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# KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1936

PART 1.—TENTH ANNUAL REPORT



ALBERT FAULCONER, President Kansas State Bar Association

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 OTHER ORGANIZATIONS, and leading citizens generally throughout the  
 state,

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

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## FOREWORD

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Our Judicial Council was created because of the recommendation of the Bar Association of the state. It has coöperated with us in the study of many of the measures considered for the improvement of our judicial system and procedure therein. We are therefore gratified to present in this issue an article by its president, Albert Faulconer, of Arkansas City, on "Improving the Administration of Justice Through the Rule-making Power of the Court." More and more the State Bar Association, not alone at its annual meeting, but through its committees, is giving intelligent study to the practice of law, the activities of those engaged therein, the structure of our judicial system, the procedure in our various courts, and the reframing of statutes and of constitutional provisions so as to make them more suitable to the wants and needs of our people. Specifically it seeks to make the profession of law a thoroughly honorable, serviceable, and trustworthy one. Every active lawyer in the state should be a member of the association, and should participate in its various activities. Its magazine, the *Journal of the Bar Association*, should be on the desk of every lawyer, and he should be familiar with it. It will aid him in his practice and ultimately will enable him to make, or to save, more money than his dues to the association would amount to in a lifetime.

At the meeting of the Probate Judges' Association, last November, Samuel E. Bartlett, of Ellsworth, read a paper on "Proposed Statutes, Probate and County Courts" which was later published in the February, 1936, number of *The Kansas Official*, Mr. O. K. Swayze, editor. By permission of the author and of the prior publisher we are including it in this BULLETIN. We have previously printed articles by Mr. Bartlett on various phases of the law of estate of decedents and of minors and other incompetents, and of procedure in probate courts. Perhaps no branch of our law needs improvement more than this. Mr. Bartlett has given much study to these questions. His articles are always interesting and helpful. May it be hoped that some time in the near future we will do something worth while in the way of improving our judicial system with respect to courts inferior to the district court.

From time to time someone suggests that judges of trial courts, in the trial of criminal cases, should be granted more authority than they have, or should exercise more freely such authority as they have, to comment on the evidence in addressing or instructing the jury. Judge Beals, a member of the Council, has made some study of the question, and has written an article on the subject which we print herein. It points out some of the benefits of such a practice, also some new problems it might create. We would be glad to hear from attorneys giving their views on the subject. Especially we would like to hear from trial judges as to what extent they "present the facts of the case" in their instructions, as appears to be authorized by R. S. 62-1447.

We review some suggestions concerning the practice of law by foreign attorneys in the courts of this state.

Others matters in this issue of the BULLETIN pertain to measures designed to improve the enforcement of criminal law. In this we coöperated with a



committee of the State Bar Association, of which the attorney general, Clarence V. Beck, is chairman. Two years ago a similar committee of the Bar Association, of which the late S. M. Brewster was chairman, coöperated with us in submitting to the legislature several bills on those matters which we thought would be helpful. Some of these were enacted into law. Three of them were not enacted. Their legislative history is set forth in our April, 1935, BULLETIN. We again recommend their enactment. They are set out later herein. The greatest handicap prosecuting officials have in this state in many cases is to procure the evidence as to who committed the crime, and to accomplish the arrest of the criminal. Our criminal procedure, imperfect as it is in some respects, is, after all, the least of the prosecutor's troubles. The great need for effective law enforcement in this state is a bureau for scientific investigation respecting crimes committed, in order to determine who committed them. A proposed measure on that subject is incorporated herein. After determining who committed the crime, which in some instances cannot be done without the aid of a scientific investigator, the next problem is to apprehend and arrest the criminal. In these days of easy transportation that requires coöperation between the states. The Interstate Conference on Crime, of which our attorney general is a member, has recommended four measures thought to be helpful. We print them herein for the study of lawyers and others. They contemplate action between the states by interstate compacts. Whether that is the best form for their adoption may be open to debate, but there can be no debate about the necessity of legislation of this character. We hope the members of the bar will give all these matters the attention they deserve, so that the next session of our legislature can have the benefit of our mature judgment respecting them.

## IMPROVING THE ADMINISTRATION OF JUSTICE THROUGH THE RULE-MAKING POWER OF THE COURTS

By ALBERT FAULCONER.

Our legal system is for the protection of the rights and property of all people. It is administered by men and is affected by the frailties of human nature, as other institutions are. There is therefore a constant responsibility for protecting and improving it. This responsibility rests primarily upon courts and lawyers.

From the time of Justice Taney the courts of the land have held that the admission of attorneys and the practice of law is a judicial matter.

The right of the court to make rules governing the practice of law and to impose disciplinary measures is no longer an unsettled question in Kansas.

In states where the bar has been incorporated under legislative act there has been a decided improvement in the general attitude toward the administration of justice, both criminal and civil.

In other states the lawyers have brought the matter to the attention of the supreme court, and the bar has been united under rules of court. Typical of the latter method are the rules promulgated by the supreme court of the state of Michigan, printed in full in *Northwestern Reporter Advance Sheet* of January 22, 1936. Every lawyer in Kansas should read these rules.

The Michigan rules, insofar as applicable, have been suggested to the supreme court of Kansas.

The subject of integrating the Kansas bar under rules of the supreme court will be presented for discussion at the meeting of the State Bar Association in Wichita, May 22 and 23, and we confidently hope that the lawyers of the state will give the subject their consideration, that we may be able to intelligently request the supreme court to cover the whole subject of the admission and practice of the law in Kansas and set up an administrative system for the bar under one uniform set of rules.

I feel sure that every practicing lawyer of the state will welcome from the supreme court the exercise of its rule-making power for the complete government of the admission to and practice of law. The responsibility of the lawyers for the good name and effective influence of the bar is inescapable. It is the duty of courts and lawyers not only to protect but to improve our legal system.

Some years ago, through the efforts of lawyers, the Judicial Council was created by legislative authority. From its inception the Council has done effective and valuable work toward the improvement of our legal system. There has been the best of coöperation between bar associations, the Judicial Council, and the supreme court in the efforts that have been made to improve procedure and the work of the courts, as a result of which improvements have been made in the criminal law and procedure.

The Judicial Council has done a great deal of work toward rewriting the judicial articles of the state constitution, and together with a committee of the State Bar Association is working out improvements in the law of estates and probate procedure.

Bar associations do not exist merely for their own glorification, but are to help maintain and improve our legal system. It seems to be conceded by most

active lawyers that to make our activities effective and at the same time create a more favorable public interest in what we are doing, the lawyers of the state should be united under some uniform plan that will more effectively accomplish the definite aims of our legal system with the supreme court of the state marking the way.

Not only is there a duty resting upon bar associations to improve legal procedure, but there is an obligation to the public, to the court, and to the other members of the bar, resting upon each individual lawyer, to improve methods of practice. This obligation of the individual attorney is not discharged by sitting idly by and permitting others to do the work.

By their admission to practice special privileges have been conferred upon attorneys, which privileges are denied laymen. The granting of the privileges was not without its price in corresponding obligations. The individual attorney who accepts the privileges without discharging the reciprocal obligations is unworthy of the privileges of the profession.

It has been found that the most effective method for the fulfillment of these obligations is by complete representative unity of the bar. This can be accomplished only through a central organization. In some states this organization has been effected through legislative direction, while in others it has been brought about through order of the supreme court of the state. Inasmuch as the lawyer is an officer of the court and is directly responsible to the court for his conduct, it would seem that the judiciary branch of the government is the proper one under whose direction such unity can and should be attained.

There is another advantage to such procedure, viz., it is much more flexible. The court can quickly and readily, by change of rule, meet any new conditions or situations. Such flexibility is not obtainable where legislative enactment is the basis of such coördination. Where organization has been had under rule of court the bar has nevertheless maintained its self-governing features and there has been no loss of independence to the bar association, and voluntary district associations have become more and more the important means of making association work of greater benefit to individual lawyers.

Legal machinery needs revision from time to time, just as mechanical contrivances require it in the industrial world. Organization under rule of court appears to be the most logical and satisfactory method of coördination of the bar and gives to the attorneys a full and complete opportunity to discharge their obligations to the public, to the court, and to other fellow members without loss of independence or surrender of any rights or privileges.

## PROPOSED STATUTES, PROBATE AND COUNTY COURTS

An address by SAMUEL E. BARTLETT, delivered at the annual meeting of the  
Kansas Probate Judges' Association

Numerous changes have recently been proposed in the statutes relative to probate courts and probate jurisdiction, and it seems to be the consensus of opinion that some revision should be made in these statutes. You are familiar with the activities and recommendations of the Kansas Judicial Council as disclosed by its published bulletins. You are also aware that at the last meeting of the Kansas Bar Association a resolution was adopted that a code of procedure for probate courts be prepared and submitted to the next legislature. Similar resolutions have been adopted by local bar associations in different parts of the state within the past few years, and there has been considerable discussion of what ought to be contained in as well as what ought to be omitted from the proposed revision.

A brief consideration of some of the major proposals is all that may be attempted at this time. I hold no official position, and the views I shall present are those that have come to me from my experience and observation as an attorney engaged in the general practice in a rural community.

I therefore invite your attention, first of all, to the probate and county court bill as a proper subject for discussion and consideration by this association. Our judicial system, from the district court up, is generally considered as satisfactory. In civil and criminal cases below the district court what we now have can hardly be classified as a system at all. The constitutional provision, that "two justices of the peace shall be elected in each township" of the state, has been outgrown. That such is the case is clearly indicated by the number of legislative acts and the larger number of legislative proposals dealing with the subject in the past two decades. With the passing of time townships have largely disappeared as municipal units and have for all practical purposes almost ceased to function.

