

Kansas Judicial Council Bulletin

NOVEMBER, 1962

SPECIAL REPORT

Recommendations as to Replevin, Quo Warranto, Receivers Habeas Corpus, Divorce and Alimony, Declaratory Judgments, Survival of Claims and Abatement of Actions, Wrongful Death Actions, Costs, Appeals, Lis Pendens and Judgment Liens on Real Property, Exemptions, Executions and Orders of Sale, Lost or Destroyed Court Files and Records, and General Provisions.



Preface

This bulletin presents recommendations for the revision of Replevin, Quo Warranto, Receivers Habeas Corpus, Divorce and Alimony, Declaratory Judgments, Survival of Claims and Abatement of Actions, Wrongful Death Actions, Costs, Appeals, Lis Pendens and Judgment Liens on Real Property, Exemptions, Executions and Orders of Sale, Lost or Destroyed Court Files and Records, and General Provisions.

This issue completes the recommendations for the revision of the Code of Civil Procedure. The recommendations will be corrected to reflect the suggestions made by the members of the bar, and a bill drafted for the requested approval by the legislature.

The members of the bar are requested to carefully consider the material in this bulletin for any objections, errors or omissions.

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

The Advisory Committee.

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ARTICLE 13—REPLEVIN

General Committee Note

In the final draft this article will be combined with Article 10, Actions Relating to Property.

60-1301. *Claim for Possession of Property, Affidavit, Bond.* The plaintiff, in an action to recover possession of specific personal property, may at any time before the judgment is rendered claim immediate possession thereof by filing an affidavit and bond as herein required.

(a) *Affidavit.* The plaintiff shall file an affidavit, unless his petition shall have been verified, which in either event shall show:

1. that the plaintiff is the owner of the property claimed, sufficiently describing it, or is lawfully entitled to the possession thereof,

2. that it is wrongfully detained by the defendant, or if it is held by an officer under legal process, that demand for the same has been made and refused, and

3. the actual value thereof.

(b) *Bond.* The plaintiff shall file with the clerk of the court in which the action is brought a bond in not less than double the amount of the value of the property as stated in the affidavit, with one or more sufficient sureties. It shall be to the effect that plaintiff shall duly prosecute the action, and pay all costs and damages that may be awarded against him, and that if he is given possession of the property he will return it to defendant if it be so adjudged. If the bond shall be found to be sufficient, the clerk shall approve the same and note his approval thereon. The defendant may challenge the sufficiency of the bond as provided in section 60-705 (b) of this chapter.

(c) *Property in Custodia Legis.* If the property the possession of which is sought is in the custody of an officer under any legal process it shall nevertheless be subject to replevin under this section, but if the same is in the custody of an officer under any process issued out of a judicial proceeding, the petition or affidavit and bond shall be filed in the same proceeding out of which such process issued.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1001 with the word answer being changed to judgment. Subsection (a) covers the provisions of G. S. 60-1002. Subsection (b) is new. Subsection (c) covers the provisions of G. S. 60-1003.

60-1302. *Order for Delivery of Property.* The order for the delivery of the property to the plaintiff shall be made by the clerk of the court in which the action is pending, and delivered to the sheriff of any county in the state in which the property is located. The order shall state the names of the parties, the description of the property, and the value as set out in plaintiff's affidavit. It shall command the sheriff to take immediate possession of the property and deliver it to plaintiff at the expiration of twenty-four hours unless there is compliance with the requirements of section 60-1304 of this article, and make return of the order on the day named therein. If the sheriff is a party defendant, then the order shall be served upon him by the clerk of the court.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1004 and the first part of G. S. 60-1002.

60-1303. *Return and Execution of Order.* (a) *Obtaining Possession.* In the execution of the order the sheriff may break open any building or enclosure in which the property is located, if he cannot otherwise obtain possession of the property or entrance to the building on demand.

(b) *Execution.* The sheriff shall execute the order by taking possession of the property described therein, and serving a copy on the person charged with the unlawful detainer in the same manner as for personal service if he can be found in the county.

(c) *Return.* The return day of the order of delivery shall be twenty days after it is issued.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1006, 60-1012 and 60-1005.

60-1304. *Redelivery Bond.* The defendant may within twenty-four hours after service of a copy of the order deliver to the sheriff a bond to be approved by him, in not less than double the amount of the value of the property as stated in the order, with one or more sufficient sureties, and the sheriff shall return the property to the defendant. The bond shall be to the effect that the defendant will deliver the property to plaintiff if it be so adjudged, and will pay all costs and damages that may be adjudged against him. The sheriff shall file the bond with the clerk after noting his approval thereon. If the defendant is a public officer, board, or governmental agency, such officer, board or agency may, in lieu of giving a redelivery bond, retain possession of the property seized by filing with the

clerk within the time required for giving the redelivery bond a writing certifying that the public health, safety or welfare would be jeopardized or impaired if the plaintiff acquired possession of the property prior to final judgment, in which case hearing may be had on the issue of public interest at the instance of any party.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1007. The last sentence is new.

60-1305. *Judgment in Action.* In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or for the recovery of possession, or the value thereof in case a delivery cannot be had, and for damages for the detention. If the property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

COMMITTEE NOTES

This section is the same as G. S. 60-1010.

ARTICLE 14—QUO WARRANTO

60-1401. *Proceedings for Relief.* Relief in the form of quo warranto shall be obtained under the same procedure as relief in other civil actions.

COMMITTEE NOTES

Relief in the form of quo warranto will be obtained by petition summons and answer as in other civil action. There would appear to be no advantage in providing a special procedure.

60-1402. *Jurisdiction and Grounds.* Such action may be brought in the supreme court or in the district court in the following cases:

(1) When any person shall usurp, intrude into or unlawfully hold or exercise any public office, or shall claim any franchise within this state, or any office in any corporation created by authority of this state.

(2) Whenever any public officer shall have done or suffered any act which by the provisions of law shall work a forfeiture of his office.

(3) When any association or number of persons shall act within this state as a corporation, without being legally incorporated.

(4) When any corporation does or omits acts which amount to a surrender or a forfeiture of its rights and privileges as a cor-

poration, or when any corporation abuses its power or exercises powers not conferred by law.

(5) For any other cause for which a remedy might have been heretofore obtained by writ of quo warranto at common law.

COMMITTEE NOTES

This section is the same as G. S. 60-1602 except the fifth ground of the old statute has been eliminated as unnecessary.

60-1403. *Name in Which Action Prosecuted; Damages.* Where the action is brought by a person claiming an interest in an office, franchise or corporation, or claiming an interest adverse to a resolution, ordinance, franchise, gift or grant, which is the subject of the action, it shall be prosecuted in the name and under the direction of such person, otherwise it shall be prosecuted in the name of the state by the attorney general or county attorney. Whenever the action is brought by the attorney general or the county attorney against a person for usurping an office, the petition shall state the name of the person rightfully entitled to the office. When the action in such case is brought by the person claiming title, he may claim and recover any damage he may have sustained.

COMMITTEE NOTES

This section is substantially the same as G. S. 60-1403. The clause relating to prosecutions in the name of the state has been eliminated as self evident.

60-1404. *Judgments.* (a) *Where Party Claims Office.* If judgment be rendered in favor of a party claiming an office he shall proceed to exercise the functions of the office, after he has been qualified as required by law, and the court shall order the defendant to deliver over all the books and papers in his custody or within his power, belonging to the office from which he shall have been ousted.

(b) *Against Corporations.* If judgment be rendered against a corporation, or any persons claiming to be a corporation, the court may restrain any disposition of the effects of the corporation, appoint a receiver of its property and effects, take an account, and make a distribution thereof among the creditors and persons entitled, and the corporation will be dissolved.

COMMITTEE NOTES

Subsection (a) is the same as G. S. 60-1605.

Subsection (b) covers G. S. 60-1605 and the last phrase of G. S. 60-1607. The balance of the latter section has been eliminated. G. S. 60-1604 and 60-1606 have been eliminated as they are covered by the general provisions of the code.

60-1405. *Grounds for Forfeiture of Public Office.* Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, except those subject to removal from office only by impeachment, who shall (1) willfully misconduct himself in office, (2) willfully neglect to perform any duty enjoined upon him by law, (3) in any public place within or without the state be in a state of intoxication produced by strong drink voluntarily taken, (4) be convicted of any form of gambling, or (5) who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit his office and shall be ousted from such office in the manner hereinafter provided.

COMMITTEE NOTES

This section is the same as G. S. 60-1609 except the phrase "except those subject to removal from office by impeachment only" has been added. This addition covers the provisions of G. S. 60-1624 but also excepts other constitutional officers.

60-1406. *Instituting Ouster Proceedings.* (a) *On Complaint.* The attorney general or any county attorney in the county of his jurisdiction, upon receiving written notice that an officer covered by section 60-1405 has violated any of the provisions thereof, shall investigate the complaint. If reasonable cause is found for the complaint, proceedings shall be instituted to oust such officer, but proceedings may be initiated by the attorney general or the county attorney without complaint having been made.

(b) *Proceedings Against State Officers.* Proceedings to oust a state officer shall be commenced only by the attorney general. If a complaint is made to a county attorney against a state officer, he shall immediately transmit such complaint to the attorney general.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1610, 60-1611, and 60-1617.

60-1407. *Suspension of Officer During Hearing.* Upon application to the court before which the petition for ouster is pending, an officer may be suspended from performing any of the duties of his office, pending a final hearing and determination of the matter; and the authority having the power of appointment to fill vacancies in such office, shall upon such suspension appoint some proper person temporarily to fill said office and to carry on its duties until such matter shall be finally determined or until the successor of the officer so suspended shall be elected and shall have qualified. No

person shall be suspended from office under the provisions of this act until at least five days' notice of the application for the order of suspension shall be served upon him, which notice shall set forth the time and place of the hearing of said application and said officer shall have the right to appear and make any defense that he may have and shall be entitled to a full hearing upon the charges contained in the complaint and upon the application for the order. No suspension shall be made except upon finding of good cause therefor. If on the final hearing the officer is not removed from his office, he shall receive the salary allowed him by law during the time of his suspension. The officer so temporarily appointed shall receive the same salary as is provided by law to be paid the officer filling such position.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1616.

