Kansas Judicial Council Bulletin

NOVEMBER, 1961 SPECIAL REPORT

Recommendations as to Rules of Civil Procedure, Process, Rules of Evidence and Limitations of Actions

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Kansas Judicial Council Bulletin

Recommendations as to Rules of Civil Procedure, Process, Rules of Evidence and Limitations of Actions

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CODE OF CIVIL PROCEDURE

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Foreword

The increasing problems incident to the efficient, speedy and inexpensive administration of justice in the courts have for many years been receiving extensive study. The broad outline for the procedural codes had been established over one hundred years ago, and followed without substantial change.

The Kansas Code of Civil Procedure was adopted by the Territorial Legislature of 1859. There was a revision in 1909 relating to joinder of causes of action, and substituting appeals for the old bill of exceptions and petitions in error but the basic procedural provisions have remained unchanged.

In 1937, pursuant to the powers vested in it, the Supreme Court of the United States adopted complete and comprehensive rules of procedure for the district courts. These rules have received careful attention from their practical application for the past twenty-four years and have from time to time been modified, amended and enlarged. Today they are acclaimed as being the best procedural rules in existence. A great majority of the states have adopted them insofar as they were adaptable to local conditions and feasible under their respective constitutions.

The Kansas legislature at the 1960 Budget Session made funds available to the Judicial Council to prepare a suggested revision of the Code of Civil Procedure. The Judicial Council does not, and could not if it wanted to, usurp unto itself judicial authority in the field of procedural rule making, or legislative authority in matters involving substantive law. The position of the Council is and must be that it can act only in the capacity of studying the subject with the thoroughness which it deserves and presenting to the Legislature, the Supreme Court, and the Bar its recommendations.

As soon as the money was made available, plans were formulated by Judicial Council action, and Earl Hatcher of Topeka was employed to carry the major responsibility of research, drafting, and reporting. At the same time the Council named an advisory committee to work with Mr. Hatcher. Judge Spencer A. Gard of Iola, a judicial member of the Council, was named as chairman of the committee. The members of the committee are: former district judge A. K. Stavely, of Lyndon; Emmet A. Blaes of Wichita; Leonard O. Thomas, of Kansas City; George Templar of Arkansas City; and Raymond F. Rice of Lawrence.

The Advisory Committee has held monthly meetings with Mr. Hatcher and several joint meetings with the Judicial Council. Every sentence of the work has been carefully considered. We are now presenting for the consideration of the Bench and Bar, recommendations covering "Rules of Procedure," "Evidence," and "Limitations of Actions." The other articles covering chiefly special proceedings will be presented later.

The Rules of Procedure follow the plan of the Federal Rules. Where experience with the Federal Rules has shown that they have worked well on the federal level and meet the needs of Kansas practice, they have been followed to the full extent that they are adaptable to local practice and in harmony with the substantive law of Kansas and the Constitution.

There are many benefits to be derived from a great degree of uniformity in the procedure to be followed by the courts of the various states and the United States. The Federal Rules, which have been in existence for some time, have been interpreted and clarified. The lawyer, whether in a court of his own state, a federal court, or a court of a sister state, will be familiar with procedure. There will be a saving of labor and confusion if one procedure can be followed without material deviation.

The members of the Kansas Bar would not find many material or substantial changes in their practice procedure if the Federal Rules of Civil Procedure were adopted in their entirety. The extension of the right to take depositions, the right of discovery and summary judgments would constitute the most substantial changes.

The Kansas Code of Civil Procedure is not in most respects foreign to the Federal Rules of Civil Procedure. They have both drawn heavily from the same source.

The California Practice Act of 1851 adopted code pleading—commonly called the Field Code. Many of the midwestern states followed the California Code. The Kansas 1868 Code of Civil Procedure was considered as following the Ohio Code which was adopted in 1853. However, the Ohio Code had followed the California Practice Act of 1851 or the Field Code. Kansas had adopted the Field Code for its 1859 Territorial Practice Act and it was substantially followed in the 1868 Code of Civil Procedure. In 1872 the California Practice Act was succeeded by a Code of Civil Procedure, which although much amended remains in effect.

The drafters of the Federal Rules of Civil Procedure leaned heavily on the provisions of the California Code for guidance. Also,

the procedural concepts of the Minnesota Code were influential. Minnesota adopted the Field Code in 1851, seven years before it became a state.

Kansas has very few statutory rules of evidence. The Supreme Court of the United States has not as yet adopted such rules. They are, however, under consideration and are being considered and adopted by the states. The Code, if it is to be complete must now have such rules. Suggested "Rules of Evidence" are presented for consideration. The uniform rules of evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association have been followed as a guide. This again should assure some uniformity with the rules of other states and of the federal courts when adopted.

Perfection is not claimed. Undoubtedly, errors and omissions will appear which will need correction.

It is only realistic to assume that every member of the Bar will have an objection to some one of the many provisions in the material submitted. It is hoped, however, that individual objections, if not substantial, will be overcome by the over-all benefits to be derived from the completed project.

Suggestions in connection with the work should be mailed to E. H. Hatcher, First National Bank Building, Topeka, Kansas.

The Advisory Committee.

Chapter 60—Code of Civil Procedure

Article 1. PREFATORY

60-101. *Title.* This Act shall be known as the Kansas Code of Civil Procedure.

60-102. *Construction.* The provisions of this Act shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding.

Committee Notes

The first 11 sections of the old code (Articles 1 and 2) have been combined into four sections. They appear under Article 1 and the first two sections of Article 2. They cover all of the essential preliminary matters.

There is no reason to provide for division of remedies. The statute makes the distinction and identifies the remedy when it provides for a special proceeding. The question is covered in new 60-201. There is no reason to define "civil actions" other than is done in new 60-201.

The liberal construction provision has been placed under 60-102 instead of Rule 1, (60-201) as it should apply to the entire code, not just the rules.

60-103. *Restricted Registered or Certified Mail Defined.* The term "restricted registered or restricted certified mail" means mail which carries on the face thereof in a conspicuous place, where it will not be obliterated, the endorsement "deliver to addressee only" and which also requires a return receipt or a statement by the postal authorities that the addressee refused to receive and receipt for such mail.

Committee Notes

Throughout the provisions of the code where service by mail is permitted, the phrase "by restricted, registered or certified mail" is used. Either "registered" or "certified" mail is permitted. Restricted delivery is necessary under either method in some instances, *i. e.*, service of process where the return receipt must show the signature of the addressee. Registered mail which may be delivered by the postman to anyone customarily about the office will not suffice. This section, in defining the phrase, designates what must be carried on the face of the cover.

60-104. *Acts by Court or Judge.* Without regard to whether the word "court" or the word "judge" is used in any provisions of this Code, all trials upon the merits shall be conducted in open court and in a regular courtroom if reasonably possible. All other acts or proceedings, including the entry of a ruling or judgment, may be done or conducted by a judge or judge pro tem in chambers, without

the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte,* shall be conducted outside the district without the consent of all parties affected thereby.

COMMITTEE NOTES

This section is included for the purpose of eliminating any confusion as to whether the judge may act or the court must act, regardless of which word is used in the various provisions of the Code.

Article 2. RULES OF CIVIL PROCEDURE

60-201. *Scope.* These rules govern the procedure in the district courts of Kansas and original proceedings in the supreme court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in 60-265.

Committee Notes

This section, 60-201, is similar to Federal Rule 1 except we have included original proceedings in the supreme court. It is necessary to make certain exceptions where special proceedings are specifically provided by independent statutes. This is done by limiting the applicability of these rules of civil procedure. (60-265.) Where special proceedings are included in the code of civil procedure, these rules will be made applicable insofar as possible.

We will maintain the same article number all the way through the rules of civil procedure. We can then make the section number correspond with the Federal Rule number. Thus 60-201 will correspond to Federal Rule 1, 60-202 to rule 2, etc. This can continue through the sections and rules until we cease following the Federal Rules at Rule 64, without in any way interfering with the orderly arrangement of our material or the statutory numbering system. We believe this will prove to be a unique method of conforming the state and federal rules, without in any way confusing the members of the Bench and Bar. The system will make for simple and ready reference from one to the other of the State or Federal rules.

60-202. *One Form of Action.* There shall be but one form of action to be known as "Civil Action," in which the party complaining shall be designated "plaintiff" and the adverse party "defendant."

Committee Notes

This section is the same as Federal Rule 2 except that we have added the designation of the parties as is done in old section 60-201. The provision has the same effect as old 60-201.

It continues the abolition of the distinction between forms of actions at law and suits in equity. It does not attempt to abolish the distinction beween equitable and legal remedies as is improperly done in the present code. The distinction between equitable and legal remedies must be recognized by the courts in determining right to jury trials, etc. Only the form is abolished, not the remedy. The right to a specific kind of legal or equitable relief upon proof of certain facts must remain.

60-203. *Commencement of Action.* A civil action is commenced by filing a petition with the clerk of the court, provided service of process is obtained or the first publication is made for service by publication, within ninety days after the petition is filed; otherwise the action is deemed commenced at the time of service of process or first publication.

COMMITTEE NOTES

This section is the same as Federal Rule 3 down to the "provided" clause except the complaint is designated "petition." Under our state practice it is necessary that the commencement of an action be dependent upon both the filing of the petition and service.

Rule 3 has caused more argument among drafters of the rules of procedure for the various states, and more confusion in the interpretation of the effect of the phrase, "a civil action is commenced by filing a complaint with the court," than any of the other eighty some rules. This is particularly true where the statute of limitations is an issue. Our present code uses the phrase under the first section of the article covering limitations, G. S. 60-301. It then proceeds to state when an action is deemed commenced for the purpose of applying limitations in G. S. 60-308. G. S. 60-301 did nothing but confuse the issue.

Under the new 60-203, the action is commenced for all purposes when the petition is filed if service is obtained or service by publication is commenced within ninety days after the filing of the petition. We have eliminated the requirement of faithful, proper and diligent endeavor to procure service as used in G. S. 60-308 believing that the importance of the determination of time of commencement demands definiteness.

60-204. *Process Generally.* The methods of serving process as set forth in Article 3 of this Chapter shall constitute sufficient service of process in all civil actions and special proceedings, but they shall be alternative to, and not in restriction of different methods specifically provided by law. In any method of serving process, substantial compliance therewith shall effect valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was by such service of process made aware that an action or proceeding was pending in a specified court in which action or proceeding his person, status or property were subject to being affected.

COMMITTEE NOTES

Although this section is inserted chiefly for the purpose of maintaining uniformity with the section number and the Federal Rule number, it also contains two general provisions. It covers the scope of the provisions for service of process, and also the effect of substantial compliance with the provisions.

60-205. *Service and Filing of Pleadings and Other Papers.* The method of service and filing of pleadings and other papers as provided in this section shall constitute sufficient service and filing in all civil actions and special proceedings, but they shall be alternative to, and not in restriction of different methods specifically provided by law.

(*a*) *Service: When Required.* Every order required by its terms to be served, every pleading subsequent to the original petition

unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte,* and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in section 60-204.

(*b*) *Same: How Made.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(*c*) *Same: Numerous Defendants.* In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(*d*) *Filing.* All papers after the petition required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(*e*) *Filing With the Court Defined.* The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note

thereon the filing date and forthwith transmit them to the office of the clerk.

COMMITTEE NOTES

Federal Rule 5 has been followed. The present Kansas code has no general provisions for service and filing of pleadings and other papers, except as G. S. 60-722 to 60-724 cover service and filing of motions.

Because of the many provisions in our substantive law for service of papers, we have taken the precaution of placing in the first paragraph the statement that these provisions "shall be alternative to, and not in restriction of different methods specifically provided by law." The many additional methods scattered through the various chapters of the Kansas statutes can be repealed when and if desired.

60-206. *Time, Computation and Extension.* The following provisions shall govern the computation and extension of time:

(*a*) *Computation.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(*b*) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the judge for cause shown may at any time in his discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under sections 60-250 (*b*), 60-252 (*b*), 60-259 (*b*), (*d*) and (*e*) and 60-260 (*b*) except to the extent and under the conditions stated in them.

(*c*) *Unaffected by Expiration of Term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term

of court in no way affects the power of a court to do any act or take any proceeding in any civil action pending before it.

(*d*) *For Motions—Affidavits.* A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the judge. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Section 60-259 (*c*), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at the time of hearing.

(*e*) *Additional Time After Service by Mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

COMMITTEE NOTES

We have followed Federal Rule 6 for general provisions covering computation and extension of time. It includes the provisions of G. S. 60-3819 and 60-3819a and additional important provisions. We find the Federal Rule entirely acceptable for Kansas practice.

60-207. *Pleadings Allowed; Forms of Motions.* (*a*) *Pleadings.* There shall be a petition and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party petition, if leave is given under section 60-214 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party petition is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(*b*) *Motions and Other Papers.* (1) An application to the court or judge for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(*c*) *Demurrers, Pleas, Etc., Abolished.* Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(*d*) *Lost Pleadings.* If an original pleading is lost, destroyed, or withheld by any person, the court or judge may allow a copy thereof to be substituted.

COMMITTEE NOTES

The only pleadings ordinarily required under this provision are the petition and answer. Demurrers are abolished and the existing provision for replies is altered. (G. S. 60-703.) The function of a general demurrer is served by a motion under new Section 60-212 (*b*) for failure to state a claim upon which relief can be granted. A reply to the answer is required only when ordered by the judge. Subsection (*d*) is the same as G. S. 60-752.

60-208. *General Rules of Pleadings.* (*a*) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(*b*) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial, subject to the obligations set forth in section 60-211.

(*c*) *Affirmative Defenses.* In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata,* statute of frauds, statute of limitations, waiver,

and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(*d*) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required or permitted, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(*e*) *Pleading To Be Concise and Direct; Consistency.* (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in section 60-211.

(*f*) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

COMMITTEE NOTES

The federal rule has been closely followed. There is not a great deal of difference between the federal rule and the present state procedure. The provision for the "short and plain relief" requires less particularity of allegation than has been necessary under the state practice to survive a demurrer. The intent and effect of the provision is to permit a claim to be stated in general terms, but the pleader must supply adequate factual information to disclose the basis of his claim for relief. It is possible to greatly simplify pleadings by providing for discovery and the provision must be read with awareness that if the defendant needs more information than the petition discloses, the discovery devices are designed for this purpose. Regardless of the permitted generality of allegations, the plaintiff may well find it to his advantage to make his allegations more informative than the rules require in order to enlighten the court and for his own enlightenment.

Sub-paragraph (*b*) is intended to prevent the indiscriminate use of the general denial particularly in cases where much of the plaintiff's complaint is in fact not in controversy.

Sub-paragraph (*c*) lists the affirmative defenses which must be specifically pleaded. The provisions are quite in harmony with present state practice.

The remaining provisions of this section follow rather closely the present state practice. It should be noted that the defendant may state as many separate claims or defenses as he has regardless of their consistency.

The purpose of this section is to promote simplicity and substantial justice. G. S. 60-702, 60-710, 60-736 and 60-737 are covered and other provisions specifically spelled out.

60-209. *Pleading Special Matters.* (*a*) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity, of any party to sue or be sued or the authority of any party to sue or be sued in a representative capacity he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(*b*) *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(*c*) *Conditions Precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(*d*) *Official Document or Act.* In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(*e*) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(*f*) *Time and Place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(*g*) *Special Damage.* When items of special damage are claimed, their nature shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered.

(*h*) *Pleading Written Instrument.* Whenever a claim, defense or counterclaim is founded upon a written instrument, the same may

be pleaded by reasonably identifying the same and stating the substance thereof or it may be recited at length in the pleading, or a copy may be attached to the pleading as an exhibit.

(*i*) *Tender of Money.* When a tender of money is made in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in the court at the trial, unless otherwise ordered by the court.

(*j*) *Libel and Slander.* In an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be not controverted in the answer, it shall not be necessary to prove it on the trial; in other cases it shall be necessary. The defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances admissible in evidence to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence any mitigating circumstances.

COMMITTEE NOTES

The first seven subsections of this section are substantially the same as the federal rules. Three paragraphs have been added to cover pleading, tender of money and libel and slander. It should be noted that under this provision, capacity to sue need not be alleged by the plaintiff. In the great majority of actions, capacity is not in dispute and there would appear to be no necessity for cluttering up the pleadings with assertions of capacity. Circumstances surrounding fraud or mistake must be set forth with particularity as is required by present state practice. Conditions of the mind need be averred only generally, for the obvious reason that it is very difficult to describe with particularity the condition of a person's mind.

Subsection (*f*) makes averments of time and place material when testing the sufficiency of a pleading. This is in harmony with the present state rule. The provision does not touch on the need of making such averments but simply provides that when they are made, they will be taken at face value. The chief importance lies in connection with the defense of the statute of limitations. This section touches on matters covered by G. S. 60-739, 60-740, 60-742, 60-743 to 60-747 and 60-750 to 60-751.

60-210. *Form of Pleadings.* (*a*) *Caption; Names of Parties.* Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in section 60-207(A). In the petition the title of the action shall include the names of all the parties, but in other pleadings it is

sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(*b*) *Paragraphs;* Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense.

(*c*) *Adoption by Reference; Exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

COMMITTEE NOTES

The Federal Rule for form of pleading has been followed. It would appear that the federal rule is concise and complete. The section has as its objective clarity in pleading. The provisions of G. S. 60-704 are included but the definite requirement of separately numbered paragraphs is an addition. Separate numbered paragraphs have always been considered a part of good pleading.

60-211. *Signing of Pleadings.* Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

COMMITTEE NOTES

This section is the same as Federal Rule 11, except the sentence covering overcoming averments of answers made under oath has been deleted as the rule has never applied in this state. The purpose is to require bona fide pleading and determination without delay. It is intended to do away with the useless practice of verified pleading except in a few instances where specifically

required. G. S. 60-730 to 60-735 inclusive will be deleted. The provisions of G. S. 60-728 relating to signature are included and extended.

60-212. *Defenses and Objections.* (*a*) *When Defenses and Objections Presented.* A defendant shall serve his answer within 20 days after the service of the summons and petition upon him, except where service by mail is had a defendant shall serve his answer within twenty days from the date of the return restricted registered or certified mail certificate, and where service by publication is had the defendant shall serve his answer within the time fixed in the notice which shall not be less than 41 days from the time the notice is first published. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(*b*) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state

a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 60-256 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 60-256.

(*c*) *Motion for Judgment on the Pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 60-256, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 60-256.

(*d*) *Preliminary Hearings.* The defenses specifically enumerated (1)-(7) in subdivision (*b*) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (*c*) of this rule shall be heard and determined before trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred until the trial.

(*e*) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleadings. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the judge is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the judge may strike the pleading to which the motion was directed or make such order as he deems just.

(*f*) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(*g*) *Consolidation of Defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this

rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (*h*) of this section.

(*h*) *Waiver of Defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial shall be disposed of as provided in section 60-215 (*b*) in the light of any evidence that may have been received.

(*i*) *Answer for Infant or Incompetent.* The guardian of an infant or person of unsound mind, or attorney for a person in prison shall deny in the answer all the material allegations in the petition prejudicial to such defendant.

COMMITTEE NOTES

Federal Rule 12 covering defenses and objections has been followed. The provision appears to amply cover all possible defenses including a substitute for a demurrer. All provisions in the present code relating to the subject will be repealed.

It may be noted that no defense or objection is waived by being joined with others in a responsive pleading or motion. Any of the seven matters set out in subsection (*b*) may be combined with an answer to the merits or they may be made separately by motion. Special appearances are no longer necessary in order to avoid submission to jurisdiction. In the discretion of the court a preliminary hearing may be held on the seven matters mentioned whether these matters are raised by motion or by answer.

Subsection (*e*) covering motions for a more definite statement is permitted only when the allegations are vague and ambiguous. The provisions for discovery should largely eliminate the necessity for this motion.

Subsection (*f*) serves a dual purpose. There is the obvious purpose of striking redundant, immaterial, impertinent or scandalous matter. The provision also permits the striking of one or more insufficient defenses which could not be reached by a general demurrer if any defense was stated.

Subsection (*g*) will prevent a party from delaying an action by making successively a series of motions.

Subsection (*h*) waives all defenses and objections which are now presented by motion or included in the answer, except the defense of failure to state a claim and jurisdiction of the subject matter.

60-213. *Counterclaims and Cross-Claims.* (*a*) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(*b*) *Permissive Counterclaims.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(*c*) *Counterclaim Exceeding Opposing Claim.* A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(*d*) *Effect of Death or Limitations.* When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or cross-claim could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other or by reason of the statute of limitations; but the two demands must be deemed compensated so far as they equal each other.

(*e*) *Counterclaim Maturing or Acquired After Pleading.* A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(*f*) *Omitted Counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(*g*) *Cross-Claim Against Co-party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(*h*) *Additional Parties May Be Brought In.* When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the judge shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(*i*) *Separate Trials; Separate Judgments.* If the court orders separate trials as provided in section 60-242 (*b*) judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of section 60-254 (*b*) when the judge has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(*j*) *Appealed and Removed Actions.* When an action is filed in the District Court on appeal or removal from an inferior court, any counterclaim made compulsory by subdivision (*a*) of this section shall be stated as an amendment to the pleading within 20 days after such filing or such other time as the court shall allow. Other counterclaims and cross-claims shall be permitted as in an original action in the District Court.