The Judicial Council reports that not more than twenty percent of the constitutional number of justices of the peace are ever elected. This fact alone is sufficient proof of the inadequacy of the system. Twenty percent is not only poor fielding; it is not even good batting. Of the justices of the peace who are elected, many do not qualify; and many of those who do qualify do not try cases or transact any judicial business. Those who are active function only in the county-seat towns or larger cities; and today the justice of the peace court in Kansas, so far as it exists, has become a sort of abridged county court. In my home county of twenty townships two justices of the peace handle ninety percent of the civil cases in justice court, and one of them sits in judgment in ninety percent of the criminal cases in justice court. It is likely that he would have heard the other ten percent if he had not become imbued with the idea of an independent judiciary and discharged a defendant over the protest of the county attorney.

A justice of the peace receives no salary, is dependent on fees, and as a rule he soon learns that it is the plaintiff and not the defendant who brings law business to his court. There are of course notable exceptions; but the system,

as it prevails, is not conducive to a fair and efficient administration of justice. And it is the system I am indicting, not the personnel of justice courts; the system is outworn and should be supplanted by something better. The solution seems to be a combined probate and county court.

It can also be safely said from an actual examination of the files of my county that any reasonable increase in the salary of the judge of the probate and county court occasioned by higher qualifications for the judges and his increased responsibilities and duties may be met by the collection and payment to the county of fees for the work done similar to those now collected by justices of the peace. I do not know how it is elsewhere but it is probable that Ellsworth county is typical in this respect of the counties in the western half of the state.

The proposed probate and county court bill was introduced in the last legislature as house bill No. 338, and was approved by the house judiciary committee. Many are of the opinion that it would have been enacted into law if the legislature had had more time. It provides for a probate and county court in each county except counties in which the county seat is a city of the first class with a city court; and it gives such court the present jurisdiction of probate courts, and present jurisdiction of justices of the peace, and further similar jurisdiction in civil cases not exceeding one thousand dollars. The bill further provides that "the probate judge shall be the judge of the probate and county court."

While justice of the peace courts have outlived their usefulness, it is not necessary to state to you that probate courts have grown in importance. According to a survey made by the Judicial Council, the total value of the estates of decedents, minors, insane and other incompetent persons, being administered in your courts on July 1, 1935, amounted in round numbers to one hundred thirty million dollars. The Judicial Council is authority for the statement that in practically every county of the state the value of property being administered in the probate courts exceeds the value of that being litigated in the district courts. The legal questions that arise are frequently as important and as difficult as those that arise in the district court.

Existing law provides "that no person shall be qualified to hold the office of judge of the district court . . . unless such person is at least thirty years of age and shall have been regularly admitted to practice law in the state and engaged in the active and continuous practice of law or shall have served as judge in a court of record, or been engaged in both such practice and such service as judge, for a period of at least four years. . . ." (R. S. 20-105.) The effect of this statute has been wholesome and no one would think of repealing it.

It would seem wise, therefore, that the judges who are to preside over probate and county courts should have some knowledge of the law they are administering. In fact, one of the objections urged against giving the probate courts further jurisdiction has been the personnel of those courts as it has existed in the past. There are those who insist that the judge of the probate court should be a member of the bar; others say it should be an open field with no favorites. If one is required to have a license to be a barber, or a plumber, or a beauty specialist, it would seem that those who sit in judgment in the administration of estates amounting to millions of dollars annually



ought to have some training or experience that fits them for the work they have undertaken.

In the midst of the extreme rightists on the one hand and the extreme leftists on the other I venture to quote a Latin proverb as pertinent: *medio tutissimus ibis*. (You will go safest in the middle.) The bill therefore in my judgment wisely provides that "no one shall be qualified to act as judge of the probate and county court who is not regularly admitted to practice law in this state, or who has not served as a probate judge in this state for as long as two years prior to the beginning of his term as judge of the probate and county court." I recommend the bill as a whole to your favorable consideration. The new court, however, will be only as efficient as its personnel; and unless we have some assurance of a higher standard of qualifications for the judge of the new court than has obtained generally in justice courts, much of our enthusiasm for the proposed measure is likely to disappear.

You have had much experience in dealing with the complications that sometimes arise in connection with the limitations placed upon the powers of an administrator when it comes to the real property of a decedent. In Kansas the administrator of an intestate decedent has no authority over the real property unless it is necessary for the payment of debts of the decedent. The defects of our present statutes on the subject have been indicated from time to time by the Judicial Council and others, and I shall not attempt to elaborate upon them. One simple illustration is sufficient. A man in Ellsworth county died intestate owning farm lands and personal property. He was unmarried and left no heirs in Kansas. His remote relatives, some of whom were minors, inherited his property and they lived in a half dozen distant states. One of them came to Kansas and procured the appointment of a local man as administrator. It was necessary to look after the farms, and the administrator as a practical necessity did the whole business—but without sanction of law. You can readily see the innumerable difficulties that might arise in a more complicated situation. If the administrator had been unfaithful in his management of the farms no liability would have been incurred by his bondsmen. Difficulties have arisen in the past with resulting loss. The situation ought to be remedied.

Two bills were prepared by Mr. E. C. Flood, of Hays, to correct these obvious defects, and these bills appear, with some revision, in the December, 1934, Judicial Council Bulletin. They were introduced in the last legislature as senate bill No. 228 and senate bill No. 278. Both passed the senate and No. 228 was favorably recommended by the house judiciary committee. These measures provide in substance that the administrator shall take charge of and administer nonexempt real property substantially in the same manner he now administers nonexempt personal property. If enacted into law, they will give administrators legal authority to exercise those powers they have in fact often exercised without legal authority and ought to be permitted rightfully to exercise; and they will do much to clarify the present unsatisfactory situation.

As complementary to the proposed measures, I suggest an additional one. It often happens that a man dies and leaves a business—a going concern. In many estates a business is the greatest asset and may be wholly destroyed if the executor or administrator has no authority except to close it up forthwith. The recommendation I am making provides a means whereby in such instances the business can be continued temporarily under strict supervision and direction of the court. The section proposed may be stated substantially as follows:

Except as otherwise directed by the decedent in his last will and testament, if any, an executor or administrator shall have authority without personal liability for losses incurred, to continue decedent's business during the three months next following the date of the appointment of such executor or administrator, unless the court directs otherwise; and for such further time as the court may authorize, after hearing. During the time the business is so continued, the executor or administrator shall file monthly reports in the probate court, setting forth the receipts and expenses of the business for the preceding month, and such other pertinent information as the court may require. The executor or administrator shall not have authority to bind the estate without court approval beyond the period during which the business is continued.

Much can be done to clarify, simplify, and at the same time reduce the bulk of existing statutes. We have one group contained in chapter 38 of the Revised Statutes dealing with the estates of minors, another contained in chapter 39 dealing with the estates of insane and other incompetent persons, and still another contained in chapter 62 (article 20) dealing with the estates of imprisoned convicts. All this in addition to the statutes dealing with the estates of decedents found in chapter 22. Much of the substantive law contained in this three-fold statement dealing with these three kinds of estates of living persons may be combined into one consistent statement; and fully half of the sections, thus combined and dealing with the estates of living persons, may be combined with like sections relating to decedents' estates in such a manner as to present a concise and consistent whole.

Provisions relating to the oath, letters of appointment, bonds and qualifications of sureties, the requirements for new or additional bonds, successor bonds, release of sureties, depositaries of trust funds, inventory and appraisement, sale of personal property, sale of real property, investment of funds, completing real contracts, insolvent estates, accounting and the like, readily admit of a uniform statement that will do much to clarify, simplify, and reduce the bulk of any restatement of the substantive probate law that may be undertaken. In the final analysis we have very little substantive probate law declared by existing statutes.

A few years ago Mr. Charles L. Hunt, of Concordia, with his characteristic thoroughness, made an examination of the existing statutes relating to decedents' estates with a view of ascertaining which sections are a pronouncement of substantive probate law and which relate to procedure. He found that of the 331 sections contained in chapter 22 of the Revised Statutes, 221 of them were entirely or partly procedural. The ratios in chapters 38, 39 and article 20 of chapter 62 are about the same. Mr. Hunt further found: "There are twenty-two situations arising in the administration of estates of decedents where notice or citation is required and . . . no two of this number are identical as to the four essentials of notice: the kind of notice, the length of time, the manner of service, and the persons who must be served." His conclusion is that "we are overloaded with technical conflicting procedural requirements sadly lacking in that uniformity needed for a certain and reasonably speedy administration of justice in the probate court."

I agree with Mr. Hunt's conclusion. The confusing, haphazard, and often ineffectual procedural provisions should be eliminated; the substantive pro-

visions, so far as necessary, should be restated, clarified, simplified and completed; and a uniform and effective code of probate procedure should be prepared and adopted. I confess to you, frankly, that I do not know the dividing line between substantive and procedural law, but find consolation for my ignorance in the statement of Prof. Charles E. Clark of the Yale law school that "no exact division between procedural and substantive law is conceivable or desirable." However, for the purpose at hand, the following statement will be sufficient. "Matters of procedure include access to courts, the conditions of maintaining or barring action, the form of proceedings in court, the method of proving a claim, the method of dealing with foreign law, and proceedings after judgment." (Restatement of conflict of laws, comment on section 585.) While a twilight zone exists between the two like the twilight hour between daylight and darkness, for practical purposes the general distinction between them should be kept in view and the work undertaken should be carried forward and completed.

