lease, or mortgage to the person entitled thereto. The instrument shall refer to the order for sale, lease, or mortgage by its date, and the court by which it was made, and shall transfer to the grantee, lessee, or mortgagee all the right, title, and interest of the decedent or ward in the estate granted by the instrument, discharged from liability for his debts, except encumbrances assumed.

SEC. 264. 22-6a07; 22-819; 38-219; 38-220; 39-216; 39-217; 39-219; 39-220. As there is little difference between sale and long-term property lease, or oil and gas lease, confirmation should be required.

SEC. 265. *Authorizing conveyances or lease.* Upon the filing of a petition by any person claiming to be entitled to a conveyance from a decedent or ward bound by written instrument to make a conveyance or lease, or by the representative, setting forth a description of the real estate and the facts upon which such claim for conveyance or lease is based, the court shall fix the time and place for the hearing thereof, notice of which shall be given to such persons and in such manner as the court shall direct. Upon proof of the petition, the court may order the representative to execute and deliver a deed of conveyance or lease upon performance of the contract.

SEC. 265. 22-820; 22-827; 22-828; 22-829; 22-830; 22-831. No reason appears why no one except the purchaser should be allowed to make the application. A purchaser may refuse to pay until tender of the deed and not make the application. Publication should not be compulsory, for in most cases there is no controversy over the amount due on the contract, and the conveyance ought to be obtained with the least expense and inconvenience.

SEC. 266. *Title of purchaser.* The deed or other instrument of the representative executed pursuant to section 264 or section 265, shall be received in all courts as presumptive evidence that the representative in all respects observed the directions and complied with the requisites of law, and shall vest title to the estate granted in the party receiving the same in like manner as if conveyed by the decedent in his lifetime or conveyed, leased, or mortgaged by the ward as if of full age and sound mind.

SEC. 266. 22-821; 38-220; 39-222.

SEC. 267. *Real estate commission.* The court may in its discretion, after notice to all parties in interest, allow a real estate commission, but such allowance shall be passed upon by the court prior to the sale.

SEC. 267. This section is new. Substance taken from Ohio laws. See Ohio General Code, section 10510-32.

SEC. 268. *Payment of title documents.* The court shall have authority to allow payment for certificate or abstract of title or policy of title insurance in connection with the sale of any real estate.

SEC. 268. This section is new. Substance taken from Ohio laws. See Ohio General Code, section 10510-33.

#### ARTICLE 24.—APPEALS

SEC. 269. *Appealable orders.* An appeal to the district court may be taken from any of the following orders, judgments, decrees, and decisions of the probate court: (1) An order admitting, or refusing to admit, a will to probate. (2) An order appointing, or refusing to appoint, or removing or refusing to re-

move, a fiduciary other than a special administrator. (3) An order setting apart, or refusing to set apart, a homestead or other property, or making or refusing to make an allowance of exempt property to the spouse and minor children. (4) An order determining, or refusing to determine, venue; an order transferring, or refusing to transfer, venue. (5) An order allowing, or disallowing, a demand in whole or in part when the amount in controversy exceeds fifty dollars. (6) An order authorizing, or refusing to authorize, the sale, lease, or mortgage of real estate; an order confirming, or refusing to confirm, the sale, lease, or mortgage of real estate. (7) Judgments for waste. (8) An order directing, or refusing to direct, a conveyance or lease of real estate under contract. (9) An order directing, or refusing to direct, the payment of a legacy or distributive share. (10) An order allowing, or refusing to allow, an account of a fiduciary or any part thereof. (11) A judgment or decree of partial or final distribution. (12) An order compelling, or refusing to compel, a legatee or distributee to refund. (13) An order directing an allowance, or refusing to direct an allowance, for the expenses of administration. (14) An order vacating a previous appealable order, judgment, decree, or decision; an order refusing to vacate a previous appealable order, judgment, decree, or decision. (15) A decree determining, or refusing to determine, the heirs, devisees and legatees. (16) An order adjudging a person in contempt. (17) An order adjudging, or refusing to adjudge, a person incompetent. (18) An order committing, or refusing to commit, a patient to a state hospital. (19) An order granting or denying restoration to capacity. (20) An order decreeing, or refusing to decree, an adoption. (21) A final decision of any matter arising under the jurisdiction of the probate court.

