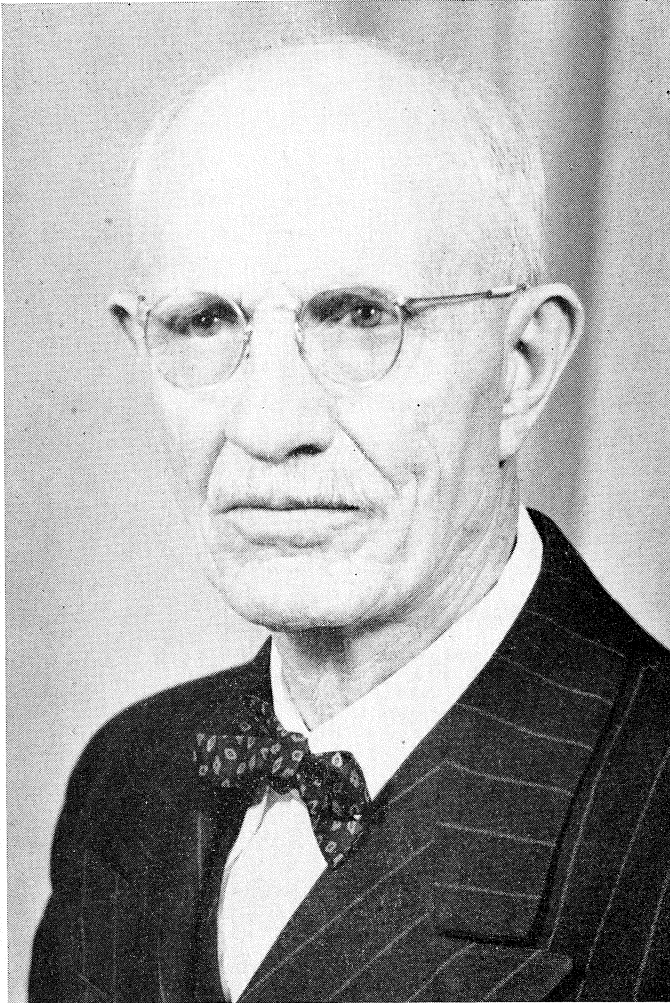


# KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1947

PART 2, TWENTY-FIRST ANNUAL REPORT



HON. J. C. RUPPENTHAL

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## FOREWORD

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In this BULLETIN we have reprinted the probate code, the property act, the uniform veteran's guardianship act, all with amendments and annotations to date, and the uniform simultaneous death act enacted by the legislature of 1947. We are indebted to Franklin Corrick, Revisor of Statutes, for assembling and indexing these statutes.

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The portrait of Hon. J. C. Ruppenthal, which is printed on the cover, is particularly appropriate to the subject matter of this BULLETIN. Judge Ruppenthal was one of the pioneers in the movement for the creation of the Judicial Council, and was appointed as one of the original members in 1927. At that time Judge Ruppenthal was judge of the district court of the twenty-third judicial district, where he had a long and outstanding record of service. Upon his appointment to the Judicial Council, he was immediately selected as secretary and served as such until his retirement in 1941. Judge Ruppenthal was among the first to suggest the enactment of a new probate code for Kansas. He wrote "A Code of Procedure for the Probate, Juvenile and County Courts of Kansas," which was published in the April, 1932, issue of the BULLETIN (page 13), one of the first printed articles on the subject. As member and secretary of the Council, he took an active part in the drafting of the code and its enactment, and has continued to maintain a lively interest in its interpretation by the courts and its perfection by such amendments as have been necessary. Since his retirement from the bench, Judge Ruppenthal has been in the active practice of law at Russell, Kan.

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The reprinting of the probate code in this issue has followed an inquiry which we printed in the April BULLETIN, in which we asked our readers to write us if they thought such publication would be advisable. We received an unusual number of letters in reply to this inquiry, all of which urged us to reprint the code in the form of a BULLETIN, even though the same material will appear in the current Supplement to the General Statutes. We have included the property act of 1939, which was enacted at the same time and is often referred to in connection with probate matters. We have also added the uniform veteran's guardianship act, not only because of the increasing number of guardianships which are governed by this procedure, but also because of the various amendments since its publication in the 1935 statutes. The simultaneous death act is also printed because it is a new statute which, in appropriate cases, will affect probate procedure.

## **Please Help Us Keep Our Mailing List Up to Date**

The JUDICIAL COUNCIL BULLETIN is published quarterly and mailed without charge to lawyers, courts, public officials, newspapers and libraries, who are or may be interested in our work. We are glad to add to our mailing list the name of any person who is interested in receiving the BULLETIN regularly. We will also send current numbers, in any reasonable quantity, to any person who has a use for them, and will furnish back numbers so far as available, upon request. However, in order to save unnecessary printing expense, we are constantly revising our mailing list, and are attempting to eliminate the names of persons who have died or moved out of the state or who have changed their addresses and are receiving the BULLETIN at the new address.

Please advise promptly if you have changed your address, giving the old address as well as the new. If you do not receive any current BULLETIN and wish to remain on the mailing list, please notify us to that effect. If you are receiving a BULLETIN addressed to some person who has died or moved away, please let us know and we will remove the name from the list. If you need additional copies of this or any other issue, let us know and we will send them if we have them.

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## **Appointments to the Judicial Council**

Pursuant to the statute creating the Judicial Council, the Chief Justice of the Supreme Court has made appointments to fill vacancies in the Council by reason of terms expiring July 1, 1947. Justice Walter G. Thiele, Judge C. A. Spencer and Mr. Samuel E. Bartlett were named to succeed themselves. A new member appointed is Mr. Robert H. Cobean, who succeeds Senator George Templar. Senator Templar has been a hard working and efficient member of the Council, but being a member of the legislature, was ineligible for reappointment under the statutes of Kansas. In a later issue we shall publish a short biography of Mr. Cobean.

# THE PROBATE CODE (Annotated)

(Annotated up to Volume 163 of the Kansas Reports)

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**Note:** The new Probate Code contains many sections which are identical or similar to sections in the General Statutes of 1935 and in the Session Laws of 1937 and of 1938. This table shows the sections of the Probate Code which correspond in subject matter in whole or in part with the sections of former laws which were repealed by the Probate Code.

<i>G. S. 1935</i>	<i>Code</i>	<i>G. S. 1935</i>	<i>Code</i>	<i>G. S. 1935</i>	<i>Code</i>
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20-1105 . . . . .	59-210		59-2224	22-264 . . . . .	59-1405
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20-1106 . . . . .	59-211	22-215 . . . . .	59-607		59-2401
20-1107 . . . . .	59-301	22-216 . . . . .	59-302	22-266 . . . . .	None
20-1108 . . . . .	59-203		59-2212	22-267 . . . . .	None
20-1109 . . . . .	59-204	22-217 . . . . .	59-2224	22-268 . . . . .	None
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	59-506	22-241 . . . . .	59-611	22-304 . . . . .	59-1104
	59-507	22-242 . . . . .	59-612	22-305 . . . . .	None
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	59-1504	22-601	59-1407	22-807	59-2305
	59-1717	22-602	59-1406	22-808	59-1412
22-818	59-710	22-603	59-2242	22-809	59-2306
22-819	59-710		59-2243	22-810	59-1405
	59-2217	22-604	59-2244		59-2201
22-820	None	22-605	59-2244	22-811	59-2214
22-821	59-708	22-606	59-1703	22-812	59-2307
	59-1709	22-607	None	22-813	59-2307
22-822	59-1710	22-608	None	22-814	59-2307
22-823	59-708	22-609	59-2245	22-815	59-1207
	59-1711	22-610	59-2217	22-816	59-2308
22-824	59-708	22-611	None	22-817	59-2305
22-825	59-707	22-6a01	59-1409	22-818	59-2308
	59-708		59-1410	22-819	59-207
22-826	59-707	22-6a02	59-2202		59-212
	59-708		59-2302		59-2309
	59-1401		59-2303	22-820	59-2310
22-827	59-1713	22-6a03	59-2302	22-821	59-2311
22-828	59-706		59-2304	22-822	59-212
22-829	59-709		59-2305		59-213
	59-2236	22-6a04	None		59-2308
22-830	None	22-6a05	59-2304	22-823	None
22-831	59-1705	22-6a06	59-2307	22-824	59-1410
22-401	59-1001	22-6a07	59-2309		59-2214
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	59-1101	22-703	59-2238	22-826	59-1413
	59-1102	22-704	59-2238	22-827	59-1715
22-403	59-1001	22-705	59-2237		59-2310
	59-1101	22-706	None	22-828	59-2201
	59-1102	22-707	59-2214		59-2310
22-404	59-301		59-2238	22-829	59-2310
	59-1001	22-708	59-212	22-830	59-2310
	59-1005		59-2237	22-831	59-710
22-405	59-1002	22-709	59-2201		59-2310
	59-1005		59-2237	22-832	59-801
22-406	59-1002	22-710	59-2201		59-802
	59-1101	22-711	59-2237		59-1707
22-407	59-1003	22-712	59-2237	22-833	59-801
22-408	59-1003	22-713	59-2237		59-802
22-409	59-1004	22-714	59-2237		59-1707
22-501	59-1201	22-715	59-2237	22-834	None
22-502	59-1206	22-716	59-302	22-835	59-801
22-503	59-1401		59-2214		59-802
22-504	59-1202	22-717	None		59-1707
22-505	None	22-718	59-2214	22-901	59-1502
22-506	59-1202		59-2240	22-902	None
22-507	59-1202	22-719	59-710	22-903	59-1711
22-508	59-1201	22-720	59-302		59-2217
22-509	59-1201		59-2214	22-904	59-301
22-510	59-1201		59-2218		59-2247
22-511	59-403	22-721	59-212		59-2249
22-512	59-403	22-722	59-212	22-904a	59-213
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	59-2235		59-2239		59-2217
22-515	59-1201	22-726	59-1302	22-909	59-1101
	59-1202		59-1507		59-1703
22-516	59-1207		59-2239	22-910	59-1703
22-517	59-1201	22-727	59-2237	22-911	59-1703
22-518	59-2217		59-2239	22-912	59-1704
22-519	59-2217	22-728	None	22-913	59-212
22-520	59-1711	22-729	59-2240		59-2237
22-521	59-708	22-730	59-708	22-914	None
22-522	None	22-731	59-709	22-915	59-2213
22-523	None	22-732	59-709	22-916	59-1301
22-524	59-1203	22-733	59-709		59-1302
22-525	59-1501	22-734	59-709	22-917	59-1301
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	59-2247		59-1101	39-212.....	59-2302
	59-2249	38-207.....	59-1102		59-2303
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22-928.....	59-2218	38-208.....	59-1201	39-215.....	59-2305
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	59-1102		59-2303		59-1808
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22-1317.....	None	39-203.....	59-2260		59-2257
22-1318.....	None		59-2261		59-2265
38-105.....	59-2101		59-2263	62-2004.....	59-1702
	59-2103		59-2264		59-2265
38-106.....	59-2102		59-2265	62-2005.....	59-1711
	59-2277	39-204.....	None		59-1804
	59-2278	39-205.....	59-2265		59-2269
	59-2279		59-2306	62-2006.....	59-1804
38-107.....	59-2103	39-206.....	59-1101	62-2007.....	59-1804
38-117.....	59-2102		59-1102	62-2008.....	59-1806
	59-2277		59-1106		59-1807
38-118.....	59-2101		59-1702		59-1808
	59-2277		59-2265		59-1809



<i>G. S. 1935</i>	<i>Code</i>	<i>G. S. 1935</i>	<i>Code</i>	<i>G. S. 1935</i>	<i>Code</i>
62-2009.....	59-1804	76-1205.....	59-2271		59-2268
62-2010.....	59-1804	76-1206.....	59-2272		59-2276
62-2011.....	59-1804	76-1207.....	59-2260	76-1226.....	59-2268
62-2012.....	None		59-2261	76-1229.....	59-2008
62-2013.....	None	76-1208.....	59-2264		59-2274
62-2014.....	59-1804	76-1209.....	59-2264		59-2275
62-2015.....	59-1811	76-1210.....	59-2272		
	59-2269	76-1211.....	59-212	<i>Laws 1937</i>	
62-2016 to 62-2019	None		59-301	Ch. 218, §§ 1, 2...	59-1202
62-2020.....	59-1804		59-2260	Ch. 218, § 3.....	59-1407
62-2021.....	59-1811		59-2261	Ch. 218, 4.....	59-2239
62-2022.....	59-1811		59-2262	Ch. 218, 5.....	59-2240
62-2023.....	59-2217		59-2265	Ch. 218, 6.....	59-2241
	59-2218		59-2275	Ch. 219, 1.....	59-1407
62-2024.....	59-1504	76-1212.....	59-2003	Ch. 219, § 2.....	59-1401
	59-1717	76-1213.....	59-2008	Ch. 219, § 4.....	59-1409
67-701.....	59-511	76-1214.....	59-212	Ch. 219, § 5.....	59-1503
67-702.....	59-511		59-2004		59-1401
67-703 to 67-705..	None		59-2401		59-1503
67-706.....	59-512	76-1215.....	59-2265		59-2249
67-707.....	59-514		59-2273	Ch. 220, § 1.....	59-2401
67-708.....	59-514	76-1216.....	59-212		
67-709 to 67-711..	None	76-1217.....	59-2008	<i>Laws 1938</i>	
76-1203.....	59-2001	76-1224.....	59-2007	Ch. 55, § 1.....	59-2207
76-1204.....	59-2002	76-1225.....	59-1812		

### Article 1a.—NAME AND DEFINITIONS

**59-1a01. Name of act.** This act is named and may be cited as the Kansas probate code. [L. 1939, ch. 180, § 1; July 1.]

**Note:** Bartlett's Probate Practice, see § 21.

**59-1a02. Definitions.** As used in this act the term "probate court" means judge of the probate court when that meaning is necessary to effectuate the general purpose of the provisions of this act. As used in this act, unless the context otherwise indicates: (1) the word "representative" includes executors, administrators, administrators with the will annexed, administrators *de bonis non*, and guardians; (2) the word "fiduciary" includes representatives, trustees, and surviving partners administering their trusts; (3) the word "person," as applied to fiduciaries, includes banks and other corporations authorized by law to act in a fiduciary capacity in this state; (4) the masculine gender includes the feminine; and (5) the singular number includes the plural. [L. 1939, ch. 180, § 2; July 1.]

**Judicial Council, 1939:** This section is new. Throughout the probate code the word "court" instead of "judge" is used wherever possible and the words "judge's office" are eliminated, because when the judge acts in his official capacity he is the court. First sentence: See *State, ex rel., v. Anderson*, 114 K. 297, 217 P. 327; *Young v. Lidrick*, 14 K. 92; *In re Johnson*, 12 K. 102. By use of "representative" and "fiduciary" much duplication is avoided.

**Note:** Bartlett's Probate Practice, see § 31.

**Cross reference:** Limitation on power of corporate fiduciary to act, see § 59-1701.

Foreign corporation cannot serve as testamentary trustee of Kansas testator's estate. *In re Estate of Lowe*, 155 K. 679, 682, 127 P. 2d 512.

### Article 2.—PROBATE COURTS AND THEIR RECORDS

**59-201. Election, term, and bond of probate judge.** There shall be elected in each county a probate judge. He shall hold his office for two years, and before he enters upon the duties of his office shall execute to the state of Kansas a bond, in a sum of not less than two thousand dollars nor more than twenty-five thousand dollars, with two or more sufficient sureties or with a corporate surety duly authorized to do business in this state, to be fixed and approved by the county commissioners, and filed in the office of county clerk, conditioned for the faithful performance of the duties required of him by law, and for the faithful application and payment of all moneys and effects that may come into his custody in the execution of the duties of his office. [L. 1939, ch. 180, § 3; July 1.]

**Source or prior law:** G. S. 1935, § 19-1101.

**Note:** Bartlett's Probate Practice, see § 42.

**Cross reference:** Practice of law prohibited, see G. S. 1935, § 21-1601 and § 59-207 herein. Public administrator in Wyandotte county, see G. S. 1935, § 19-1104.

Time of filing bond, see G. S. 1935, § 19-2602.

Probate judge-elect's death prior to qualification; incumbent holds over. *Smith v. Snell*, 154 K. 187, 188, 117 P. 2d 567.

Probate judge not required to be member of bar. *Yeager v. Yeager*, 155 K. 734, 753, 129 P. 2d 242.

**59-202. Clerks, clerical assistants and reporters; fees of reporters.**

The probate judge shall be the clerk of the probate court, and shall have such clerical assistants as may be allowed by law. He may appoint in writing one of such assistants as deputy clerk. The probate judge may appoint a competent stenographer as reporter in any matter pending or to be heard in the probate court. The reporter shall have the same powers and duties and be subject to the same liabilities, in the matter for which he is appointed, as a reporter of the district court. He shall receive such fees as may be fixed by the court not exceeding the compensation allowed by law to reporters of the district court. Such fees shall be taxed as other costs. [L. 1939, ch. 180, § 4; July 1.]

**Source or prior law:** G. S. 1935, § 19-1102.

**Judicial Council, 1939:** This section provides for deputy clerk and reporter when necessary. Fees and salaries unaffected by probate code.

**Note:** Bartlett's Probate Practice, see § 46.

**Cross references:** Fees and salaries of assistants and clerks, see G. S. 1947 Supp. §§ 28-113a, 28-113b, 28-167, 28-169, 28-215, 28-608, 28-616, 28-707.

Compensation of shorthand reporters, see G. S. 1935, § 20-901 *et seq.*; see, also, G. S. 1947 Supp. § 20-904.

**59-203. Probate judge pro tem; appointment.** The probate judge may appoint some qualified person to act as probate judge pro tem during the absence or incapacity of the probate judge. When an affidavit of a party to a probate proceeding, or of his attorney of record, is filed with the clerk of the district court stating that the probate judge is insane, or that he is interested or has been counsel in the subject matter of the probate proceeding, the clerk of the district court shall appoint a probate judge pro tem, who shall be a member of the bar, to act as probate judge. [L. 1939, ch. 180, § 5; July 1.]

**Source or prior law:** G. S. 1935, §§ 20-1108, 22-1307.

**Note:** Bartlett's Probate Practice, see § 50.

**59-204. Same; qualification.** The probate judge pro tem shall take and subscribe to the same oath as required of the probate judge. When such selection is made by the clerk of the district court, such oath, with a transcript of the proceedings for the appointment of such probate judge pro tem, shall be filed in the probate court. [L. 1939, ch. 180, § 6; July 1.]

**Source or prior law:** G. S. 1935, § 20-1109.

**Note:** Bartlett's Probate Practice, see § 51.

**59-205. Same; insanity of probate judge; how vacancy filled.** If the probate judge is duly and finally adjudged insane or incapacitated to act by reason of mental disability, the probate judge pro tem trying the case shall certify such adjudication to the governor, who shall thereupon declare the office of such probate judge vacant and fill the same by appointment. The probate judge pro tem trying the case of insanity or mental incapacity shall not be eligible for such appointment. [L. 1939, ch. 180, § 7; July 1.]

**Source or prior law:** G. S. 1935, § 20-1110.

**Note:** Bartlett's Probate Practice, see § 53.

**59-206. Vacancy and appointment.** If a vacancy occurs in the office of probate judge, the governor shall appoint some qualified person to fill such vacancy until a successor shall be elected according to law. [L. 1939, ch. 180, § 8; July 1.]

**Source or prior law:** G. S. 1935, § 19-1103.

**Note:** Bartlett's Probate Practice, see § 54.

Judge-elect's death prior to qualification does not create vacancy. *Smith v. Snell*, 154 K. 187, 188, 117 P. 2d 567.

**59-207. Not to deal in assets nor be counsel.** No judge, probate judge pro tem, clerk, deputy clerk, or employee of any probate court shall directly or indirectly invest or deal in any property or securities involved in any proceedings over which such court has jurisdiction; nor shall he be counsel or attorney in any action or proceeding for or against any devisee, legatee, heir, creditor, fiduciary, or ward, over whom or whose estate claim, or accounts such court has jurisdiction. Except in matters relating to commitments, none of them shall give counsel or advice, nor shall any of them draw or prepare any paper relating to any matter which is or may be brought before such court, except orders, judgments, decrees, executions, attachments, warrants, certificates, commissions, citations, or subpoenas issuing out of such court. [L. 1939, ch. 180, § 9; July 1.]

**Source or prior law:** G. S. 1935, § 22-819.

**Judicial Council, 1939:** See *Wheat v. Hilkey*, 148 K. 60, 79 P. 2d 865.

**Note:** Bartlett's Probate Practice, see § 53.

**Cross reference:** Similar provision in "Crimes Act," see G. S. 1935, § 21-1601.

**59-208. Delivery and completion of records upon expiration of term.** Whenever the term of office of any probate judge expires he shall deliver to his successor all books, records, and papers in his possession relating to his office. Willful failure to do so within five days after demand by his successor shall constitute contempt. Whenever the records, books, and papers, or any of them, belonging to the probate court, have been delivered to the judge by his predecessor in an unfinished or imperfect condition, and it shall be necessary for the business of his court that the same be completed, the said judge shall proceed at once with the completion of said records, as far as possible; and his predecessor shall be liable on his official bond for the expense of the completion of such records for his term. [L. 1939, ch. 180, § 10; July 1.]

**Source or prior law:** G. S. 1935, § 22-1306.

**Note:** Bartlett's Probate Practice, see § 61.

**59-209. Seal.** Each probate court shall have a seal with which all process issuing therefrom shall be authenticated; which seal shall be provided by the county commissioners, and shall contain the following words, viz.: "Probate court, \_\_\_\_\_ county, Kansas,"—naming the county for which such seal is provided. [L. 1939, ch. 180, § 11; July 1.]

**Source or prior law:** G. S. 1935, § 20-1102.

**Note:** Bartlett's Probate Practice, see § 63.

**59-210. Process.** All writs, orders, and other process of the probate court shall be issued and directed to the sheriff of the proper county where such process is to be served. In the absence or nonattendance of the sheriff, or where he is a party, the probate court may appoint any suitable person of the county and qualify him as a special sheriff for the service of any such process. [L. 1939, ch. 180, § 12; July 1.]

**Source or prior law:** G. S. 1935, §§ 20-1105, 22-209.

**Note:** Bartlett's Probate Practice, see § 64.

**59-211. No terms of court; office hours; hearings.** There shall be no terms of the probate court. It shall be open for the transaction of business at the county seat at all reasonable hours. Hearings may be had at such other places in the county as the court may deem advisable. [L. 1939, ch. 180, § 13; July 1.]

**Source or prior law:** G. S. 1935, §§ 20-1103, 20-1104, 20-1106.

**Judicial Council, 1939:** Fixed terms of the probate court are omitted, being unnecessary and without significance, as the court is open at all times so matters may be heard at any date previously set.

**Note:** Bartlett's Probate Practice, see § 66.

**Cross reference:** Court's control over its judgments, limited, see § 59-2213.  
Discussed; court's jurisdiction to vacate order after 30 days under § 59-2213 determined. *In re Estate of Lillibridge*, 161 K. 93, 101, 166 P. 2d 720.

**59-212. Books of record.** The following books shall be kept by the probate court:

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

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

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

(4) An index pertaining to wills deposited pursuant to section 56 [59-620] under the name of the testator.

(5) An index to each book of record.

(6) Books of record, kept for that purpose, in which the following documents shall be recorded by the probate court: (1) All wills admitted to probate; (2) all elections filed; (3) all letters of appointment issued; (4) all certificates of appointment filed; (5) all bonds filed; (6) all orders, judgments, and decrees, including inheritance tax orders; (7) such other documents as the court may determine. [L. 1939, ch. 180, § 14; July 1.]

**Source or prior law:** G. S. 1935, §§ 19-1102, 20-1105, 20-1109, 22-219, 22-221, 22-227, 22-232, 22-246, 22-248, 22-252, 22-253, 22-271, 22-708, 22-721, 22-722, 22-819, 22-822, 22-913, 22-1309, 22-1310, 76-1211, 76-1214, 76-1216.

**Judicial Council, 1939:** Consolidates, amends and revises parts of above sections.

**Note:** Bartlett's Probate Practice, see § 72.

**Cross reference:** Probate judge to keep a fee book, see G. S. 1947 Supp. § 28-123.

**59-213. Recordation in another county.** A duly certified copy of any probate proceedings or documents of record in the probate court of any county of the state may be filed and recorded in the probate court of any other county of the state, and when so filed shall have the same force and effect in such other county as in the county of origin. [L. 1939, ch. 180, § 15; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-220, 22-221, 22-227, 22-822, 22-904a, 38-213, 39-221.

**Note:** Bartlett's Probate Practice, see § 74.

**59-214. Inspection of books and records; copies.** The books and records of the probate court shall be open to inspection by all persons at all times, except as provided in adoption proceedings. The court shall furnish a certified or authenticated copy of any document on file or of record upon payment therefor. The court, in making certified or authenticated copies of letters of appointment, is authorized upon request to certify further whenever such is the fact, that the letters so certified stand unrevoked at the date of the certificate; and such certificate shall be prima facie evidence of such fact. [L. 1939, ch. 180, § 16; July 1.]

**Source or prior law:** G. S. 1935, § 19-1102.

**Judicial Council, 1939:** All of section after first sentence is new.

**Note:** Bartlett's Probate Practice, see § 76.

**Cross reference:** Inspection of adoption files and records limited, see § 59-2279.

### Article 3.—JURISDICTION AND POWERS

**Cross references:** Juvenile court, see G. S. 1935, ch. 38, art. 4, also, G. S. 1947 Supp. §§ 38-405a, 38-407.

Incompetent persons, see ch. 39.

Infants, see G. S. 1935, ch. 38; also, G. S. 1947 Supp. §§ 38-109, 38-112 to 38-114, 38-405a, 38-407, 38-602.

**59-301. Courts of record; original jurisdiction.** The probate courts shall be courts of record, and, within their respective counties, shall have original jurisdiction:

- (1) To admit last wills and testaments to probate.
- (2) To grant and revoke letters testamentary and of administration.
- (3) To direct and control the official acts of executors and administrators, to settle their accounts, and to order the distribution of estates.
- (4) Of partnership estates as provided in this act.
- (5) To determine the heirs, devisees, and legatees of decedents.
- (6) To appoint and remove guardians for minors and incompetent persons, to make all necessary orders relating to their estates, to direct and control the official acts of such guardians, and to settle their accounts.
- (7) To hear and determine cases of habeas corpus.
- (8) Of trusts and powers created by wills admitted to probate, and of trusts and powers created by written instruments other than by wills in favor of persons subject to guardianship; to appoint and remove trustees for such trusts, to make all necessary orders relating to such trust estates, to direct and control the official acts of such trustees, and to settle their accounts; but this provision shall not affect the jurisdiction of district courts in such cases.
- (9) To appoint and remove trustees of estates of convicts imprisoned in the penitentiary under sentence of imprisonment for life, to make all necessary orders relating to their estates, to direct and control the official acts of such trustees, and to settle their accounts.
- (10) To hold inquests respecting insane persons, and to commit insane persons to hospitals for the insane, or elsewhere, for their care and treatment.
- (11) Such other jurisdiction as may be given them by statutes pertaining to particular subjects.
- (12) And they shall have and exercise such equitable powers as may be necessary and proper fully to hear and determine any matter properly before such courts. [L. 1939, ch. 180, § 17; July 1.]

**Source or prior law:** G. S. 1935, §§ 20-1101, 20-1107, 22-404, 22-904, 22-1207, 62-2001, 76-1211.

**Judicial Council, 1939:** Subsection (8). See the uniform trustees' accounting act prepared by the commissioners on uniform state laws. Subsection (9). Limited to estates of life convicts, see G. S. 1935, § 21-134. Subsection (12). See, *In re Osborne's Estate*, 99 K. 227, 161 P. 601; *Dick v. Taylor*, 124 K. 646, 261 P. 579; *Bennett v. Arrowsmith*, 101 K. 143, 165 P. 812; *Eadie v. Hamilton*, 94 K. 214, 146 P. 323; *O'Neil v. Epting*, 82 K. 245, 108 P. 107; *Citizens Building and Loan Association v. Knox*, 146 K. 734, 74 P. 2d 161.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.

*Bartlett's Probate Practice*, see § 82.

**Cross reference:** Constitutional jurisdiction of probate court, see Kan. Const., art. 3, § 8. Accounting of trustees, see §§ 59-1601 to 59-1611.

District court cannot supersede probate court in probate of wills; declaratory judgment. *Pennington v. Green*, 152 K. 739, 741, 107 P. 2d 766.

Probate court may order incompetent's guardian to support ward's adult indigent daughter. *Sheneman v. Manring*, 152 K. 780, 782, 107 P. 2d 741.

Mechanic's lien may be enforced in district court while administration pending. *Leidigh & Havens Lumber Co. v. Wyatt*, 153 K. 214, 218, 109 P. 2d 87.

Action to enforce oral contract to will real estate held action to contest will; probate court has exclusive jurisdiction; jurisdiction of probate and district courts discussed. *Foss v. Wiles*, 155 K. 262, 269, 124 P. 2d 438.

Probate court has exclusive original jurisdiction over estates of incompetent persons. *Starke v. Starke*, 155 K. 331, 335, 125 P. 2d 738.

Probate court has exclusive jurisdiction to enforce decedent's oral contract to convey or bequeath real estate. *Dixon v. Fluker*, 155 K. 399, 403, 404, 125 P. 2d 364.

Jurisdiction of probate court over implied trusts discussed in dissenting opinion. *Yeager v. Yeager*, 155 K. 734, 750, 751, 129 P. 2d 242.

Action to impose constructive trust held will contest; probate court's original jurisdiction exclusive. *Yeager v. Yeager*, 155 K. 734, 750, 751, 129 P. 2d 242.

Action to enforce specific performance of agreement to make will; probate court's jurisdiction exclusive. *Swisher v. Bouse*, 155 K. 797, 130 P. 2d 565.

Limited equitable powers conferred on probate court are constitutional. *In re Estate of Hoover*, 156 K. 31, 39, 40, 41, 42, 131 P. 2d 917.

Probate court has exclusive original jurisdiction of action on contract to devise property. *Behee v. Beem*, 156 K. 115, 131 P. 2d 675.

Guardian cannot pay ward's parents funeral expenses from ward's estate. *Osment v. Trout*, 156 K. 120, 122, 131 P. 2d 640.

Probate court's order allowing claim against estate is judgment of court of record. *In re Estate of Casey*, 156 K. 590, 599, 134 P. 2d 665.

District court's habeas corpus jurisdiction not impaired by probate code guardianship provisions. *Johnson v. Best*, 156 K. 668, 670, 135 P. 2d 896.

District court has original jurisdiction of administrator's action to quiet title. *Kininmonth v. Carson*, 156 K. 808, 817, 818, 137 P. 2d 173.

Probate court's original exclusive jurisdiction over claims against decedent's estates determined. *Egnatic v. Wollard*, 156 K. 843, 847, 848, 851, 852, 853, 855, 137 P. 2d 188.

Probate court has exclusive original jurisdiction of wrongful death demand against deceased wrongdoer's estate. *Shively v. Burr*, 157 K. 336, 338, 345, 139 P. 2d 401.

District court has jurisdiction of executor's action to partition real property; probate court's approval of action not essential. *Sheedy v. Willoughby*, 157 K. 508, 515, 142 P. 2d 801.

Final settlement decree unappealed is binding adjudication of devisee's interest in real estate. *Bitzer v. Smith*, 158 K. 83, 87, 145 P. 2d 148.

Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.

Probate court's exclusive, original jurisdiction over decedents' estates and settlements defined. *Herbel v. Nuss*, 128 K. 376, 378, 147 P. 2d 735.

Insane widow's guardian under direction of probate court may sell homestead. *Lockridge v. Glace*, 158 K. 431, 434, 147 P. 2d 726.

Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 21, 23, 27, 35, 152 P. 2d 61.

Guardian may make voluntary partition of ward's real estate under probate code. *Thompson v. Hall*, 159 K. 592, 595, 156 P. 2d 530.

Court may exercise judicial discretion as to approval of fiduciary's final receipts. *In re Estate of Williams*, 160 K. 220, 224, 160 P. 2d 260.

Probate court lacks jurisdiction to annul marriage; appeal; no jurisdiction. *In re Estate of Crump*, 160 K. 154, 160, 166 P. 2d 684; *In re Estate of Dix*, 161 K. 364, 368, 369, 168 P. 2d 537.

Discussed in determining court's jurisdiction to vacate order under § 59-2213. *In re Estate of Lillibridge*, 161 K. 93, 104, 166 P. 2d 720.

Cited; contractual will and subsequent inconsistent will entitled to probate under § 59-2235. *In re Estate of Adkins*, 161 K. 239, 249, 167 P. 2d 618.

Federal court has jurisdiction to determine questions relating to interests of heirs, etc., when. *Rosenberg v. Baum*, 153 F. 2d 10, 12, 13.

Probate court has exclusive, original jurisdiction to determine validity of will clause. *Asendorf v. Asendorf*, 162 K. 310, 313, 314, 176 P. 2d 535.

District court without original jurisdiction to determine validity of will. *Asendorf v. Asendorf*, 162 K. 310, 313, 314, 176 P. 2d 535.

Probate court has exclusive jurisdiction to distribute estate according to family settlement, when. *Down v. Austenfeld*, 162 K. 562, 178 P. 2d 201.

**59-302. Powers of probate courts.** The probate courts, in addition to their general jurisdiction, shall have power:

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

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

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

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

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

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

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

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

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

(10) To punish for contempt. [L. 1939, ch. 180, § 18; July 1.]

**Source or prior law:** G. S. 1935, §§ 20-1101, 22-213, 22-216, 22-716, 22-720.

**Judicial Council, 1939:** Subsection (4). See *Stratton v. McCandless*, 32 K. 512, 4 P. 1018; *Proctor v. Dicklow*, 57 K. 119, 45 P. 86. Subsection (5). See *Clark v. Andrews*, 136 K. 23, 13 P. 2d 294; *Smith v. Eureka Bank*, 24 K. 528. Subsection (6). See *Aydelotte v. Brittain & Co.*, 29 K. 98; *Martindale v. Battey*, 73 K. 92, 84 P. 527; *Graden v. Mais*, 83 K. 481, 112 P. 107; *Plumber v. Ash*, 90 K. 40, 133 P. 157; *Faler v. Culver*, 94 K. 123, 146 P. 333; *Brooks v. Brooks*, 52 K. 562, 35 P. 215; *In re Shoupe*, 130 K. 53, 285 P. 554. Subsection (9). This subsection is new. The fiduciary may contract independently of the court and is personally liable, see *Brown v. Quinton*, 80 K. 44, 102 P. 242. To protect the fiduciary in the allowance of his expense he may obtain authority prior to or confirmation after the contract.

**Note:** Bartlett's Probate Practice, see § 96.

**Cross references:** Courts of record may grant commission to take depositions; notice, see G. S. 1935, § 60-2826 *et seq.*

Vacation of judgments or orders under civil code, see G. S. 1935, §§ 60-3007 to 60-3016.

Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.

Court may exercise judicial discretion as to approval of fiduciary's final receipts. *In re Estate of Williams*, 160 K. 220, 224, 160 P. 2d 260.

Probate court lacks jurisdiction to annul marriage; appeal; no jurisdiction. *In re Estate of Crump*, 160 K. 154, 160, 166 P. 2d 684; *In re Estate of Dix*, 161 K. 364, 368, 369, 168 P. 2d 537.

Discussed; jurisdiction of court to vacate order after 30 days under § 59-2213 determined. *In re Estate of Lillibridge*, 161 K. 93, 98, 166 P. 2d 720.

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

**59-401. Homestead.** A homestead to the extent of one hundred and sixty acres of land lying without, or of one acre lying within, the limits of an incorporated city, occupied by the decedent and family, at the time of the owner's death, as a residence, and continued to be so occupied by the surviving spouse and children, after such death, together with all the improvements on the same, shall be wholly exempt from distribution under any of the laws of this state, and from the payment of the debts of the decedent, but it shall not be exempt from sale for taxes thereon, or for the payment of obligations contracted for the purchase thereof, or for the erection of improvements thereon, or for the payment of any lien given thereon by the joint consent of husband and wife. The title to the homestead property of a decedent shall pass the same as the title to other property of the decedent. [L. 1939, ch. 180, § 19; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-102, 22-104, 22-107, 22-127.

**Judicial Council, 1939:** Last sentence is new. See *Newby v. Anderson*, 106 K. 477, 188 P. 438; *Hollinger v. Boatman's Bank*, 69 K. 519, 77 P. 263; *Dayton v. Donart*, 22 K. 256; *Mitchell v. Mitchell*, 69 K. 441, 77 P. 98; *Barbe v. Hyatt*, 50 K. 86, 31 P. 694; *Martindale v. Smith*, 31 K. 270, 1 P. 569.

**Note:** Bartlett's Probate Practice, see § 174.

**Cross references:** Selection of homestead, see § 59-2235.

Constitutional homestead exemption, see Kan. Const., art. 15, § 9.

Referred to in § 59-1405.

Execution of mortgages and oil, gas and other mineral leases upon homestead of insane spouse, see §§ 59-2314 to 59-2322.

Section inapplicable where valid postnuptial contract providing for property disposition exists. *Porter v. Axline*, 154 K. 87, 88, 90, 114 P. 2d 849.

Facts considered and homestead rights of widow held waived. *In re Estate of Meech*, 155 K. 792, 130 P. 2d 571.

Insane widow's guardian under direction of probate court may sell homestead. *Lockridge v. Glace*, 158 K. 431, 433, 147 P. 2d 726.

**59-402. Same; partition.** The homestead shall not be subject to forced partition unless the surviving spouse remarries, nor until all the children arrive at the age of majority. [L. 1939, ch. 180, § 20; July 1.]

**Source or prior law:** G. S. 1935, § 22-105.

**Judicial Council, 1939:** Gives spouse with adult children same rights as spouse without children. See *Breen v. Breen*, 102 K. 766, 173 P. 2; *Campbell v. Durant*, 110 K. 30, 202 P. 841; *Parks v. Tuffi*, 148 K. 221, 80 P. 2d 1062. Provisions for allotment in probate court are omitted because (1) the provisions are seldom if ever used; (2) they fail to give adequate relief in all cases, and cannot be made to do so without the incorporation of many of the provisions of the partition statute; and (3) an adequate remedy is afforded in all cases by partition in the district court.

**Note:** Bartlett's Probate Practice, see § 194.

Section inapplicable where valid postnuptial contract providing for property disposition exists. *Porter v. Axline*, 154 K. 87, 90, 114 P. 2d 849.

Stepfather cannot resist partition of homestead against deceased wife's adult children. *Cole v. Coons*, 161 K. 332, 335, 167 P. 2d 295.  
 Section does not create homestead right; applies to property in which homestead right can be established; cotenants' right to partition. *Cole v. Coons*, 162 K. 624, 625, 628, 630, 632, 633, 638, 643, 173 P. 2d 997.

**59-403. Allowance to spouse and minor children.** When a resident of the state dies, testate or intestate, the surviving spouse shall be allowed, for the benefit of such spouse and the decedent's minor children during the period of their minority, from the personal property of which the decedent was possessed or to which he was entitled at the time of death, the following: (1) The wearing apparel, family library, pictures, musical instruments, furniture and household goods, utensils and implements used in the home, one automobile, and provisions and fuel on hand necessary for the support of the spouse and minor children for one year. (2) The sum of seven hundred fifty dollars, or other personal property at its appraised value in full or part payment thereof. The property shall not be liable for the payment of any of decedent's debts or other demands against his estate, except liens thereon existing at the time of his death. If there are no minor children, the property shall belong to the spouse; if there are minor children and no spouse, it shall belong to the minor children. The selection shall be made by the spouse, if living, otherwise by the guardian of the minor children. In case any of the decedent's minor children are not living with the surviving spouse, the court may make such division as it deems equitable. [L. 1939, ch. 180, § 21; L. 1941, ch. 284, § 1; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-511, 22-512, 22-513, 22-514.

**Judicial Council, 1939:** Makes allowances more uniform and more equitable; vests title in surviving spouse, if any, otherwise in minor children.

**Note:** Bartlett's Probate Practice, see § 212.

**Cross references:** Selection of allowances, see § 59-2235.  
 Referred to in §§ 59-502, 59-1201, 59-1405, 59-2235.

Cited; widow required to promptly select and describe land claimed as homestead. *Meech v. Grigsby*, 153 K. 784, 789, 113 P. 2d 1091.

Section inapplicable where valid postnuptial contract providing for property disposition exists. *Porter v. Axline*, 154 K. 87, 88, 90, 91, 114 P. 2d 849.

Proceedings to probate; notice insufficient to sustain order holding contract of spouse constituted election. *In re Estate of Hoover*, 155 K. 647, 648, 127 P. 2d 460. Affirmed: 156 K. 31, 33, 131 P. 2d 917.

