

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Bob Frey at  
Chairperson

3:30 ~~am.~~/p.m. on February 9, 1983 in room 526-S of the Capitol.

All members were present except:

Representative Harper was excused.  
Representative Barkis was absent.

Committee staff present:

Mark Burghart, Legislative Research Department  
Mike Heim, Legislative Research Department  
Nedra Spingler, Secretary

Conferees appearing before the committee:

Justice David Prager, Kansas Supreme Court  
Randy Hearrell, Research Director, Kansas Judicial Council  
Kathleen Sebelius, Kansas Trial Lawyers Association  
Jerry Palmer, Kansas Trial Lawyers Association  
Jim Clark, Kansas County and District Attorneys Association  
John Brookens, Kansas Bar Association

The Chairman called attention to suggestions from Jean Colling, Mulvane, concerning HB 2040, HB 2070, and HB 2116 (Attachment No.1).

A hearing was held on HB 2112 relating to place of hearing or trial; HB 2113 relating to time of commencement of action; HB 2115 relating to multidistrict litigation; and HB 2116 relating to jury instruction in certain cases.

Randy Hearrell, Research Director for the Kansas Judicial Council, gave a background of the Council which studies the judicial branch and recommends needed improvements. These bills are the result of Judicial Council committee findings and were requested as legislation by the Judicial Council.

Justice David Prager, Kansas Supreme Court, spoke in support of the bills which resulted from certain cases handed down by the Appellate Court. They attempt to remove impediments to justice. He then reviewed the bills, an outline of which is contained in Attachment No.2.

In discussion Justice Prager said Section 1 of HB 2112 was modeled on federal rules. In HB 2113, although he could not speak for the Judicial Council or its committees, he said he personally would not object to an amendment to the bill suggested by a member to extend the 90-day court order period in certain cases where it is impossible to locate the person to be served although that person may not have left the jurisdiction nor had been hiding.

Kathleen Sebelius, Director of the Kansas Trial Lawyers Association, gave a background of this group and introduced a past president, Jerry Palmer, who spoke to the four bills. In HB 2112, he believed the language in Section 1 (a) had been softened and suggested adding, on line 26, "However, the right of the plaintiff to choose the form shall be an important consideration." Justice Prager, speaking for himself, had no objection to this suggestion. In HB 2113, Mr. Palmer mentioned SB 553, 1982 session, requested by the Trial Lawyers, had not passed. He did not object to the language in HB 2113 but suggested the language in SB 553 (f) (Attachment No.3) would be better. In HB 2115, he suggested amending line 46 by placing a period after "discovery" and deleting "pretrial". Mr. Palmer agreed with all provisions in HB 2116. The Chairman requested him to submit his suggestions in writing to the Committee.

Jim Clark, representing the Kansas County and District Attorneys Association, supported the concept of HB 2116 but believed the language implies if the defense attorney objects, the trial court will not give jury instructions for lesser pleas. This would give an undue advantage to defense attorneys. The matter of trial court discretion should be made clear. Justice Prager said this suggestion might merit consideration.

John Brookens, Kansas Bar Association, said this group endorses all four bills as written.

The meeting was adjourned at 4:40 p.m.

Dear Representative Frey

This is testimony concerning  
HBs 2040, 2070 + 2116.

Please give a copy of this  
testimony to each committee person  
on the Judiciary committee.

Thank you, so very  
much,

Jean Colling  
Mulvane, K2

Honorable Committee Member,

HB 2040 is good because it mentions  
( a person's constitutional rights and respects  
them. The current law, lines 0020-0030,  
is awful. How can a person have a "fair hearing"  
of an appeal on an action of someone employed  
by the Secretary, when the appeals referee or  
committee will be employees of the Secretary?!!  
The Secretary also prescribes the procedure  
for those appeals. It should be that a  
jury of average people - not employees of the  
government - be the judge in SRS appeals.  
After all, this isn't Poland, you know.

Now for some positive stuff. I whole  
heartedly approve of HB 2116. It is a step  
towards the freedom and justice we're  
supposed to have in the courts. Also HB  
2070 is needed because there are  
( people who would use a child's immature  
misunderstandings against the parent in  
a court of law. see ya, Sean Colling

Approved and Proposed by the Judicial Council.

Product of the Judicial Council Civil Code Advisory  
Committee composed of:

Marvin E. Thompson, Chairman, Russell

Judge Terry L. Bullock, Topeka

Emmet A. Blaes, Wichita

Professor Robert Casad, Lawrence

Chief Judge J. Richard Foth, Topeka

Morris D. Hildreth, Coffeyville

Justice David Prager, Topeka

Richard O. Shannon, Kansas City, and

Leonard O. Thomas, Kansas City

It amends K.S.A. 60-609 and 60-612 which govern changes  
of venue in civil cases.