SEC. 269. 22-223; 22-265; Supp. 22-1101; 38-228; 39-234; 76-1214. Present sections consolidated and revised in accordance with the code revision.

SEC. 270. *Questions certified to district court.* In any proceeding pending in the probate court when it appears that a decision upon any question of which the probate court does not have jurisdiction is necessary to a full determination of the proceeding, such question shall be certified by the probate court to the district court, having appellate jurisdiction thereof, which court shall proceed to hear and determine the same as though an action involving that question had been filed originally therein. The decision of the district court, when final, shall be certified to the probate court in like manner as a decision upon appeal.

SEC. 270. 39-234. Makes provision where transfer of venue has been made. See section 242 herein.

SEC. 271. *Venue.* The appeal shall be to the district court of the county of the probate court which made the order, judgment, decree, or decision appealed from, except that an appeal taken from any order, judgment, decree, or decision (other than one determining or refusing to determine venue or transferring or refusing to transfer venue) made before the transfer of venue shall be taken to the district court of the county to which the transfer was made.

SEC. 271. 22-1102; 39-234. Appeal in will cases extended to nine months; contest by separate action in district court being omitted.

SEC. 272. *Time for appeal.* Such appeal may be taken by any person aggrieved within thirty days after the making of such order, judgment, decree, or decision: *Provided*, That an appeal may be taken within nine months from an order admitting, or refusing to admit, a will to probate. In an appeal from

an order admitting, or refusing to admit, a will to probate, after the transcript has been filed in the district court, the order appealed from and the notice of appeal shall be served upon all interested parties not personally served when the appeal was taken, as in civil actions in the district court. Other persons may be made parties thereto by the service of such order and notice upon them.

SEC. 272. 22-1103; 22-1104; 39-234. The affidavit of good faith not required. Subsection (3) is new.

SEC. 273. *Requisites.* To render the appeal effective: (1) The appellant shall serve upon the adverse party or his attorney of record, or upon the probate judge for the adverse party, a written notice of appeal specifying the order, judgment, decree, or decision appealed from, and file such notice of appeal in the probate court with proof of service thereof verified by his affidavit. (2) The appellant, other than the state or municipality or a fiduciary appealing on behalf of the estate, shall file in the probate court a bond in such sum and with such sureties as may be fixed and approved by the probate court, conditioned that he will without unnecessary delay prosecute the appeal and pay all sums, damages, and costs that may be adjudged against him. (3) Whenever a party in good faith gives due notice of appeal and omits through mistake to do any other act necessary to perfect the appeal, the district court may permit an amendment on such terms as may be just.

SEC. 273. 22-1106; 39-234.

SEC. 274. *Transcript.* When an appeal has been effected, the probate court shall transmit to the district court a complete transcript of the proceedings pertaining to the matter in which the appeal is taken.

SEC. 274. 22-1105; 39-234.

SEC. 275. *Effect of appeal.* An appeal from an order admitting a will to probate shall not suspend the operation of the order until the appeal is determined, but no distribution to heirs, devisees, or legatees shall be made pending the appeal. In all other cases the appeal shall suspend the operation of the order, judgment, decree, or decision appealed from until the appeal is determined or the district court shall otherwise order.

SEC. 275. 22-1107; 39-234. Clarified by omitting "be possessed of the cause." See *Lormis v. Hartmann*, (Mo.) 193 S. W. 36. And words "without unnecessary delay" inserted.

SEC. 276. *Trial on appeal.* Upon the filing of the transcript the district court, without unnecessary delay, shall proceed to hear and determine the appeal, and in doing so shall have and exercise the same general jurisdiction and power as though the controversy had been commenced by action or proceeding in such court and as though such court would have had original jurisdiction of the matter. The district court may allow or require pleadings to be filed or amended. All appeals other than those from the allowance or disallowance of a demand, adjudging or refusing to adjudge a person incompetent, and committing or refusing to commit a person to a state hospital, shall be tried by the court without a jury, but the court may call a jury in an advisory capacity or in a proper case may refer the matter or part thereof to a referee.