COMMITTEE NOTES

Federal Rule 13 has been followed with the exception that the provisions of G. S. 60-715 have been substituted in subsection (*d*) to cover the effect of death or limitations on cross demands, and subsection (*j*) has been added to cover counterclaims where there has been an appeal or removal from an inferior court to the district court. This section does make material changes in the existing procedure pertaining to counterclaims.

G. S. 60-711 requires that the counterclaim arise out of the same transaction or be connected with the subject matter. G. S. 60-713 permits a setoff only where recovery of money is sought by both claimants.

This new section requires a counterclaim to be interposed or forfeited under certain conditions, and permits a counterclaim to be interposed under most any condition.

Under paragraph (*a*) a defendant having a claim against the plaintiff arising out of the same transaction or occurrence as plaintiff's claim must interpose it as a counterclaim or he will be precluded from recovery in a later independent action. This danger must be guarded against but it is minimized somewhat by paragraph (*b*) which permits a counterclaim to be interposed by amendment at the discretion of the judge. A defaulting defendant would not be affected by the compulsory provision.

Paragraph (*b*) extends the existing practice by permitting any claim which the defendant has against the plaintiff to be interposed as a counterclaim although it is factually unrelated to the original claim or an unliquidated claim.

Paragraph (*d*) retains the present state provision denying to the plaintiff the right to the benefit of the statute of limitations on a cross-claim by the defendant, to the amount of the plaintiff's claim.

Paragraph (*g*) provides for a cross-claim as distinguished from a counterclaim. The latter is a claim against the opposite party while a cross-claim is a claim against a party on the same side of the case. A cross claim is not compulsory and is permissible when it arises out of the same transaction or relates to property that is the subject matter of the original action.

Paragraph (*h*) which provides for bringing in additional parties is not a substantial departure from G. S. 60-712 and 60-714, except there is no provision for striking the counterclaim and making it the subject of a separate action.

Paragraph (*j*) is added to the federal rule to provide for compulsory counterclaims on appeal or removal of cases from inferior courts to the district court. There is no such provision in the lower courts.

60-214. *Third Party Practice.* (*a*) *When Defendant May Bring In Third Party.* Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and petition upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and petition are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in section 60-212 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in section 60-213. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in section 60-212 and his counterclaims and cross-claims as provided in section 60-213. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(*b*) *When Plaintiff May Bring In Third Party.* When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(*c*) *Execution by Third-Party Plaintiff—Limitation.* Where a third-party defendant is liable to the plaintiff, or to anyone holding a similar position under subdivisions (*a*) and (*b*) of this section, on the claim on which a third-party plaintiff has been sued, execution by said third-party plaintiff on a judgment against said third-party defendant shall be permitted only to the extent that the third-party plaintiff has paid any judgment obtained against him by the obligee.

COMMITTEE NOTES

The use of this provision is optional with the defendant. He may elect to wait and bring a separate action. This provision for impleader cannot be used by the defendant who contends that it is the third party instead of the defendant who is liable to the plaintiff.

Although it is the purpose of the provision to permit the entire controversy in a single proceeding to be determined, it is only the liability of the third-party defendant to the original defendant for the original defendant's liability to the plaintiff that is to be determined. Subsection (*c*) has been added to limit the execution to such liability.

60-215. *Amendment and Supplemental Pleadings.* (*a*) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(*b*) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting

party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(*c*) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(*d*) *Supplemental Pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the judge deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

COMMITTEE NOTES

This section is the same as Federal Rule 15. It broadens somewhat the already liberal practice with respect to amendments. A pleading may be amended once as a matter of course without leave of court before a responsive pleading is filed, or, if no responsive pleading is permitted, within 20 days after it is served.

Subsection (*b*) allowing amendments to conform to the proof seems substantially declaratory of existing law. The provision for continuance in the event that an amendment allowed at trial unfairly surprises an opponent also reflects present practice.

Section (*c*), dealing with relation back of amendments, is important only when the statute of limitations would bar a new suit. Here an amendment which changes the "cause of action," as that term has been commonly construed, is allowed if the amended claim arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and thus defeat the bar of the statute of limitations.

Subsection (*d*), provides for supplemental pleadings setting forth events which have happened since the date of the original pleading.

60-216. *Pre-trial Procedure; Formulating Issues.* In any action, the court shall on the request of either party, or may in its discretion without such request, direct the attorneys for the parties to appear before it for a conference to consider.

(1) The simplification of the issues;

(2) The trial of issues of law the determination of which may eliminate or affect the trial of issues of fact;

(3) The necessity or desirability of amendments to the pleadings;

(4) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(5) The limitation of the number of expert witnesses;

(6) The advisability of a preliminary reference of issues to a master;

(7) Such other matters as may aid in the disposition of the action.

The court in its discretion may, and shall upon the request of either party make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

COMMITTEE NOTES

This section is the same as Federal Rule 16 and the present G. S. 60-2705, which is identical to the federal rule, except the holding of the conference is made mandatory on request of either party to the action, and the trial of issues of law is included in paragraph (2).

The remainder of Article 27 (60-2701) to (60-2705) is to be eliminated as unnecessary.

60-217. *Parties; Capacity.* (*a*) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Kansas.

(*b*) *Claim Accruing Under Law of Another State.* Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be sued upon in any of the courts of this state by the person or persons who are authorized to bring and maintain an action thereon in the state or territory where the same arose: *Provided,* That when the law of the state or territory where a cause of action for death arose authorizes said action to be prosecuted by an administrator or executor, then said action may be maintained in any of the courts of this state by an administrator or executor appointed under the laws of the state of Kansas.

(*c*) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem.* The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

COMMITTEE NOTES

Subsection (*a*) of this section is the same as Federal Rule 17. This state has had the real party in interest statute (G. S. 60-401) upon which Federal Rule 17 (*a*) is based.

Subsection (*b*) of the Federal Rule is not applicable to state practice. The provisions of G. S. 60-423 have been substituted, but broadened to cover actions other than death.

Subsection (*c*) of the Federal Rule, which covers the provisions of G. S. 60-406 and 60-409, has been followed. G. S. 60-407 will be covered under costs. G. S. 60-408 providing for service of process on a minor or incompetent person has been covered under 60-204 (*e*) (2) and (3).

60-218. *Joinder of Claims and Remedies.* (*a*) *Joinder of Claims.* The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Sections 60-219, 60-220, and 60-222 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Sections 60-213 and 60-214 respectively are satisfied.

(*b*) *Joinder of Remedies.* Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, but not exclusively, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money; a plaintiff may state in his original claim against the defendant and also in either the original or an amended petition or in a reply, a claim for having any release, composition, settlement, or discharge

of the original claim set aside as fraudulent or otherwise wrongfully procured.

COMMITTEE NOTES

This secion, allowing unlimited joinder of claims by plaintiffs or a counter-claiming defendant, is the same as Federal Rule 18, except we have added the last independent phrase. Legal or equitable claims may be joined, either independently or in the alternative

Subsection (*b*) is not intended to permit the joinder of a liability insurer in the original tort action. The last sentence states a significant instance for the application of this paragraph.

This section covers the provisions of G. S. 60-601 except the limitations in the last sentence are omitted.

60-219. *Joinder of Parties.* (*a*) *Necessary Joinder—Persons with Joint Interest.* Subject to the provisions of Section 60-223 hereof, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When the consent of a person who should join as plaintiff cannot be obtained, he may be made a defendant.

(*b*) *Other Parties Necessary for Complete Determination.* When a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in by an amended or supplemental petition, and service of process.

(*c*) *Names of Omitted Persons and Reasons.* In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

COMMITTEE NOTES

This section and the following section (60-220) cover the provisions of G. S. 60-410 and G. S. 60-411 and are not substantially different. Paragraph (*a*) also covers the provisions of G. S. 60-412.

60-220. *Joinder of Parties.* (*a*) *Permissive Joinder.* All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of

them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(*b*) *Separate Trials.* The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

COMMITTEE NOTES

This section is designed to allow an action on claims of two or more plaintiffs or against two or more defendants arising out of the same or related transactions. If the plaintiff is uncertain as to which of several defendants are liable, he may plead to that effect and join them all in a single action. A master and servant may be joined in a single action arising out of the latter's negligence. This section however, does not provide for unrestricted joinder of parties to the extent 60-218 provides for unrestricted joinder of claims.

60-221. *Misjoinder Not Ground for Dismissal.* Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

COMMITTEE NOTES

This section is the same as Federal Rule 21 and covers the provisions of G. S. 60-416. It does not change the present state practice. This section is not intended as an authorization for adding parties. It should be read in conjunction with Sections 60-218 and 60-219. Defects in joinder of parties will be raised by responsive pleading, or, if the objection is failure to join an indispensable party, by motion under 60-212 (*a*) (7).

60-222. *Interpleader.* (*a*) *Persons Required to Interplead.* Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim.

(*b*) *Disclaimer by Defendant.* In any action upon contract or

for the recovery of personal property, the defendant may answer that some third party without collusion with him has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the court may direct, the court or judge may make an order for the safekeeping, or for the payment or deposit in court, or delivery of the subject of the action to such persons as it may direct, and may make an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order by the sheriff, or such other person as the court or judge may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court or judge for the payment, deposit or delivery thereof.

(*c*) *Application.* The provisions of this section supplement and do not in any way limit the joinder of parties permitted in Section 60-220.

COMMITTEE NOTES

Subsection (*a*) is the same as Federal Rule 22. It is not necessary that all of the adverse claims be dependent or derived from a common source. Any requirement that the person asking the relief must not have nor claim any interest in the subject matter is specifically abolished.

Subsection (*b*) has been added. It includes the provisions of G. S. 60-418. Subsection (*a*) permits a defendant exposed to multiple liability to admit liability, pay the money into court, and be dismissed from the case. Subsection (*b*) permits the defendant to disclaim any interest in the subject matter and have the interested party brought in to defend.

60-223. *Class Actions.* (*a*) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(*b*) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the petition shall aver that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. The petition shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(*c*) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subsection (*a*) of this section notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subsection (*a*) notice shall be given only if the court requires it.

(*d*) *Pleading and Proof.* Whenever an action is instituted by one or more plaintiffs as representative or representatives of a class or against one or more defendants as representative or representatives of a class, the petition shall allege such facts as shall show that they or the defendants specifically named and served with process, have been fairly chosen and adequately and fairly represent the whole class. The plaintiff shall be required to prove such allegations, unless all of the members of the class have entered their appearance.

COMMITTEE NOTES

This section is substantially the same as Federal Rule 23 and G. S. 60-413 with additions to provide restrictions and responsibilities. The class must be so numerous as to make it impracticable to bring them all before the court. The character of the right that can be determined is also spelled out.

Paragraph (*b*) deals with derivative actions of stockholders.

Paragraph (*d*) is added to require the pleading and proof of facts protecting the members of the class not participating.

60-224. *Intervention.* (*a*) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action; (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing par-

ties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody of, or subject to the control of, or disposition by the court or an officer thereof.

(*b*) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(*c*) *Motion to Intervene and Practice in Intervention.* (1) A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor, and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene. (2) When the validity of a statute, regulation or constitutional provision of this state, or an ordinance or regulation of a governmental subdivision thereof affecting the public interest, is drawn in question in any action to which the state or governmental subdivision or an officer, agency or employee thereof is not a party, the court may in its discretion notify the chief legal officer of the state or subdivision thereof affected, and permit intervention on proper application.

COMMITTEE NOTES

This section is substantially the same as Federal Rule 24, with necessary changes to conform to state practice. It broadens the provisions of G. S. 60-417 and provides for definite and simplified procedure.

60-225. *Substitution of Parties.* (*a*) *Death of Party.* (1) *Where Claim Not Extinguished.* If a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of the hearing, shall be served on the parties as provided in Section 60-205, and upon persons not parties in the manner provided for the service of a summons.

(2) *Where Right Survives Only to or Against Surviving Party.* In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against

the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(*b*) *Incompetency.* If a party becomes incompetent, the court, upon motion served as provided in subsection (*a*) of this section, may allow the action to be continued by or against his representative as provided in section 60-217 (*c*).

(*c*) *Transfer of Interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court, upon motion, directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (*a*) of this section.

(*d*) *Public Officers—Death or Separation from Office.* When any public officer is a party to an action as such and during its pendency dies, resigns or otherwise ceases to hold office, the action may be continued and maintained by or against his successor upon motion for substitution. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. If no successor is otherwise appointed or elected, the court in which the action is pending may appoint a successor for the prosecution or defense of the action.

(*e*) *Continued Representation by Attorney.* An attorney representing a party who dies or becomes incompetent, or a public officer who dies or is separated from his office, in any action, may, in order to protect rights and avoid time limitations, continue such representation in the name of the original party until there has been a substitution therefor.

COMMITTEE NOTES

This section imposes no rigid time limit for substitution of parties. If substitution for the deceased plaintiff is not made within a reasonable time the action can be dismissed. This change was recommended by the Federal Advisory Committee in 1955. G. S. 60-415 has been extended.

Subsection (*e*) has been added to permit the attorney for the deceased or incapacitated party to continue his representation in order to protect rights until substitution is made.

60-226. *Depositions and Discovery Pending Action.* (*a*) *When Depositions May Be Taken.* Subject to the limitations set forth in Section 60-230 (*b*) any party may take the testimony of any person, including a party, either within or without the state, by deposition upon oral examination or written questions for the purpose of dis-

covery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after service upon the defendant. The attendance of witnesses may be compelled by the use of a subpoena as provided in Section 60-245. Depositions shall be taken only in accordance with these rules or such other method as is specifically provided by statute or in accordance with the laws of the state, United States territory or possession, or foreign country where taken. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(*b*) *Scope of Examination.* Unless otherwise ordered by the court as provided by Section 60-230 (*b*) or (*d*), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. A party shall not require a deponent to produce, or submit for inspection any writing prepared by, or under the supervision of, an attorney in preparation for trial.

(*c*) *Examination and Cross-Examination.* Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Section 60-243 (*b*).

(*d*) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which

is a party may be used by an adverse party for any purpose without regard to the limitations of sub-paragraph (3) of this paragraph (*d*).

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (I) that the witness is dead; or (II) that the witness is outside of the county of the place of trial or hearing, unless it appears that the absence of the witness was procured by the party offering the deposition; or (III) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (IV) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (V) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(*e*) *Objections to Admissibility.* Subject to the provisions of Section 60-232 (*c*), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(*f*) *Effect of Taking or Using Depositions.* A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (*d*) of this section. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

COMMITTEE NOTES

This section is substantially the same as Federal Rule 26. The chief change will come in Section 60-230. (*b*) where additional restrictions are provided to prevent abuse. Depositions may be taken either within or without the state orally or by written interrogatories. Leave of court is not required except when the deposition is to be taken within 20 days after service upon defendant. Subsection (*d*) limiting the use of depositions at trial should be considered in connection with the liberty to take depositions. The purpose of the provision is to make possible the broad use of depositions for discovery purposes.

Under subsection (*b*) inquiry may be made as to any matter not privileged, which is relevant to the subject matter of the action. Leads may be obtained in the form of inadmissible hearsay over objection. The objection may be made at the time of trial. The last sentence has been added to paragraph (*b*) to protect the secrecy of information assembled by the attorney in prepara- for trial.

Subsection (*d*) provides for the use of depositions at trial where the usual rules of admissibility apply.

Subsection (*e*) allows objections to be made for the first time at trial except where the objection is based upon grounds which might have been obviated if presented at the taking of the deposition.

Subsection (*f*) covers the effect of taking a deposition. By taking the deposition the party does not make the deponent his own witness for any purpose, and the evidence so taken may be rebutted by the party taking it.

60-227. *Perpetuation of Testimony.* (*a*) *Deposition Before Action.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the state may file a verified petition to the district court in the county of the residence of any expected adverse party; but if the subject matter of the expected action or proceeding is the validity of a will the petition shall be filed in the district court of the county in which the testator resides.

(1) *Petition.* The petition shall be entitled in the name of the petitioner and shall show: (I) that the petitioner or his personal representatives, heirs, beneficiaries, successors or assigns may be parties to an action or proceeding cognizable in a court but are presently unable to bring or defend it, (II) the subject matter of the expected action or proceeding and his interest therein and a copy of any written instrument the validity or construction of which may be called in question or which is connected with the subject matter of the deposition, (III) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (IV) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (V) the names and addresses of the persons to be examined and the sub-

stance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state within the time and in the manner for personal service of summons or by restricted registered or certified mail, or by any other manner affording actual notice as directed by order of the judge. The judge upon application and showing of extraordinary circumstances may prescribe a hearing on shorter notice.

(3) *Order and Examination.* If satisfied that the petition is not for the purpose of discovery, and that its allowance may prevent future delay or failure of justice, and that the petitioner is unable to bring the contemplated action or cause it to be brought, the court shall order the testimony perpetuated, designating the deponents, the subject matter of their examination, when, where and before whom their deposition shall be taken, and whether orally or upon written interrogatories.

(4) *Use of Deposition.* Subject to the same limitations and objections as though the deponent were testifying at the trial in person, a deposition taken in accordance with this section may be used as evidence in any action subsequently brought in any court, where the deposition is that of a party to the action, or where the issue is such that an interested party in the proceedings in which the deposition was taken had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the deposition is offered. But, except where the deposition is that of a party to the action and is offered against the party, the deposition may not be used as evidence unless the deponent is unavailable as a witness at the trial.

(*b*) *Pending Appeal.* If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in that court. In such case the party who desires to perpetuate the testimony may

make a motion for leave to take the depositions, upon the same notice and service thereof as if the action was pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Sections 60-234 and 60-235, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the District Court.

(*c*) *Filing.* Depositions taken under this section shall be filed with the court in which the petition is filed or the motion is made.

(*d*) *Perpetuation by Action.* This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(*e*) *Impeachment.* No provision of this section is intended to limit the use of any deposition for the purpose of impeachment of the deponent when he is a witness in any action.

(*f*) *Reciprocity.* A deposition taken under similar procedure of another jurisdiction is admissible in this state to the same extent as a deposition taken under this act.

COMMITTEE NOTES

This section is written to remove the objectionable feature found in the Federal Rule where depositions before action can be used for discovery.

The provisions of three separate acts were considered in the drafting of this section providing for the perpetuation of testimony—G. S. 60-2817 to 60-2877 of the Kansas Code of Civil Procedure, Federal Rule 27 and the Uniform Perpetuation of Testimony Act of the National Conference of Commissioners. There is no great difference in the procedural provisions of the three acts.

The Kansas Code provides only for testimony by written interrogatories and is insufficient. This section is a combination of the Uniform Act and Federal Rule 27 with additions and deletions.

The general provision of subsection (*a*) follows the Federal Rule except it provides for filing the petition in the district court of the county in which the testator resides if the subject matter is the mental capacity of the testator to execute a will. This is the only logical place to file such an action because it is the county in which the will must be probated. It would serve no purpose to file the petition in the county in which one of the many heirs at law might reside.

Subsection (*a*) (1) (i) adopts the provision of the Uniform Law which would permit the petitioner to anticipate an action after his death or after he has assigned his interest in the subject matter. A testator may perpetuate testimony relating to his mental capacity to execute a will.

Under the provisions of subsection (*a*) (1) (ii) requiring the production of the written instrument which is the subject matter of the expected action, a testator desiring to perpetuate testimony as to his mental capacity to make a will would have to produce the instrument. However, there would appear to be no restriction on perpetuating evidence of general mental competence before any instrument is executed. It would also appear that a prospective party could perpetuate the testimony of another as to the mental capacity although he could not produce the instrument, as this section cannot be used for discovery purposes.

Subsection (*a*) (2) follows the provision of the Uniform Law. The Federal Rule permits service by publication. In this provision actual notice is required.

Subsection (*a*) (3) follows the Uniform Law. The Federal Rule contemplates that the deposition may be for discovery purposes. Under this provision use for discovery purposes is prohibited.

Subsection (*a*) (4) also follows the Uniform Law. Here the bases for admissibility are spelled out, without relating them by reference to other deposition provisions.

Subsection (*b*) providing for taking depositions pending appeal is similar to the Federal Rule and the Uniform Law. We have in this case a situation where the parties are determined and the issues are drawn. Consequently there appears to be no reason why the deposition should not be used in this instance for discovery purposes, if discovery is otherwise permitted.

Subsection (*c*) provides for filing the deposition in the court in which the petition is filed.

Subsection (*d*) preserves the practice originating in courts of equity actions to perpetuate testimony on equitable consideraions.

60-228. *Persons Before Whom Depositions May Be Taken.* (*a*) *Within the United States.* (1) Depositions may be taken in this state before any officer or person authorized to administer oaths by the laws of this state. (2) Without the state but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. (3) Any court of record of this state, or any judge thereof, before whom an action or proceeding is pending, is authorized to grant a commission to take depositions within or without the state. The commission may be issued by the clerk to a person or persons therein named, under the seal of the court granting the same.

(*b*) *In Foreign Countries.* In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commis-

sion or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the jurisdiction)."

(*c*) *Disqualification for Interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(*d*) *Depositions for Use in Foreign Jurisdictions.* Whenever the deposition of any person is to be taken in this state pursuant to the laws of another state or of the United States or of another country for use in proceedings there, the District Court in the county where the deponent resides or is employed or transacts his business in person may, upon *ex parte* petition, make an order directing issuance of a subpoena as provided in Section 60-245, in aid of the taking of the deposition, and may make any order in accordance with Sections 60-230 (*d*), 60-237 (*a*) or 60-237 (*b*) (1).