60-1408. *Witnesses.* (a) *Testimony, Violations.* The attorney general and the county attorneys of the several counties of the state of Kansas shall have the power and they are hereby authorized and directed whenever complaint has been made and the names of the witnesses furnished them, or whenever they deem necessary, to issue subpoenas for such witnesses so furnished them, and for such persons as they shall have reason to believe have any knowledge of the truth of the complaint made, to appear before said attorney general or county attorney, at a time and place to be designated in the subpoena, then and there to testify concerning the subject matter set out in said complaint. Each witness shall be sworn true answers to make to all questions propounded to him, touching the matter under investigation, and the testimony of each witness shall be reduced to writing and be signed by the witness. The attorney general, assistant attorney general and the county attorneys of the several counties of the state are hereby authorized and empowered to administer the necessary oaths and affirmations to such witnesses.

(b) *Penalties.* Any disobedience to such subpoena, or refusal to answer any proper question propounded by the attorney general, assistant attorney general, or county attorney, at such inquiry shall be a misdemeanor and shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

(c) *Privilege and Immunity of Witness.* No person shall be excused from testifying before said attorney general, assistant attorney general, or county attorney at any such investigation, or be excused

from testifying at the request of the state in any proceeding brought under the provisions of this article, on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished in any criminal proceeding on account of any transaction, matter, or thing concerning which he shall be compelled to testify; nor shall such testimony be used against him for any crime or misdemeanor under the laws of this state.

COMMITTEE NOTES

Subsections (a) and (b) contain the provisions of G. S. 60-1619. Subsection (c) covers the provisions of G. S. 60-1620.

Other sections of the present code not mentioned have been deleted as unnecessary.

ARTICLE 15—RECEIVERS

60-1501. *Appointment.* A judge of the supreme court, district judge, or in his absence from the county, the probate judge shall have authority to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep, preserve, and manage all property and protect any business or business interest entrusted to him pending the determination of any proceeding in which such property or interest may be affected by the final judgment. A person who has an interest in property or in the outcome of the proceeding shall not be appointed or continued as a receiver if objection is made thereto by another interested party unless the judge shall find such objection is arbitrary or unreasonable.

COMMITTEE NOTES

There would appear to be no advantage in specifying the conditions under which a receiver may be appointed. A receiver should be appointed whenever necessary, and not otherwise.

60-1502. *Oath and Bond.* The receiver shall before entering upon his duties, (a) be sworn to perform them faithfully, and (b) execute a bond to such persons on such conditions and in such sum as the judge shall direct.

COMMITTEE NOTES

This section follows G. S. 60-1203.

60-1503. *Powers.* The receiver shall perform such acts respecting the property or business as the judge may authorize.

COMMITTEE NOTES

Again there would appear to be no advantage in detailing a receiver's powers. He has no powers not authorized by the judge. The judge should have authority to authorize all necessary acts.

60-1504. *Notice.* A receiver shall not be appointed without notice and an opportunity for the interested parties to be heard unless the judge finds that immediate and irreparable injury is likely to result, and a bond may be required of the applicant conditioned on such terms as the judge may direct. This section shall not apply where the defendant is a nonresident or a foreign corporation not authorized to do business in this state.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1208. It should be noted that corporations authorized to do business in the state are not included in the exception.

60-1505. *Appeal.* An aggrieved party may, within 10 days, appeal from an order appointing or refusing to appoint a receiver without awaiting final determination of the proceeding. If a receiver has been appointed and the appellant files an appeal bond with such terms and conditions as the judge may direct, the appointment shall be suspended and the property retained in the possession of the appellant pending the final determination of the appeal.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1209.

ARTICLE 16—CHANGE OF NAME

60-1601. *Jurisdiction and Costs.* The district court shall have authority to change the name of any person, township, town or city within this state at the cost of the petitioner without affecting any legal right.

COMMITTEE NOTES

This section follows G. S. 60-2301 and 60-2304.

60-1602. *Changing Name of Person.* (a) *Petition.* A petition may be filed in the county in which the petitioner resides stating: (1) that the petitioner has been a resident of such county for at least one year, (2) the reason for the change of name, and (3) the name desired.

(b) *Notice.* Notice of the hearing shall be published as provided in section 60-308 (e).

(c) *Order.* If upon hearing the judge is satisfied as to the truth of the allegations of the petition, and that there is reasonable cause for changing the name of the petitioner he shall so order.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-2302.

60-1603. *Municipalities.* A petition for the change of name of any township, town, or city may be filed in the district court of such county, signed by a majority of the legal voters of such body, setting forth the cause why such change is desirable and the name to be substituted. The court, upon being satisfied by proof that the prayer of the petitioners is just and reasonable, that notice as required in the foregoing section has been given, that the petitioners are legal voters of such township, town, or city and that they desire the change, and that such change will not result in an objectionable confusion of names within the state, may order the change prayed for in such petition.

COMMITTEE NOTES

This section is to the same effect as G. S. 60-2303.

ARTICLE 17—HABEAS CORPUS

60-1701. *Jurisdiction and Right to Writ.* Subject to the provisions of Section 60-1707 any person in this state who is detained, confined, or restrained of his liberty on any pretense whatsoever, except when in custody on a criminal charge for which bail is not permitted, and any parent, guardian, or next friend for the protection of infants or allegedly incapacitated persons, may prosecute a writ of habeas corpus in the supreme court, or the district court or probate court of the county in which such restraint is taking place. No deposit for security for costs shall be required.

COMMITTEE NOTES

This section is couched in general terms for the purpose of covering G. S. 60-2201, 2202, 2204, 2213, 2223, and 2225. Rather than detail when the writ will lie and when it will not lie a general statement has been made.

60-1702. *Petition.* The petition shall be verified and state: (1) the place where the person is restrained and by whom, (2) the cause or pretense of the restraint to the best of plaintiff's knowledge and belief, and (3) why the restraint is wrongful.

COMMITTEE NOTES

This section is to the same effect as 60-2203.

60-1703. *The Writ. (a) Issuance.* Upon filing of the petition, the writ shall be issued forthwith by the clerk of the court and shall bear the seal of the court.

(b) *Form.* The writ shall be directed to the party having the person under restraint and shall command him to have such person before the judge at the time and place specified in the writ.

(c) *Service.* The writ shall be served without delay. If directed to the sheriff it shall be served by the clerk. If directed to any other person it shall be served by the sheriff or some other person designated by the judge. If the person to whom it is directed cannot be found or shall refuse admittance, the writ may be served by leaving it at his residence or affixing it at some conspicuous place where the party is confined or restrained.

(d) *Sundays and Holidays.* The writ may be issued and served at any time, including Sundays and holidays.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-2205, 2206, 2207, 2208 and 2222.

60-1704. *Answer.* (a) *Time.* The person to whom the writ is directed shall file an answer thereto immediately or at such other time as shall be specified in the writ.

(b) *Contents.* The answer must be verified by the person making it and shall contain: (1) a statement of the authority or reasons for the restraint, (2) a copy of the written authority for the restraint, if any, (3) if the custody of the party has been transferred, a statement as to whom, the time, place, and reason for the transfer, and (4) if it is claimed that the party cannot be produced for any reason, a statement as to the reasons why the party cannot be produced.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-2209, and 60-2210.

60-1705. *Hearing.* (a) *Summary Proceedings.* The judge shall proceed in a summary way to hear and determine the cause and may do so regardless of whether the person restrained is present.

(b) *Infectious Diseases.* When any person is restrained because of an alleged infectious or communicable disease, the judge shall appoint a board of not less than two competent physicians to make an examination of such person and report their findings to the judge.

(c) *Temporary Orders.* The judge may make an order for the temporary custody of the party and any other temporary orders during the pendency of the proceeding that justice may require.

(d) *Judgment.* If the court determines that the restraint is not wrongful, the writ shall be dissolved at the cost of the plaintiff. If

the restraint is found to be wrongful, the judgment shall be either that the person shall be released, or that custody shall be transferred to some other person rightfully entitled thereto, and the court may make such other orders as justice and equity may require. In cases in which the person restrained is a minor, or other incompetent, at the time of rendering judgment at the request of any person adversely affected thereby, the judge shall stay the enforcement of the judgment for a period of not to exceed forty-eight hours to permit the filing of an appeal, and the judge may provide for the temporary custody of the person during such stay in such manner as he sees fit. Enforcement of the judgment after the taking of any appeal may be stayed on such terms and conditions, including such provisions for custody during pendency of the appeal, as the judge shall prescribe.

COMMITTEE NOTES

Subsection (a) covers G. S. 60-2212. Subsection (b) covers the provisions of G. S. 60-2226. Subsection (c) covers the provisions of G. S. 60-2221. Subsection (d) is new.

60-1706. *Warrant in Aid of Writ. (a) Issuance.* If it be made to appear by affidavit that a person may be carried out of the jurisdiction or suffer irreparable injury before compliance with the writ can be enforced, the judge may cause a warrant to be issued commanding such person to be brought before him forthwith.

(b) *Person Causing Restraint.* The judge may also insert in the warrant a command for the apprehension of the person charged with causing the illegal restraint.

(c) *Procedure.* The officer shall execute the writ by bringing the person therein named before the judge, and the answer and proceedings shall be the same as in cases of writs of habeas corpus.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-2218 to G. S. 60-2220.