SEC. 276. 22-1108; 39-234.

SEC. 277. *Certification to probate court.* The clerk of the district court shall certify a transcript of the proceedings and judgment of the district court to the probate court, which shall proceed in accordance therewith.

SEC. 277. This section may not be entirely new. See 60-3825. It is made a separate article that any rules promulgated may be placed in the article as published in the General Statutes.

#### ARTICLE 25.—RULES OF COURT

SEC. 278. *Rules may be promulgated.* Appropriate rules of court not inconsistent with the provisions of this act may be promulgated by the supreme court to regulate the practice in matters covered by this act.

SEC. 278. For uniform veterans' guardianship act, see chapter 73, article 5.

#### ARTICLE 26.—MISCELLANEOUS

SEC. 279. *Statutes saved.* Nothing in this act contained shall be construed to repeal or modify the provisions of the uniform veterans' guardianship act (chapter 73, article 5, General Statutes, 1935), and acts amendatory thereof or supplemental thereto nor the special administrator act for Wyandotte county (Laws 1903, chapter 199, being section 19-1104 of the General Statutes of 1935), and acts amendatory thereof or supplemental thereto.

SEC. 279. A careful study of all probate laws has been made, and as this bill is to be the probate code, all statutes except those saved, are repealed. Sections 22-132 and 22-256 are repealed by the property act.

SEC. 280. *Statutes repealed.* Chapter 5 of the General Statutes of 1935, sections 19-1101 to 19-1103, inclusive, of the General Statutes of 1935, article 11 of chapter 20 of the General Statutes of 1935, chapter 22 of the General Statutes of 1935, except section 22-132 and section 22-256 of said chapter, sections 38-105, 38-106, 38-107, 38-117, 38-118 and 38-119 of the General Statutes of 1935, article 2 of chapter 38 of the General Statutes of 1935, article 2 of chapter 39 of the General Statutes of 1935, article 20 of chapter 62 of the General Statutes of 1935, article 7 of chapter 67 of the General Statutes of 1935, sections 76-1203, 76-1204, 76-1205, 76-1206, 76-1207, 76-1208, 76-1209, 76-1210, 76-1211, 76-1212, 76-1213, 76-1214, 76-1215, 76-1216, 76-1217, 76-1224, 76-1225, 76-1226 and 76-1229 of the General Statutes of 1935, and sections 22-504, 22-507, 22-601, 22-702, 22-729, 22-729a, 22-735, 22-736, 22-737, 22-738, 22-739, 22-1009 and 22-1101 of the 1937 Supplement to the General Statutes of 1935, and all laws in conflict with the provisions of this act are hereby repealed.

SEC. 280. The first sentence of this section is adapted from the New Federal Rules of Civil Procedure. See Rule 86.

SEC. 281. *Effective date.* The rules of procedure herein prescribed shall govern all probate proceedings brought after they take effect and also all further procedure in probate proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding when they take effect would not be feasible or would work injustice, in which event the former procedure applies. This act shall take effect and be in force on and after July 1, 1939, and after its publication in the statute book.

## Suggestions for Putting the Probate Code Into Effect

By SAMUEL E. BARTLETT

The purpose of this article is not to discuss the merits of the new probate code nor to state the reasons for any of its provisions. It is rather to make some suggestions which may be helpful in putting it into operation. Adjustments to legislative changes are often attended with some inconveniences, but it is hoped that the inconveniences occasioned by the code may be reduced to a minimum.

Whether the code gets off with a good start or operates under a handicap in the initial stages will be determined largely by the intelligent coöperation of probate judges, lawyers and persons who have business to transact in the probate courts.