COMMITTEE NOTES

This section is similar to Federal Rule 28 but some modifications and exceptions have been made to conform to state practice. The chief difference between this section and existing state practice is the provision, before whom depositions may be taken. Any person authorized to administer oaths in this state will qualify. The almost uniform practice of taking depositions before a shorthand reporter authorized to administer oaths makes the provision rather immaterial. The judge before whom the action is pending is given broad power to grant commissions to take depositions.

Subsection (*b*) covering depositions in foreign countries contemplates the taking under simple notice procedure. However, notice procedure will not work when it is necessary to seek the aid of a court in the foreign country to compel the attendance of witnesses. Some foreign countries will not permit a person appointed by a court of another country to sit for the purpose of taking depositions. In such cases letters rogatory may be necessary. By letters "rogatory" is meant a formal communication from a court in which an action is pending to a foreign court requesting that the testimony of a witness residing in such foreign jurisdiction may be taken under the direction of the court addressed and transmitted to the court making the request. Letters rogatory are usually in the form of written interrogatories. When the need arises to take depositions in a foreign country, it is advisable to inquire of the State Department as to precisely what method may be used.

Subsection (*d*) is not included in the Federal Rule nor the present state statutes. It is designed to help persons in other states get depositions from witnesses in this state. It is being followed by the states generally as a uniform rule.

60-229. *Stipulations as to Taking Depositions.* If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

COMMITTEE NOTES

This section requires no comment. It simply means that the attorneys may take a deposition in any manner they choose if they can do so by agreement.

60-230. *Depositions Upon Oral Examination.* (*a*) *Notice of Examination: Time and Place.* A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action within a reasonable time before the time of the taking of the deposition. The attendance of witnesses may be compelled by the use of subpoenas as provided in Section 60-245. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the judge may for cause shown enlarge or shorten the time.

(*b*) *Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the judge may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written questions, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. Upon such a motion the judge shall also make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression and may in its discretion where notice is given of the taking of depositions outside the state and at great distances from the place where the case is to be tried, require the party taking the deposition to pay the traveling expenses of the opposite party and of his attorney where his attendance is reasonably necessary at the taking of said deposition; and where it appears that the witness whose

deposition is sought is under the control or subject to the authority of the party taking the deposition, the court may require such witness to be brought within the state and his deposition taken there. The power of the judge under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

(*c*) *Record of Examination; Oath; Objections.* The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed when requested by any party; the judge may order the cost of transcription paid by one or some of, or apportioned among, the parties. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written questions to the officer, who shall propound them to the witness and record the answers verbatim.

(*d*) *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the judge in the district where the action is pending or where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Subsection (*b*) of this section. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the judge where the action is pending. Upon demand of the objecting party or deponent the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the judge may impose upon either party or upon the witness the requirement to pay such costs or expenses as the judge may deem reasonable.

(*e*) *Submission to Witness; Changes; Signing.* When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless

such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Section 60-232 (*d*) the judge holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(*f*) *Certification and Filing by Officer; Copies; Notice of Filing.* (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then place the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly deliver or mail it to the clerk of the court in which the action is pending.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(*g*) *Failure to Attend or to Serve Subpoena; Expenses.* (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(*h*) *Persons to be Present.* Unless otherwise ordered by the judge or stipulated by counsel, no person shall be present while a

deposition is being taken except the officer before whom it is being taken, the reporter recording the deposition, the parties to the action, their respective counsel, and the deponent.

COMMITTEE NOTES

This section is based on Federal Rule 30, but with some changes. Subsections (*b*) and (*d*) are important checks against abuse of the liberal discovery procedures. There is a similar check with respect to Sections 60-231, 60-233 and 60-234, which incorporate these provisions by reference. Subsection (*b*) applies before the taking of the deposition begins. Subsection (*d*) offers protection while it is being taken; at this point an improper purpose may be more easily detected or demonstrated.

Subsection (*a*) provides for giving notice within reasonable time of the taking of a deposition rather than attempting to fix the time for notice as is done in G. S. 60-2827. In most instances good practice would require counsel to agree on the time.

The reference in subsection (*b*) to "undue" expense and the last sentence of the subdivision are not in the Federal rule and are inserted to emphasize that the rule should be administered in a way to afford adequate protection to parties and witnesses, particularly in cases involving small sums. The provision for charging the party taking the deposition with the travelling expenses of his opponent in appropriate cases is similarly not included in the Federal Rule, although it reflects the Federal decisions.

The provision in subsection (*c*) that the court may order the cost of transcription to be paid by one or some of, or apportioned among, the parties is not in the Federal rule. It is taken from an unadopted recommendation of the Federal Advisory Committee made in 1955. It is designed to aid the court in policing the fairness of the use of the deposition machinery. For instance, a party wishing to take a brief deposition on a single vital issue might appropriately seek relief from paying the full cost of transcribing a lengthy examination by his opponent. Furthermore, when the party who took the deposition does not care to have it transcribed and the adverse party wants it, this rule would permit an order requiring the adverse party to bear the cost of transcription. There has been a conflict in the Federal decisions as to the propriety of such an order under the present Federal rule.

The attendance of a witness may be compelled by subpoena, but no subpoena is necessary to take the deposition of an adverse party. A notice of the taking, given to the attorney as provided by subsection (*b*), is sufficient. A party is not guilty of contempt for nonappearance unless he has been served with a subpoena, but the sanctions of Section 60-237 may be invoked against him. His attorney may seek a protective order under Paragraph (*b*), but he cannot simply ignore the notice without risking dismissal or default under Section 60-237 (*b*).

Subsection (*e*) deals with the mechanics of submitting the deposition to the witness for his examination, correction and signature.

60-231. *Depositions of Witnesses Upon Written Questions.* (*a*) *Serving Questions; Notice.* A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and ad-

dress of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days therefrom a party so served may serve cross questions upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect questions upon a party who has served cross questions. Within 5 days after being served with redirect questions, a party may serve recross questions upon the party proposing to take the depositions.

(*b*) *Officer to Take Responses and Prepare Record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Section 60-230 (*c*), (*e*), and (*f*), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(*c*) *Orders for the Protection of Parties and Deponents.* After the service of questions and prior to the taking of the testimony of the deponent, the judge before whom the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Section 60-230 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

COMMITTEE NOTES

This section is the same as Federal Rule 31 except that the time for filing recross interrogatories has been increased to five days and subsection (*c*) of the Federal Rule has been eliminated. It would seem that the opposing party with notice of the deposition should protect himself as to its filing. This section should be distinguished from Section 60-233 providing for interrogatories to parties.

60-232. *Effect of Errors and Irregularities in Depositions.* (*a*) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(*b*) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(*c*) *As to Taking of Deposition.* (1) Objections to the competency of a witness or to the competency, relevancy, or materiality

of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions submitted under Section 60-231 are waived unless they are served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(*d*) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or other wise dealt with by the officer under Sections 60-230 and 60-231 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

COMMITTEE NOTES

This section is the same as Federal Rule 32 except the time limit for objections in subsection (*c*) (3) has been increased. The purpose of the section is to eliminate technical objections to minor procedural irregularities. The provisions need no comment. They do not materially change the provisions of G. S. 60-2846 and 60-2847.

60-233. *Interrogatories to Parties.* Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answer shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days

after the service of the interrogatories, unless the judge, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Section 60-226 (*b*), and the answers may be used to the same extent as provided in Section 60-226 (*d*) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the judge, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Section 60-230 (*b*) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

COMMITTEE NOTES

This section follows Federal Rule 33. It provides a quick and inexpensive method for obtaining information about an opponent's case. The provisions compensate for the generality of allegations permitted under 60-208. Interrogatories may be of better service than definiteness and certainty in pleadings, as unlike pleadings, answers to interrogatories must be made under oath and the answers may be used at the trial by the interrogating party, subject to the rules of evidence. The interrogatories are not limited to facts admissible in evidence and may be used for discovery purposes. One purpose of this rule is to curtail the necessity of motions to make definite and certain.

60-234. *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.* Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Section 60-230 (*b*), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Section 60-226 (*b*) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting,

measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Section 60-226 (*b*). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

COMMITTEE NOTES

This rule is the same as Federal Rule 34. It is much broader than G. S. 60-2856, which applies only to "books, papers or written instruments relating to the merits of the issue." The test for production under this rule is the same as the scope of permitted examination under Section 60-226, subject to the protective provisions of that rule.

A motion under this rule requires a showing of good cause, and it is limited to parties to the action. If a document is in the control of a third person, a deposition under Section 60-226 and a subpoena *duces tecum* under Section 60-245 (*b*) must be used.

This rule is primarily intended to govern production and inspection before trial. Section 60-245 (*b*) applies both to the taking of depositions and to testimony and production of documents at trial.

60-235. *Physical and Mental Examination of Person.* (*a*) *Order for Examination.* In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(*b*) *Report of Findings.* (1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any

other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

COMMITTEE NOTES

This section follows Federal Rule 35. Kansas has no statutory provision covering the subject. The Kansas Supreme Court has by court decision accepted in principle the generally prevailing rule recognizing court discretion to permit the examination.

60-236. *Admission of Facts and Genuineness of Documents.* (*a*) *Request for Admission.* After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 20 days after commencement of the action leave of the judge, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or qualify a matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

(*b*) *Effect of Admission.* Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

COMMITTEE NOTES

This section follows Federal Rule 36 except the word "qualify" has been added in the last phrase of subsection (*a*). It is quite similar to the present state statute G. S. 60-2849. No comment is required.

60-237. *Refusal to Make Discovery.* (*a*) *Refusal to Answer.* If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the judge in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Section 60-231 or upon the refusal of a party to answer any interrogatory submitted under Section 60-233, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the judge finds that the refusal was without substantial justification the judge shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the judge finds that the motion was made without substantial justification, the judge shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(*b*) *Failure to Comply With Order.* (1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the judge in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (*a*) of this section requiring him to answer designated questions, or an order made under Section 60-234 to produce any document or other things for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Section 60-235 requiring him to submit to a physical or mental examination, the judge may make such orders in regard to the refusal as are just, and among others the following:

(I) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(II) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(III) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(IV) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(*c*) *Expenses on Refusal to Admit.* If a party, after being served with a request under Section 60-236 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the judge for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the judge finds that there were good reasons for the denial or that the admissions sought were of no substantial inportance, the order shall be made.

(*d*) *Failure of Party to Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Section 60-233, after proper service of such interrogatories, the court on motion and notice may strike out all or any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

COMMITTEE NOTES

This rule is substantially the same as Federal Rule 37. It furnishes the sanctions necessary to make the preceding rules work. Court surveillance of discovery procedure may be invoked in two ways (1) by application for a protec-

tive order under section 60-230 (*b*) or 60-230 (*d*) on appropriate objection from the party against whom discovery is sought; and (2) by application for a Section 60-237 sanction by the party seeking discovery.

Subsection (*b*) lists the sanctions. As to nonparty witnesses punishment for contempt is the sole sanction. As to parties, the sanctions vary up to and including dismissal of the case or default. The court will select the one thought most adaptable to the particular situation. It is expressly provided that a party refusing to submit to a physical examination may not be punished for contempt, but his case may be dismissed.

The rule spells out those things which courts no doubt have inherent power to do without the aid of an express rule in order to make their procedure effective, but which powers, in view of the traditional policy to leave such matters to the legislature, the courts have either reluctantly or weakly exercised or exercised not at all.

60-238. *Jury Trial of Right.* (*a*) *Right Preserved.* The right of trial by jury as declared by section 5 of the Bill of Rights in the Kansas Constitution, and as given by a statute of the state shall be preserved to the parties inviolate.

(*b*) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(*c*) *Same: Specification of Issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(*d*) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by section 60-205 constitutes a waiver by him of trial by jury but waiver of a jury trial may be set aside by the judge in the interest of justice or when the waiver involuntarily results without serious negligence of the party. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

COMMITTEE NOTES

This section is the same as Federal Rule 38 except in subsection (*d*) it is provided that the judge may in his discretion set aside a waiver in the interest of justice or where the waiver is involuntary. This section changes the present Kansas procedure (G. S. 60-2920) as to waiver of a jury trial as it requires definite action to prevent waiver.

60-239. *Trial by Jury or by the Court.* (*a*) *By Jury.* When trial by jury has been demanded as provided in section 60-238, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

(*b*) *By the Court.* Issues not demanded for trial by jury as provided in section 69-238 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion may order a trial by a jury of any or all issues.

(*c*) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or (except in actions against the State when a statute of the State provides for trial without a jury) the court, with the consent of all parties, may order a trial with a jury whose verdict shall have the same effect as if trial by jury had been a matter of right.

COMMITTEE NOTES

This section is the same as Federal Rule 39. It is believed that uniformity in these provisions will help to prevent inadvertent omissions.

Subsection (*c*) is similar to the last sentence of G. S. 60-2903.

60-240. *Assignment of Cases for Trial: Continuances.* (*a*) *Assignment of Cases for Trial.* The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the judge deems expedient. Precedence shall be given to actions entitled thereto by any statute of the state.

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

(*c*) *Affidavit in Support of Motion.* The court need not entertain any motion for a continuance based on the absence of a material witness unless supported by an affidavit which shall state the name

of the witness, and, if known, his residence, a statement of his expected testimony and the basis of such expectation, a statement that the affiant believes it to be true, and the efforts which have been made to procure his attendance or deposition. The party objecting to the continuance shall not be allowed to contradict the statement of what the absent witness is expected to testify but may disprove any other statement in such affidavit. Such motion may, in the discretion of the court, be denied if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree that the same shall be received and considered as evidence at the trial as though the witness were present and so testified. The same rule shall apply, with necessary changes, when the motion is grounded on the want of any material document, thing or other evidence. In all cases, the grant or denial of a continuance shall be discretionary whether the foregoing provisions have been complied with or not.

COMMITTEE NOTES

Paragraph (*a*) of this section is the same as Federal Rule 40. Subsections (*b*) and (*c*) have been added to provide for continuances in line with G. S. 60-2933 and G. S. 60-2934.

Subsection (*a*) is is lieu of G. S. 60-2931 to G. S. 60-2933.

60-241. *Dismissal of Actions.* (*a*) *Voluntary Dismissal: Effect Thereof.* (1) *By Plaintiff; by Stipulation.* Subject to the provisions of section 60-223 (*c*), and of any statute of the State, an action may be dismissed by the plaintiff without order of court (*i*) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (*ii*) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as the judge deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless other-

wise specified in the order, a dismissal under this paragraph is without prejudice. The judge may on his own motion cause a case to be dismissed without prejudice for lack of prosecution, but only after directing the clerk to notify counsel of record not less than ten days in advance of such intended dismissal, that an order of dismissal will be entered unless cause be shown for not doing so.

(*b*) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in section 60-252 (*a*). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

(*c*) *Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (*a*) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(*d*) *Costs of Previously Dismissed Action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

COMMITTEE NOTES

We have followed Federal Rule 41 except for the addition of the last sentence to subsection (*a*) (2). This section changes the present Kansas practice in that an order of the judge must be obtained to dismiss after answer.

This section supplants G. S. 60-3105 and 60-3106.

60-242. *Consolidations; Separate Trials.* (*a*) *Consolidation.* When actions involving a common question of law or fact are pending before the court, in the same county, or in different counties, in the judicial district, the judge may order a joint hearing or trial of any or all of the matters in issue in the actions; he may order all the actions consolidated; and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(*b*) *Separate Trials.* The judge in furtherance of convenience or to avoid prejudice may order a separate trial in the county where the action is pending or a different county in the judicial district, of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

COMMITTEE NOTES

The federal rule has been followed except for the added provision permitting consolidation of cases filed in any county or counties in the judicial district. Subsection (*b*) corresponds to G. S. 60-2904.

60-243. *Evidence.* (*a*) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under specific statutes or Article 4 of this code. The competency of a witness to testify shall be determined in like manner.

(*b*) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

(*c*) *Record of Excluded Evidence.* In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the

objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(*d*) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(*e*) *Evidence on Motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

COMMITTEE NOTES

The Federal Rule has been followed except for the change in subsection (*a*) anticipating an additional article on Evidence.

60-244. *Proof of Records.* Official records and other documents shall be evidenced in the manner provided in Article 4 of this Code.

COMMITTEE NOTES

This article is inserted only for the purpose of retaining the rule number. The subject matter is covered under the new Article 3 of the Code.

Means of Producing Witnesses

60-245. *Subpoena* (*a*) *For Attendance of Witnesses; Form; Issuance.* Every subpoena shall be issued by the clerk under the seal of the court or by a judge, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, bearing the seal of the court and his signature or facsimile signature, but otherwise in blank, to a party requesting it, who shall fill it in before service.

(*b*) *For Production of Documentary Evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the

reasonable cost of producing the books, papers, documents, or tangible things.

(*c*) *Service.* A subpoena may be served by the sheriff, by his deputy, by a constable, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is not served by the sheriff or constable, proof of service shall be shown by affidavit.

(*d*) *Subpoena for Taking Depositions; Place of Examination.* (1) Proof of service of a notice to take a deposition as provided in section 60-230 (*a*) and 60-231 (*a*) constitutes a sufficient authorization for the issuance of subpoenas for the persons named or described therein. In addition to those mentioned in subdivision (*a*) of this section a subpoena for taking depositions may be issued by the officer before whom the deposition is to be taken or by the clerk of the district court where the deposition is to be taken or if the deposition is to be taken outside the state by an officer authorized by the law of such state to issue such subpoena. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by section 60-226 (*b*), but in that event the subpoena will be subject to the provisions of subdivision (*b*) of section 60-230 and subdivision (*b*) of this section, 60-245.

(2) A resident of this state shall not be required to attend an examination at a place which is not within 50 miles of either the place of his residence, or of the place of his employment, or of the place of his principal business. A nonresident shall not be required to attend an examination at a place which is more than 50 miles distant from the place where he is served with a subpoena.

(3) A person confined in prison may be required to be produced for examination in the county where he is imprisoned, but in all other cases, his examination must be by deposition.

(*e*) *Subpoena for a Hearing or Trial.* Subpoenas for attendance at a hearing or trial shall be issued at the request of any party. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

(*f*) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending or in the county in which the deposition is taken. Punishment for such contempt shall be in accordance with Article 12 of Chapter 20 of the General Statutes.

COMMITTEE NOTES

This is substantially the federal rule, except we have added a few phrases to cover Kansas statutory provisions. This section is in lieu of G. S. 60-2806 to 60-2817.

60-246. *Objections to Rulings.* Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

COMMITTEE NOTES

Federal Rule 46 has been followed. This section is substantially the same as our present Kansas practice.

60-247. *Jurors.* (*a*) *Examination of Jurors.* Prospective jurors shall be examined under oath as to their qualifications to sit as jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by proper further inquiry.

(*b*) *Challenges.* In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making challenges. If there is more than one defendant and if the judge finds there is a good faith controversy existing between the defendants, the court shall allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

(*c*) *Oath of Jurors.* The jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and the evidence.

COMMITTEE NOTES

Subsection (*a*) of Federal Rule 47 has been followed except the last phrase has been dropped.

Subsection (*b*) has been dropped because it is covered by G. S. 43-201.

New subsection (*b*) is taken from Section 1870 of the Federal Judicial Code with the addition of the "good faith controversy" between the defendants.

Subsection (*c*) is added from the Kansas statute.

This section takes the place of G. S. 60-2906 to 60-2908.

60-248. *Jury Trial Procedure.* (*a*) *Stipulation as to Number.* The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

(*b*) *View of Property or Place.* Whenever in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person or persons appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial. A view permitted hereunder shall not be considered by the court in determining any question of the sufficiency or insufficiency of evidence admitted in an action.

(*c*) *Case Submitted, Action and Conduct of Jury.* When the case is finally submitted to the jury, they shall retire for deliberation. They must be kept together in some convenient place under charge of an officer until they agree upon a verdict, or be discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night, and at their meals. The officer having them under his charge shall not suffer any communications to be made to them, or make any himself except to ask them if they are agreed upon their verdict, unless by order of the court; and he shall not before their verdict is rendered communicate to any person the state of their deliberations, or the verdict agreed upon.

(*d*) *Separation of Jury, Admonition of Court.* If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them, and that such admonition shall apply to every subsequent separation of the jury.

(*e*) *Jury May Request Information After Retiring.* After the jury have retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given in writing, or the evidence shall be read or exhibited to them in the presence of, or after notice to, the parties or their counsel.

(*f*) *Discharge of Jury, When.* The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity, or other necessity to be found by the court requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

(*g*) *Form of Verdict; Correction.* The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury, before they are discharged, be corrected by the court.

COMMITTEE NOTES

Federal Rule 48 is used as Paragraph (*a*) and there have been added 6 additional paragraphs to take care of Kansas statutory provisions.

Subsections (*b*) to (*f*) are the same as G. S. 60-2910 to 60-2914 respectively, except (*b*) limits consideration of the view in considering the sufficiency of the evidence. Subsection (*g*) is the same as G. S. 60-2917.

60-249. (*a*) *Special Verdicts.* The judge may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The judge shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its

submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accordance with the judgment on the special verdict.

(*b*) *General Verdict Accompanied by Answer to Interrogatories.* The judge may and shall if requested in writing, submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more substantial questions of disputed facts on which decision is necessary to a verdict. The number and form thereof shall be subject to the control of the judge. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

COMMITTEE NOTES

Federal Rule 49 has been followed except subsection (*b*) has been changed to make submission of interrogatories compulsory on request but giving the judge control of the number and form. This section is in lieu of G. S. 60-2918 and 60-2919.