A restatement, such as has been indicated, of the substantive probate law is not only desirable but necessary if a separate code of procedure is to be adopted; and a uniform code of procedure for the administration of all estates is equally desirable and attainable. Mr. Justice Harvey, who has devoted much of his time and talent to the subject, has stated, "It has certainly been demonstrated that probate procedure may be provided by rules." It is immaterial to this discussion whether the legislature adopts these rules or authorizes the supreme court to promulgate them; but the duty to establish rules of procedure seems imperative under any fair interpretation of pronouncements on the subject by the highest court of the land.

The United States supreme court has given us an excellent statement of the objects to be accomplished by the administration of an estate in the following forceful language:

"When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the state, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice, or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it." (*Tilt v. Kelsey*, 207 U. S. 43.)

Notwithstanding it is the duty of the state to provide a tribunal to decree the succession and determine those who are entitled to the estate, under our present law a probate court does not have jurisdiction to determine heirship as to real property. (*McVeigh v. First Trust Co.*, 140 Kan. 79; *First Colored Baptist Church v. Caldwell*, 138 Kan. 581, 139 Kan. 45.) Under the laws of this state, where real property passes by the laws of intestate succession or under a will to a person or persons not named in such will, there is no adequate probate procedure for a judicial determination of the persons entitled to the property. The usual final settlement, which "adjudges" that the heirs of A are B and C, is not binding on D, who is in fact an heir of A and as such owns

an interest in land. In such a situation one purchasing land from B and C does so at his own risk, and D, who is in fact an heir and owned an interest in the land, still owns such interest. The purchaser's title is defective notwithstanding the alleged adjudication under our present probate law. With provision for notice as required by due process of law under the fourteenth amendment to the federal constitution, a correct decree would undoubtedly have been entered in the probate court. From any point of view it is certainly desirable that adequate provision be made for a determination of those entitled to the property of a decedent.

The code of civil procedure is familiar to all of you, has been judicially construed, works well, many of its provisions are easily adaptable to probate matters, and a proper application of its principles in probate matters will provide a proper remedy. The probate code draft appearing in the December, 1932, Judicial Council BULLETIN is patterned almost entirely after the civil code. It is largely the work of the late Judge Roscoe H. Wilson, of Jetmore, who was a pioneer in the movement and who has our gratitude for his industry and accomplishments. The draft contains the fundamental requirements for a judicial determination of rights and interests. It was certainly a fine beginning. The principal criticisms of the draft have been that it is too intricate, unduly slows up the proceedings, and may incur too much expense. However, it contains many valuable features and suggestions that would find a place in any final draft.

"All the authorities agree that the fundamental requisites of due process are, first, adequate notice; second, a hearing; third, the application of equal laws; fourth, jurisdiction, when proceedings before a regularly constituted court are in question." (Taylor on Due Process of Law, section 132.)

It makes little difference whether a probate proceeding is considered an action *in personam* or an action *in rem*, the principle is the same. The question of notice is always of primary importance, for notice inheres in due process of law. Without adequate provision for reasonable notice there can be no effective adjudication of anything. "A state cannot exercise through its courts judicial jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notification is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard." (Restatement of Conflict of Laws, section 75.) "A state cannot exercise through its courts judicial jurisdiction over a thing, although it is within the territory of the state, unless a method of notification is employed which is reasonably calculated to give knowledge of the attempted exercise of jurisdiction and an opportunity to be heard to persons whose interests in the things are affected thereby." (Restatement of Conflict of Laws, section 100.)

The matter of notice is important; yet a half dozen sections in the new code will meet the fundamental requirements and give us uniformity "as to the four essentials of notice: the kind of notice, the length of time, the manner of service, and the persons who must be served."

These basic principles must be utilized in the preparation of a procedural code for probate courts if our threefold aim in the administration of estates is to be realized: First, to make the administration of an estate as simple, inexpensive, and practicable as possible. Second, to secure uniformity for all

estates and conform to the provisions of the civil code as far as is practicable without disadvantage. Third, to effect a valid adjudication of probate matters and a judicial determination of the persons entitled to the property of a decedent.

With these principles and these aims as a guide, a probate code of fifty sections or less ought to do the work admirably and get rid of much of the present conflicting procedural statutes of which Mr. Hunt justly complains. And what probate judge would not welcome in their place half a hundred concise and consistent rules as a guide to the procedure to be followed in his court?

The new probate code may well have a name, adopt the rule of liberal construction, give the probate courts jurisdiction to do the work they were created to do, determine the nature of and what may or shall be included in a probate action, and fix the venue in probate actions for the appointment of administrators, for the probate of wills, for the appointment of guardians of estates of persons under disability, and for the appointment of trustees in cases over which probate courts have jurisdiction. For convenience, executors, administrators, guardians, and trustees may collectively be designated as fiduciaries.

It seems wise to provide:

1. Issues of fact on the trial of a probate action, or the determination of any controverted matter therein, shall be in accordance with the rules of evidence provided for civil cases by the code of civil procedure.

2. Trials and hearings in probate actions shall be by the court; and the decision of the court therein or in any matter pertinent thereto, shall have the same force and effect as a judgment at law or a decree in equity, as the particular case may require, and shall be final as to all persons having notice of the hearing, except: (1) upon appeal according to law; (2) in case of fraud or collusion; (3) as against rights which are saved by statute to persons under disability; and (4) nothing in this act shall be construed to abridge or modify the provisions of chapter 160 of the Laws of 1925 relating to the contest of wills in the district court.

Uniform provisions for appeal should be added. The suggested provisions, together with an adequate provision for notice which has already been discussed, seem to cover the basic requirements; nor does it seem that it would be difficult to state them in concrete form. The remainder of the code seems to be largely a matter of detail, which may be contracted or expanded as may appear best to accomplish its purposes. A few suggestions of some of these details as to parties and pleadings may be considered.

1. The title of a probate action shall be: "In the matter of the estate of (name of decedent or person under disability with a specific designation which it is)."

2. A probate action may be commenced in the probate court by filing a petition in the proper court and causing said petition to be set for hearing.

3. Every action must be prosecuted in the name of and by some person having a substantial interest in obtaining the relief sought in the petition.

4. The action of a person under disability must be brought by his guardian or next friend. When an action is brought by his next friend, the court has power to substitute the guardian, or any person, as the next friend.

5. The party instituting a probate action shall be known as the petitioner. Any number of persons having an interest in obtaining the relief sought may join as petitioners. All other parties shall be known as respondents.

6. The pleadings in probate actions shall be in writing and shall be signed



and verified by affidavit of the pleader or his attorney. No defect of form shall impair substantial rights; and no defect in the statement of jurisdictional facts actually existing shall render void any proceedings.

7. The pleadings shall consist of a petition, an answer thereto, and such motions subsequent to the appointment of a fiduciary as occasion may require.

8. The petition shall state: (1) the name of the court and county in which the action is filed; (2) the title of the action; (3) the name of the petitioner; (4) the names of the respondents so far as known to the petitioner; (5) the word "petition," followed by (6) a statement in ordinary and concise language of the facts constituting the jurisdiction of the court and the grounds of the proceedings; (7) and shall pray for such relief as is desired. A petition for the probate of a will shall be accompanied by the will if it can be produced.

9. The answer shall be filed on or before the return day specified in the notice of hearing, and shall in ordinary and concise language set forth the facts constituting the defense. A respondent may contest the application for the appointment of a fiduciary on the ground of incompetency of the person proposed as such or may assert his own right to letters of appointment.

10. A motion is an application for an order addressed to the court or judge thereof by a party to the proceeding or anyone interested therein or affected thereby. All orders in probate actions subsequent to the appointment of a fiduciary shall be made upon motion.

11. Before the hearing of any petition, or any subsequent motion requiring notice thereof, except as otherwise provided, the probate court shall give or cause to be given notice of such hearing. In such cases all parties to be given notice shall be notified in writing (or by publication) of the nature of the proceeding, the time and place of hearing, and the nature of the order or other relief sought in such proceeding.

12. Upon the filing of a sufficient answer the cause shall be at issue, new matter being deemed denied; and the cause shall be heard at the date set for hearing, unless the court for good cause should continue it to a later date. The hearing shall proceed upon the petition and answer together, in case an answer is filed.

You may be interested in the matter of claims against a decedent's estate. Here are three brief procedural sections which fit in nicely with the general scheme and seem to be sufficient:

1. Creditors shall present their claims to the executor or administrator of a decedent's estate within the time provided by law. All claims shall be in writing, verified by the oath of the claimant, who shall state that to the best of his knowledge and belief he has given credit to the estate for all payments and offsets to which it is entitled and that the balance claimed is justly due.

2. The executor or administrator shall from time to time as occasion requires, and must on application of any creditor, make and return upon oath into court a schedule of all claims so presented to him and all claims known to the executor or administrator but not presented. Such schedule shall state the name and address of each claimant, the amount claimed, whether secured by mortgage or otherwise, and the date of maturity if not yet due.

3. Upon the filing of any schedule of debts by the executor or administrator, the court shall forthwith set a day, within the time and in the manner herein provided for the hearing of motions, for the hearing of said schedule of debts and the determination thereof.

In connection with the final settlement these provisions seem pertinent:

1. Whenever property passes by the laws of intestate succession, or under a will to a beneficiary or beneficiaries not named in such will, the proceedings in the probate court shall include a determination of the person or persons entitled to such property. Before final settlement in such cases, an application shall be made to the probate court to determine the persons entitled to such property, which application may be made by the executor or administrator or

any interested party, and may be included in the application for a final settlement of the estate.