Allowance to surviving spouse not subject to garnishment for her individual debts. *O'Dell v. O'Dell*, 157 K. 351, 352, 353, 354, 139 P. 2d 376.

**59-404. Effect of election to take under will by spouse.** The surviving spouse, by electing to take under the will of the decedent or by consenting thereto, does not waive the homestead right nor the right to such allowance, unless it clearly appears from the will that the provision therein made for such spouse was intended to be in lieu of such rights. [L. 1939, ch. 180, § 22; July 1.]

**Source or prior law:** G. S. 1935, § 22-246.

**Judicial Council, 1939:** Clarifies provision as to election. See annotation in 4 A. L. R. 393.

**Note:** Bartlett's Probate Practice, see § 214.

Section inapplicable where valid postnuptial contract providing for property disposition exists. *Porter v. Axline*, 154 K. 87, 91, 114 P. 2d 849.

Proceedings to probate; notice insufficient to sustain order holding contract of spouse constituted election. *In re Estate of Hoover*, 155 K. 647, 648, 127 P. 2d 460. Affirmed: 156 K. 31, 33, 131 P. 2d 917.

Will construed; widow's homestead claim denied. *In re Estate of Wenzel*, 161 K. 545, 556, 170 P. 2d 618.

## Article 5.—INTESTATE SUCCESSION

**59-501. Definitions.** As used in this article, the word "children" means natural children, including a posthumous child, and children adopted as provided by law, and includes illegitimate children when applied to mother and child, and also when applied to father and child where the father has notoriously or in writing recognized his paternity of the child, or his paternity thereof has been determined in his lifetime in any action or proceeding involving that question in a court of competent jurisdiction. The word "issue" includes adopted children of deceased children or issue. [L. 1939, ch. 180, § 23; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-121, 22-122, 22-123, 22-129.

**Note:** Bartlett's Probate Practice, see § 226.



**59-502. Descent of property of intestate resident.** Subject to any homestead rights, the allowances provided in section 21 [59-403], and the payment of reasonable funeral expenses, expenses of last sickness and costs of administration, taxes, and debts, the property of a resident decedent, who dies intestate, shall at the time of his death pass by intestate succession as provided in this article. [L. 1939, ch. 180, § 24; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-101, 22-127, 22-130.

**Note:** Bartlett's Probate Practice, see § 229.

Sections 59-401 and 59-403 inapplicable where valid postnuptial contract disposing of property exists. Porter v. Axline, 154 K. 87, 91, 114 P. 2d 849.

**59-503. Descent of property of intestate nonresident.** Real estate situated in this state, owned by an intestate decedent who is a nonresident of this state at the time of his death, shall pass by intestate succession in the same manner as though he were a resident of this state at the time of his death. The personal property of such a decedent shall pass by intestate succession under the laws of the place of his residence at the time of his death. [L. 1939, ch. 180, § 25; July 1.]

**Judicial Council, 1939:** This section is new. See Hartley v. Hartley, 71 K. 691, 81 P. 505; *In re Rieman's Estate*, 124 K. 539, 262 P. 16; Cooper v. Ives, 62 K. 395, 63 P. 434; McLean v. McLean, 92 K. 326, 140 P. 847; Wilcox v. Hollar, 115 K. 27, 222 P. 758; Martin v. Martin, 93 K. 714, 145 P. 565; Williams v. Wessels, 94 K. 71, 145 P. 856. "Residence" means "domicile." See G. S. 1935, § 77-201, ¶ 23; Modern Woodmen v. Hester, 66 K. 129, 71 P. 279.

**Note:** Bartlett's Probate Practice, see § 231.

Applied; postnuptial agreement held not to deprive surviving spouse of inheritance. *In re Estate of Troemper*, 160 K. 464, 467, 163 P. 2d 379.

**59-504. Surviving spouse.** If the decedent leaves a spouse and no children nor issue of a previously deceased child, all his property shall pass to the surviving spouse. If the decedent leaves a spouse and a child, or children, or issue of a previously deceased child or children, one-half of such property shall pass to the surviving spouse. [L. 1939, ch. 180, § 26; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-118, 22-119, 22-127.

**Note:** Bartlett's Probate Practice, see § 242.

Widow not estopped from claiming statutory share by offering will for probate. *In re Estate of Garden*, 158 K. 554, 564, 148 P. 2d 745.

Postnuptial agreement held not to deprive surviving spouse of inheritance. *In re Estate of Troemper*, 160 K. 464, 471, 163 P. 2d 379.

Cited; cotenant cannot establish homestead right against other cotenants. Cole v. Coons, 162 K. 624, 632, 178 P. 2d 997.

**59-505. Same; half of realty to surviving spouse.** Also, the surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing, or by a will, or by an election as provided by law to take under a will, except such real estate as has been sold on execution or judicial sale, or taken by other legal proceeding: *Provided*, That the surviving spouse shall not be entitled to any interest under the provisions of this section in any real estate of which such decedent in his lifetime made a conveyance, when such spouse at the time of the conveyance was not a resident of this state and never had been during the existence of the marriage relation. [L. 1939, ch. 180, § 27; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-108, 22-117, 22-127.

**Note:** Bartlett's Probate Practice, see § 246.

Section contemplates surviving spouse's share to be held in severalty. Ward v. Ward, 153 K. 222, 226, 109 P. 2d 68.

Nature of wife's interest discussed; spouse of will beneficiary competent witness to will. *In re Estate of Williams*, 153 K. 734, 737, 150 P. 2d 336. Reaffirmed: 159 K. 232, 153 P. 2d 906.

Discussed; contract, will and deed construed as family settlement; not revoked. Hagerman v. Hagerman, 160 K. 742, 751, 165 P. 2d 431.

**59-506. Surviving children or issue.** If the decedent leaves a child, or children, or issue of a previously deceased child or children, and no spouse, all

his property shall pass to the surviving child, or in equal shares to the surviving children and the living issue, if any, of a previously deceased child, but such issue shall collectively take only the share their parent would have taken had such parent been living. If the decedent leaves such child, children, or issue, and a spouse, one-half of such property shall pass to such child, children, and issue as aforesaid. [L. 1939, ch. 180, § 28; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-118, 22-127, 22-128.

**Judicial Council, 1939:** Provision relating to "children of the half-blood" omitted as meaningless. See *Genschorek v. Blumer*, 136 K. 228, 232, 14 P. 2d 722.

**Note:** Bartlett's Probate Practice, see § 250.

**59-507. No spouse, child or issue, of the decedent.** If the decedent leaves no surviving spouse, child, or issue, but leaves a surviving parent or surviving parents, all of his property shall pass to such surviving parent, or in equal shares to such surviving parents, but if the decedent is an adopted child such property shall pass to his adoptive parent or parents in like manner including a natural parent who is the spouse of an adoptive parent. [L. 1939, ch. 180, § 29; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-119, 22-120, 22-127.

**Judicial Council, 1939:** See *In re Yates' Estate*, 108 K. 721, 196 P. 1077; *Baird v. Yates*, (Kan.) 200 P. 280. Changes law to the effect that natural parents do not inherit from child adopted by others.

**Note:** Bartlett's Probate Practice, see § 253.

**Cross reference:** Right of natural parent to inherit from adopted child, see § 59-2103.

**59-508. No spouse, child, issue, or parents.** If the decedent leaves no surviving spouse, child, issue, or parents, the respective shares of his property which would have passed to the parents, had both of them been living, shall pass to the heirs of such parents respectively (excluding their respective spouses), the same as it would have passed had such parents owned it in equal shares and died intestate at the time of his death. [L. 1939, ch. 180, § 30; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-120, 22-127.

**Judicial Council, 1939:** The words "excluding their respective spouses" are new. See *Russell v. Hallet*, 23 K. 276; *Tays v. Robinson*, 68 K. 53, 74 P. 623; *Fuller v. Haynes*, 86 K. 37, 119 P. 331.

**Note:** Bartlett's Probate Practice, see § 255.

**59-509. Limitation on descent.** In computing degrees of relationship by blood for the purpose of the passing of property of an intestate decedent, each generation in the ascending or descending line shall be counted as one degree. None of such property shall pass except by lineal descent to a person further removed from the decedent than the sixth degree, as so computed. In all cases of intestate succession the right of a living person to have the property, or a share of it, pass to him, shall be determined as here provided, but the property shall pass immediately from the decedent to the person entitled to receive it. [L. 1939, ch. 180, § 31; July 1.]

**Judicial Council, 1939:** This section is new. See article by Justice Walter G. Thiele in *Kansas Judicial Council Bulletin*, December, 1937, pp. 209-212.

**Note:** Bartlett's Probate Practice, see § 259.

Inapplicable where intestate died prior to enactment of probate code. *Miami County Nat. Bank of Paola, Kan., v. Bancroft*, 121 F. 2d 921, 924, 925.

**59-510. Advancements.** Property which has been given by an intestate decedent by way of an advancement to one to whom the decedent's property, or a part of it, would pass by intestate succession, shall be counted as a part of the distributive share of such property to such person, and to that extent shall be taken into account in determining the estate to be distributed among those to whom it passes by intestate succession, but if such advancement exceeds the amount to which such person would be entitled by the laws of intestate succession he shall not be required to refund any portion of the advancement. If such person receiving an advancement dies before the de-

cedent, leaving heirs who take from the decedent, the advancement shall be allowed in like manner as if it had been made directly to them. [L. 1939, ch. 180, § 32; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-125, 22-126.

**Judicial Council, 1939:** Last sentence added.

**Note:** Bartlett's Probate Practice, see § 273.

**Cross reference:** Method of determining advancement, see § 59-2248.

Notes given by son to father held advancements and wiped out by will. *In re Estate of Bush*, 155 K. 556, 561, 127 P. 2d 455.

**59-511. Rights of aliens.** All aliens eligible to citizenship under the laws of the United States may transmit and inherit real estate, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States. All other aliens may transmit and inherit real estate, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise. [L. 1939, ch. 180, § 33; July 1.]

**Source or prior law:** G. S. 1935, §§ 67-701, 67-702.

**Note:** Bartlett's Probate Practice, see § 278.

**Cross reference:** Referred to in § 59-512.

**59-512. Sale when alien not permitted to take.** Whenever by reason of section 33 [59-511] an heir or devisee cannot take real estate in this state, the probate court shall order a sale of said real estate to be made in the manner provided by law for probate sales of real estate, and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property. [L. 1939, ch. 180, § 34; July 1.]

**Source or prior law:** G. S. 1935, § 67-706.

**Note:** Bartlett's Probate Practice, see § 283.

**Cross reference:** Proceedings for sale of real estate, see ch. 59, art. 23.

**59-513. Incapacity to take on conviction of killing.** No person who shall be convicted of feloniously killing, or procuring the killing of another person shall inherit or take by will or otherwise from such other person any portion of his estate. [L. 1939, ch. 180, § 35; July 1.]

**Source or prior law:** G. S. 1935, § 22-133.

**Judicial Council, 1939:** See *Hogg v. Whitham*, 120 K. 341, 342, 242 P. 1021. "Conspiring to kill" omitted, not a criminal offense in this state.

**Note:** Bartlett's Probate Practice, see § 285.

**59-514. Escheat.** If an intestate decedent leaves no person entitled to take his property by intestate succession, as provided in this article, it shall escheat to and become the property of the state. [L. 1939, ch. 180, § 36; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1315, 67-707, 67-708.

**Judicial Council, 1939:** Section added to make article complete.

**Note:** Bartlett's Probate Practice, see § 287.

## Article 6.—WILLS

**59-601. Who may make will.** Any person of sound mind, and possessing the rights of majority, may dispose of any or all of his property by will, subject to the provisions of this act. [L. 1939, ch. 180, § 37; July 1.]

**Source or prior law:** G. S. 1935, § 22-201.

**Judicial Council, 1939:** Changes "full age" to "possessing the rights of majority." See first tentative draft (1938) of uniform execution of wills act, § 2, prepared by commissioners on uniform state laws.

**Note:** Bartlett's Probate Practice, see § 312.

**Cross references:** Age of majority, see G. S. 1935, § 38-101.

Provisions for conferring rights of majority on minors, see G. S. 1935, §§ 38-108, 38-110; also, G. S. 1947 Supp. § 38-109.

Capacity and authority to make will includes capacity and authority to name executor. *In re Estate of Grattan*, 155 K. 839, 130 P. 2d 580.  
 Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 32, 152 P. 2d 61. (But see, § 59-2404.)  
 "Will" as used in statute defined; will may be contractual in character. *In re Estate of Koellen*, 162 K. 395, 176 P. 2d 544.

**59-602. Limitation on testamentary power.** (1) Any devise of real estate located in this state, and any bequest of any personal property by a resident of this state, without regard to the time when the will containing such devise or bequest shall have been made, to any foreign country, subdivision thereof, or city, body politic or corporation, located therein or existing under the laws thereof, or in trust or otherwise to any trustee or agent thereof, except devises and bequests to institutions created and existing exclusively for religious, educational, or charitable purposes, is hereby prohibited. Any such devise or bequest shall be void. (2) Either spouse may will away from the other half of his property, subject to the rights of homestead and allowances secured by statute. Neither spouse shall will away from the other more than half of his property, subject to such rights and allowances, unless the other shall consent thereto in writing executed in the presence of two or more competent witnesses, or shall elect to take under the testator's will as provided by law. [L. 1939, ch. 180, § 38; July 1.]

**Source or prior law:** G. S. 1935, § 22-238.

**Judicial Council, 1939:** Clarified and made to conform to § 59-502. See *Pellett v. Pellett*, 132 K. 427, 295 P. 984.

**Note:** Bartlett's Probate Practice, see § 323.

**Cross reference:** Effect of election of spouse to take under will, see § 59-404.

Spouse elected to take under law; rules for distributing remainder of property under will stated and applied. *Tomb v. Bardo*, 153 K. 766, 768, 114 P. 2d 320.

Clause (1) discussed, construed and applied; bequest to town in Switzerland held void. *In re Estate of Weeks*, 154 K. 103, 104, 105, 110, 112, 114 P. 2d 857.

**59-603. Election of spouse.** The surviving spouse, who shall not have consented in the lifetime of the testator to the testator's will as provided by law, may make an election whether he will take under the will or take what he is entitled to by the laws of intestate succession; but he shall not be entitled to both. If the survivor fails to consent or to make an election, he shall take by the laws of intestate succession. [L. 1939, ch. 180, § 39; July 1.]

**Source or prior law:** G. S. 1935, § 22-245.

**Note:** Bartlett's Probate Practice, see § 327.

Spouse elected to take under law; rules for distributing remainder of property under will stated and applied. *Tomb v. Bardo*, 153 K. 766, 768, 114 P. 2d 320.

**59-604. Devise or bequest to witness.** A beneficial devise or bequest made in a will to a subscribing witness thereto shall be void, unless there are two other competent subscribing witnesses who are not beneficiaries thereunder. But if such witness would have been entitled to any share of the testator's estate in the absence of a will, then so much of such share as will not exceed the value of the devise or bequest shall pass to him from the part of the estate included in the void devise or bequest. Such share shall be considered as a legacy or devise within the meaning of section 103 [59-1405]. [L. 1939, ch. 180, § 40; July 1.]

**Source or prior law:** G. S. 1935, § 22-212.

**Judicial Council, 1939:** Takes share of void devise or bequest.

**Note:** Bartlett's Probate Practice, see § 334.

Spouse of a beneficiary of will is competent witness to will. *In re Estate of Williams*, 158 K. 734, 737, 738, 150 P. 2d 336. Reaffirmed: 159 K. 232, 153 P. 2d 906.

**59-605. Preparation of will by principal beneficiary.** If it shall appear that any will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall affirmatively appear that the testator had read or knew the

contents of such will, and had independent advice with reference thereto. [L. 1939, ch. 180, § 41; July 1.]

**Source or prior law:** G. S. 1935, § 22-214.

**Judicial Council, 1939:** Eliminates procedural provisions.

**Note:** Bartlett's Probate Practice, see § 336.

Section does not extend to making deeds or wills; principles applicable. *Overstreet v. Beadles*, 151 K. 842, 848, 101 P. 2d 874.

Question of independent advice immaterial where principal beneficiary did not prepare will. *In re Estate of Horton*, 154 K. 269, 274, 118 P. 2d 527.

Evidence did not establish will written by principal beneficiary. *In re Estate of Peirano*, 155 K. 48, 53, 122 P. 2d 772.

Evidence sustained finding of lack of independent advice; will invalid. *In re Estate of Casida*, 156 K. 73, 78, 131 P. 2d 644.

Facts considered and beneficiary held not "confidential agent or legal adviser." *Jernberg v. Evangelical Lutheran Home for the Aged*, 156 K. 167, 172, 174, 131 P. 2d 691.

Independent advice unnecessary where principal beneficiary not shown to be scrivener. *In re Estate of Koellen*, 162 K. 395, 403, 176 P. 2d 544.

**59-606. Execution and attestation.** Every will, except an oral will as provided in section 44 [59-608], shall be in writing, and signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party by two or more competent witnesses, who saw the testator subscribe or heard him acknowledge the same. [L. 1939, ch. 180, § 42; July 1.]

**Source or prior law:** G. S. 1935, § 22-202.

**Note:** Bartlett's Probate Practice, see § 351.

Oral express trust testamentary in character invalid; constructive trust; dissenting opinion. *Yeager v. Yeager*, 155 K. 734, 739, 129 P. 2d 242.

Nuncupative will cannot revoke or alter prior written will. *In re Estate of Grattan*, 157 K. 116, 119, 124, 138 P. 2d 497.

Evidence sustained finding will not properly witnessed and attested. *In re Estate of Charles*, 158 K. 221, 222, 146 P. 2d 395.

Attestation clause prima facie evidence of facts therein stated; evidence of witness must be clear and convincing to overcome attestation clause; will proponent has burden of making prima facie case. *In re Estate of Wallace*, 158 K. 633, 634, 639, 640, 149 P. 2d 595.

Statute does not prescribe formalities; attestation and testimonium clauses sufficient. *In re Estate of Williams*, 158 K. 734, 741, 150 P. 2d 336. Reaffirmed: 159 K. 232, 153 P. 2d 906.

Only two ways to make valid will in Kansas. *In re Estate of Bond*, 159 K. 249, 251, 252, 153 P. 2d 912.

Testator must sign at end of will; signature in body of will insufficient. *In re Estate of Bond*, 159 K. 249, 251, 252, 153 P. 2d 912.

"Warranty deeds" held testamentary in character; void; deed and will distinguished. *Lowry v. Lowry*, 160 K. 11, 14, 159 P. 2d 411.

Evidence sufficient to sustain finding that will was properly executed. *In re Estate of Wittman*, 161 K. 398, 400, 168 P. 2d 541.

Will need not be published; witnesses need not know instrument is a will. *In re Estate of Koellen*, 162 K. 395, 400, 176 P. 2d 544.

"Will" as used in statute defined; will may be contractual in character. *In re Estate of Koellen*, 162 K. 395, 400, 176 P. 2d 544.

**59-607. Competency of witness.** If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the admission of such will to probate. [L. 1939, ch. 180, § 43; July 1.]

**Source or prior law:** G. S. 1935, § 22-215.

**Note:** Bartlett's Probate Practice, see § 355.

**59-608. Nuncupative will.** An oral will made in the last sickness shall be valid in respect to personal property, if reduced to writing and subscribed by two competent, disinterested witnesses within thirty days after the speaking of the testamentary words, when the testator called upon some person present at the time the testamentary words were spoken to bear testimony to said disposition as his will. [L. 1939, ch. 180, § 44; July 1.]

**Source or prior law:** G. S. 1935, § 22-273.

**Judicial Council, 1939:** Eliminates procedural provisions. "Ten days" changed to "thirty days."

**Note:** Bartlett's Probate Practice, see § 357.

**Cross reference:** Referred to in § 59-606.

Nuncupative will cannot revoke or alter prior written will. *In re Estate of Grattan*, 157 K. 116, 117, 119, 124, 138 P. 2d 497.  
 Only two ways to make valid will in Kansas. *In re Estate of Bond*, 159 K. 249, 252, 153 P. 2d 912.

**59-609. Will executed without state.** A will executed without this state in the manner prescribed by this act, or by the law of the place of its execution, or by the law of the testator's residence either at the time of its execution or of the testator's death, shall be deemed to be legally executed, and shall have the same force and effect as if executed in compliance with the provisions of this act: *Provided*, Said will is in writing and subscribed by the testator. [L. 1939, ch. 180, § 45; July 1.]

**Source or prior law:** G. S. 1935, § 22-203.

**Judicial Council, 1939:** Revised in accordance with § 7 of the first tentative draft (1938) of uniform execution of wills act prepared by commissioners on uniform state laws.

**Note:** Bartlett's Probate Practice, see § 360.

**59-610. Revocation by marriage, birth or adoption; divorce.** If after making a will the testator marries and has a child, by birth or adoption, the will is thereby revoked. If after making a will the testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked. [L. 1939, ch. 180, § 46; July 1.]

**Source or prior law:** G. S. 1935, § 22-240.

**Judicial Council, 1939:** Marriage and birth or adoption revokes will. Last sentence is new.

**Note:** Bartlett's Probate Practice, see § 373.

**Cross reference:** Referred to in § 59-611.

Nuncupative will cannot revoke or alter prior written will. *In re Estate of Grattan*, 157 K. 116, 119, 138 P. 2d 497.

**59-611. Manner of revocation.** Except as provided in section 46 [59-610], no will in writing shall be revoked or altered otherwise than by some other will in writing; or by some other writing of the testator declaring such revocation or alteration and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence by his direction. [L. 1939, ch. 180, § 47; July 1.]

**Source or prior law:** G. S. 1935, § 22-241.

**Judicial Council, 1939:** Last sentence of G. S. 1935, § 22-241, is omitted, as it is believed to be fully covered by § 59-610 and the rules of ademption and lapse.

**Note:** Bartlett's Probate Practice, see § 375.

Nuncupative will cannot revoke or alter prior written will. *In re Estate of Grattan*, 157 K. 116, 119, 123, 124, 138 P. 2d 497.

Section in mandatory; must be strictly pursued to effect revocation; intent; mental capacity; cancellation or obliteration; presumption of revocation; evidence. *In re Estate of Kemper*, 157 K. 727, 734, 145 P. 2d 103.

Section mandatory; will revocable only as herein provided; marginal writing not revocation. *In re Estate of Rinker*, 158 K. 406, 407, 410, 412, 415, 416, 147 P. 2d 740.

Oral testimony cannot nullify existing written will. *In re Estate of Koellen*, 162 K. 395, 396, 403, 176 P. 2d 544.

**59-612. Revocation of second will not revivor of first, when.** If the testator shall make a second will, the revocation of the second will shall not revive the first will, unless it appears by the terms of such revocation that it was his intention to revive the first will, or unless after such revocation he shall duly republish his first will in the presence of two or more competent witnesses who shall subscribe the same in the presence of the testator. [L. 1939, ch. 180, § 48; July 1.]

**Source or prior law:** G. S. 1935, § 22-242.

**Judicial Council, 1939:** Last clause requires that the republication be subscribed by the witnesses. See *Collins v. Collins*, 110 Oh. St. 105, 143 N. E. 561, 38 A. L. R. 230; *In re Stickney*, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246.

**Note:** Bartlett's Probate Practice, see § 383.

Evidence of second will insufficient to prove revocation of former will. *In re Estate of Rinker*, 158 K. 406, 416, 147 P. 2d 740.

Discussed; court's jurisdiction to vacate order after 30 days under § 59-2213 determined. *In re Estate of Lillibridge*, 161 K. 93, 98, 166 P. 2d 720.  
Oral testimony cannot nullify existing written will. *In re Estate of Koellen*, 162 K. 395, 403, 176 P. 2d 544.

**59-613. After-acquired property.** All property acquired by the testator after making his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention appears from the will. [L. 1939, ch. 180, § 49; July 1.]

**Source or prior law:** G. S. 1935, § 22-257.

**Judicial Council, 1939:** Last clause changed to conform to present rules of construction. See *Compton v. Akers*, 96 K. 229, 150 P. 219; *Kinkaid v. Maxwell*, 75 K. 50, 88 P. 523; *Jameson v. Best*, 124 K. 633, 261 P. 582.

**Note:** Bartlett's Probate Practice, see § 410.

Cited; generally will speaks from time of testator's death; construction. *In re Estate of Ellertson*, 157 K. 492, 497, 142 P. 2d 724.

**59-614. When devise passes whole.** Every devise of real estate shall pass all the estate of the testator therein, unless it clearly appears by the will that he intended a less estate to pass. [L. 1939, ch. 180, § 50; July 1.]

**Source or prior law:** G. S. 1935, § 22-258.

**Note:** Bartlett's Probate Practice, see § 416.

Common law rule abrogated. *Pomroy v. Jenkins*, 151 K. 466, 468, 99 P. 2d 752.

Devise of real estate passes all estate unless other intention apparent. *Zabel v. Stewart*, 153 K. 272, 279, 109 P. 2d 177.

Will construed to convey life estate not fee simple. *Weaver v. Chatterton*, 154 K. 696, 698, 701, 121 P. 2d 211.

Applied; deed conveyed life estate, vested remainder; Wild's case rule inapplicable. *Epperson v. Bennett*, 161 K. 298, 301, 167 P. 2d 606.

Devise in will construed to convey life estate from whole instrument. *In re Estate of Thompson*, 161 K. 641, 645, 171 P. 2d 294.

**59-615. Issue of relative.** If a devise or bequest is made to an adopted child or any blood relative by lineal descent or within the sixth degree, and such adopted child or blood relative dies before the testator, leaving issue who survive the testator, such issue shall take the same estate which said devisee or legatee would have taken if he had survived, unless a different disposition is made or required by the will. [L. 1939, ch. 180, § 51; July 1.]

**Source or prior law:** G. S. 1935, § 22-259.

**Judicial Council, 1939:** Adopted children included to conform to *Dreyer v. Schrick*, 105 K. 495, 185 P. 30; "blood" inserted before "relative" to conform to the decisions generally. As illustrative of the rule, see *Elliott v. Fessenden*, 83 Me. 197, 22 Atl. 115, 18 L. R. A. 37; *Union Trust Co. v. Bingham*, 273 Mass. 287, 173 N. E. 435; *In re Spier's Estate*, 224 Mich. 658, 195 N. W. 430; *Schaefer v. Barnhardt*, 76 Oh. St. 443, 81 N. E. 640, 10 Ann. Cas. 919. See, also, *Lawrence National Bank v. Jacobs*, 145 K. 189, 64 P. 2d 22. Relative limited to lineal descent, or sixth degree, in accordance with § 59-509.

**Note:** Bartlett's Probate Practice, see § 453.

**59-616. Probate essential.** No will shall be effectual to pass real or personal property unless it shall have been duly admitted to probate. [L. 1939, ch. 180, § 52; July 1.]

**Source or prior law:** G. S. 1935, § 22-232.

**Note:** Bartlett's Probate Practice, see § 461.

Application for probate of will held filed too late; statutes construed. *In re Estate of Colyer*, 157 K. 347, 348, 139 P. 2d 411.

**59-617. Limitation on probate of a written will.** No will of a testator who died while a resident of this state shall be effectual to pass property unless an application is made for the probate of such will within one year after the death of the testator, except as hereinafter provided. [L. 1939, ch. 180, § 53; L. 1943, ch. 213, § 1; June 28.]

**Source or prior law:** G. S. 1935, § 22-233.

**Judicial Council, 1939:** "Three years" changed to "one year."

**Note:** Bartlett's Probate Practice, see § 463.

Discussed but not applied in denying probate of will; estoppel. *Swisher v. McMain*, 153 K. 401, 407, 413, 110 P. 2d 765.

Application for admission to probate must be filed within one year. *Swisher v. Bouse*, 155 K. 797, 799, 130 P. 2d 565.  
 No provision similar to this section before probate code enacted. *Kininmonth v. Carson*, 156 K. 808, 819, 820, 137 P. 2d 173.  
 Section not subject to exception by reason of other provisions of code. *In re Estate of Colyer*, 157 K. 347, 348, 349, 139 P. 2d 411.  
 Application for probate of will held filed too late; statutes construed. *In re Estate of Colyer*, 157 K. 347, 348, 349, 139 P. 2d 411.  
 Applies to probate proceeding commenced after effective date although testator died before. *In re Estate of Reed*, 157 K. 602, 603, 605, 608, 609, 610, 142 P. 2d 824.

**59-618. Liability and effect of withholding will.** Any person who has possession of the will of a testator dying a resident of this state, or has knowledge of such will and access to it for the purpose of probate, and knowingly withholds it from the probate court having jurisdiction to probate it for more than one year after the death of the testator, shall be barred from all rights under the will and shall be liable for all damages sustained by such beneficiaries who do not have such possession of the will and are without such knowledge thereof and such access thereto; and the said will may be admitted to probate as to any innocent beneficiary on the application by him for such probate, if such application is made within ninety days after he has knowledge of such will and access thereto and within five years after the death of the testator: *Provided*, The title of any purchaser in good faith, without knowledge of such will, to any property derived from the fiduciary, heirs, devisees or legatees of the decedent, shall not be defeated by the production of the will of such decedent and the application for probate thereof after the expiration of one year from the death of the decedent. [L. 1939, ch. 180, § 54; L. 1943, ch. 213, § 2; June 28.]

**Source or prior law:** G. S. 1935, § 22-233.

**Note:** Bartlett's Probate Practice, see § 465.

**Cross reference:** Liability for failure to produce will, see, also, § 59-621.

Discussed; record insufficient to show will withheld from probate. *Kininmonth v. Carson*, 156 K. 808, 819, 820, 137 P. 2d 173.

Application for probate of will held filed too late; statutes construed. *In re Estate of Colyer*, 157 K. 347, 349, 139 P. 2d 411.

Applies to probate proceeding commenced after effective date although testator died before. *In re Estate of Reed*, 157 K. 602, 605, 606, 608, 609, 610, 142 P. 2d 824.

Widow not estopped from claiming statutory share by offering will for probate. *In re Estate of Garden*, 158 K. 554, 564, 148 P. 2d 745.

**59-619. Limitation on probate of oral will.** No oral will shall be admitted to probate unless an application is made therefor within six months after the death of the testator. [L. 1939, ch. 180, § 55; July 1.]

**Source or prior law:** G. S. 1935, § 22-274.

**Note:** Bartlett's Probate Practice, see § 467.

**59-620. Deposit of wills; certificate; opening; venue.** A will enclosed in a sealed wrapper, upon which is endorsed the name and address of the testator, the day when and the person by whom it is delivered, may be deposited in the probate court of the county where the testator resides. The court shall give a certificate of its deposit and shall retain such will. During the testator's lifetime, such will shall be delivered only to him or upon his written order witnessed by at least two subscribing witnesses. After the testator's death the court shall open the will publicly and retain the same. Notice shall be given to the executor and to such other persons as the court may designate. If the proper venue is in another court the will shall be transmitted to such court, but before such transmission a true copy thereof shall be made by and retained in the court in which the will was deposited. [L. 1939, ch. 180, § 56; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-204, 22-205, 22-206, 22-207.

**Note:** Bartlett's Probate Practice, see § 469.

**Cross reference:** Referred to in § 59-212.

**59-621. Duty of custodian; liability.** After the death of a testator the person having custody of his will shall deliver it to the court which has juris-



diction thereof. Every person who willfully neglects or refuses to deliver a will after being duly ordered to do so shall be guilty of contempt of court. He shall be further liable to any party aggrieved for the damage which may be sustained by such neglect or refusal. [L. 1939, ch. 180, § 57; July 1.]

**Source or prior law:** Terr. L. 1859, ch. 131, § 16; Gen. L. 1862, ch. 215, § 16; G. S. 1935, §§ 22-208, 22-209, 22-211.

**Judicial Council, 1939:** Requires custodian to deliver will to court. In some cases it is to executor's advantage to conceal the will.

**Note:** Bartlett's Probate Practice, see § 471.

**Cross reference:** Liability to beneficiaries for failure to deliver will, see § 59-618.

Application for probate of will held filed too late; statutes construed. *In re Estate of Colyer*, 157 K. 347, 349, 139 P. 2d 411.

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

**Cross reference:** Proceedings for probate and administration, see §§ 59-2219 to 59-2232.

**59-701. Letters testamentary.** Letters testamentary shall be granted to the executor, if any is named in the will, if he is legally competent and shall accept the trust; otherwise letters of administration shall be granted with the will annexed. [L. 1939, ch. 180, § 58; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-302, 22-307.

**Note:** Bartlett's Probate Practice, see § 532.

Court must appoint executor named in will as executor; exceptions. *In re Estate of Grattan*, 155 K. 839, 849, 850, 851, 853, 130 P. 2d 580.

**59-702. Minor as executor.** When a person appointed executor is a minor and without the rights of majority at the time of proving the will, administration may be granted with the will annexed during his minority or disability, unless there is another executor who will accept the trust, in which case the estate shall be administered by such other executor until the minor shall arrive at full age or shall possess the rights of majority, when he may be admitted as joint executor with the former. [L. 1939, ch. 180, § 59; July 1.]

**Source or prior law:** G. S. 1935, § 22-308.

**Judicial Council, 1939:** If minor has rights of majority he may serve.

**Note:** Bartlett's Probate Practice, see § 534.

Disqualifications of executor are statutory, court will not add others. *In re Estate of Grattan*, 155 K. 839, 853, 130 P. 2d 580.

**59-703. Executor of an executor.** The executor of an executor shall have no authority as such to administer the estate of the first testator. [L. 1939, ch. 180, § 60; July 1.]

**Source or prior law:** G. S. 1935, § 22-310.

**Judicial Council, 1939:** Latter part of G. S. 1935, § 22-310, is omitted, covered by § 59-708.

**Note:** Bartlett's Probate Practice, see § 536.

**59-704. Powers of executor before letters granted.** No executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay reasonable funeral expenses, nor to interfere in any manner with such estate, further than is necessary for its conservation. [L. 1939, ch. 180, § 61; July 1.]

**Source or prior law:** G. S. 1935, § 22-311.

**Note:** Bartlett's Probate Practice, see § 538.

Powers of executor named in will limited until appointed by court and qualified. *In re Estate of Grattan*, 155 K. 839, 850, 130 P. 2d 580.

**59-705. To whom administration granted.** Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, suitable and competent to discharge the trust, and in the following order: (1) The surviving spouse or next of kin, or both, as the court may determine, or some person or persons selected by them or any of them. (2) If all such persons are incompetent or unsuitable, or do not accept, administration may be granted to one or more of the creditors, or to a nominee or nominees thereof. (3) Whenever the court determines that it is for the best inter-

ests of the estate and all persons interested therein, administration may be granted to any other person whether interested in the estate or not. [L. 1939, ch. 180, § 62; July 1.]

**Source or prior law:** G. S. 1935, § 22-312.

**Judicial Council, 1939:** Subsections (1) and (2) make some minor changes in law; subsection (3) is new.

**Note:** Bartlett's Probate Practice, see § 540.

**Cross references:** Granting of administration when will not admitted to probate, see § 59-2224.

Hearing of petition for administration, see § 59-2232.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 153 K. 420, 423, 110 P. 2d 774.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re* Estate of Dumback, 154 K. 501, 504, 119 P. 2d 476.

Court's discretionary power in making appointment of administrator under code discussed.

*In re* Estate of Grattan, 155 K. 839, 850, 130 P. 2d 580.

Court must appoint executor named in will as executor; exceptions. *In re* Estate of Grattan, 155 K. 839, 850, 130 P. 2d 580.

Person having claim should have administrator appointed if estate not being administered. Gantz v. Bondurant, 159 K. 839, 394, 155 P. 2d 450.

Cited; appointment of administrator *de bonis non* without notice is void. *In re* Estate of Oliver, 162 K. 407, 414, 176 P. 2d 574.

**59-706. When residence of administrator required.** In cases of domiciliary administration, letters testamentary or of administration shall in no case be granted to a nonresident of this state; and when a domiciliary executor or administrator shall become a nonresident, the probate court shall revoke his letters. [L. 1939, ch. 180, § 63; July 1.]

**Source or prior law:** G. S. 1935, § 22-328.

**Judicial Council, 1939:** Nonresident may serve in ancillary administration. See § 59-1706 requiring appointment of resident agent by nonresident.

**Note:** Bartlett's Probate Practice, see § 543.

Disqualifications of executor are statutory, court will not add others. *In re* Estate of Grattan, 155 K. 839, 853, 130 P. 2d 580.

**59-707. Effect of will on administration.** If, after the appointment of an administrator, a will is admitted to probate, the powers of such administrator shall cease, and he shall proceed to final accounting. The new executor or administrator with the will annexed shall continue the administration. [L. 1939, ch. 180, § 64; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-325, 22-326.

**Judicial Council, 1939:** Clarifies former law that the new executor or administrator continues the administration.

**Note:** Bartlett's Probate Practice, see § 545.

**59-708. Administrator de bonis non.** If the authority of the sole or surviving executor or administrator terminates before the estate is fully administered, a new administrator shall be appointed to administer the estate not already administered. Such successor shall have the same powers and duties as his predecessor. [L. 1939, ch. 180, § 65; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-310, 22-321, 22-323, 22-324, 22-325, 22-326, 22-521, 22-730, 22-825.

**Note:** Bartlett's Probate Practice, see § 547.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 153 K. 420, 423, 110 P. 2d 774.

Appointment of administrator *de bonis non* without notice is void; petition; hearing. *In re* Estate of Oliver, 162 K. 407, 412, 414, 176 P. 2d 574.

"Special administrator" and "administrator *de bonis non*" distinguished; notice; hearing. *In re* Estate of Oliver, 162 K. 407, 414, 176 P. 2d 574.

**59-709. Notice of appointment; publication.** An executor or administrator, except a special administrator, shall within thirty days after his appointment and qualification cause notice of his appointment to be published in some newspaper of the county authorized by law to publish legal notices, which notice shall be published once a week for three consecutive weeks. A new administrator shall give notice of his appointment in the same manner. If notice of appointment shall not be published within the time herein pre-

scribed, the court shall order such notice to be published; but such order shall not exempt the executor or administrator or his sureties from liability which they would otherwise incur by reason of the failure to give notice within the time herein first prescribed. [L. 1939, ch. 180, § 66; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-329, 22-731, 22-732, 22-733.

**Notes:** See "Judicial Council, 1939" note under § 59-2209.  
Bartlett's Probate Practice, see § 549.

**59-710. Special administrator; appointment; bond; duties.** For good cause shown a special administrator may be appointed pending the appointment of an executor or administrator, or after the appointment of an executor or administrator without removing the executor or administrator. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts. The duties of a special administrator shall be stated in the order of appointment. He may be required to give bond in such sum as the court shall direct. He shall make such reports as the court shall direct, and shall account to the court upon the termination of his authority. [L. 1939, ch. 180, § 67; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-315, 22-316, 22-317, 22-318, 22-319, 22-719, 22-831.

**Judicial Council, 1939:** Powers can be restricted in the order and letters to specified acts and only a small bond required. The change allows the special administrator, when authorized by the court, to do anything a general administrator might do.

**Note:** Bartlett's Probate Practice, see § 551.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 158 K. 420, 423, 110 P. 2d 774.

"Special administrator" and "administrator *de bonis non*" distinguished; notice; hearing. *In re Estate of Oliver*, 162 K. 407, 414, 176 P. 2d 574.

Construed with § 59-708; administrator appointed hereunder cannot administer assets generally. *In re Estate of Oliver*, 162 K. 407, 414, 176 P. 2d 574.

## Article 8.—ESTATES OF NONRESIDENTS

**59-801. Wills proved elsewhere; administration in this state, when necessary.** Authenticated copies of wills, proved outside of this state according to the laws in force in the place where proved, relative to any property in this state, may be admitted to probate and record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies so admitted and recorded shall have the same validity as wills proved in this state in conformity with the laws thereof. Upon such admission to probate the court shall determine whether administration in this state is necessary. [L. 1939, ch. 180, § 68; L. 1941, ch. 284, § 2; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-227, 22-228, 22-832, 22-833, 22-835.

**Judicial Council, 1939:** The provisions of former laws permitting foreign representatives to function in this state have been omitted or greatly curtailed, because (1) they are unfair to Kansas creditors; (2) our courts have practically no control over them; (3) the state is insufficiently protected as to inheritance taxes; (4) ancillary proceedings provided by the code require no more work and entail no greater expense than the present law requires or entails; and (5) uniformity in proceedings is thereby established.

**Notes:** Uniform wills act, foreign executed, see 9 U. L. A.  
Bartlett's Probate Practice, see § 561.

Will probated in Illinois; admitted to Kansas record in 1905; administration denied. *In re Estate of Moore*, 161 K. 603, 608, 170 P. 2d 838.