60-250. *Motion for Directed Verdict.* (*a*) *When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(*b*) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied

or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

COMMITTEE NOTES

Federal Rule 50 has been followed.

Subsection (*a*) is in line with the present Kansas practice.

60-251. (*a*) *Instructions to Jury.* At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The judge shall instruct the jury at the close of the evidence before argument and the judge may, in his discretion, after the opening statements, instruct the jury on such matters as in his opinion will assist the jury in considering the evidence as it is presented and he may after the closing arguments supplement his instructions.

(*b*) No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objections out of the hearing of the jury.

COMMITTEE NOTES

This section differs from Federal Rule 51 in that the instructions are to be given before argument. It differs from the present Kansas rule in that written instructions cannot be required. There is an addition to both the Federal and the present Kansas rule, permitting the court to instruct generally before the evidence is submitted.

This section is in lieu of G. S. 60-2909.

60-252. *Findings by the Court.* (*a*) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the judge shall find the controlling facts, direct the entry of the appropriate judgment and state his reasons therefor; and in granting or refusing interlocutory injunctions, except in divorce cases, the judge shall similarly set forth the findings. Requests for finding are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the judge adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and reasons for the decision appear therein. Such findings are unnecessary on decisions of motions under sections 60-212 or 60-256 or any other motion except as provided in section 60-241 (*b*).

(*b*) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to section 60-259. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

COMMITTEE NOTES

The Federal Rule has been followed except for the first sentence, excepting divorce cases, and other minor changes.

This section differs from G. S. 60-2921 in that it is compulsory that the court find the controlling facts and give the reasons for his decisions.

60-253. *Trial by Masters.* (*a*) *Appointment and Compensation.* As used in this code the word "master" includes a referee, an auditor, a commissioner and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a

writ of execution against the delinquent party. The master must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein, according to the best of his understanding. The oath may be administered by any person authorized to take depositions.

(*b*) *Reference.* With the consent of the parties, all or any issues of fact or law or both may be referred to a master. Otherwise, the judge may order a reference only on a finding that the ends of justice will be measurably advanced thereby, and, in a case triable to a jury, only on such issues as involve an examination of complex or voluminous accounts.

(*c*) *Powers.* The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Section 60-243 (*c*) for a court sitting without a jury.

(*d*) *Proceedings.* (1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party

fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Section 60-245. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Sections 60-237 and 60-245.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(*e*) *Report.* (1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Nonjury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in section 60-206 (*d*). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. If the master is

available for cross-examination his findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

COMMITTEE NOTES

This section follows Federal Rule 53 except for the last two sentences of paragraph (*a*) and subsection (*b*) which follow G. S. 60-2922 and 60-2923. The other provisions of the Federal Rule are not materially different from the other Kansas provisions, (G. S. 60-2924) except there is no specific provision for naming the master by consent. Paragraph (3) of subsection (*e*) requires that the master be available for cross-examination if his findings are to be used as evidence.

60-254. *Judgments.* (*a*) *Definition.* A judgment is the final determination of the rights of the parties in an action.

(*b*) *Judgment upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision shall be subject to revision at any time before the entry of judgment adjudicating all the claims.

(*c*) *Demand for Judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

COMMITTEE NOTES

Subsection (*a*) follows G. S. 60-301. It bases the definition on "final determination of rights" rather than on an "appealable order" as does the Federal Rule.

Subsection (*b*) follows the Federal Rule which covers additional claimants made possible under these rules. It also covers the provisions of G. S. 60-3102. G. S. 60-3110 to 60-3116 are omitted as there would appear to be no reason to place restrictions on a judgment by confession.

The first sentence of subsection (*c*) is similar to the last sentence of G. S. 60-2501. Subsection (*d*) of the Federal Rule has been omitted as costs are covered under a separate article.

60-255. *Default.* (*a*) *Entry.* Upon request and proper showing by the party entitled thereto, the judge shall render judgment against a party in default for the remedy to which the party is entitled. But no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian or other legally authorized representative who has appeared in the action, or by a guardian *ad litem* appointed by the court. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state.

(*b*) *Setting Aside Default.* For good cause shown the court may set aside a judgment entered by default in accordance with Section 60-260 (*b*).

(*c*) *Plaintiffs, Counterclaimants, Cross-Claimants.* The provisions of this section apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Section 60-254 (*c*).

(*d*) *Judgment Against the State.* No judgment by default shall be entered against the State or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

COMMITTEE NOTES

Federal Rule 55 has been followed in substance, except only the judge is permitted to enter a default judgment.

60-256. *Summary Judgment.* (*a*) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(*b*) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(*c*) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(*d*) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(*e*) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show

affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(*f*) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(*g*) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

COMMITTEE NOTES

This provision is foreign to present Kansas procedure. The Federal rule has been adopted verbatim.

60-257. *Declaratory Judgments. Procedure.* The procedure for obtaining a declaratory judgment pursuant to Article ___ of this Code, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Sections 60-238 and 60-239. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

COMMITTEE NOTES

This section is the same as the Federal Rule. The more substantive law relating to declaratory judgments will be covered under a separate article.

60-258. *Entry of Judgments and Orders.* (*a*) *Entry of Judgment.* Unless the judge otherwise directs and subject to the provisions of Section 60-254 (*b*), judgment upon the verdict of a jury shall be entered forthwith. The judge shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a

jury pursuant to Section 60-249. When the judge directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk.

(*b*) *Entry of Order.* Orders made by the judge shall be forthwith entered by the clerk in the Journal of the Court.

(*c*) *Contents of Judgment Record.* The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of an account, or the copies of papers attached to the pleadings, be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. Evidence must not be recorded.

COMMITTEE NOTES

Subsection (*a*) is substantially the same as the Federal Rule. There has been added subsection (*b*) Kansas G. S. 60-3104. The Federal Rule sufficiently takes care of G. S. 60-3117 to 60-3119.

Subsection (*c*) has also been added which is Kansas G. S. 60-3124.

60-259. *New Trial; Amendment of Judgments.* (*a*) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues when it appears that the rights of the party are substantially affected:

First. Because of abuse of discretion of the court, misconduct of the jury or party, or accident or surprise which ordinary prudence could not have guarded against, or for any other cause whereby the party was not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.

Second. Erroneous rulings or instructions of the court.

Third. That the verdict, report or decision was given under the influence of passion or prejudice.

Fourth. That the verdict, report or decision is in whole or in part contrary to the evidence.

Fifth. For newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

Sixth. That the verdict, report or decision was procured by the corruption of the party obtaining it. In this case the new trial shall be granted as a matter of right, and all the costs made in the case

up to the time of granting the new trial shall be charged to the party obtaining the decision, report or verdict.

On motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(*b*) *Time for Motion.* A motion for a new trial shall be served and filed not later than 10 days after the entry of the judgment, except for good cause shown the judge may extend the time an additional 20 days.

(*c*) *Definite Statement of Grounds.* The motion shall not follow the general language of the statute in stating the grounds for a new trial, but shall state specifically the alleged error or other grounds relied on.

(*d*) *Time for Serving Affidavits.* When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(*e*) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(*f*) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served and filed not later than 10 days after entry of the judgment.

(*g*) *Production of Evidence.* In all cases where the ground of the motion is error in the exclusion of evidence, want of fair opportunity to produce evidence, or newly discovered evidence, such evidence shall be produced at the hearing of the motion by affidavit, or when authorized by the judge by deposition or oral testimony of the witnesses, and the opposing party may rebut the same in like manner.

COMMITTEE NOTES

The Kansas grounds for a new trial have been substituted in lieu of the rather indefinite language of the Federal Rule. Subsection (*b*) which is the first sentence of G. S. 60-3004 has been added. It should be noted that this section provides a time limit of 10 days rather than 3 as the Kansas statute now

provides, and the time may be extended an additional 20 days. The additional time should give a party ample opportunity to specifically state the grounds as required by subsection (*c*).

60-260. *Relief from Judgment or Order.* (*a*) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the abstract of appellant is filed in the supreme court, and thereafter while the appeal is pending may be so corrected with leave of the supreme court.

(*b*) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Section 60-259 (*b*); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subsection (*b*) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in 60-205 (*b*) or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

COMMITTEE NOTES

We have followed the Federal Rule except for clerical errors discovered before the abstract is filed in the Supreme Court. It should be noted that this rule makes the relief possible by motion while in many instances our statute

requires a petition and summons. It should also be noted that the limitation period is changed in many instances. You will also note that relief will be granted for fraud whether extrinsic or intrinsic. Fraud of any kind should vitiate everything that it touches. This section would appear to sufficiently cover the provision of G. S. 60-3005 to G. S. 60-3013. Attention is also called to the fact that right to relief is not affected by the expiration of a term of court, rather definite time limits are fixed.

60-261. *Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

COMMITTEE NOTES

The Federal Rule has been followed. It is substantially the same as the present Kansas rule.

60-262. *Stay of Proceedings to Enforce Judgment.* (*a*) *Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings.* Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subsection (*c*) of this section govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(*b*) *Stay of Motion for New Trial or for Judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Section 60-259, or of a motion for relief from a judgment or order made pursuant to Section 60-260, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Section 60-250, or of a motion for amendment to the findings or for additional findings made pursuant to Section 60-252 (*b*).

(*c*) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying

an injunction, the judge in his discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(*d*) *Stay Upon Appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subsection (*a*) of this rule. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(*e*) *Stay in Favor of the State or Agency Thereof.* When an appeal is taken by the State or an officer or agency thereof or by direction of any department of the State and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(*f*) *Power of Appellate Court Not Limited.* The provisions in this rule do not limit any power of the supreme court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the *status quo* or the effectiveness of the judgment subsequently to be entered.

(*g*) *Stay of Judgment Upon Multiple Claims.* When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Section 60-254 (*b*), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMITTEE NOTES

The Federal Rule has been followed. It appears to be quite sufficient. The provisions of G. S. 60-3014 are covered. It will be noted that subsection (*a*) provided for an automatic stay for ten days after the entry of judgment, the time allowed for filing a motion for a new trial.

60-263. *Disability of Judge.* If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those

duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

COMMITTEE NOTES

The Federal Rule has been followed. This rule gives the new judge some discretion, contrary to G. S. 60-3002. It will obviate the possibility that when the successor to a disabled judge is satisfied he cannot act the aggrieved party would be without a remedy.

60-264. *Process in Behalf of and Against Persons not Parties.* When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

COMMITTEE NOTES

This section follows Federal Rule 71. It will avoid considerable complicated procedure when applicable.

The section does not designate in what instances court process is to be used for or against nonparties. Examples of the use of process for nonparties would be, enforcement of restraining orders and injunctions against nonparties in privity with parties; writs of assistance for the purchaser at a foreclosure to get possession of the property, or the charging of costs against witnesses who obstruct discovery process.

60-265. *Applicability of Rules.* The provisions of this article shall apply only to actions and proceedings in the district courts and original actions in the Supreme Court except:

(1) When made applicable in any other courts, boards, commissions, or other judicial or quasi-judicial bodies by specific statutory provisions referring to these rules.

(2) When any other such court or judicial or quasi-judicial body adopts by an order, which order is consistent with all statutes controlling its procedures, all or a part of these rules for its own proceedings, either in a particular matter before it or in any matters generally, or

(3) When any statute pertaining to any such court or other judicial or quasi-judicial body, which statute was enacted prior to the adoption of these rules and which incorporated by reference procedures under the then existing Code of Civil Procedure, then the most nearly comparable provisions of these rules shall be applicable to the procedures in such court or body until modified or supplemented by specific statutes or orders in accordance with clauses (1) or (2) of this section.

In any matter over which the court has jurisdiction but with reference to which no specific rule is included in this article, the court shall proceed in such manner as shall be just and equitable to protect the rights and interests of all parties affected thereby.

COMMITTEE NOTES

There are many provisions in the Kansas substantive law for special procedure. We cannot expect to reach them all in this code. The most practical solution will be to amend the provisions in the substantive law to conform to the Rules of Civil Procedure. We have where possible caused the special proceeding provided for in the Code of Civil Procedure to conform to these rules. No set of rules can hope to prescribe procedure for every possible situation that may arise. The last sentence states that in any such circumstances the court shall proceed in any lawful manner not inconsistent with constitution, statutes or rules.

60-266. *Jurisdiction and Venue.* This article shall not be construed to extend or limit the jurisdiction of the district courts or the venue of actions therein.

60-267. *Rules by District Courts.* Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with this article. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court. In all cases not provided for by this article, the district courts may regulate their practice in any manner not inconsistent with this article and other rules prescribed by the Supreme Court.

60-268. *Forms.* The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

60-269. *Title.* This article and these rules may be known and cited as the Kansas Rules of Civil Procedure.

APPENDIX OF FORMS

(See 60-268)

INTRODUCTORY

The following forms are intended for illustration only, but they are expressly declared by Section 60-268 to be sufficient under the Rules of Civil Procedure.

FORMS FOR SUMMONS

FORM No. 1

(To be used for personal service)

IN THE DISTRICT COURT OF ______________________ COUNTY, KANSAS

____

Plaintiff

vs. No.______________

____

Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon______________ plaintiff's attorney, whose address is ____________________, a pleading to the petition which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition. Your pleading must also be filed with the court. As provided in section 60-213 (*a*), your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

____

Clerk of said District Court

[Seal of the Court]
Dated__________

FORM No. 2

(For use in action in another county.)

IN THE DISTRICT COURT OF ______________________ COUNTY, KANSAS

____

Plaintiff

vs. No.______________

____

Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned to defend an action brought in the District Court for ______________ County and required to serve upon ___________ plaintiff's attorney, whose address is ____________________, a pleading to

the petition which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition. Your pleading also must be filed with the court in ________ County. As provided in Section 60-213 (*a*), your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

____
Clerk of said District Court

[Seal of the Court]
Dated ____________

RETURN ON SERVICE OF SUMMONS

I hereby certify that I have served the within summons:
(1) By delivering on the ______ day of ______, 19______, a copy of the summons and a copy of the petition to each of the within-named defendants

____

____

(2) By leaving on the ______ day of ______, 19____, for each of the within-named defendants ____

____

a copy of the summons and a copy of the petition at the respective dwelling place or usual place of abode of said defendants with some person of his or her family of suitable age and discretion.
(3) ____

____

____

____

____

All done in ____ County, Kansas

Sheriff's fees:
Summons
non est
Mileage
Total ____________

____
Sheriff of ____________________ County, Kansas
By ____________________

FORM NO. 3

IN THE DISTRICT COURT OF ____________________ COUNTY, KANSAS.

____
Plaintiff__
vs.

No. ____________

____
Defendant__ and Third-Party Plaintiff
vs.

____
Third-Party Defendant__

THIRD-PARTY SUMMONS

The State of Kansas to Third-Party Defendant ____________________

____

____

You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to file your pleading to the third-party petition, copy of which is attached hereto, and to serve a copy of each of your said pleadings upon ____________, attorney__ for plaintiff__, whose address is ____________________, and upon ____________________, attorney__ for defendant__ and third-party plaintiff__, whose address is ____________________, all within 20 days after the service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party petition.

____
District Clerk

(Seal of District Court) By ____________________
Deputy Clerk

Dated ____________________, 19______.

RETURN OF SERVICE ON THIRD-PARTY SUMMONS

I hereby certify that I have served the within third-party summons:
(1) By delivering on the ______ day of __________, 19 ____, a copy of the third-party summons and a copy of the petition and a copy of the third-party petition to each of the within-named third-party defendants ____________

____

(2) By leaving on the ________ day of __________, 19____, for each of the within-named third-party defendants ____________________

____

____

a copy of the summons and a copy of the petition and a copy of the third-party petition at the respective dwelling place or usual place of abode of said third-party defendants with some person of his or her family of suitable age and discretion.
(3) By ____________________

____

____

All done in ____________________ County, Kansas.
Sheriff's fees:

____
Sheriff of ______________ County, Kansas
By ____________________
Deputy Sheriff

Summons
Non est
Mileage
____
Total

FORM NO. 4

IN THE DISTRICT COURT OF ____________ COUNTY, KANSAS

____
Plaintiff__
vs. No. __________
____
Defendant__

SUMMONS UPON SERVICE BY MAIL

The State of Kansas to Defendant ______________________________
____
____

You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon ________________ attorney__ for plaintiff__, whose address is ________________, all within 30 days after the return registered or certified mail receipt signed by you or refused by you has been filed by the said court in the above-entitled cause. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

____
District Clerk

(Seal of District Court) By ______________________
Deputy Clerk

Dated ________________, 19____

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of ____ 19___, I mailed a copy of this summons and a copy of the petition to each of the defendant ______
____
by registered or certified mail, requesting a return receipt signed by the addressee only, addressed to each of said defendant__ at the address furnished by plaintiff.

____
District Court
By ______________________
Deputy Clerk

Dated ________________, 19____

FORM NO. 5

IN THE DISTRICT COURT OF ____________ COUNTY, KANSAS

____
Plaintiff__
vs. No. __________
____
____
____
Defendant__

SUMMONS FOR PERSONAL SERVICE OUTSIDE THE STATE OF KANSAS

The State of Kansas to defendant ____________________

____

____

You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon ____________________, attorney__ for the plaintiff__, whose address is ____________________, all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

Dated ____________________, 19______

____

District Clerk

By ____________________

(Seal of District Court) Deputy Clerk

RETURN ON SERVICE OF SUMMONS

State of ____________ }
County of ___________ } ss.

____________________, being first duly sworn, upon oath says that he served the annexed summons upon ____________________

____

____

named as defendant__ in said summons, on the ______ day of ________, 19______, in the aforesaid County of ____________________ in the State of ____________________, by delivering to each of said defendants a copy of said annexed summons, together with a copy of the petition therein referred to.

____

________ Sheriff of ________

County, State of __________

Subscribed and sworn to before me this __________ day of ________, 19______, by ____________________, who I certify was at the date of such service and now is ____________________ sheriff of ______________ County in the State of ________________ and as such officer is duly authorized to serve process in civil actions within said state and is an officer of the court of which I am the clerk.

Witness my hand and the seal of the

____

Court, within and for the County and State aforesaid.

____

Clerk

(Seal of Court)

Sheriff's Fees:

Summons ____________________

Non est ____________________

Mileage ____________________

Total ____________________

4—419

FORM NO. 6

IN THE DISTRICT COURT OF ________ COUNTY, KANSAS

____
Plaintiff__
vs. No. __________
____
Defendant__

MOTION FOR SUBSTITUTION

Now comes ______________________, a ______________ in this action, and shows the court that ______________________, a ______________________ in this action, died on or about ______________, 19____, and that ______________ is (are) the lawful successor__ or representative__ of said __________.

It is therefore prayed that the court enter an order that __________ be substituted in this action as ______________ in the place and stead of said ______________________.

____
Attorney for __________

Notice of Motion

To the parties in the above-entitled cause and the above-named __________ ______________:

Please take notice that the above motion will be brought on for hearing before the court on __________, 19____, at __________ o'clock __ M. or as soon thereafter as counsel can be heard.

____
Attorney for __________
Address __________

SHERIFF'S RETURN

Served the foregoing motion for substitution and notice of motion in the County of ______________, State of Kansas, this __________ day of ________, 19____, by ______________________________
____
____
____
____
____

____
Sheriff __________ County, Kansas
By ______________
Deputy Sheriff

FORMS FOR PLEADING

INTRODUCTORY

These forms are for the purpose of illustration only. They indicate the minimum amount that may be pleaded and the pleading kept free from successful attack. They should indicate to the courts and the attorneys as to whether a pleading is subject to motion. Regardless of the permitted generality of allegations, the plaintiff may well find it to his advantage to make his allegations more informative than the rules require. There will never be a substitute for good pleading, sufficient in form and content to enlighten the court and the parties as to all issues in the case.

FORM 7. PETITION ON A PROMISSORY NOTE

1. Defendant on or about June 1, 1957, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, the sum of ten thousand dollars with interest thereon at the rate of six percent, per annum.]

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: ____________________
Attorney for Plaintiff.
Address: ____________________

Dated ____________________

FORM 8. PETITION ON AN ACCOUNT ANNEXED

Defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc., as in Form 7).

FORM 9. PETITION FOR GOODS SOLD AND DELIVERED

Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1958, and December 1, 1958.

Wherefore (etc., as in Form 7).

FORM 10. PETITION FOR MONEY LENT

Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1958.

Wherefore (etc., as in Form 7).

FORM 11. PETITION FOR MONEY PAID BY MISTAKE

Defendant owes plaintiff ten thousand dollars for money paid by plaintiff to defendant by mistake on June 1, 1958, under the following circumstances: [here state the circumstances with particularity].

Wherefore (etc., as in Form 7).

FORM 12. PETITION FOR MONEY HAD AND RECEIVED

Defendant owes plaintiff ten thousand dollars for money had and received from one G. H. on June 1, 1958, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 7).

FORM 13. PETITION FOR NEGLIGENCE

1. On June 1, 1958, in a public highway called Congress Street in Portland, Kansas, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

FORM 14. PETITION FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

A. B., Plaintiff
v.
C. D. and E. F., Defendants } *Petition*

1. On June 1, 1958, in a public highway called Congress Street in Portland, Kansas, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway and was in the exercise of due care.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ten thousand dollars and costs.

FORM 15. PETITION FOR CONVERSION

On or about December 1, 1958, defendant converted to his own use ten bonds of the ______________ Company (here insert brief identification as by number and issue) of the value of ten thousand dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars, interest, and costs.