2. The application shall set forth an accurate description of the real property in this state of which the deceased person died seized, the names and places of residence of the devisees, legatees, and heirs of such deceased person so far as known to the applicant or ascertainable to him on diligent search and inquiry, the nature and character of their respective interests and claims so far as known, and shall designate those who are believed by him to be minors or otherwise under disability and whether those so designated are under legal guardianship in this state. If the applicant believes that there are or may be persons who have claims against or interests in such estate as devisees, legatees, or heirs whose names are not known to him the application shall so state.

3. Upon the filing of such application the probate court shall set the said cause for hearing at the same time as the hearing of the final settlement, and notice of such hearing shall be given to all parties interested whose place of residence is known as provided herein for the giving of notice of hearing. If the application shall set forth that there are or may be persons whose names are not known who have claims against or interests in said estate, notice of hearing shall be published, directed to all persons claiming any beneficial interest in the estate of such decedent. Such publication of notice may also include all persons whose names are known and set forth in said application but who cannot be personally served within the state. Such notice as may be made by publication may be included with and published at the same time and in the same manner as notice of final settlement is published.

I have thus ventured to indicate some of the features I have thought ought to be in a probate code. Time will not permit recital of further details, as I have detained you too long now. What I have said has nothing of completeness or finality about it, and is offered to you only as an expression of the views of a country lawyer engaged in the general practice of law. The undertaking as a whole is a task which challenges your individual and united efforts. I rejoice in the interest you have manifested for the improvement of the administration of justice in this particular field, and I thank you for the kindness you have shown me.

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## COMMENT ON THE EVIDENCE BY TRIAL JUDGES IN CRIMINAL CASES

By RAY H. BEALS, Judge Twentieth Judicial District.

Under a proper system of jury trial the judge should instruct the jury in a binding way upon the law, and the jury should determine for themselves the facts. In most jurisdictions in the United States the state trial judge may not comment on the facts or the credibility of the witnesses, and is confined in his instructions to an abstract statement of the applicable law. In some jurisdictions he is permitted only to give such instructions as are requested and presented to him by counsel for the respective parties. In some jurisdictions he is required to reduce his instructions to writing and submit them to counsel for their criticism and exceptions. In some jurisdictions he is permitted, on the one hand, as at common law, not only to instruct the jury orally in a general charge upon the law, but also to apply the law concretely to the facts of the case, and to discuss with the jury the credibility of the evidence and of the witnesses, provided he cautions the jury of their right to disregard his expressed opinion as to the facts if the jurors see fit to do so.

Success of a trial means the attaining of a single result—a verdict in accordance with the evidence and the law. If the instructions of the court are merely statements of abstract law, whose relevancy to the facts of the case is left for the jury to deduct unaided, the jury may not be able to make the proper application of the law to the facts.

As to whether or not the trial judge should be permitted to express an opinion upon the credibility of witnesses or circumstances and to state that in his opinion certain witnesses did or did not tell the truth, with the accompanying qualification that the jury may disregard his expression of opinion, is a question which has been discussed by judges and trial lawyers for some time.

Our statute (R. S. 62-1447) reads as follows:

"The judge must charge the jury in writing, and the charge shall be filed among the papers of the cause. In charging the jury he must state to them all matters of law which are necessary for their information in giving their verdict. *If he presents the facts of the case, he must inform the jury that they are the exclusive judges of all questions of facts.*"

This statute was enacted in the territorial laws of Kansas for the year 1859, and was taken from the Indiana statutes, and will be found in section 113, volume 2, of the statutes of Indiana for 1852.

In the case of *Barker v. The State of Indiana*, 48 Ind. Rep. (1874) 163, the supreme court commented upon the language, "If he presents the facts of the case, he must inform the jury that they are the exclusive judges of all questions of fact."

The supreme court of Indiana said: "The court is not authorized to tell the jury that certain facts have been proved." (*Driskell v. The State of Indiana*, 7 Ind. 338.)

"Though the jury are the exclusive judges of what is proved by the evidence, still it may be summed up by the court. The court in charging a jury has no right to assume the existence of a fact which the jury are required to find from the evidence." (*Smathers v. The State of Indiana*, 46 Ind. 447, with authorities cited.)

In the case of *Horne v. The State*, 1 Kan. 42, the fifth subdivision of the syllabus reads as follows:

"While the court has a right to present the facts in the instructions to the jury, yet in such case it must inform the jury that they are the exclusive judges of all questions of fact."

In the above case the court said:

"The court has a right to present the facts in his charge, but must in that case inform the jury that they are the exclusive judges of all questions of fact. . . .

"The first duty of the jury was to decide whether a murder had been committed. This duty was forestalled by the court by intimating that this was a murder. If it be considered as presenting the facts, or suggesting a conclusion from facts, it is equally error. If the first, it is error because the jury were not informed that they were the exclusive judges of the facts. If the second, it is error because it was intimating a conclusion from facts, which is the special and exclusive province of the jury.

"All persons familiar with the trial of criminal causes have had occasion to observe with what anxiety a jury listens to catch from the court the slightest indication of its views. This is particularly the case when matters of great

doubt and difficulty are before them for decision. How then can it be known that the expression used in this charge had not some influence in determining the final result? The more able and upright the court, the more likely are its intimations to have weight; and it is impossible to say that the jury may not have received some bias from the language used."

In the case of *Craft v. The State*, 3 Kan. 447 (p. 450), the tenth subdivision of the syllabus reads as follows:

"Where there is testimony on a question of fact material to the issue, the jury are the exclusive judges of that question, and must determine what the testimony proves; but the law requires the court, after the jury have made their findings, to determine whether there is any evidence of the particular material facts."

In the case of *The State v. Truskett*, 85 Kan. 804, it was held error for the trial court to instruct to the effect that there was no evidence for the jury to consider tending to justify the killing, the court saying, at page 816, that the statutes of this state "carefully limit the functioning of the court, reserving to the jury the exclusive right to decide the facts." The court says:

"While in this case the jury were properly informed that they were the exclusive judges of the facts, still the decision that there was no evidence of self-defense for the jury to consider was a conclusion from outward circumstances, which was the exclusive province of the jury."

For over a century federal judges have been exercising the power of commenting upon the evidence in criminal cases. It is, of course, impossible to ascertain how far its exercise has been helpful to juries in arriving at the truth, for the merits of particular cases cannot in any way be determined infallibly; but, granting the correctness of decisions of the appellate courts, we can very readily ascertain if the exercise of the power to comment upon the evidence has been abused, if it has led to unfair trials and the reversal of convictions.

An examination of the decisions of the circuit court of appeal for a period slightly less than three years (vols. 1 to 20, Fed. Reporter, second series, covering cases for November, 1924, to September, 1927) shows that in a majority of cases where it was contended that the trial judge had exercised in an unfair and prejudicial manner the power to comment upon the evidence that contention was sustained and the conviction reversed for that reason. More than this, despite the reluctance of appellate courts to speak critically of the rulings of a trial judge, they have, in many instances, been sharply condemnatory of the manner in which the power under discussion has been exercised.

In *Weare v. U. S.*, 1 F. 2d 617, which is a leading case, citing many decisions, the court, after setting out part of the charge, said:

"The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the functions of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors."

"Under the constitution, one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. This is not a part of the court's duty. He is not precluded, of course, from expressing his opinion on the facts, but

he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment."

See, also, *Parker v. U. S.*, 2 F. 2d 710; *Wallace v. U. S.*, (C. C. A.) 291 F. 972; *Kolp v. U. S.*, 2 F. 2d 953; *Graham v. U. S.*, 12 F. 2d 717; *Spring Drug Co. v. U. S.*, 12 F. 2d 852; *Cook v. U. S.*, 14 F. 2d 833; *LaRosa v. U. S.*, 15 F. 2d 479; *Lett v. U. S.*, 15 F. 2d 686; *O'Shaughnessy v. U. S.*, 17 F. 2d 225; *Smith v. U. S.*, 18 F. 2d 896; *Cline v. U. S.*, 20 F. 2d 495. In each of these cases the decision of the trial court was reversed because, as the appellate court said, the trial court invaded the province of the jury to such an extent as to constitute reversible error. In some of the cases the trial judge told the jury that he believed that the witnesses for the prosecution told the truth.

Reversing a conviction in another case, the court said that "every juror in the case must have known that the court fully expected them to return a verdict of guilty, as much as if they had been expressly directed to do so."

In *Sunderland v. U. S.*, 19 F. 2d 202, in reversing a conviction, the court said:

"The right of the defendant to a fair trial means that while the judge may and should direct and control the proceedings, and may exercise his right to comment upon the evidence, yet he may not extend his activities so far as to become in effect either assisting prosecutor or a thirteenth juror."

In Canada the judge must direct the attention of the jury to the evidence material to the main issue raised in the case. Any discrepancies in the evidence as to matters of fact which are important, and any possible innocent interpretation which might be placed upon the evidence, should be pointed out to the jury.

The Outline of a Code of Criminal Procedure, prepared by the Committee on Criminal Procedure and Judicial Administration of the National Crime Commission, contained this provision:

"10. In the conduct of the trial, including the examination of the witnesses, the judge shall have the same powers as at common law. He shall instruct the jury as to the law applicable to the case, and in said instructions may make such comment on the evidence and on the testimony and character of any witness as, in his opinion, the interests of justice may require. . . ."