**59-802. Administration.** The estate of nonresident decedents, if administration thereof in this state is necessary, shall be administered in the same manner as the estate of a resident decedent. Upon the payment of the expenses of administration, of the debts and other items here proved and of the inheritance taxes, the residue of the personal property, or of the proceeds from the sale of real estate, shall be transmitted to the domiciliary executor or administrator, to be disposed of by him; or the court may direct it to be distributed according to the terms of the will applicable thereto, or if the terms of the will are not applicable thereto, or if there is no will, it shall be distributed according to the law of the decedent's residence if personal, and according to the laws of Kansas, if real estate. The real estate not sold in the course of

administration shall be assigned according to the terms of the will applicable thereto, or if the terms of the will are not applicable thereto, or if there is no will, it shall pass according to the laws of this state. [L. 1939, ch. 180, § 69; L. 1941, ch. 284, § 3; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-229, 22-230, 22-231, 22-832, 22-833, 22-835, 22-930.

**Judicial Council, 1939:** There may not be a foreign executor or administrator to whom the assets may be delivered. See, also, *Pickens v. Campbell*, 98 K. 518, 520, 159 P. 21.

**Note:** Bartlett's Probate Practice, see § 563.

Will probated in Illinois; admitted to Kansas record in 1905; administration denied. *In re Estate of Moore*, 161 K. 603, 608, 170 P. 2d 838.

**59-803. Innocent purchaser from heirs.** The title of any purchaser in good faith, without knowledge of a will, to any real estate situated in this state, derived from the heirs of any person not domiciled in this state at the time of his death, shall not be defeated by the production of the will of such decedent unless an application shall be made for the probate of such will in this state within one year from the death of the testator. [L. 1939, ch. 180, § 70; July 1.]

**Source or prior law:** G. S. 1935, § 22-254.

**Note:** Bartlett's Probate Practice, see § 571.

## Article 9.—ESTATES OF INTESTATES WITHOUT HEIRS

**59-901. Administration.** The estate of an intestate decedent without known heirs shall be administered in the same manner as the estate of any other intestate decedent, except as herein otherwise provided. The administrator shall as expeditiously as possible convert the personal property into money, and collect the rents, income, and profits from the real estate. If no one claims as heir, devisee, or legatee within one year after the appointment of the administrator, the administrator shall sell the real estate and close the estate as other estates are closed and pay the net proceeds of the estate to the state treasurer. [L. 1939, ch. 180, § 71; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1207, 22-1208.

**Note:** Bartlett's Probate Practice, see § 582.

Article cited in denying attorney general right to intervene in federal court case. *Miami County Nat. Bank of Paola, Kan., v. Bancroft*, 121 F. 2d 921, 925.

**59-902. Disposition of proceeds.** The state school-fund commissioners shall invest and handle this money as other moneys of the state school fund, except that it shall be kept as a temporary fund until ten years after it shall have been first received, at which time it shall be covered into the perpetual school fund of the state, provided no one in the meantime has established his right thereto as heir, devisee or legatee. [L. 1939, ch. 180, § 72; July 1.]

**Source or prior law:** G. S. 1935, § 22-1209.

**Note:** Bartlett's Probate Practice, see § 584.

**59-903. Claimants to estate.** Any person who claims as heir of such decedent shall present his claim to the probate court within ten years after the appointment and qualification of the administrator, or such claim shall be forever barred. If he establishes his claim it shall be allowed by the court. The court shall determine which of several claimants have established their claims and the share of the estate to which each is entitled. If at the time of such determination the estate is in the custody of the administrator, the same shall be paid or delivered to those adjudged entitled thereto, less claims previously allowed and prior demands and other items. If the proceeds of the estate have been delivered to the state treasurer, the school-fund commissioners shall pay to those entitled thereto the sum or share of the estate the court has adjudged they are entitled to receive. No interest shall be allowed or paid thereon. [L. 1939, ch. 180, § 73; July 1.]

**Source or prior law:** G. S. 1935, § 22-1210.

**Note:** Bartlett's Probate Practice, see § 586.

**59-904. Same; subsequent claimants.** If others later, but within ten years after the appointment and qualification of the administrator, claim as heirs of such decedent and are thereafter adjudged to be heirs of the decedent and entitled to the said estate or some part thereof, and the said estate or its proceeds or some part thereof shall have been delivered or paid to those whose claims were earlier adjudged, neither the state nor the school-fund commissioners shall be liable to such claimants for moneys previously paid to those adjudged to be heirs of the decedent; but the later claimants whose claims were duly established shall have a cause of action in the district court against the earlier claimants whose claims were established to determine the rights of the respective parties, subject to any prior determination of descent made pursuant to article 22. [L. 1939, ch. 180, § 74; July 1.]

**Source or prior law:** G. S. 1935, § 22-1211.

**Judicial Council, 1939:** The clause "subject to any prior determination," etc., added at end of section. See §§ 59-2249 to 59-2252.

**Note:** Bartlett's Probate Practice, see § 588.

**59-905. Duty of county attorney and attorney general.** The state shall be a party to all such proceedings. The county attorney shall represent the state. He shall diligently protect and conserve the estate for the benefit of the state school fund, scrutinize all claims against the estate, and diligently defend against all such claims. Claimants shall have the burden of proving their claims by clear and convincing evidence. The attorney general may appear and assist the county attorney, or take charge thereof in lieu of the county attorney. The state may institute any proceedings deemed necessary or proper in the handling of such estate, and defend any proceedings instituted by another. The attorney general may appoint such persons deemed necessary to investigate, protect, conserve, defend or handle such estate, and any such estate now pending or hereafter commenced in any court of this state shall be liable in a reasonable amount for all obligations and expenses incurred by the county attorney or attorney general in protecting, conserving, investigating, defending or handling of such estate, and the same shall be allowed by the probate court as costs of administration upon application of the county attorney or attorney general and due proof. [L. 1939, ch. 180, § 75; July 1.]

**Source or prior law:** G. S. 1935, § 22-1212.

**Judicial Council, 1939:** The draft of this section was changed by the legislature, the principal change being the last sentence.

**Note:** Bartlett's Probate Practice, see § 590.

### Article 10.—PARTNERSHIP ESTATES

**Cross references:** Venue for administration of partnership estate, see § 59-2203.

Contents of inventory of partnership estate, see § 59-1201.

**59-1001. Management; bond.** The property of a partnership dissolved by the death of any of its members shall be delivered to the surviving partner who may be disposed to undertake the management thereof agreeably to the conditions of a bond which he shall give as provided by law. Upon the giving of such bond he shall with due diligence close the affairs of the late partnership, apply the property thereof toward the payment of the partnership debts, render an account upon oath to the probate court, whenever by it required, of all partnership affairs, including the property owned by the late firm and the debts due thereto, as well as what may have been paid by the survivor toward the partnership debts, and what may still be due and owing therefor, and pay within one year, unless a longer time be allowed by the probate court, to the executor or administrator his proportion of the net proceeds of the partnership estate. [L. 1939, ch. 180, § 76; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-401, 22-402, 22-403, 22-404.

**Note:** Bartlett's Probate Practice, see § 603.

Cited in discussing proper method of administering partnership estate. *Evans v. Thornton*, 159 K. 149, 155, 152 P. 2d 853.

Judgment involving alleged partnership estate held *res adjudicata*; claim barred. *In re Estate of Bourke*, 159 K. 553, 156 P. 2d 501.

**59-1002. When administrator takes charge.** In case the surviving partner, having been duly cited for that purpose, shall neglect or refuse to give the bond required by law, the executor or administrator of the estate of the deceased partner, on giving a bond as provided by law, shall take the whole of the partnership estate into his possession, and shall be authorized to use the name of the survivor in collecting the debts due to the late firm if necessary, and shall with the partnership property pay the debts due from the late firm with as much expedition as possible, and return or pay to the surviving partner his proportion of the net proceeds of the partnership estate. [L. 1939, ch. 180, § 77; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-405, 22-406.

**Note:** Bartlett's Probate Practice, see § 606.

**59-1003. Exhibition and surrender of property; statement; contempt.** Every surviving partner, on demand of the executor or administrator of a deceased partner, shall exhibit to such executor or administrator and the appraisers of the deceased partner's estate the property belonging to the partnership at the time of the death of the deceased partner, for inventory and appraisement and shall furnish him a verified written statement of such property described in the manner required for inventory; and in case the administration thereof shall devolve upon such executor or administrator the said survivor shall surrender to him, on demand, all of the property of such partnership, and shall afford him all reasonable information and facilities for the execution of his trust. Willful failure or neglect by the surviving partner thus to exhibit or surrender such property, on demand, shall constitute contempt of court. [L. 1939, ch. 180, § 78; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-407, 22-408.

**Note:** Bartlett's Probate Practice, see § 608.

**59-1004. Sale of assets.** An executor or administrator having the whole of the partnership estate in his possession, as herein provided, may sell the assets thereof at public or private sale as provided by law, and may without such possession sell the interest of the deceased partner therein in the manner aforesaid. The surviving partner shall be an eligible purchaser. [L. 1939, ch. 180, § 79; July 1.]

**Source or prior law:** G. S. 1935, § 22-409.

**Judicial Council, 1939:** Clarified.

**Note:** Bartlett's Probate Practice, see § 610.

Surviving partner may purchase assets although he is administrator. *Murphy v. Murphy*, 152 K. 810, 812, 813, 107 P. 2d 700.

Public sale of assets for less than three-fourths of appraised value valid. *Murphy v. Murphy*, 152 K. 810, 812, 813, 107 P. 2d 700.

Cited in discussing proper method of administering partnership estate. *Evans v. Thornton*, 159 K. 149, 155, 152 P. 2d 853.

**59-1005. Accounting; liabilities and penalties.** The person executing the trust, whether surviving partner or executor or administrator, shall have the same duty to account and to have his account adjudicated as in the case of ordinary administration; and such person shall be subject to the same liabilities, remedies, and penalties with reference thereto as an ordinary administrator. [L. 1939, ch. 180, § 80; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-401, 22-404, 22-405.

**Note:** Bartlett's Probate Practice, see § 614.

Cited in discussing proper method of administering partnership estate. *Evans v. Thornton*, 159 K. 149, 155, 152 P. 2d 853.

## Article 11.—BONDS

**59-1101. Bond requirements and conditions.** Every fiduciary, except as otherwise provided in this act, before entering upon the duties of his trust shall execute and file a bond, with sufficient sureties, in such amount as the court directs, which amount shall not be less than 125 percent of the value of the personal property and the probable annual income from real estate

which shall come into his possession, conditioned upon the faithful discharge of all the duties of his trust according to law. [L. 1939, ch. 180, § 81; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-270, 22-272, 22-303, 22-309, 22-313, 22-402, 22-403, 22-406, 22-909, 22-918, 22-1001, 22-1002, 22-1003, 22-1004, 38-203, 38-207, 39-206.

**Judicial Council, 1939:** Reduces the minimum bond required. Many separate provisions consolidated.

**Note:** Bartlett's Probate Practice, see § 631.

**59-1102. Approval and prosecution.** All such bonds shall run to the state of Kansas. They shall be subject to the approval of the probate court and shall not be approved until the court is fully satisfied as to the sufficiency of the sureties. In case of breach of any condition thereof, an action on any such bond may be prosecuted in the name and for the benefit of any person interested. [L. 1939, ch. 180, § 82; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-270, 22-272, 22-303, 22-309, 22-313, 22-402, 22-403, 22-1001, 22-1002, 22-1003, 22-1004, 22-1005, 38-203, 38-207, 38-221, 39-206.

**Judicial Council, 1939:** Requires court to satisfy itself as to sufficiency of bond. Many separate provisions consolidated.

**Note:** Bartlett's Probate Practice, see § 633.

**59-1103. Joint or separate bonds.** When two or more persons are appointed joint fiduciaries, the court may approve a separate bond for each or a joint bond for all. [L. 1939, ch. 180, § 83; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-270, 22-272, 22-314.

**Note:** Bartlett's Probate Practice, see § 635.

**59-1104. Request of testator or settlor; bond may be required.** When by the terms of any last will, or other written instrument creating a trust in favor of persons subject to guardianship, the testator or settlor shall express a wish that the executor, testamentary guardian, or trustee named therein shall execute the same, or the trust created thereby, or condition named therein, without giving bond, no bond shall be required unless the probate court, for sufficient cause, deems it proper to require it; but the court may, at any subsequent period, on the application of any party interested, or on its own motion, require bond to be given. [L. 1939, ch. 180, § 84; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-270, 22-272, 22-304, 38-203.

**Judicial Council, 1939:** Includes settlor of living trust for minors or incompetents.

**Note:** Bartlett's Probate Practice, see § 637.

Discussed; foreign corporation cannot serve as testamentary trustee of Kansas testator's estate. *In re Estate of Lowe*, 155 K. 679, 688, 127 P. 2d 512.

**59-1105. Public, charitable or certain nonprofit corporation trustees; exceptions.** No bond shall be required from any public, religious, charitable, or educational corporation or society, or any nonprofit Kansas corporation trustee where the purpose of the trust shall be financial aid to any Kansas educational institution or for research or for the financing of scholarships or fellowships at, or for the aid either through loans, grants or otherwise to the students of such institution, unless the will provides otherwise, where devises or legacies are given to such corporation or society in trust for any of the purposes of such corporation or society nor shall such trustee be required to file inventory or make reports as required in article 16 of this code unless the same shall be necessary under the terms of the instrument establishing the trust under which it operates or unless the probate court having jurisdiction shall, on petition and after due notice and hearing, finds that such bond, inventory or reports are necessary for the purpose of compelling the faithful performance of the trust by the trustee named. [L. 1939, ch. 180, § 85; L. 1945, ch. 235, § 1; March 30.]

**Judicial Council, 1939:** This section is new.

**Note:** Bartlett's Probate Practice, see § 639.

**59-1106. Increase or reduction of bond; cancellation.** The court, on its own motion or upon application of any interested person, may for good

cause require a fiduciary to file a new or additional bond. Thereupon his accounts shall be settled, and if approved the liability of the sureties on such new or additional bond shall be limited to the property then in the possession of the fiduciary, or thereafter acquired by him. Whenever the court shall find the bond of a fiduciary is larger than necessary, it may, by order, reduce the liability thereon to the proper amount. It may, by like order, cancel any bond found to be unnecessary. [L. 1939, ch. 180, § 86; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-270, 22-272, 22-1006, 22-1007, 38-203, 38-207, 38-222, 39-206.

**Note:** Bartlett's Probate Practice, see § 640.

**Cross reference:** Procedure, see §§ 59-2201 to 59-2218.

Discussed; foreign corporation cannot serve as testamentary trustee of Kansas testator's estate. *In re Estate of Lowe*, 155 K. 679, 688, 127 P. 2d 512.

**59-1107. New bond; discharge of surety.** The court shall, upon application of a surety and after notice, require a fiduciary to settle his account and file a new bond. If such account is approved, the surety shall be discharged from liability thereafter accruing. The fiduciary shall file a new bond, to be approved by the court, and if he fails or refuses to do so he shall be removed. [L. 1939, ch. 180, § 87; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-270, 22-272, 22-1007, 22-1008, 38-203, 38-207, 38-231.

**Note:** Bartlett's Probate Practice, see § 641.

**Cross reference:** Procedure, see §§ 59-2201 to 59-2218.

Discussed; foreign corporation cannot serve as testamentary trustee of Kansas testator's estate. *In re Estate of Lowe*, 155 K. 679, 688, 127 P. 2d 512.

## Article 12.—INVENTORY AND APPRAISEMENT

**59-1201. Inventory.** Within thirty days from the date of his letters of appointment, unless a longer time has been granted by the court, every representative shall make an inventory, verified by his affidavit, of all the estate of the decedent or ward which shall come to his possession or knowledge. Such property shall be classified therein as follows: (1) Real estate, with plat or survey description, and if a homestead, designated as such. (2) The statutory allowances, classified according to section 21 [59-403], of the estate of a decedent leaving spouse or minor children; otherwise the furniture, household goods, and wearing apparel. (3) Corporation stocks, described by certificate numbers. (4) Bonds, mortgages, notes, and other written evidence of debt, described by name of debtor, recording data, and other identification. (5) All other personal property accurately identified. If the decedent was a member of a partnership, the inventory shall contain a separate inventory of the whole of the partnership estate and of the decedent's proportional share therein. The court may, for good cause shown, require an earlier inventory of any estate. [L. 1939, ch. 180, § 88; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-401, 22-501, 22-508, 22-509, 22-510, 22-513, 22-515, 22-517, 38-208, 39-208.

**Note:** Bartlett's Probate Practice, see § 651.

Order requiring executor to file inventory and appraisal not an appealable order. *In re Estate of Crawford*, 154 K. 737, 738, 739, 121 P. 2d 206.

Powers of executor named in will limited until appointed by court and qualified. *In re Estate of Grattan*, 155 K. 839, 851, 130 P. 2d 580.

**59-1202. Appraisal.** The inventory and the property therein described shall be exhibited by the executor or administrator to the appraisers when they are appointed. If the inventory lists no property other than moneys of the United States, no appraisal shall be required; otherwise the property shall be appraised at its full and fair value as of the date of death or date of appointment of guardian, by three disinterested persons appointed by the court within thirty days after the appointment of the executor or administrator. Within sixty days after their appointment, unless a longer time has been granted by the court, the appraisers shall state opposite each item contained in the inventory the value thereof, and forthwith deliver such inventory and ap-



praisement, certified by them under oath, to the representative, who shall file it with the probate court. The court may, for good cause shown, require an earlier appraisement thereof. [L. 1939, ch. 180, § 89; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-504, 22-506, 22-507, 22-513, 22-515, 38-208, 39-208; L. 1937, ch. 218, §§ 1, 2.

**Note:** Bartlett's Probate Practice, see § 654.

Order requiring executor to file inventory and appraisement not an appealable order. *In re Estate of Crawford*, 154 K. 737, 738, 739, 121 P. 2d 206.

**59-1203. Supplementary inventory and appraisement.** Whenever assets of any kind, not mentioned in the inventory that has been made, come to the knowledge or possession of a representative, he shall make an inventory thereof and cause such assets to be appraised, and the inventory and appraisement to be returned within thirty days after the discovery thereof. [L. 1939, ch. 180, § 90; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-524, 39-208.

**Note:** Bartlett's Probate Practice, see § 655.

**59-1204. Debt discharged by will to be included.** The discharge or bequest, in a will, of any debt or demand of a testator against any person shall not be valid as against the creditors of decedent, but shall be construed only as a specific bequest of such debt or demand; and the amount thereof shall be included in the inventory of the assets of the decedent, and shall, if necessary, be applied to the payment of his debts, and other items, and if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies. [L. 1939, ch. 180, § 91; July 1.]

**Source or prior law:** G. S. 1935, § 22-527.

**Note:** Bartlett's Probate Practice, see § 657.

**59-1205. Debt of executor to be included.** The naming of any person executor in a will shall not operate as a discharge or bequest of any just claim which the testator had against such executor, but such claim shall be included among the assets of the decedent in the inventory. [L. 1939, ch. 180, § 92; July 1.]

**Source or prior law:** G. S. 1935, § 22-528.

**Judicial Council, 1939:** Majority rule adopted. See *In re Estate of Edgington*, 144 K. 478, 61 P. 2d 873.

**Note:** Bartlett's Probate Practice, see § 659.

**59-1206. Annual crops to be included.** Annual crops, whether severed or not from the land of the decedent at the time of his death, shall be deemed personal assets in the custody of the executor or administrator and shall be inventoried and administered as such. [L. 1939, ch. 180, § 93; July 1.]

**Source or prior law:** G. S. 1935, § 22-502.

**Note:** Bartlett's Probate Practice, see § 661.

**59-1207. Compensation of appraisers and advisers.** Appraisers shall each be paid, for services performed by them, the sum of two dollars per day. The appraisers may be authorized by the court to employ expert and technical advisers to aid them. Such advisers, when so employed, shall be paid such compensation as the court shall deem reasonable. [L. 1939, ch. 180, § 94; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-516, 22-815.

**Judicial Council, 1939:** Last two sentences are new.

**Note:** Bartlett's Probate Practice, see § 663.

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

**59-1301. Classification of demands.** If the applicable assets of an estate are insufficient to pay in full all demands allowed against it, payment shall be made in the following classified order: First class, the expenses of an appropriate funeral in such amount as was reasonably necessary, having due regard to the assets of the estate available for the payment of demands and to

the rights of other creditors. Any part of the funeral expenses allowed as a demand against the estate in excess of the sum ascertained as above shall be paid as other demands of the fourth class. Second class, the appropriate and necessary costs and expenses of administration and the reasonable sums for the appropriate and necessary expenses of the last sickness of decedent, including wages of servants. Third class, judgments rendered against decedent in his lifetime, all judgments or liens upon the property of the decedent shall be paid in the order of their priority. Fourth class, all other demands duly proved, including the cost of any appropriate tombstone or marker or the lettering thereon, in such amount as may be reasonably necessary, but whether there shall be an allowance, and if so the amount thereof, shall be determined by the court before any obligation therefor is incurred: *Provided*, That debts having preference by the laws of the United States and demands having preference by the laws of this state shall be paid according to such preference. No preference shall be given in the payment of any demand over any other demand of the same class, nor shall a demand due and payable be entitled to preference over demands not due. [L. 1939, ch. 180, § 95; L. 1941, ch. 284, § 4; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-701, 22-722, 22-916, 22-917.

**Judicial Council, 1939:** This section has nothing to do with the allowance of demands against an estate. That is provided for by § 59-2237, and under § 59-2213 all demands must be established by proof. This section pertains to preference in payment of demands which have been allowed. It is of no real importance except in insolvent estates. Our reports collected from probate courts show that about nine percent of the estates administered upon are insolvent. The actual figures for the years ending June 30, 1936, 1937, and 1938, show that of the 11,797 estates of decedents closed within that time, in 10,733 of them the assets were sufficient to pay all demands in full, and in 1,064 of them the assets were insufficient. The purpose of this section is to prevent unreasonable or unnecessary allowances as preferences under classes first and second, to the detriment of creditors in class four. The words "necessary funeral expenses" have a well-defined meaning. See *Samuel v. Estate of Thomas*, 51 Wis. 549; *Schneider v. Brier's Estate*, 129 Wis. 446, 109 N. W. 99. For debts due the United States, see 31 U. S. C. A., sec. 191, and cases therein cited, and note in 77 Law Ed. 757-796. Last sentence is new.

**Note:** Bartlett's Probate Practice, see § 678.

Mechanic's lien may be enforced in district court while administration pending. *Leidigh & Havens Lumber Co. v. Wyatt*, 153 K. 214, 218, 109 P. 2d 87.

**59-1302. When payment to be made.** If any executor or administrator shall not, within nine months after having given notice of his appointment, have notice of demands against the estate of the decedent which will authorize him to represent it insolvent, he may, after the expiration of said nine months, proceed to pay the debts and other items due from the estate, according to their classification; but, prior to the expiration of said period of nine months, he shall pay said debts and other items if ordered to do so by the court, and the court may require bond or security to be given by the creditor to refund such part of such payment as may be necessary to make payment in accordance with this section after the expiration of said period of nine months. [L. 1939, ch. 180, § 96; L. 1941, ch. 284, § 5; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-723, 22-724, 22-725, 22-726, 22-916, 22-917.

**Note:** Bartlett's Probate Practice, see § 687.

**59-1303. Secured demands.** When a claimant holds any security for his demand, it may be allowed, conditioned upon the claimant surrendering the security or upon the claimant exhausting the security; it shall be allowed for the full amount found to be due if the security has been surrendered, or for any remaining amount found to be due if the security has been exhausted. [L. 1939, ch. 180, § 97; July 1.]

**Judicial Council, 1939:** This action is new. The bankruptcy rule is adopted.

**Note:** Bartlett's Probate Practice, see § 689.

Discussed in determining probate court's equitable jurisdiction; exclusive jurisdiction. *Foss v. Wiles*, 155 K. 262, 266, 124 P. 2d 438.

Construed with § 59-2238; district court's jurisdiction over claims against decedents' estates limited. *Egnatic v. Wollard*, 156 K. 843, 853, 137 P. 2d 188.

Probate court has exclusive original jurisdiction of wrongful death demand against deceased wrongdoer's estate. *Shively v. Burr*, 157 K. 336, 338, 139 P. 2d 401. Secured claim filed and caused to be allowed in full; security waived. *In re Estate of Harris*, 159 K. 431, 433, 155 P. 2d 425.

**59-1304. Encumbered assets.** When any assets of the estate are encumbered by mortgage, pledge, or otherwise, the executor or administrator may pay such encumbrance or any part thereof, whether or not the holder of the encumbrance has exhibited his demand, if it appears to be for the best interests of the estate and if the court shall have so ordered. No such payment shall increase the share of the devisee, legatee, or heir entitled to receive such encumbered assets, unless otherwise provided in the will. [L. 1939, ch. 180, § 98; July 1.]

**Source or prior law:** L. 1937, ch. 219, § 3.

**Judicial Council, 1939:** Payment of encumbrance based upon advantage to estate rather than upon advantage to secured creditor. See *In re Estate of Hartley*, 148 K. 82, 80 P. 2d 1.

**Note:** *Bartlett's Probate Practice*, see § 691.

#### Article 14.—MANAGEMENT AND SALE OF ASSETS

**59-1401. Possession.** The executor or administrator shall have a right to the possession of all the property of the decedent, except the homestead and allowances to the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the heirs, devisees, and legatees. He shall keep in tenable repair the buildings and fixtures under his control and may protect the same by insurance. He may by himself, or with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same. [L. 1939, ch. 180, § 99; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-326, 22-503; L. 1937, ch. 219, §§ 2, 4, 5.

**Judicial Council, 1939:** For construction of similar statutes, particularly of "right to the possession," see *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Rough v. Womer*, 76 Mich. 375, 43 N. W. 573; *McDaniels v. Walker*, 44 Mich. 83, 6 N. W. 112; *Footo v. Footo*, 61 Mich. 189, 28 N. W. 90; *Van Fleet v. Van Fleet*, 49 Mich. 612, 14 N. W. 566; *Edwards v. Evans*, 16 Wis. 193; *Jones v. Billstein*, 28 Wis. 221; *Flood v. Pilgrim*, 32 Wis. 376; *Marsh v. Waupaca*, 38 Wis. 250; *Curtis v. Herrick*, 14 Cal. 117, 73 Am. Dec. 632; *Jenkins v. Jensen*, 24 Utah 108, 66 P. 733, 91 Am. St. Rep. 783; *Estate of Higgins*, 15 Mont. 474, 39 P. 506, 23 L. R. A. 116; *Waldo v. Waldo*, 52 Mich. 94, 17 N. W. 710; *McLeod v. Jones*, 105 Mass. 403; *Daniels v. Brown*, 34 N. H. 454; *Smith v. Park*, 31 Minn. 70, 16 N. W. 490; *Price v. Ward*, 25 Nev. 205, 58 P. 849, 46 L. R. A. 459; *Morangue v. Doe*, 143 Ala. 459, 39 So. 161, 5 Ann. Cas. 331, 111 Am. St. Rep. 52; *Moody v. Macomber*, 159 Mich. 657, 124 N. W. 549, 134 Am. St. Rep. 755; *Tillson v. Holloway*, 90 Neb. 481, 134 N. W. 232, Ann. Cas. 1913B 78.

**Note:** *Bartlett's Probate Practice*, see § 701.

**Cross reference:** Procedure to procure order of delivery to heirs, devisees and legatees before final settlement, see §§ 59-2201 to 59-2218.

Discussed in determining probate court's equitable jurisdiction; exclusive jurisdiction. *Foss v. Wiles*, 155 K. 262, 269, 124 P. 2d 438.

Powers of executor named in will limited until appointed by court and qualified. *In re Estate of Grattan*, 155 K. 839, 851, 130 P. 2d 580.

District court has original jurisdiction of administrator's action to quiet title. *Kininmonth v. Carson*, 156 K. 808, 813, 137 P. 2d 173.

Right of executor to bring partition action in district court determined. *Sheedy v. Willoughby*, 157 K. 508, 511, 612, 142 P. 2d 801.

Cited; district court without original jurisdiction to determine validity of will. *Asendorf v. Asendorf*, 162 K. 310, 315, 176 P. 2d 535.

**59-1402. Continuation of business.** Upon a showing of advantage to the estate the court, with or without notice, may authorize a representative to continue and operate any business of a decedent or ward for the benefit of his estate, under such conditions, restrictions, regulations and requirements, and for such periods of time not exceeding six months as the court may determine. No debts incurred or contracts entered into shall involve the estate or the representative beyond the assets used in such business immediately prior to the death of the decedent or the appointment of a guardian for the estate of the ward. [L. 1939, ch. 180, § 100; July 1.]

**Judicial Council, 1939:** This section is new. It may, in some cases, be advantageous to an estate to continue the decedent's business for a limited period in order to obtain the

greatest amount in liquidating the business. This section is so drawn to provide as many safeguards against loss as are reasonable.

Note: Bartlett's Probate Practice, see § 710.

**59-1403. Foreclosure of mortgage.** An executor or administrator shall have the same right to foreclose a mortgage or collect the debt secured thereby as the decedent would have had if living and he may complete any such proceedings commenced by such decedent. [L. 1939, ch. 180, § 101; July 1.]

Source or prior law: G. S. 1935, § 22-529.

Note: Bartlett's Probate Practice, see § 713.

**59-1404. Realty acquired.** When a foreclosure sale or a sale on execution for the recovery of a debt due the estate is had, or redemption is made, the executor or administrator shall receive the money paid and execute the necessary satisfaction or release. If bid in by the executor or administrator, the real estate shall be treated as personal property, but any sale or lease shall be made pursuant to article 23. If not so sold the real estate, and if so sold or leased the proceeds, shall be assigned or distributed to the same persons and in the same proportions as if it had been a part of the personal property of the decedent. [L. 1939, ch. 180, § 102; July 1.]

Source or prior law: G. S. 1935, §§ 22-529, 22-530.

Note: Bartlett's Probate Practice, see § 715.

**59-1405. Order in which assets to be appropriated.** The property of a decedent, except as provided in sections 19 [59-401] and 21 [59-403], shall be liable for the payment of his debts and other lawful demands against his estate. When a will designates the property to be appropriated for the payment of debts or other items, it shall be applied to such purpose. Unless the will provides otherwise for the payment thereof, the property of the testator, subject to the payment of debts and other items, shall be applied to that purpose in the following order: (1) Personal property not disposed of by will; (2) real estate not disposed of by will; (3) personal property bequeathed to the residuary legatee; (4) real estate devised to the residuary devisee; (5) property not specifically bequeathed or devised; (6) property specifically bequeathed or devised. Demonstrative legacies shall be classed as specific legacies to the extent of the payment thereof from the fund or property out of which payment is to be made, and as general legacies upon failure or insufficiency of the fund or property out of which payment was to be made to the extent of such insufficiency. The property of each class shall be exhausted before resorting to that of the next class; and all of one class shall contribute ratably if all the property of that class is not required for the payment of such debts or other items. [L. 1939, ch. 180, § 103; L. 1941, ch. 284, § 6; April 17.]

Source or prior law: G. S. 1935, §§ 22-260, 22-261, 22-262, 22-264, 22-810.

**Judicial Council, 1939:** For reasons for specific bequests and specific devises being in same class, see *In re Martin*, (R. I.) 54 Atl. 589; *Baker v. Baker*, 319 Ill. 320, 150 N. E. 284, 24 A. L. R. 1514; *Farnum v. Bascom*, 122 Mass. 282; *O'Day v. O'Day*, 193 Mo. 62, 91 S. W. 921, 4 L. R. A., n. s., 922; *Hollowell's Estate*, 23 Pa. 223; *In re Woodworth*, 31 Cal. 595; *Manlove v. Gaut*, 2 Tenn. Ch. App. 410. The Ohio statute, like our G. S. 1935, § 22-262, has been construed in that state. The court said: "As between specific legatees and devisees, where the property or money devised or bequeathed is taken to pay debts, and it cannot be otherwise replaced, contribution may undoubtedly be enforced." *Glass v. Dunn*, 17 Oh. St. 413.

Note: Bartlett's Probate Practice, see § 717.

**Cross references:** Void devise or bequest to witness considered as legacy or devise hereunder, see § 59-604.

Referred to in §§ 59-604, 59-1408.

**59-1406. Specifically bequeathed property.** Property specifically bequeathed may be delivered to the legatee entitled thereto upon his giving security for the redelivery thereof, or its appraised value, if ordered by the court so to do, to the executor or administrator; otherwise it shall remain in the custody of the executor or administrator, to be delivered or sold as may be required by law. [L. 1939, ch. 180, § 104; L. 1941, ch. 284, § 7; April 17.]

Source or prior law: G. S. 1935, § 22-602.

Note: Bartlett's Probate Practice, see § 719.

**59-1407. Sale of personal property.** The executor or administrator shall, within such time as the court may direct, sell the personal property, or any part thereof, belonging to the estate: (1) When the sale of such property is necessary for the payment of debts and other items, or legacies; (2) when a division thereof cannot be made in kind to those entitled thereto; or (3) when the sale thereof is to the best interests of the estate. [L. 1939, ch. 180, § 105; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-131, 22-601, 22-923; L. 1937, ch. 218, § 3; L. 1937, ch. 219, § 1.

**Note:** Bartlett's Probate Practice, see § 721.

**Cross reference:** Sale of personal property of decedent, see, also, §§ 59-2242 to 59-2245.

**59-1408. Refund of legacies and distributive shares.** If after the payment of legacies or distribution it becomes necessary that the same or any part thereof be refunded for the payment of debts or other items, the amount necessary to be refunded shall be apportioned among the legatees and distributees according to their liability for payment as provided in section 103 [59-1405]. [L. 1939, ch. 180, § 106; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-734, 22-921, 22-927.

**Note:** Bartlett's Probate Practice, see § 723.

**59-1409. Lease of property.** The executor or administrator may lease real estate in his possession for a term of not more than one year. He, together with the heirs and devisees having an interest therein, may lease such real estate for a term longer than one year, and they may execute an oil and gas or other mineral lease for such real estate. The income from any lease, by whatever name called, shall be received by the executor or administrator as income from such property. [L. 1939, ch. 180, § 107; July 1.]

**Source or prior law:** G. S. 1935, § 22-6a01; L. 1937, ch. 219, § 2.

**Note:** Bartlett's Probate Practice, see § 724.

**Cross reference:** Proceedings for sale, lease and mortgage of realty, see ch. 59, art. 23.

Discussed in determining probate court's equitable jurisdiction; exclusive jurisdiction. *Foss v. Wiles*, 155 K. 262, 271, 124 P. 2d 438.

**59-1410. Sale of realty.** The executor or administrator may sell real estate of a decedent whenever the sale thereof is necessary for the payment of reasonable funeral expenses, expenses of last sickness, wages of servants during the last sickness, cost of administration, taxes, debts, or legacies charged upon such real estate. The proceeds of any such sale which shall be available for distribution shall be distributed to the same persons and in the same shares as if it had remained real estate. [L. 1939, ch. 180, § 108; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-6a01, 22-801, 22-824.

**Note:** Bartlett's Probate Practice, see § 725.

**Cross reference:** Proceedings for sale, lease and mortgage of realty, see ch. 59, art. 23.

Mechanic's lien may be enforced in district court while administration pending. *Leidigh & Havens Lumber Co. v. Wyatt*, 153 K. 214, 218, 109 P. 2d 87.

Court's power to order sale of realty to pay debts discussed and determined. *Schul v. Clapp*, 154 K. 372, 376, 118 P. 2d 570.

**59-1411. When realty fraudulently conveyed to be included.** The real estate liable to be sold to pay debts of a decedent shall include, so far as necessary for that purpose, all real estate conveyed by him with intent to defraud his creditors; but no real estate so conveyed shall be taken from anyone who purchased it for a valuable consideration, in good faith, and without knowledge of the fraud, and no claim to real estate so conveyed shall be made unless within two years after the death of the grantor. [L. 1939, ch. 180, § 109; July 1.]

**Source or prior law:** G. S. 1935, § 22-803.

**Note:** Bartlett's Probate Practice, see § 731.

**59-1412. Sale of part or whole.** Whenever a sale of some part of the real estate is necessary and by such sale the residue thereof would suffer mani-

fest injury, the sale may be of the whole or such part thereof as necessity and the interests of the estate require. [L. 1939, ch. 180, § 110; July 1.]

**Source or prior law:** G. S. 1935, § 22-808.

**Note:** Bartlett's Probate Practice, see § 733.

Discussed in determining probate court's equitable jurisdiction; exclusive jurisdiction. *Foss v. Wiles*, 155 K. 262, 271, 124 P. 2d 438.

**59-1413. Sale under will.** If a will authorizes the executor to sell real estate, he, or an administrator with the will annexed, may exercise such power without any order of the probate court, unless the will provides otherwise. [L. 1939, ch. 180, § 111; July 1.]

**Source or prior law:** G. S. 1935, § 22-826.

**Judicial Council, 1939:** Administrator with will annexed may exercise power unless the will provides otherwise.

**Note:** Bartlett's Probate Practice, see § 734.

Right of executor to bring partition action in district court determined. *Sheedy v. Willoughby*, 157 K. 508, 512, 142 P. 2d 801.

### Article 15.—ACCOUNTING AND DISTRIBUTION

**59-1501. Duration of administration; reopening, when; costs.** Every executor and administrator shall have one year from the date of his appointment for the settlement of the estate. An administrator *de bonis non* shall have such time, not exceeding one year, as the court may determine. For cause shown the period herein limited may be extended by the court, not exceeding one year at a time. The executor or administrator shall not be disqualified thereafter in any way, unless removed but he shall not be relieved from any loss, liability, or penalty incurred by his failure to settle the estate within the time limited. That in case any executor or administrator shall fail or refuse for a period of thirty days after the expiration of said one year to make such settlement, he may be cited by the court for the purpose of making such settlement unless the time therefor has been extended by the court, and all costs connected with such citation and the hearing thereon shall be assessed against such executor or administrator, and not against the estate: *Provided*, In the event the return of said citation shows that the executor or administrator is not within the jurisdiction of said court, said estate may be closed by the order of the court without a publication notice when there has been no prosecution thereon for a period of five years. Said estate may be reopened within one year thereafter upon written application by a direct heir, executor or administrator who shall be charged with the costs thereof. [L. 1939, ch. 180, § 112; L. 1941, ch. 284, § 17; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-525, 22-907, 22-908.

**Note:** Bartlett's Probate Practice, see § 741.

**Cross reference:** Opening default judgment, when, see § 59-2252.

Procedure for allowance and payment of creditor's claim stated and applied; claim barred. *In re Estate of Dotson*, 154 K. 562, 568, 119 P. 2d 518.

Powers of executor named in will limited until appointed by court and qualified. *In re Estate of Grattan*, 155 K. 839, 851, 130 P. 2d 580.

**59-1502. Duty to account.** Every executor or administrator shall present a verified account of his administration within the time limited and make application to the court to settle and allow his account and to assign the estate to the persons entitled thereto. He shall also account at such other times as the court may require. [L. 1939, ch. 180, § 113; July 1.]

**Source or prior law:** G. S. 1935, § 22-901.

**Note:** Bartlett's Probate Practice, see § 743.

**59-1503. Time for distribution.** If upon any settlement it appears that there is sufficient money to satisfy all the demands against an estate, the executor or administrator may, on order of the court, make payment of legacies and distribution of shares, except that specific legacies shall be first satisfied; but no executor or administrator shall be compelled to pay legacies or make distribution within one year from the date of his qualification unless

ordered to do so by the court nor until bond or security is given by the legatee or distributee to refund his due proportion of any demand which may afterward be established against the estate and the cost attending the recovery thereof. [L. 1939, ch. 180, § 114; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-734, 22-921, 22-922; L. 1937, ch. 219, §§ 4, 5.

**Note:** Bartlett's Probate Practice, see § 745.

Applicability of former law (G. S. 1935, § 22-921) considered. *First Nat'l Bank v. Gray*, 151 K. 558, 563, 99 P. 2d 771.

**59-1504. Compensation and expenses.** Whenever a decedent by will makes a provision for the compensation of his executor, that shall be taken as his full compensation, unless he files a written instrument, renouncing all claim to the compensation provided for in the will. Whenever any person named in a will or codicil defends it, or prosecutes any proceedings in good faith and with just cause, for the purpose of having it admitted to probate, whether successful or not, or if any person successfully opposes the probate of any will or codicil, he shall be allowed out of the estate his necessary expenses and disbursements in such proceedings, together with such compensation for his services and those of his attorneys as shall be just and proper. [L. 1939, ch. 180, § 115; L. 1941, ch. 284, § 16; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-317, 22-919, 22-920, 38-227, 62-2024.

**Note:** Bartlett's Probate Practice, see § 747.

**Cross reference:** Compensation and expenses of fiduciary and his attorneys, see § 59-1717. Lack of good faith in prosecuting probate of will; costs taxed against proponents. *In re Estate of Casida*, 156 K. 73, 78, 131 P. 2d 644.