FORM 16. PETITION FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND

1. On or about December 1, 1958, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ten thousand dollars.

FORM 17. PETITION ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER SECTION 60-218 (*b*)

A. B., Plaintiff
v.
C. D. and E. F., Defendants } *Petition*

1. Defendant C. D. on or about ____________ executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on ________ the sum of five thousand dollars with interest thereon at the rate of ________ percent, per annum].

2. Defendant C. D. owes to plaintiff the amount of said note and interest.

3. Defendant C. D. on or about ____________ conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ten thousand dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

FORM 18. PETITION FOR INTERPLEADER AND DECLARATORY RELIEF

1. On or about June 1, 1957, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ten thousand dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1958, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 1958, was ever paid and the policy ceased to have any force or effect on July 1, 1958.

3. Thereafter, on September 1, 1958, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

5. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

FORM 19. MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, OF LACK OF SERVICE OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF JURISDICTION UNDER SECTION 60-212 (*b*)

The defendant moves the court as follows:

1. To dismiss the action because the petition fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (*a*) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Maine, and (*b*) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong county because [here state the reasons why the venue is improper].

4. To dismiss the action on the ground that the court lacks jurisdiction because [here state the reasons why the court lacks jurisdiction].

Signed: ____________________
Attorney for Defendant
Address: ____________________

Notice of Motion

To: ______________________________
Attorney for Plaintiff

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at ______________, on the ________ day of ________, 196__, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: ____________________
Attorney for Defendant
Address: ____________________

FORM 20. ANSWER PRESENTING DEFENSES UNDER SECTION 60-212 (*b*)

First Defense

The petition fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen resident of this state, is subject to the jurisdiction of this court; can be made a party but has not been made one.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the petition; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the petition; and denies each and every other allegation contained in the petition.

Fourth Defense

The right of action set forth in the petition did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a petition.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a petition.)

FORM 21. ANSWER TO PETITION SET FORTH IN FORM 12, WITH COUNTERCLAIM FOR INTERPLEADER

Defense

Defendant denies the allegations contained in the complaint to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of ten thousand dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the petition and to this counterclaim.

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

Note

Section 60-213 (*h*) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

FORM 22. MOTION TO INTERVENE AS A DEFENDANT UNDER SECTION 60-224

A. B., Plaintiff
v.
C. D., Defendant
E. F., Applicant for Intervention
} *Motion to Intervene as a Defendant*

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that [here insert the grounds of intervention, either of right or in the discretion of the court.]

Signed: ______________________

Attorney for E. F., Applicant for Intervention

Address ______________________

Note

The motion should be accompanied by notice of motion, as in Form 19, and a copy of the proposed answer in conformity with Section 60-212 (*b*).

Notice of Motion
(Contents the same as in Form 19)
Exhibit A

State of ________________,
County of ________________

A. B., being first duly sworn, says:

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above-mentioned items is relevant to some issue in the action.)

Signed: A. B.

[Jurat]

FORM 23. ALLEGATION OF REASON FOR OMITTING PARTY

When it is necessary, under Section 60-219 (*c*), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action because he is not subject to the jurisdiction of this court.

FORMS PERTAINING TO DOCUMENTS

FORM 24. MOTION FOR PRODUCTION OF DOCUMENTS, ETC., UNDER SECTION 60-234

Plaintiff A. B. moves the court for an order requiring defendant C. D.

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents and describe each of them.)

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

(Here list the objects and describe each of them.)

(3) To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Signed: ________________________
Attorney for Plaintiff.
Address: ________________________

FORM 25. REQUEST FOR ADMISSION UNDER SECTION 60-236

Plaintiff A. B. requests defendant C. D. within __________ days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed: ______________________

Attorney for Plaintiff.

Address: ______________________

ARTICLE 3. PROCESS

Committee Notes Generally

The following provisions are subject to the general provisions of 60-204 relating to scope and substantial compliance. The committee notes are carried at the end of the article in order not to break the continuity.

60-301. *Summons: Issuance.* Upon the filing of the petition the clerk shall forthwith issue a summons and deliver it for service to the sheriff or to a person specially appointed to serve it. Upon the written request of the plaintiff separate or additional summonses shall issue against any defendant. In the absence of a request of the plaintiff to the contrary the clerk shall deliver the process to the sheriff of the county where the petition is filed.

60-302. *Same: Form.* The summons shall be signed by the clerk, dated the day it is issued, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which the law requires the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the petition.

60-303. *By Whom Served.* Service of all process shall be made by a sheriff within his county, by his deputy or by some person specially appointed by the judge for that purpose, except that a subpoena may be served as provided in 60-245(d). Special appointments to serve process shall be made freely when substantial savings in travel fees will result. A person specially appointed to serve process may make such service any place in the state, and shall be allowed the same fees as the sheriff for similar services.

60-304. *Deputies.* When in any civil action or proceeding any clerk or sheriff is authorized or directed by law to take any action, any deputy of such clerk or deputy or undersheriff of such sheriff, may likewise take such action. Orders, writs and other documents requiring signature by the clerk may be signed by the clerk, the deputy clerk or the clerk by a deputy clerk. Writs, returns and other documents requiring signature by the sheriff may be signed by the sheriff, undersheriff or the sheriff by a deputy sheriff.

60-305. *Summons: Personal Service.* The summons and petition shall be served together. The plaintiff shall furnish the clerk such

copies of the petition as are necessary. Service shall be made as follows:

(*a*) *Individual.* Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the petition to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the petition to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The judge, or in his absence the probate judge, upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the petition at the defendant's dwelling house or usual place of abode.

(*b*) *Infant.* Upon an infant, by delivering a copy of the summons and of the petition personally (1) to the infant and (2) also either to his legal guardian if he has one within the state or to his father or mother or other person having his care or control or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the judge.

(*c*) *Incompetent.* Upon an incompetent person, by delivering a copy of the summons and of the petition personally (1) to his legal guardian or a competent adult member of his family with whom he resides, or if he is living in an institution, then to the director or chief executive officer of the institution, or if service cannot be made upon any of them, then as provided by order of the judge and (2) unless the judge otherwise orders, also to the incompetent.

(*d*) *Governmental Bodies.* Upon a county, by delivering a copy of the summons and of the petition to one of the county commissioners or the county clerk or the county treasurer; upon a township, by delivering a copy of the summons and of the petition to the clerk or the trustee; upon a city, by delivering a copy of the summons and of the petition to the clerk or the mayor; upon any other public corporation, body politic, district or authority by delivering a copy of the summons and of the complaint to the clerk or secretary or, if not to be found, to any officer, director, or manager thereof, and upon the state or any governmental agency of the state, when subject to suit, by delivering a copy of the summons and petition to the attorney general or an assistant attorney general.

(*e*) *Corporations and Partnerships.* Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, when by law it may be sued as such, by delivering a copy of the summons and of the petition to an officer, partner, or a managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof or by delivering copies to any other agent authorized by appointment or required by law to receive service of process, and if the agent is one authorized by law to receive service and the law so requires, by also mailing a copy to the defendant.

(*f*) *Foreign Corporation—Registered Agent.* Service of process or service of any notice or demand required or permitted by law to be served on a foreign corporation may also be made on such corporation by service thereof on the registered agent of such corporation. Whenever any foreign corporation authorized to transact business or transacting business without authority in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process or service of any such notice or demand may be had, or whenever any such registered agent of such corporation cannot with reasonable diligence be found at the registered office in this state, or whenever the certificate of authority of any foreign corporation shall be forfeited, then and in every such case the secretary of state shall be irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process, or service of any notice or demand required or permitted by law to be served upon such corporation. Service on the secretary of state of any such process, notice or demand against any such foreign corporation shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, and duplicate copies of the petition, notice or demand or the clerk of the court may send such duplicate copies directly to the secretary of state by restricted registered or restricted certified mail. In the event that any process, notice or demand is served on the secretary of state, he shall immediately cause a copy thereof to be forwarded by restricted registered or restricted certified mail, addressed to such corporation at its principal office as the same appears in the records of the secretary of state, or to the registered or principal office of such corporation in the state of its incorporation. The secretary of state shall keep a record of all processes, notices and demands served upon him under this rule, and shall record therein the time of such service and his action with reference thereto.

(*g*) *Insurance Companies or Associations.* Service of summons or other process may also be made on any insurance company or association, organized under the laws of the state of Kansas by service on the commissioner of insurance in the same manner as that provided for service on foreign insurance companies. All the requirements of law relating to service on foreign insurance companies so far as applicable shall also apply to domestic insurance companies.

(*h*) *Acknowledgment or Appearance.* An acknowledgment of service on the summons, or the voluntary general appearance of a defendant, is equivalent to service.

(*i*) *Refusal to Accept Service.* In all cases when the person to be served, or an agent authorized by him to accept service of summonses and petitions, shall refuse to receive copies thereof, the offer of the duly authorized process server to deliver copies thereof, and such refusal, shall be a sufficient service of such summons and petition.

60-306. *Process Agent for Public Utilities.* Every individual, partnership, association or corporation engaged in the business of transportation as a common carrier or contract carrier, or the transmission of communications, or the distribution of electricity, gas, water or petroleum products, which is subject to regulation by the Kansas Corporation Commission, doing business in this state, is hereby required to designate some person residing in each county into which its line or route may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record or justice of the peace of such county may be served. In every case such company or corporation shall file a certificate of the appointment and designation of such person in the office of the clerk of the district court of the county in which such person resides; and the service of the process upon the person so designated, in any civil action, shall be deemed and held to be as effectual and complete as if service of such process were made upon the president or other chief officer of such company or corporation. Any company or corporation may revoke the appointment and designation of such person upon whom process may be served, as hereinbefore provided, by appointing any other person qualified as above specified and filing a certificate of such appointment, as aforesaid; but every second or subsequent appointment shall also designate the person whose place is filled by such appointment.

(*a*) *Failure to Designate and Appoint.* If any such company

or corporation fails to designate and appoint such person, as in the preceding paragraph is provided and required, such process may be served in such county as provided by the other provisions of this Article 3.

(*b*) *Inability to Serve.* In all cases where service of any process cannot be had upon the person designated by such company or corporation personally, service may be made by leaving a copy of such process at the usual place of residence of such person.

60-307. *Process Service Agent.* (*a*) *Generally.* Any individual, partnership, association or corporation may file in the office of the clerk of the district court of any county an instrument appointing a resident of the state of Kansas as agent upon whom process for such person, fiduciary, company or corporation may be served, and consenting without limitation or exception other than as provided in this act that service of process may be issued out of any court of said county upon such service agent as the agent of such individual, partnership, association or corporation. The instrument appointing such service agent shall be acknowledged, shall state the residence or office address of the service agent, shall be recorded at length upon the register of service agents and shall state that such designation is made pursuant to this act.

(*b*) *Register and Index.* The clerk of the district court in each county shall maintain in his office a register of service agents in which the instruments of appointment provided for in paragraph (*a*) hereof, shall be recorded at length and such clerk shall maintain an alphabetical index of the names of the service agents and a like index of the names of the principals. The clerk of the district court shall be liable on his bond for any damages arising from his failure to maintain the register of service agents or any index thereof.

(*c*) *Change of Address.* The clerk of the district court shall from time to time, when requested by the service agent, note upon the margin of the record any change in the office or resident address of the service agent.

(*d*) *Period of Appointment.* The appointment made under subsection (*g*) of this section shall remain in effect for a period of three years from the date of its filing unless revoked in writing, executed in the same manner as such appointment, which revocation shall be recorded and indexed in the register of service agents, in the same manner as is provided for appointments, and the clerk shall enter upon the record of the original appointment the statement

that it has been revoked, giving the date of such revocation and the book and page where the same is recorded.

(*e*) *Collection of Fee.* The clerk of the district court shall collect a fee of one dollar for the recording of each appointment and a like fee for the recording of each revocation, which fees shall be accounted for in the same manner as other costs and fees collected by him.

(*f*) *Effect of Service Upon Agent.* When any person, fiduciary or corporation shall have appointed such a service agent and such appointment remains unexpired and unrevoked, process issued in any action or proceeding against such person, fiduciary or corporation in any of the courts of the county may be served upon such service agent. Service by publication shall be of no force or effect where an appointment of service agent made and filed as herein provided remains in effect, unless process showing upon its face the name and address of such service agent shall have been duly issued to the proper officer of the county of such service agent's residence as shown on the register of service agents and returned by such officer to whom it has been directed, with a notation that he cannot find such service agent, naming him, in his county.

60-308. *Service by Mail or Publication.* (*a*) *When Permissible.* Service may be made either by mail where the address is known, or by publication in any of the following cases:

(1) In actions to obtain a divorce or alimony or annulment of the contract of marriage where the defendant resides out of the state or where plaintiff with due diligence is unable to make service of summons upon the defendant within the state.

(2) In actions brought against a nonresident of the state or a foreign corporation having in this state property or debts owing to him sought to be taken by any of provisional remedies or to be appropriated in any way.

(3) In actions which relate to or the subject of which is real or personal property in this state, where any defendant has or claims a lien or interest, vested or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, or for partition or for foreclosure of a lien, and such defendant is a nonresident of the state or a foreign corporation.

(4) In all actions where the defendant, being a resident of this state, has departed therefrom, or from the county of his residence, with the intent to delay or defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the

like intent; or in an action against a domestic corporation which has not been legally dissolved, where the officers thereof have departed from the state or cannot be found.

(5) In any of the actions mentioned in this paragraph publication service may be had on the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved or dormant corporations; the unknown executors, administrators, devisees, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership; and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disability; and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of any person alleged to be deceased, and made defendants as such.

(*b*) *Construction and Effect.* The process provisions of this subsection (*h*) shall be construed as separate and permissive methods of obtaining service. If the defendant so served does not appear, judgment may be rendered affecting said property, res or status within the jurisdiction of the court as to said defendant, but such service shall not warrant a personal judgment against such defendant. In case a return receipt bearing the signature or purported signature of the addressee or a receipt or return of the post office showing delivery or receipt refused by the addressee, is not filed, the court shall not enter judgment by default until service by publication is had in accordance with this section. In case the receipt bears the signature of the addressee, or in case the receipt or return of the post office shows in substance that delivery was refused by the addressee, service by mail shall be deemed good even if copies of the summons and petition are not actually received by the addressee.

(*c*) *Procedure for Service by Mail.* A party desiring service by mail shall file an affidavit stating any one or more of the specific grounds for substituted service set forth in subsection (*a*) of this section, and shall state the facts showing why personal service cannot be had on the defendant or defendants in this state. Such affidavit shall be by the party or of someone in his behalf, and shall state the address of the party to be served by mail. Upon the filing of such affidavit with the clerk, the clerk shall serve a copy of the summons and of the petition by restricted, registered or certified mail, requesting a return receipt signed by addressee only,

addressed to the defendant at the address furnished by plaintiff. No default shall be entered until the expiration of at least 30 days after service.

(*d*) *Affidavit for Service by Publication.* Before service by publication as provided in this section can be made, one of the parties or his attorney shall make and file an affidavit stating the applicable provision in substance as follows:

(1) The residences of all named defendants sought to be served, if known, and the names of all such whose residences are unknown.

(2) That the affiant does not know and with reasonable diligence is unable to ascertain the names or residences of any of those classes of unknown persons mentioned in subsection (*a*) (5).

(3) That the party seeking it is unable to procure personal service of summons on such defendants in this state.

(4) That the case is one of those mentioned in subdivisions (1) to (4) inclusive, of paragraph (*a*).

(5) Such affidavit shall be in substantially the following form:

(Name of Court)

______________________________, Plaintiff,

vs.

(Name of first defendant), et al., Defendants.

(Affidavit)

State of Kansas, ______________ County, ss:

______________________________, of lawful age, being first duly sworn, states

1. That he is (plaintiff or defendant, or an attorney for such) in the above action.

2. That the names and residences of all defendants known to affiant, on whom constructive service is desired, are as follows: (Names and Addresses.)

3. That the names of all known defendants whose residences are unknown to affiant, are as follows: (Names.)

4. That affiant does not know and with reasonable diligence is unable to ascertain the names or residences of any of those classes of unknown persons who are or may be concerned in the subject of this litigation, as mentioned in subdivision (1) (v) but that he desires to include all such in his constructive service.

5. That the said (plaintiff or defendant) is unable to procure personal service of summons on all such defendants within this state.

6. That this action is one of those metnioned in subdivision (*a*) (1-5).

(Jurat)

____

(Signature)

(6) When such affidavit is filed service may proceed by publication or by mail.

(*e*) *Publication; Form of Notice; Description of Property, When.* The notice shall be published once a week for three consecutive weeks in some newspaper printed and published in the county where the petition is filed and which newspaper is authorized by law to publish legal notices: *Provided,* if there is no newspapers printed and published in such county the notice may be published

in a newspaper having general circulation therein. It must name the defendants thus to be served and notify them and all other persons who are or may be concerned that he or they have been sued in a named court and must answer or plead otherwise to the petition, or other pleading, filed therein, on or before a date to be stated, which date shall be not less than forty-one (41) days from the date the notice is first published, or the petition or other pleading so filed will be taken as true, and judgment, the nature of which shall be stated, will be rendered accordingly.

Such notice shall be in substantially the following form:

NOTICE OF SUIT

The state of Kansas to (names of defendants to whom notice is given) and all other persons who are or may be concerned:

You are hereby notified that a (petition or other pleading) has been filed in (name of court) by (name of pleader) praying for (state briefly the nature of the pleading and the judgment or other relief sought), and you are hereby required to plead to said (petition or other pleading) on or before __________, 19_____ in said court at _______________, Kansas. Should you fail therein judgment and decree will be entered in due course upon said (petition or other pleading).

(name of plaintiff or other party)

Where the action affects property, such notice need not expressly describe the property, unless such description is otherwise required by law, but the same may be identified by reference to the pleading.

(*f*) *Mailing Copy of Notice.* The party seeking to secure service by publication shall, within seven days after the first publication, mail a copy of the publication notice and the petition, by restricted registered or restricted certified mail, to each defendant whose address is stated in the affidavit for service by publication.

(*g*) *When Service Complete.* Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding paragraphs (*e*) and (*f*), and such service shall be proved. No judgment by default shall be entered on such service until proof thereof be made, approved by the court, and filed.

60-309. *Personal Service Outside State.* (*a*) *Proof and Effect.* (1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

(2) The service of summons shall be made in like manner as service within this State, by any officer authorized to make service

of summons in such state. No order of court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

(3) No default shall be entered until the expiration of at least 30 days after service. A default judgment rendered on such service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this State.

(*b*) *Submitting to Jurisdiction—Process.* Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(1) The transaction of any business within this State;

(2) The commission of a tortious act within this State;

(3) The ownership, use, or possession of any real estate situated in this State;

(4) Contracting to insure any person, property or risk located within this State at the time of contracting.

Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this subsection (*b*) of this section, may be made by personally serving the summons upon the defendant outside this State, as provided in subsection (*a*) of this section, with the same force and effect as though summons had been personally served within this State, but only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this paragraph.

Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

60-310. *Opening Default Judgment Rendered on Service by Publication.* A party against whom a judgment or order has been rendered, without other service than publication in a newspaper, may, at any time within two years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require

them to be paid, and to make is appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall, after expiration of six months, not be affected by any proceedings under this section, nor shall they after the expiration of six months affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense.

60-311. *Procedure Where Only Part of Defendants Served.* (*a*) *Same.* Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows:

First. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment it may be entered against all the defendants thus jointly indebted so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served; and if they are subject to arrest, against the persons of the defendants served.

Second. If the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.

(*b*) *Same.* Nothing in this section shall be so construed as to make a judgment against one or more defendants jointly or severally liable a bar to another action against those not served.

60-312. *Where Process May Be Served.* All process issued for service from any court within the state may be served anywhere within the territorial limits of the state.

60-313. *Proof of Service.* Proof of service shall be made as follows:

(*a*) *Personal Service.* (1) Every officer to whom summons or other process shall be delivered for service within or without the state, shall make return thereof in writing stating the time, place

and manner of service of such writ, and shall sign his name to such return.

(2) If service of such process is, by order of the court, directed to and delivered to a person, other than an officer, for service, such person shall make affidavit as to the time, place and manner of his service thereof.

(*b*) *Service by Mail.* Service by mail shall be proven by a certificate of the clerk that he has mailed a copy of the summons and of the petition as required by law and by the return restricted registered or certified mail receipt which shall be filed in the particular action.

(*c*) *Publication Service.* Service by publication shall be proved by an affidavit showing the dates upon which and the newspaper in which the notice of publication was published. A copy of the notice shall be attached to the affidavit which shall be filed in the cause. The return receipts for the mailing of notice as required by Section 60-308(*f*) shall also be filed, but failure of any such receipt to show delivery to the addressee shall not invalidate the service if all other requirements have in good faith been fulfilled.

(*d*) *Time for Return.* The officer or other person receiving a summons or other process shall make return of service promptly and in any event within the time during which the person served must plead. If the process cannot be served it shall be returned to the court within thirty days after the date of issue with a statement of the reason for the failure to serve the same; provided, however, that the time for service thereof may be extended up to ninety days from the date of issue by order of the court or judge of the court to which it is returnable.

60-314. *Amendment of Return.* At any time in his discretion and upon such terms as he deems just, the judge may allow any process, return or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

COMMITTEE NOTES

Generally. An effort has been made to provide, under this section, a complete method of service for every possible civil remedy. It is sufficiently complete that all other methods of service provided in numerous chapters of the statutes can be repealed except where the service is tied to the substantive law for constitutional reasons. We have not attempted to do the repealing. This can be done from time to time as the legislature desires. The methods presented here are alternative to but not in restriction of the different methods specifically provided by law.