I doubt that the public is anxious to restore the power of the common-law judges.

The import of that part of the section should be carefully studied and history should be consulted and the qualifications of the average judge carefully considered before incorporating it in legislation.

It has been suggested that the power of judges be extended. The primary purpose of courts is of a twofold nature: the determination of facts which are or may be controverted, and the application of the law to determined or uncontroverted facts with reasonable accuracy and without delay and without unreasonable expense. It is claimed by some that the investment of judges with common-law power is a remedy for erroneous verdicts. This proposal is based upon the assumption that one judge is better qualified to determine a question of fact than twelve ordinary American citizens.

As I said before, the federal judges have the power to comment upon the evidence. But some of the judges exercise this power sparingly. It is



said that some of the judges realize their own limitations and know that their expressed opinion may unduly influence the jury, and that the jury has an important function to perform, and that its verdict should bespeak its own mind and not that of the judge. Some of the judges know that they must not become imbued with the idea that the only correct opinion of a controverted matter is one which coincides with their own.

The jury, as a trier of facts, is a vital means of administering justice. The trouble is not with the jury, but with the method employed in submitting issues to it. While the jury is well fitted to determine facts, it is entirely unfitted to apply principles of law to sets of fact. It requires training and skill to apply rules of law with such accuracy that the result will be certain. Instructions must, of necessity, be couched in terms and phraseology with which the jurors are more or less unfamiliar. Lawyers and judges sometimes disagree upon the exact meaning of instructions, no matter how carefully drawn. Hence, it is not to be wondered at that verdicts are not always warranted by the facts. This is particularly true in civil cases. Erroneous verdicts in civil cases sometimes result from requiring juries to apply the law, instead of submitting to the jury issues of fact and requiring the jurors to answer questions and letting the judge apply the law to the facts as found by the jury, so that each will be doing that for which he is best qualified, and not to permit the judge to comment on the evidence. It is an easy and practical matter to formulate an interrogatory pertaining to any material fact in issue, which, when answered, will constitute a specific finding of fact on that matter. It is much simpler than preparing instructions covering the questions of fact and law applicable thereto. All that is necessary to effect the change is to provide a rule of procedure requiring the court to submit to the jury pertinent interrogatories under the issues of fact, just as the court now submits instructions on the questions involved. The court would then apply the law to the facts so found.

It is said that erroneous verdicts result in criminal cases from counsel appealing to the emotions in argument, instead of making an argument upon the facts. Such appeals to the sympathies of the jurors are nothing more than invitations to the jury to disregard the law. Where the judge fixes the punishment, appeals to sympathies should not be tolerated, and the proper remedy is an enforced rule prohibiting them. Some law writers now claim that where the jury fixes the punishment, it should be required first to make findings of fact, and, if the facts found constitute the crime charged, it should then determine the punishment upon argument pertaining to the amount or character of punishment. The evil resulting from appeals to sympathy on the part of counsel does not call for commenting on evidence or credibility of witnesses by judges. Legal justice consists of correct determination of the facts in controversy, and a correct application of the law to the facts. A jury is the better fitted to find the facts, and only the judge is qualified to apply the law to the facts. Some law writers now claim that the remedy for erroneous verdicts is to limit the jury's functions to fact-finding and to free it from the influence of improper argument and not to make it a mouthpiece for the judge's opinions on matters of fact.

It is said, in *Smith v. U. S.*, 18 F. 2d 896, in referring to the power of the federal judges to comment on the evidence:

"But, as in all other instances, those who are invested with power are prone, perhaps unconsciously, to extend it; and so, believing it was being unjustly exercised, Congress recently seriously proposed that it be restricted or withdrawn."

It is argued that the power to comment upon the evidence is too dangerous to be placed in the hands of even an upright and able man, who can resist every temptation to do wrong, but who is certain of his opinions or conclusions and naturally desires that others should think the same way. It is argued, also, that until we get ready to discard the wisdom of others and substitute one man's judgment for the jury system we must not extend the power to trial judges to impress their views of the facts on jurymen.

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## RECOGNITION OF FOREIGN ATTORNEYS

Frequently our trial courts have difficulty in setting and disposing of cases when the only attorney representing the party to the action is a nonresident of this state. Our attorneys representing adverse parties in the action have the same difficulty. In some states there are statutes requiring a foreign attorney having business in the courts of the state to have a local attorney associated with him upon whom copies of pleadings may be served and to whom notice may be given of setting the case for trial and of other necessary hearings in court. In some other states and in some of the federal circuits rules of court make similar requirements. We discussed this matter in our October, 1934, BULLETIN, page 41, and set out the form of such a rule which we suggested might be promulgated by the supreme court and made applicable to all courts of this state. At that time we asked for comments from lawyers and judges throughout the state as to the advisability of such a rule. In the few months following that publication we received many letters commending the rule and urging its promulgation. Also, we received a few letters expressing the view that it was not advisable. Pending the further consideration of the matter by the Judicial Council the legislature of 1935 met, and almost immediately there was introduced in the House a bill which, as amended, was enacted into law, and is chapter 69, Laws 1935. This statute is of but little assistance at best, and of states adjoining us it applies only to lawyers of Nebraska. Since its enactment many have voluntarily written us urging that we recommend to the court the promulgation of the rule substantially as previously proposed in order that it may apply to all foreign attorneys and may be uniform throughout the state. We therefore again propose the rule with a slight change in its wording and again ask the lawyers and judges of the state to write us their views as to the advisability of having it promulgated by the supreme court. The proposed rule reads as follows:

"An attorney residing outside of this state, in good standing as an attorney at the place of his residence, may be recognized as an attorney by the courts of this state, for any action or proceeding in court, but only if he has associated with him as attorney of record in such action an attorney of this state residing within this state, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record."

Perhaps in this connection it would be well for a rule to require attorneys filing papers in court not only to sign or endorse them but to state thereon

their post-office address. To illustrate the need for this: A year or two ago a foreign attorney went into several counties and filed in the aggregate a number of actions involving rights claimed under oil leases or royalty deeds. No one knew him, his address was not on the papers filed. Defendants, their attorneys and the courts were handicapped in dealing with the cases. They proved to be of the class known as "nuisance cases." Later, someone came around hunting up the defendant and suggesting settlements. In another part of the state we are informed foreign attorneys come in and file actions and have attachments or garnishments issued, without leaving their address or having local counsel with them. Defendants have difficulty in proceeding to set aside such orders. Our citizens should not be harassed by such proceedings; our courts should not be open to such unjust practices. Reputable foreign attorneys do not do those things; but there appear to be attorneys who will do them, through oversight or design. We are glad to make our courts available to attorneys of other states; but our rules with respect to their appearance in our courts should be so framed that the fact a foreign attorney represents a litigant will not handicap our courts in the disposition of business or be an additional hazard to litigants in this state and their attorneys.

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## PROPOSALS RESPECTING CRIMINAL LAW AND PROCEDURE

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### Appeals in Criminal Actions

One of the measures we rerecommend for enactment pertains to appeals in criminal cases. It is a rewriting of our statute on that subject. It leaves as they are the present sections of our statute permitting a defendant to appeal in any case, and also the section of the statute which permits the state to appeal in certain classes of cases. It places the burden upon the appellant, whether that be the defendant or the state, to see that his appeal is lodged promptly in the supreme court. A case came to the supreme court recently in which the notice of appeal had lain in the office of the clerk of the district court for approximately two years. It should have been sent to the supreme court within a few days. Other cases show the time is from several months to more than a year. There are many other ways in which the progress of the case from the time of the trial in the district court to its submission on the merits in the supreme court may be delayed. That some of these delays are unreasonable is a notorious fact. This proposed measure, if enacted into law, would eliminate all, or practically all, of such unreasonable delays. It reads as follows:

AN ACT relating to appeals in criminal actions, and repealing sections 62-1702, 62-1704, 62-1709, 62-1710, 62-1711, 62-1712, 62-1713, 62-1714, of the Revised Statutes of Kansas of 1923.

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

SECTION 1. In any criminal action in which defendant pleads guilty, or is found guilty by a jury, or by the court if the trial is to the court, if defendant is not then in custody of the sheriff, he shall be taken into custody at once;

and unless he announces that he desires to file a motion for a new trial, he shall be sentenced either on that date or at a fixed time within ten days.

SEC. 2. If at the time the plea, verdict, or finding of guilty is made defendant announces that he desires to file a motion for a new trial, the court shall fix a time, not exceeding five days, in which to file the motion for a new trial, and such motion shall be heard and determined as expeditiously as possible and in no event later than thirty days after it is filed. Pending the filing and hearing of the motion for a new trial, if defendant desires to be at liberty on bond, and the offense is bailable after conviction, the court shall fix the amount of the bond, which bond shall be approved by the court, or, if the court so directs, by the clerk of the court. If the motion for a new trial is overruled, sentence shall be imposed at once. If defendant desires to appeal promptly, and has given bond pending the hearing of his motion for a new trial, the court may order the bond to be in force pending the application to the supreme court for bond.