60-1707. *Prisoner in Custody Under Sentence. (a) Motion Attacking Sentence.* A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may at any time move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) *Hearing and Judgment.* Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. The court may entertain and determine such motion without requiring the production of the prisoner at the hearing. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) *Successive Motions.* The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(d) *Appeal.* An appeal may be taken to the supreme court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) *Exclusiveness of Remedy.* An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

COMMITTEE NOTES

This section is new. It follows the language of the Federal Statute, 28 U. S. C. A. Sec. 2255. It is considered a matter of policy that where a prisoner desires to object to his sentence after he is placed in custody, he should address his motion to the court which sentenced him. The provision should tend to limit the number of cases filed in the supreme court where there is no record. It should also tend to ease the burden placed on the district courts of counties in which the penal institutions are situated, and in which there is no record.

ARTICLE 18—DIVORCE AND ALIMONY

60-1801. *Grounds for Divorce or Separate Maintenance.* The district court may grant a decree of divorce or separate maintenance for any of the following causes: (1) Abandonment for one year, (2) adultery, (3) extreme cruelty, (4) habitual drunkenness, (5)

gross neglect of duty, (6) the conviction of a felony and imprisonment therefor subsequent to the marriage, (7) confinement in an institution for five years because of insanity and a unanimous finding by three physicians, appointed by the judge before whom the action is pending, that the insanity is incurable, but a decree granted on this ground shall not relieve the plaintiff from contributing to the support and maintenance of the defendant.

COMMITTEE NOTES

It is not intended to change the grounds for divorce. The grounds for divorce and separate maintenance, and grounds for annulment have been separated for clarity in section 60-1801 and 60-1802. Separate maintenance has been included here in lieu of G. S. 60-1516.

60-1802. *Grounds for Annulment.* The district court may grant a decree of annulment of any marriage for any of the following causes: (1) When either of the parties had a husband or wife living at the time of the subsequent marriage, (2) impotency existing at the time of the marriage, (3) fraudulent contract, including pregnancy on the part of the wife at the time of the marriage by another than her husband and concealed from the husband, or where the marriage is void for any reason.

60-1803. *Residence.* (a) *State and County.* The plaintiff in an action for divorce must have been an actual resident of the state for one year next preceding the filing of the petition.

(b) *Military Residence.* Any person who has been a resident of a United States post or military reservation within the state for one year next preceding the filing of the petition may file an action for divorce in any county adjacent thereto.

(c) *Residence of Wife.* For the purposes of this article, a wife may have a residence in this state separate and apart from the residence of the husband.

COMMITTEE NOTES

Although there has been a slight change for the purpose of clarity, it is not intended to change the effect of either G. S. 60-1502 or 60-1503 which is included under subsection (c). Venue will follow the general venue provisions.

60-1804. *Petition and Summons.* (a) *Verification of Petition.* The truth of the allegations of any petition under this article must be verified by the plaintiff in person.

(b) *Contents of Petition.* The grounds for divorce, annulment, or separate maintenance shall be alleged as nearly as possible in the general language of the statute, without detailed statement of facts.

(c) *Bill of Particulars.* The opposing party may demand a statement of the facts which shall be furnished in the form of a bill of particulars and the facts stated therein shall be the specific facts upon which the action shall be tried. A copy shall be delivered to the judge. The bill of particulars shall not be filed with the clerk of the court or become a part of the record except on appeal, and then only when the issue to be reviewed relates to such facts.

(d) *Service of Process.* Service of process shall be made in the manner provided in Article 3 of this chapter.

COMMITTEE NOTES

Subsection (a) covers the provisions of the first sentence of G. S. 60-1504. Subsection (b) covers the provisions of the first sentence of G. S. 60-1519. Subsection (c) covers that part of the same section relating to a bill of particulars. Subsection (d) makes general reference to the article on process. Where service is by publication, a copy of the petition and notice must be mailed to the defendant. The only difference is the general provision requires the mailing within seven days after the first publication where G. S. 60-1504 provides for notice within three days.

60-1805. *Answer and Cross-Petition.* The defendant may answer and may also file a cross-petition for divorce, annulment, or separate maintenance. If new matter is set up in the answer, it shall be verified by the defendant in person. If a cross-petition is filed, it shall be subject to the provisions of subsections (a), (b) and (c) of Sec. 60-1804.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1505.

60-1806. *Persons in Equal Fault.* When the parties are found to be in equal fault, the court may grant or refuse a divorce, and in case a divorce is refused for any reason, the court may grant a decree of separate maintenance and make such orders as may be proper, including (1) the custody, maintenance, and education of the children, and (2) the control and equitable division of the property of the parties, vesting a fee simple title in each party with the right to convey or devise the same without the consent of the other party.

COMMITTEE NOTES

This section covers the provision of G. S. 60-1506. The right to grant a divorce where both parties are in equal wrong has been made definite.

60-1807. *Interlocutory Orders.* After a petition for divorce, annulment, or separate maintenance has been filed, the judge of the district court may, without requiring bond, make and enforce by attachment, orders covering the following matters:

(a) *Property*. Restraining the disposition of the property of the parties, or either of them, and providing for the use, occupancy, management and control thereof;

(b) *Molesting*. Restraining either party from molesting or interfering with the privacy or rights of the other;

(c) *Custody and Support*. Providing for the custody of the minor children, and the support, if necessary, of either party and of the minor children during the pendency of the action.

(d) *Expenses of Suit*. Making such provisions, if necessary, for the expenses of the suit, including reasonable attorneys fees, as will insure to either party efficient preparation for the trial of the case.

(e) *Modifying or Vacating*. The judge may vacate or modify any interlocutory order from time to time as he may deem proper. In the absence, disability, or disqualification of the judge of the district court, the probate judge may make any order authorized by this section, but he shall not vacate or modify any order issued by the judge of the district court.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1507.

60-1808. *Time for Hearing*. An action for divorce shall not be heard until sixty days after the filing of the petition unless the judge shall enter an order declaring the existence of an emergency, stating the precise nature of the emergency, the substance of the evidence material thereto, and the names of the witnesses who gave the evidence.

COMMITTEE NOTES

This section carries the same import as G. S. 60-1517.

60-1809. *Evidence*. (a) *Admissions*. Upon the trial of the action, the court may admit proof of the admissions of the parties to be received in evidence, excluding such as shall appear to have been obtained by connivance, fraud, coercion, or other improper means.

(b) *Marriage*. Testimony admissible to prove a common-law marriage may be received as evidence of the marriage of the parties.

(c) *Husband and Wife as Witness*. Either party to the action shall be competent to testify upon all material matters involved in the controversy.

(d) *Corroborating Testimony*. A decree of divorce or separate maintenance shall not be granted upon the uncorroborated testimony of either party or both of them.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-1508 and 60-1509.

60-1810. *Decree.* A decree in an action under this article may include orders on the following matters:

(a) *Care of Minor Children.* The court shall make provisions for the custody, support and education of the minor children, and may modify or change any order in connection therewith at any time. In connection with any decree under this article, the court may set apart such portion of the property of either the husband or the wife, or both of them, as may seem necessary and proper for the support of all of the minor children of the parties, or of either of them. If the court finds that both parties are unfit to have the custody of such minor children, their parental rights may be terminated and the custody of such children placed with an appropriate person, agency, or association, in or out of the state of Kansas. If such an order remains in effect for one year or more, the person, agency, or association having such custody may be given by the court the power to consent to the adoption of any such minor child under the adoption laws of this state under the following conditions:

(1) *Application.* Application shall be made to the district court in which the decree was granted for permission to consent to such adoption.

(2) *Notice.* At least thirty days written notice of such application shall be given to the parents, if their whereabouts are known, and to their attorneys of record, if any, by restricted, registered, or certified mail prior to the hearing of the application.

(3) *Restoration of Parental Rights.* If the court permits such consent to be given, the court in which the adoption proceedings are commenced shall have exclusive jurisdiction over the custody of the minor child. If the adoption proceedings do not result in final adoption, the jurisdiction of the district court shall be immediately restored, and parental rights which have been terminated under the provisions of this subsection may be restored on the application of either party by order of the court in which they were terminated and on such reasonable notice to all parties affected as the court may require.

(b) *Division of Property.* The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reason-

able manner, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring the other to pay such sum as may be just and proper, or by ordering a sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.

(c) *Maintenance.* The decree may award to either party an allowance for future support, denominated as alimony, in such amount as the court shall find to be fair, just and equitable under all of the circumstances. The decree may make the future payments conditional or terminable under circumstances prescribed therein. The allowance may be in a lump sum or in periodic payments or on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the alimony originally awarded that have not already become due, but no modification shall be made, without the consent of the party liable for the alimony, if it has the effect of increasing or accelerating the liability for the unpaid alimony beyond what was prescribed in the original decree.

(d) *Separation Agreement.* If the parties have entered into a separation agreement which the court finds to be valid, just, and equitable, it shall be incorporated in the decree; and the provisions thereof on all matters settled thereby shall be confirmed in the decree except that any provisions for the custody, support, or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by such an agreement, other than matters pertaining to the custody, support, or education of the minor children, shall not be subject to subsequent modification by the court except as the agreement itself may prescribe or the parties may subsequently consent.

(e) *Restoration of Name.* Upon the request of the wife, the court shall order the restoration of her maiden or former name.

(f) *Costs and Fees.* Costs and attorneys' fees may be awarded to either party as justice and equity may require.

(g) *Effective Date.* Every decree of divorce shall contain a provision to the effect that the parties are prohibited from contracting marriage with any other persons until thirty days after the decree shall become unappealable and final, and any marriage contracted before the expiration of that period shall be null and void, and any agreement to waive the right to appeal shall not be effective to shorten such period of time.

(h) *Orders on Denial of Relief.* If a decree of divorce, separate maintenance or annulment is denied the court may nevertheless make any of the orders authorized by this section for the benefit of the minor children of the parties or for the equal division of the property of the parties.

COMMITTEE NOTES

This section is new. It covers the care and custody of minor children, division of property and alimony. It will be noted that no distinction is made the wife or husband in the division of property or allowance of alimony. Separation agreements covering property rights are recognized by subsection (d). The six months waiting period is changed by subsection (g).