**59-1505. Conditions precedent to discharge.** Whenever any bequest or devise is made to a testamentary trustee, the executor or administrator shall not be discharged, unless the will provides otherwise, until a trustee has qualified in a court of competent jurisdiction and until proof of such qualification has been made and a receipt by the trustee has been filed, except as otherwise provided. No executor or administrator who has received any funds for death by wrongful act shall be discharged until he has filed a certified copy of the order, judgment or decree of distribution of the court wherein such funds were recovered, and receipts from the persons entitled to such funds, or copies thereof certified by the clerk of such court. [L. 1939, ch. 180, § 116; July 1.]

**Judicial Council, 1939:** This section is new. As to liability of sureties on bond of executor or administrator, see *United States Fidelity & Guaranty Co. v. Decker*, (Ohio) 171 N. E. 333, 68 A. L. R. 1535; *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255; *Aetna Casualty & Surety Co. v. Young*, 107 Okla. 151, 231 P. 261.

**Note:** Bartlett's Probate Practice, see § 751.

Cited; receipt from executor to himself as trustee sufficient under prior law. *Ward v. Krhounek*, 151 K. 414, 419, 99 P. 2d 800.

**59-1506. Protection of remainderman's interest in personalty; bond.** When by will the use or income of personal property is given to a person for a term of years or for life, and another person has an interest in such property as remainderman, the court, unless the will provides otherwise, may order such property to be delivered to the person having the limited estate, or to be held by the executor or some other person as trustee for the benefit of the person having the limited estate. Bond may be required of the person to whom the property is delivered or by whom it is held, in the first instance or at any time prior to the termination of the limited estate. [L. 1939, ch. 180, § 117; July 1.]

**Judicial Council, 1939:** This section is new. With the increasing popularity of investment in securities, a need has arisen for protection of the remainderman's interest in personal estates against waste by persons receiving the use or income for life from such estates, and this section should provide the court with power to deal fairly in all cases. The section makes an exception to the court's power, when the testator has made provision precluding the court from acting.

**Note:** Bartlett's Probate Practice, see § 753.

**59-1507. Summary proceedings.** Whenever it is established that the estate of a decedent, exclusive of the homestead and allowances to the spouse and minor children, does not exceed the amounts required for funeral expenses, expenses of last sickness, wages of servants during the last sickness, costs of administration, debts having preference under the laws of the United States or this state, and taxes, the executor or administrator may by order of the court pay the same in the order named, and present his account with an application for the settlement and allowance thereof. Thereupon the court, with or without notice, may adjust, correct, settle, allow or disallow such account, and if the account is allowed, summarily determine the heirs, legatees, and devisees, and close the administration. [L. 1939, ch. 180, § 118; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-726, 22-920.

**Judicial Council, 1939:** In many cases administration is commenced upon the assumption that there is a great deal of property and it later appears that there is little or no property. Under this section time and expense will be saved.

**Note:** Bartlett's Probate Practice, see § 755.

**59-1508. Unclaimed money.** If any part of the money on hand has not been paid over because the person entitled thereto cannot be found or refuses to accept the same, or for any other good and sufficient reason, the court may order the executor or administrator to deposit the same with the county treasurer for the benefit of the common schools of the county: *Provided*, If the person to whom said sum is ordered to be paid refuses to accept the same when it is tendered him by the executor or administrator, the court may, either before or after the sum has been deposited, order the same to be paid and distributed to those who would be entitled thereto had the refusing legatee or distributee not been entitled to it. Upon application to the probate court within ten years after such deposit, and upon notice to the county attorney and the county treasurer, the court may order the county treasurer to pay the same to the person entitled thereto. No interest shall be allowed or paid thereon, and if the deposit is not claimed within such time no recovery thereof can be had. [L. 1939, ch. 180, § 119; July 1.]

**Source or prior law:** G. S. 1935, § 22-932.

**Judicial Council, 1939:** Holding fund for one year not required.

**Note:** Bartlett's Probate Practice, see § 757.

History of section discussed; conservator of absentee's estate cannot withdraw impounded money. *Ruppenthal v. Maag*, 153 K. 588, 589, 595, 113 P. 2d 101.

Probate court has exclusive original jurisdiction of proceedings to recover money deposited; anyone entitled thereto may bring proceeding; construed. *In re Estate of Dinsmoor*, 159 K. 76, 77, 78, 152 P. 2d 58.

Garnishment; money may be redistributed hereunder to other legatees. *In re Estate of Hall*, 160 K. 25, 27, 159 P. 2d 408.

## Article 16.—ACCOUNTING OF TRUSTEES

**Cross reference:** Trustees' accounting proceedings, see §§ 59-2253 to 59-2256.

**59-1601. Testamentary trust inventory.** Within thirty days after it is the duty of the first qualifying testamentary trustee to take possession of the trust property he shall file with the probate court where the will was admitted to probate an inventory under oath, showing by items all the trust property which shall have come to his possession or knowledge, with an estimated value thereof. [L. 1939, ch. 180, § 120; July 1.]

**Judicial Council, 1939:** This is § 2 of the uniform trustee's accounting act prepared by the commissioners on uniform state laws, with the addition of the last five words. For a summary of the laws of the several states on the subject covered by this article, see Bogert on Trusts and Trustees, vol. 4, ch. 46.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 802.

**Cross reference:** Referred to in § 59-1602.

Article applicable where administration begun after July 1, 1939. *First Nat'l Bank v. Gray*, 151 K. 558, 562, 563, 564, 99 P. 2d 771.

Cited in allowing claim of trustee against trust estate. *In re Estate of Rutherford*, 154 K. 361, 364, 118 P. 2d 553.

Discussed; foreign corporation cannot serve as testamentary trustee of Kansas testator's estate *In re Estate of Lowe*, 155 K. 679, 687, 127 P. 2d 512.



Article applies to express, not constructive trusts; dissenting opinion. *Yeager v. Yeager*, 155 K. 734, 752, 129 P. 2d 242.

**59-1602. Intermediate accountings.** Within thirty days after the expiration of the first year after the first qualifying testamentary trustee was under a duty to file his inventory as prescribed in section 120 [59-1601] the testamentary trustee then in office shall file with the probate court of the county where the will was admitted to probate an intermediate account under oath covering such year showing: (1) The period which the account covers; (2) a complete statement of the trust capital and income received and expended; (3) present investments and other trust property held; (4) the names and addresses of the beneficiaries and which of them are minors or incompetents; (5) proposed distributions; (6) the payment of expenses, commissions, and counsel fees; and (7) such other facts as the court may require. Within thirty days after the end of each yearly period thereafter during the life of the trust the testamentary trustee then in office shall file with the same court an intermediate account under oath showing corresponding facts regarding the current accounting period. [L. 1939, ch. 180, § 121; July 1.]

**Judicial Council, 1939:** This is § 3 of the uniform trustees' accounting act, with a condensation of what the account shall show.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 804.

**Cross reference:** Referred to in § 59-1603.

**59-1603. Final accounting.** Within thirty days after the termination of every testamentary trust the trustee, and in the case of the transfer of the trusteeship due to the death, resignation, removal, dissolution, merger or consolidation of a sole trustee, the successor in interest of the old trustee shall file with the probate court of the county where the will was admitted to probate a final account under oath, showing for the period since the filing of the last account the facts required by section 121 [59-1602] regarding intermediate accountings and, in case of termination of the trust, the distribution of the trust property which the accountant proposes to make. [L. 1939, ch. 180, § 122; July 1.]

**Judicial Council, 1939:** This is § 4 of the uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 805.

**59-1604. Distribution accounting.** Within thirty days after the distribution of the trust property by the testamentary trustee he shall file in the court where the final account was filed a distribution account of the trust property which he had distributed and the receipts of the distributees. [L. 1939, ch. 180, § 123; July 1.]

**Judicial Council, 1939:** This is § 5 of the uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 806.

**59-1605. Inventory by nontestamentary trustee.** Within thirty days after it is the duty of the first qualifying trustee of a trust created by written instrument, other than by will, in favor of persons subject to guardianship, to take possession of the trust property he shall file in the probate court of the county where the trust was created a notice of his appointment as trustee, a copy of the instrument creating the trust, a list of the names, addresses and dates of birth of the known living beneficiaries, and an inventory under oath of the trust property which shall come to his possession or knowledge, with an estimated value thereof. [L. 1939, ch. 180, § 124; July 1.]

**Judicial Council, 1939:** This is § 6 of the uniform trustees' accounting act, with the addition of the last five words, and the exclusion of living trusts other than those created in favor of minors and incompetents.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 807.

**59-1606. Accounting by nontestamentary trustee.** Every such trustee shall file intermediate, final and distribution accounts with the probate court

of the county where the trust was created, at the same intervals, under the same conditions, and with the same effect as herein provided with respect to the accountings of a testamentary trustee in the probate court. [L. 1939, ch. 180, § 125; July 1.]

**Judicial Council, 1939:** This is § 13 of the uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 803.

**59-1607. Power of testator or settlor.** The testator or settlor of any trust affected by this article, may by provision in the instrument creating the trust, or by an amendment of the trust if a settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties which would otherwise be placed upon him by this article, or add duties to those imposed by this article on his trustee with regard to inventories and accountings: *Provided*, That the court may, upon the application of any beneficiary or some person in his behalf, require the performance of the duties herein otherwise required. No expression of intent by any testator or settlor shall affect the jurisdiction of the courts of this state over inventories and accounts of trustees, insofar as such jurisdiction does not depend upon the provisions of this article. [L. 1939, ch. 180, § 126; July 1.]

**Judicial Council, 1939:** This is § 15 of the uniform trustees' accounting act with a minor change.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 809.

**Cross reference:** Referred to in § 59-2253.

Discussed; foreign corporation cannot serve as testamentary trustee of Kansas testator's estate. *In re Estate of Lowe*, 155 K. 679, 687, 127 P. 2d 512.

**59-1608. Power of beneficiary.** Subject to the approval of the court, any beneficiary, if of full age and sound mind, may, if acting upon full information, by written instrument delivered to the trustee, excuse the trustee as to such beneficiary from performing any of the duties imposed on him by this article or exempt the trustee from liability to such beneficiary for failure to perform any of the duties imposed upon the trustee by the terms of this article. [L. 1939, ch. 180, § 127; July 1.]

**Judicial Council, 1939:** This is § 16 of the uniform trustees' accounting act with a minor change.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 811.

**Cross reference:** Referred to in § 59-2253.

**59-1609. Applicability of provisions.** Nothing in this article shall be construed to abridge the power of any court to require trustees to file an inventory, to account, to exhibit the trust property, or to give beneficiaries information or the privilege of inspection of trust records and papers, at times other than those herein prescribed; and nothing in this article shall be construed to abridge the power of such court for cause shown to excuse a trustee from performing any or all of the duties imposed on him by this article. Nothing in this article shall prevent the trustee from accounting voluntarily when it is reasonably necessary, even though he is not required to do so by this article or by court order. And nothing in this act shall require a trustee to qualify or to file an inventory or any accounting when the devise or bequest is to any governmental unit or department or solely for religious, charitable, or educational purposes, or for the maintenance of a cemetery or any part thereof or a place of burial, unless the court for good cause shown, or the will shall so require. [L. 1939, ch. 180, § 128; July 1.]

**Judicial Council, 1939:** The first part of this section is taken from § 17 of the uniform trustee's accounting act with a minor change. The purpose of the latter part is apparent, see *Harrison v. Brophy*, 59 K. 1, 51 P. 883.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 813.

**59-1610. Enforcement.** Any beneficiary may apply to the court for an order requiring the trustee to perform the duties imposed upon him by this article. [L. 1939, ch. 180, § 129; July 1.]

**Judicial Council, 1939:** This is § 18 of the uniform trustees' accounting act with a minor change.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 815.

**59-1611. Article not retroactive.** This article shall apply only to trusts the administration of which shall begin after the effective date of this act. [L. 1939, ch. 180, § 130; July 1.]

**Judicial Council, 1939:** This is taken in substance from the uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 816.

Article applicable where administration begun after July 1, 1939. First Nat'l Bank v. Gray, 151 K. 558, 560, 562, 563, 564, 99 P. 2d 771.  
Cited in allowing claim of trustee against trust estate. *In re Estate of Rutherford*, 154 K. 361, 364, 118 P. 2d 553.

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

**59-1701. Corporate fiduciaries.** No bank or other corporation, unless it is organized under the laws of and has its principal place of business in this state, or is a national bank located in this state, shall be appointed or authorized directly or indirectly to act as a fiduciary in this state, except in ancillary proceedings; and no officer, employee or agent of such bank or corporation shall be permitted to act as a fiduciary in this state, whether such officer, employee or agent is a resident or a nonresident of this state, when in fact such officer, employee or agent is acting as such fiduciary on behalf of such bank or corporation; nor shall any bank or other corporation be appointed guardian of the person of a ward. [L. 1939, ch. 180, § 131; July 1.]

**Judicial Council, 1939:** This section is new.

**Note:** Bartlett's Probate Practice, see § 821.

**Cross references:** Trust companies, see G. S. 1935, ch. 17, art. 20.

Trust authority of banks, see L. 1947, ch. 102, §§ 77 to 82 (G. S. 1947 Supp. §§ 9-1601 to 9-1606).

Inapplicable where trust accepted prior to July 1, 1939. First Nat'l Bank v. Gray, 151 K. 558, 559, 560, 561, 562, 564, 99 P. 2d 771.

Foreign corporation cannot serve as testamentary trustee of Kansas testator's estate. *In re Estate of Lowe*, 155 K. 679, 681, 682, 127 P. 2d 512.

Disqualifications of executor are statutory, court will not add others. *In re Estate of Grattan*, 155 K. 839, 853, 130 P. 2d 580.

**59-1702. Qualification of fiduciary.** Every fiduciary, before entering upon the duties of his trust, shall take and subscribe to an oath that he will faithfully and impartially and to the best of his ability discharge all the duties of his trust according to law and that he is acting on his own behalf and not on behalf of any bank or corporation organized and having its principal place of business outside this state. The oath on behalf of a corporate fiduciary shall be taken and subscribed by a duly authorized officer thereof. [L. 1939, ch. 180, § 132; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-303, 22-309, 22-313, 38-207, 39-206, 39-218, 62-2004.

**Judicial Council, 1939:** Last sentence taken from uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 824.

**59-1703. Duties of fiduciary.** No fiduciary shall make a profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the estate, and he shall account for the excess when he sells for more than the appraisement and shall not be responsible for the loss when he sells for less, if such sale appear to be beneficial to the estate. He shall not be responsible for any loss happening by the insolvency of any purchaser, or his sureties, for any sale duly made according to law, if he proceeded with due caution in taking surety, and has used due diligence to collect

thereon. He shall not be accountable for debts due the decedent or ward which remain uncollected without fault on his part, but where he neglects or unreasonably delays to raise money by collecting debts or selling property, or neglects to pay over the money in his hands and by reason thereof the value of the estate is lessened, or unnecessary costs, interest, or penalties accrue, or the persons interested suffer loss, the same shall be deemed waste and the fiduciary shall be charged in his account with the damages sustained. He shall not purchase any claim against the estate nor shall he purchase directly or indirectly or be interested in the purchase of any property sold by him. [L. 1939, ch. 180, § 133; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-606, 22-909, 22-910, 22-911, 22-1001, 22-1003, 22-1004.

**Note:** Bartlett's Probate Practice, see § 826.

**59-1704. Liability for conversion.** If any person embezzles or converts to his own use any of the personal property of a decedent or ward, such person shall be liable for double the value of the property so embezzled or converted. [L. 1939, ch. 180, § 134; July 1.]

**Source or prior law:** G. S. 1935, § 22-912.

**Judicial Council, 1939:** Extends former law to any person.

**Note:** Bartlett's Probate Practice, see § 831.

**59-1705. Notice to consular representative.** When it appears in the administration of an estate of a decedent or a ward that subjects, citizens or nationals of any foreign country are or may be interested as heirs, devisees, legatees, or otherwise, the court before whom the matter is pending shall give notice by mail to the consular representative of such country for this state of the pendency of such matter and the probate interest of such foreign citizens, subjects, and nationals therein, if such consular representative has filed his name and address in such court. The failure to give such notice shall not affect the validity of any proceeding. [L. 1939, ch. 180, § 135; July 1.]

**Source or prior law:** G. S. 1935, § 22-331.

**Note:** Bartlett's Probate Practice, see § 834.

**59-1706. Appointment of agent.** Every nonresident appointed fiduciary in this state shall, before entering upon the duties of his trust, appoint in writing an agent residing in the county where the appointment is made, and shall by such writing consent that the service of any notice or process when made upon said agent shall have the same force and effect as if made upon the fiduciary personally within said county and state. Such writing shall state the correct address of such agent and shall be filed in the probate court where such appointment is made. Service of notice or process upon such agent shall have the same force and effect as personal service upon the fiduciary. [L. 1939, ch. 180, § 136; July 1.]

**Judicial Council, 1939:** This section is new. Taken in substance from the Oklahoma statutes, see Oklahoma Statutes, 1931, § 1073.

**Note:** Bartlett's Probate Practice, see § 836.

Trust accepted prior to July 1, 1939; agent should be appointed hereunder. First Nat'l Bank v. Gray, 151 K. 558, 564, 99 P. 2d 771.

**59-1707. Powers of nonresident fiduciaries.** Upon the filing for record in the probate court of the proper county of an authenticated copy of his letters or other record of his authority and a certificate that the same are still in force, a fiduciary appointed by a court of competent jurisdiction in another state or country may assign, extend, release, satisfy, or foreclose any mortgage, judgment, or lien, or collect any debts secured thereby belonging to the estate represented by him. The sale, lease, or mortgage of any real estate acquired on execution or judicial sale by a foreign representative shall be made pursuant to article 23. [L. 1939, ch. 180, § 137; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-231, 22-832, 22-833, 22-835, 38-224, 38-225, 39-218.

**Note:** Bartlett's Probate Practice, see § 837.

**59-1708. Nonresident fiduciary may sue and be sued.** A fiduciary duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of fiduciary, in like manner and under like restrictions as a nonresident may sue or be sued. [L. 1939, ch. 180, § 138; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1308, 38-232.

**Note:** Bartlett's Probate Practice, see § 838.

Applicable to revivor of actions as well as original service. *National Bank of Topeka v. Mitchell*, 154 K. 276, 278, 279, 118 P. 2d 519.

**59-1709. Accounting on resignation.** A fiduciary may resign his trust at any time, but his resignation shall not be effective until the court shall have examined and allowed his final account and shall have made an order accepting such resignation. [L. 1939, ch. 180, § 139; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-321, 38-222, 38-229, 39-223, 39-229.

**Note:** Bartlett's Probate Practice, see § 841.

**59-1710. Effect of resignation.** The acceptance of the resignation of a fiduciary and the appointment of another shall not affect the liability of such former fiduciary, or his sureties, previously incurred. [L. 1939, ch. 180, § 140; July 1.]

**Source or prior law:** G. S. 1935, § 22-322.

**Note:** Bartlett's Probate Practice, see § 843.

**59-1711. Removal and penalties.** Whenever a fiduciary is or becomes insane or otherwise incapable of performing the duties of his trust, he may be removed. Whenever a fiduciary fails or refuses to perform any of the duties imposed upon him by law or by any lawful order of the court, he may be removed and his compensation may be reduced or forfeited, in the discretion of the court. [L. 1939, ch. 180, § 141; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-323, 22-520, 22-533, 22-903, 22-922, 38-221, 38-222, 39-229, 62-2005.

**Judicial Council, 1939:** See uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.

Bartlett's Probate Practice, see § 844.

Discussed; foreign corporation cannot serve as testamentary trustee of Kansas testator's estate. *In re Estate of Lowe*, 155 K. 679, 688, 127 P. 2d 512.

**59-1712. Accounting on death or disability.** Whenever a sole or the last surviving fiduciary dies, or is adjudged insane or otherwise mentally incompetent, his representative, upon appointment, shall file an account and application for the settlement and allowance thereof and, if proper, for distribution. If the estate has not been fully administered, the surety shall not be discharged until a successor has been appointed and qualified and receipted for the unadministered property. [L. 1939, ch. 180, § 142; July 1.]

**Judicial Council, 1939:** This section is new. Provides a method of accounting in case of death or insanity.

**Note:** Bartlett's Probate Practice, see § 846.

**59-1713. Termination of authority not to invalidate acts.** All the acts of a fiduciary as such, before the termination of his authority, shall be as valid to all intents and purposes as if such fiduciary had continued lawfully to execute the duties of his trust. [L. 1939, ch. 180, § 143; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-327, 22-825.

**Note:** Bartlett's Probate Practice, see § 848.

Appeal from order appointing executor does not revoke order; effect. *Hutchinson v. Pihlblad*, 157 K. 392, 395, 139 P. 2d 835.

**59-1714. Compromise with debtor.** Whenever it appears for the best interests of the estate, the fiduciary may, on order of the court, effect a fair and reasonable compromise with any debtor or other obligor. [L. 1939, ch. 180, § 144; July 1.]

**Source or prior law:** G. S. 1935, § 22-532.

**Note:** Bartlett's Probate Practice, see § 850.

**59-1715. Authorizing conveyance or lease.** When any person legally bound by a written instrument to make a conveyance or lease dies before making the same, or when any ward is likewise bound to make a conveyance or lease, the representative of the estate may, upon order of the court and with its approval, make the conveyance or lease to the person entitled thereto. [L. 1939, ch. 180, § 145; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-234, 22-827.

**Note:** Bartlett's Probate Practice, see § 852.

**59-1716. Platting real estate.** Whenever it is for the best interests of the estate of a decedent or ward, real estate may, with the approval of the court, be platted by the fiduciary. [L. 1939, ch. 180, § 146; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1311, 38-211, 38-214.

**Note:** Bartlett's Probate Practice, see § 854.

**59-1717. Compensation and expenses.** Every fiduciary shall be allowed his necessary expenses incurred in the execution of his trust, and shall have such compensation for his services and those of his attorneys as shall be just and reasonable. At any time during administration the fiduciary may apply to the court for an allowance upon his compensation and upon attorneys' fees. [L. 1939, ch. 180, § 147; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-317, 22-919, 22-920, 38-227, 62-2024.

**Judicial Council, 1939:** Provides application may be made for fees of fiduciaries and attorneys during administration.

**Note:** Bartlett's Probate Practice, see § 855.

**Cross reference:** Compensation and expenses of executor and his attorneys, see, also, § 59-1504.

Applied to appeal from final settlement order. *In re Estate of Eyth*, 157 K. 268, 275, 276, 139 P. 2d 378.

Attorney for administrator cannot enforce claim for services directly against estate. *In re Estate of Eyth*, 157 K. 268, 275, 276, 139 P. 2d 378.

**59-1718. Discharge.** Whenever any fiduciary has paid or transferred to the persons entitled thereto all of the property of the estate, paid all taxes required to be paid by him and has filed proof thereof, and has complied with all the orders and decrees of the court and with the provisions of law, and has otherwise fully discharged his trust, the court shall finally discharge him and his sureties. [L. 1939, ch. 180, § 148; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-906, 22-931.

**Note:** Bartlett's Probate Practice, see § 858.

Court may exercise judicial discretion as to approval of fiduciary's final receipts. *In re Estate of Williams*, 160 K. 220, 224, 160 P. 2d 260.

## Article 18.—GUARDIANSHIP

**Cross references:** Guardianship proceedings, see §§ 59-2257 to 59-2270.

Venue of guardianship proceedings, see § 59-2203.

Applicable to estates of convicts, see § 59-1902.

**59-1801. Definition.** As used in this article, the term "incompetent person" includes insane person, lunatic, idiot, imbecile, distracted person, feeble-minded person, drug habitué, or an habitual drunkard, who is incapable of managing his person or estate. [L. 1939, ch. 180, § 149; July 1.]

**Source or prior law:** G. S. 1935, § 39-240.

**Note:** Bartlett's Probate Practice, see § 882.

Probate court may order incompetent's guardian to support ward's adult indigent daughter. *Sheneman v. Manring*, 152 K. 780, 782, 107 P. 2d 741.

**59-1802. Natural, testamentary, and probate guardians.** The father and mother are the natural guardians of the persons of their minor children. If either dies, or is incapable of acting, the natural guardianship devolves upon the other. The survivor may, by last will, appoint a guardian for any of his children, whether born at the time of making the will or afterwards, to continue during the minority of the child, or for a less time; and every such

testamentary guardian shall have the same power and shall perform the same duties with regard to the person and estate of the ward as natural guardians, subject to the provisions of the will. If without such will both parents are dead or disqualified to act as guardian, the probate court may appoint one. Although the parents are living and of sound mind, yet if the minor has property not derived from either of them, a guardian shall be appointed to manage such property. [L. 1939, ch. 180, § 150; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-201, 38-202, 38-205.

**Judicial Council, 1939:** See *Denton v. James*, 107 K. 729, 733, 734, 193 P. 307.

**Note:** Bartlett's Probate Practice, see § 884.

Guardian appointed without finding of mother's unfitness; mother's custody unimpaired. *Johnson v. Best*, 156 K. 668, 671, 135 P. 2d 896.

Both parents dead; common law rule respecting next of kin not abrogated. *Paronto v. Armstrong*, 161 K. 702, 725, 171 P. 2d 299.

**59-1803. Persons subject to guardianship.** When it is necessary, the probate court shall appoint one or two persons suitable and competent to discharge the trust, as guardians of the person or estate, or both, of any person who is a minor, or any incompetent person. When a person is of full age by the laws of his residence, but would, if residing here, be a minor by the laws of this state, a guardian of his estate may be appointed. No guardian of the person of any minor shall be appointed while proceedings for his care and custody are pending in any court of this state. [L. 1939, ch. 180, § 151; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-204, 38-205, 38-235, 38-237, 39-201, 39-241.

**Note:** Bartlett's Probate Practice, see § 889.

District court's habeas corpus jurisdiction not impaired by probate code guardianship provisions. *Johnson v. Best*, 156 K. 668, 670, 135 P. 2d 896.

**59-1804. Guardian's duties.** A guardian shall be subject to the control and direction of the court at all times and in all things. A guardian of the person shall have charge of the person of the ward. A guardian of the estate shall (1) prosecute and defend for his ward; (2) sell assets of the estate when the interests of the ward and his estate require the sale thereof; (3) pay the reasonable charges for the support, maintenance, and education of the ward in a manner suitable to his station in life and the value of his estate; but nothing herein contained shall release parents from obligations imposed by law as to the support, maintenance, and education of their minor children; (4) pay all just and lawful debts of the ward and the reasonable charges incurred for the support, maintenance, and education of his spouse and children; (5) possess and manage the estate, collect all debts and claims in favor of the ward, or with the approval of the court comprise the same; and (6) invest all funds, except such as may be currently needed for the debts and charges aforesaid and the management of the estate, in such securities as are proper for the investment of trust funds, including securities approved by the comptroller of the currency of the United States for the investment of trust funds by national bank. [L. 1939, ch. 180, § 152; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-209, 38-210, 39-207, 39-209, 39-210, 39-230, 39-231, 62-2005, 62-2006, 62-2007, 62-2009, 62-2010, 62-2011, 62-2014, 62-2020.

**Judicial Council, 1939:** Guardian may, with court approval, sell bonds, stocks and wheat without further appraisal. For investments proper for national banks, see Reports of Comptroller of Currency.

**Note:** Bartlett's Probate Practice, see § 891.

**Cross reference:** Investment of funds, see, also, G. S. 1947 Supp. §§ 17-5002, 17-5003.

Probate court may order incompetent's guardian to support ward's adult indigent daughter. *Sheneman v. Manning*, 152 K. 780, 782, 107 P. 2d 741.

Power of insane person's guardian to consent to alienation of homestead discussed. *Starke v. Starke*, 155 K. 331, 343, 125 P. 2d 738.

Guardian cannot pay ward's parents funeral expenses from ward's estate. *Osment v. Trout*, 156 K. 120, 122, 131 P. 2d 640.

District court's habeas corpus jurisdiction not impaired by probate code guardianship provisions. *Johnson v. Best*, 156 K. 668, 670, 135 P. 2d 896.

Insane widow's guardian under direction of probate court may sell homestead. *Lockridge v. Glace*, 158 K. 431, 434, 147 P. 2d 726.

Guardian may make voluntary partition of ward's real estate under probate code. *Thompson v. Hall*, 159 K. 592, 595, 156 P. 2d 530.

**59-1805. Original assets.** A guardian may retain, until maturity, any security or investment which was a part of the trust estate as received by him, even though such security or investment is not of the class considered as proper for the investment of trust funds, unless circumstances are such to require the guardian to dispose of such security or investment in the performance of his duties according to law. A guardian entitled to a distributive share of the assets of an estate or trust shall have the same right as other distributees or beneficiaries to accept or demand distribution in kind, and may retain any security or investment so distributed to him as though it were a part of the original estate received by him. [L. 1939, ch. 180, § 153; July 1.]

**Judicial Council, 1939:** This section is new. It permits guardians, subject to limitations, to retain original assets and to accept distribution in kind.

**Note:** Bartlett's Probate Practice, see § 894.

**59-1806. Power to lease for three years or less.** A guardian of the estate may, subject to the approval of the court, lease for three years or less the possession or use of any real estate of his ward whenever it appears to be for the best interest of the ward and his estate. [L. 1939, ch. 180, § 154; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-211, 62-2008.

**Judicial Council, 1939:** A property lease for three years or less may be made with court approval.

**Note:** Bartlett's Probate Practice, see § 896.

Probate court has exclusive original jurisdiction over estates of incompetent persons. *Starke v. Starke*, 155 K. 331, 335, 125 P. 2d 738.

Insane widow's guardian under direction of probate court may sell homestead. *Lockridge v. Glace*, 158 K. 431, 434, 147 P. 2d 726.

**59-1807. Sale, lease, mortgage.** A guardian of the estate may, pursuant to article 23, sell, lease for more than three years, or for oil and gas or other minerals, or mortgage any real estate of a ward subject thereto to provide for the support, maintenance, and education of the ward, his spouse and children, or whenever the personal property is insufficient to pay his debts and other demands against the estate, or whenever it shall be determined by the court that such sale, lease, or mortgage is for the best interests of the ward and his estate. [L. 1939, ch. 180, § 155; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-211, 39-211, 62-2008.

**Judicial Council, 1939:** A property lease for more than three years, and a mineral lease may be made in the same manner as real estate is sold or mortgaged.

**Note:** Bartlett's Probate Practice, see § 897.

**Cross reference:** Proceedings for sale, lease and mortgage of realty, see §§ 59-2301 to 59-2322.

Probate court has exclusive original jurisdiction over estates of incompetent persons. *Starke v. Starke*, 155 K. 331, 335, 125 P. 2d 738.

Power of insane person's guardian to consent to alienation of homestead discussed. *Starke v. Starke*, 155 K. 331, 343, 125 P. 2d 738.

Insane widow's guardian under direction of probate court may sell homestead. *Lockridge v. Glace*, 158 K. 431, 435, 436, 147 P. 2d 726.

Guardian may make voluntary partition of ward's real estate under probate code. *Thompson v. Hall*, 159 K. 592, 593, 156 P. 2d 530.

**59-1808. Sale of inchoate right.** The guardian of the estate of a spouse may, with or without notice, upon order of the probate court, sell, convey, lease or mortgage, any real estate, except the homestead, the title to which is in the other spouse; but no guardian's deed or other instrument executed by virtue of such order shall be valid unless the other spouse, or if insane his guardian, shall join therein as one of the grantors thereof. [L. 1939, ch. 180, § 156; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-211, 39-221, 62-2008.

**Judicial Council, 1939:** Provision of former law authorizing alienation of homestead unconstitutional. *In re Barnell Estate*, 141 K. 842, 44 P. 2d 214.

**Note:** Bartlett's Probate Practice, see § 898.

**Cross reference:** Execution of mortgages and oil, gas, and other mineral leases on a homestead, see §§ 59-2314 to 59-2322.

Probate court has exclusive original jurisdiction over estates of incompetent persons. *Starke v. Starke*, 155 K. 331, 335, 125 P. 2d 738.



**59-1809. Extension of mortgage.** A guardian may, subject to the approval of the court, make an extension of an existing mortgage, or of a prior extension thereof, for a period of five years or less, if the extension agreement contains the same prepayment privileges and the rate of interest does not exceed the lowest rate in the mortgage extended. [L. 1939, ch. 180, § 157; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-211, 62-2008.

**Judicial Council, 1939:** Mortgage may be extended for five years at a time, with court approval.

**Note:** Bartlett's Probate Practice, see § 899.

**Cross reference:** Referred to in § 59-2301.

Probate court has exclusive original jurisdiction over estates of incompetent persons. *Starke v. Starke*, 155 K. 331, 335, 125 P. 2d 738.

**59-1810. No personal liability on mortgage note.** No guardian shall be personally liable on any mortgage note or by reason of the covenants in any instrument of conveyance duly executed by him in his representative capacity. [L. 1939, ch. 180, § 158; July 1.]

**Judicial Council, 1939:** This section is new. The ward is not personally liable. *Eureka Building & Loan Association v. Schultz*, 139 K. 435, 32 P. 2d 477. The guardian is personally liable at common law. Personal liability of guardian avoided.

**Note:** Bartlett's Probate Practice, see § 900.

**59-1811. Accounting and settlement.** Except where expressly waived by the court, every guardian shall annually present a verified account covering the period from the date of appointment or the last account. At the termination of the guardianship, or upon the guardian's removal or resignation, he or his surety, or in the event of his death or disability, his representative or surety, shall present a verified final account with an application for the settlement and allowance thereof; and such guardian or his estate shall not be discharged from liability until such account is presented, settled, and allowed. [L. 1939, ch. 180, § 159; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-222, 39-223, 39-227, 39-228, 62-2015, 62-2021, 62-2022.

**Judicial Council, 1939:** Guardian settles with the court. See *Fitzpatrick v. National Surety Co.*, 148 K. 303, 80 P. 2d 1059.

**Note:** Bartlett's Probate Practice, see § 902.

**59-1812. Termination of guardianship.** A guardianship of a minor shall terminate upon his death or upon his attainment of legal age. The marriage of a ward, under guardianship as a minor only, shall terminate the guardianship of his person, but not of his estate unless by such marriage the rights of majority are thereby conferred. The guardianship of a ward, other than a minor, shall terminate upon his death or upon his restoration to capacity. Whenever there is no further need of any guardianship the court may terminate it. [L. 1939, ch. 180, § 160; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-222, 38-229, 39-228, 76-1225.

**Judicial Council, 1939:** Guardianship may be terminated when no further need of it.

**Note:** Bartlett's Probate Practice, see § 904.

**59-1813. Estate of less than five hundred dollars.** If the estate of a ward is less than five hundred dollars, and the ward is a minor, the court may in its discretion, without the appointment of a guardian, or the giving of bond, authorize the deposit thereof in a savings account of a bank, payable to the legal guardian when appointed or to the ward upon his attaining the age of majority; or the court may authorize the payment or delivery thereof to the natural guardian of the minor, or to the person by whom the minor is maintained, or to the minor himself. [L. 1939, ch. 180, § 161; July 1.]

**Judicial Council, 1939:** This section is new. When the minor is industrious and frugal, and the amount is small, it seems unnecessary to subject the fund to the expense of guardianship.

**Note:** Bartlett's Probate Practice, see § 906.

Article 19.—ESTATES OF CONVICTS

Former law: G. S. 1935, ch. 62, art. 20.

**59-1901. Appointment of trustee.** The probate court may appoint a trustee of the estate of any person imprisoned in the penitentiary under a sentence of imprisonment for life, to manage and administer his property. [L. 1939, ch. 180, § 162; July 1.]

**Judicial Council, 1939:** Descent of property is not cast. *Smith v. Becker*, 62 K. 541, 84 P. 70; *Preston v. Fyfe*, 81 K. 906, 106 P. 1011. Former law had no provision for trustee of estate of convict imprisoned for life. Such convict is civilly dead, see G. S. 1935, § 21-118. Hence, the provision for trustee in such cases. Convicts imprisoned for less than life may make contracts for the sale, lease, mortgage, and management of their property, see G. S. 1935, § 21-134. Hence, no trustee is necessary, and G. S. 1935, §§ 62-2002 to 62-2024 are obsolete.

**Note:** Bartlett's Probate Practice, see § 942.

**59-1902. Provisions applicable to convicts' estates.** The provisions of law relating to the estates of incompetents, guardians thereof, and their powers, duties, and liabilities in connection therewith, shall govern in the administration and management of the estates of such convicts, trustees thereof, and their powers, duties and liabilities in connection therewith. [L. 1939, ch. 180, § 163; July 1.]

**Judicial Council, 1939:** Law pertaining to guardianship of estates of incompetents is made applicable.

**Note:** Bartlett's Probate Practice, see § 944.

**Cross references:** Guardianship, see ch. 59, art. 18.

Guardianship proceedings, see §§ 59-2257 to 59-2270.

**59-1903. Termination of trusteeship.** Upon the death of such imprisoned convict, or the commutation of his sentence to a sentence of less than life, or his lawful release from his imprisonment by parole or otherwise, the trustee shall settle his accounts as required of a guardian upon the death or restoration of an incompetent person. [L. 1939, ch. 180, § 164; July 1.]

**Judicial Council, 1939:** Provides for termination of trusteeship.

**Note:** Bartlett's Probate Practice, see § 946.

**Cross reference:** Final settlement of guardian's accounts, see §§ 59-1811, 59-2270.

Article 20.—COMMITMENT AND CARE OF INSANE PERSONS

**Cross reference:** Proceedings for commitment of insane persons, see §§ 59-2271 to 59-2276.

**59-2001. Definitions.** As used in this article, unless the context otherwise indicates: (1) The term "insane person" means any person who is so far disordered in his mind as to endanger health, person, or property; or any person who is so far disordered in his mind as to render him a proper person for care and treatment in a hospital for insanity or mental disease: *Provided*, That no person idiotic from birth or whose mental development was arrested prior to the age of puberty, and no person afflicted with simple epilepsy shall be regarded as insane, unless the manifestations thereof are such as to endanger health, person, or property. (2) The word "patient" means any person for whose commitment as an insane person proceedings have been instituted or completed. (3) The term "state hospital" includes the Topeka state hospital for the insane, the Osawatomie state hospital for the insane, the Larned state hospital for the insane, the Parsons state hospital for epileptics, and the Winfield state training school. [L. 1939, ch. 180, § 165; July 1.]

**Source or prior law:** G. S. 1935, §§ 89-232, 89-238, 76-1203.

**Note:** Bartlett's Probate Practice, see § 952.

**59-2002. Temporary detention.** No person who has not been adjudged insane shall by reason of his insanity be restrained of his liberty; but he may be temporarily detained for a reasonable time, not exceeding thirty days, pending medical examination and a proceeding commenced for judicial determination of his mental condition: *Provided*, That any such person may be

detained for additional periods of thirty days, when at the expiration of any thirty day period the physician in charge of the medical staff of any hospital where such person may be detained makes a written report to the probate judge of the county from which said person was referred, stating that in the opinion of the medical staff of such hospital said person so referred will be benefited by further stay at said hospital for continued examination and treatment; upon receipt of such report the probate judge may make an order directing that such person be further detained for examination and treatment for an additional period of thirty days: *Provided further*, That no person shall be so detained for a total period of more than ninety days without having been adjudged insane [L. 1939, ch. 180, § 166; L. 1945, ch. 236, § 1; L. 1947, ch. 314, § 1; June 30.]

**Source or prior law:** G. S. 1935, § 76-1204.

**Note:** Bartlett's Probate Practice, see § 954.

**59-2003. Admission to hospital.** Any person adjudged to be insane may be committed to a state hospital. In case of commitment the probate court shall make an application in the manner prescribed by the state board of administration for the admission of the patient to a state hospital and shall furnish the board with a transcript of the proceedings. The state board shall determine whether the patient shall be admitted and, in case of admission, shall designate the hospital to which admission shall be made. Thereupon the court shall issue to the sheriff or any other person a warrant in duplicate committing the patient to the custody of the superintendent of the proper state hospital. The probate court, at the time of the inquest, shall inquire into the pecuniary condition of the patient and those bound by law to support him, and shall transmit to the superintendent a statement showing the assets and liabilities of the patient and of those bound by law to support him. The patient committed shall be designated as either a private or a county patient. [L. 1939, ch. 180, § 167; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-238, 76-1212, 76-1213, 76-1217.

**Note:** Bartlett's Probate Practice, see § 956.

**Cross reference:** Jurisdiction, powers, and duties of state board of administration relating to state hospitals transferred to state department of social welfare, see G. S. 1947 Supp. § 75-3307.