Service by mail has been added. This should be found more satisfactory than publication service where the out of state address is known. The return receipt is evidence of knowledge of the action and will eliminate the possibility of opening a default judgment.

Perhaps more methods are included than are necessary. However, several different methods of service are not offensive. We have proceeded on the theory that if a party has a good cause of action and is in the proper venue, service should be made as easy as possible. Proper notice is all that is desired. Technical objections to service of process is as outmoded as technicalities in pleading.

Sections 60-301 to 60-304 are self-explanatory. They are different from the old procedure. Where the names and addresses of the defendants are given the clerk will issue the summons without a praecipe. If a separate or additional summons is desired written request must be made. Although the responsibility is placed on the clerk to issue the summons, counsel is not relieved of the obligation of following the proceedings to make sure service is properly and timely made. A copy of the petition will be served with the summons and the summons need only inform the defendant that if he does not appear and defend, judgment will be rendered for the relief demanded in the petition.

Section 60-305 is complete as to how personal service shall be made. It provides for personal service on individuals, infants, incompetents, governmental bodies, corporations, partnerships and insurance companies or associations. It makes possible the repeal of all other provisions, in the statutes, for personal service if desired.

Section 60-306. This section retains the old provisions (G. S. 60-2519 to 60-2521) requiring process agents in every county through which designated public utilities operate.

Section 60-307 retains the old provisions (G. S. 60-2533 to 60-2538) for appointment of process service agents. Although there are other sufficient methods of service many such process service agents have been appointed and there would appear to be no reason to eliminate the procedure.

Section 60-308. There would appear to be no objection to the present method of constructive service. The old provisions (G. S. 60-2525 to 60-2528) have not been disturbed except service by mail, as an additional permissive service, has been added. Where the address of the out of state defendant is known, service by mail will eliminate the possibility of opening a default judgment as provided in section 60-306.

Section 60-309 is in lieu of G. S. 60-2529. Personal service out of state on a citizen or resident of this state is the equivalent of personal service. The same is true of a person who has submitted to the jurisdiction of the courts of this state as provided in paragraph (*b*) thereof. No additional privileges are granted for setting aside default judgments. If the defendant has actual notice, nothing more should be required.

Paragraph (*b*) is entirely new. It is in line with the general trend to expand jurisdiction over nonresidents having "contacts, ties or relations" within the jurisdiction of the state. It would not appear to offend the due process clause of the Fourteenth Amendment to require a nonresident who has entered a foreign state and offended against its private citizens to return and defend its position, if the method of serving process gives due notice. The requirement

of submission to jurisdiction is not different from the numerous nonresident motor statutes. The provision simply adds additional causes of action to which the principle is applied.

The Supreme Court of the United States has ruled that ". . . due process requires only that in order to subject a defendant to a judgment *in personam,* if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*Shoe Co. v. Washington,* 326 U. S. 310. See also *Travelers Health Ass'n v. Virginia,* 339 U. S. 643.)

The constitutional requirement that the method of service give "reasonable assurance that the notice will be actual," is met by personal service out of state. It certainly constitutes as "actual notice" as substituted service upon the Secretary of State.

Nonresidents are protected against assertion of causes of actions not within the scope of the provision. The right to use other methods of service of process, such as service under the nonresident motorist statute, is preserved.

The Illinois statute has been followed, with the thought that uniformity in laws applying interstate are desirable.

Section 60-310 covers the opening of default judgments rendered on service by publication. The old provisions are retained (G. S. 60-2530) except the time limit has been changed from three to two years.

Section 60-311. There has been no change from the old provisions (G. S. 60-2531 and 60-2532) protecting the plaintiff where only part of the defendants are served.

Section 60-312. Under this paragraph when an action is filed in the county of proper venue, service may be made anywhere within the territorial limits of the state.

Section 60-313. The provisions for proof of all types of service of process have been included under this paragraph.

Section 60-314. The provision for the amendment of the process, return or proof of service is not materially different from the old provision contained in G. S. 60-759. It follows Federal Rule 5 (*h*).

ARTICLE 4. RULES OF EVIDENCE

Committee Notes

PREFATORY

The Federal Rules have not as yet been extended to cover the important subject of evidence. This for the reason that at the time the Federal Rules were drafted a complete code for modern rules of evidence had not been sufficiently considered. The matter has now been given careful and extended study by the best talent in the American Bar.

A suggested "Uniform Rules of Evidence" has been drafted by a committee acting for the National Conference of Commissioners on Uniform State Laws. One of the outstanding trial judges of Kansas, Judge Spencer Gard, was chairman of the committee. The order of arrangement of the material, and to a great extent the material itself, is acceptable for Kansas practice.

Only a few changes will be necessary to convert the Kansas rules of evidence into a modern and orderly arranged code. The matter will be covered in the form of broad general rules rather than extended detail. The rules will deal primarily with the admissibility of evidence and the related subject of privileges and immunities pertaining to witnesses.

Omitting, for the most part, statements as to admissibility and simply stating the rules of limitation will reduce the volume and simplify the statements. Any evidence having a reasonable tendency to prove a material fact is admissible unless specifically restricted.

A. GENERAL PROVISIONS

60-401. *Definitions.* (*a*) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.

(*b*) "Relevant evidence" means evidence having any tendency in reason to prove any material fact.

(*c*) "Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or nonexistence of such fact.

(*d*) "Burden of proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

(*e*) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

(*f*) "Conduct" includes all active and passive behavior, both verbal and nonverbal.

(*g*) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(*h*) "Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state.

(*i*) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a *sui juris* person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(*j*) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.

(*k*) "Trier of fact" includes a jury, or a judge when he is trying an issue of fact other than one relating to the admissibility of evidence.

(*l*) "Verbal" includes both oral and written words.

(*m*) "Writing" means handwriting, typewriting, printing, photostating, photographing and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

COMMITTEE NOTES

The broad definitions are to eliminate the possibility of unduly restricting evidence. The purpose of the rules is to make admissible evidence which logically tends to establish a fact. All evidence is to be admissible unless specifically restricted. The broad definition of "relevant evidence" does little more than leave the determination of the question to the logic and common sense of the trial judge. Whether evidence is relative or material as tending to prove any material fact must depend upon the facts and issues in each particular case.

60-402. *Scope of Rules.* Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the

specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

COMMITTEE NOTES

These rules are made applicable to court proceeding and are not specifically extended to boards, commissions or other administrative tribunals with fact-finding responsibility.

The rules can be readily adopted to fit any situation and may provide the pattern for all inquiries where evidence is introduced before either judicial or administrative tribunals. There are also many statutes covering specific situations which should not be disturbed. This is particularly true in connection with certain specified crimes, since Kansas has had no general rules of evidence applicable to criminal procedure.

Except where special rules of evidence are provided for specific crimes the rules of evidence applicable to civil procedure must apply. G. S. 62-1413 specifically provides that the provisions for civil cases as to attendance, testimony and examination of witnesses shall apply to criminal cases. These rules of evidence being made applicable to both civil and criminal actions constitute no departure from previous Kansas practice.

60-403. *Exclusionary Rules Not to Apply to Undisputed Matter.* If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to section 60-445 and any valid claim of privilege.

COMMITTEE NOTES

This rule eliminates the necessity of strict proof of matters which must be established under the pleadings but as to which there is no material dispute.

60-404. *Effect of Erroneous Admission of Evidence.* A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (*a*) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (*b*) the court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

COMMITTEE NOTES

This rule simply restates the present practice requiring specific and timely objections and the ignoring of harmless admission of evidence.

60-405. *Effect of Erroneous Exclusion of Evidence.* A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of

evidence unless (*a*) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (*b*) the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

COMMITTEE NOTES

Again this rule simply restates the present practice requiring the substance of the excluded evidence be made a matter of record and the ignoring of harmless exclusion of evidence.

60-406. *Limited Admissibility.* When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

COMMITTEE NOTES

This rule is necessary where the judge is not permitted to comment generally on the evidence. Otherwise the jury would be left without guidance. As a safeguard against the jury ignoring the instruction the judge would have the right under new 60-445 to exclude the evidence if the fact as to which it is admissible could be proved by other evidence.

60-407. *General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.* Except as otherwise provided in this article, (*a*) every person is qualified to be a witness, and (*b*) no person has a privilege to refuse to be a witness, and (*c*) no person is disqualified to testify to any matter, and (*d*) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (*e*) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (*f*) all relevant evidence is admissible.

COMMITTEE NOTES

This rule wipes out all existing restrictions and privileges of witnesses and limitations on the admissibility of relevant evidence. They are then reinstated by subsequent sections insofar as desirable. This is necessary if a complete and orderly code is presented as to form and contents.

This section presents the basic rule. All provisions that follow, except the few touching upon related matters or procedure, are exceptions to this rule in the form of limitations or modifications.

60-408. *Preliminary Inquiry by Judge.* When the qualification of a person to be a witness, or the admissibility of evidence, or the

existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession of the accused in a criminal case, the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

COMMITTEE NOTES

This rule is quite in conformity with present practice. When the preliminary question of the qualification of a person to testify or the admissibility of evidence is raised, the judge may proceed to determine the matters under a common sense rule and not by procedural restrictions. If a request is made, the determination of the admissibility of a confession must be made out of the presence of the jury. The final clause protects the right to present evidence of weaknesses in admitted evidence.

B. JUDICIAL NOTICE

60-409. *Facts Which Must or May Be Judicially Noticed.* (*a*) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(*b*) Judicial notice may be taken without request by a party, of (1) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (2) the laws of foreign countries, and (3) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (4) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

(*c*) Judicial notice shall be taken of each matter specified in paragraph (*b*) of this rule if a party requests it and (1) furnishes the judge sufficient information to enable him properly to comply

with the request and (2) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

COMMITTEE NOTES

The first phase of subsection (*a*) is a restatement of G. S. 60-2878. The second phase is a restatement of the common law practice. Subsection (*b*) makes matters such as municipal ordinances, departmental regulations and other matter subjects of judicial knowledge, which have heretofore been proved by certified copies. Sufficient safeguards are provided to protect the adverse party and to require the parties to furnish the judge with sources of information.

60-410. *Determination as to Propriety of Judicial Notice and Tenor of Matter Noticed.* (*a*) The judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.

(*b*) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (1) the judge may consult and use any source of pertinent information, whether or not furnished by a party, and (2) no exclusionary rule except a valid claim of privilege shall apply.

(*c*) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls clearly within section 60-409, or if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof.

(*d*) In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within section 60-409, shall be a matter for the judge and not for the jury.

COMMITTEE NOTES

This rule makes it clear that the determination of applicable law is for the judge, not the jury. This is true whether evidence is offered on the issue of what the law is or whether the rule of judicial notice is strictly invoked.

60-411. *Instructing the Trier of Fact as to Matter Judicially Noticed.* If a matter judicially noticed is other than the common law or constitution or public statutes of this state, the judge shall indicate for the record the matter which is judicially noticed and if the matter would otherwise have been for determination by a trier of fact other than the judge, he shall instruct the trier of the fact to accept as a fact the matter so noticed.

COMMITTEE NOTES

This provision goes further than the present facts which he notices judicially but also his findings with respect to foreign laws, municipal ordinances and the like. The jury is, of course, entitled to be apprised of the facts judicially noticed which it would otherwise be their province to determine.

60-412. *Judicial Notice in Proceedings Subsequent to Trial.* (*a*) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the trier of fact with respect to the matter, shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(*b*) The rulings of the judge under sections 60-409, 60-410 and 60-411 are subject to review as are other rulings under the provisions of this article.

(*c*) The reviewing court in its discretion may take judicial notice of any matter specified in section 60-409 whether or not judicially noticed by the judge.

(*d*) A judge or a reviewing court taking judicial notice under paragraph (*a*) or (*c*) of this section of matter not theretofore so noticed in the action shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

COMMITTEE NOTES

This provision would not appear to change the present practice except as subdivision (*d*) requires the trial judge or reviewing court to afford the parties reasonable opportunity to present information relative to the propriety of taking judicial notice and the tenor of the matter to be noticed.

C. PRESUMPTIONS

60-413. *Definition.* A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

COMMITTEE NOTES

This definition limits presumptions to situations where the presumption must be first made from established basic facts which give it birth. The establishing of the facts on which the presumption is based is accomplished in the same manner, by evidence or by judicial notice, or by the pleadings or stipulation as any other fact is established. When the presumption depends on what the jury finds with respect to the basic facts, it arises or not in accordance with such findings.

60-414. *Effect of Presumptions.* Subject to section 60-416, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (*a*) if the facts from which

the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates, (*b*) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

COMMITTEE NOTES

Most presumptions arise where facts are proven from which a presumption, based wholly or partly in probability, arises. Under subsection (*a*) once evidence of probative value establishes the presumption it continues to exist and the opposing party must overcome it, if possible, by convincing evidence. The burden does not shift as evidentiary facts are presented. As an example, consider the presumption of death after seven years' disappearance. Evidence is introduced of the disappearance and surrounding circumstances. The presumption arises. The opposing party produces a witness who testifies that he has seen the absentee within the last year. The jury may believe the witness or it may not. If it does believe the witness the presumption is overcome and no longer exists. If it does not believe the witness the presumption prevails. It will be simple for the court to so instruct the jury.

Under subsection (*b*) if the fact from which the presumption arises has no probative value as evidence, the production of evidence of the nonexistence of the presumed fact destroys the presumption, and the fact will be determined exactly as if there had never been a presumption involved. In such a case no instruction as to the presumption is necessary or proper.

60-415. *Inconsistent Presumptions.* If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.

COMMITTEE NOTES

The judge will have to determine which presumtion is founded on the weightier considerations of policy and logic and so instruct the jury. If there is no such preponderance no instruction is necessary or proper. The judge will have the problem of determining whether to give greater consideration to a presumption having a rational connection with its basic facts, than he would give to a presumption of convenience or statutory policy based on facts having no probative value if the two presumptions are inconsistent. Where the determination must be made the determination of the judge is preferred over that of the jury.

60-416. *Burden of Proof Not Relaxed as to Some Presumptions.* A presumption, which by a rule of law may be overcome only by

proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by sections 60-414 or 60-415 and the burden of proof to overcome it continues on the party against whom the presumption operates.

COMMITTEE NOTES

Some statutory presumptions are based on public policy, such as the presumption of legitimacy of a child born in wedlock. In such cases the presumption does not fall when a mere preponderance of the evidence would indicate a contrary finding, but continues with its original force until overcome by the degree of proof required by the particular statute to overcome it.

D. WITNESSES

60-417. *Disqualification of Witness. Interpreters.* A person is disqualified to be a witness if the judge finds that (*a*) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (*b*) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.

COMMITTEE NOTES

This provision is a simple statement of the common law rule as applied in Kansas. It avoids arbitrary use of a disqualifying age or specific reference to sanity. The policy of the rule is that matters of the witness's opportunity for perception, knowledge, memory, experience and the like go to the weight to be given the testimony rather than to the right to have the witness testify.

60-418. *Oath.* Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law.

COMMITTEE NOTES

This provision assumes that the witness has the necessary qualifications and is therefore capable of understanding his duty to tell the truth. It avoids the possibility of 60-407 and 60-417 specifying disqualifying conditions being interpreted as eliminating the necessity of the oath or affirmation.

60-419. *Prerequisites of Knowledge and Experience.* As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive

conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

COMMITTEE NOTES

This provision makes it clear that the necessity of qualifying the witness has not been discarded. It also gives the judge some discretion to reject testimony for completely unreliable foundation proof.

60-420. *Evidence Generally Affecting Credibility.* Subject to sections 60-421 and 60-422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

COMMITTEE NOTES

This rule permits a party to impeach his own witness and is contrary to the present Kansas practice. It follows the modern concept of justice by making the witness the agent of the court by which it is to arrive at the truth. It enables a party to defend himself against surprise or a double-crossing witness.

60-421. *Limitations on Evidence of Conviction of Crime as Affecting Credibility.* Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

COMMITTEE NOTES

This provision is more limited than the provision in present G. S. 60-2801. It takes the more practical approach that conviction of a crime does not reflect on the credibility of the witness as to truth and veracity unless the crime involved dishonesty or a false statement. There is no logical presumption that a person committing a crime in the heat of passion would perjure himself on the witness stand.

If the accused introduces evidence for the sole purpose of supporting his credibility the door is open. The purpose of this provision, as is that part of new 60-423 (*d*) permitting comment on failure to testify, is to encourage defendants in criminal actions to take the stand. It is also important that a disinterested witness not be frightened away from the witness stand because he may be required to disclose a conviction for crime. This rule would correct the abuse of smearing rather than discrediting a witness or a defendant who takes the stand.

60-422. *Further Limitations on Admissibility of Evidence Affecting Credibility.* As affecting the credibility of a witness (*a*) in

examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (*b*) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (*c*) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (*d*) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

COMMITTEE NOTES

Clause (*a*) relieves the cross-examiner of responsibility to show or read to the witness the inconsistent writing. The party putting the witness on the stand can submit the details if further explanation is desired.

Clause (*b*) is contrary to court decisions which exclude evidence of prior contradictory statements which were not brought to the attention of the witness while testifying. This rule gives the witness all protection necessary by leaving it to the discretion of the judge. Any other approach is too technical and unrealistic.

Clause (*c*) places the same limitation on character testimony for impeachment purposes as is provided by new 60-421 for evidence of conviction of crime, in that it must relate to honesty or veracity.

Clause (*d*), as contrasted to new 60-446 prohibits proof of specific instances of conduct to prove a character trait where the purpose is impeachment.

E. PRIVILEGES

60-423. *Privilege of Accused.* (*a*) Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify.

(*b*) An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (1) in an action in which the accused is charged with (*i*) a crime involving the marriage relation, or (*ii*) a crime against the person or property of the other spouse or the child of either spouse, or (*iii*) a desertion of the other spouse or a child of either spouse, or (2) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.

(*c*) An accused in a criminal action has no privilege to refuse,

when ordered by the judge, to present his person for identification or do any act in the presence of the judge or the trier of the facts, except to refuse to be a witness against himself.

(*d*) If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom.

COMMITTEE NOTES

Subdivision (*a*) is not out of harmony with G. S. 62-1420 and section 10 of the Kansas Bill of Rights and is the universal rule.

Subdivision (*b*) narrows the privilege granted by G. S. 62-1420. This provision limits the privilege to confidential communications between husband and wife. The old theory of protecting the peace of the home is no longer highly regarded where one spouse is a criminal and the other is abetting by silence. It should also be noted that by paragraph (*b*) the communication loses its confidential character if the accused offers evidence of it.

Subdivision (*c*) is intended to go as far as sections 10 of the Kansas Bill of Rights permits in obtaining information by which a true verdict may be returned.

Subdivision (*d*) granting the right to comment on failure of the accused to testify, is a complete departure from the related provision in G. S. 62-1420. It is hoped that this provision coupled with the protection given the accused by new 60-421 will encourage the accused to testify.

60-424. *Definition of Incrimination.* A matter will incriminate a person within the meaning of this Article if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation.

COMMITTEE NOTES

The design of the privilege against self-incrimination is to protect the accused against punishment. It is not designed to prevent the compulsory disclosure of criminal conduct where for any reason punishment is impossible.

60-425. *Self-Incrimination: Exceptions.* Subject to sections 60-423 and 60-437, every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this section,

(*a*) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; and

(*b*) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features

and other identifying characteristics, or his physical or mental condition; and

(*c*) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and

(*d*) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; and

(*e*) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; and

(*f*) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; and

(*g*) subject to section 60-421, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action.

COMMITTEE NOTES

All material relating to self incrimination has been collected under this section except as it is incidentally affected by privileges under 60-423.

Subsection (*a*) protects the witness only from self incrimination not from disclosing the facts if he cannot be prosecuted.

Subsection (*b*) covers only the matter of identification and physical and mental condition. Attention to the physical and mental condition of the accused would appear to be humane requirement. Also where sanity is in question it must be determined.

Subsection (*c*) must be so limited as not to conflict with the immunity guaranteed by section 10 of the Kansas Bill of Rights. However, there are many occasions when blood tests are proper, such as paternity cases and the like. There would appear to be no constitutional objection from standpoint of self incrimination so long as the information obtained is not used against such person in a criminal action.

Subsection (*d*) pertains to recovery of property. An extreme example of the use of the provision would be where a person is forced to bring in stolen property. The unexplained possession of the stolen property would be evidence of theft. Certainly the law would not countenance the retention of

the stolen property because its production for the rightful owner should be evidence of a theft.

Subsection (*g*) simply requires a defendant in a criminal case who has testified in part to disclose all.

60-426. *Lawyer-Client Privilege.* (*a*) *General Rule.* Subject to section 60-437, and except as otherwise provided by paragraph (*b*) of this section communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (1) if he is the witness to refuse to disclose any such communication, and (2) to prevent his lawyer from disclosing it, and (3) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (*i*) in the course of its transmittal between the client and the lawyer, or (*ii*) in a manner not reasonably to be anticipated by the client, or (*iii*) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative.

(*b*) *Exceptions.* Such privileges shall not extend (1) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or a tort, or (2) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or (3) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or (*d*) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (4) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.

(*c*) *Definitions.* As used in this rule (1) "Client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (2) "communi-

cation" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship, (3) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.