Section 9 is a concise and accurate statement of the law as it has existed in this state since 1867. It is believed to have been observed generally in the past, and where it has been observed the code will not make any change or inconvenience in adjustment to the practice required of it. Where it has not been observed in the past the inconvenience of adjustment will be no greater than that of adjusting and conforming to the law as it has heretofore existed.

All applications to the probate court are to be made by petition verified by or on behalf of the petitioner. Under the former law no petition was required for the probate of a will or for administration. However, the petitions were usually filed in such cases, and the filing of them has been considered by far the better practice. This practice ought not to work any inconvenience whatever. The requirements of the several petitions are set forth in article 22.

The next step in probate proceedings (for the probate of a will or for administration) is that the court shall fix the time and place for the hearing of the petition. This is a simple matter. The order of the court may be in substantially the following form:

"(Caption) On this ..... day of ....., 19.... it is ordered that the petition, filed herein, of ..... for administration of the estate of ....., deceased, be heard on the .... day of ....., 19...., at .... o'clock ....m. by this court in the courthouse at ....., in said county and state; and that notice of the time and place of the said hearing be given pursuant to probate code, section 185; that notice of the time and place of said hearing be given, unless waived as provided by law, by personal service on all the persons named in said petition as heirs of the decedent at least ten days before the date of hearing."

Notice of the hearing may be waived by adults. The waiver may be substantially as follows:

"(Caption) The undersigned, being all the heirs of ....., deceased, hereby waive notice of the hearing of the petition, filed herein, of ..... for administration of the estate of ....., deceased, and for the appointment of an administrator thereof and hereby consent that said petition be heard at the time and place of hearing fixed by the court ..... hereby consent to an immediate hearing of the said petition."

The form of the notice in all cases is set forth in section 186. For the probate of wills or administration it may be served personally if the court so orders, otherwise pursuant to section 185. In either event proof of service should be made.

Where notice is not waived, some time must elapse between the filing of

the petition and the issuance of letters of appointment. The time, however, is not lost for the estate will, in ordinary cases, be closed within a shorter period under the code than under the old law. Besides, the administrator is required to give bond, the witnesses to the will in testate cases must be produced, and these often require a short period of time. After qualification, an inventory and appraisal must be made. In ordinary cases, where everything is harmonious, all these matters can, in part, be attended to with a little coöperation before the hearing, and completed on the day of the hearing without further delay. The order fixing the time and place of hearing may also well contain the following:

"It is further ordered that ....., the proposed administrator of said estate, be and he is hereby appointed, without bond, to conserve the estate of the decedent until an administrator is appointed." (See section 180.)

Such an order should avoid any inconvenience whatever on account of the brief delay in the appointment.

The letters of appointment should be brief and to the point. The following is sufficient:

"(Caption) Know All Men By These Presents: That ....., having been appointed and having qualified as administrator of the estate of ....., deceased, is hereby granted letters of administration of said estate, with full power and authority in the premises as provided by law. In testimony whereof, etc."

The presentation of claims is a simple affair—much simpler than the method prescribed by the old law. To exhibit a claim, all one has to do is to prepare it much in the manner heretofore required, stating the facts constituting the claim, ask for its allowance, verify the petition, and file it in the probate court. It is then exhibited within the meaning of the statute. The old law stated that no claim shall be allowed without proof. Proof under the code is as simple as before, and the elaborate provisions of the old law are omitted. Attention is called to section 215, which limits the presentation of claims to nine months after the notice of appointment. Claims against estates now pending are barred if not presented within nine months after July 1, 1939.

Attention is also called to section 281. An administrator was appointed March 1, 1939. On August 1, 1939, the administrator desires to institute proceedings for the sale of land to pay debts. This is a separate proceeding and the administrator should proceed under the new code. Final settlement of an estate the administration of which was commenced prior to July 1, 1939, should be made pursuant to the new code.

And, finally, it should be emphasized that the simplicity of the procedure does not dispense with the necessity of care in preparing papers, which should be exercised at all times.

## THE PROPERTY ACT

AN ACT relating to property, and repealing sections 22-132 and 22-256 of the General Statutes of 1935.