**59-2004. Release before commitment; bond.** Before the delivery of the warrant of commitment, the court may release an insane patient to any person who files a bond to the state in such amount as the court may direct, conditioned upon the care and safekeeping of the patient; but no person against whom a criminal proceeding is pending, or who is dangerous to the public, shall be so released. [L. 1939, ch. 180, § 168; July 1.]

**Source or prior law:** G. S. 1935, § 76-1214.

**Note:** Bartlett's Probate Practice, see § 958.

**59-2005. Detention at hospital.** Upon delivery of an insane patient to the state hospital to which he has been committed, the superintendent thereof shall retain the duplicate warrant and endorse his receipt upon the original, which shall be filed in the court of commitment. After such delivery, the patient shall be under the care, custody, and control of the board of administration until discharged by it or by a court of competent jurisdiction. Whenever a patient is paroled, discharged, transferred to another institution, dies, escapes, or is returned, the hospital having charge of the patient shall transmit notice thereof to the probate court of the patient's residence. Whenever a patient in a state hospital is duly adjudged not to be insane he shall be discharged therefrom. [L. 1939, ch. 180, § 169; July 1.]

**Judicial Council, 1939:** This section is new.

**Note:** Bartlett's Probate Practice, see § 960.

**Cross reference:** Jurisdiction, powers, and duties of state board of administration relating to state hospitals transferred to state department of social welfare, see G. S. 1947 Supp. § 75-3307.

**59-2006. Duty to support patient; actions for support, limitation.**

The following shall be bound by law to support persons committed to or received as patients at the state hospitals, as that term is defined in subsection 3 of section 59-2001 of the General Statutes Supplement of 1939: Spouses, parents and children. The maintenance, care, and treatment of such person shall be paid by the guardian of his estate, or by any person bound by law to support him, or by the county. In case of payment by the county it may recover the amount paid by it from the estate of such person or from any person bound by law to support such person. The state may recover the sum of five dollars per week, to be applied on the maintenance, care, and treatment of a patient in a state hospital, from the estate of such person, or from any person bound by law to support such person. The state shall annually make written demand upon the spouse, parents, or children liable for the support of the patient for the amount claimed by the state to be due for the preceding year, and no action shall be commenced by the state against such spouse, parents, or children for the recovery thereof unless such action is commenced within three years after the date of such written demand. [L. 1939, ch. 180, § 170; L. 1941, ch. 284, § 18; April 17.]

**Source or prior law:** G. S. 1935, §§ 39-232, 39-233.

**Judicial Council, 1939:** Puts a limitation on recovery of claims by the state.

**Note:** Bartlett's Probate Practice, see § 962.

State's claim against estate of inmate held barred; history of section discussed. *In re Estate of Dotson*, 154 K. 562, 564, 566, 567, 119 P. 2d 518.

Annual demand on person secondarily liable prerequisite to recovery; construed. *In re Estate of Colclazier*, 157 K. 125, 126, 127, 128, 129, 130, 139 P. 2d 152.

Limitations apply to proceedings to collect under probate code. *In re Estate of Colclazier*, 157 K. 125, 126, 127, 128, 129, 130, 139 P. 2d 152.

Demand made on father as guardian insufficient to bind him personally. *In re Estate of Colclazier*, 157 K. 125, 126, 127, 128, 129, 130, 139 P. 2d 152.

Annual demand prerequisite to recovery although patient is a county one. *In re Estate of Caplinger*, 157 K. 131, 139 P. 2d 152.

**59-2007. Discharge from hospital; regulations.** Authority to discharge patients from state hospitals for the insane is vested in the board of administration, but may be delegated to the superintendent, under such regulations as the board shall adopt. Discharges may be made for any of the following reasons: (1) The patient is not insane. (2) He has been restored to capacity. (3) He is capable of caring for himself. (4) Friends of the patient request his discharge and in the judgment of the superintendent no evil consequences are likely to follow his discharge. (5) There is no prospect of further improvement and the room occupied by him is needed for others. Authority is also vested in the board to release patients on parole. No patient who is violent, dangerous or unusually troublesome or filthy shall be released or returned to any county not provided with suitable facilities for the proper care of the patient. No patient who has not been restored to capacity, or who is charged with a criminal offense, shall be released until at least ten days after notice that he is to be released has been transmitted to the probate court of patient's residence. The probate court on receipt of such information shall transmit the information to the county attorney. [L. 1939, ch. 180, § 171; July 1.]

**Source or prior law:** G. S. 1935, § 76-1224.

**Note:** Bartlett's Probate Practice, see § 965.

**Cross reference:** Jurisdiction, powers, and duties of state board of administration relating to state hospitals transferred to state department of social welfare, see G. S. 1947 Supp. § 75-3307.

**59-2008. Penalty for unlawful acts.** Whoever for a corrupt consideration or advantage, or through malice, shall make or join in making, or advise the making of any false petition, report, or verdict, in any proceeding for the commitment of a patient, or shall knowingly or willfully make any false representation for the purpose of causing such petition, report, or verdict to be made, shall be guilty of a misdemeanor, and punished by a fine of not

more than one thousand dollars, or by imprisonment in the county jail for not more than one year. [L. 1939, ch. 180, § 172; July 1.]

**Source or prior law:** G. S. 1935, § 76-1229.

**Note:** Bartlett's Probate Practice, see § 967.

### Article 21.—ADOPTION OF CHILDREN

**Cross references:** Adoption proceedings, see §§ 59-2277, 59-2278, 59-2279.

Proceedings for adoption of adult, see § 59-2280.

Venue of adoption proceedings, see § 59-2203.

**59-2101. Who may adopt.** Any adult, or husband and wife jointly, may adopt any minor or adult as his child in the manner herein provided; but one spouse cannot do so without the consent of the other. [L. 1939, ch. 180, § 173; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-105, 38-118.

**Judicial Council, 1939:** Residence of child in home of adopter required; this provision is found in most late revisions.

**Note:** Bartlett's Probate Practice, see § 974.

Cited in discussing when effect of court order for child support ceases. *Trunkey v. Johnson*, 154 K. 725, 730, 121 P. 2d 247.

Discussed; probate court lacks jurisdiction to annul marriage; appeal; no jurisdiction. *In re Estate of Dix*, 161 K. 364, 370, 168 P. 2d 537.

**59-2102. Written consent required.** Before any minor child is adopted, consent must be given to such adoption: (1) By the living parents of such child. (2) By the mother of an illegitimate child: *Provided*, If the father of such illegitimate child has acknowledged paternity and has assumed the duties of a parent, his consent shall also be required. (3) By one of the parents if the other has failed or refused to assume the duties of a parent for two consecutive years or is incapable of giving such consent. (4) By the legal guardian of the person of the child if both parents are dead or if they have failed or refused to assume the duties of parents for two consecutive years. (5) By the proper authority of any charitable institution or child welfare agency authorized by the laws of this state to place children for adoption when such institution or agency has acquired custody and legal control of the child for the period of minority. In all cases where the child sought to be adopted is over fourteen years of age and of sound intellect, the consent of such child must be given. Consent in all cases shall be in writing, acknowledged before an officer authorized by law to take acknowledgments. Minority of a parent shall not invalidate his consent. [L. 1939, ch. 180, § 174; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-106, 38-117.

**Judicial Council, 1939:** Consent of divorced parent to whom custody is not awarded is required because (1) upon death of parent having custody, custody goes to surviving parent, (2) right of natural parent to inherit from child adopted by another is cut off. Section makes it clear that minority of parent giving consent shall not invalidate it. Adults may be adopted.

**Note:** Bartlett's Probate Practice, see § 976.

Unmarried minor cannot legally surrender her child without probate court's consent (concurring opinion). *Wilson v. Kansas Children's Home*, 159 K. 325, 332, 154 P. 2d 137.

**59-2103. Effect of adoption.** Any child adopted as herein provided shall assume the surname of the person by whom the child is adopted, and shall be entitled to the same rights of person and property as a natural child of the person thus adopting the child. The person so adopting such child shall be entitled to exercise all the rights of a natural parent and be subject to all the liabilities of that relation. Upon such adoption all the rights of natural parents to the adopted child, including their right to inherit from such child, shall cease, except the rights of a natural parent who is the spouse of the adopting parent. [L. 1939, ch. 180, § 175; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-105, 38-107.

**Judicial Council, 1939:** Spouse of natural parent may adopt without natural parent relinquishing rights. "Heirs at law" omitted. *Nemo est haeres viventis*.

**Note:** Bartlett's Probate Practice, see § 980.

Cited in discussing when effect of court order for child support ceases. *Trunkey v. Johnson*, 154 K. 725, 730, 121 P. 2d 247.

**59-2104. Report of adoption.** The probate court shall report the adoption to the state registrar of vital statistics. [L. 1939, ch. 180, § 176; July 1.]

**Judicial Council, 1939:** This section is new. Found in most late revisions.

**Note:** Bartlett's Probate Practice, see § 983.

**Cross reference:** Birth certificate, see § 65-142a.

## Article 22.—PROBATE PROCEDURE

**Cross reference:** Referred to in § 59-904.

### GENERAL PROVISIONS

**59-2201. Pleading.** Every application in a probate proceeding, unless made during a hearing or trial, shall be by petition signed and verified by or on behalf of the petitioner. No defect in form shall impair substantial rights; and no defect in the statement of jurisdictional facts actually existing shall invalidate any proceedings. [L. 1939, ch. 180, § 177; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-208, 22-265, 22-301, 22-709, 22-710, 22-810, 22-828, 22-1312, 38-212, 39-201.

**Judicial Council, 1939:** The theory and practice of probate procedure in ordinary matters may be summarized as (1) application or petition to the court; (2) citation or notice of hearing; (3) hearing or trial; (4) order or decree; and (5) enforcement by execution or other proceedings. The numerous specific procedures in which the former statutes abound could not be converted into a general and uniform one without material changes. The foregoing citations to them and those to follow are in many instances to specific procedures while the draft provides for a general procedure.

**Note:** Bartlett's Probate Practice, see § 993.

Procedure and notice required for appointment of administrator *de bonis non* discussed. *Barrett v. McMannis*, 153 K. 420, 423, 110 P. 2d 774.

Creditor's claim not complying with § 59-2202 held sufficient to toll statute of limitations; amendment. *Roberts v. Setty*, 154 K. 505, 506, 119 P. 2d 539.

Procedure for allowance and payment of creditor's claim stated and applied; claim barred.

*In re Estate of Dotson*, 154 K. 562, 568, 119 P. 2d 518.

Procedure for filing and allowance of claims against ward's estate stated and applied. *Osment v. Trout*, 156 K. 120, 122, 131 P. 2d 640.

Claim filed under 1941 law, but not set for hearing, within nine months after notice to creditors barred. *In re Estate of Whittelsey*, 156 K. 157, 161, 131 P. 2d 911.

Mere filing of petition does not commence proceeding to probate; hearing; limitations. *In re Estate of Reed*, 157 K. 602, 605, 612, 142 P. 2d 824.

Applied in determining jurisdiction of court to vacate order after 30 days under § 59-2213.

*In re Estate of Lillibridge*, 161 K. 93, 104, 166 P. 2d 720.

Appointment of administrator *de bonis non* without notice is void; petition; hearing. *In re Estate of Oliver*, 162 K. 407, 413, 176 P. 2d 574.

**59-2202. Contents of petition.** Every petition in a probate proceeding shall state: (1) The name, residence, and address of the petitioner; (2) the interest of the petitioner and his right to apply to the court; (3) the jurisdictional facts; (4) the facts, in ordinary and concise language, showing that the petitioner is entitled to the relief sought; and (5) a prayer for relief. [L. 1939, ch. 180, § 178; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-301, 22-6a02, 22-804, 22-1312.

**Judicial Council, 1939:** This section refers to all petitions and provides for a concise statement of all necessary facts. The residence and address are important for the purpose of service of notice or citation. This section should be considered in connection with other sections relating to petitions for particular purposes.

**Note:** Bartlett's Probate Practice, see § 995.

**Cross references:** Petition for administration, see § 59-2219.

Petition for probate of a will, see § 59-2220.

Petition exhibiting demand against estate of decedent, see § 59-2237.

Petition for final settlement, see § 59-2247.

Petition to determine descent, see § 59-2250.

Petition for approval of trustees' final account, see § 59-2253.

Petition for guardianship, see § 59-2257.

Petition to restore incompetent to capacity, see § 59-2268.

Petition for commitment of insane persons, see § 59-2271.

Petition for adoption of child, see § 59-2277.

Petition to sell, lease, or mortgage real estate of decedent, see § 59-2303.

Petition of person under legal disability, see § 59-2204.

Petition to require public, charitable, religious or educational corporation or society to give bond or make inventory or reports, see § 59-1105.

Petition for transfer of proceeding to district court, see § 59-2402a.

Petition for execution of mortgage or mineral lease on homestead where one spouse insane, see § 59-2315.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 153 K. 420, 423, 110 P. 2d 774.

Creditor's claim not complying herewith held sufficient to toll statute of limitations; amendment. Roberts v. Setty, 154 K. 505, 506, 119 P. 2d 539.

**59-2203. Venue.** Proceedings for the probate of a will or for administration shall be had in the county of the residence of the decedent at the time of his death; if the decedent was not a resident of this state, proceedings may be had in any county wherein he left any estate to be administered. Proceedings for the appointment of a guardian of the person may be had in the county of the ward's residence or where he may be found. Proceedings for the appointment of a guardian of his estate shall be had in the county of the ward's residence; if he resides without this state, proceedings may be had in any county in which any of his property is situated. Proceedings for the administration of a partnership estate by the surviving partner shall be had in the county of the residence of the deceased partner at the time. If the deceased partner is a nonresident of the state the proceedings may be had in any county in which any of the partnership property is situated. Such proceedings first legally commenced shall extend to all of the property of the decedent or ward in this state. If proceedings are instituted in more than one county, they shall be stayed except in the county where first commenced until final determination of venue. If the proper venue is determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. Proceedings by a person seeking to adopt a child shall be had in the county of the residence of such person if he is a resident of the state. If such person is a nonresident of the state such proceedings shall be had in the county in which the child to be adopted resides, except that if the child is in the custody of an institution or agency authorized by the laws of this state to place children for adoption such proceedings shall be had in the county in which such institution or agency is located. [L. 1939, ch. 180, § 179; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-208, 22-301, 38-236, 39-201, 62-2002.

**Judicial Council, 1939:** Venue, rather than jurisdiction, is the proper term. See *In re Davidson's Estate*, 168 Minn. 147, 210 N. W. 40; *In re Martin's Estate*, 188 Minn. 408, 247 N. W. 515. This section in connection with provisions for notice and hearing avoids the difficulties that arose in *Ewing v. Mallison*, 65 K. 484, 70 P. 369; *Dresser v. Bank*, 101 K. 401, 168 P. 672; *Edgington v. Stine*, 135 K. 173, 10 P. 2d 27; and other cases. The matter is determined at the beginning before complications arise or loss results.

**Note:** Bartlett's Probate Practice, see § 997.

Section not affected by Wyandotte County public administrator statute; construed. *In re Estate of Summerfield*, 158 K. 830, 382, 383, 388, 147 P. 2d 759.

**59-2204. Commencement of proceeding.** A probate proceeding may be commenced in the probate court by filing a petition and causing it to be set for hearing. When a petition is filed the court shall fix the time and place for the hearing thereof. When a petition is filed for the appointment of a representative, the court may appoint the proposed representative or some other suitable person, with or without bond, to conserve the estate until a hearing is had and a representative is appointed. [L. 1939, ch. 180, § 180; July 1.]

**Judicial Council, 1939:** Every application to the court, except as stated, is a separate proceeding. See *In re Murphy*, (Ohio) 29 Nisi Prius, n. s., 183. Thus a proceeding to probate a will is a separate proceeding from one to sell real estate in the same estate.

**Note:** Bartlett's Probate Practice, see § 1004.

**Cross reference:** Transfer of certain matters to district court for hearing, see §§ 59-2402a, 59-2402b.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 153 K. 420, 422, 423, 424, 110 P. 2d 774.

Procedure for allowance and payment of creditor's claim stated and applied; claim barred. *In re Estate of Dotson*, 154 K. 562, 568, 119 P. 2d 518.

Order admitting will to probate not appealed from in time. *Swisher v. Bouse*, 155 K. 797, 799, 130 P. 2d 565.

Procedure for filing and allowance of claims against ward's estate stated and applied. *Osment v. Trout*, 156 K. 120, 122, 131 P. 2d 640.

Claim filed under 1941 law, but not set for hearing, within nine months after notice to creditors barred. *In re Estate of Whittelsey*, 156 K. 157, 159, 160, 161, 181 P. 2d 911.  
 Filing petition to sell real estate is commencement of proceeding. *Hicks v. King*, 157 K. 263, 267, 139 P. 2d 390.  
 Mere filing of petition does not commence proceeding to probate; hearing; limitations. *In re Estate of Reed*, 157 K. 602, 605, 612, 142 P. 2d 824.  
 Appointment of administrator *de bonis non* without notice is void; petition; hearing. *In re Estate of Oliver*, 162 K. 407, 413, 176 P. 2d 574.

**59-2205. Persons under disability.** The petition of a person under legal disability shall be by his guardian or next friend. When it is by his next friend the court may substitute the guardian, or any person, as the next friend. The court may appoint a guardian *ad litem* in any probate proceeding to represent and defend a party thereto under legal disability. [L. 1939, ch. 180, § 181; July 1.]

**Judicial Council, 1939:** The appointment of a guardian *ad litem* is discretionary; unnecessary in merely formal matters. If a contest is imminent or substantial rights are affected, one should be appointed.

**Note:** Bartlett's Probate Practice, see § 1008.

**Cross references:** Actions of infants under civil code, see G. S. 1935, § 60-406.  
 Homestead of insane spouse, see §§ 59-2314 to 59-2322.

"Next friend" may bring action in behalf of unadjudged incompetent. *In re Estate of Grove*, 158 K. 444, 448, 148 P. 2d 497.

Discussed; word "custodian" defined; order appointing guardian void; custody of child. *Parrington v. Armstrong*, 161 K. 720, 727, 171 P. 2d 299.

**59-2206. No abatement.** No probate proceedings commenced by a representative shall abate by reason of the termination of his authority. [L. 1939, ch. 180, § 182; July 1.]

**Judicial Council, 1939:** This section is new. No abatement where representative dies, resigns, or is removed. New representative begins where the old one left off.

**Note:** Bartlett's Probate Practice, see § 1010.

**59-2207. Venue of actions against fiduciaries.** Any fiduciary of any estate or ward may be sued in the district court of the county in which he was appointed, or in which he resides. If the fiduciary does not reside in the county of his appointment, service may be had upon him by serving a summons in the county of his residence. [L. 1939, ch. 180, § 183; July 1.]

**Source or prior law:** L. 1938, ch. 55, § 1.

**Note:** Bartlett's Probate Practice, see § 1012.

Probate court has exclusive original jurisdiction of wrongful death demand against deceased wrongdoer's estate. *Shively v. Burr*, 157 K. 336, 341, 346, 139 P. 2d 401.

**59-2208. Notice to be fixed by court.** When notice of any probate proceedings is required by law or deemed necessary by the court and the manner of giving the same shall not be directed by law, the court shall order notice to be given to all persons interested, in such manner and for such length of time as it shall deem reasonable. Any required notice may be waived in writing by any competent person or by any fiduciary. [L. 1939, ch. 180, § 184; July 1.]

**Judicial Council, 1939:** This and the following three sections cover the subject of notice in ordinary matters; the sections are so drawn as to displace the former "twenty-two situations arising in the administration of estates of decedents where notice or citation is required, no two of which number are identical as to the four essentials of notice; the kind of notice, the length of notice, the manner of service, and the persons who must be served." (Charles L. Hunt, in 1 K. Bar. Assn. Journal 228, February, 1933.) They also displace similar situations in the estates of wards. Judgments and decrees will be as free from collateral attack as judgments of the district court. Under this section the court may require notice to be given pursuant to § 59-2209.

**Note:** Bartlett's Probate Practice, see § 1014.

Procedure for filing and allowance of claims against ward's estate stated and applied. *Osment v. Trout*, 156 K. 120, 122, 131 P. 2d 640.

Probate court's original exclusive jurisdiction over claims against, and decedents' estates determined. *Egnatic v. Wollard*, 156 K. 843, 854, 855, 137 P. 2d 188.

Waiver of notice did not waive substantive rights. *In re Estate of Reed*, 157 K. 602, 613, 142 P. 2d 824.

Final settlement notice insufficient to vacate order allowing claim against estate. *In re Estate of Grove*, 158 K. 444, 451, 148 P. 2d 497.

Probate court order setting aside homestead without notice to creditor held void. *In re Estate of Schroeder*, 158 K. 783, 785, 150 P. 2d 173.



**59-2209. Notice by publication and mailing.** When notice of hearing is required by any provision of this act, by specific reference to this section, such notice shall be published once a week for three consecutive weeks in some newspaper of the county authorized by law to publish legal notices. The first publication shall be had within ten days after the order fixing the time and place of the hearing; and within seven days after first published notice the petitioner shall mail or cause to be mailed a copy of the notice to each heir, devisee, and legatee or guardian and ward, as the case may be, other than the petitioner, whose name and address are known to him. The date set for the hearing shall not be earlier than seven days nor later than fourteen days after the date of the last publication of notice. [L. 1939, ch. 180, § 185; L. 1943, ch. 214, § 1; June 28.]

**Judicial Council, 1939:** The substance of this section is taken from the Minnesota laws. See Minnesota Probate Code, sec. 188. Sections 59-2247, 59-2251, and 59-2304 require notice of hearing petition for final settlement, decree of descent, and for sale, lease (for more than three years or for mineral lease) to be given as required by this section. Section 59-2222 requires notice of hearing for probate of domestic will or for administration to be given as required by this section unless the court makes an order to the contrary. Under § 59-2246 the court may require notice of hearing for partial distribution to be given as required by this section. In all other cases, except notice of appointment (§ 59-709), sale of realty at public auction (§ 59-2308), and sale of personalty at public auction (§ 59-2243), where notice is required, it shall be given in such manner and to such persons as the court directs. The court may direct notice in such cases to be given pursuant to this section. Notice by mail is made obligatory by this section, as notice by publication of itself in the larger cities is practically no notice at all.

**Note:** Bartlett's Probate Practice, see § 1017.

**Cross reference:** Referred to in §§ 59-2222, 59-2246, 59-2247, 59-2251, 59-2304.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 503, 119 P. 2d 476.

Sale of minors' real estate without notice to minors is void; collateral attack. *Hicks v. King*, 157 K. 263, 265, 266, 139 P. 2d 390.

District court without appellate jurisdiction of will contest where will not objected to in probate court. *In re Estate of Grindrod*, 158 K. 345, 351, 148 P. 2d 278.

Final settlement notice insufficient to vacate order allowing claim against estate. *In re Estate of Grove*, 158 K. 444, 451, 148 P. 2d 497.

Section does not authorize dispensing with notice except where waived. *In re Estate of Oliver*, 162 K. 407, 413, 414, 176 P. 2d 574.

**59-2210. Form of notice.** Notice of any hearing, if such is required, shall be in substantially the following form:

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

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

[L. 1939, ch. 180, § 186; L. 1941, ch. 284, § 8; April 17.]

**Judicial Council, 1939:** The substance of this section is taken from the Florida laws. See Florida Probate Act, sec. 46. The form is so drawn that it may be used in all probate proceedings requiring notice, whether by publication, mailing, or personal service. Uniformity is procured.

**Note:** Bartlett's Probate Practice, see § 1019.

Discussed in holding uncontested order admitting will to probate unappealable. *In re Estate of Grindrod*, 158 K. 345, 351, 358, 363, 148 P. 2d 278.

Final settlement notice insufficient to vacate order allowing claim against estate. *In re Estate of Grove*, 158 K. 444, 451, 452, 148 P. 2d 497.

Written defenses filed sufficient to maintain appeal although no evidence introduced. *In re Estate of Pallister*, 159 K. 7, 10, 25, 29, 152 P. 2d 61.

Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 25, 152 P. 2d 61.

**59-2211. Proof of service and effect.** In all cases of notice by publication the newspaper shall be selected by the petitioner or other person required to give such notice. Proof by affidavit of service in all cases requiring notice, whether by publication, mailing, or otherwise, shall be filed before the hearing. No defect in any notice nor in the service thereof, not affecting the

substantial rights of the parties, shall invalidate any proceedings after such notice and the proof of service thereof shall have been approved by the court. [L. 1939, ch. 180, § 187; July 1.]

**Judicial Council, 1939:** First sentence: See John Hancock Mutual Life Insurance Co. v. Heinzl, 141 K. 540, 41 P. 2d 1046. Last sentence: See Thompson v. Bale, 23 K. 88; Johnson v. Clark, 18 K. 157.

**Note:** Bartlett's Probate Practice, see § 1021.

**59-2212. Hearings and rules of evidence.** Trials and hearings in probate proceedings shall be by the court unless otherwise provided by law. The determination of any issue of fact or controverted matter on the hearing of any probate proceedings shall be in accordance with the rules of evidence provided for civil cases by the code of civil procedure. [L. 1939, ch. 180, § 188; July 1.]

**Source or prior law:** G. S. 1935, § 22-216.

**Judicial Council, 1939:** Rules of evidence prescribed by civil code apply.

**Note:** Bartlett's Probate Practice, see § 1023.

**Cross reference:** Evidence under civil code, see G. S. 1935, ch. 60, art. 28.

Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 25, 152 P. 2d 61.

**59-2213. Judgments and their vacation.** No judgment or decree shall be rendered in a probate proceeding without proof. The court shall have control of its orders, judgments, and decrees for thirty days after the date of the rendition thereof. Thereafter such orders, judgments, and decrees may be vacated or modified as provided by section 605 [\*] of the code of civil procedure. [L. 1939, ch. 180, § 189; July 1.]

\* "Section 605" see G. S. 1935, § 60-3016.

**Source or prior law:** G. S. 1935, §§ 22-222, 22-915.

**Judicial Council, 1939:** First clause: One reason assigned by the courts for allowing collateral attacks upon probate decrees is that "the question may be decided by default, although the practice is a bad one, without hearing and without any actual notice." *Bank v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894, cited in *Ewing v. Mallison*, 65 K. 484, 70 P. 369. Second clause: Terms are abolished by § 59-211, and the court has control over its judgments, as of term time, for thirty days. The two-year statute of limitations applies as to vacation for fraud, see G. S. 1935, § 60-3016.

**Note:** Bartlett's Probate Practice, see § 1026.

Discussed; opponent of will should exhaust probate court remedies before perfecting appeal.

*In re Estate of Grindrod*, 158 K. 345, 252, 356, 362, 364, 148 P. 2d 278.

Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 25, 152 P. 2d 61.

Court has jurisdiction to vacate order after thirty days, when; section construed. *In re Estate of Lillibridge*, 161 K. 98, 98, 100, 101, 105, 166 P. 2d 720.

Void judgment may be vacated at any time. *In re Estate of Oliver*, 162 K. 407, 415, 176 P. 2d 574.

**59-2214. Taxation of costs and security therefor; poverty affidavit.** In all probate proceedings relating to the estate of a decedent or ward, the court shall tax the costs thereof against the estate unless otherwise provided by this act, or unless it appears that it would be unjust and inequitable to do so, in which event the court shall tax such costs or any part thereof against such party as it appears to the court is just and equitable in the premises. In case of any contested demand or matters the probate court may, in its discretion, require the claimant to give security for costs, or in lieu thereof file a poverty affidavit as provided in the code of civil procedure. [L. 1939, ch. 180, § 190; L. 1941, ch. 284, § 9; April 17.]

**Source or prior law:** G. S. 1935, §§ 22-701, 22-707, 22-716, 22-718, 22-720, 22-806, 22-811, 22-824.

**Note:** Bartlett's Probate Practice, see § 1030.

**Cross reference:** Taxation of certain costs when matter transferred to district court, see § 59-2402a.

**59-2215. Remission of court costs in small estates.** When the total assets of the estate of a decedent or ward do not exceed the sum of five hun-

dred dollars in value, the court may remit the court costs or any part thereof to said estate. [L. 1939, ch. 180, § 191; July 1.]

**Source or prior law:** G. S. 1935, § 22-905.

**Note:** Bartlett's Probate Practice, see § 1031.

**59-2216. Disclosure proceedings.** Upon the filing of a petition by a representative or any person interested in the estate, alleging that any person has concealed, converted, embezzled, or disposed of any property belonging to the estate of a decedent or ward, or that any person has possession or knowledge of any will or codicil of a decedent, or of any instruments in writing relating to the property of such decedent or ward, the court, upon such notice as it may direct, may order such person to appear before it for disclosure. Refusal to appear or submit to examination, or failure to obey any lawful order based thereon shall constitute contempt of court. [L. 1939, ch. 180, § 192; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-208, 22-211, 22-1301, 22-1302.

**Note:** Bartlett's Probate Practice, see § 1033.

**59-2217. Citation and attachment.** If any person neglects or refuses to perform an order or judgment of a probate court, other than for the payment of money, he shall be guilty of contempt of court; and the court shall issue a citation requiring him, at an early day therein to be appointed, to appear before the court and show cause, if any he has, why he should not be punished for contempt. If, after personal service of citation by an officer or other person, such person shall not on the day appointed appear before the court, or if it appears to the court that he is secreting himself to avoid the process of the court or is about to leave the county for that purpose, the court may issue an attachment commanding the officer to whom it is directed to bring such person before the court to answer for contempt. [L. 1939, ch. 180, § 193; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-208, 22-210, 22-319, 22-518, 22-519, 22-533, 22-610, 22-903, 22-908, 22-922, 38-221, 39-230, 62-2023.

**Judicial Council, 1939:** Punishment for contempt for failure to pay money might in some cases violate constitutional provisions against imprisonment for debt. See, for example, the early cases of *In re Bingham*, 32 Vt. 329; *Golson v. Holman*, 28 S. C. 53, 4 S. E. 811; *In re Blair*, 4 Wis. 522; *Hosack v. Rogers*, 11 Paige (N. Y.) 603.

**Note:** Bartlett's Probate Practice, see § 1038.

**59-2218. Executions.** Orders for the payment of money may be enforced by execution, or otherwise, as judgments in the district court are enforced. [L. 1939, ch. 180, § 194; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-720, 22-918, 22-922, 22-928, 22-1305, 39-230, 62-2023.

**Note:** Bartlett's Probate Practice, see § 1040.

**Cross reference:** Executions in district court see G. S. 1935, ch. 60, art. 34; also, G. S. 1947 Supp. §§ 60-3405 and 60-3494.

Mentioned; homestead devised to wife exempt from sale for decedent's debts. *In re Estate of Casey*, 156 K. 590, 599, 134 P. 2d 665.

#### PROCEEDINGS FOR PROBATE AND ADMINISTRATION

**Cross reference:** Joinder of probate and administration proceedings, see §§ 59-2281 to 59-2285.

**59-2219. Petition for administration.** A petition for administration shall state: (1) The name, residence, and date and place of death, of the decedent; (2) the names, ages, residences, and addresses of the heirs of the decedent so far as known or can with reasonable diligence be ascertained; (3) the general character and probable value of the real and personal property; (4) and the name, residence and address of the person for whom letters are prayed. [L. 1939, ch. 180, § 195; July 1.]

**Source or prior law:** G. S. 1935, § 22-301.

**Judicial Council, 1939:** Former law did not require petition, but it was the usual and better practice to file one.

**Note:** Bartlett's Probate Practice, see § 1051.

**Cross reference:** Contents of petition, see, also, § 59-2202.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 153 K. 420, 423, 110 P. 2d 774.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 503, 119 P. 2d 476.

Transfer of proceedings not authorized by §§ 59-2402a, 59-2402b; section applicable. *In re Estate of Duel*, 161 K. 593, 596, 171 P. 2d 271.

**59-2220. Petition for probate of will.** A petition for the probate of a will, in addition to the requirements of a petition for administration, shall state: (1) The names, ages, residences, and addresses of the devisees and legatees so far as known or can with reasonable diligence be ascertained; and (2) the name, residence, and address of the person, if any, named as executor. The will shall accompany the petition if it can be produced. A petition for the probate of a lost or destroyed will shall contain a statement of the provisions of the will. [L. 1939, ch. 180, § 196; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-208, 22-249, 22-301.

**Note:** Bartlett's Probate Practice, see § 1054.

**Cross reference:** Contents of petition, see, also, §§ 59-2202, 59-2219.

**Cited;** order admitting will to probate not prima facie evidence of validity. *In re Estate of Wallace*, 158 K. 633, 637, 149 P. 2d 595.

**59-2221. Who may petition for probate or administration.** Any person interested in the estate, after the death of the testator or intestate, may petition for the probate of his will or for administration. [L. 1939, ch. 180, § 197; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-208, 22-301.

**Note:** Bartlett's Probate Practice, see § 1056.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 503, 119 P. 2d 476.

Widow not estopped from claiming statutory share by offering will for probate. *In re Estate of Garden*, 158 K. 554, 564, 148 P. 2d 745.

**59-2222. Notice for probate or administration.** When a petition for the probate of a will or for administration is filed, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to section 185 [59-2209] unless the court shall make an order to the contrary. If notice is by order of the court not required to be given pursuant to section 185 [59-2209], the court shall order notice thereof to be given, such notice, unless waived, shall be given in such manner as the court shall direct. When the state is a proper party the notice shall be served upon the attorney general and the county attorney of the county. [L. 1939, ch. 180, § 198; L. 1941, ch. 284, § 15; April 17.]

**Source or prior law:** G. S. 1935, § 22-250.

**Note:** Bartlett's Probate Practice, see § 1058.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 153 K. 420, 423, 110 P. 2d 774.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 503, 119 P. 2d 476.

Mere filing of petition does not commence proceeding to probate; hearing; limitations. *In re Estate of Reed*, 157 K. 602, 604, 605, 612, 142 P. 2d 824.

District court without appellate jurisdiction of will contest where will not objected to in probate court. *In re Estate of Grindrod*, 158 K. 345, 351, 148 P. 2d 278.

**Cited;** order admitting will to probate not prima facie evidence of validity. *In re Estate of Wallace*, 158 K. 633, 637, 149 P. 2d 595.

Appointment of administrator *de bonis non* without notice is void; petition; hearing. *In re Estate of Oliver*, 162 K. 407, 413, 176 P. 2d 574.

**59-2223. Waiver of notice.** When a petition is filed for the probate of a will or for administration, if all the parties interested as heirs, devisees, and legatees enter their appearance in writing, waive the notice otherwise required, and consent to an immediate hearing, a hearing may in the discretion of the court be had as if notice had been given. [L. 1939, ch. 180, § 199; July 1.]

**Source or prior law:** G. S. 1935, § 22-250.

**Note:** Bartlett's Probate Practice, see § 1060.

Procedure and notice required for appointment of administrator *de bonis non* discussed. *Barrett v. McMannis*, 153 K. 420, 423, 110 P. 2d 774.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 503, 119 P. 2d 476.

Cited; appointment of administrator *de bonis non* without notice is void. *In re Estate of Oliver*, 162 K. 407, 414, 176 P. 2d 574.

**59-2224. Hearing for probate of will.** On the hearing of a petition for the probate of a will at least two of the subscribing witnesses shall be examined if they are within the state and competent and able to testify. Otherwise the court may admit the testimony of other witnesses to prove the capacity of the testator and the due execution of the will; and as evidence of such execution may admit proof of the handwriting of the testator and of the subscribing witnesses. Any heir, devisee, or legatee may prosecute or oppose the probate of any will. If the instrument is not allowed as the last will and if the estate should be administered, the court shall grant administration to the person or persons entitled thereto. [L. 1939, ch. 180, § 200; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-213, 22-217, 22-218, 22-251.

**Judicial Council, 1939:** Provision for contest by separate action in the district court omitted; for reasons, see article by Judge Robert T. Price in 7 Kan. Bar. Assn. Journal, pp. 42-45, August, 1938.

**Note:** Bartlett's Probate Practice, see § 1062.

**Cross reference:** Persons to whom administration granted, see § 59-705.

Burden of proof in proceedings to probate a will stated; prima facie case. *In re Estate of Peirano*, 155 K. 48, 49, 51, 122 P. 2d 772.

Order admitting will to probate appealable only when objection made in probate court. *In re Estate of Grindrod*, 158 K. 345, 351, 362, 148 P. 2d 278.

Cited; order admitting will to probate not prima facie evidence of validity. *In re Estate of Wallace*, 158 K. 633, 637, 638, 149 P. 2d 595.

Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 32, 152 P. 2d 61.

**59-2225. Hearing on will in opposition.** If, after a petition for the probate of a will has been filed, another instrument in writing purporting to be the last will or codicil shall be presented, proceedings shall be had for the probate thereof and thereupon the hearing on the petition theretofore filed shall be adjourned to the time fixed for the hearing of the subsequent petition. At such time proof shall be had upon all of such wills, codicils, and all matters pertaining thereto, and the court shall determine which of such instruments, if any, should be allowed as the last will. [L. 1939, ch. 180, § 201; July 1.]

**Judicial Council, 1939:** This section is new; provides a convenient method of consolidating hearings.

**Note:** Bartlett's Probate Practice, see § 1075.

Inconsistent will made subsequent to contractual will entitled to probate; inoperative. *In re Estate of Adkins*, 161 K. 239, 240, 248, 249, 250, 251, 167 P. 2d 618.

**59-2226. Will presented after probate of will.** If, after a will has been admitted to probate, a later instrument in writing purporting to be the last will or codicil shall be presented, proceedings shall be had for the probate thereof, but notice of the hearing thereof shall be given to the devisees and legatees named in the will admitted to probate in addition to the heirs, and the devisees and legatees named in the will or codicil presented for probate. If the court admits the later will or codicil to probate, the order so admitting such will or codicil shall operate as a revocation of the order admitting the earlier will to probate so far as is necessary to give effect to the later will or codicil. [L. 1939, ch. 180, § 202; July 1.]

**Judicial Council, 1939:** This section is new. The decisions of other states are in conflict on this question. See Freeman on Judgments, 5th ed., sec. 816, pp. 1734, 1735. The section will settle the question in this state. The substance of the section is taken from Ohio. See Ohio General Code, §§ 10504-27 and 10504-28.

**Note:** Bartlett's Probate Practice, see § 1077.

**59-2227. Granting of letters.** Upon admission of the will to probate, the court shall appoint an executor or administrator with the will annexed and

fix the amount of his bond as required by law, if such is required. If any person appointed does not qualify within ten days, the court may, with or without notice, grant letters to another or others. Upon filing of the oath and bond as required by law, letters shall issue. [L. 1939, ch. 180, § 203; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-302, 22-307.

**Judicial Council, 1939:** Subscribing to the oath is an acceptance of the trust.

**Note:** Bartlett's Probate Practice, see § 1079.

Procedure and notice required for appointment of administrator *de bonis non* discussed. *Barrett v. McMannis*, 153 K. 420, 424, 110 P. 2d 774.

**59-2228. Hearing for probate of lost will.** No lost or destroyed will shall be established unless it is proved to have remained unrevoked, nor unless its provisions are clearly and distinctly proved. When such will is established the provisions thereof shall be distinctly stated, certified by the court, and filed and recorded. Letters shall issue thereon as in the case of other wills. [L. 1939, ch. 180, § 204; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-249, 22-252, 22-253.

**Judicial Council, 1939:** Clarified in accordance with the decisions. See *Craig v. Craig*, 112 K. 472, 212 P. 72.

**Note:** Bartlett's Probate Practice, see § 1081.

**59-2229. Petition for admission of will probated elsewhere.** When a copy of a will executed outside this state and the probate thereof, duly authenticated, shall be presented by the executor or any other person interested in the will, with a petition for the probate thereof, the court shall fix the time and place for the hearing of the petition, notice of which shall be given to such persons and in such manner as the court shall direct. [L. 1939, ch. 180, § 205: July 1.]

**Source or prior law:** G. S. 1935, §§ 22-229, 22-230.

**Judicial Council, 1939:** See § 2 of uniform wills act, foreign probated.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 1086.

**59-2230. Hearing for admission of will probated elsewhere.** If, upon the hearing, it appears to the satisfaction of the court that the will has been duly proved and admitted to probate outside this state, and that it was executed according to the law of the place in which it was made, or in which the testator at the time resided or in conformity with the laws of this state, it shall be admitted to probate, which probate shall have the same force and effect as the original probate of a will. [L. 1939, ch. 180, § 206; July 1.]

**Source or prior law:** G. S. 1935, § 22-230.

**Judicial Council, 1939:** See § 3 of uniform wills act, foreign probated.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.  
Bartlett's Probate Practice, see § 1088.