60-1811. *Effect of a Decree in Another State.* A judgment or decree of divorce rendered in any other state or territory of the United States, in conformity with the laws thereof, shall be given full faith and credit in this state; except, that in the event the defendant in such action, at the time of such judgment or decree, was a resident of this state and did not personally appear or defend the action in the court of such state or territory, all matters relating to alimony, and to the property rights of the parties, and to the custody and maintenance of the minor children of the parties, shall be subject to inquiry and determination in any proper action or proceeding brought in the courts of this state within two years after the date of the foreign judgment or decree, to the same extent as though the foreign judgment or decree had not been rendered.

COMMITTEE NOTES

This section is in lieu of G. S. 60-1518.

ARTICLE 19—DECLARATORY JUDGMENTS

60-1901. *Jurisdiction. Generally.* In cases of actual controversy, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceedings shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for. Controversies involving the validity or interpretation of deeds, wills, or other instruments of writing, express trusts, statutes, municipal ordinances, and other government regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

COMMITTEE NOTES

This article is in lieu of G. S. 60-3127 to 60-3132c.

60-1902. *Submission of Issues to Jury.* When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable to a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

60-1903. *Further Relief.* Further relief based on a declaratory judgment may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaration of right, to show cause why further relief should not be granted forthwith.

ARTICLE 20—SURVIVAL OF CLAIMS AND ABATEMENT
OF ACTIONS

60-2001. *Survival of Actions. What Causes of Action Survive.* In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, or for death by wrongful act or omission, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same.

60-2002. *Abatement.* No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, or for a nuisance.

COMMITTEE NOTES

A large part of Article 32, "Abatement, Survivor and Revivor" of the old code is covered by section 60-225, "Substitution of Parties." This article is intended to cover "Survival of Claims and Abatement of Actions."

ARTICLE 20A—(Tentative Designation)
WRONGFUL DEATH ACTIONS

60-20A01. *Cause of Action.* If the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom in accordance with the provisions of this Article, against the wrongdoer, or his personal representative if he is deceased.

60-20A02. *Plaintiff.* The action may be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death. Any heir who does not join as a party plaintiff in the original action but who claims to have been damaged by reason of the death shall be permitted to intervene therein. The action shall be for the exclusive benefit of all of the heirs who have sustained a loss regardless of whether they all join or intervene therein, but the amounts of their respective recoveries shall be in accordance with the subsequent provisions of this Article.

60-20A03. *Amount of Damages.* In any such action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages cannot exceed in the aggregate the sum of twenty-five thousand dollars and costs.

60-20A04. *Elements of Damage.* Damages may be recovered for, but are not limited to: mental anguish, suffering, or bereavement; loss of society, companionship, comfort, or protection; loss of marital care, attention, advice or counsel; loss of filial care or attention; and loss of parental care, training, guidance, or education, and the reasonable funeral expenses for the deceased. If no probate administration for the estate of the deceased has been commenced, expenses for the care of the deceased which resulted from the wrongful act may also be recovered by any one of the heirs who paid or became liable for the same; and such amounts shall not be included in the limitation of Sec. 60-20A03.

60-20A05. *Apportionment of Recovery.* The net amount recovered in any such action shall be apportioned by the judge upon a hearing, with reasonable notice to all of the known heirs having an interest therein, such notice to be given in such manner as the judge shall direct. The apportionment shall be in proportion to the loss sustained by each of the heirs, and all heirs known to have sustained a loss shall share in such apportionment regardless of whether they joined or intervened in the action; but in the absence of fraud, no person who failed to join or intervene in the action may claim any error in such apportionment after the order shall have been entered and the funds distributed pursuant thereto.

COMMITTEE NOTES

This article is in lieu of G. S. 60-3302.

ARTICLE 21—COSTS

60-2101. *Security for Costs.* (a) *Deposit.* Every plaintiff, except the state, or any subdivision, agency, board, or officer thereof acting in his official capacity, shall deposit with the clerk of the district court the sum of fifteen dollars as security for costs before summons shall be issued.

(b) *Poverty Affidavit in Lieu of Deposit.* (1) *Effect.* In any case where a plaintiff by reason of poverty is unable to make the deposit to secure costs, an affidavit so stating may be filed and no deposit will be required.

(2) *Form of Affidavit.* The affidavit provided for in this subsection shall be in the following form and attached to the petition, viz.:
State of Kansas, _____ County.

In the district court of said county: I do solemnly swear that the claim set forth in the petition herein is just, and I do further swear that by reason of my poverty, I am unable to give security for costs.

(c) *Additional Security for Costs.* If at any time the judge finds that a party has caused, or is about to cause, costs to be incurred in an action substantially in excess of the amount for which security has been deposited with the clerk of the court, the judge may order such party to make a deposit, or a further deposit, as security for costs. Any party who wilfully refuses to comply with such an order of the judge shall be subject to having his pleadings stricken from the files in the office of the clerk.

COMMITTEE NOTES

This section covers G. S. 60-2401 to 60-2404. The provision for bond for cost has been eliminated. No distinction is made between residents and non-residents as to the deposit for costs.

60-2102. *Taxation of Costs.* (a) *As of Course.* Unless otherwise provided by statute, or by order of the judge, the costs shall be allowed to the party in whose favor judgment is rendered.

(b) *Offer of Judgment.* At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 5 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the judge shall enter judgment. An offer not accepted shall be deemed withdrawn

and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted shall not preclude a subsequent offer.

(c) *Duty of Clerk.* The clerk of the court shall tax the costs and shall mail a cost statement to counsel of record for each of the parties. The taxation of the costs by the clerk shall be subject to review by the judge on timely motion by any interested party.

COMMITTEE NOTES

Subsection (a) covers the provision of G. S. 60-3705. Subsection (b) protects a defendant who desires to escape costs by offering settlement, following the Federal Rule. Subsection (c) covers the provisions of G. S. 60-3708.

60-2103. *Items Allowable as Costs.* Items which may be included in the taxation of costs are:

1. The clerks fees and charges allowed by law.
2. The mileage, fees, and other allowable expenses of the sheriff or other officer incurred in the service of process or in effecting any of the provisional remedies authorized by this chapter.
3. Publisher's charges in effecting any publication of notices authorized by law.
4. Statutory fees and mileage of witnesses attending court or the taking of depositions used as evidence.
5. Reporter's charges for reporting proceedings in court or the taking of depositions used as evidence.
6. The reasonable cost of certified or exemplified copies, maps, diagrams, surveys, charts, and similar instruments necessarily procured or prepared and admitted as evidence.
7. Such other charges as are by statute authorized to be taxed as costs.

COMMITTEE NOTES

This section has been added to specifically identify items of cost.

ARTICLE 22—APPEALS

60-2201. *Appellate Jurisdiction.* (a) *District Courts.* A judgment rendered or final order made by a court or any other tribunal, board or officer exercising judicial or quasi judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court. If no other means for perfecting such an appeal is provided by law, it shall be sufficient for an aggrieved party to file a notice that he is appealing from such judgment

or order with such court, tribunal, board, or officer within thirty days of its entry, and then causing true copies of all pertinent proceedings before such court, tribunal, board or officer to be prepared and filed with the clerk of the district court of the county in which such judgment or order was entered. The clerk shall thereupon docket the same as an action in the district court, which court shall then proceed to review the same, either with or without additional pleadings and evidence, and enter such order or judgment as justice shall require. A deposit as security for costs shall be required by the clerk of the district court as in the filing of an original action.

(b) *Supreme Court.* The supreme court shall have jurisdiction to correct, modify, vacate, or reverse any act, order, or judgment of a district court in order to assure that any such act, order, or judgment is just, legal, and free of abuse.

COMMITTEE NOTES

Subsection (a) covers the provisions of G. S. 60-3301 with additional provisions for procedure. Subsection (b) gives the Supreme Court unlimited jurisdiction over acts of district courts, except as limited by the next section.

60-2202. *Invoking Supreme Court Jurisdiction.* (a) *As of Right.* The appellate jurisdiction of the supreme court may be invoked by appeal as a matter of right from:

1. An order that discharges, vacates, or modifies a provisional remedy.
2. An order that grants, continues, modifies, refuses, or dissolves an injunction.
3. An order that appoints a receiver, or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or involving the tax or revenue laws, or the title to real estate.
4. A final decision in any action in which the amount in controversy is in excess of one thousand dollars. In any appeal or cross-appeal from a final decision, any act or ruling from the beginning of the proceeding shall be reviewable.

(b) *Other Appeals.* When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The supreme court may thereupon, in its discretion, permit an appeal to be taken from such order, if application

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is made to it within ten days after the entry of the order. Application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Supreme Court or a judge thereof shall so order.

COMMITTEE NOTES

This section states when the jurisdiction of the Supreme Court can be invoked. It will be noted that unless otherwise specifically provided appeals are limited to final orders involving an amount in excess of one thousand dollars.

60-2203. *Appeal to Supreme Court. (a) When and How Taken.* When an appeal is permitted by law from a district court to the supreme court, the time within which an appeal may be taken shall be 30 days from the entry of the judgment, as provided by Section 60-258, except that in any action in which the state, or an officer or agency thereof, is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Sec. 60-250(b); or granting or denying a motion under Sec. 60-252(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Sec. 60-259 to alter or amend the judgment; or denying a motion for new trial under Sec. 60-259.

A party may appeal from a judgment by filing with the clerk of the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this chapter, or when no remedy is specified, for such action as the supreme court deems appropriate, which may include dismissal of the appeal. If the record on appeal has not been filed with the supreme court, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in the district court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) *Notice of Appeal.* The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from, and shall name the court to which the appeal is taken. The appealing party shall cause notice of the appeal to be served upon all other parties to the judgment as provided in Sec. 60-205, but his failure so to do does not affect the validity of the appeal.

(c) *Security for Costs.* Security for the costs on appeal shall be given in such sum and manner as shall be prescribed by a general rule of the supreme court unless the court shall make a different order applicable to a particular case.