SEC. 3. *Proceeding on appeal:* (a) If defendant does not seek to have execution of his sentence stayed, or release from custody on bond pending his appeal, he may appeal at any time within six months from the date of the sentence by serving notice of appeal on the county attorney of the county in which he was tried and filing the same with the clerk of the district court; and such clerk, within ten days after such notice is filed with him, shall send a certified copy of such notice with proof of service and a certified copy of the journal entry of defendant's conviction to the clerk of the supreme court. Defendant shall then prepare and present his appeal in accordance with the statutes and rules of court applicable thereto. (b) If defendant seeks stay of execution of the sentence, or release from custody, or both, pending his appeal, he shall serve notice of his intention to appeal on the county attorney and file the same with the clerk of the court, order a transcript of so much of the testimony as is needed to present his case on appeal, see that the journal entry of trial and sentence is filed, and cause copies of such notice of appeal, with proof of service, order for transcript and journal entry to be filed with the clerk of the supreme court within ten days after sentence. On the application of defendant the supreme court, or any justice thereof, shall order execution of the sentence stayed, and if the offense is bailable after conviction shall fix the amount of the bond and direct that it be approved by the supreme court, or any justice thereof, or its clerk, or by the trial court, or its clerk. Defendant shall thereafter prepare and present his appeal in accordance with statutes and rules of court applicable thereto: *Provided*, If the offense of which defendant was convicted was a misdemeanor, and the bonds mentioned in section 62-1705 of the Revised Statutes of Kansas of 1923 have been given, and that fact duly certified as required by section 62-1706 of the Revised Statutes of Kansas of 1923, no further bond shall be required.

SEC. 4. If the state desires to appeal in any case mentioned in section 62-1703 of the Revised Statutes of 1923, the county attorney, within ten days after the ruling complained of, shall serve notice of appeal upon the defendant, or his attorney of record, and file the same with the clerk of the court, order a transcript of so much of the testimony as is needed to present the case on appeal, see that the journal entry of the ruling complained of is filed, and cause copies of such notice of appeal, with proof of service, order for transcript and journal entry, to be filed with the clerk of the supreme court. The appeal by the state in no case stays or affects the operation of the ruling or judgment appealed from until the ruling or judgment is reversed. The state shall thereafter prepare and present its appeal in accordance with statutes and rules of the court applicable thereto.

SEC. 5. The supreme court shall have authority to make such additional rules, not repugnant to statute, as it may deem necessary or proper in order to facilitate the prompt and orderly preparation and presentation of the appeal and to carry into effect the final order of the court in such appealed actions.

SEC. 6. Sections 62-1702, 62-1704, 62-1709, 62-1710, 62-1711, 62-1712, 62-1713 and 62-1714 of the Revised Statutes of Kansas of 1923 are hereby repealed:

*Provided*, That appeals in criminal actions in which the verdict of guilty was returned before the effective date of this act may be appealed and the appeal disposed of under the statutes in force at the time the verdict was returned.

SEC. 7. This act shall take effect and be in force from and after July 1, 1937, and its publication in the statute book.

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### Joint Trials of Defendants

Another proposed measure rerecommended pertains to joint trials of two or more persons jointly charged with the same offense. Under our present statute, if the offense charged is a felony, each can demand a separate trial as a matter of right, while if the offense charged is a misdemeanor the defendants are tried jointly or separately in the discretion of the court. We think that should be the rule for felonies as well as for misdemeanors. Robberies frequently are committed by gangs of several persons. If they are all arrested and charged jointly with the offense, under the present statute the prosecution must try them separately if they demand it. This means as many separate trials as there are defendants. Each must be tried to a separate jury panel. This has necessitated dragging the trials out for as long as two years in some cases. This has resulted in great expense, a lot of unnecessary work, and sometimes, in the later trials, with the loss of witnesses for the prosecution by reason of death or otherwise. In the federal court and in many of the state courts the trial of all defendants charged with the same offense takes place at one time. There is no sound reason why that could not be done in this state. The proposed measure reads:

AN ACT relating to criminal procedure, amending section 62-1429 of the Revised Statutes of 1923, and repealing said original section.

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

SECTION 1. That section 62-1429 of the Revised Statutes of 1923 be amended so as to read: Section 62-1429. When two or more defendants are jointly charged with the same offense in the same complaint, indictment, or information, they shall be tried jointly: *Provided*, The court, upon the hearing of an application for separate trials, timely made, may order separate trials in the interests of justice.

SEC. 2. That section 62-1429 of the Revised Statutes of 1923 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the official state paper.

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### Depositions in Criminal Cases

Another measure relates to the taking and use of depositions in criminal cases. Under our present law a defendant may take the deposition of a witness to be used in his behalf. The state cannot do so, for the reason that we have no statute which makes it possible to take such deposition in the presence of defendant in conformity with section 10 of our bill of rights. This proposed measure is designed to remove that difficulty. Recently, in one of our border counties, property was stolen and taken into another state. Our officers located it and learned who had taken it, but all of the witnesses necessary to use in the prosecution were nonresidents. They would not agree to come to Kansas



to testify. The result was no prosecution. Instances arise quite frequently where some nonresident witness is essential to the prosecution. Frequently such witnesses will come into the state and testify if paid their expenses and a sum which they name for their time. Unless some arrangement of that kind can be made with them their evidence is not available. That situation should not exist. Successful prosecutions have been defeated because a resident of this state was too ill to appear as a witness. This proposed measure covers that situation also. Statutes of this kind, when properly drawn, as we think this one is, are not repugnant to constitutional provisions such as section 10 of our bill of rights. We think the measure should be enacted into law. It reads as follows:

AN ACT relating to criminal procedure and providing for the taking and use of depositions, and repealing sections 62-1313, 62-1314 and 62-1315 of the Revised Statutes of 1923.

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

SECTION 1. In any criminal action or proceeding pending in a court of this state, or before a judge thereof, depositions may be taken when allowed by an order of the court or judge. Such order may be made only when the court or judge is satisfied that due diligence has been used in making application therefor, that the person whose deposition is wanted is a material witness, and that the witness resides without this state; or, residing in this state, is pregnant, sick, or infirm, or is about to or likely to leave the state, and that his attendance at the trial or examination cannot be procured by the use of ordinary diligence. Such application by the defendant shall be accompanied by proof of notice to the county attorney of the time and place it is to be presented, and such an application on the part of the state shall be accompanied by proof of like notice to the defendant or to his attorney of record. The order for the taking of the depositions shall direct whether they shall be taken on oral or written interrogatories.

SEC. 2. When the state procures such an order its notice, in addition to what is required by the preceding section, shall inform the defendant that he is required personally to attend the taking of such deposition and that his failure to do so shall constitute a waiver of his right to face the witness whose deposition is to be taken; and the failure of defendant to attend the taking of such depositions shall constitute such waiver unless the court or judge is satisfied when the deposition is offered in evidence that defendant was physically unable to attend. If the defendant be not then in custody he shall be paid by the county in which the action or proceeding is pending a sum equal to witness fees for travel and attendance upon the taking of such deposition; but if defendant be in custody the court shall adjudge, direct and order the sheriff to convey defendant to and from the place the deposition is to be taken and to have the defendant in attendance at the taking of such deposition, the expense to be paid by the county. If the order for the taking of the deposition has been made upon application of the state, and defendant shows to the court that he desires his attorney present and that he is unable financially to pay the expense of his attorney to attend the taking of such deposition, the court shall order a sum equal to witness fees for travel and attendance to be paid defendant for the use of his attorney in attending, on behalf of defendant, the taking of such deposition. Any sum the court orders to be paid by the county, under the provisions of this act, to enable defendant or his attorney to be present at the taking of such deposition, shall be paid by the county promptly and before the taking of the deposition.

SEC. 3. Depositions taken under the provisions of this act may be read in evidence upon the hearing of the action or proceeding subject to rulings applicable to the reception in evidence in a civil action of depositions taken upon due notice.

SEC. 4. Sections 62-1313, 62-1314 and 62-1315 of the Revised Statutes of 1923 be and the same are hereby repealed.

SEC. 5. This act shall take effect and be in force from and after its publication in the official state paper.

### A Crime Bureau Needed

When a major crime is committed to which there is no eyewitness the first difficulty confronting prosecuting officers is to find out who committed it. Often this requires scientific research. At present we have no facilities for such research. Naturally the officers do the best they can, but all too frequently such major crimes are unsolved for the simple reason that we have no adequate way of examining scientifically the mute evidences available. Peace officers and prosecuting officers have been asking the legislature for help in this matter for several sessions. Their appeals have been turned down because a crime bureau, fairly well equipped and manned to be helpful in such cases, would cost possibly \$40,000 to \$50,000 a year to maintain; yet we can go on, with perhaps a dozen or more such cases unsolved every year when the solution of any one of them would justify an expenditure necessary to maintain the crime bureau for a full year. At the last session of the legislature a measure was introduced in the senate for the creation of such a crime bureau. Its consideration was delayed for the consideration of a house bill much wider in scope which was earnestly pressed. That measure would have required perhaps several hundred thousand dollars a year to maintain it, which fact was one of the reasons for its defeat. We earnestly recommend the enactment of a statute creating a state crime bureau such as that proposed in the senate bill. It may not be a perfect measure, possibly should be modified in some of its provisions, but it will serve as a working basis for a much needed statute. It reads as follows:

AN ACT creating a state crime bureau, providing for the selection of the personnel thereof, fixing the duties and compensation of its members and employees and imposing penalties for certain violations of this act.

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

SECTION 1. *Personnel.* (a) A "state crime bureau" is hereby created. It shall consist of three members, one of whom shall be the attorney general of the state of Kansas who shall be its chairman, and two other qualified electors and citizens of Kansas of opposite major political parties who shall be appointed by the governor of the state of Kansas. The office of such two directors so appointed shall expire on the second Monday in January of each odd year. And they shall hold office until their successors are appointed and qualify. Vacancies shall be filled in a similar manner as the original appointments and shall be for the unexpired term. Resignations, if any, shall be filed with the clerk of the supreme court. Removal from the state or inability to perform their duties shall constitute a vacancy in such office. The appointment of such directors shall be filed with the clerk of the supreme court and they shall, before entering on to their duties, take, subscribe and file their oath of office with the clerk of such court.