**59-2231. Record of order setting aside will probated elsewhere.** If such will shall later be set aside according to the law of the place where it was originally proved and admitted to probate, a duly authenticated copy of the final decree setting said will aside may be admitted to record in this state in the same manner and with like notice as the authenticated copy of said will was admitted to probate, and when so admitted to record shall have the same force and effect as a like order as to domestic will, unless the heirs, devisees, and legatees thereunder shall have been determined under the provisions of section 225 [59-2249]. [L. 1939, ch. 180, § 207; July 1.]

**Source or prior law:** G. S. 1935, § 22-255.

**Note:** Bartlett's Probate Practice, see § 1090.

**59-2232. Hearing for administration.** On the hearing of a petition for administration and proof thereof, the court shall appoint an administrator and fix the amount of his bond, as required by law. If the person appointed neglects for ten days after written notice of such appointment, served as the court may direct, to file the oath and bond required by law, such neglect shall

be deemed a refusal to serve and the court, with or without notice, may appoint such other person or persons as may be entitled to administer such estate. [L. 1939, ch. 180, § 208; July 1.]

**Source or prior law:** G. S. 1935, § 22-313.

**Note:** Bartlett's Probate Practice, see § 1092.

**Cross reference:** Persons to whom administration granted, see § 59-705.

Procedure and notice required for appointment of administrator *de bonis non* discussed. Barrett v. McMannis, 153 K. 420, 423, 424, 110 P. 2d 774.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 503, 119 P. 2d 476.

#### ELECTION AND SELECTION

**59-2233. Election.** When a will is admitted to probate the court shall forthwith transmit to the surviving spouse a certified copy thereof. If such spouse has not consented to the will, as provided by law, such spouse shall be deemed to have renounced and refused to elect to take under the will unless he shall have filed in the probate court an instrument in writing to accept the provisions of such will within six months after probate of the will. If the said spouse files an election before the appraisalment of the estate is filed, the said election shall be set aside upon application of the spouse made within thirty days after the filing of the appraisalment. For good cause shown, the court may permit an election within such further time as the court may determine, if an application therefor is made within said period of six months. [L. 1939, ch. 180, § 209; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-246, 22-247.

**Judicial Council, 1939:** Eliminates provision requiring probate judge to give an *ex parte* construction of the will. The receipt of a copy is as beneficial as the reading of the will by the judge. Election should not be filed until after the appraisalment. If it is filed before the appraisalment it may be recalled. In case of contest, or for other reasons, extension of time may be had if asked for promptly.

**Note:** Bartlett's Probate Practice, see § 1101.

Inapplicable where widow made election *in pais* under former law. *Cox v. McBroom*, 155 K. 2, 6, 122 P. 2d 185.

Proceedings to probate; notice insufficient to sustain order holding contract of spouse constituted election. *In re Estate of Hoover*, 155 K. 647, 648, 651, 127 P. 2d 460. Affirmed: 156 K. 31, 33, 36, 131 P. 2d 917.

Code contemplates and provides for election after will admitted to probate. *In re Estate of Hoover*, 156 K. 31, 33, 36, 131 P. 2d 917.

Widow not estopped from claiming statutory share by offering will for probate. *In re Estate of Garden*, 158 K. 554, 564, 148 P. 2d 745.

Inapplicable where election *in pais* made under former law. *In re Estate of Anderson*, 159 K. 512, 518, 519, 156 P. 2d 860.

**59-2234. Election in case of incapacity.** If the surviving spouse shall be insane or incapacitated to act by reason of mental disability, it shall be the duty of the court to appoint some suitable person as commissioner, who shall ascertain the value of the provision made by will in lieu of the rights in the estate secured by statute and the value of the rights secured by statute. The commissioner shall make his verified written report to the court. Notice of the time and place of the hearing of the petition for the appointment of a commissioner and of the hearing on his report shall be given to the surviving spouse and his guardian, if any, and all other persons interested in such manner and for such length of time as the court shall direct. After the hearing on the report the court shall make such election for such spouse under disability as is more valuable or advantageous to the spouse, which election shall be deemed as effectual as if made by the spouse when fully competent. [L. 1939, ch. 180, § 210; July 1.]

**Source or prior law:** G. S. 1935, § 22-248.

**Judicial Council, 1939:** Provides for notice to interested parties. The words of former law "more valuable and advantageous" changed to "more valuable or advantageous." Reasons for the change are found in the very able opinion in *Van Steenwick v. Washburn*, 59 Wis. 483; see, also, the companion case of *In re Washburn*, 32 Minn. 336, 20 N. W. 324.

**Note:** Bartlett's Probate Practice, see § 1103.

**59-2235. Selection of homestead and allowances.** After the inventory and appraisalment have been filed, the surviving spouse, or in case there is

none, the children, may petition the court to set apart the homestead, and the personal property allowed in section 21 [59-403]. Such petition shall show the names, ages, and relationship of the parties, a description of the homestead claimed and of the personal property selected, and the appraised value thereof. The petition may be heard with or without notice. Upon proof of the petition, the court shall set apart such homestead and personal property. The property so set apart shall be delivered by the executor or administrator to the persons entitled thereto, and shall not be treated as assets in his custody, but the title to the homestead shall be included in the final decree of distribution. [L. 1939, ch. 180, § 211; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-103, 22-512, 22-514.

**Judicial Council, 1939:** A simple and inexpensive procedure for setting aside homestead and family allowances. The title of the homestead is included in the decree of final settlement, see §§ 59-2249 and 59-2251.

**Note:** Bartlett's Probate Practice, see § 1106.

**Cross references:** Exemption of homestead, see § 59-401; see, also, Kan. Const., art. 15, § 9. Execution of mortgages and mineral leases where one spouse insane, see §§ 59-2314 to 59-2322.

Cited; widow required to promptly select and describe land claimed as homestead. *Meech v. Grigsby*, 153 K. 784, 789, 113 P. 2d 1091.

Spouse cannot petition where valid postnuptial contract disposing of property exists. *Porter v. Axline*, 154 K. 87, 90, 114 P. 2d 849.

Probate court order setting aside homestead without notice to creditor held void. *In re Estate of Schroeder*, 158 K. 783, 785, 150 P. 2d 173.

Petition to set apart homestead not filed; effect; cotenants' rights, discussed. *Cole v. Coons*, 162 K. 624, 626, 634, 639, 643, 178 P. 2d 997.

**ALLOWANCE OF DEMANDS**

**59-2236. Notice to creditors.** The notice of appointment to be published by an executor or administrator shall be to the creditors, heirs, devisees, legatees, and all others concerned. It shall state the date of appointment and qualification, and shall notify the creditors to exhibit their demands against the estate within nine months from the date of the first published notice as provided by law, and that if their demands are not thus exhibited they shall be forever barred. [L. 1939, ch. 180, § 212; July 1.]

**Source or prior law:** G. S. 1935, § 22-329.

**Judicial Council, 1939:** Nonclaim statute (§ 59-2239) begins to run from date of first published notice rather than administration bond; there may be no administration bond.

**Note:** Bartlett's Probate Practice, see § 1111.

**Cross reference:** Executors and administrators to give notice of appointment, see § 59-709. Limitation in § 59-2239 applies to estates being administered when act took effect; republication of creditors' notice unnecessary. *Hurst v. Hammel*, 153 K. 827, 829, 830, 113 P. 2d 1045.

**59-2237. Exhibition of demands and hearing thereon; allowance without hearing, when.** Any person may exhibit his demand against the estate of a decedent by filing his petition for its allowance in the proper probate court. Such demand shall be deemed duly exhibited from the date of the filing of said petition. The petition shall contain a statement of all offsets to which the estate is entitled. The court shall from time to time as it deems advisable, and must at the request of the executor or administrator, or at the request of any creditor having exhibited his demand, fix the time and place for the hearing of such demands, notice of which shall be given in such manner and to such persons as the court shall direct. Any demand not exceeding fifty dollars, duly itemized and verified, may be allowed, if approved in writing by the executor or administrator, without compliance with any of the provisions of this act relating to petition, notice of hearing, or otherwise. The verification of any demand may be deemed prima facie evidence of its validity unless a written defense thereto is filed. Upon the adjudication of any demand, the court shall enter its judgment allowing or disallowing it. Such judgment shall show the date of adjudication, the amount allowed, the amount disallowed, and classification if allowed. Judgments relating to contingent de-



mands shall state the nature of the contingency. [L. 1939, ch. 180, § 213; L. 1941, ch. 284, § 10; L. 1943, ch. 213, § 3; June 28.]

**Source or prior law:** G. S. 1935, §§ 22-705, 22-708, 22-709, 22-711, 22-712, 22-713, 22-714, 22-715, 22-727, 22-913.

**Judicial Council, 1939:** Former elaborate procedure simplified. All applications are by petition (see § 59-2201) and the claimant files his petition with the account attached for its allowance. The reasons for the last sentence will be found in the following cases: *Hantzsch v. Massott*, 61 Minn. 361, 63 N. W. 1069; *Land & Improvement Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974; *State, ex rel., v. Probate Court*, 66 Minn. 246, 68 N. W. 1063; *Berryhill v. Peabody*, 72 Minn. 232, 75 N. W. 220.

**Note:** Bartlett's Probate Practice, see § 1113.

**Cross references:** Allowance and payment of demands against estate of wards, see § 59-2267.

Contents of petition, see, also, § 59-2202.

**Annotations to L. 1939, ch. 180, § 213:**

Cited in action against administrator on demand against estate; limitations, waiver. *Allen v. Turner*, 152 K. 590, 594, 106 P. 2d 715.

Mechanic's lien may be enforced in district court while administration pending. *Leidigh & Havens Lumber Co. v. Wyatt*, 153 K. 214, 218, 109 P. 2d 87.

Limitation in § 59-2239 applies to estates being administered when act took effect; republication of creditors' notice unnecessary. *Hurst v. Hammel*, 153 K. 827, 829, 830, 113 P. 2d 1045.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 503, 119 P. 2d 476.

Procedure for allowance and payment of creditor's claim stated and applied; claim barred. *In re Estate of Dotson*, 154 K. 562, 568, 119 P. 2d 518.

**Annotations to L. 1941, ch. 284, § 10:**

Claim filed, but not set for hearing, within nine months after notice to creditors barred. *In re Estate of Whittlesey*, 156 K. 157, 159, 160, 161, 162, 131 P. 2d 911.

Executor cannot waive bar of statute of limitations; pleading bar unnecessary. *In re Estate of Badger*, 156 K. 734, 137 P. 2d 198.

Probate court's original exclusive jurisdiction over claims against, and decedents' estates determined. *Egnatic v. Wollard*, 156 K. 843, 847, 854, 855, 137 P. 2d 188.

"Demands" is all inclusive; includes demand for specific performance; barred. *Burns v. Drake*, 157 K. 367, 368, 139 P. 2d 386.

1943 amendment operates prospectively not retrospectively. *In re Estate of Cramer*, 159 K. 693, 694, 695, 696, 158 P. 2d 383.

**59-2238. Exhibition by revivor of action.** Any action pending against any person at the time of his death, which by law survives against the executor or administrator, shall be considered a demand legally exhibited against such estate from the time such action shall be revived. Any action commenced against such executor or administrator after the death of the decedent shall be considered a demand legally exhibited against such estate from the time of serving the original process on such executor or administrator. The judgment creditor shall file a certified copy of the judgment in the proper probate court within thirty days after said judgment becomes final. [L. 1939, ch. 180, § 214; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-703, 22-704, 22-707.

**Judicial Council, 1939:** The last sentence is new.

**Note:** Bartlett's Probate Practice, see § 1119.

Cited in action against administrator on demand against estate; limitations, waiver. *Allen v. Turner*, 152 K. 590, 594, 106 P. 2d 715.

District court action to foreclose mechanic's lien held demand legally exhibited. *Leidigh & Havens Lumber Co. v. Wyatt*, 153 K. 214, 219, 109 P. 2d 87.

District court's jurisdiction over claims against decedent while administration pending discussed. *Grinnell State Bank v. Fellhoelter*, 153 K. 554, 557, 112 P. 2d 116.

Limitation in § 59-2239 applies to estates being administered when act took effect; republication of creditors' notice unnecessary. *Hurst v. Hammel*, 153 K. 827, 829, 830, 113 P. 2d 1045.

Construed with § 59-1303; district court's jurisdiction over claims against decedents' estates limited. *Egnatic v. Wollard*, 156 K. 843, 850, 852, 853, 854, 855, 856, 137 P. 2d 188.

Probate court has exclusive original jurisdiction of wrongful death demand against deceased wrongdoer's estate. *Shively v. Burr*, 157 K. 336, 340, 346, 139 P. 2d 401.

**59-2239. Nonclaim statute.** All demands, including demands of the state, against a decedent's estate, whether due or to become due, whether absolute or contingent, including any demand arising from or out of any statutory liability of decedent or on account of or arising from any liability as surety, guarantor, or indemnitor, and including the individual demands of executors and administrators, not exhibited as required by this act within

nine months after the date of the first published notice to creditors as herein provided, shall be forever barred from payment: *Provided*, That the provisions of the testator's will requiring the payment of a demand exhibited later shall control. No creditor shall have any claim against or lien upon the property of a decedent other than liens existing at the date of his death, unless an executor or administrator of his estate has been appointed within one year after the death of the decedent and such creditor shall have exhibited his demand in the manner and within the time herein prescribed. In any estate in the process of administration at the time of the taking effect of this act in which any executor or administrator has not been discharged, all demands, including demands of the state, whether due or to become due, whether absolute or contingent, including any demands arising from or out of any statutory liability of decedent or on account of or arising from any liability as surety, guarantor or indemnitor, and including the individual demands of executors and administrators, not exhibited as required by this act within nine months after the taking effect of this act shall be forever barred from payment by any such executor or administrator unless a provision of a will requires payment of any such demand exhibited later. This section applies to both domiciliary and ancillary administration. [L. 1939, ch. 180, § 215; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-702, 22-724, 22-725, 22-726, 22-727; L. 1937, ch. 218, § 4.

**Judicial Council, 1939:** Claims of the state included; see § 59-2006. A complete bar if no administration within one year, except as to liens of record prior to death. Time reduced to nine months that estate may be closed at end of year. A special nonclaim statute applicable to pending estates has been included.

**Note:** Bartlett's Probate Practice, see § 1122.

Section does not revive demands barred prior to July 1, 1939. *Siefkin v. Siefkin*, 150 K. 396, 397, 398, 400, 92 P. 2d 1005.

Time allowed for filing mentioned but not determined. *Woods v. Duval*, 151 K. 472, 482, 99 P. 2d 804.

Mechanic's lien may be enforced in district court while administration pending. *Leidigh & Havens Lumber Co. v. Wyatt*, 153 K. 214, 218, 109 P. 2d 87.

Section does not revive claims barred prior to July 1, 1939. *Grinnell State Bank v. Felthoelter*, 153 K. 554, 555, 112 P. 2d 116.

Limitation applies to estates being administered when act took effect; republication of creditors' notice unnecessary. *Hurst v. Hammel*, 153 K. 827, 829, 830, 113 P. 2d 1045.

Inapplicable to claim made by trustee against trust fund of estate. *In re Estate of Rutherford*, 154 K. 361, 363, 118 P. 2d 553.

Creditor's petition for appointment of administrator held filed too late; computation of time. *In re Estate of Dumback*, 154 K. 501, 504, 119 P. 2d 476.

Creditor's claim not complying with § 59-2202 held sufficient to toll nonclaim statute; amendment. *Roberts v. Setty*, 154 K. 505, 506, 507, 119 P. 2d 539.

"Exhibited" under 1941 law meant filing of petition and causing it to be set for hearing. *In re Estate of Dotson*, 154 K. 562, 568, 119 P. 2d 518.

Claim filed under 1941 law (since amended, see § 59-2237) but not set for hearing, within nine months after notice to creditors barred. *In re Estate of Whittelsey*, 156 K. 157, 158, 160, 131 P. 2d 911.

Contract for services to two promisors and survivor; claim against estate of promisor dying first unnecessary. *In re Estate of Henry*, 156 K. 788, 802, 137 P. 2d 222.

Probate court has exclusive original jurisdiction of wrongful death demand against deceased wrongdoer's estate. *Shively v. Burr*, 157 K. 336, 342, 139 P. 2d 401.

Includes demands arising from torts of decedent; concurring opinion. *Shively v. Burr*, 157 K. 336, 342, 139 P. 2d 401.

"Demands" is all inclusive; includes demand for specific performance; barred. *Burns v. Drake*, 157 K. 367, 369, 371, 139 P. 2d 386.

Statute starts to run from date of first published notice. *Hutchinson v. Pihlblad*, 157 K. 392, 394, 396, 139 P. 2d 835.

"All demands" defined; will contest held tantamount to demand; original exclusive jurisdiction of probate court. *In re Estate of Grindrod*, 158 K. 345, 354, 361, 148 P. 2d 278.

Scope of "demands" discussed in concurring opinion; claim to property. *Malcolm v. Larson*, 158 K. 423, 427, 428, 429, 148 P. 2d 291.

Demand of executor held "individual demand" and barred hereunder. *In re Estate of Charles*, 158 K. 460, 468, 148 P. 2d 765; 159 K. 228, 229, 154 P. 2d 117.

Amended petition on appeal; proceeding held will contest; action not barred. *In re Estate of Pallister*, 159 K. 7, 15, 152 P. 2d 61.

Demand must be filed in probate court, exception; payment of redemption money for son by father, barred; "demands" is all inclusive; claimant should have administrator appointed if estate not being administered. *Gantz v. Bondurant*, 159 K. 389, 393, 394, 395, 155 P. 2d 450.

Partnership claim held demand; barred; "demands" all inclusive; real estate. *In re Estate of Bourke*, 159 K. 553, 556, 560, 561, 156 P. 2d 501.

Action to partition real estate; failure to comply with section; action barred. *Simmons v. Gill*, 161 K. 123, 126, 166 P. 2d 574.  
 Applied; objections to final order of distribution filed too late. *In re Estate of Wenzel*, 161 K. 545, 552, 558, 170 P. 2d 618.  
 Right under antenuptial contract held "demand"; executor cannot waive limitation. *In re Estate of Hill*, 162 K. 385, 386, 392, 176 P. 2d 515.  
 If claim barred, duty of court to disallow it. *In re Estate of Hill*, 162 K. 385, 386, 392, 176 P. 2d 515.

**59-2240. Demands not due.** The court may allow demands, which are payable at a future day, at the then present value thereof, or the court may order the executor or administrator to retain in his hands sufficient funds to satisfy the same upon maturity; or if the heirs, devisees, or legatees offer to give bond to a creditor for the payment of his demand according to the terms thereof, the court may order such bond to be given in satisfaction of such demand. [L. 1939, ch. 180, § 216; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-718, 22-729; L. 1937, ch. 218, § 5.

**Note:** Bartlett's Probate Practice, see § 1128.

**59-2241. Hearing on contingent demands.** Contingent claims or demands against an estate shall be heard and determined by the court in accordance with the rights of the parties respecting such claims and in such manner as not to delay the closing of the estate, if that can be done with justice to the parties. [L. 1939, ch. 180, § 217; July 1.]

**Source or prior law:** L. 1937, ch. 218, § 6.

**Note:** Bartlett's Probate Practice, see § 1130.

Discussed; opponent of will should exhaust probate court remedies before perfecting appeal. *In re Estate of Grindrod*, 158 K. 345, 354, 148 P. 2d 278.

#### SALE OF PERSONAL PROPERTY

**Cross reference:** Sale of personal property, see, also, § 59-1407.

**59-2242. Sale of personal property.** A petition for the sale of personal property of a decedent may be heard with or without notice. The order of sale shall describe the property, and direct whether it shall be sold at private sale or public auction. No sale of personal property shall be made at private sale for less than three-fourths the appraised value. [L. 1939, ch. 180, § 218; July 1.]

**Source or prior law:** G. S. 1935, § 22-603.

**Note:** Bartlett's Probate Practice, see § 1141.

**59-2243. Notice of sale at public auction.** In all sales at public auction the executor or administrator shall give notice containing a description of the property to be sold, and stating the time, terms, and place of sale, by publication for ten days in some newspaper, authorized to publish legal notices, of the county where the sale is to be had. [L. 1939, ch. 180, § 219; July 1.]

**Source or prior law:** G. S. 1935, § 22-603.

**Judicial Council, 1939:** Same as execution sales in the district court, see G. S. 1935, § 60-3412. For construction of "ten days," see G. S. 1935, § 64-102.

**Notes:** See "Judicial Council, 1939" note under § 59-2209.  
 Bartlett's Probate Practice, see § 1143.

**59-2244. Credit may be given.** In all sales of personal property, the court may authorize credit to be given by the executor or administrator not exceeding one year from the date of his appointment and qualification. When such credit is given, notes or bonds with approved sureties shall be taken by the executor or administrator. [L. 1939, ch. 180, § 220; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-604, 22-605.

**Judicial Council, 1939:** Time limited to period of administration to prevent delay in closing estate.

**Note:** Bartlett's Probate Practice, see § 1145.

**59-2245. Report of sale.** Within thirty days after any public or private sale of personal property the executor or administrator shall make due report thereof verified by his affidavit to the probate court. Such report shall include

proof of proper notice of such sale, if at public auction, and if a clerk was employed for such sale, shall be accompanied by a sale bill signed by such clerk. [L. 1939, ch. 180, § 221; July 1.]

**Source or prior law:** G. S. 1935, § 22-609.

**Note:** Bartlett's Probate Practice, see § 1148.

#### SETTLEMENT AND DETERMINATION OF DESCENT

**59-2246. Partial distribution.** A petition for partial distribution may be heard without notice, or the court may require notice to be given pursuant to section 185 [59-2209]. When such notice is required or given, a decree of partial distribution shall be final as to the persons entitled to such distribution and as to their respective proportions of the whole estate, unless such decree includes only specific legacies. [L. 1939, ch. 180, § 222; July 1.]

**Source or prior law:** G. S. 1935, § 22-924.

**Judicial Council, 1939:** In some cases it is safe to make partial distribution without an adjudication; in others it is not. This section is a protection to the heirs, devisees, and legatees as to expense, and to the executor or administrator as to liability for erroneous distribution.

**Note:** Bartlett's Probate Practice, see § 1151.

Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.

Probate court has exclusive, original jurisdiction to determine validity of will clause. *Asendorf v. Asendorf*, 162 K. 310, 313, 176 P. 2d 535.

**59-2247. Petition and notice of final settlement.** The petition of an executor or an administrator for a final settlement and accounting, and a determination of the persons entitled to the estate of a decedent, shall, in addition to other requirements, contain: (1) A statement of the account; (2) the names, residences, and addresses of the heirs, devisees, and legatees; (3) a description of the real estate and the interest of the decedent therein at the time of his death; and (4) the nature and character of the respective claims of the heirs, devisees, and legatees of the decedent. Notice of the hearing thereof shall be given pursuant to section 185 [59-2209]. [L. 1939, ch. 180, § 223; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-904, 22-924.

**Note:** Bartlett's Probate Practice, see § 1153.

**Cross reference:** Contents of petition, see, also, § 59-2202.

Probate court has jurisdiction to distribute estate according to family settlement contract.

*Erwin v. Erwin*, 153 K. 703, 708, 113 P. 2d 349.

Probate judge only person who can limit extent of final settlement hearing. *In re Estate of Eyth*, 157 K. 268, 273, 139 P. 2d 378.

Final settlement decree unappealed is binding adjudication of devisee's interest in real estate. *Bitzer v. Smith*, 158 K. 83, 87, 145 P. 2d 148.

Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.

Probate court has exclusive, original jurisdiction to determine validity of will clause. *Asendorf v. Asendorf*, 162 K. 310, 313, 176 P. 2d 535.

Probate court has exclusive jurisdiction to distribute estate according to family settlement, when.

*Down v. Austenfeld*, 162 K. 562, 565, 178 P. 2d 201.

Petition to set apart homestead not filed; effect; cotenants' rights; discussed. *Cole v. Coons*, 162 K. 624, 640, 178 P. 2d 997.

**59-2248. Determination of advancements.** All questions as to advancements made, or alleged to have been made, by the intestate to any heir shall be heard and determined by the court at the time of settlement, and every such advancement shall be specified in the decree distributing and assigning the estate. For the purpose of determining what proportion any one who has received an advancement is entitled to receive from the estate, the court shall ascertain the value of the entire residue of such estate, by ordering an appraisement or in such other manner as it may deem best. [L. 1939, ch. 180, § 224; July 1.]

**Judicial Council, 1939:** Provides method of determining advancement, including when there is realty and advancement amounts to more than share of personalty. See *White v. White*, 41 K. 556, 21 P. 604.

**Note:** Bartlett's Probate Practice, see § 1155.

**Cross reference:** Advancements, see, also, § 59-510.

Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.  
 Probate court has exclusive, original jurisdiction to determine validity of will clause. *Asendorf v. Asendorf*, 162 K. 310, 313, 176 P. 2d 535.

**59-2249. Hearing and final decree.** On the hearing, unless otherwise ordered, the executor or administrator shall, and other persons may, be examined relative to the account and the distribution of the estate. If all the taxes payable by the estate have been paid so far as there are funds to pay them and the account is correct, it shall be settled and allowed; if the account is incorrect, it shall be corrected and then settled and allowed. Upon such settlement and allowance the court shall determine the heirs, devisees, and legatees entitled to the estate and assign the same to them by its decree. The decree shall name the heirs, devisees, and legatees, describe the property, and state the proportion or part thereof to which each is entitled. Said decree shall be binding as to all the estate of the decedent, whether specifically described in the proceedings or not. In the estate of a testate decedent, no heirs need be named in the decree unless they have, as such, an interest in the estate. No final decree shall be entered until after the determination and payment of inheritance taxes. When the final decree includes real estate, such decree, or a certified copy thereof, may be entered on the transfer record of the county clerk of the proper county. [L. 1939, ch. 180, § 225; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-904, 22-906, 22-925; L. 1937, ch. 219, § 5.

**Judicial Council, 1939:** Provides for determination of heirs, devisees, and legatees. See *McVeigh v. First Trust Co.*, 140 K. 79, 34 P. 2d 571; *First Colored Baptist Church v. Caldwell*, 138 K. 581, 27 P. 2d 237, 139 K. 45, 30 P. 2d 144.

**Note:** *Bartlett's Probate Practice*, see § 1157.

**Cross references:** County clerk's transfer record, see G. S. 1935, § 67-239. Referred to in § 59-2231.

Probate court has jurisdiction to distribute estate according to family settlement contract. *Erwin v. Erwin*, 153 K. 703, 708, 113 P. 2d 349.  
 Cited; widow required to promptly select and describe land claimed as homestead. *Meech v. Grigsby*, 153 K. 784, 789, 113 P. 2d 1091.  
 Discussed in determining probate court's equitable jurisdiction; exclusive jurisdiction. *Foss v. Wiles*, 155 K. 262, 266, 124 P. 2d 438.  
 Probate court has exclusive jurisdiction to enforce decedent's oral contract to convey or bequeath real estate. *Dixon v. Fluker*, 155 K. 399, 403, 404, 125 P. 2d 364.  
 Final decree of distribution examined and found to conform herewith. *In re Estate of Casey*, 156 K. 590, 593, 595, 134 P. 2d 665.  
 Probate judge only person who can limit extent of final settlement hearing. *In re Estate of Eyth*, 157 K. 268, 273, 139 P. 2d 378.  
 Conclusive effect of final settlement decree; construction of will; designation of devisees. *Bitzer v. Smith*, 158 K. 83, 87, 145 P. 2d 148.  
 Final settlement decree unappealed is binding adjudication of devisee's interest in real estate. *Bitzer v. Smith*, 158 K. 83, 87, 145 P. 2d 148.  
 Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.  
 Probate court's exclusive, original jurisdiction over decedents' estates and settlements defined. *Herbel v. Nuss*, 153 K. 376, 379, 147 P. 2d 735.  
 Probate court has exclusive, original jurisdiction to determine validity of will clause. *Asendorf v. Asendorf*, 162 K. 310, 313, 176 P. 2d 535.  
 Probate court has exclusive jurisdiction to distribute estate according to family settlement, when. *Down v. Austenfeld*, 162 K. 562, 565, 178 P. 2d 201.  
 Petition to set apart homestead not filed; effect; cotenants' rights, discussed. *Cole v. Coons*, 162 K. 624, 634, 640, 644, 178 P. 2d 997.

**59-2250. Proceedings to determine descent.** Whenever any person has been dead for more than one year and has left property, or any interest therein, and no will has been admitted to probate nor administration had in this state, or in which administration has been had without a determination of the descent of such property, any person interested in the estate, or claiming an interest in such property, may petition the probate court of the county of the decedent's residence, or of any county wherein real estate of the decedent is situated, to determine its descent: *Provided*, Nothing in this act shall be construed to divest district courts of power to determine descent in any proper proceeding. [L. 1939, ch. 180, § 226; L. 1941, ch. 284, § 11; April 17.]

**Judicial Council, 1939:** This section is new. Provides a simple and inexpensive method of determining heirship where no administration is had. Practically all the late revisions, and many other jurisdictions, have a similar provision.

**Note:** Bartlett's Probate Practice, see § 1160.

**Cross references:** Contents of petition, see § 59-2202.

Joinder of proceedings, see § 59-2282.

Judicial estoppel by descent decree mentioned but not determined. *Gantz v. Bondurant*, 159 K. 389, 391, 393, 155 P. 2d 450.

**59-2251. Decree of descent.** Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given pursuant to section 185 [59-2209]. Upon proof of the petition, the court shall allow the same and enter its decree assigning the property to the persons entitled thereto at the time of the decedent's death pursuant to the law of intestate succession then in force. No decree shall be entered until after the determination and payment of inheritance taxes. [L. 1939, ch. 180, § 227; L. 1941, ch. 284, § 12; April 17.]

**Judicial Council, 1939:** This section is new. See "Judicial Council, 1939" note to § 59-2250.

**Note:** Bartlett's Probate Practice, see § 1162.

**Cited;** widow required to promptly select and describe land claimed as homestead. *Meech v. Grigsby*, 153 K. 784, 789, 113 P. 2d 1091.

Judicial estoppel by descent decree mentioned but not determined. *Gantz v. Bondurant*, 159 K. 389, 391, 393, 155 P. 2d 450.

**59-2252. Opening judgment.** A party against whom a judgment or decree has been rendered in proceedings to determine the persons entitled to the real property of a decedent, without other service than publication in a newspaper, may at any time within one year after the date of the judgment or decree have the same opened or set aside and be let in to defend. Before such judgment or decree shall be opened or set aside the respondent shall give notice to the adverse party of his intention to make such application, and shall file a full answer to the petition or other pleadings, pay all costs of such proceeding if the court require them to be paid, and shall make it appear to the satisfaction of the court, by affidavit, that during the pendency of the proceeding he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or decree sought to be opened or set aside, which in consequence of said judgment or decree shall have passed to a purchaser in good faith, shall not, after the expiration of six months, be affected by any proceedings under this section. The adverse party, on the hearing of an application to open or set aside such judgment or decree as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of such proceeding the respondent had notice thereof in time to appear in court and make his defense. [L. 1939, ch. 180, § 228; July 1.]

**Judicial Council, 1939:** See G. S. 1935, § 60-2530, after which this section is patterned.

**Note:** Bartlett's Probate Practice, see § 1164.

**Cross reference:** Reopening of estates, when, see § 59-1501.

Discussed; opponent of will should exhaust probate court remedies before perfecting appeal. *In re Estate of Grindrod*, 158 K. 345, 355, 365, 148 P. 2d 278.

#### TRUSTEES' ACCOUNTING PROCEEDINGS

**Cross reference:** Accounting of trustees, see ch. 59, art. 16.

**59-2253. Petition and notice of hearing on account.** When any intermediate account of a trustee is filed without a petition of the trustee for a hearing thereon, a copy of the account shall be transmitted to each known beneficiary and proof of such transmission shall be filed with the court. The trustee or any beneficiary may file a petition for the approval of the account, and any beneficiary may file a petition for the disapproval thereof. The trustee shall, subject to the provisions of sections 126 [59-1607] and 127 [59-1608], file a petition for the approval of a final account. When any such petition is filed, notice of the hearing shall be given to the trustee and each known beneficiary, other than the petitioner, for such time and in such manner as the court deems reasonable. [L. 1939, ch. 180, § 229; July 1.]

**Judicial Council, 1939:** Taken from uniform trustees' accounting act and modified to conform to general procedure of ch. 59, art. 22.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.

Bartlett's Probate Practice, see § 1171.

**Cross reference:** Contents of petition, see § 59-2202.

**59-2254. Representation.** Any beneficiary who is a minor or otherwise incompetent, and also all possible unborn or unascertained beneficiaries may be represented in a trust accounting by living competent members of the class to which they do or would belong, or by a guardian *ad litem*, as the court deems best. [L. 1939, ch. 180, § 230; July 1.]

**Judicial Council, 1939:** Taken from uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.

Bartlett's Probate Practice, see § 1172.

**Cross reference:** Homestead of insane spouse, see §§ 59-2314 to 59-2322.

**59-2255. Hearing on account.** The court shall, after hearing the petition, act upon the account, and discharge the trustees if the account is an approved distribution account. The court may disapprove any account and surcharge the trustee for any loss caused by a breach of trust committed by him. [L. 1939, ch. 180, § 231; July 1.]

**Judicial Council, 1939:** Taken from uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.

Bartlett's Probate Practice, see § 1173.

**59-2256. Effect of court approval.** The approval by the court of a trustee's account after due notice or representation as provided in this act, shall relieve the trustee and his sureties from liability to all beneficiaries then known and in being, or who thereafter become known or in being, for all the trustee's acts and omissions which are fully and accurately described in the account, including the then investment of trust funds. [L. 1939, ch. 180, § 232; July 1.]

**Judicial Council, 1939:** Taken from uniform trustees' accounting act.

**Notes:** Uniform Laws Annotated, see 9 U. L. A.

Bartlett's Probate Practice, see § 1174.

#### GUARDIANSHIP PROCEEDINGS

**Cross references:** Guardianship, see, also, ch. 59, art. 18.

Application to estates of convicts, see § 59-1902.

**59-2257. Petition for guardianship.** A petition for the appointment of a guardian shall state: (1) The name, residence, and address of the person for whom a guardian is sought; (2) the date and place of his birth; (3) if he is a minor, the names, residences, and addresses of his parents, or if the parents are dead or have abandoned the minor, the names, residences, and addresses of his custodians and of any person named as testamentary guardian; (4) if he is unmarried and not a minor, the names, residences and addresses of his nearest kindred; (5) if he is married, the name, residence, and address of his spouse; (6) the reasons for the guardianship; (7) the general character and probable value of his real and personal property; (8) whether the proposed appointment is for his person or estate, or both; and (9) the names, residences, and addresses of the proposed guardians. [L. 1939, ch. 180, § 233; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-201, 62-2003.

**Note:** Bartlett's Probate Practice, see § 1181.

**Cross reference:** Contents of petition, see, also, § 59-2202.

Petition insufficient to confer jurisdiction on probate court; notice; hearing. *Johnson v. Best*, 156 K. 668, 671, 672, 135 P. 2d 896.

Partnership claim held demand; barred; "demands" all inclusive; real estate. *In re Estate of Bourke*, 159 K. 553, 156 P. 2d 501.

Word "custodian" defined; order appointing guardian void; custody of child determined. *Paronto v. Armstrong*, 161 K. 720, 726, 171 P. 2d 299.

**59-2258. Who may petition for guardianship.** Any person may petition for the appointment of a guardian for the person or estate of any person believed to be subject to guardianship; but the petition of any of the following shall have priority in the order named over that of any other person: (1) A

minor over the age of fourteen years, if of sound intellect; (2) natural guardians; and (3) testamentary guardians. [L. 1939, ch. 180, § 234; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-201, 62-2002.

**Note:** Bartlett's Probate Practice, see § 1183.

Petition insufficient to confer jurisdiction on probate court; notice; hearing. *Johnson v. Best*, 156 K. 668, 671, 135 P. 2d 896.

**59-2259. Notice for guardianship.** If a petition for guardianship is made by the person for whom guardian is sought, or by a parent, custodian, or testamentary guardian, the court may hear the same with or without notice. In all other cases, personal service shall be made upon the ward in such manner and for such period of time as the court shall direct. If he has a spouse, custodian, testamentary or natural guardian, notice shall be given to such persons and to such of the nearest kindred and in such manner as the court may direct. If he is an inmate of any hospital, notice by mail shall be given to the superintendent thereof. If he is a nonresident of the state, notice shall be given in such manner and to such persons as the court shall deem reasonable. [L. 1939, ch. 180, § 235; July 1.]

**Source or prior law:** G. S. 1935, § 39-202.

**Note:** Bartlett's Probate Practice, see § 1185.

Petition insufficient to confer jurisdiction on probate court; notice; hearing. *Johnson v. Best*, 156 K. 668, 671, 135 P. 2d 896.

Word "custodian" defined; order appointing guardian void; child's custody determined. *Paronto v. Armstrong*, 161 K. 720, 726, 171 P. 2d 299.

**59-2260. Examination and report prior to hearing; requirements for hearing.** Prior to a hearing, and as a part thereof before a jury or by a commission it shall be lawful for the probate judge, in his discretion, to refer the person suspected of insanity or mental incompetency to the psychiatric receiving ward of the school of medicine of the university of Kansas or to the Larned state hospital, the Topeka state hospital, Osawatome state hospital or to a physician learned in psychiatric medicine and the necessary professional staff thereof for a complete physical and mental examination and for treatment. Upon completion of such examination and treatment it shall be the duty of the staff officers of such medical school hospital or psychiatric physician to make a report to the probate judge who referred the patient for examination giving findings, conclusions and recommendations. Such report shall be made available to, and considered by the jury or commission, as the case may be. At the hearing of a petition for the commitment of an insane person and the appointment of a guardian of such person or his estate, or for the appointment of a guardian of an incompetent person or his estate, such person shall have the right to be present and shall be represented by counsel. If none is selected in his behalf, the court shall appoint suitable counsel to represent him. The court shall determine whether the presence of such person at the hearing is required, but the hearing shall not proceed until the person is represented by counsel. If such person has been duly adjudged insane or incompetent by any court of competent jurisdiction, in this state or elsewhere, a duly authenticated copy of said adjudication shall be prima facie evidence of his insanity or incompetency, and where such adjudication is relied upon for the appointment of a guardian in this state, the court may hear and determine the cause without a trial by jury or a hearing by commission. [L. 1939, ch. 180, § 236; L. 1943, ch. 213, § 4; L. 1945, ch. 236, § 2; L. 1947, ch. 314, § 2; June 30.]

**Source or prior law:** G. S. 1935, §§ 39-203, 76-1207, 76-1211.

**Note:** Bartlett's Probate Practice, see § 1187.

**Cross reference:** Examinations, see, also, §§ 59-2002, 59-2271, 59-2276a.

**59-2261. Trial by jury; selection of jurors.** Trial by jury, if a demand therefor is made by an interested party or on his behalf prior to the hearing, shall be had in a proceeding for the commitment of an insane person and the appointment of a guardian thereof, or for the appointment of a guardian of an incompetent person. The jury shall consist of six persons, one of whom shall be a duly licensed doctor of medicine to be selected by the court.



The other members of the jury shall be selected as follows: The court shall write in a panel the names of fifteen persons, citizens of the county, from which the person charged, or his attorney, must strike one name; the complainant, or his attorney, one; and so on alternately until each shall have stricken five names, and the remaining five, together with the doctor of medicine selected by the court, shall constitute the jury to try the cause; and if either party neglect or refuse to aid in striking the jury, the court shall strike the same in behalf of such party. In the event of the disqualification for cause of any juror so selected the court shall summon sufficient talesmen to complete the panel. The trial shall proceed and a verdict returned in accordance with the rules prescribed by the code of civil procedure. [L. 1939, ch. 180, § 237; L. 1941, ch. 284, § 13; April 17.]

**Source or prior law:** G. S. 1935, §§ 39-203, 76-1207, 76-1211.

**Note:** Bartlett's Probate Practice, see § 1189.

**59-2262. Form of verdict of insanity.** The verdict in insanity proceedings shall be in substantially the following form:

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

[L. 1939, ch. 180, § 238; July 1.]

**Source or prior law:** G. S. 1935, § 76-1211.

**Note:** Bartlett's Probate Practice, see § 1191.

**59-2263. Form of verdict of incompetency.** The verdict in incompetency proceedings shall be in substantially the following form:

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

[L. 1939, ch. 180, § 239; July 1.]

**Source or prior law:** G. S. 1935, § 39-203.

**Note:** Bartlett's Probate Practice, see § 1192.

**59-2264. Hearing by commission.** Unless a jury shall have been demanded, the court shall appoint a commission of two duly licensed doctors of medicine to assist at the hearing. The commissioners and the court shall make and file a report of their findings. In case the hearing is for the commitment of an insane person, the report shall be in duplicate and on such forms as may be prescribed by the state board of administration, one of which shall be filed with the court and the other shall be transmitted to the board of administration. [L. 1939, ch. 180, § 240; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-203, 39-236, 76-1208, 76-1209.