Section 1 -- NEW SECTION

It is similar to the federal change of venue rule,  
28 USCA 1404a.

Under present law, if a case is filed in a county which  
is not a forum where the case can be disposed of with  
the convenience of the parties, the case must be  
dismissed and refiled.

See Quillin v. Hesston Corp., 230 Kan. 591 (1982).

Section 1 makes it possible for a trial court on motion of a party to transfer any civil action to any county where it might have been brought.

It is to be used, for example, where all witnesses are in another county or a view by the jury is necessary.

Section 1 (b) is essentially the present K.S.A. 60-609.

Section 1 (c) -- (NEW SECTION)

Permits the trial court to change the place of trial to any other county, in or outside the district.

Requires:

- (1) Agreement of all parties not in default
- (2) Approval of trial court
- (3) Approval of Supreme Court.

Section 2 -- Amends 60-612

Permits a non-jury hearing in any county agreed upon by the parties and with approval of trial court.

The venue of the action remains in the original county where case was filed.

Permits greater flexibility for the convenience of the parties.

Examples

(1) Judge Brookens-Topeka lawyers go to Pottawatomie and dispose of a matter pending in Jefferson County.

(2) Important witness in a hospital in a different county. Testimony may be heard by the trial judge.

HOUSE BILL 2113

Approved and Proposed by the Judicial Council.

Amends K.S.A. 60-203 which now is a combination of Sections 1(a) and 1(c).

Section 1 (b) is the new section.

It has been proposed to avoid a most unjust result, due to a technicality under the present law.

Read Judge Buchele's letter to Senator Pomeroy.

Proposal is the result of two cases:

- (1) Haley v. Hershberger, 207 Kan. 459 (1971).  
Service on defendant's secretary.
- (2) Bray v. Bayles, 228 Kan. 481 (1980).  
Service on a doctor's secretary.

This section covers situations where the sheriff's return shows that proper service was made, when, in fact, it was defective within the technical requirements of the statute.

The defendant, although receiving the process, delays the case, participates in discovery until the statute of limitations has run, and then asserts the bar of the statute of limitations as a defense.

This is a gross injustice.

House Bill 2113 - Page 2

House Bill No. 2235 filed by Representative Peterson also seeks to amend K.S.A. 60-203 by providing that "the court may extend the 90-day period upon a showing of good cause.



Handwritten letter from James Buchele to Elwaine Pomeroy

Elwaine,

I just dismissed a medical malpractice case because service was made on the doctor's secretary. His insurance carrier had notice and all papers within the week. I am unsure whether the sheriff may be sued as the return was made showing "personal service", when in fact it was made on the secretary.

The area is a mess in that sheriff's deputies don't want to be chasing down Dr's at hospitals or be kept waiting for long periods of time in Drs. offices.

I would suggest that thought be given to amending 60-304 (a) to permit service of summons at the business office of the defendant and upon an employee of the defendant who is authorized to receive mail and other business communications who will agree to accept service on her employer's behalf.

This would permit the Dr. to decide if he wants his secretary to take service or get it at the operating room door or nursing station at the hospital.

Thanks

s/ Jim

HOUSE BILL 2115

Approved and proposed by the Judicial Council.

Amends K.S.A. 60-242 by adding a new section (c) to cover multidistrict litigation.

Proposal arose as a result of the Whipperwill tragedy when a pleasure boat capsized in a windstorm on Lake Pomona and several passengers drowned.

Applies where multiple causes of action arise out of a common disaster.

For example:

The Hyatt Hotel disaster in Kansas City.

This section would have the effect of making it possible to consolidate cases across district lines where today this can be done only between counties within a particular judicial district.

Cases having common issues of law or fact could be consolidated for discovery, pretrial proceedings, summary judgment, and even for trial in some cases.

HOUSE BILL 2116

Approved and proposed by the Judicial Council.

Product of the Judicial Council Criminal Law Advisory  
Committee composed of:

Judge James J. Noone, Chairman, Wichita

Judge William Clement, Junction City

Michael Crow, Leavenworth

A. Jack Focht, Wichita

Judge Earle Jones, Olathe

Michael Lerner, Kansas City

Judge Michael Malone, Lawrence

Steven L. Opat, Junction City

Senator Elwaine Pomeroy, Topeka, and

Loren Taylor, Kansas City.

It amends K.S.A. 21-3107(3), by changing one sentence.

This bill seeks to solve a problem arising in criminal  
cases where lesser offenses may be involved.

This amendment, in substance, seeks to avoid the  
sandbagging of the trial court by defense counsel.

Example:

A defendant is charged with murder in the first degree.

The trial court wants to instruct on the lesser degrees of homicide.

Defense counsel objects to such instructions on strategy grounds. The trial court follows the request of defense counsel.

Defendant is convicted of murder first degree. On appeal, defendant argues it was error to fail to instruct on the lesser offenses of homicide even though he objected to the trial court's doing so.