(b) The board of directors of the state crime bureau shall select a chief of the state crime bureau who shall ex officio be its secretary and executive officer acting under the direction of the board of directors; the directors may appoint an agent in charge of identification and detection who shall be the assistant secretary to the directors—and not to exceed ten other operatives in

addition thereto, the board of directors may select and employ a chief clerk who shall be head stenographer and an additional stenographer or filing clerk as the work may require.

(c) The directors, other than the attorney general, shall be allowed the sum of ten dollars (\$10) per diem not exceeding ten days in any calendar year and their traveling expenses while away from their respective residences, in the discharge of their official duties as directors. The chief of the state crime bureau and agent in charge of identification and detection and the operatives shall receive such monthly salaries as may be fixed by the board of directors, not less than fifteen hundred dollars (\$1,500) per annum nor more than three thousand dollars (\$3,000) per annum and that such directors may establish within such limitations a scale of wages increasing with the years of service. The chief clerk shall receive a salary not to exceed eighteen hundred dollars (\$1,800) per annum and the filing clerk a salary not to exceed twelve hundred dollars (\$1,200) per annum, which salaries shall be fixed by the board of directors. No agent, servant nor employee of the state crime bureau shall directly or indirectly receive any reward for any service performed by them.

(d) The board of directors shall have a right to employ and discharge any of the personnel as they may deem for the best interests of the service. In no event shall any of the employees or personnel be employed for exceeding four years and the contract of employment shall provide that the board of directors may discharge them for incompetency, neglect of duty or violation of the rules and standards of ethics and conduct called for herein or as may be provided by such board of directors.

(e) The chief of the state crime bureau, the agent in charge of identification and all other operatives, when appointed, shall be not less than twenty-three years of age nor more than forty-five years of age, they shall have attained at least a four-year education, shall be of good moral character and shall be subject to such examination as to qualifications as the board of directors may by rule prescribe.

SEC. 2. *Oath of employees.* The chief of the crime bureau, agent in charge of identification and detection and all other operatives including the chief clerk and filing clerk shall, before entering upon their duties, take and subscribe to an oath in substance as follows:

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of Kansas and faithfully discharge the duties of \_\_\_\_\_ of the state crime bureau of the state of Kansas; that in my conduct I will be governed by the rules of ethics and conduct prescribed by law; that I will not unlawfully reveal any of the information in the possession of such bureau or that I may have gained by virtue of employment in such bureau, either while employed or after my discharge from such bureau and that I will not accept employment, after discharge from such bureau, on any cases pending or under investigation by such bureau while I was connected therewith. So help me God.

SEC. 3. *Rules of ethics and conduct.* No agent, operative or employee of the state crime bureau shall at any time while in the employment of such bureau engage in speaking in any political campaign, or take any active interest in politics or hold any political office or be an active officer in any political party organization of any kind. They shall not use any automobile owned or operated by them for the hauling and distribution of any political literature. They shall not give to the press or otherwise publish information concerning any person or party being investigated by such bureau at any time and especially prior to the arrest or apprehension of such party. The information of such bureau shall be considered as privileged information and the operatives and employees of such bureau need not disclose any such information which they deem improper except as called upon to do in some court proceeding or court investigation. That generally the information in the posses-

sion of such bureau which in its nature should be kept secret shall not be disclosed by any operative or employee either before or after his discharge from the service. Nothing in this section shall be applicable or apply to any member of the board of directors.

SEC. 4. *Duties; office arrangements.* (a) The duties of the agents, operatives and employees shall be such as prescribed by the board of directors and as their names of office may indicate. The official office of the state crime bureau shall be at the capitol building in the city of Topeka. The board of directors may establish substations in other cities in Kansas not exceeding eight in number and may place in charge of such substations one or more operatives. And the board of county commissioners and governing bodies of any municipality be and they are authorized to make available for such operatives suitable quarters and furniture including lights, heat and telephone accommodations. The permanent files shall be kept in Topeka.

(b) The operatives shall be allowed, in addition to their salaries and compensation, all necessary and proper traveling expenses while away from their official residences or stations and shall be allowed such compensation for use of their automobiles, if any, as the board of directors may prescribe, in any event not to exceed the rate of mileage found by such directors as being reasonable and proper and as generally allowed to other employees of the state furnishing their own motor vehicles: *Provided*, The mileage expenses shall not exceed five cents (5¢) per mile and the subsistence and other traveling expenses shall not exceed four dollars (\$4) per diem, the same shall be exclusive of telephones and telegrams.

(c) The board of directors may authorize any agent, employee or operative, not exceeding five in number in any one year, at state expense to take such course in training or schooling in crime detection and kindred subjects as may be available by the department of justice or any other agencies in the United States government.

(d) The bureau shall establish files with reference to finger-printing identifications, ballistics and suitable laboratories as they may deem advisable and appropriate. The operatives of the state crime bureau shall under the rules and regulations of the board of directors be made available to assist and supplement the sheriffs and police officers in this state, more especially in the detection and apprehension of those committing felonies and other major crimes.

(e) All agents, operatives and employees of the state crime bureau shall be officers of the court and their files and records shall be subject to the proper orders of the courts and may be made available to the attorney general, county attorneys, city attorneys and federal law enforcement officers subject to such rules and regulations as the board of directors may prescribe.

SEC. 5. *Police powers.* The chief of the state crime bureau, the agent in charge of identification and detection and all operatives shall have and are hereby authorized to carry arms and to make arrests to the same extent and in the same manner as sheriffs of this state are authorized to arrest or carry arms. The rights herein conferred shall be coextensive with the entire state of Kansas. Process and warrants for arrest including search and seizure warrants may, when directed to the operatives of the state crime bureau, be executed and served by any one of them in the same manner as such process might be served by any sheriff.

SEC. 6. *Penalty.* Any agent, operative or employee of the state crime bureau who shall, while in the employment of such bureau engage in speaking in any political campaign, or accept and hold any political office under the laws of this state, other than members of a school board, or who shall use an automobile owned and operated by him for the hauling and distribution of political literature used in promoting the candidacy of any person or party, or who shall take or receive any reward for any service performed by him, or who shall purposely and intentionally give or reveal to a party charged with crime or being investigated for crime any information within the knowledge

of the bureau or its members and employees shall be guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding one thousand dollars (\$1,000) or imprisoned in the county jail not exceeding one year, or both. That in addition to such penalty such party or parties so convicted shall thereupon forfeit their office and employment and shall be prohibited from holding any office of trust or confidence under the laws of this state for one year thereafter.

SEC. 7. This act shall take effect and be in force from and after its publication in the statute book.

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## WORK OF THE INTERSTATE CONFERENCE ON CRIME

The Interstate Conference on Crime first met at Newark, N. J., in October, 1935, pursuant to a call sent out by Governor Hoffman of that state. At the first meeting were representatives from the federal department of justice, also representatives, usually attorneys general or other leading law-enforcement officials from twenty-eight states. At a later meeting a permanent organization was effected, composed of one delegate from each of the states, but three, which, while coöperating with the movement, had not as yet named delegates. Broadly speaking, the purpose of the meeting was to face frankly the many problems involved in the detection of those who commit crimes, particularly major crimes, and those committed by "gangs"; of apprehending and arresting the criminals and of obtaining the necessary evidence against them for successful prosecutions. It was thought that could be brought about by compacts between the states. Congress, in June, 1935, had already given its consent in advance to such compacts. How such compacts were to be authorized and made effective was to be worked out. At a later meeting, and with the aid of several professors from law schools called in to assist, four measures have been agreed upon by the Conference and are recommended for adoption in each of the states. The theory is for each state to adopt the same measure, and that thereafter the compacts authorized by the statutes be entered into. The purpose of the Conference is readily recognized as being commendable in a high degree. In order that the measures so far proposed may receive the study which they deserve from lawyers and others interested therein we set them out without further comment.

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### Attendance of Witnesses from Other States

UNIFORM ACT to secure the attendance of witnesses from without the state in criminal proceedings.

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

SECTION 1. "Witness," as used in this act, shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

The word state shall include any territory of the United States and District of Columbia.

SEC. 2. *Summoning witness in this state to testify in another state.* If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pend-

ing in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be *prima facie* evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be *prima facie* proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

**SEC. 3.** *Witness from another state summoned to testify in this state.* If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be *prima facie* proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the sum-

mons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

SEC. 4. *Exemption from arrest and service of process.* If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons or order be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons or order to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons or order.

SEC. 5. *Uniformity of interpretation.* This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

SEC. 6. *Short title.* This act may be cited as "Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases."

SEC. 7. *Inconsistent laws repealed.* All acts or parts of acts inconsistent with this act are hereby repealed.

SEC. 8. *Constitutionality.* If any part of this act is for any reason declared void, such invalidity shall not affect the validity of the remaining portions thereof.

SEC. 9. *Time of taking effect.* This act shall take effect.....

### Note.

This act has been drafted by the Interstate Commission on Crime, composed of official representatives concerned with the administration of criminal law from every state in the Union, as well as the federal government. In general, it is based upon the act proposed by the National Conference of Commissioners on Uniform State Laws, which act is now in effect in seven states. Only a few relatively minor variations from such act have been made. This act is being presented concurrently herewith in the legislatures of every state now in session.