(d) *Supersedeas Bond.* Whenever an appellant entitled thereto desires a stay on appeal, he may present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment such costs, interest, and damages as the supreme court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. When an order is made discharging, vacating, or modifying a provisional remedy, or modifying or dissolving an injunction, a party aggrieved thereby shall be entitled, upon application to the judge, to have the operation of such order suspended for a period of not to exceed ten days on condition that, within said period of ten days he shall file his notice of appeal and obtain the approval of such supersedeas bond as is required under this section.

(e) *Failure to File or Insufficiency of Bond.* If a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the supreme court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the supreme court.

(f) *Judgment Against Surety.* By entering into a supersedeas bond given pursuant to subdivisions (c) and (d) of this section, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the judge prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

(g) *Docketing Record on Appeal.* The record on appeal shall be filed and docketed with the Supreme Court at such time as such Court may prescribe by rule.

(h) *Cross-Appeal.* When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which he complains, he shall within twenty days after the notice of appeal is filed with the clerk of the trial court, give notice of his cross-appeal.

(i) *Intermediate Rulings.* When an appeal or cross-appeal has been timely perfected the fact that some ruling of which the appealing or cross-appealing party complains was made more than thirty days before filing of the notice of appeal shall not prevent a review of the ruling.

60-2204. *Contents and Preparation of Record.* The record on appeal shall contain such matters and shall be prepared in such manner and form, as shall be prescribed by rules of the Supreme Court.

60-2205. *Technical and Inadvertent Errors.* The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it, the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the

appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court.

COMMITTEE NOTES

This section is the same as G. S. 60-3317.

60-2206. *Supreme Court Decisions. (a) Opinions.* It shall be the duty of the judges of the supreme court to prepare and file with the papers in each case, notes of the opinion of the court, either in full or in memorandum form, upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party, and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed.

(b) *Syllabus.* A syllabus of the points of law decided in any case in the supreme court shall be stated in writing by the judge delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case that have been determined by the court. The syllabus shall be submitted to the judges concurring therein, for revision before filing and shall be filed with the papers without alteration, unless by consent of the judges concurring therein. A copy of such syllabus shall in all cases be sent to the court below, by the clerk of the supreme court, with the mandate.

(c) *Judgment and Mandate.* The supreme court may by rule provide for post decision motions for rehearing or other relief. When under such rule a decision becomes final, it shall promptly cause to be transmitted to the clerk of the district court its mandate containing such directions as are appropriate under the decision. The clerk of the district court shall make a notation thereof on the appearance docket. Such mandate, without further order of the judge, shall thereupon be a part of the judgment of the court if it is determinative of the action, or shall be controlling in the conduct of any further proceedings necessary in the district court.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-3328 to 60-3330.

60-2207. *Costs.* The costs of appeal shall be taxed against such party or parties as the court shall direct.

COMMITTEE NOTES

This section is the same as G. S. 60-3319.

ARTICLE 23—*LIS PENDENS* AND JUDGMENT LIENS OF REAL PROPERTY

60-2301. *Pendency of Action as Notice.* (a) *Filing.* When the petition has been filed the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's claim; but such notice shall be of no avail unless the summons be served or the first publication made within ninety days after the filing of the petition. When the subject of the action is real property situated in two or more counties, the filing of the petition in the district court of one county shall not be held to impart notice to persons acquiring an interest in the real property situated in another county, except from the time the plaintiff in such action shall file for record with the register of deeds of such other county, a verified statement setting forth the nature of the action, the court in which it is pending, and a description of the real property sought to be affected thereby.

(b) *Judgment as to Realty as Notice.* When any part of real property, the subject of an action, is situated in any other county or counties than the one in which the action is brought, and notice of the action has not been filed in accordance with subsection (a) of this section, a certified copy of the judgment in such action must be recorded in the office of the clerk of the district court of such other county or counties before it shall operate therein as notice, so as to charge third persons.

COMMITTEE NOTES

Subsection (a) covers the provisions of G. S. 60-2601. The restriction for filing the first publication has been changed to ninety instead of sixty. Subsection (b) covers the provisions of G. S. 60-2602. However, the recording of the judgment is not required where subsection (a) has been followed.

60-2302. *Judgment Liens on Real Estate.* Judgments of courts of record of this state, and of courts of the United States rendered within this state, shall be liens on the real estate of the debtor within the county in which the judgment is rendered. The lien shall be effective from the time at which the petition stating the claim against the judgment debtor was filed but not to exceed four months prior to the entry of the judgment; but judgments by confession, and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered. An attested copy of the journal entry of

any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the district court of any county, and such judgment shall be a lien on the real estate of the debtor within that county from the date of filing such copy. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner as if rendered in the court of which he is clerk. Executions shall be issued only from the court in which the judgment is rendered.

COMMITTEE NOTES

This section is the same as G. S. 60-2302 except the effective date has been changed from the first day of the term in which the judgment is rendered to the filing of the claim but not to exceed four months.

ARTICLE 24—EXEMPTIONS

60-2401. *Homestead; Extent of Exemption.* A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon. The provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife.

60-2402. *Designation of Homestead.* Whenever any levy shall be made upon the lands or tenements of a householder whose homestead has not been selected and set apart, such householder, his wife, agent or attorney may notify the officer in writing at the time of making such levy, or at any time before the sale, of what he regards as his homestead, with a description thereof, and the remainder alone shall be subject to sale under such levy.

60-2403. *Contract for Conveyance of Homestead.* That no action for the specific performance of a contract for the sale or exchange of real estate in the state of Kansas or for damages by reason of the violation of any contract to sell or exchange lands within the state of Kansas, occupied as a homestead by the owner and his family, shall be maintained unless the contract of sale is signed by both the husband and wife, or by an agent or broker duly authorized

in writing by both the husband and wife to make such sale or exchange.

60-2404. *Personal Property of Family; Articles Exempt.* Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state, the following articles of personal property:

1. The family Bible, schoolbooks, and family library.
2. Family pictures, and musical instruments used by the family.
3. A seat or pew in any church or place of public worship, and a lot in any burial ground.
4. All the wearing apparel of the debtor and his family, all beds, bedsteads and bedding used by the debtor and his family; one cooking stove and appendages, and all other cooking utensils and all other stoves and appendages necessary for the use of the debtor and his family; one sewing machine, all spinning wheels and looms and all other implements of industry; and all other household furniture not herein enumerated not exceeding in value five hundred dollars.
5. Two cows, 100 chickens or other domestic fowls, ten hogs, one yoke of oxen, and one horse or mule, or, in lieu of one yoke of oxen and one horse or mule, a span of horses or mules; twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth.
6. The necessary food for the support of the stock mentioned in this section for one year, either provided or growing, or both, as the debtor may choose; also, one wagon, cart or dray, two plows, one drag, and other farming utensils including harness and tackle for teams not exceeding in value three hundred dollars.
7. The grain, meat, vegetables, groceries, and other provisions on hand, necessary for the support of the debtor and his family for one year, and also all the fuel on hand necessary for their use for one year.
8. The necessary tools and implements of any mechanic, miner or other person, used and kept in stock for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding four hundred dollars in value.
9. The library, implements, and office furniture of any professional man.

60-2405. *Personal Property of Person Not Head of Family; Articles Exempt.* The following property only shall be exempt from attachment and execution, when owned by any person residing in this state, other than the head of a family: 1. The wearing apparel of the debtor; 2. a seat or pew in any church or place of public worship, and a lot in any burial ground; 3. the necessary tools and instruments of any mechanic, miner or other person, used for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade, as provided in the last preceding section; 4. the library, implements, and office furniture of any professional man.

60-2406. *Not Exempt from Taxes.* Nothing in this article shall be construed as exempting any personal property from taxation or sale for taxes under the laws of this state.

60-2407. *Not Exempt for Wages.* None of the personal property mentioned in this article shall be exempt from attachment or execution for the wages of any clerk, mechanic, laborer or servant.

60-2408. *Pension Money Exempt, When.* Money received by any debtor as pensioner of the United States within the three months next preceding the issuing of an execution, or attachment, or garnishment process, cannot be applied to the payment of the debts of such pensioner when it is made to appear by the affidavit of the debtor or otherwise that such pension money is necessary for the maintenance of a family supported wholly or in part by said pension money. The filing of the affidavit by the debtor, or making proof as above provided, shall be prima facie evidence, and it shall be the duty of the court in which such proceeding is pending to release all moneys held by such attachment or garnishee process, immediately upon the filing of such affidavit, or the making of such proof.

60-2409. *Wages Earned in Another State.* Wages earned out of this state and payable out of this state shall be exempt from attachment or garnishment in all cases where the cause of action arose out of this state, unless the defendant in the attachment or garnishment suit is personally served with process, and if the writ of attachment or garnishment is not personally served on the defendant, the court issuing the writ of attachment or garnishment shall not entertain jurisdiction of the cause, but shall dismiss the suit at the cost of the plaintiff.

COMMITTEE NOTES

Nothing substantial has been changed in the foregoing sections from G. S. Chapter 60, Article 35.

60-2410. *Exemptions of Personal Earnings of Heads of Family.*

(a) *Amount.* Ten percent (10%), and court costs not to exceed four dollars (\$4), and no more of the earnings of a debtor who is a resident of this state, for his personal services at any time within three months next preceding the issuing of any attachment, or garnishment process, may be taken and applied to the payment of his debts, when it is made to appear by the debtor's affidavit or otherwise, that the remainder of such earnings above the said ten percent (10%) and court costs not to exceed four dollars (\$4), are necessary for the maintenance of a family supported wholly or partly by his labor; and such earnings of any such debtor, earned during any one calendar month, shall be subject to only one deduction of the amount herein made, and one application of such deduction in one action shall be a bar to any deduction in any other action for such calendar month, regardless of where or by whom the action may be brought.