COMMITTEE NOTES

This section is in harmony with paragraph Fourth of G. S. 60-2805 except that it has been broadened by subsection (*a*) (3) to prevent disclosure of communications overheard by eavesdroppers, agents of the client in transmitting the communication and the like, so long as the communication was in the course of professional confidence.

60-427. *Physician-Patient Privilege.* (*a*) As used in this section, "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (2) "physician" means a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in Sec. 65-2802 of the 1959 Supplement to General Statutes 1949 in the state or jurisdiction in which the consultation or examination takes place; (3) "holder of the privilege" means the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (4) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(*b*) Except as provided by paragraphs (*c*), (*d*), (3) and (4) of this section, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (1) the communication was a confidential communication between patient and physician, and (2) the patient or the physician reasonably believed the communication to necessary or helpful to enable

the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (3) the witness (*i*) is the holder of the privilege or (*ii*) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (*iii*) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (4) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

(*c*) There is no privilege under this section as to any relevant communication between the patient and his physician (1) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offence other than a misdemeanor, or (2) upon an issue as to the validity of a document as a will of the patient, or (3) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(*d*) There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(*e*) There is no privilege under this section as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(*f*) No person has a privilege under this section if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(*g*) A privilege under this section as to a communication is terminated if the judge finds that any person while a holder of the

privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.

COMMITTEE NOTES

This section is a substitute for paragraph Sixth of G. S. 60-2805. Certain exceptions have been added which tend somewhat to limit the privilege.

60-428. *Marital Privilege—Confidential Communications.* (*a*) *General Rule.* Subject to section 60-427 and except as otherwise provided in Paragraphs (*b*) and (*c*) of this section, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.

(*b*) *Exceptions.* Neither spouse may claim such privilege (1) in an action by one spouse against the other spouse, or (2) in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, or (3) in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, or (4) in a criminal action in which the accused offers evidence of a communication between him and his spouse, or (5) if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.

(*c*) *Termination.* A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.

COMMITTEE NOTES

This section is a substitute for paragraph Third of G. S. 60-2805. The exceptions which have been read into the old provision by interpretation have been included.

60-429. *Penitential Communication Privilege.* (*a*) *Definitions.* As used in this section, (1) the term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization; (2) the term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister; (3) the term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization; (4) "penitent" means a person who recognizes the existence and the authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct; (5) "penitential communication" means any communication between a penitent and a regular or duly ordained minister of religion which the penitent intends shall be kept secret and confidential and which pertains to advice or assistance in determining or discharging the penitent's moral obligations, or to obtaining God's mercy or forgiveness for past culpable conduct.

(*b*) *Privilege.* A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a

communication if he claims the privilege and the judge finds that (1) the communication was a penitential communication and (2) the witness is the penitent or the minister, and (3) the claimant is the penitent, or the minister making the claim on behalf of an absent penitent.

COMMITTEE NOTES

This section is much broader than paragraph Fifth of G. S. 60-2805. Public interest cannot be served by preventing a culprit from seeking religious solace through fear of having his confidence betrayed. Public interest is served any time a person consciously seeks to confess and repent his culpable conduct. It may well discourage the commission of another crime. The definition of "minister" has been taken from 50 App. U. S. C. A. sec. 456 g.

60-430. *Religious Belief.* Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.

60-431. *Political Vote.* Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally.

60-432. *Trade Secret.* The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

60-433. *Secret of State.* (*a*) As used in this section, "secret of state" means information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States, or a state or territory, or concerning international relations.

(*b*) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible, (1) if the judge finds that the matter is a secret of state, or (2) unless the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action.

60-434. *Official Information.* (*a*) As used in this section, "official information" means information not open or theretofore officially disclosed to the public relating to internal security of this state or of the United States acquired by a public official of this state or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.

(*b*) A witness has the privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information, and (1) disclosure is forbidden by an act of the congress of the United States or a statute of this state, or (2) disclosure of the information in the action will be harmful to the security of the government of which the witness is an officer in a governmental capacity.

60-435. *Communication to Grand Jury.* A witness has a privilege to refuse to disclose a communication made to a grand jury by a complainant or witness, and evidence thereof is inadmissible, unless the judge finds (*a*) the matter which the communication concerned was not within the function of the grand jury to investigate, or (*b*) the grand jury has finished its investigation, if any, of the matter, and its finding, if any, has lawfully been made public by filing it in court or otherwise, or (*c*) disclosure should be made in the interests of justice.

60-436. *Identity of Informer.* A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or a governmental division thereof, charged wih the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (*a*) the identity of the person furnishing the information has already been otherwise disclosed or (*b*) disclosure of his identity is essential to assure a fair determination of the issues.

60-437. *Waiver of Privilege by Contract or Previous Disclosure.* A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (*a*) contracted with a party against whom the privilege is claimed that he would not claim the privilege or, (*b*) without coercion, or without any trickery, deception, or fraud practiced against him, and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

COMMITTEE NOTES

Clause (*a*) recognizes the right of a person to contract with another to waive his privilege, but the waiver does not extend beyond the contracting parties.

The most common application of clause (*b*) is compulsory disclosure on cross-examination, of incriminating material part of which was disclosed in

the direct examination. As to the suggestion that the broad provisions may violate the rule as to privilege against self incrimination, it is suggested that a person should not be permitted to pick and choose, when, where, to whom and how much of a privileged matter he will disclose.

60-438. *Admissibility of Disclosure Wrongfully Compelled.* Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it.

COMMITTEE NOTES

This provision states the generally accepted view. It safeguards the privileges against disclosure by their very violation and protects against improper compulsory disclosure.

60-439. *Reference to Exercise of Privileges.* Subject to paragraph (*d*), section 60-423, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or may be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

COMMITTEE NOTES

A recognized privilege not to introduce evidence should not be impaired by giving the judge or counsel any right to comment on the exercise of the privilege to the prejudice of the one exercising the privilege.

60-440. *Effect of Error in Overruling Claim of Privilege.* A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

F. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY

60-441. *Evidence to Test a Verdict or Indictment.* Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

COMMITTEE NOTES

This rule makes no change but adopts what is almost universally the law. The rule does not impose limitations on testimony as to the existence of conditions or the occurrence of events bearing on the verdict. The limitation imposed by this provision extends only to that testimony which concerns the mental or emotional effects on the jurors of such conditions or occurrences.

60-442. *Testimony by the Judge.* Against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness.

COMMITTEE NOTES

This rule does not prevent a judge from testifying as a witness when his duty calls upon him to disqualify himself as presiding judge at the trial.

60-443. *Testimony by a Juror.* A member of a jury sworn and empanelled in the trial of an action, may not testify in that trial as a witness.

60-444. *Testimony of Jurors Not Limited Except by These Rules.* These rules shall not be construed to (*a*) exempt a juror from testifying as a witness to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by section 60-441; (*b*) exempt a grand juror from testifying to testimony or statements of a person appearing before the grand jury, where such testimony or statements are the subject of lawful inquiry in the action in which the juror is called to testify.

COMMITTEE NOTES

On any subject which is a proper subject for judicial inquiry a juror, either petit or grand, may be a witness to give relevant testimony under 60-407. Sections 60-441 and 60-443 impose some limitations as does also 60-435 (communications to grand juries). Section 60-444 is included here out of an abundance of caution to make it clear that it is not intended by implication to impose other limitations, except as they are imposed by other law of the state.

60-445. *Discretion of Judge to Exclude Admissible Evidence.* Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (*a*) necessitate undue consumption of time, or (*b*) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (*c*) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

COMMITTEE NOTES

This applies to frequently arising situations where the trial may get out of hand by the injection of collateral issues having only slight probative value and which would tend to confuse the jury, or have illegitimate emotional appeal. Obviously the judge should have some discretion to prevent the trial from going off on tangents of relative unimportance. Likewise some protection is needed from unfair surprise with respect to such matters. This represents the sort of thing which the trial judge does every day in actual practice and which is sanctioned here, in the assurance that the results of rare and harmful abuse of discretion will be readily corrected on appeal. It is a rule of necessity. Its sanction cannot be escaped if we are to have orderly and efficient trial procedure.

60-446. *Character—Manner of Proof.* When a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of sections 60-447 and 60-448.

COMMITTEE NOTES

This rule deals with the rather rare situations where character is an ultimate issue as contrasted with the use of character merely as circumstantial evidence of another fact. In situations where character is in issue it is necessary to prove it, and the danger of prejudice which comes from showing character by particular acts is outweighed by the necessity of ascertaining the fact of character.

60-447. *Character Trait as Proof of Conduct.* Subject to section 60-448 when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by section 60-446, except that (*a*) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (*b*) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged, (*i*) may not be excluded by the judge under section 60-445 if offered by the accused to prove his innocence, and (*ii*) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character.

COMMITTEE NOTES

As contrasted to 60-446 (character an issue) this rule definitely requires rejection of evidence of specific behavior to prove a character trait except evidence of conviction of a crime. This rule permits the prosecution after the defendant has produced evidence of his good character, to prove prior convictions as evidence of criminal propensity and likelihood of guilt.

60-448. *Character Trait for Care or Skill—Inadmissible to Prove Quality of Conduct.* Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

COMMITTEE NOTES

This rule probably conduces to saving of time and avoids distraction of attention from the main question of what was actually done on the particular occasion.

60-449. *Habit or Custom to Prove Specific Behavior.* Evidence of habit or custom is relevant to an issue of behavior on a specified occasion, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to the habit or custom.

COMMITTEE NOTES

See comment under 60-450.

60-450. *Opinion and Specific Instances of Behavior to Prove Habit or Custom.* Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to wararnt a finding of such habit or custom.

COMMITTEE NOTES

It is sometimes difficult to distinguish between character and habit, especially when the quality in question is skill or care. This section makes evidence of specific instances admissible if the number offered is sufficient to justify an inference of habit, subject to the provision of section 60-445 that the value of the evidence be not, in the opinion of the judge, outweighed by the disadvantages which its receipt would involve.

60-451. *Subsequent Remedial Conduct.* When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

COMMITTEE NOTES

This section limits the common law rule of this state which has permitted such showing for limited purposes.

60-452. *Offer to Compromise and the Like, Not Evidence of Liability.* Evidence that a person has, in compromise or from humanitarian motives furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claims to have sustained loss or damage, is inadmissible to prove his

liability for the loss or damage or any part of it. This rule shall not affect the admissibility of evidence (*a*) of partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim, or (*b*) of a debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

COMMITTEE NOTES

In this rule the words "humanitarian motives" are designed to cover the rather common occurrence of calling an ambulance, paying a doctor bill, repairing or restoring property and the like, with no thought of liability or of compromising a possible liability. The significance of exceptions (*a*) and (*b*) is obvious.

60-453. *Offer to Discount Claim, Not Evidence of Invalidity.* Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act or service in satisfaction of a claim, is inadmissible to prove the invalidity of the claim or any part of it.

COMMITTEE NOTES

This states the well settled practice of this state.

60-454. *Liability Insurance.* Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible as tending to prove negligence or other wrongdoing.

COMMITTEE NOTES

This states the generally accepted rule on the subject. It does not, of course, exclude evidence of liability insurance where relevant upon an issue other than the quality of the insured's conduct.

60-455. *Other Crimes or Civil Wrongs.* Subject to section 60-447 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to sections 60-445 and 60-448 such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

COMMITTEE NOTES

This states the generally accepted rule rejecting evidence of another crime or civil wrong as proof that a person committed a crime or civil wrong on a specified occasion. The limitation is directed against the idea that when it

is shown that a person committed a crime on a former occasion there arises an inference that he has a disposition to commit crime and therefore committed the crime with which he is now charged.

G. EXPERT AND OTHER OPINION TESTIMONY

60-456. *Testimony in Form of Opinion.* (*a*) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (*a*) may be rationally based on the perception of the witness and (*b*) are helpful to a clearer understanding of his testimony.

(*b*) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(*c*) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.

(*d*) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

COMMITTEE NOTES

This rule states affirmatively the conditions under which such testimony is admissible and presumes scrutiny by the judge as a condition to letting it in. Clause (*c*) removes the necessity of cumbersome preliminary findings and resulting delay and presumes that the judge finds the conditions fulfilled unless he excludes the testimony.

60-457. *Preliminary Examination.* The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

COMMITTEE NOTES

This is the same as the present accepted practice.

60-458. *Hypothesis for Expert Opinion Not Necessary.* Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross-examination he may be required to specify such data.

COMMITTEE NOTES

This rule does away with the necessity of following the practice (grossly abused) of using the hypothetical question, but does not forbid its use.

60-459. *Appointment of Experts.* If the judge determines that the appointment of expert witnesses in an action may be desirable, he shall order the parties to show cause why expert witnesses should not be appointed, and after opportunity for hearing may request nominations and appoint one or more such witnesses. If the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. Otherwise the judge may make his own selection. An expert witness shall not be appointed unless he consents to act. The judge shall determine the duties of the witness and inform him thereof at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the judge or any party. He may be examined and cross-examined by each party. This rule shall not limit the parties in calling expert witnesses of their own selection and at their own expense.

COMMITTEE NOTES

The necessity for this rule has long been apparent. The abuses which have developed since experts have come to be witnesses for litigants, are everywhere deplored, not only by the bench and bar but also by members of the other learned professions. Expert witnesses are all too frequently merely expert advocates. They have abandoned the practice of their profession to become professional witnesses for plaintiffs or defendants.

60-460. *Compensation of Expert Witnesses.* Expert witnesses appointed by the judge shall be entitled to reasonable compensation in such sum only as the judge may allow. Except as may be otherwise provided by statute of this state applicable to a specific situation, the compensation shall be paid (*a*) in a criminal action by the county in the first instance under order of the judge and charged as costs in the case, and (*b*) in a civil action by the opposing parties in equal portions, unless the judge otherwise directs, to the clerk of the court at such time as the judge shall direct, and charged as costs in the case. The amount of compensation paid to an expert witness not appointed by the judge shall be a proper subject of inquiry as relevant to his credibility and the weight of his testimony.

COMMITTEE NOTES

This provision is necessary to supplement 60-459.

60-461. *Credibility of Appointed Expert Witness.* The fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony.

COMMITTEE NOTES

Since experts appointed by the judge will ordinarily be impartial witnesses, the fact of their appointment should be disclosed to the trier of the facts in order that their testimony may be properly valued.

H. HEARSAY EVIDENCE

60-462. *Definitions.* As used in section 60-463, its exceptions and in the following rules.

(*a*) "Statement" means not only an oral or written expression but also nonverbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(*b*) "Declarant" is a person who makes a statement.

(*c*) "Perceive" means acquire knowledge through one's own senses.

(*d*) "Public official" of a state or territory of the United States includes an official of a political subdivision of such state or territory and of a municipality.

(*e*) "State" includes the District of Columbia.

(*f*) "A business" as used in exception 60-463(*m*) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(*g*) "Unavailable as a witness" includes situations where the witness is (1) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (2) disqualified from testifying to the matter, or (3) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (4) absent beyond the jurisdiction of the court to compel appearance by its process, or (5) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (1) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such party, or (2) if unavailability is claimed under clause (4) of the preceding paragraph and the judge finds

that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition.

COMMITTEE NOTES

The definition of "statement" makes it clear that it is intended to include as hearsay the conduct of a declarant, whether verbal or nonverbal, where it amounts to a communication to another or an expression.

In view of the fact that unavailability of the declarant is an important condition under a number of exceptions, a safe definition of "unavailable as a witness" becomes absolutely essential. The objective is to assure that unavailability is honest and not planned in order to gain an advantage. This definition gives the judge considerable discretion to reject the offer if he is not satisfied that the absence of the declarant is legitimately explained. Responsibility is placed on the proponent to take the deposition of the declarant if he is out of the jurisdiction of the court and the deposition can be taken by the use of due diligence and without undue hardship.

The other definitions need no comment.

60-463. *Hearsay Evidence Excluded—Exceptions.* Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

COMMITTEE NOTES

This rule must be read in connection with the definition of "statement" in section 60-462, which treats nonverbal conduct used by the declarant in the place of words as within the definition of hearsay. The policy of the rule is to make all hearsay, even though relevant, inadmissible except to the extent that hearsay statements are admissible by the exceptions under this rule. In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness.

(*a*) *Previous Statements of Persons Present and Subject to Cross-Examination.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

COMMITTEE NOTES

This rule has the support of modern decisions which have held that evidence of prior consistent statements of a witness is not hearsay because the rights of confrontation and cross-examination are not impaired. Other decisions have admitted evidence to prior inconsistent statements for its full value, not limited merely to impeachment. When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.

(*b*) *Affidavits.* Affidavits to the extent admissible by the statutes of this state;

COMMITTEE NOTES

Because of the general use of affidavits under statutory sanction in *ex parte* and formal proceedings, discovery procedure, proof of process and the like, and because affidavits are hearsay and inadmissible under the general prohibition of section 60-463, an express exception is necessary to preserve their admissibility and to avoid the possible result of implied repeal of such sanctioning statutes.

(*c*) *Depositions and Prior Testimony.* Subject to the same limitations and objections as though the declarant were testifying in person, (1) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (2) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (*i*) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (*ii*) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered; *Provided:* The provisions of this paragraph (*c*) shall not appy in criminal actions if it denies to the accused the right to meet the witness face to face;

COMMITTEE NOTES

The admissibility of former deposition testimony is limited, only, to that which has been taken for use as testimony in the trial of an action including testimony which results from the taking of discovery depositions or in connection with any discovery procedure, if also, taken to be used as testimony. It should be noted that the testimony may be used against those in privity with the former adversary. Neither does it take from the accused his constitutional privilege to face the witness.

The definition of hearsay makes this exception necessary.

(*d*) *Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally.* A statement (1) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (2) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (3) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which

the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.

COMMITTEE NOTES

Clause (1) covers spontaneous statements of narration made simultaneously with perception. Clause (2) covers statements of narration not necessarily simultaneous with perception but made while the declarant is under the excitement of the event. Both clauses are necessary because under (1) the element of excitement is not necessary but spontaneity is the sole test. Both are well recognized exceptions. Clause (3) is new. Unavailability is here recognized as an essential justifying factor. Also the trial judge is necessarily given considerable discretion. Clause (3) is drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions. "Unavailability" is carefully defined in section 60-362 so as to give assurance against the planned or fraudulent absence of the declarant.

(*e*) *Dying Declarations.* A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

COMMITTEE NOTES

Because of the limited character of exception (*d*) a specific exception covering dying declarations is necessary. Kansas pioneered in broadening the scope of this exception.

(*f*) *Confessions.* In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (1) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (2) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;

COMMITTEE NOTES

This exception adopts the present Kansas rule. It is not required that the suffering inflicted or threatened be "physical" or that it be to the accused himself. Threats to a member of his family may render the confession involuntary. The last sentence of section 60-408 insures that the circumstances of making

the confession may be presented to the jury even after the judge had held the preliminary inquiry and let the confession come in.

(*g*) *Admissions by Parties.* As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

COMMITTEE NOTES

This and exceptions (*h*) and (*i*) cover the admissibility of admissions by a party or by those by whose statements he is bound.

(*h*) *Authorized and Adoptive Admissions.* As against a party, a statement (1) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (2) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

COMMITTEE NOTES

See comment under exception (*g*) of this section.

(*i*) *Vicarious Admissions.* As against a party, a statement which would be admissible if made by the declarant at the hearing if (1) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (2) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (3) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

COMMITTEE NOTES

See comment under exception (*g*) of this section.

(*j*) *Declarations Against Interest.* Subject to the limitations of exceptions (*f*), a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

COMMITTEE NOTES

This exception makes declarations against interest admissible even though the declarant is available as a witness, and by recognizing the value of declarations against his social, as well as his pecuniary or proprietary interest. No attempt is made here to lay down a guide for the determination of what portions of a statement containing declarations against interest, are admissible.

(*k*) *Voter's Statements.* A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

COMMITTEE NOTES

This is, of course, subject to the privilege which the voter has not to reveal the tenor of his vote under section 60-431. The real reason behind this widely accepted exception is the temptation of the voter to misrepresent after litigation has begun, and the likelihood of the truth of previous statements made by him relative to the subject.

(*l*) *Statements of Physical or Mental Condition of Declarant.* Unless the judge finds it was made in bad faith, a statement of the declarant's (1) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (2) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition;

COMMITTEE NOTES

Clause (1) of this exception, broadly speaking, is accepted in almost all modern decisions.

Where the fact to be proved is the declarant's state of mind, emotion or sensation at the time of the declaration, dissent from the unqualified rule is negligible. The same is true where the declared condition is to be used as the basis for an inference to the same or another condition at a later date not too remote.

The exception applies only to statements asserting the existence of the specified condition, offered as tending to prove the truth of the assertion. A state of mind or emotion or physical sensation may be proved by circumstantial evidence. For example, a wife's feelings toward her husband may be evidenced by her declarations to him that she has been accepting gifts from a stranger and has been taking automobile trips with him and the like, regardless of the truth of the statements.

A declaration of a presently existing subjective condition has some quality of spontaneity and is probably more likely to accord with the fact than a recollection of the same condition as later given expression in testimony in an action. This is the theory of the common law rule and is accepted herein.

Clause (2) admits evidence of declarations of past pain by a declarant when made to a physician.

(*m*) *Business Entries and the Like.* Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

COMMITTEE NOTES

This rule includes every kind of institution making it clear that conduct for profit is not essential. The broad policy leaves it up to the judge to determine whether or not the sources of information, method and time of preparation reflect trustworthiness.