The conviction is reversed under the present statute K.S.A. 21-3107.

See State v. Weyer, 210 Kan. 721 (1972).

It is often extremely difficult for the trial court and counsel to know whether a particular criminal charge has lesser included offenses.

This amendment simply precludes defense counsel in a criminal case from raising the issue on appeal, if he has specifically objected to instructions on lesser offenses in the trial court.

0082 service of process; ~~and~~; or (4) if the agent is one authorized by law  
0083 to receive service and the law so requires, by also mailing a copy  
0084 to the defendant.

0085 *(f) Sufficiency of other service. Service of process shall be*  
0086 *deemed sufficient if any appearance is made by counsel or by*  
0087 *any person to be served when the appearance is made prior to*  
0088 *the entry of judgment. Failure to perfect service as provided in*  
0089 *this section shall give the party not otherwise served additional*  
0090 *time to answer or otherwise plead but it shall not be grounds for*  
0091 *dismissal of the action..*

0092 ~~(f)~~ (g) *Foreign corporation resident agent.* Service of process  
0093 or service of any notice or demand required or permitted by law  
0094 to be served on a foreign corporation may also be made on such  
0095 corporation by service thereof on the resident agent of such  
0096 corporation. Whenever any foreign corporation authorized to  
0097 transact business or transacting business without authority in this  
0098 state shall fail to appoint or maintain in this state a resident agent  
0099 upon whom service of legal process or service of any such notice  
0100 or demand may be had, or whenever any such resident agent of  
0101 such corporation cannot with reasonable diligence be found at  
0102 the registered office in this state, or whenever the certificate of  
0103 authority of any foreign corporation shall be forfeited, then and  
0104 in every such case the secretary of state shall be irrevocably  
0105 authorized as the agent and representative of such foreign corpo-  
0106 ration to accept service of any process, or service of any notice or  
0107 demand required or permitted by law to be served upon such  
0108 corporation. Service on the secretary of state of any such process,  
0109 notice or demand against any such foreign corporation shall be  
0110 made by delivering to and leaving with the secretary, or with any  
0111 clerk having charge of the corporation department of the secre-  
0112 tary's office, duplicate copies of such process, and duplicate  
0113 copies of the petition, notice or demand or the clerk of the court  
0114 may send such duplicate copies directly to the secretary of state  
0115 by restricted mail. In the event that any process, notice or demand  
0116 is served on the secretary of state, the secretary shall immediately  
0117 cause a copy thereof to be forwarded by restricted mail, addressed  
0118 to such corporation at its principal office as the same appears in

0119 the records of the secretary of state, or to the registered or  
0120 principal office of such corporation in the state of its incorpora-  
0121 tion. The secretary of state shall keep a record of all processes  
0122 notices and demands served upon the secretary under this rule  
0123 and shall record therein the time of such service and the action of  
0124 the secretary with reference thereto. A fee of \$5 shall be paid to  
0125 the secretary of state by the party requesting such service or  
0126 process to cover the cost thereof. Such fee shall not be included  
0127 within or paid from any deposit as security for costs or docket fee  
0128 required by subsection (a) of K.S.A. 60-2001 or of K.S.A. 61-2501.

0129 ~~(g)~~ (h) *Insurance companies or associations.* Service of sum-  
0130 mons or other process may also be made on any insurance  
0131 company or association, organized under the laws of the state of  
0132 Kansas by service on the commissioner of insurance in the same  
0133 manner as that provided for service on foreign insurance compa-  
0134 nies. All the requirements of law relating to service on foreign  
0135 insurance companies so far as applicable shall also apply to  
0136 domestic insurance companies.

0137 ~~(h)~~ (i) *Acknowledgment or appearance.* An acknowledgment  
0138 of service on the summons, or the voluntary general appearance  
0139 of a defendant, is equivalent to service.

0140 ~~(i)~~ (j) *Refusal to accept service.* In all cases when the person  
0141 to be served, or an agent authorized by such person to accept  
0142 service of summonses and petitions, shall refuse to receive copies  
0143 thereof, the offer of the duly authorized process server to deliver  
0144 copies thereof, and such refusal, shall be a sufficient service of  
0145 such summons and petition. If the plaintiff, the plaintiff's agent  
0146 or attorney shall file an affidavit that to the best of the affiant's  
0147 knowledge and belief the defendant is a nonresident who is  
0148 employed in this state, or that the place of residence of the  
0149 defendant is unknown, then the affiant may direct that the service  
0150 of summons or other process shall be made by the sheriff or other  
0151 duly authorized person by directing an officer, partner, managing  
0152 or general agent or the person having charge of the office or place  
0153 of employment at which the defendant is employed, to make the  
0154 defendant available for the purpose of permitting the sheriff or  
0155 such other duly authorized person to serve the summons or other