In brief, the act provides for reciprocal action between this state and all others to remove from other states to this state witnesses needed here in criminal proceedings; this state at the same time to remove from this state to others, witnesses similarly needed there. These witnesses are fully protected by the requirement of the payment of substantial witness fees, by the provision that they are exempt from arrest or service of process when so removed, and finally that they shall not be removed in any event if same will cause them "undue hardship."

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## Interstate Extradition

AN ACT to make uniform the procedure on interstate extradition.

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

SECTION 1. *Definitions.* Where appearing in this act, the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

SEC. 2. *Fugitives from justice; duty of governor.* Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

SEC. 3. *Demand; form.* No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, except in cases arising under section 6, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

SEC. 4. *Investigation by governor.* When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

SEC. 5. *Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.* When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the governor of any other state any person in this state who is charged in the manner provided in section 23 of this act with having violated the laws of the state whose governor is making the demand, even though such person left the demanding state involuntarily.

SEC. 6. *Extradition of persons not present in demanding state at time of commission of crime.* The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

SEC. 7. *Issuance of warrant of arrest by governor; recitals therein.* If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.



SEC. 8. *Execution of warrant; manner and place thereof.* Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act, to the duly authorized agent of the demanding state.

SEC. 9. *Authority of arresting officer.* Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

SEC. 10. *Rights of accused person; application for writ of habeas corpus.* No person arrested under such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

SEC. 11. *Penalty for noncompliance with preceding section.* Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in wilful disobedience to the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than \$1,000 or be imprisoned not more than six months, or both.

SEC. 12. *Confinement of accused in jail when necessary.* The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping: *Provided, however,* That such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

SEC. 13. *Arrest of accused before making of requisition.* Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under section 6, with having fled from justice, or, with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person

in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 6, has fled from justice, or with having been convicted of a crime in that state and having escaped from bail, probation or parole and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

SEC. 14. *Arrest of accused without warrant therefor.* The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

SEC. 15. *Commitment to await requisition; bail.* If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, and, except in cases arising under section 6, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

SEC. 16. *Bail; in what cases; conditions of bond.* Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state.

SEC. 17. *Extension of time of commitment, adjournment.* If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, a judge or magistrate may discharge him or may recommit him for a further period of sixty days, or a supreme court justice or county judge may again take bail for his appearance and surrender, as provided in section 16, but within a period not to exceed sixty days after the date of such new bond or undertaking.

SEC. 18. *Bail; when forfeited.* If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

SEC. 19. *Persons under criminal prosecution in this state at the time of requisition.* If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

SEC. 20. *Guilt or innocence of accused, when inquired into.* The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

SEC. 21. *Alias warrant or arrest.* The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

SEC. 22. *Fugitives from this state; duty of governors.* Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the chief executive of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

SEC. 23. *Application for issuance of requisition; by whom made; contents.* (I) When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

(II) When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

(III) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

SEC. 24. *Costs and expenses.* (Note: The provisions in this regard will so vary with the different states that same must be drafted separately in each state.)

SEC. 25. *Immunity from service of process in certain civil actions.* A person brought into this state on, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal

proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

Sec. 25a. *Written waiver of extradition proceedings.* Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 7 and 8 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 10.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

Sec. 25b. *Nonwaiver by this state.* Nothing in this act contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

Sec. 26. *No immunity from other criminal prosecutions while in this state.* After a person has been brought back to this state by extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

Sec. 27. *Interpretation.* The provisions of this act shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

Sec. 28. *Constitutionality.* If any part of this act is for any reason declared void, such invalidity shall not affect the validity of the remaining portions thereof.

Sec. 29. *Repeal.* All acts and parts of acts inconsistent with the provisions of this act and not expressly repealed herein are hereby repealed.

Sec. 30. *Short title.* This act may be cited as the Uniform Criminal Extradition Act.

Sec. 31. *Time of taking effect.* This act shall take effect on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

#### Note.

The basis of present interstate extradition of fugitive criminals is article IV, section 2, subdivision 2 of the constitution of the United States. In 1793 Congress set up a general framework for the extradition process, but left many matters incident to extradition to be dealt with by the states. As to all of these matters there is undesirable variation in the provisions of law of the several states and in their interpretation.

This diversity hinders state coöperation and the administration of justice. It is imperative that each state adopt and enforce regulations which will satisfy its own views as to the safeguards to be afforded accused persons, and as to precedence to be given its own criminal and civil proceedings, which will also give the most efficient aid possible to other states; and that such regulations be uniform throughout the United States and therefore reciprocal in their operation.

In 1926 the Conference of Commissioners on Uniform State Laws adopted a draft of a Uniform Criminal Extradition Act. This act has been the basis of legislation in the following ten states: Alabama, Idaho, Maine, New Mexico, North Carolina, Pennsylvania, South Dakota, Utah, Vermont and Wisconsin. The commission has incorporated certain slight modifications and additions in the draft herewith, which are intended simply to supplement and round out the uniform act.

The act as approved by the Interstate Commission on Crime brings uniformity to such matters as the form of requisition and the documents to accompany it, the arrest pending requisition as well as after requisition, bail, habeas corpus proceedings, confinement in transit, and the right to withhold extradition while a criminal prosecution is pending in the asylum state against the person claimed or while he is serving a sentence there. It also recognizes and regulates waiver of extradition. It gives to the governor of an asylum state the very important power to extradite, in his discretion, one who was not in the demanding state when the crime is alleged to have been committed—a power not covered by the federal provisions as to extradition, but which may be exercised by each state under its constitutional residuum of sovereignty in its coöperative warfare on crime. It gives to the governor the power to extradite a person who has come into the state involuntarily. It provides for requisition of a person, already under prosecution or undergoing punishment in another state, so that he may be prosecuted in the demanding state while the evidence is still fresh, but with the understanding that at the termination of the prosecution he will be returned to the state which extradited him. The Interstate Commission on Crime has studied the uniform act with care and strongly urges its immediate general adoption.

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### Coöperation as to Person Paroled

AN ACT providing that the state of ——— may enter into a compact with any of the United States for mutual helpfulness in relation to persons convicted of crime or offenses who may be on probation or parole.

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

SECTION 1. The governor of this state is hereby authorized and directed to enter into a compact on behalf of the state of ——— with any of the United States legally joining therein in the form substantially as follows:

A COMPACT. Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An act granting the consent of Congress to any two or more states to enter into agreements or compacts for coöperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

1. That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, if—

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

2. That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

3. That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: *Provided, however*, That if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

4. That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

5. That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

6. That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

7. That this compact shall continue in force and remain binding upon each ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto.

SEC. 2. If any section, sentence, subdivision or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act.

SEC. 3. Whereas an emergency exists for the immediate taking effect of this act, the same shall become effective immediately upon its passage.

SEC. 4. This act may be cited as the Uniform Act for Out-of-state Parolee Supervision.

#### **Note.**

This act has been drafted by the Interstate Commission on Crime, composed of official representatives concerned with the administration of criminal law from every state in the Union, as well as the federal government. This act is being presented concurrently herewith in the legislatures of every state now in session.

In brief, the act authorizes the governor of this state to enter into a compact for this state with other states of the Union whereby such other states will there supervise on probation or parole their residents convicted of crime here in return for the reciprocal action of this state in similarly supervising here its citizens convicted of crime there. The reciprocal terms of such compact are set forth in detail with provisions for the necessary administrative action. Such act and compact will effectuate the prime purpose of probation and parole; to wit, rehabilitation to good citizenship of the person convicted. From the standpoint of the convicted person, obviously this can be better accomplished under proper supervision among home surroundings rather than among strangers. From the standpoint of the authorities, the state where such person resides has a greater responsibility for his conduct, and consequently his supervision, than the state to which he goes to commit a crime. The act accords substantially with the Indiana statute, Laws 1935, chapter 239, page 1441, and the compact in that regard just signed by that state and Michigan, and a similar one now being negotiated by the states of Maryland and Illinois.

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### **Coöperation Respecting Close Pursuit**

AN ACT to make uniform the law on close pursuit and authorizing this state to coöperate with other states therein.

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

SECTION 1. Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in close pursuit, and continues within this state in such close pursuit, of a person in order to arrest him on the ground that he has committed a felony in such other state, shall have the same authority to arrest and hold in custody such person, as members of a duly organized state, county or municipal peace unit of this state have, to arrest and hold in custody a person on the ground that he has committed a felony in this state.

SEC. 2. If an arrest is made in this state by an officer of another state in accordance with the provisions of section 1 of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

SEC. 3. Section 1 of act shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.

SEC. 4. For the purpose of this act the word state shall include the District of Columbia.

SEC. 5. For the purpose of this act the term "felony" includes "high misdemeanor."

SEC. 6. Upon the passage and approval by the governor of this act it shall be the duty of the secretary of state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States.

SEC. 7. If any part of this act is for any reason declared void, it is declared to be the intent of this act that such invalidity shall not affect the validity of the remaining portions of this act.

SEC. 8. This act may be cited as the Uniform Act on Close Pursuit.

SEC. 9. This act shall take effect immediately.

### Statement

This act has been drafted by the Interstate Commission on Crime, composed of official representatives concerned with the administration of criminal law from every state in the Union, as well as the federal government. It is being presented concurrently herewith in the legislatures of every state now in session.

The purpose of the act is to prevent the state boundaries from permitting a criminal to escape. The act accomplishes this in simple fashion by clarifying the common law doctrine of close pursuit, which permits an officer to cross a boundary and make an arrest of a criminal while in such close pursuit, the act further providing for the return of such criminal thereafter.

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