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

SECTION 1. Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created: *Except*, That a grant or devise to executors or trustees, as such, shall create in them a joint tenancy unless the grant or devise expressly declares otherwise.

SECTION 1. This is G. S. 1935, 22-132, rewritten for clarification and so as to apply to both real and personal property, in harmony with the opinions of our supreme court construing the section. *Simons v. McLain*, 51 Kan. 153; *Boyer v. Sims*, 61 Kan. 593; *Stewart v. Thomas*, 64 Kan. 511; *Holmes v. Holmes*, 70 Kan. 892; *Best v. Tatum*, 78 Kan. 215; *Withers v. Barnes*, 95 Kan. 798; *Malone v. Sullivan*, 136 Kan. 193; *Cress v. Hamnett*, 144 Kan. 128.

SEC. 2. The rules of the common law, known as the rule in Shelley's case, and those pertaining to estates tail, however created, shall not be applied in this state to any instrument which becomes effective after the effective date of this act. Every instrument not without the purview of section 3 taking effect after the effective date of this act and disposing of property which but for this section would create an estate tail shall create a life estate in the first taker and a remainder in fee in the next taker.

SEC. 2. Many of our cases demonstrate that these rules are not suitable to titles to property in this state or to the wants and needs of our people. Here is a partial list of our cases dealing with this question: *Ewing v. Nesbitt*, 88 Kan. 708; *Busey v. Stockhoff*, 88 Kan. 729; *Howe v. Howe*, 94 Kan. 67; *Ryan v. Cullen*, 96 Kan. 284; *Wiggins v. Powell*, 96 Kan. 478; *Bryant v. Flanner*, 99 Kan. 472; *Stevenson v. Stevenson*, 102 Kan. 80; *Grossenbacher v. Spring*, 108 Kan. 397; *Gardner v. Anderson, Trustee*, 114 Kan. 778; 116 Kan. 431; *Allen v. Pedder*, 119 Kan. 773; *Davis v. Davis*, 121 Kan. 312; *Wright v. Jenks*, 124 Kan. 604; *Lisman v. Marks*, 126 Kan. 344; *Farmers State Bank v. Howlett*, 126 Kan. 610; *Somers v. O'Brien*, 129 Kan. 24; *Schwarz v. Rabe*, 129 Kan. 430; *Brown v. Boone* (two cases), 129 Kan. 786; *Berthoud v. McCune*, 130 Kan. 634; *Houck v. Merritt*, 131 Kan. 151; *Burnworth v. Fellerman*, 131 Kan. 186; *Blaker v. Blaker*, 131 Kan. 833; *Walker v. Row*, 132 Kan. 564; *Woodley v. Howse*, 133 Kan. 639; *Coughlin v. Coughlin*, 135 Kan. 70; *Gibbs v. Turner*, 140 Kan. 53; *Brann v. Hall*, 141 Kan. 749; *Kistler v. Fitzpatrick Mortgage Co.*, 146 Kan. 467; *Meyer v. Meyer*, 146 Kan. 709; 147 Kan. 664; 149 Kan. 23; *Coleman v. Shoemaker*, 147 Kan. 689.

SEC. 3. When real or personal property is granted or devised to one person for life, and then to some other person, or persons, whether named individually or as one or more of a class of which the individuals can be ascertained by the time the fee is possessed, the instrument by which such property is so transferred shall be construed as creating in the person first named an estate during his lifetime only, and a remainder in fee simple in the person or persons last named.

SEC. 3. This broadens G. S. 1935, 22-256, so as to include personal as well as real property and any instrument by which property may be transferred, and with respect to any person or class of persons to whom the grantor or testator desires to leave the remainder in fee. The following cases, as well as many of those cited under section 2, will tend to show the desirability of this revision: *Bunting v. Speck*, 41 Kan. 424, 437, 453; *Peck v. Ayres*, 79 Kan. 457; *Kirby v. Broadus*, 94 Kan. 48; *Orphans' Home Association v. Williams*, 104 Kan. 316; *Grossenbacher v. Spring*, 108 Kan. 397; *Kirkpatrick v. Kirkpatrick*, 112 Kan. 314, 319; *McCartney v. Robbins*, 114 Kan. 141; *Gardner v. Anderson, Trustee*, 116 Kan. 431; *Allen v. Pedder*, 119 Kan. 773, 781, 782; *Farmers State Bank v. Howlett*, 126 Kan. 610; *Schwarz v. Rabe*, 129 Kan. 430, 432.