(*n*) *Absence of Entry in Business Records.* Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them;

COMMITTEE NOTES

It would seem that the failure of a business record to recite an event which would normally be noted in the record if the event had occurred, would be circumstantial evidence of its nonoccurrence. But it has been held that in order to draw such an inference, resort must be had to a consideration of the silence of the record as a negative recital by the record which would be hearsay, the same as an affirmative recital of the happening of the event. To remove any doubt that may exist, this exception is included in order to make available as an exception to the hearsay rule inferences arising from absence of entry in business records kept in regular course of business.

(*o*) *Reports and Findings of Public Officials.* Subject to section 60-464 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (1) to perform the act reported, or (2) to observe the act, condition or event reported, or (3) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

COMMITTEE NOTES

The exception deals with writings made by public officials in the performance of their official functions. The writing may or may not be kept in a public office. It may be, and often will be, contained in a register, or record or file maintained in a public office. On the other hand, it may consist of a

certificate held by a private person which has never been filed, copied, recorded or even noted in any sort of file or volume in a public office. So long as it was made by an official in the performance of the functions of his office and concerns acts, events, or conditions which it was the function of the writer to do, or observe, or about which it was his function to make findings or conclusions after investigation, it falls within this exception.

This exception goes beyond the common law, for it admits statements as to matters not within the knowledge of the reporter or of the recorder. Protection is given the adverse party by section 60-464. If he has notice a reasonable time before the evidence is offered, he can prepare to meet it by summoning the maker of the writing or the persons upon whose information it is made, or by gathering material to refute it or to decrease its apparent value.

(*p*) *Filed Reports, Made by Persons Exclusively Authorized.* Subject to section 60-464, writings made as a record, report or finding of fact, if the judge finds that (1) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (2) the writing was made and filed as so required by the statute;

COMMITTEE NOTES

This exception deals with records made by persons who are sometimes said to be *ad hoc* public officials, such as physicians, undertakers and ministers of the gospel but it is not confined to them. It is applied to those whose business or profession requires action in matters usually made the subject of vital statistics and health regulations, and who are under a duty to make and file reports of specified acts, events or conditions.

(*q*) *Content of Official Record.* Subject to section 60-464, (1) if meeting the requirements of authentication under section 60-468, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (2) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

COMMITTEE NOTES

There is some question whether clause (1) is necessary as an exception to the hearsay rule. If the record is made admissible it then becomes a matter of providing the content of the record either by the original record or some other means such as a certified copy.

(*r*) *Certificate of Marriage.* Subject to section 60-464 certificates that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that (1) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform mar-

riage ceremonies, and (2) the certificate was issued at that time or within a reasonable time thereafter;

COMMITTEE NOTES

The exception applies only to marriage certificates which are unrecorded. In most instances it would be the certificate delivered to the couple by the marrying official at the time of the marriage ceremony.

(*s*) *Records of Documents Affecting an Interest in Property.* Subject to section 60-364 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (1) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (2) an applicable statute authorized such a document to be recorded in that office;

COMMITTEE NOTES

This applies only to the original public record of an instrument. The manner of proving the record is taken care of by the rules covering authentication and proof of content.

(*t*) *Judgment of Previous Conviction.* Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment.

COMMITTEE NOTES

Analytically a judgment of conviction is hearsay and is for that reason rejected by the majority of courts when offered to prove the defendant's guilt in another action in which the issue of guilt is material. Where a person has had an opportunity to defend himself and has entered a plea of *nolo contendere* or a plea of guilty or has been found guilty beyond a reasonable doubt, the judgment entered on the plea or verdict would seem to have sufficient value to be worth consideration by a trier of fact, and necessarily includes a finding of all facts essential to sustain the judgment in the case in which rendered. Only felonies, not misdemeanors, are included.

(*u*) *Judgment Against Persons Entitled to Indemnity.* To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if offered by a judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

COMMITTEE NOTES

This is a statement of the doctrine applied by a number of courts in cases where an indemnitee is suing his indemnitor on a contract of indemnity, or a warrantee is suing his warrantor or a surety his principal. It is frequently applicable in actions on official bonds, but its use is not limited to cases where the duty to indemnify or save harmless arises from contract.

(*v*) *Judgment Determining Public Interest in Land.* To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

COMMITTEE NOTES

A judicial determination of the nature of the title or of the boundaries of the public domain should have evidentiary value in determining disputes over titles or boundaries between private parties where there is relevancy because a tie exists between the two situations.

(*w*) *Statement Concerning One's Own Family History.* A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

COMMITTEE NOTES

At common law much evidence of slight value may be admissible to prove facts relating to pedigree, and it is in cases of this sort that section 60-445 may be applied to exclude what amounts to gossip or rumor or is otherwise of trifling worth.

(*x*) *Statement Concerning Family History of Another.* A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (1) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (2) finds that the declarant is unavailable as a witness;

(*y*) *Statement Concerning Family History Based on Statement of Another Declarant.* A statement of a declarant that a statement

admissible under exceptions (*w*) or (*x*) of this section was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

(*z*) *Reputation in Family Concerning Family History.* Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

(*aa*) *Reputation—Boundaries, General History, Family History.* Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (1) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (2) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (3) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

COMMITTEE NOTES

Most of the decisions limit evidence of reputation to a reputation of a former generation. With that qualification, clause (1) is accepted in most American states. The result stated in clause (2) is reached by common law or statute in a number of states.

(*bb*) *Reputation as to Character.* If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

COMMITTEE NOTES

This exception in connection with section 60-422 will do away with the quibbles found in some cases as to general reputation for general moral character, and general reputation for specific traits of moral character.

(*cc*) *Recitals in Documents Affecting Property.* Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter

stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

COMMITTEE NOTES

There is much uncertainty in the decisions concerning the admissibility of recitals in dispositive documents. Most of the cases have to do with ancient writings. Of these a few can be explained only upon the ground that a statement in an ancient writing of any sort is admissible as evidence of the truth of the matter stated. The great majority, however, require the writing to be a constitutive document, and the statement to be corroborated in some way. Since the recitals, whether ancient or recent, when not inconsistent with subsequent dealings with the land or chattel, are likely to be true, the present rule makes no distinction based on the age of the document.

(dd) Commercial Lists and the Like. Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

COMMITTEE NOTES

The principle of this exception is generally recognized. It has been applied to reports of judicial decisions. It is applicable to unofficially published law reports as well as to those officially published, foreign as well as domestic. The cases dealing with the admissibility of market reports, lists of prices current, registers of pedigreed animals and the like differ only as to the requirements of preliminary proof of trustworthiness.

(ee) Learned Treatises. A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

COMMITTEE NOTES

The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This exception will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose.

60-464. *Discretion of Judge under Exception to Exclude Evidence.* Any writing admissible under exceptions *(o)*, *(p)*, *(q)*,

(*r*), and (*s*) of section 60-463 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

COMMITTEE NOTES

The exceptions enumerated in the foregoing rule all relate to proof by evidence of a secondary character, such as the official report, copy of a record, unrecorded marriage certificate and the like which the adverse party should ordinarily have an opportunity to check against the original record in order to test its accuracy for what it purports to be. Thus the rule offers the necessary protection against surprise.

60-465. *Credibility of Declarant.* Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to section 60-463, is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

COMMITTEE NOTES

This rule has to do with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. This is the generally recognized rule.

60-466. *Multiple Hearsay.* A statement within the scope of an exception to section 60-463 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

COMMITTEE NOTES

Probably the most frequent occasion for the application of this rule is the record of the "history" given by an accident victim upon arrival at the hospital, contained in the patient's hospital record. If the record shows that the patient said he was injured by running into the side of a truck, the Business Entries Exception (Section 60-463 (*m*)) could be relied upon to show that the patient made the statement, and if the patient brought suit against the truck owner, the statement could be used against the plaintiff as an admission (Section 60-463 (*g*)).

I. AUTHENTICATION AND CONTENT OF WRITINGS

60-467. *Authentication Required; Ancient Documents.* Authentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law. If

the judge finds that a writing (1) is at least thirty years old at the time it is offered, and (2) is in such condition as to create no suspicion concerning its authenticity, and (3) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found, it is sufficiently authenticated.

COMMITTEE NOTES

This rule recognizes the principle that there must be some evidence of the genuineness of the document or other writing. Authenticity may be proved as any other fact by evidence which warrants a finding of authenticity. After this is done, the writing is entitled to be received in evidence. The part relating to ancient documents adopts the common law rule as an alternative method of proving authenticity.

60-468. *Authentication of Copies of Records.* A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (*a*) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (*b*) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (*c*) the office in which the record is kept is within this state and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (*d*) if the office is not within the state, the writing is attested as required in clause (*e*) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

COMMITTEE NOTES

This rule simplifies the methods of proving the autenticity of copies of official records and embodies the provisions of Rule 44 of the Federal Rules of Civil Procedure.

60-469. *Certificate of Lack of Record.* A writing admissible under exception (*q*) (2) of section 60-463 is authenticated in the same manner as is provided in clause (*c*) or (*d*) of section 60-468.

COMMITTEE NOTES

Clause (1) of exception (*q*) under the hearsay rule is subject to section 60-468 regarding authentication since the writing would be a copy of an official record. The certificate of absence of a record referred to in clause (2) of exception (*q*) is not a copy of a record, so this rule is necessary to provide for authentication of the certificate in the same manner as is provided for copies of records.

60-470. *Documentary Originals as the Best Evidence.* (*a*) As tending to prove the content of a writing, no evidence other than the writing itself is admissible, except as otherwise provided in these rules, unless the judge finds (1) that the writing is lost or has been destroyed without fraudulent intent on the part of the proponent, or (2) that the writing is outside the reach of the court's process and not procurable by the proponent, or (3) that the opponent, at a time when the writing was under his control has been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it, or (4) that the writing is not closely related to the controlling issues and it would be inexpedient to require its production, or (5) that the writing is an official record, or is a writing affecting property authorized to be recorded and actually recorded in the public records as described in section 60-463, exception (*s*).

(*b*) If the judge makes one of the findings specified in the preceding paragraph, secondary evidence of the content of the writing is admissible. Evidence offered by the opponent tending to prove (1) that the asserted writing never existed, or (2) that a writing produced at the trial is the asserted writing, or (3) that the secondary evidence does not correctly reflect the content of the asserted writings, is irrelevant and inadmissible upon the question of admissibility of the secondary evidence but is relevant and admissible upon the issues of the existence and content of the asserted writing to be determined by the trier of fact.

COMMITTEE NOTES

Paragraph (*a*). This rule applies to all writing as defined in section 60-401 (*m*). The common law rule is generally understood to apply only to "documents." Does not require the production of the original when the failure to produce it is satisfactorily explained (clauses (1), (2), (3)); does not require the production of the original if relevant only to a "collateral" issue and if it would be inexpedient to require it (clause (4)); does not require the production of recorded originals affecting property or of official records

(clause (5)). The "Best Evidence Rule" at common law as well as here is a preferential rather than an exclusionary rule.

Paragraph (*b*). The purpose of this paragraph is to indicate the separation of functions between the judge and the trier of fact. The function of the judge is to pass on the preliminary question of whether secondary evidence may be offered. In so doing he must assume that the original writing existed and is not the writing produced at the trial, even though the opponent offers evidence to prove that such a writing never existed or that a writing which he produces is in fact the original. The issues raised by these claims as well as the issue of whether the secondary evidence correctly reflects the content of the original are questions for the trier of fact.

60-471. *Proof of Attested Writings.* When the execution of an attested writing is in issue, whether or not attestation is a statutory requisite of its effective execution, no attester is a necessary witness even though all attesters are available unless the statute requiring attestation specifically provides otherwise.

COMMITTEE NOTES

This rule is a departure from the common law rule as generally understood requiring a satisfactory explanation for failure to produce the attesting witnesses before evidence from another source would be received of the execution of an attested writing where an attestation was necessary to its legally effective execution. This rule permits the signing by the maker and attestation by the witnesses to be evidenced and established in the same way as any other disputed matter. The credibility of an attesting witness is determined in the same way as that of any other witness.

60-472. *Photographic Copies to Prove Content of Business and Public Records.* The content of any admissible writing made in the regular course of "a business" as defined by section 60-452 or in the regular course of duty of any "public official" as defined by said rule, may be proved by a photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction or by an enlargement thereof, when duly authenticated, if it was in the regular course of such business or official activity to make and preserve such copies or reproductions as a part of the records of such business or office. The introduction of such copy, reproduction or enlargement does not preclude admission of the original writing if it is still in existence.

COMMITTEE NOTES

While the volume has been shortened somewhat, this rule states the substance of the Uniform Photographic Copies of Business and Public Records as Evidence Act. (G. S. 60-454a). The Uniform Act relates solely to the proof of the content of business and official records specifically made admissible under the exceptions to the hearsay rule (60-463). Consequently it is not deemed necessary to include this rule as a separate exception to the hearsay rule any more than it is deemed necessary to state an exception to the secondary

evidence rule (60-470). Both relate to proving the content of admissible writings. Authentication of photographic copies would be in the same manner as authentication of any other writing depending on its nature.

60-473. *Title.* The rules contained in this article 4 may be known and cited as the Kansas Rules of Evidence.

ARTICLE 5. LIMITATIONS OF ACTIONS

60-501. *Scope.* The provisions of this article govern the limitation of time for commencing civil actions, except where a different limitation is specifically provided by statute.

COMMITTEE NOTES

This article is intended to be complete in scope, but it must be recognized, without enumeration, that there are, scattered through other statutes covering substantive law, specified limitaions which are not to be disturbed.

Real Property Actions

60-502. Reserved for supplemental material.

60-503. *Adverse Possession.* No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen years. This section shall not apply to any action commenced within one year after the effective date of this act.

COMMITTEE NOTES

It will be noted that this section changes the common law principles of adverse possession as pronounced by the Kansas Supreme Court. The purpose is to eliminate disputes, particularly, as to boundary lines which have been treated as correct over a long period of years.

60-504. *Execution Sale.* No action shall be maintained for the recovery of real property, by the execution debtor, his heirs, or any person claiming under him by title acquired after the date of judgment, after five years from the date of the recording of the deed made in pursuance of the sale.

COMMITTEE NOTES

This section and sections 60-505 to 60-508 cover the provisions of G. S. 60-504. The provisions have been placed under separate sections for clarity and convenient reference.

60-505. *Sales by Executors, Administrators or Guardians.* No action shall be maintained for recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of

the deceased person, or the ward or his guardian, or any person claiming under any or either of them by after acquired title, after five years from the date of the recording of the deed made in pursuance of the sale.

60-506. *Forcible Entry and Detention.* No action shall be maintained for forcible entry and detention, or for forcible detention only, of real property, after two years from the time the cause of action accrued.

60-507. *Unspecified Real Property Actions.* No action shall be maintained for the recovery of real property or for the determination of any adverse claim or interest therein, not provided for in this article, after fifteen years from the time the cause of action accrued.

60-508. *Persons Under Legal Disabilities.* (*a*) *Effect.* If, any person entitled to bring an action for the recovery of real property or for the determination of any adverse claim or interest therein be, at the time the cause of action accrued, or at any time during the period the statute of limitations is running, within the age of twenty-one years, or insane, or imprisoned for a term less than his natural life, such person shall be entitled to bring such action within two years after the disability is removed; but no such action shall be maintained by or on behalf of any person under the disabilities specified after twenty-three years from the time the cause of action shall have accrued.

(*b*) *Death of Person Under Disability.* If any person entitled to bring such action die during the continuance of any disability specified in subsection (*a*) of this section and no determination be had of the title, claim, interest, or action to him accrued, his heirs, or any person entitled to claim, from, by or under him, may commence such action after the time specified as a limitation, and within two years after his death, but not after that period.

COMMITTEE NOTES

Paragraph (*a*) of this section covers the provisions of G. S. 60-305, but the persons to be considered as under legal disability are specifically named.

Paragraph (*b*) provides a time limitation for actions by the successors of those who have died during the legal disability. The present code has no such specific provision.

60-509. *Real Property Actions Excepted.* Nothing contained in any statutes of limitations shall be applicable to any real property given, granted, sequestered or appropriated to any public use, or to any lands belonging to this state.

COMMITTEE NOTES

The purpose of this section is to eliminate any inference that the rewriting of the code provisions covering the statute of limitations affecting real property claimed by the state or devoted to public use.

Personal Actions and General Provisions

60-510. *Effect of Limitations Prescribed.* Civil actions, other than for the recovery of real property, can only be commenced within the period prescribed in the following sections of this article, after the cause of action shall have accrued. The cause of action in such cases shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended more than ten years beyond the time of the act giving rise to the cause of action.

COMMITTEE NOTES

This section is in the general language of the first paragraph of G. S. 60-306. However a proviso has been added to care for situations where other events must occur after the wrongful act before there is determinable injury and also the fact of the injury must be reasonably ascertainable before the limitation period starts to run, but in no event beyond ten years.

60-511. *Actions Limited to Five Years.* The following actions shall be brought within five years: (1) An action upon any agreement, contract or promise in writing.

(2) An action brought on any covenant of seizin contained in any deed of conveyance of land.

(3) An action brought on a covenant of warranty contained in any deed of conveyance of land, after there shall have been a final decision against the title of the covenantor in such deed.

(4) An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case required by statute.

(5) An action for relief, other than the recovery of real property not provided for in this article.

COMMITTEE NOTES

This section covers the five-year limitations set out in G. S. 60-306.

60-512. *Actions Limited to Three Years.* The following actions shall be brought within three years: (1) All actions upon contracts, obligations or liabilities expressed or implied but not in

writing. (2) An action upon a liability created by a statute other than a penalty or forfeiture.

COMMITTEE NOTES

This section covers the three-year limitations set out in G. S. 60-306.

60-513. *Actions Limited to Two Years.* The following actions shall be brought within two years: (1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

COMMITTEE NOTES

The provisions of this section cover the two-year limitations in G. S. 60-306.

60-514. *Actions Limited to One Year.* The following actions shall be brought within one year: (1) An action for libel or slander.

(2) An action for assault, battery, malicious prosecution, or false imprisonment.

(3) An action upon a statutory penalty or forfeiture.

COMMITTEE NOTES

This section covers the one-year limitations set out in G. S. 60-306 Fourth.

60-515. *Persons Under Legal Disability.* (*a*) *Effect.* If any person entitled to bring an action, other than for the recovery of real property or a penalty or a forfeiture, at the time the cause of action accrued, or at any time during the period the statute of limitations is running, be within the age of twenty-one years, or insane, or imprisoned for a term less than his natural life, such person shall be entitled to bring such action within one year after such disability shall be removed: *Provided,* That no such action shall be maintained by or on behalf of any person under the disabilities specified after twenty-two years from the time the cause of action shall have accrued.

(*b*) *Death of Person Under Disability.* If any person entitled to bring such action die during the continuance of any disability specified in subsection (*a*) of this section and no determination be had of the title, claim, interest, or action to him accrued, any

person entitled to claim from, by or under him, may commence such action within one year after his death, but not after that period.

COMMITTEE NOTES

This section follows the provisions of G. S. 60-307 except the legal disability is specifically spelled out. Subsection (*b*) is added to provide for actions in case of the death of the party under disability.

60-516. *Actions Originating in Another State Between Nonresidents.* Where the cause of action has arisen in another state or country, between nonresidents of this state, and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state.

COMMITTEE NOTES

This section is the same as G. S. 60-310.

60-517. *When Defendant Out of State.* If when a cause of action accrues against a person he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed, and if after the cause of action accrues he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought. This section shall not apply to extend the period of limitation as to any defendant whose whereabouts are known and upon whom service of summons can be effected under the provisions of Article 3 of this chapter.

COMMITTEE NOTES

This section is the same as G. S. 60-309.

60-518. *New Action, When.* If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action within six months after such failure.

COMMITTEE NOTES

This section is the same as G. S. 60-311 except the time for filing the new action is limited to six months rather than a year.

60-519. *Suits Stayed by Injunction.* Whenever the commencement of any action shall be stayed by an injunction of any court, the time during which such injunction shall be in force shall not

be deemed any portion of the time limit for the commencement of such action.

COMMITTEE NOTES

This section simply spells out the rule that has heretofore been judicially applied.

60-520. *Part Payment or Acknowledgment of Liability.* (*a*) *Effect.* In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

(*b*) *Joint Debtors.* If there be two or more joint contractors, no one of whom is entitled to act as the agent of the others, no such joint contractor shall lose the benefit of the statute of limitations so as to be chargeable by reason of any acknowledgment or promise made by any other or others of them, but this subsection shall not limit the effect of payment of any principal or interest made by any of them.

COMMITTEE NOTES

Paragraph (*a*) of this section follows G. S. 60-312. Paragraph (*b*) is new. It limits the effect of the acknowledgment to the joint debtor making it.

60-521. *Limitations Applicable to Public Bodies.* As to any cause of action accruing to the state, any political subdivision, or any other public body, which cause of action arises out of any proprietary function or activity, the limitations prescribed in this article shall apply to actions brought in the name or for the benefit of such public body in the same manner as to actions by private parties, except in (1) actions for the recovery of real property or any interest therein, or (2) actions to recover from any former officer or employee for his own wrongdoing or default in the performance of his duties.

COMMITTEE NOTES

This section abolishes the common law maxim *nullum tempus occurrit regi* where public bodies are operating in a proprietary capacity. The common law principle is no longer applicable in view of the complicated activities of such bodies.

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