(b) *Notice and Affidavits.* At the time of filing such affidavit the debtor shall notify the plaintiff or his agent or attorneys by serving a copy of said affidavit on said plaintiff or his agent or attorneys. Nothing herein contained shall prevent the adverse party from controverting the matters sought to be proven by such affidavit by a counter affidavit, or, if sought to be proven in any other manner, the same may be controverted by any competent evidence. Such counter affidavit shall be filed within forty-eight hours after the notice of the filing of the said debtor's affidavit, and final hearing shall be had thereon at a time to be fixed by the judge within ten days from the notice of the filing of the debtor's affidavit.

(c) *Sickness Preventing Work.* If any debtor is prevented, on account of being sick, or on account of the sickness of any member of his family, from working at his regular trade, profession or calling for any period greater than two weeks and this fact is shown by the testimony of a regular admitted and practicing physician, the provisions of this act shall not be invoked against any such debtor until after the expiration of two months after his recovery from such sickness.

(d) *Assignment of Account.* If any person, firm or corporation sells or assigns his account to any person or collecting agency, or sends or delivers the same to any collector or collecting agency for collection, then such person, firm or corporation or the assignees of either shall not have nor be entitled to the benefits of this act.

(e) *After Judgment.* Nothing in this section shall be construed to hold or subject to execution, attachment or garnishment, any amount of such debtor's earnings above the amount of ten percent and court costs of \$4 herein held to pay the debt of any such debtor, until after judgment may be obtained against such debtor, and any employer of any such debtor is authorized to pay to any such debtor at any time all of his earnings except the amount of ten percent and court costs of \$4 herein made subject to pay his debts, and the taking of any of the earnings of any debtor, who is the head of a family, after judgment, shall be governed by the laws governing attachment and garnishment proceedings.

(f) *Restrictions on Application.* Nothing herein shall be construed as exempting any of the earnings of any debtor who is not the head of a family dependent wholly or in part upon him for support.

COMMITTEE NOTES

This section contains the same provisions as G. S. 60-3495.

ARTICLE 25—EXECUTIONS AND ORDERS OF SALE

60-2501. *Writ of Execution.* (a) *Definitions.* A general execution is a direction to an officer to seize any non-exempt property of a judgment debtor and cause the same to be sold in satisfaction of the judgment. A special execution or order of sale is a direction to an officer to effect some action as to some specified property in such manner as the court shall have determined necessary in adjudicating the rights of parties to an action.

(b) *By Whom Issued.* Executions and orders of sale shall be issued by the clerk at the request of any interested person and directed to the appropriate officers of the counties where they are to be levied.

(c) *When Returnable.* The officer to whom any execution or order of sale shall be directed shall return the same to the court out of which it is issued within sixty days from the date thereof.

(d) *Executions to Another County.* When an execution or order of sale is issued to an officer of any county other than that in which the judgment was rendered, the officer, after endorsing the date of its reception thereon, shall deliver the same to the clerk of the district court of his county, who shall thereupon enter the same in the execution docket in the same manner as if it had issued from the court of which he is clerk; and before the officer shall return any such execution or order, he shall cause his return to be entered in like manner.

(e) *Manner of Levy.* A general execution shall be levied upon any non-exempt property of the judgment debtor, either real or personal, in the same manner and with like effect as is provided for the service and execution of orders of attachment under Sec. 60-706 to 60-710, all inclusive. Oil and gas leaseholds shall, for the purposes of this article, be treated as real property. Special executions or orders of sale shall be levied and executed in such manner as the court shall have determined.

COMMITTEE NOTES

Subsections (b), (c) and (d) cover the provisions of G. S. 60-3401, 60-3426 and 60-3432, respectively. Subsection (e) is in lieu of G. S. 60-3403.

60-2502. *Multiple Executions.* Subject to any rights, liens, or preferences existing by law independently of the levy of an execution, when two or more general executions are levied against property of the same judgment debtor, their priorities and all questions pertaining thereto shall be determined in the same manner as is provided for conflicting claims and multiple attachment orders in 60-713.

COMMITTEE NOTES

This section is in lieu of G. S. 60-3407.

60-2503. *Judgment; when dormant; release of record.* If execution shall not be sued out within five years from the date of any judgment, including judgments in favor of the state or any municipality in the state, that has been or may hereafter be rendered, in any court of record in this state, or within five years from the date of any order reviving such judgment, or if five years have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment, including court costs and fees therein shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor. When a judgment shall become dormant as herein provided, and shall so remain for a period of two years, it shall be the duty of the clerk of the court to release said judgment of record, and the clerk shall make an entry on the appearance and judgment dockets wherein the judgment appears of record, reciting, "this judgment including all court costs and fees therewith is barred under provisions of G. S. 60-2503 and is hereby released of record."

COMMITTEE NOTES

This section and the next section is in lieu of G. S. 60-3405.

60-2504. *Revivor of Dormant Judgment.* A dormant judgment may be revived and have the same force and effect as if it had not become dormant if, within two years of the date on which such judgment became dormant, the holder thereof files a motion for revivor and a request for the immediate issuance of an execution thereon if such motion is granted. Notice of the filing of the motion shall be given as for a summons under Article 3 of this chapter, and on the hearing thereof the court shall enter an order of revivor unless good cause to the contrary be shown, and thereupon the execution shall issue forthwith. A judgment may also be revived by the filing of a written stipulation of revivor signed by all of the parties affected thereby. For the purpose of this section and the preceding section attachment or garnishment process shall have the same effect as the issuance of an execution.

60-2505. *Substitution of Judgment Creditor.* Any person who claims to have succeeded to the interest of the holder of a judgment by appointment as personal representative for a deceased or incompetent judgment holder, by assignment, by operation of law, or otherwise, shall file with the clerk a copy of his letters as personal representative, assignment, or proceedings effecting such transfer, and thereafter such successor in interest shall be entitled to all the rights and remedies available to his predecessor and may proceed to enforce the same in his own name as such successor. If the validity of any such transfer be controverted by any party affected thereby, the court shall, on reasonable notice to all interested parties whose whereabouts are known, determine the respective rights and liabilities of all the parties.

COMMITTEE NOTES

This section is new. It covers the provisions of G. S. 60-3220.

60-2506. *Sale Subject to Liens.* The interest of a judgment debtor in property, either real or personal, may be levied upon and sold on execution subject to liens or encumbrances already existing. If the holder of a lien or other security interest in tangible personal property asserts a right of possession thereto and does not consent to an execution sale subject to his interest, the sale shall not be completed unless for an amount in excess of such senior interest as determined by the court, and in such event the property shall be delivered by the officer to the lienholder entitled to the same. If the sale is

completed, the net proceeds thereof shall be applied to the satisfaction of the senior interest in full and the balance applied to the judgment debt.

COMMITTEE NOTES

This section is new. It covers the provisions of G. S. 60-3408.

60-2507. *Levy on Property Claimed by Third Person.* If the officer, by virtue of an execution issued from any court of record in this state, shall levy the same on any goods and chattels claimed by any person other than the defendant, or be requested by the plaintiff to levy on any such goods and chattels, the officer may, before proceeding, require the plaintiff to give him an undertaking with good and sufficient sureties to pay all costs and damages that he may sustain by reason of the detention or sale of such property.

COMMITTEE NOTES

This section is in lieu of G. S. 60-3410.

60-2508. *Forthcoming Bond.* In all cases where an officer shall by virtue of an execution levy upon any goods or chattels, they may be left in the possession of the defendant or some other person pending sale if the officer take an undertaking from such person with security in such sum as he deem sufficient. The undertaking shall be to the effect that such person will deliver the property to the officer at the time and place fixed for sale. The officer shall give such person written notice of the time and place fixed for the sale by delivery in person or by restricted registered or certified mail.

COMMITTEE NOTES

This section is intended to clarify G. S. 60-3411.

60-2509. *Notice of Sale of Personal Property; Resale.* The officer who levies upon personal property, shall, before he proceeds to sell the same, cause public notice to be given of the time and place of sale, for at least ten days before the day of sale. The notice shall be given by advertisement, published in some newspaper printed in the county, or, in case no newspaper be printed therein, by putting up advertisements in five public places in the county, one of which shall be on a bulletin board established for public notices in the county courthouse. If the personal property levied upon cannot be sold at the execution sale for want of bidders, the judgment creditor may direct the officer to return the execution showing that fact or, at his option, he may report the same to the judge and obtain an order permitting a second sale under the same execution

and an extension of the return day of the execution if that be necessary.

COMMITTEE NOTES

This section is in lieu of G. S. 60-3412.

60-2510. *Sale of Real Property Under Execution.* (a) *Notice.* Lands and tenements taken on execution shall not be sold until the officer cause public notice of the time and place of sale to be given for at least thirty days before the day of sale, by advertisement in some newspaper regularly printed and published and having a general circulation in the county, to be designated by the party ordering the sale; or in case no newspaper be printed in the county, in some newspaper in general circulation therein and by putting up an advertisement in five public places in the county, two of which shall be in the township where such lands and tenements lie, and one which shall be on a bulletin board established for public notices in the county courthouse.

(b) *Where Sale of Land Held.* All sales of lands or tenements under execution shall be held at the courthouse located in the city in which the judgment was rendered, except that if the judgment was rendered in a county other than that in which the land is located the sale shall be at the courthouse located in the county seat, except that for good cause shown, the judge in the county in which the judgment was rendered may order the sale to be held on the premises or at any other place.

(c) *Reversal of Judgment after Sale of Land; Title of Purchaser.* If any judgment or judgments in satisfaction of which any lands or tenements are sold shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser, or purchasers. In such cases restitution shall be made by the judgment creditors of the money for which such lands or tenements were sold, with lawful interest from the day of sale. This subsection shall not apply in cases of sales under judgments rendered without personal appearance by the party against whom the judgment was rendered, and without service on him other than by publication, when such sale was made within six months from the date of such judgment.

(d) *Deed or Certificate to Purchaser of Estate.* After sale by the sheriff of any real estate on execution, special execution or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount

of money paid by such purchaser, together with the amount of the costs up to said date, stating that, unless redemption is made thereafter according to law, the purchaser or his heirs or assigns will be entitled to a deed to the same. Any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void except as provided by section 60-2514 (a).