**Note:** Bartlett's Probate Practice, see § 1193.

**Cross reference:** Jurisdiction, powers, and duties of state board of administration relating to state hospitals transferred to state department of social welfare, see G. S. 1947 Supp. § 75-3307.

**59-2265. Judgment and appointment.** The court may render judgment on the verdict or findings, set them aside, order another trial or hearing, or dismiss the proceedings. If the court adjudges that the person is insane or incompetent and that a guardian ought to be appointed, the court shall appoint one or two suitable persons as guardians of the person, or of estate, or of both. Upon the filing of a bond in such amount as the court may direct and an oath according to law, letters of guardianship shall be granted. If there is no property, the court may waive the filing of a bond, but if the guardian receives or becomes entitled to any property, he shall immediately file a report thereof and a bond in such amount as the court may direct. If a guardian dies, resigns,

or is removed, the court, with or without notice, may appoint a successor. [L. 1939, ch. 180, § 241; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-203, 39-205, 39-206, 62-2003, 62-2004, 76-1211, 76-1215.

**Judicial Council, 1939:** Provides for waiver of bond if there is no personal property.

**Note:** Bartlett's Probate Practice, see § 1194.

**59-2266. Transfer of venue.** When the residence of a ward shall have been changed to another county in the state and it is for the best interest of the ward or his estate, the venue may be transferred to such other county. Upon the filing of a petition by any person interested in the ward or in his estate, the court shall fix the time and place for the hearing thereof, notice of which shall be given to such persons and in such manner as the court shall direct. Upon proof of the petition and that a transfer of venue is for the best interest of the ward or his estate, and upon the settlement and allowance of the guardian's accounts to the time of such hearing the court, after making and retaining a true copy of the essential files, not previously recorded, shall transmit the original file to the court of such other county in which all subsequent proceedings shall be had. [L. 1939, ch. 180, § 242; July 1.]

**Judicial Council, 1939:** This section is new. A parent with his child (under guardianship) moves from Cheyenne to Cherokee county; this section furnishes a convenient court. See *Connell v. Moore*, 70 K. 88, 94, 78 P. 164; *Foran v. Healy*, 73 K. 633, 637-639, 85 P. 751. The court to which the guardianship is transferred should not be required to go over accounts for the period when it was under the supervision of the first court. A court in many cases knows more than is shown by the record.

**Note:** Bartlett's Probate Practice, see § 1195.

**59-2267. Allowance and payment of demands.** Any person having a demand, other than tort, against the estate of a ward, or against his guardian as such, may present it to the probate court for determination, and upon proof thereof procure an order for its allowance and payment. [L. 1939, ch. 180, § 243; July 1.]

**Judicial Council, 1939:** This section is new. A simple permissive method for the presentation, allowance, and payment of claims. Compare *Harter v. Miller*, 67 K. 468, 73 P. 74, with *Hill v. Honeywell*, 65 K. 349, 69 P. 334.

**Note:** Bartlett's Probate Practice, see § 1197.

Procedure for filing and allowance of claims against ward's estate stated and applied. *Osment v. Trout*, 156 K. 120, 122, 131 P. 2d 640.

Probate court has exclusive original jurisdiction of wrongful death demand against deceased wrongdoer's estate. *Shively v. Burr*, 157 K. 336, 342, 139 P. 2d 401.

**59-2268. Restoration to capacity.** Any person who has been adjudged insane or incompetent as herein provided, or his guardian, or any other person interested in him or his estate may petition the court in which he was so adjudicated or to which the venue has been transferred to be restored to capacity: *Provided*, A petition for the restoration to capacity of a patient committed to a state hospital shall not be filed within six months after the patient's admission thereto nor oftener than once every six months. Upon the filing of such petition, the court shall fix the time and place for the hearing thereof, notice of which shall be given to the superintendent thereof if the patient is under the control of or has been discharged from a state hospital, and to such other persons and in such manner as the court may direct. Any person may oppose such restoration. Upon hearing of the petition and proof that such person has been restored to capacity and is capable of managing his person and estate, the court shall adjudge him restored to capacity. If the venue has been transferred no proceedings need be had in the court from which the venue was transferred. [L. 1939, ch. 180, § 244; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-226, 39-227, 76-1225, 76-1226.

**Note:** Bartlett's Probate Practice, see § 1199.

**Cross reference:** Contents of petition, see § 59-2202.

**59-2269. Notice for accounting.** The court may on its own motion and shall upon the petition of the guardian or any person interested in the ward or his estate fix the time and place for the hearing of any account, notice of which shall be given to such persons and in such manner as the court shall

direct. Whenever any funds have been received from the veterans' administration, notice by mail shall be given to the regional office having charge thereof. [L. 1939, ch. 180, § 245; July 1.]

**Source or prior law:** G. S. 1935, §§ 62-2005, 62-2015.

**Judicial Council, 1939:** Section made general.

**Note:** Bartlett's Probate Practice, see § 1200.

**59-2270. Hearing on accounting.** On the hearing, unless otherwise ordered, the guardian shall, and other persons may, be examined. If the account is correct, it shall be settled, and allowed. The order of settlement and allowance shall show the amount of the personal property remaining. Upon settlement of the final account, and upon delivery of the property on hand to the person entitled thereto, the court shall discharge the guardian and his sureties. [L. 1939, ch. 180, § 246; July 1.]

**Source or prior law:** G. S. 1935, §§ 39-227, 39-228.

**Note:** Bartlett's Probate Practice, see § 1201.

#### PROCEEDINGS FOR COMMITMENT OF INSANE PERSONS

**Cross reference:** Commitment and care of insane persons, see, also, §§ 59-2001 to 59-2008.

**59-2271. Institution of proceedings; examination.** Any reputable citizen may file in the probate court of the county of the patient's residence or presence a petition for the commitment of the person as an insane patient to the state hospital. The petition shall state the name, residence, and address of the patient and of his nearest relatives, the reasons for the application and the names of two witnesses by whom the truth of the petition may be proved. The court may have the patient examined by a duly licensed doctor of medicine or psychiatrist or by the staff of the psychiatric receiving ward of the school of medicine of the university of Kansas, a member of the staff of the Larned state hospital, the Topeka state hospital or the Osawatimie state hospital. [L. 1939, ch. 180, § 247; L. 1945, ch. 236, § 3; March 30.]

**Source or prior law:** G. S. 1935, § 76-1205.

**Notes:** Bartlett's Probate Practice, see § 1211.

Referred to in § 59-2276a.

**Cross references:** Contents of petition, see, also, § 59-2202.

Examination and report prior to hearing, see § 59-2260.

**59-2272. Notice and process.** The trial or hearing shall be held at such time and place and upon notice to such persons and served in such manner as the court may determine. Unless the patient shall be brought before the court without a writ, or it appears to the court that the condition of the patient is such as to render it manifestly improper that the patient be brought before the court, the court shall issue a writ directed to the sheriff, or any proper person, commanding the patient to be brought before the court for the hearing. In no case shall the hearing be had until the patient shall be notified as the court may determine. [L. 1939, ch. 180, § 248; July 1.]

**Source or prior law:** G. S. 1935, §§ 76-1206, 76-1210.

**Note:** Bartlett's Probate Practice, see § 1212.

**59-2273. Appointment of guardian.** If the patient is adjudged insane, the court may appoint a guardian of his estate; provided (1) such proceedings are had in the county having venue of appointment, (2) such appointment is within the terms of the application made by the petition, and (3) the notice required therefor has been duly given. [L. 1939, ch. 180, § 249; July 1.]

**Source or prior law:** G. S. 1935, § 76-1215.

**Judicial Council, 1939:** Section clarified.

**Note:** Bartlett's Probate Practice, see § 1213.

**Cross reference:** Homestead of insane spouse, see §§ 59-2314 to 59-2322.

**59-2274. Transmission of transcript to county of residence.** Whenever the residence of the patient is found to be in another county, the court of commitment shall transmit to the probate court of such county a transcript

of the proceedings, including the return of the warrant from the superintendent, and all subsequent proceedings relating to the case shall be in the probate court of said county. The court of commitment shall also transmit to such court a statement of the expenses of the inquest, confinement, commitment, and conveyance of the patient to the place of detention. If the probate court to which such claim is transmitted shall deny the same, it shall transmit the claim to the state board of administration, which shall determine the question of residence and certify its findings to each court. If the claim is not paid within thirty days after such certification, an action may be maintained thereon by the claimant county in the district court of the claimant county against the debtor county. [L. 1939, ch. 180, § 250; July 1.]

**Source or prior law:** G. S. 1935, § 76-1229.

**Judicial Council, 1939:** Sets up machinery for enforcing claim of one county against another.

**Note:** Bartlett's Probate Practice, see § 1214.

**Cross reference:** Powers, jurisdiction, and duties of state board of administration relating to insane transferred to state department of social welfare, see G. S. 1947 Supp. § 75-3307.

**59-2275. Costs.** In each proceeding the court shall allow and order to be paid as a part of the costs thereof: (1) The sum of five dollars to the examining physician for his services; (2) the sum of five dollars per day to each commissioner for his services; and (3) the actual and necessary traveling expenses of each of the above named. The court shall fix the fee of patient's counsel when counsel is appointed by the court, and tax the same as a part of the costs of the proceedings. Other fees shall be allowed and paid as are allowed by law for similar services in other cases. In case of a private patient, the costs shall be paid from his estate or by those bound by law to support him, as the court may determine. If the patient is found to be sane, and the court finds that such proceedings were instituted without probable cause and not in good faith, it may tax the costs thereof against the petitioner. [L. 1939, ch. 180, § 251; July 1.]

**Source or prior law:** G. S. 1935, §§ 76-1211, 76-1229.

**Note:** Bartlett's Probate Practice, see § 1215.

**59-2276. Order of restoration.** When notice is received from the superintendent of a state hospital by the court of the patient's residence that a patient has been discharged as restored to capacity, the court shall make an order that the patient has been restored to capacity. [L. 1939, ch. 180, § 252; July 1.]

**Source or prior law:** G. S. 1935, § 76-1225.

**Note:** Bartlett's Probate Practice, see § 1216.

**59-2276a. Confined patients may be referred to psychiatric receiving ward for examination.** The official in charge of each of the institutions named in section 3 [59-2271] of this act may refer any public patient confined in such institution to the psychiatric receiving ward of the school of medicine of the university of Kansas for a complete physical and mental examination and upon completion of such examination it shall be the duty of the person in charge of such psychiatric receiving board [ward] to make a report to the official in charge of the institution from which said patient was referred for examination, giving his findings, conclusions and recommendations. [L. 1945, ch. 236, § 4; March 30.]

#### ADOPTION PROCEEDINGS

**Cross reference:** Adoption of children, see, also, ch. 59, art. 21.

**59-2277. Petition for adoption.** A petition for adoption shall be filed by the person desiring to adopt the child, and shall state: (1) The name, residence, and address of the petitioner. (2) The name of the child, the date and place of his birth if known, and place at which the child resides. (3) The facts showing the financial ability of the petitioner to assume the relationship. (4) Whether one or both parents are living; and the name, residence and address of those living, so far as known to the petitioner: *Provided*, The names of

parents may be omitted if the child is under the custody and legal control for the period of its minority of an institution or agency established or authorized by the laws of this state to place children for adoption. (5) If the consent of either or both parents is not obtained, the facts relied upon as eliminating the necessity therefor. [L. 1939, ch. 180, § 253; July 1.]

**Source or prior law:** G. S. 1935, §§ 38-106, 38-117, 38-118.

**Judicial Council, 1939:** Revised in accordance with modern adoption laws. See, particularly, the late laws of Alabama, Wisconsin, and Minnesota.

**Note:** Bartlett's Probate Practice, see § 1221.

**Cross reference:** Contents of petition, see, also, § 59-2202.

Discussed; probate court lacks jurisdiction to annul marriage; appeal; no jurisdiction. *In re Estate of Dix*, 161 K. 364, 370, 168 P. 2d 537.

**59-2278. Procedure after petition filed.** The written consents required shall be filed with the petition. Upon the filing of the petition the court shall fix the time and place for the hearing thereon, which shall not be less than thirty days nor more than sixty days from the filing of the petition, which time may be extended by the court for cause. Pending the hearing the court may make an appropriate order for the care and custody of the child. Promptly upon the filing of the petition the court shall send to the state board of social welfare a copy thereof and of the consents. The state board of social welfare, without cost to the natural parents or to the petitioner, shall make an investigation of the advisability of the adoption and report its findings and recommendations to the court as much as ten days before the hearing on the petition. In making its investigation the state board of social welfare is authorized to make an appropriate examination of the child as to its mental development and physical condition so as to determine whether there are obvious or latent conditions which should be known to the adopting parents, and shall also make such investigation of the adopting parents and their home and their ability to care for the child as would tend to show its suitability as a home for the child, and if requested to do so by the court, may inquire whether the consents to the adoption were freely and voluntarily made. Upon the hearing of the petition the court shall consider the report of the state board of social welfare, together with all other evidence offered by any interested party, and if the court is of the opinion the adoption should be made it shall make an interlocutory order of adoption, which cannot be made final for six months, and may deliver the child to the petitioner, if that has not already been done. Within six months after the interlocutory order the state board of social welfare, as often as it deems prudent, may investigate the condition of the child in the home of its temporary adoption, and before the expiration of the six months' period shall make a report to the court of its findings and of the advisability of the making of a final order of adoption. After the expiration of six months from the interlocutory order the court shall fix the time and place for the hearing upon the petition for a final order of adoption, notice of which shall be given to all interested parties, including the state board of social welfare. If upon this hearing the court finds it to be for the best interests of the child that the petition for the adoption be allowed, it may make a final order of adoption. Prior to the making of the final order of adoption, upon the application of any interested party, or the state board of social welfare, or upon its own motion, the court, after hearing, at which all parties have been given notice, may set aside its interlocutory order and dismiss the petition for adoption. In any event the costs of the adoption proceedings, other than those caused by the state board of social welfare, shall be paid by the petitioner. [L. 1939, ch. 180, § 254; July 1.]

**Source or prior law:** G. S. 1935, § 38-106.

**Judicial Council, 1939:** Includes features of late revision laws. See Memorandum of Problems to Be Considered in Adoption Legislation as Illustrated by the Laws of the United States, October, 1938, issued by The Federal Children's Bureau.

**Note:** Bartlett's Probate Practice, see § 1223.

**59-2279. Files and records of adoption.** The files and records of the court in adoption proceedings shall not be open to inspection or copy by other persons than the parties in interest and their attorneys, and representatives

of the state board of social welfare, except upon an order of the court expressly permitting the same. [L. 1939, ch. 180, § 255; July 1.]

**Source or prior law:** G. S. 1935, § 38-106.

**Note:** Bartlett's Probate Practice, see § 1224.

**59-2280. Procedure for adoption of adult.** That upon the filing of a petition for the adoption of an adult person, the probate court shall by order fix a time and place for a hearing thereon. The hearing may be with or without notice, as the court shall direct, and the court may, in its discretion, hear the petition forthwith. If upon the hearing the court finds that the petition should be allowed, it may make a final order of adoption. [L. 1945, ch. 238, § 1; June 28.]

#### JOINDER OF PROBATE AND ADMINISTRATIVE PROCEEDINGS

**Cross reference:** Proceedings for probate and administration, see §§ 59-2219 to 59-2232.

**59-2281. Cases in which joinder of proceedings is proper.** Proceedings for the administration of estates of two deceased persons, who died intestate, may be joined and united in one proceeding, where the estate or estates left by one or both of such deceased persons has been or is to be received from the other of such deceased persons, immediately or remotely, and no probate or administration proceedings have been had or commenced upon the estate of either of such deceased persons, or where two persons died seized of undivided interests in property, real or personal, and no probate or administration proceedings have been had or commenced on the estate of either, and one or more persons are heirs of both such deceased persons. The court may grant letters of administration upon such estates and they may be administered as one proceeding: *Provided*, That in all cases herein mentioned the court granting such letters has jurisdiction of each proceeding so joined and united. [L. 1947, ch. 316, § 1; June 30.]

**59-2282. Same; proceedings to determine descent.** Proceedings for the determination of descent of real or personal property, as provided by the probate code, of two or more deceased persons, may be joined and united in one proceeding where the estate or estates left by one or more of such deceased persons, or some part thereof, has been or is to be received from another of such deceased persons, immediately or remotely, or where two or more deceased persons died seized of undivided interests in property, real or personal, and no probate or administration proceedings have been had or commenced on the estate of any of them and one or more persons are heirs of all of such deceased persons. [L. 1947, ch. 316, § 2; June 30.]

**Cross reference:** Proceedings to determine descent, see §§ 59-2250 to 59-2252.

**59-2283. Same; separation of proceedings; notice.** The probate court may, in its discretion, for good cause shown to the court's satisfaction, permit said proceedings to be separated and separate petitions filed and docketed for the probate or administration of any estate, and if notice has been previously given and approved by the court, each of said estates shall be proceeded in without further notice. [L. 1947, ch. 316, § 3; June 30.]

**59-2284. Same; facts as to each estate.** In all cases in which proceedings under this act are joined or united, as herein provided, the proceedings shall set out and disclose all facts as to each separate estate that would be required if such proceedings were separately conducted. [L. 1947, ch. 316, § 4; June 30.]

**59-2285. Same; act intended as a clarification.** This act is intended as a clarification of the present law and not as a legislative construction that the probate courts do not now have power to permit such proceedings. [L. 1947, ch. 316, § 5; June 30.]

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

**Judicial Council, 1939:** The provisions of chapters 22, 38, 39 and article 20 of chapter 62 of the General Statutes of 1935 and acts amendatory and supplemental thereto, relating to the sale, lease, and mortgage of real estate, are combined in this article.

**Cross references:** Sale or lease of realty of decedent, see, also, §§ 59-1409 to 59-1413. Referred to in §§ 59-1404, 59-1707, 59-1807.

**59-2301. Definitions.** As used in this article [\*], the word "lease," unless the context otherwise indicates, means a lease for more than three years, or an oil and gas or other mineral lease; the word "mortgage" includes an extension of an existing mortgage, subject to the provision of section 157 [59-1809]. [L. 1939, ch. 180, § 256; July 1.]

\* "Article" means §§ 59-2301 to 59-2313.

**Note:** Bartlett's Probate Practice, see § 1231.

**59-2302. Lease for three years or less.** A petition for the lease of the real estate of a decedent, or of a ward, for a term of three years or less, may be heard with or without notice. The court may direct the representative to execute the lease whenever it appears to be for the best interests of the estate or the persons interested in such real estate. [L. 1939, ch. 180, § 257; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-6a02, 22-6a03, 39-212.

**Note:** Bartlett's Probate Practice, see § 1233.

**59-2303. Petition to sell, lease, or mortgage.** (1) An executor or administrator may file a petition to sell real estate of a decedent. The petition shall state the facts constituting the reasons for the application and describe the real estate to be sold. It may include all the real estate of the decedent subject to sale, or any part or parts thereof. (2) A guardian may file a petition to sell, lease, or mortgage real estate of a ward. The petition shall state the facts constituting the reasons for the application and describe the real estate to be sold, leased, or mortgaged. It may include all the real estate of the ward subject to sale, lease, or mortgage, or any part or parts thereof. It may apply in the alternative for authority to sell, lease, or mortgage. [L. 1939, ch. 180, § 258; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-6a02, 22-802, 22-804, 38-211, 38-212, 39-212.

**Judicial Council, 1939:** Subsection (1) deals with realty of decedent; subsection (2) deals with realty of ward. This section makes it possible to obtain a sale, lease, or mortgage of realty of ward, or any one, two, or three of them, as to one, some, or all of the tracts of real estate, if the petition prays for relief in the alternative and the notice so states. The present provision requiring the assets listed in the inventory to be set forth in the petition is omitted.

**Note:** Bartlett's Probate Practice, see § 1235.

**Cross reference:** Contents of petition, see, also, § 59-2201.

**Procedure for sale of ward's real estate under old law and code compared.** *Hicks v. King*, 157 K. 263, 266, 139 P. 2d 390.

**Guardian may make voluntary partition of ward's real estate under probate code.** *Thompson v. Hall*, 159 K. 592, 593, 156 P. 2d 530.

**59-2304. Notice and hearing.** Notice of the hearing shall briefly state the nature of the application made by the petition and shall be given pursuant to section 185 [59-2209]. At the hearing and upon proof of the petition, the court shall have full power to order the sale, lease, or mortgage of all the real estate described in the petition, or to order the sale, lease, or mortgage of one or more tracts thereof, if such order shall be within the terms of the application made by the petition. The probate court, with the consent of the mortgagee, may order the sale of real estate subject to the mortgage, but such consent shall release the estate of the decedent or ward, should a deficit later appear. [L. 1939, ch. 180, § 259; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-6a03, 22-6a05, 22-805, 38-211, 38-212, 38-215, 39-210, 39-212, 39-213.

**Note:** Bartlett's Probate Practice, see § 1238.

**Sale of minors' real estate without notice to minors is void; collateral attack.** *Hicks v. King*, 157 K. 263, 265, 266, 139 P. 2d 390.

**59-2305. Order.** (1) In all cases the order shall describe the real estate to be sold, leased, or mortgaged, and may designate the sequence in which the several tracts shall be sold, leased, or mortgaged, subject to the provisions of this act. (2) An order for sale shall direct whether the real estate shall be sold at private sale or public auction. If at private sale it shall direct that the real estate shall not be sold for less than three-fourths of the appraised value. If at public auction it shall direct the place or places of sale. It shall direct that the sale be for cash, for cash and deferred payments, or deferred payments: *Provided*, That in decedents' estates the payment shall not be deferred for more than one year from the date of the appointment and qualification of the executor or administrator making the sale. In all cases the order shall specify the time of payment, the interest on deferred payments, and the manner in which the payments shall be secured. (3) An order to lease shall not be made for less than three-fourths of the appraised value of the leasehold interest. The order shall direct that the lease be for cash, for cash and deferred payments, or deferred payments, and shall specify the time of payment, the interest on deferred payments, and the manner in which the payments shall be secured. (4) An order to mortgage shall fix the maximum amount of principal, the maximum rate of interest, the earliest and latest date of maturity, and shall direct the purpose for which the proceeds shall be used. (5) An order for sale, lease, or mortgage shall remain in force until terminated by the court, but no private sale or lease shall be made after one year from the date of the order, unless the real estate or the leasehold interest therein shall have been reappraised under order of the court within three months preceding the sale or lease. [L. 1939, ch. 180, § 260; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-6a03, 22-807, 22-817, 38-211, 39-214, 39-215.

**Note:** Bartlett's Probate Practice, see § 1242.

**59-2306. Additional bond of representative.** The court may require any representative, if it deems it necessary before such sale, lease, or mortgage, or before the confirmation thereof, to give an additional bond to secure the further assets arising from the sale, lease, or mortgage of such real estate. [L. 1939, ch. 180, § 261; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-809, 22-825, 38-217, 39-205.

**Judicial Council, 1939:** If general bond is sufficient, no further bond need be filed. Provision preventing sale by giving bond omitted because (1) it is seldom used; (2) it may unduly delay closing estate even to extent of suit on bond, execution on judgment, and right of redemption as to realty sold; and (3) delay can be had by proper showing of prospective payment and by appeal.

**Note:** Bartlett's Probate Practice, see § 1244.

**59-2307. Appraisalment.** Before any representative shall sell any real estate at private sale he shall have it appraised by three disinterested persons appointed by the court and of the county in which at least part of it lies. Before he shall lease any real estate, he shall in like manner have the leasehold interest therein appraised. The appraisers shall appraise the said real estate, or leasehold interest therein, as the case may be, at its full and fair value, and forthwith deliver such appraisalment certified by them under oath to the representative. [L. 1939, ch. 180, § 262; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-6a06, 22-812, 22-813, 22-814, 39-215.

**Judicial Council, 1939:** Appraisers appointed by the court. See *Fleming v. Bale*, 23 K. 88, 94, for construction of G. S. 1935, § 22-812.

**Note:** Bartlett's Probate Practice, see § 1246.

**59-2308. Sale at public auction.** In all sales at public auction the representative shall give notice thereof containing a particular description of the real estate to be sold, and by stating the time, terms, and place of sale, by publication once a week for three consecutive weeks in some newspaper, authorized to publish legal notices, of the county in which the real estate is situated. The date set for the sale shall not be earlier than seven days nor later than fourteen days after the date of the last publication of notice. If



the tracts to be sold are contiguous and lie in more than one county, notice may be given and the sale made in either of such counties. [L. 1939, ch. 180, § 263; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-816, 22-818, 39-215; see, also, G. S. 1935, § 22-822.

**Judicial Council, 1939:** Clarifies law where land is situated in more than one county.

**Notes:** See "Judicial Council, 1939" note under § 59-2209.

Bartlett's Probate Practice, see § 1248.

**59-2309. Report and confirmation.** (1) The representative shall make a verified report of his proceedings to the court, with the certificate of appraisalment in case appraisalment is required, and with proof of publication in case sale is made at public auction, which report shall state that he did not directly or indirectly acquire any beneficial interest in the said real estate, or the lease thereof, or the mortgage thereof, as the case may be, and that he is not interested in the property sold, leased, or mortgaged, except as stated in his report. (2) The court, after having duly examined the report and being satisfied that the sale, lease, or mortgage has been in all respects made in conformity to law and ought to be confirmed, shall confirm the same and order the representative to make a deed, lease, or mortgage to the person entitled thereto. The instrument shall refer to the order for sale, lease, or mortgage by its date, and the court by which it was made, and shall transfer to the grantee, lessee, or mortgagee all the right, title, and interest of the decedent or ward in the estate granted by the instrument, discharged from liability for his debts, except encumbrances assumed. [L. 1939, ch. 180, § 264; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-6a07, 22-819, 38-219, 38-220, 39-216, 39-217, 39-219, 39-220.

**Judicial Council, 1939:** As there is little difference between sale and long-term property lease, or oil and gas lease, confirmation should be required.

**Note:** Bartlett's Probate Practice, see § 1250.

**Cross reference:** Referred to in § 59-2311.

**59-2310. Authorizing conveyances or lease.** Upon the filing of a petition by any person claiming to be entitled to a conveyance from a decedent or ward bound by written instrument to make a conveyance or lease, or by the representative, setting forth a description of the real estate and the facts upon which such claim for conveyance or lease is based, the court shall fix the time and place for the hearing thereof, notice of which shall be given to such persons and in such manner as the court shall direct. Upon proof of the petition, the court may order the representative to execute and deliver a deed of conveyance or lease upon performance of the contract. [L. 1939, ch. 180, § 265; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-820, 22-827, 22-828, 22-829, 22-830, 22-831.

**Judicial Council, 1939:** No reason appears why no one except the purchaser should be allowed to make the application. A purchaser may refuse to pay until tender of the deed and not make the application. Publication should not be compulsory, for in most cases there is no controversy over the amount due on the contract, and the conveyance ought to be obtained with the least expense and inconvenience.

**Note:** Bartlett's Probate Practice, see § 1253.

**Cross reference:** Referred to in § 59-2311.

Applicability to oral agreements discussed in dissenting opinion. *Yeager v. Yeager*, 155 K. 734, 752, 129 P. 2d 242.

**59-2311. Title of purchaser.** The deed or other instrument of the representative executed pursuant to section 264 [59-2309] or section 265 [59-2310], shall be received in all courts as presumptive evidence that the representative in all respects observed the directions and complied with the requisites of law, and shall vest title to the estate granted in the party receiving the same in like manner as if conveyed by the decedent in his lifetime or conveyed, leased, or mortgaged by the ward as if of full age and sound mind. [L. 1939, ch. 180, § 266; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-821, 38-220, 39-222.

**Note:** Bartlett's Probate Practice, see § 1255.

**59-2312. Real-estate commission.** The court may in its discretion, after notice to all parties in interest, allow a real-estate commission, but such allowance shall be passed upon by the court prior to the sale. [L. 1939, ch. 180, § 267; July 1.]

**Judicial Council, 1939:** This section is new. Substance taken from Ohio laws. See Ohio General Code, § 10510-32.

**Note:** Bartlett's Probate Practice, see § 1259.

**59-2313. Payment of title documents.** The court shall have authority to allow payment for certificate of abstract of title or policy of title insurance in connection with the sale of any real estate. [L. 1939, ch. 180, § 268; July 1.]

**Judicial Council, 1939:** This section is new. Substance taken from Ohio laws. See Ohio General Code, § 10510-33.

**Note:** Bartlett's Probate Practice, see § 1261.

**59-2314. Homestead of insane spouse; execution of mortgages and oil, gas and other mineral leases.** When a husband or wife, while occupying a homestead, is adjudged to be insane, the duly appointed guardian of the estate of the insane spouse may be authorized, by the probate court having jurisdiction, to join with the sane spouse in executing a mortgage upon the homestead, renewing or refinancing an encumbrance thereon which is likely to cause loss, or in executing a lease thereon authorizing the lessee, his heirs and assigns, to explore and produce therefrom oil, gas, coal, lead, zinc, or other minerals as herein provided. [L. 1945, ch. 240, § 1; April 6.]

**Cross references:** Sale of inchoate right, see § 59-1808.

Homestead and family allowances, see ch. 59, art. 4, and § 59-2235.

Constitution amended in 1944, see Kan. Const., art. 15, § 9.

**59-2315. Same; petition.** For the purposes set out in section 1 [59-2314] of this act, the sane spouse and the guardian of the estate of the insane spouse may jointly file a petition in the probate court of the county in which such homestead is situated praying for the execution of a mortgage upon the homestead or for the execution of an oil, gas or other mineral lease thereon. [L. 1945, ch. 240, § 2; April 6.]

**59-2316. Same; copy of proposed lease; notice and hearing.** In the case of a proceeding hereunder for the execution of oil, gas or other mineral lease, a copy of the proposed lease shall be attached to the petition. The petition shall be heard upon notice as directed by the probate court and determined as in other cases: *Provided*, That such petition shall not be heard in less than ten days after a guardian *ad litem* shall have been appointed as in this act provided and notice of such appointment shall have been given to such guardian *ad litem*. [L. 1945, ch. 240, § 3; April 6.]

**59-2317. Same; guardian *ad litem*; duties.** In every proceeding brought under this act and immediately upon the filing of a petition as provided in section 2 [59-2315] of this act, a guardian *ad litem* shall be appointed for the insane spouse, who shall make an independent investigation of the facts and representations made in the petition, and shall, on or before the date fixed for the hearing on said petition, file in said probate court a verified report setting forth the results of his investigation, together with his recommendations respecting the relief prayed for in the petition. And the court shall consider such report together with all evidence that may be offered in support of such petition or report in determining what relief, if any, should be granted in the proceeding. [L. 1945, ch. 240, § 4; April 6.]

**59-2318. Same; what renewed or refinanced mortgage may include.** In case of a proceeding to mortgage, the renewed or refinanced mortgage may include all sums of money necessary to discharge all liens on the homestead including interest, taxes, costs of all necessary proceedings, with a reasonable attorney fee, and the cost of abstract of title, or other title papers, when the

necessity therefor or advantage to the owner of the homestead or to the insane spouse shall clearly appear. [L. 1945, ch. 240, § 5; April 6.]

**59-2319. Same; proceeds from lease exempt from certain liabilities.** The proceeds from the execution of any such lease, whether denominated bonus, rental, royalty, or otherwise, shall be wholly exempt from liability for payment or satisfaction of any debts or other obligations of either spouse, except taxes, encumbrances and liens on the homestead, the necessary cost of the proceeding for the execution of such lease, and the support, maintenance and education of the ward, his spouse, and children. [L. 1945, ch. 240, § 6; April 6.]

**59-2320. Same; assignment of proceeds from lease for certain purposes.** In its order authorizing the guardian of the insane spouse to join with the sane spouse in executing an oil, gas or other mineral lease as provided in this act, the court may, in any proper case, authorize such guardian to join the sane spouse in the execution and delivery of an assignment of the proceeds of such lease to the owner and holder of any mortgage lien upon the homestead, as additional security for the payment of such mortgage lien, and for the application of such proceeds to the payment of the mortgage debt. [L. 1945, ch. 240, § 7; April 6.]

**59-2321. Same; distribution of net proceeds of lease; revocation or modification.** The probate court authorizing any such lease by order shall direct the division of the net proceeds of such lease between the sane spouse and the guardian of the insane spouse in such proportions as may be proper, equitable and just, having due regard for the time and manner of acquiring the homestead. Any unpaid or undistributed proceeds at the death of either spouse shall be considered as property of the owner of the homestead and payable to him. Within the limits above prescribed such order for payment or distribution may for good cause shown, upon due notice and hearing, be revoked or modified from time to time as justice and interest of the parties may require. [L. 1945, ch. 240, § 8; April 6.]

**59-2322. Same; presumptive evidence that mortgage or lease properly executed.** The mortgage or lease executed pursuant to this section [act] shall be received in all courts as presumptive evidence that the guardian in all respects observed the directions and complied with the requisites of law, and shall vest title to the interest granted in the party receiving the same in like manner as if the mortgage or lease was executed by the ward and the ward was of full age and sound mind. [L. 1945, ch. 240, § 9; April 6.]

#### Article 24.—APPEALS

**59-2401. Appealable orders.** An appeal to the district court may be taken from any of the following orders, judgments, decrees, and decisions of the probate court: (1) An order admitting, or refusing to admit, a will to probate. (2) An order appointing, or refusing to appoint, or removing or refusing to remove, a fiduciary other than a special administrator. (3) An order setting apart, or refusing to set apart, a homestead or other property, or making or refusing to make an allowance of exempt property to the spouse and minor children. (4) An order determining, or refusing to determine, venue; an order transferring, or refusing to transfer, venue. (5) An order allowing, or disallowing, a demand in whole or in part when the amount in controversy exceeds fifty dollars. (6) An order authorizing, or refusing to authorize, the sale, lease, or mortgage of real estate; an order confirming, or refusing to confirm, the sale, lease, or mortgage of real estate. (7) Judgments for waste. (8) An order directing, or refusing to direct, a conveyance or lease of real estate under contract. (9) An order directing, or refusing to direct, the payment of a legacy or distributive share. (10) An order allowing, or refusing to allow, an account of a fiduciary or any part thereof. (11) A judgment or decree of partial or final distribution. (12) An order compelling, or refusing to compel, a legatee

or distributee to refund. (13) An order directing an allowance, or refusing to direct an allowance, for the expenses of administration. (14) An order vacating a previous appealable order, judgment, decree, or decision; an order refusing to vacate a previous appealable order, judgment, decree, or decision. (15) A decree determining, or refusing to determine, the heirs, devisees and legatees. (16) An order adjudging a person in contempt. (17) An order adjudging, or refusing to adjudge, a person incompetent. (18) An order committing, or refusing to commit, a patient to a state hospital. (19) An order granting or denying restoration to capacity. (20) An order decreeing, or refusing to decree, an adoption. (21) A final decision of any matter arising under the jurisdiction of the probate court. [L. 1939, ch. 180, § 269; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-223, 22-265, 22-1101, 38-228, 39-234, 76-1214; L. 1937, ch. 220, § 1.

**Judicial Council, 1939:** Sections cited in "source or prior law" consolidated and revised in accordance with the code revision.

**Note:** Bartlett's Probate Practice, see § 1272.

Order allowing claim is appealable but appeal not perfected in time. *Meech v. Grigsby*, 153 K. 784, 790, 113 P. 2d 1091.

Order requiring executor to file inventory and appraisal not an appealable order. *In re Estate of Crawford*, 154 K. 737, 738, 739, 121 P. 2d 206.

Administratrix accepting favorable parts of order cannot appeal from remainder. *Stephenson v. Stephenson*, 156 K. 520, 134 P. 2d 397.

Probate court's original exclusive jurisdiction over claims against, and decedents' estates determined. *Egnatic v. Wollard*, 156 K. 843, 855, 137 P. 2d 188.

Final settlement decree unappealed is binding adjudication of devisee's interest in real estate. *Bitzer v. Smith*, 158 K. 83, 87, 145 P. 2d 148.

Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.

District court without appellate jurisdiction of will contest where will not objected to in probate court. *In re Estate of Grindrod*, 158 K. 345, 348, 357, 363, 365, 148 P. 2d 278.

No particular language required to effectuate appeal; appeal from order of final settlement not limited in scope. *In re Estate of Charles*, 158 K. 460, 465, 148 P. 2d 765.

Cited; order admitting will to probate not prima facie evidence of validity. *In re Estate of Wallace*, 158 K. 633, 637, 149 P. 2d 595.

Probate court order setting aside homestead without notice to creditor held void. *In re Estate of Schroeder*, 158 K. 783, 785, 150 P. 2d 173.

**Clause 1:**

Order admitting will to probate appealable only when objection made in probate court. *In re Estate of Grindrod*, 158 K. 345, 348, 357, 363, 365, 148 P. 2d 278.

Appeal allowed although no evidence introduced in probate court after petition filed. *In re Estate of Pallister*, 159 K. 7, 10, 27, 29, 36, 152 P. 2d 61.

**Clause 13:**

Administrator's right to expenses of appeal taken under this clause discussed. *In re Estate of Eyth*, 157 K. 268, 275, 139 P. 2d 378.

**Clause 21:**

Order striking from inventory items listed as debts due estate is appealable. *In re Estate of Bush*, 155 K. 556, 558, 127 P. 2d 455.

**59-2402. Questions certified to district court.** In any proceeding pending in the probate court when it appears that a decision upon any question of which the probate court does not have jurisdiction is necessary to a full determination of the proceeding, such question shall be certified by the probate court to the district court, having appellate jurisdiction thereof, which court shall proceed to hear and determine the same as though an action involving that question had been filed originally therein. The decision of the district court, when final, shall be certified to the probate court in like manner as a decision upon appeal. [L. 1939, ch. 180, § 270; July 1.]

**Note:** Bartlett's Probate Practice, see § 1275.

Jurisdiction of district court on appeal discussed and determined. *Erwin v. Erwin*, 153 K. 703, 708, 113 P. 2d 349.

Procedure hereunder followed to determine legality of bequest. *In re Estate of Weeks*, 154 K. 103, 104, 114 P. 2d 857.

Probate court's original exclusive jurisdiction over claims against, and decedents' estates determined. *Egnatic v. Wollard*, 156 K. 843, 855, 137 P. 2d 188.

Probate court has exclusive original jurisdiction of wrongful death demand against deceased wrongdoer's estate. *Shively v. Burr*, 157 K. 336, 343, 139 P. 2d 401.

District court has jurisdiction of executor's action to partition real property; probate court's approval of action not essential. *Sheedy v. Willoughby*, 157 K. 508, 515, 142 P. 2d 801.

Cited in holding equitable claim of father in deceased son's land barred. *Gantz v. Bondurant*, 159 K. 389, 394, 155 P. 2d 450.

Discussed; district court lacks jurisdiction on appeal from void probate court order. *In re Estate of Crump*, 161 K. 154, 161, 166 P. 2d 684.

**59-2402a. Transfer of certain matters to district court; when costs assessed against party requesting transfer; notice.** When a petition, except a petition for the allowance of a demand for less than five hundred dollars, or for the admission to probate of a last will and testament, or to grant or revoke letters testamentary, or of administration, or to direct and to control the official acts of executors and administrators, to settle their accounts, and to order the distribution of estates, or to determine the heirs, devisees and legatees of decedents, or to appoint and remove guardians for minors and incompetent persons, or to direct and control the official acts of such guardians, or to settle their accounts, or to hear and determine cases of habeas corpus shall be filed in the probate court, any interested party may request the transfer of such matter to the district court. When a request for such transfer is filed less than three-days prior to the commencement of the hearing, the court shall assess the costs occasioned by the subpoena and attendance of witnesses against the party seeking the transfer. Such request may be included in any petition, answer, or other pleading, or may be filed as a separate petition, and shall include an allegation that a bona fide controversy exists and that the transfer is not sought for the purpose of vexation or delay. Notice of such request shall be given as ordered by the probate court. [L. 1945, ch. 237, § 1; June 28.]

Inapplicable to petition for administration of estate; transfer not authorized. *In re Estate of Duel*, 161 K. 593, 594, 595, 596, 171 P. 2d 271.

**59-2402b. Same; delivery of file to district court; trial; transcript to probate court.** Upon the filing of such request the probate court shall deliver to the district court the file in the matter, or so much thereof as may be necessary for a determination of the issues raised. Such issues shall thereupon be heard and determined in the district court as on appeal as provided by section 59-2408 of the General Statutes Supplement of 1943 as amended. A transcript of the proceedings and judgment of the district court shall be certified to the probate court as in other appeals, and the probate court shall proceed in accordance therewith. No further appeal upon such issue shall be had in the district court. [L. 1945, ch. 237, § 2; June 28.]

Inapplicable to petition for administration of estate; transfer not authorized. *In re Estate of Duel*, 161 K. 593, 594, 596, 171 P. 2d 271.