SEC. 4. In the case of instruments disposing of property, of which the following is a type: "A to B and his heirs, but if B dies without issue, then to C and his heirs," the common-law rule of interpretation that indefinite failure of issue is indicated shall not be applied. Definite failure of issue is indicated, that is, death of B without having issue living at the time of his death. B's death without living issue need not occur in the lifetime of the maker of the instrument. The rules here presented apply when the limitation is on death "without heirs," or, "heirs of the body," or, "issue," or, "children," or, "offspring," or, "descendants," or any such relative however described. Enactment of this statute shall not be regarded as legislative recognition that the common law indefinite failure of issue presumption has ever been a part of the law of this state.

SEC. 4. The common-law rule was one of construction of instruments. Under it, when the instrument was construed as indicating an indefinite failure of issue, an estate tail was held to have been created. It had many refinements. Since we are doing away with the common-law rules of estates tail this rule should be eliminated. There appear to be differing opinions among our attorneys as to whether the common-law rule ever was recognized in this state. See: *Klingman v. Gilbert*, 90 Kan. 543; *McCartney v. Robbins*, 114 Kan. 141; *Platt v. Woodland*, 121 Kan. 291; *Cress v. Hamnett*, 144 Kan. 128; concurring opinion in *Ragland v. Ragland*, 146 Kan. 103, 109-112; letter of Dean Burch in *Judicial Council Bulletin*, October, 1937, p. 101.

SEC. 5. In the case of instruments disposing of property of which the following is a type: "A to B and his children," the doctrine of the common law known as the rule in Wild's case shall not hereafter apply, and the instrument shall create a life interest in B and a remainder in his children. The rule here prescribed applies when the expression is "children," or "issue," or words of similar import.

SEC. 5. Under the rule in Wild's Case (*Richardson v. Yardley*, 3 Coke Rep., Part VI, p. 16b), as generally construed (see Vol. IV, p. 122, Journal State Bar Association), a grant or devise to A and his children, or to A and his issue, created in them a joint tenancy (*Noble v. Teeple*, 58 Kan. 398) if A had children or issue at the time of the grant or devise, but if he did not, it created an estate tail. Since we are doing away with the doctrine of estates tail this rule should be eliminated. Also, it was thought best to have a definite statutory rule applicable to such instruments.

SEC. 6. In the case of a will to heirs, or to next of kin of the testator, or to a person an heir or next of kin, the common-law doctrine of worthier title is abolished and the devisees or devisee shall take under the will and not by descent.

SEC. 6. The common-law doctrine of worthier title, to the effect that one who under the laws of descent would take property as an heir cannot take it by will, was established in England as early as 1555 (*Hind v. Lyon*, 2 Dy. 124a, 73 Eng. Repr. 271). To inherit property was more "worthy" than to acquire it by "purchase." It was an outgrowth of the feudal doctrine of primogeniture. Courts had difficulty applying the doctrine when the property devised was not the same in quantity or quality as the devisee would have received as an heir, or where the devise was upon a condition either precedent or subsequent. In 1833 (3 & 4 Will. IV, c. 106, § 3) the doctrine was abandoned in England by an act of Parliament, which provided that an heir to whom lands are devised takes as devisee. In the meantime the doctrine had found a foothold in the American colonies and later in some of the states, with varying results in its application. (See 24 Ill. Law Rev. 627.) We have no need for the doctrine in this state.

SEC. 7. Sections 22-132 and 22-256 of the General Statutes of 1935 are hereby repealed.

SEC. 8. This act shall take effect and be in force from and after July 1, 1939, and its publication in the statute book.



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