COMMITTEE NOTES

Subparagraphs (a), (b), (c) and (d) are in lieu of G. S. 60-3416, 60-3419, 60-3424 and 60-3422 respectively.

60-2511. *Printer's Fees Advanced.* The officer who levies upon personal property, or lands and tenements, or who is charged with the duty of selling the same, by virtue of any writ of execution, may refuse to publish a notice of the sale thereof, by advertisement in a newspaper until the party for whose benefit such execution issued, his agent or attorney, shall advance to such officer, on demand, so much money as will be sufficient to discharge the fees of the printer for publishing such notice.

COMMITTEE NOTES

This section is the same as G. S. 60-3417.

60-2512. *Restriction on Purchasers.* No officer making the sale of property, either real or personal, nor any appraiser of such property, shall either directly or indirectly purchase the same, and any such sale, if made, shall be fraudulent and void.

COMMITTEE NOTES

This section covers the last sentence of G. S. 60-3419.

60-2513. *Contribution Between Joint Obligors.* (a) *Generally.* Persons jointly liable to another whether in contract or in tort, except for torts intentionally inflicted, are entitled to contribution among themselves as heretofore recognized by principles of equity in obligations arising out of contract. Such right of contribution may be asserted in separate actions or by way of cross-claim, interpleader, or intervention under the provisions of article 2.

(b) *Judgment Debtors.* A right of contribution or indemnity among judgment debtors, arising out of the payment of the judgment by one or more of them, may be enforced by execution against the property of the judgment debtor from whom contribution or indemnity is sought.

COMMITTEE NOTES

This section takes the place of G. S. 60-3437, which has been considered grossly inadequate. The present section extends the right of contribution to joint tortfeasors on well-known principles of equity heretofore applicable only

to contract liability. No judgment is necessary in order for the remedy of contribution to be available. If one of several discharges the joint liability he may have contribution from the others. Rights of indemnity are not affected.

60-2514. *Redemption of Real Property. (a) Right of Redemption by Defendant Owner; Junior Lienholders.* Except as otherwise provided by law, the defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs and taxes, at any time within eighteen months from the day of sale, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be six months from the date of sale, and all junior lienholders shall be entitled to three months to redeem after the expiration of said six months. The right of redemption shall not apply to oil and gas leaseholds. Any corporation organized under the laws of the United States, the District of Columbia or any state of the United States, may, as mortgagor, agree in the mortgage instrument to a shorter period of redemption than eighteen months, or may wholly waive the period of redemption as against said corporation mortgagor only and all such agreements when so made shall be fully binding on such mortgagor.

(b) *Redemption by Lien Creditor.* For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within fifteen months from the date of sale.

(c) *Creditors Who May Redeem.* Any creditor whose claim is or becomes a lien prior to the expiration of the time allowed by law for the redemption by creditors may redeem. A mortgagee may redeem upon the terms hereinafter prescribed before or after the debt secured by the mortgage falls due.

(d) *Terms of Redemption; Rights of Parties.* During the period allowed for the redemption of real property from sale under execution, special execution or order of sale, the holder of the certificate of purchase may pay the taxes on the lands sold, insurance premiums on the buildings thereon, and interest or sums due, upon any prior lien or encumbrance thereon; and upon the redemption of the premises from such sale the holder of the certificate shall be

entitled to repayment of all sums thus paid by him, together with interest thereon. The terms of redemption shall be in all cases the reimbursement of the amount paid by the then holder of the certificate of purchase, added to his own claim, and including all sums paid by him for taxes, insurance premiums, and interest or sums due, as shown by receipts or vouchers to be filed in the office of the clerk of the district court, with interest, together with costs, subject to the exemption contained in the next subsection. But where a mortgagee or other lienholder, as provided for in this code, whose claim is not yet due, is the person from whom redemption is to be made, he shall receive in payment the full amount paid by him, as stated in his certificate of redemption, together with interest, together with the actual amount of his claim at the date of redemption.

(e) *Senior Creditor Redeeming from Junior Creditor.* When a senior creditor redeems from a junior, the senior creditor shall only be required to pay the amount of those liens which are paramount to his own, and with interest and costs appertaining to the same, but a junior creditor may prevent redemption by the senior creditor or the holder of the paramount lien by paying off the lien, or depositing with the clerk of the district court beforehand the amount necessary to remove said lien.

(f) *Junior Creditor May Redeem from Senior Creditor.* A junior creditor may redeem from a senior creditor by paying to the clerk of the district court the full sum due said senior creditor, with interest and costs, and shall become thereby vested with full title to the judgment so redeemed from, and to all liens of such judgment.

(g) *Time in Which Creditors May Redeem from Each Other.* After the expiration of fifteen months from the day of sale, the creditors can no longer redeem from each other, but the defendant owner may still redeem at any time before the end of the eighteen months as aforesaid.

(h) *Effect of Failure of Debtor to Redeem—Deficiency.* If the defendant or holder of the legal title fails to redeem as herein provided, the purchaser or the creditor who has last redeemed prior to the expiration of the fifteen months aforesaid will hold the property absolutely. In case it is thus held by a redeeming creditor, his lien and the claim out of which it arose will be held to be extinguished, unless he being unwilling to hold the property and credit the defendant owner therefor with the full amount of his lien, does, within ten days after the fifteen months aforesaid, file with the

clerk of the district court a statement of the amount that he is willing to credit on his claim, and in order to redeem said real estate, the defendant shall only be bound to pay the amount so stated.

COMMITTEE NOTES

This section is the same as G. S. 60-3448, 60-3449 and 60-3450.

(i) *Mode of Redemption.* The party redeeming shall pay the money into the office of the clerk of the district court for the use of the persons thereunto entitled. The person so redeeming, if not the defendant owner in execution or order of sale, must also file his affidavit or that of his agent or attorney, stating as nearly as practicable the amount still unpaid due on his claim. The clerk shall give him a receipt for the money, stating the purpose for which it is paid. He must also enter the same upon a book kept for that purpose, with a minute of such redemption, the amount paid, and the amount of the lien of the last redemption or as sworn to by him.

(j) *Redemption of Property Sold in Parcels, or Undivided Portions.* Whenever the property has been sold in parcels, any distinct portion thereof may be redeemed by itself, and if creditors other than the original purchaser have redeemed, the amount of their claim shall be added to each parcel pro rata in proportion to the amount for which the same was originally sold. When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately.

(k) *Transfer of Right of Redemption.* The rights of the defendant owner in relation to redemption may be assigned or transferred, and the purchaser or assignee thereof shall have the same right of redemption as the defendant owner; but the right of redemption shall not be subject to levy or sale on execution.

(l) *Holder of Legal Title.* The holder of the legal title at the time of issuance of execution or order of sale shall have the same right of redemption upon the same terms and conditions as the defendant in execution, and also shall be entitled to the possession of the property the same as the defendant in execution.

(m) *Deed at End of Redemption Period.* If the defendant in execution or order of sale, or his assigns, or the owner of said legal title, fail to redeem, the sheriff shall, at the end of the redemption period, execute a deed to the then owner of the certificate of purchase.

(n) *Injury or Waste After Sale.* The purchaser or party entitled to a deed under sale, as hereinbefore provided, may, after the deed is made to him by the sheriff, recover damages for any injury or waste permitted upon the property purchased after the sale and before possession is delivered under the conveyance.

(o) *Second Sale Not Permitted.* Real estate once sold upon order of sale, special execution or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months as hereinbefore provided.

(p) *Injunction or Receiver to Protect Property.* The holder of the certificate of purchase shall be entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction, or, when required to protect said premises against waste, appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed, and shall be entitled to rent, control and manage the same, but the income during said time, except what is necessary to keep up repairs and prevent waste, shall go to the person who otherwise would be entitled to possession during the period of redemption.

(q) *Purchase Money Liens.* Whenever a lien shall be given for the purchase price of any real estate, and default shall be made in the conditions of the mortgage or instrument giving such lien before one-third of the purchase price of such real estate shall have been paid by the purchaser, and such purchase money lien is foreclosed and the real estate sold, and the same shall not be redeemed from the judgment by the payment of all principal and interest due upon such lien and costs of such foreclosure within six months from the date of such sale, such sale shall become absolute, and the purchaser at such foreclosure sale shall be immediately entitled to a deed to the real estate purchased.

COMMITTEE NOTES

This section covers redemption rights in line with what was provided in G. S. 60-3439 to G. S. 60-3461 and 60-3466.

60-2515. *Sheriff's Return of Sale.* (a) *Certificate of Purchase.* The sheriff shall at once make a return of all sales made under this article to the court. If the court finds the proceedings regular and in conformity with law and equity, it shall confirm the same, direct the clerk to make such entry upon the journal and order the sheriff

to make to the purchaser the certificate of sale or deed provided for in this article.

(b) *Equity Powers of Court.* The court may decline to confirm the sale where the bid is substantially inadequate, or in ordering a sale or a resale, may, in its discretion, if conditions or circumstances warrant and after a proper hearing, fix a minimum or upset price at which the premises must be bid in if the sale is to be confirmed; or the court may, upon application for the confirmation of the sale, if it has not theretofore fixed an upset price, conduct a hearing to establish the value of the property, and as a condition to confirmation require the fair value of the property be credited upon the judgment, interest, taxes and costs. A sale for the full amount of the judgment, taxes, interest and costs shall be deemed adequate.

COMMITTEE NOTES

The provisions of G. S. 60-3463 and G. S. 60-3463a are covered by this section.