**59-2402c. Same; appeals to supreme court.** Appeals to the supreme court from judgments and orders of the district court made pursuant to this act may be taken as appeals in other cases. [L. 1945, ch. 237, § 3; June 28.]

**59-2403. Venue.** The appeal shall be to the district court of the county of the probate court which made the order, judgment, decree, or decision appealed from, except that an appeal taken from any order, judgment, decree, or decision (other than one determining or refusing to determine venue or transferring or refusing to transfer venue) made before the transfer of venue shall be taken to the district court of the county to which the transfer was made. [L. 1939, ch. 180, § 271; July 1.]

Source or prior law: G. S. 1935, § 39-234.

Judicial Council, 1939: Makes provision where transfer of venue has been made.

Note: Bartlett's Probate Practice, see § 1277.

Cross reference: Transfer of venue, see § 59-2266.

Discussed in determining probate court's equitable jurisdiction; exclusive jurisdiction. *Foss v. Wiles*, 155 K. 262, 270, 124 P. 2d 438.

**59-2404. Time for appeal; failure to defend or appear not to affect right to appeal.** Such appeal may be taken by any person aggrieved within thirty days after the making of such order, judgment, decree, or decision: *Provided*, That an appeal may be taken within nine months from an order admitting, or refusing to admit, a will to probate. The right of appeal shall not be denied nor abridged for failure of the party appealing to present his defenses in the probate court or to appear therein. [L. 1939, ch. 180, § 272; L. 1941, ch. 284, § 14; L. 1945, ch. 237, § 4; June 28.]

**Source or prior law:** G. S. 1935, §§ 22-1102, 39-234.

**Judicial Council, 1939:** Appeal in will cases extended to nine months contest by separate action in district court being omitted.

**Note:** Bartlett's Probate Practice, see § 1279.

Order allowing claim is appealable but appeal not perfected in time. *Meech v. Grigsby*, 153 K. 784, 790, 113 P. 2d 1091.

Appeal from order admitting will to probate barred under former law not revived. *In re Estate of Pennington*, 154 K. 531, 532, 119 P. 2d 488.

Order admitting will to probate may be appealed within nine months. *In re Estate of Hoover*, 155 K. 647, 650, 651, 127 P. 2d 460. Affirmed: 156 K. 31, 131 P. 2d 917.

Discussed in holding § 59-2239 applicable to demand for specific performance. *Burns v. Drake*, 157 K. 367, 371, 139 P. 2d 386.

Action to compel performance of agreement to make will held will contest; barred. *Hutchinson v. Pihlblad*, 157 K. 392, 396, 139 P. 2d 835.

Probate court judgment distributing estate cannot be collaterally attacked. *Cole v. Thacker*, 158 K. 242, 251, 146 P. 2d 665.

Order admitting will to probate appealable (before 1945 amendment) only when objection made in probate court. *In re Estate of Grindrod*, 158 K. 345, 348, 148 P. 2d 278.

Applied; amended contest petition amended on appeal; action not barred. *In re Estate of Pallister*, 159 K. 7, 15, 152 P. 2d 61.

Appeal bond required before time for appeal has expired. *In re Estate of Dudley*, 159 K. 160, 161, 164, 152 P. 2d 678.

Discussed in determining jurisdiction of court to vacate order under § 59-2213. *In re Estate of Lillibridge*, 161 K. 93, 104, 166 P. 2d 720.

Applied; objections to final report of executor of will filed too late. *In re Estate of Wenzel*, 161 K. 545, 551, 552, 170 P. 2d 618.

**59-2405. Requisites.** To render the appeal effective: (1) The appellant shall serve upon the adverse party or his attorney of record, or upon the probate judge for the adverse party, a written notice of appeal specifying the order, judgment, decree, or decision appealed from, and file such notice of appeal in the probate court with proof of service thereof verified by his affidavit. (2) The appellant, other than the state or municipality or a fiduciary appealing on behalf of the estate, shall file in the probate court a bond in such sum and with such sureties as may be fixed and approved by the probate court, conditioned that he will without unnecessary delay prosecute the appeal and pay all sums, damages, and costs that may be adjudged against him. (3) Whenever a party in good faith gives due notice of appeal and omits through mistake to do any other act necessary to perfect the appeal, the district court may permit an amendment on such terms as may be just. [L. 1939, ch. 180, § 273; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1103, 22-1104, 39-234.

**Judicial Council, 1939:** The affidavit of good faith not required. Subsection (3) is new.

**Note:** Bartlett's Probate Practice, see § 1281.

**Cross reference:** Transfer of certain matters to district court, see §§ 59-2402a to 59-2402c.

District court without appellate jurisdiction of will contest where will not objected to in probate court. *In re Estate of Grindrod*, 158 K. 345, 363, 367, 148 P. 2d 278 (But see, § 59-2404 as amended).

No particular language required to effectuate appeal; appeal from order of final settlement not limited in scope. *In re Estate of Charles*, 158 K. 460, 148 P. 2d 765.

Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 19, 36, 152 P. 2d 61 (But see, § 59-2404 as amended).

Last sentence prevents trivial imperfections from defeating an appeal. *In re Estate of Dudley*, 159 K. 160, 163, 152 P. 2d 678.

**59-2406. Transcript.** When an appeal has been effected, the probate court shall transmit to the district court a complete transcript of the proceedings pertaining to the matter in which the appeal is taken. [L. 1939, ch. 180, § 274; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1106, 39-234.

**Note:** Bartlett's Probate Practice, see § 1284.

Showing necessary in probate court to maintain appeal discussed and determined. *In re Estate of Pallister*, 159 K. 7, 29, 152 P. 2d 61 (But see, § 59-2404 as amended).

**59-2407. Effect of appeal.** An appeal from an order admitting a will to probate shall not suspend the operation of the order until the appeal is determined, but no distribution to heirs, devisees, or legatees shall be made pending the appeal. In all other cases the appeal shall suspend the operation of the order, judgment, decree, or decision appealed from until the appeal is determined or the district court shall otherwise order. [L. 1939, ch. 180, § 275; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1105, 39-234.

**Note:** Bartlett's Probate Practice, see § 1286.

Appeal from order appointing executor does not revoke order; effect. *Hutchinson v. Pihlblad*, 157 K. 392, 394, 395, 139 P. 2d 835.

Executor may publish notice of appointment while appeal from order pending. *Hutchinson v. Pihlblad*, 157 K. 392, 394, 395, 139 P. 2d 835.

Administration may proceed although appeal from order admitting will pending. *In re Estate of Dudley*, 159 K. 160, 162, 152 P. 2d 678.

**59-2408. Trial on appeal; pleadings; issues; evidence.** Upon the filing of the transcript the district court, without unnecessary delay, shall proceed to hear and determine the appeal, and in doing so shall have and exercise the same general jurisdiction and power as though the controversy had been commenced by action or proceeding in such court and as though such court would have had original jurisdiction of the matter. The district court shall allow and may require pleadings to be filed or amended. The right to file new pleadings shall not be abridged or restricted by the pleadings filed, or by failure to file pleadings, in the probate court; nor shall the trial in, or the issues to be considered by, the district court be abridged or restricted by any failure to appear or by the evidence introduced, or the absence or insufficiency thereof, in the probate court. All appeals other than those from the allowance or disallowance of a demand, adjudging or refusing to adjudge a person incompetent, and committing or refusing to commit a person to a state hospital, shall be tried by the court without a jury, but the court may call a jury in an advisory capacity or in a proper case may refer the matter or part thereof to a referee. [L. 1939, ch. 180, § 276; L. 1945, ch. 237, § 5; June 28.]

**Source or prior law:** G. S. 1935, §§ 22-1107, 39-234.

**Judicial Council, 1939:** Clarified by omitting "be possessed of the cause." See *Lormis v. Hartmann*, (Mo.) 193 S. W. 36. And words "without unnecessary delay" inserted.

**Note:** Bartlett's Probate Practice, see § 1288.

Cited; appeal under prior statutes from judgment allowing monetary claim. *In re Estate of Hutchinson*, 151 K. 333, 339, 99 P. 2d 992.

Jurisdiction of district court on appeal discussed and determined. *Erwin v. Erwin*, 153 K. 703, 708, 113 P. 2d 349.

District court may permit pleadings or amendments to pleadings to be filed. *Meech v. Grigsby*, 153 K. 784, 789, 113 P. 2d 1091.

Creditor's claim not complying with § 59-2202 held sufficient to toll nonclaim statute; amendment. *Roberts v. Setty*, 154 K. 505, 119 P. 2d 539.

Discussed in determining probate court's equitable jurisdiction; exclusive jurisdiction. *Foss v. Wiles*, 155 K. 262, 270, 124 P. 2d 438.

Validity of contract consenting to will referred to district court for determination. *In re Estate of Hoover*, 155 K. 647, 649, 652, 127 P. 2d 460. Affirmed: 156 K. 31, 33, 37, 38, 131 P. 2d 917.

Cited; action to impose constructive trust held will contest; jurisdiction. *Yeager v. Yeager*, 155 K. 734, 736, 129 P. 2d 242.

Claim for specific performance of contract to devise realty; jury trial discretionary. *In re Estate of Henry*, 156 K. 788, 803, 137 P. 2d 222.

District court's general jurisdiction and power on appeal discussed. *Egnatic v. Wollard*, 156 K. 843, 849, 855, 137 P. 2d 188.

Scope of appeal from final settlement order determined. *In re Estate of Eyth*, 157 K. 268, 273, 139 P. 2d 378.

Discussed in holding § 59-2239 applicable to demand for specific performance. *Buras v. Drake*, 157 K. 367, 371, 139 P. 2d 386.

*De novo* trial on appeal but objections should be asserted originally in probate court. *In re Estate of Grindrod*, 158 K. 345, 349, 351, 357, 362, 148 P. 2d 278 (But see § 59-2404 as amended).

Proceedings, pleadings or objections in probate court prerequisite to appeal discussed. *In re Estate of Grindrod*, 158 K. 345, 349, 351, 357, 362, 148 P. 2d 278 (But see § 59-2404 as amended).

Cited; order admitting will to probate not prima facie evidence of validity. *In re Estate of Wallace*, 158 K. 633, 637, 149 P. 2d 595.

Discussed; jurisdiction of district court on appeal; pleadings. *In re Estate of Pallister*, 159 K. 7, 11, 29, 152 P. 2d 61.

Cited; district court's duty to appoint guardian *ad litem* for minor discussed (dissenting opinion). *In re Estate of Douglas*, 160 K. 162, 166, 160 P. 2d 661.

Cited; appealable action; supreme court's original jurisdiction cannot be substituted. *Mahoney v. Stavelly*, 160 K. 792, 796, 165 P. 2d 230.

Discussed in determining jurisdiction of court to vacate order under § 59-2213. *In re Estate of Lillibridge*, 161 K. 93, 104, 166 P. 2d 720.

Appeal action to probate will; no jury trial as of right. *In re Estate of Crump*, 161 K. 154, 156, 166 P. 2d 684.

Probate court's annulment order void; district court lacks jurisdiction on appeal. *In re Estate of Crump*, 161 K. 154, 161, 162, 166 P. 2d 684; *In re Estate of Dix*, 161 K. 364, 370, 168 P. 2d 537.

**59-2409. Certification to probate court.** The clerk of the district court shall certify a transcript of the proceedings and judgment of the district court to the probate court, which shall proceed in accordance therewith. [L. 1939, ch. 180, § 277; July 1.]

**Source or prior law:** G. S. 1935, §§ 22-1108, 39-234.

**Note:** Bartlett's Probate Practice, see § 1293.

Appeal from order appointing executor does not revoke order; effect. *Hutchinson v. Pihlblad*, 157 K. 392, 394, 139 P. 2d 835.

**Article 25.—RULES OF COURT**

**59-2501. Rules may be promulgated.** Appropriate rules of court not inconsistent with the provisions of this act may be promulgated by the supreme court to regulate the practice in matters covered by this act. (L. 1939, ch. 180, § 278; July 1.)

**Judicial Council, 1939:** This section may not be entirely new, see G. S. 1935, § 60-3825.

**Note:** Bartlett's Probate Practice, see § 1301.

**Article 26.—MISCELLANEOUS**

**59-2601. Statutes saved.** Nothing in this act contained shall be construed to repeal or modify the provisions of the uniform veteran's guardianship act (chapter 73, article 5, General Statutes, 1935), and acts amendatory thereof or supplemental thereto nor the special administrator act for Wyandotte county (Laws 1903, chapter 199, being section 19-1104 of the General Statutes of 1935), and acts amendatory thereof or supplemental thereto. [L. 1939, ch. 180, § 279; July 1.]

**Note:** Bartlett's Probate Practice, see § 1311.

**Cross reference:** Uniform veterans' guardianship act, see §§ 73-501 to 73-523, printed herein  
Section 59-2203 relating to venue for administration of estates not affected by § 19-1104. *In re Estate of Summerfield*, 158 K. 380, 384, 147 P. 2d 759.

**59-2602. Effective date.** The rules of procedure herein prescribed shall govern all probate proceedings brought after they take effect and also all further procedure in probate proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding when they take effect would not be feasible or would work injustice, in which event the former procedure applies. This act shall take effect and be in force on and after July 1, 1939, and after its publication in the statute book [L. 1939, ch. 180, § 281; July 1.]

**Judicial Council, 1939:** The first sentence of this section is adopted from the New Federal Rules of Civil Procedure, see rule 86.

**Note:** Bartlett's Probate Practice, see § 1314.

Section not applicable to statutes of nonclaim or limitation. *Siefkin v. Siefkin*, 150 K. 396, 398, 399, 92 P. 2d 1005.

Applicability of Article 16 and § 59-1701 considered. *First Nat'l Bank v. Gray*, 151 K. 558, 562, 563, 99 P. 2d 771.

Action begun under § 22-223 not abated by enactment of code. *Mirise v. Rathbun*, 152 K. 441, 443, 104 P. 2d 420.

Appointment of administrator *de bonis non* under old code provisions upheld. *Barrett v. McMannis*, 153 K. 420, 424, 110 P. 2d 774.

New code procedure applies to administration commenced after June 30, 1939. *Erwin v. Erwin*, 153 K. 703, 707, 113 P. 2d 349.

Under facts sale of real estate to pay debts governed by new code. *Schul v. Clapp*, 154 K. 372, 375, 118 P. 2d 570.

Under facts code provisions inapplicable to election to take under will. *Cox v. McBroom*, 155 K. 2, 6, 122 P. 2d 185.

Administration presumed carried on under new code unless contrary shown. *Swisher v. Bouse*, 155 K. 797, 801, 130 P. 2d 555.

Code applies to proceeding to sell real estate commenced after code effective. *Hicks v. King*, 157 K. 263, 266, 139 P. 2d 390.

Procedure in proceedings commenced after code effective governed by code. *In re Estate of Reed*, 157 K. 602, 609, 610, 611, 142 P. 2d 824.

Code inapplicable where election to take under will completed under former law. *In re Estate of Anderson*, 159 K. 512, 518, 519, 156 P. 2d 860.

Applied; § 59-509 inapplicable where intestate died prior to enactment of code. *Miami County Nat. Bank of Paola, Kan., v. Bancroft*, 121 F. 2d 921, 924, 925.



## THE UNIFORM VETERANS' GUARDIANSHIP ACT

**Note:** The uniform veterans' guardianship act as recommended by the National Conference of Commissioners on Uniform State Laws was adopted in Kansas by the enactment of §§ 73-501 to 73-521. For table of states wherein act has been adopted, annotations and notes, see Uniform Laws Annotated, Vol. 9.

**73-501. Definition of terms.** As used in this act: The term "person" includes a partnership, corporation or an association. The term "bureau" means the United States veterans' bureau or its successor. The terms "estate" and "income" shall include only moneys received by the guardian from the bureau and all earnings, interest and profits derived therefrom. The term "benefits" shall mean all moneys payable by the United States through the bureau. The term "director" means the director of the United States veterans' bureau or his successor. The term "ward" means a beneficiary of the bureau. The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward. [L. 1929, ch. 250, § 1; May 28.]

**73-502. When guardian appointed for ward.** Whenever, pursuant to any law of the United States or regulation of the bureau, the director requires prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. [L. 1929, ch. 250, § 2; May 28.]

**73-503. Qualification to act as guardian.** Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards. In any case, upon presentation of a petition by an attorney of the bureau under this section alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for the wards' estates only. An individual may be guardian of more than five wards if they are all members of the same family. [L. 1929, ch. 250, § 3; May 28.]

**73-504. Petition for appointment of guardian; form and content of petition.** A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such petition within thirty days after mailing of notice by the bureau to the last known address of such person indicating the necessity for the same a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this state. The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the bureau and shall set forth the amount of moneys then due and the amount of probable future payments. The petition shall also set forth the name and addresses of the person or institution if any having actual custody of the ward. In the case of a mentally incompetent ward the petition shall show that such ward had been rated incompetent on examination by the bureau in accordance with the laws and regulations governing the bureau. [L. 1929, ch. 250, § 4; May 28.]

**73-505. Certificate of director prima facie evidence of necessity for guardian.** Where a petition is filed for the appointment of a guardian of a minor ward a certificate of the director, or his representative, setting forth the age of such minor as shown by the records of the bureau and the fact that

the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the bureau, shall be prima facie evidence of the necessity for such appointment. [L. 1929, ch. 250, § 5; May 28.]

**73-506. Same.** Where a petition is filed for the appointment of a guardian of a mentally incompetent ward a certificate of the director or his representative, setting forth the fact that such person has been rated incompetent by the bureau on examination in accordance with the laws and regulations governing such bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the bureau, shall be prima facie evidence of the necessity for such appointment. [L. 1929, ch. 250, § 6; May 28.]

**73-507. Notice upon filing of petition.** Upon the filing of a petition for the appointment of a guardian, under the provisions of this act, the court shall cause such notice to be given as provided by law. [L. 1929, ch. 250, § 7; May 28.]

**73-508. Appointment of guardian; bond.** Before making an appointment under the provisions of this act the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian shall execute and file a bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be in the form and be conditioned as required of guardians appointed under the guardianship laws of this state. The court shall have power from time to time to require the guardian to file an additional bond. Where a bond is tendered by a guardian with personal sureties, such sureties shall file with the court a certificate under oath which shall describe the property owned, both real and personal, and that they are each worth the sum named in the bond as the penalty thereof over and above all their debts and liabilities and exclusive of property exempt from execution. [L. 1929, ch. 250, § 8; May 28.]

**73-509. Annual accounting by guardian; hearing; notice; account filed.** Every guardian who shall receive on account of his ward any moneys from the veterans' administration shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account, under oath, of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the veterans' administration having jurisdiction over the area in which such court is located. The court shall fix a time and place for the hearing on such account not less than fifteen days nor more than thirty days from the date of filing same and notice thereof shall be given by the court to the aforesaid veterans' administration office not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall in like manner be given to the guardian. Upon rendering any such account the guardian shall produce for examination by the court, or a duly authorized clerk or other appointee thereof, evidences of balance on deposit, and of investments reported therein, which shall be described in such account in sufficient detail so that they may be identified, and the court or its duly authorized clerk or other appointee shall ascertain whether such balance on deposit and investments correspond with such account, and if so shall certify to that effect upon the account filed with the court and upon the copy supplied the veterans' administration. [G. S. 1935, § 73-509; L. 1939, ch. 283, § 1; March 2.]

**73-510. Failure to account; removal.** If any guardian shall fail to file any account of the moneys received by him from the bureau on account of his ward within thirty days after such account is required by either the court or the bureau, or shall fail to furnish the bureau a copy of his accounts as re-

quired by this act, such failure shall be grounds for removal. [L. 1929, ch. 250, § 10; May 28.]

**73-511. Guardian's compensation; additional allowance by court.** Compensation payable to guardians shall not exceed five percent of the income of the ward during any year, or one percent of the corpus of the estate, whichever is greater. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the bureau in the manner provided in section 73-509 of the General Statutes Supplement of 1945. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. [L. 1929, ch. 250, § 11; L. 1947, ch. 395, § 1; June 30.]

**73-512. Investment of ward's funds; approval; examination of titles.** It shall be the duty of guardians to invest and keep invested their ward's surplus money and only in the securities hereinafter indicated, and in which the guardian has no interest. Such investments, except those provided in paragraph (A) hereof, shall be made only upon the prior approval of the court, after notice to the veterans' administration as provided in section 4 [73-523] of this act.

(A) Direct obligations of this state and of the United States government, and obligations, the interest and principal of which are both unconditionally guaranteed by the United States government.

(B) The bonds of any other state, or of any county, city or town in the United States with a population as shown by next preceding federal census of not less than 10,000 inhabitants, and which bonds were not issued in aid of railroads, and where the laws do not permit such counties, cities or towns to become indebted in excess of five percent of the assessed valuation of property for taxation therein, and where the total indebtedness of such county, city or municipality does not exceed five percent of the assessed valuation of property for taxation at the time of such investment: *Provided always*, There has been no default for more than thirty days during the preceding ten years upon any of the issuing state, county, city or town.

(C) In the legally issued notes of the owner of improved unencumbered real property located in this state secured by first mortgage or deed of trust thereon: *Provided*, That the total debt secured by such encumbrances does not exceed fifty percent of the actual cash value of such real property at the time of such investment: *And provided*, That if buildings or other improvements constitute a material part of the value of such premises encumbered to secure such indebtedness they shall be kept insured against loss or damage by fire in a reasonable amount for the benefit of the owners of such notes secured by first mortgages or deeds of trust.

Before making any such investment a signed application therefor shall be procured from the borrower, which shall contain such information as may be required by the lender, and in every case shall contain a complete description of the real estate, including improvements thereon, and an affirmative statement that such proposed borrower is the owner of the entire fee-simple title to such real estate and improvements, that same are free of every encumbrance or lien of any character, or if not, a statement of any existing encumbrance or other liens thereon and specific authorization to the lender to withhold from the proposed loan the necessary sum to discharge and procure the release of any such encumbrances or other liens, and such release shall in all cases be procured and filed for record prior to or contemporaneously with the making of such loan. The proposed borrower shall also furnish with such application an abstract or certificate of title and same shall be completed to the time of closing the loan. The guardian proposing to make any such loan or to purchase any notes secured by first mortgage or deed of trust shall exhibit to the court with his application for approval thereof the opinion of a qualified attorney at law satisfactory to the court, which opin-

ion shall show that such attorney has examined said title or certificate of title and the papers evidencing the proposed debt and encumbrances to secure same, and based thereon it is the opinion of such attorney that the proposed borrower has good title to the property to be encumbered and that such proposed encumbrance will constitute a valid first lien thereon. In addition thereto the guardian shall file with the court satisfactory written evidence that the reasonable cash value of the property to be encumbered is in accordance with the requirements of this paragraph.

If the guardian purchases previously issued notes secured by first mortgage or deed of trust, the attorney's examination and opinion shall also disclose whether the proposed transferor has and will pass to the guardian good title thereto together with the liens securing same as hereinbefore provided. In such case the guardian shall file with the court satisfactory written evidence of value of the encumbered property as is hereinabove required, as of the time of acquiring such notes. [G. S. 1935, § 73-512; L. 1939, ch. 283, § 2; March 2.]

**73-513. Use of funds for support of third persons.** A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper office of the bureau in the manner provided in section 9 [73-509]. [L. 1929, ch. 250, § 13; May 28.]

**73-514. Copy of public records to be furnished when required.** Whenever a copy of any public record is required by the bureau to be used in determining the eligibility of any person to participate in benefits made available to such bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such bureau with a certified copy of such record. [L. 1929, ch. 250, § 14; May 28.]

**73-515. Commitment to United States veterans' hospital.** Whenever it appears that a veteran of any war, military occupation or expedition is eligible for treatment in a United States veterans' bureau hospital and commitment to such hospital is necessary for the proper care and treatment of such veteran, the courts of this state are hereby authorized to communicate with the official in charge of such hospital with reference to available facilities and eligibility, and upon receipt of a certificate from the official in charge of such hospital the court may then direct such veteran's commitment to such United States veterans' bureau hospital. Thereafter such veteran upon admission shall be subject to the rules and regulations of such hospital and the officials of such hospital shall be vested with the same powers now exercised by superintendents of state hospitals for mental diseases within this state with reference to the retention of custody of the veteran so committed. Notice of such pending proceedings shall be furnished the person to be committed and his right to appear and defend shall not be denied. [L. 1929, ch. 250, § 15; May 28.]

**73-516. Accounting of guardian upon discharge.** When a ward for whom a guardian has been appointed under the provisions of this act or other laws of this state shall have attained his or her majority, and if incompetent shall be declared competent by the bureau and the court, and when any incompetent ward, not a minor, shall be declared competent by said bureau and the court, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. [L. 1929, ch. 250, § 16; May 28.]

**73-517. Construction of act.** This act shall be construed liberally to secure the beneficial intents and purposes thereof, and shall apply only to beneficiaries of the bureau. [L. 1929, ch. 250, § 17; May 28.]

**73-518. Title.** This act may be cited as the "uniform veterans' guardian-ship act." [L. 1929, ch. 250, § 18; May 28.]

**73-519. Interpretation.** 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. [L. 1929, ch. 250, § 19; May 28.]

**73-520. Validity.** The invalidity of any portion of this act shall not affect the validity of any other portion thereof which can be given effect without such invalid part. [L. 1929, ch. 250, § 20; May 28.]

**73-521. Repeals.** All laws or parts of laws relating to beneficiaries of the bureau inconsistent with this act are hereby repealed. [L. 1929, ch. 250, § 21; May 28.]

**73-522. Purchase of real estate; evidence of value and title.** The court may authorize the purchase of the entire fee-simple title to real estate in this state in which the guardian has no interest, but only as a home for the ward, or to protect his interests, or (if he is not a minor) as a home for his dependent family. Such purchase of real estate shall not be made except upon the entry of an order of the court after hearing upon verified petition. Notice of such hearing shall be given the veterans' administration in the manner and within the time provided by section 4 [73-523] of this act. Before authorizing such investment the court shall require evidence of value and title as is hereinabove provided, and of the advisability of acquiring such real estate. Title shall be taken in the ward's name. This paragraph shall not be construed to limit the right of the guardian, on behalf of his ward, to bid and to become the purchaser of real estate at a sale thereof pursuant to decree of foreclosure of a lien held by or for the ward, or at a trustee's sale, to protect the ward's right in the property so foreclosed or sold, or at a sale under partition decree, if necessary to protect the ward's interest in such property. [L. 1939, ch. 283, § 3; March 2.]

**73-523. Administrator of veterans' affairs to be party in interest, when.** The administrator of veterans' affairs or his successor, is and shall be a party in interest in any proceedings brought under any law of this state for the appointment of a guardian of a veteran of any war or other beneficiary on whose account benefits of compensation, adjusted compensation, pension or insurance or other benefits are payable by the veterans' administration, and the said administrator or his successor is and shall be an interested party in the administration of the estate of any such ward on whose account such benefits are payable or whose estate includes assets derived from benefits paid by the veterans' administration, its predecessor or successor, and written notice shall be given by registered mail (unless waived in writing) to the office of the veterans' administration having jurisdiction over the area in which the court is located, of the time and place for hearing on any petition or pleading or in connection with any proceeding pertaining to or affecting in any manner the administration of the estate of any beneficiary of the veterans' administration. Said notice shall be given at such time as to reach such office in due course of mail not less than ten days before the date of such hearing or other proceeding. [L. 1939, ch. 283, § 4; March 2.]

## THE PROPERTY ACT OF 1939 (Annotated)

(Real or Personal Property Granted or Devised)

**Cross reference:** Disposition of property in perpetuity for burial purposes, see G. S. 1947 Supp. § 12-1419a.

**58-501. Tenancy in common unless joint tenancy intended, when; exception.** Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created: *Except*, That a grant or devise to executors or trustees, as such, shall create in them a joint tenancy unless the grant or devise expressly declares otherwise. [L. 1939, ch. 181, § 1; July 1.]

**Judicial Council, 1939:** This is G. S. 1935, § 22-132, rewritten for clarification and so as to apply to both real and personal property, in harmony with the opinions of our supreme court construing the section. *Simons v. McLain*, 51 K. 153, 32 P. 919; *Boyer v. Sims*, 61 K. 593, 60 P. 309; *Stewart v. Thomas*, 64 K. 511, 68 P. 70; *Holmes v. Holmes*, 70 K. 892, 79 P. 163; *Best v. Tatum*, 78 K. 215, 96 P. 140; *Withers v. Barnes*, 95 K. 798, 149 P. 691; *Malone v. Sullivan*, 136 K. 193, 14 P. 2d 647; *Cress v. Hamnett*, 144 K. 128, 58 P. 2d 61.

**Note:** Bartlett's Probate Practice, see § 404.

History, purpose and effect of section discussed; conveyance construed. *Bouska v. Bouska*, 159 K. 276, 279, 280, 153 P. 2d 923.

**58-502. Common-law rules inapplicable (rule in Shelley's case and estates tail).** The rules of the common law, known as the rule in Shelley's case, and those pertaining to estates tail, however created, shall not be applied in this state to any instrument which becomes effective after the effective date of this act. Every instrument not within the purview of section 3 [58-503] taking effect after the effective date of this act and disposing of property which but for this section would create an estate tail shall create a life estate in the first taker and a remainder in fee in the next taker. [L. 1939, ch. 181, § 2; July 1.]

**Judicial Council, 1939:** Many of our cases demonstrate that these rules are not suitable to titles to property in this state or to the wants and needs of our people. Here is a partial list of our cases dealing with this question: *Ewing v. Nesbitt*, 58 K. 708, 129 P. 1131; *Busey v. Stockhoff*, 83 K. 729, 129 P. 1135; *Howe v. Howe*, 94 K. 67, 145 P. 873; *Ryan v. Cullen*, 96 K. 284, 150 P. 597; *Wiggins v. Powell*, 96 K. 478, 152 P. 765; *Bryant v. Flanner*, 99 K. 472, 162 P. 280; *Stevenson v. Stevenson*, 102 K. 80, 169 P. 552; *Grossenbacher v. Spring*, 108 K. 397, 195 P. 884; *Gardner v. Anderson*, *Trustee*, 114 K. 778, 227 P. 743; 116 K. 431, 227 P. 743; *Allen v. Pedder*, 119 K. 773, 241 P. 696; *Davis v. Davis*, 121 K. 312, 246 P. 982; *Wright v. Jenks*, 124 K. 604, 261 P. 840; *Lisman v. Marks*, 126 K. 344, 267 P. 963; *Farmers State Bank v. Howlett*, 126 K. 610, 270 P. 605; *Somers v. O'Brien*, 129 K. 24, 281 P. 888; *Schwarz v. Rabe*, 129 K. 430, 283 P. 642; *Brown v. Boone* (two cases), 129 K. 786, 284 P. 436; *Berthoud v. McCune*, 130 K. 634, 287 P. 904; *Houck v. Merritt*, 131 K. 151, 289 P. 431; *Burnworth v. Fellerman*, 131 K. 186, 289 P. 433; *Blaker v. Blaker*, 131 K. 833, 293 P. 517; *Walker v. Row*, 132 K. 564, 296 P. 699; *Woodley v. Howe*, 133 K. 639, 3 P. 2d 475; *Coughlin v. Coughlin*, 135 K. 70, 9 P. 2d 980; *Gibbs v. Turner*, 140 K. 53, 34 P. 2d 564; *Brann v. Hall*, 141 K. 749, 43 P. 2d 229; *Kistler v. Fitzpatrick Mortgage Co.*, 146 K. 467, 71 P. 2d 882; *Meyer v. Meyer*, 146 K. 907, 73 P. 2d 1007; 147 K. 664, 78 P. 2d 910; 149 K. 23, 86 P. 2d 493; *Coleman v. Shoemaker*, 147 K. 689, 78 P. 2d 905.

**Note:** Bartlett's Probate Practice, see § 419.

Effect of section discussed but not applied in construing deed. *Foster v. Stowers*, 150 K. 599, 602, 95 P. 2d 343.

Cited but not applied; deed held not to create fee tail estate. *Jones v. Jones*, 153 K. 108, 112, 109 P. 2d 211.

Mentioned but not applied; will held not to create estate tail. *Delp v. George*, 158 K. 774, 775, 150 P. 2d 334.

Mentioned but not applied; will held not to create estate tail. *Morehead v. Goellert*, 160 K. 598, 599, 164 P. 2d 110.

**58-503. Same (grant or devise to person for life and then to some other).** When real or personal property is granted or devised to one person for life, and then to some other person, or persons, whether named individually

or as one or more of a class of which the individuals can be ascertained by the time the fee is possessed, the instrument by which such property is so transferred shall be construed as creating in the person first named an estate during his lifetime only, and a remainder in fee simple in the person or persons last named. [L. 1939, ch. 181, § 3; July 1.]

**Judicial Council, 1939:** This broadens G. S. 1935, § 22-256, so as to include personal as well as real property and any instrument by which property may be transferred, and with respect to any person or class of persons to whom the grantor or testator desires to leave the remainder in fee. The following cases, as well as many of those cited under section 58-502, will tend to show the desirability of this revision: *Bunting v. Speck*, 41 K. 424, 437, 453, 21 P. 288; *Peck v. Ayres*, 79 K. 457, 100 P. 283; *Kirby v. Broadus*, 94 K. 48, 145 P. 875; *Orphans' Home Association v. Williams*, 104 K. 316, 178 P. 616; *Grossenbacher v. Spring*, 108 K. 397, 195 P. 884; *Kirkpatrick v. Kirkpatrick*, 112 K. 314, 319, 211 P. 146; *McCartney v. Robbins*, 114 K. 141, 217 P. 311; *Gardner v. Anderson, Trustee*, 116 K. 431, 227 P. 743; *Allen v. Pedder*, 119 K. 773, 781, 782, 241 P. 696; *Farmers State Bank v. Howlett*, 126 K. 610, 270 P. 605; *Schwarz v. Rabe*, 129 K. 430, 432, 233 P. 642.

**Note:** *Bartlett's Probate Practice*, see § 420.

**58-504. Same (indefinite failure of issue; definite failure of issue).** In the case of instruments disposing of property, of which the following is a type: "A to B and his heirs, but if B dies without issue, then to C and his heirs," the common law rule of interpretation that indefinite failure of issue is indicated shall not be applied. Definite failure of issue is indicated, that is, death of B without having issue living at the time of his death. B's death without living issue need not occur in the lifetime of the maker of the instrument. The rules here presented apply when the limitation is on death "without heirs," or, "heirs of the body," or, "issue," or, "children," or, "offspring," or, "descendants," or any such relative however described. Enactment of this statute shall not be regarded as legislative recognition that the common law indefinite failure of issue presumption has ever been a part of the law of this state. [L. 1939, ch. 181, § 4; July 1.]

**Judicial Council, 1939:** The common-law rule was one of construction of instruments. Under it, when the instrument was construed as indicating an indefinite failure of issue, an estate tail was held to have been created. It had many refinements. Since we are doing away with the common-law rules of estates tail this rule should be eliminated. There appear to be differing opinions among our attorneys as to whether the common-law rule ever was recognized in this state. See: *Klingman v. Gilbert*, 90 K. 545, 135 P. 682; *McCartney v. Robbins*, 114 K. 141, 217 P. 311; *Platt v. Woodland*, 121 K. 291, 246 P. 1017; *Cress v. Hamnett*, 144 K. 128, 58 P. 2d 61; concurring opinion in *Ragland v. Ragland*, 146 K. 103, 109-112, 68 P. 2d 1100; letter of Dean Burch in *Judicial Council Bulletin*, October, 1937, p. 101.

**Note:** *Bartlett's Probate Practice*, see § 421.

Mentioned but not applied; will held not to create estate tail. *Delp v. George*, 158 K. 774, 775, 150 P. 2d 334.

**58-505. Same (rule in Wild's case).** In the case of instruments disposing of property of which the following is a type: "A to B and his children," the doctrine of the common law known as the rule in *Wild's case* shall not hereafter apply, and the instrument shall create a life interest in B and a remainder in his children. The rule here prescribed applies when the expression is "children," or "issue," or words of similar import. [L. 1939, ch. 181, § 5; July 1.]

**Judicial Council, 1939:** Under the rule in *Wild's case* (*Richardson v. Yardley*, 3 Coke Rep., Part VI, p. 16b), as generally construed (see Vol. iv, p. 122, *Journal State Bar Association*), a grant or devise to A and his children, or to A and his issue, created in them a joint tenancy (*Noble v. Teeple*, 58 K. 398, 49 P. 598) if A had children or issue at the time of the grant or devise, but if he did not, it created an estate tail. Since we are doing away with the doctrine of estates tail this rule should be eliminated. Also, it was thought best to have a definite statutory rule applicable to such instruments.

**Note:** *Bartlett's Probate Practice*, see § 422.

Cited; deed executed before this section enacted construed. *Schlemeyer v. Mellencamp*, 159 K. 544, 547, 156 P. 2d 879.

Deed construed; rule in *Wild's case* before section enacted held inapplicable. *Epperson v. Bennett*, 161 K. 298, 306, 167 P. 2d 606.

**58-506. Same (doctrine of worthier title).** In the case of a will to heirs, or to next of kin of the testator, or to a person an heir or next of kin, the common-law doctrine of worthier title is abolished and the devisees or

devisee shall take under the will and not by descent. [L. 1939, ch. 181, § 6; July 1.]

**Judicial Council, 1939:** The common-law doctrine of worthier title, to the effect that one who under the laws of descent would take property as an heir cannot take it by will, was established in England as early as 1555 (*Hind v. Lyon*, 2 Dy, 124a, 73 Eng. Repr. 271). To inherit property was more "worthy" than to acquire it by "purchase." It was an outgrowth of the feudal doctrine of primogeniture. Courts had difficulty applying the doctrine when the property devised was not the same in quantity or quality as the devisee would have received as an heir, or where the devise was upon a condition either precedent or subsequent. In 1833 (3 & 4 Will, IV, c. 106, § 3) the doctrine was abandoned in England by an act of Parliament, which provided that an heir to whom lands are devised takes as devisee. In the meantime the doctrine had found a foothold in the American colonies and later in some of the states, with varying results in its application. (See 24 Ill. Law Rev. 627.) We have no need for the doctrine in this state.

**Note:** Bartlett's Probate Practice, see § 423.

Common law doctrine abrogated by this section. *Jones v. Petrie*, 156 K. 241, 243, 132 P. 2d 396.

Doctrine of "worthier title" is definitely abolished. *In re Estate of Casey*, 156 K. 590, 598, 134 P. 2d 665.



## THE UNIFORM SIMULTANEOUS DEATH LAW

**Note:** The original simultaneous death law was prepared by the national conference of state commissioners and recommended by the American bar association. For table of states wherein act has been adopted, and notes, see Uniform Laws Annotated, Vol. 9.

**58-701. Disposal of property when no sufficient evidence of survivorship.** Where title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons concerned have died otherwise than simultaneously the property of each person shall be disposed of as if he had survived, except as otherwise provided in this act. [L. 1947, ch. 239, § 1; June 30.]

**58-702. Beneficiaries of another person's disposition of property.** Where two or more beneficiaries are designated to take successively or alternately by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive or alternate beneficiaries, and the portion allocable to each beneficiary shall be distributed as if he had survived all the other beneficiaries. [L. 1947, ch. 239, § 2; June 30.]

**Note:** Words "or alternate" added to uniform act by Kansas legislature.

**58-703. Joint tenants or tenants by the entirety.** Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other survived. Where more than two joint tenants have died and there is no sufficient evidence that they died otherwise than simultaneously the property so held shall be divided into as many equal shares as there were joint tenants and the share allocable to each shall be distributed as if he had survived all the others. [L. 1947, ch. 239, § 3; June 30.]

**Note:** Last sentence of this section of the uniform act reads: "If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to whole number of joint tenants."

**58-704. Insurance policies or contracts.** Where the insured and the beneficiary in a policy or contract of life or endowment insurance or insurance against accident have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy or contract shall be payable as if the insured had survived the beneficiary. [L. 1947, ch. 239, § 4; June 30.]

**Note:** Words "or contract of life or endowment insurance or insurance against accident" substituted for "of life or accident insurance" of the uniform act.

**58-705. Act does not apply if different provision has been made.** This act shall not apply to a will, living trust or deed wherein provision has been made for distribution different from the distribution under this act, or to a policy or contract of insurance wherein provision has been made for payment of its proceeds different from such payment under this act. [L. 1947, ch. 239, § 5; June 30.]

**Note:** The comparable section of the uniform act reads: "This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this act."

**58-706. Invalidity of part.** If any of the provisions of this act or the application thereof to any persons or circumstances is held invalid such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared severable. [L. 1947, ch. 239, § 6; June 30.]

**58-707. Title of act.** This act may be cited as the "uniform simultaneous death law." [L. 1947, ch. 239, § 7; June 30.]

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