60-2516. *Sheriff's Deed as Evidence of Legality; Sufficiency of Order.* Every deed for any lands or tenements heretofore or hereafter made and executed by any sheriff or other officer, purporting to have been made under or in pursuance of any execution, process or judgment of any court of record in this state, shall be sufficient evidence of the legality of the sale and the proceedings therein until the contrary be proved, and shall vest in the purchaser as good and perfect an estate in the premises therein mentioned as was vested in the person or persons against whom the execution, writ or order was issued at or after the time when such lands and tenements became liable to the satisfaction of the judgment or lien for which the same was sold. Any order of confirmation of any such sale shall be sufficient if it shall appear that the court ordered such sheriff or other officer to make to the purchaser a deed or certificate of sale for the lands and tenements so sold.

COMMITTEE NOTES

This section is the same as G. S. 60-3465.

60-2517. *Executions in Special Cases.* (a) *Delivery of Property.* If the execution be for the delivery of the possession of real or personal property, it shall require the officer to deliver the same, particularly describing the property, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered in the same judgment out of the personal

property of the party against whom it was rendered; and for the want of such personal property, then out of the lands and tenements; and in this respect it shall be deemed an execution against the property.

(b) *Execution to Conform to Judgment; Insufficiency.* In special cases not hereinbefore provided for the execution shall conform to the judgment or order of the court. When a judgment for any specified amount, and also the sale of specific real or personal property, shall have been rendered, and an amount sufficient to satisfy the amount of the debt or damages and cost be not made from the sale of property specified, an execution may issue for the balance as in other cases.

COMMITTEE NOTES

The provisions of the above subsections are the same as G. S. 60-3467 to G. S. 60-3469, respectively, except G. S. 60-3468 is omitted. There is to be no attachment of the person.

60-2518. *Judgments of Other Courts.* (a) *Filing in District Court.* In all cases in which a judgment shall be rendered by a court of limited jurisdiction, the party in whose favor the judgment shall be rendered may file a transcript of such judgment in the office of the clerk of the district court of the county in which the judgment was rendered. Thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the appearance and judgment docket, together with the amount of the judgment and time of filing the transcript.

(b) *Judgment Lien.* Such judgment shall be a lien upon the real estate of the judgment debtor, from the day of filing the transcript, in the same manner and to the same extent as if the judgment had been rendered in the district court. A certified copy of the entry of such transcript may be filed in the office of the clerk of the district court of any other county, and shall be a lien on the real estate of the debtor in such county, from the date of the filing of such copy.

(c) *Revivor of Judgment.* If such judgment becomes dormant, it may be revived in the same manner as other judgments in the district court.

(d) *Procedure.* Execution to satisfy the judgment shall proceed in the same manner as original judgments in the district court.

COMMITTEE NOTES

This section is in lieu of G. S. 60-3480 to G. S. 60-3484 providing for enforcement of judgments of the justices of the peace.

60-2519. *Proceedings in Aid of Execution.* When an execution against the judgment debtor or one of several debtors in the same judgment issued to the sheriff of the county where he resides, or, if he does not reside in the state, to the sheriff of the county where judgment was rendered or a transcript of a justice's judgment has been filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order of the probate judge or judge of the district court of the county to which the execution was issued requiring such debtor to appear and answer concerning his property, before such judge, or a referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued.

COMMITTEE NOTES

This section is the same as 60-3486.

ARTICLE 26—LOST OR DESTROYED COURT FILES AND RECORDS

60-2601. *Restoration of Records and Papers Lost or Destroyed.* If any original bond, pleading, process, affidavit, order, judgment, docket entry, journal entry, notice, return, release, record or other paper filed or recorded in any action or proceeding in any court of record be lost or destroyed, the court may restore the same by allowing a copy thereof to be substituted.

COMMITTEE NOTES

This section enlarges G. S. 60-3901 to cover any lost or destroyed instrument in a judicial proceeding.

60-2602. *Application for Restoration.* The application for the restoration or substitution of any such paper or record so lost or destroyed may be made by any party to the action wherein it was filed or recorded, or by any person claiming under such party, and shall be verified by his affidavit.

COMMITTEE NOTES

This section is the same as G. S. 60-3902.

60-2603. *Notice of Hearing of Application.* Notice of the hearing on the application shall be given in the same manner as provided for summons and service of process by Article 3 of this chapter.

COMMITTEE NOTES

This section has been changed to permit notice of the hearing in the same manner as service of process. G. S. 60-3904 and 60-3905 are omitted.

60-2604. *Reopening Proceedings.* Where the notice is given by publication service, the proceedings may be reopened in accordance with the proceedings provided by section 60-310.

COMMITTEE NOTES

This section is in lieu of G. S. 60-3906.

60-2605. *Records Affecting Titles Ceasing to Impart Notice.* Judicial files and records affecting the title to real estate which have been lost or destroyed shall not be deemed to impart constructive notice of their contents, so as to bind purchasers in good faith, unless an application for the restoration of the same shall be filed within one year from date of the destruction or loss.

COMMITTEE NOTES

This section is the same as G. S. 60-3907.

60-2606. *Remedies Deemed Cumulative.* The provisions of this article are cumulative only and shall not be deemed to supplant any other means of establishing lost or destroyed records.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-3908.

ARTICLE 27—GENERAL PROVISIONS

60-2701. *Duties of Clerk of Court.* (a) *General Powers and Duties.* In the performance of his duties all clerks of record shall be under the direction of his court.

(b) *Dockets and Journals.* The clerk of the court shall keep the following dockets and journals and such other books or records as may be ordered by the court.

(1) *Appearance Docket.* The clerk shall keep a book known as "appearance docket" and shall enter therein each civil action. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the page of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the appearance docket on the page assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the

substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made.

(2) *Journal*. On the journal shall be entered the proceedings of the court of each day, and all orders of the judge in vacation or at chambers, and also all judgments entered on confession or default.

(3) *Judgment Docket*. The judgment docket shall be kept in the form of an index, in which the name of each person against whom a judgment is rendered shall appear in alphabetical order. A statement of each judgment upon its rendition shall be entered therein, containing the names of the parties, the amount or nature of the judgment and costs, and the date of its rendition; and if the judgment be against several persons, the entry shall be repeated in the name of each person against whom the judgment is rendered, in alphabetical order.

(4) *Execution Docket*. In the execution docket the clerk shall enter all executions as they are issued by him. The entry shall contain the names of the parties, the date and amount of the judgment and costs, the date of the execution, and the name of the county to which it is issued. The clerk shall also record in full the return of the sheriff to each execution, and such record shall be evidence of such return if the original be mislaid or lost.

(c) *Issuance of Writs and Orders*. All writs and orders for provisional remedies, of every kind, shall be issued by the clerks of the several courts, upon praecipes filed with the clerk, demanding the same.

(d) *Filing and Preservation of Papers*. Except as otherwise provided by law it is the duty of the clerk of each of the courts to file together and carefully preserve in his office all papers delivered to him for that purpose, in every action or special proceeding. He shall keep the papers in each case separate, carefully enveloped in a wrapper or folder labeled with the title of the cause. He shall endorse on every paper filed by him, the day of filing it, and upon every order for a provisional remedy, and upon every undertaking given under the same, the day of its return to his office.

COMMITTEE NOTES

Paragraph (1) of subsection (b) incorporates the provisions of G. S. 60-3802 and 60-3810 but follows the Federal Rule 79(a). Paragraphs (2), (3) and (4) are the same as G. S. 60-3803, 60-3804 and 60-3805 respectively.

Subsection (b) is the same as G. S. 60-3806.

Subsection (d) incorporate the provisions of G. S. 60-3808 and 60-3809.

The provisions remain the same except the word "or folder" is added to permit flat filing if desired.

60-2702. *Duties of Sheriff. Endorsement of Time.* The sheriff shall endorse upon every summons, order of arrest, or for the delivery of property, or of attachment, injunction execution or order of sale, the day and hour it was received by him. He shall execute every summons, order or other process and return the same as required by law.

COMMITTEE NOTES

This section covers the provisions of G. S. 60-3814 and 60-3815.

60-2703. *Deputies.* Any duty enjoined by this chapter upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy as provided by section 60-304.

COMMITTEE NOTES

This section is in lieu of G. S. 60-3817.

60-2704. *Amercement of Officers.* If any clerk of the district court, sheriff, or other officer wilfully refuses, or fails without clearly excusing cause, to discharge or perform a duty imposed upon him under this chapter, or fails to account promptly for any funds or property coming into his possession in any proceeding under this chapter the court may, on the motion of any injured party and with not less than ten days notice, cause such officer to be amerced for the benefit of the injured party in an amount equal to the loss sustained plus ten percent and plus reasonable attorneys fees. Such liability shall also extend to the official bond of the officer.

COMMITTEE NOTES

This is a new general provision to cover amercement of all officers.

60-2705. *Affirmation in Lieu of Oath.* Whenever an oath is required by this code, the affirmation of a person, conscientiously opposed to taking an oath, shall have the same effect.

COMMITTEE NOTES

This section is the same as G. S. 60-3818.

60-2706. *Availability of Other Relief.* If a case arises in which an action or proceeding for the enforcement or protection of a substantive right, or the redress or prevention of a wrong, cannot be had under any specific provisions of this chapter or other statutes then the court shall proceed as nearly in conformity with the provisions of this chapter as the circumstances permit to do whatever law and equity and justice require for the protection of the parties.

COMMITTEE NOTES

This is a general provision assuring procedure if none should be provided.

60-2707. *Amendment by Supreme Court.* The supreme court shall have the power to supplement or amend the provisions of this chapter insofar as they pertain to forms of process, writs, pleadings, motions and the practice and procedure in the district courts or other judicial tribunals to which they are applicable. Such supplements or amendments shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury, oral examination of witnesses, and the right of appeal. Such supplements and amendments shall take effect upon their being filed with the clerk of the supreme court and published in the Supreme Court Reports.

60-2708. *Effective Date.* This act shall take effect January 1, 1964. As to any actions or proceedings commenced prior thereto, the procedures prescribed by this chapter shall apply except that the court in which the same are pending may by order prescribe that an action or proceeding may continue in whole or in part in the manner prescribed by prior law if such prior law would expedite the just and efficient disposition of the particular action or proceeding.

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