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or more persons by the use of force or any other means with the intent to exercise control over the aircraft.

Aircraft piracy is a class A felony. [L. 1973, ch. 138, § 1; July 1.]

Article 35.—SEX OFFENSES

21-3501. Definitions. The following definitions apply in this article unless a different meaning is plainly required:

(1) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ;

(2) "Unlawful sexual act" means any rape, indecent liberties with a child, sodomy, aggravated sodomy, or lewd and lascivious behavior, as defined in this article.

(3) "Woman" means any female human being. [L. 1969, ch. 180, § 21-3501; July 1, 1970.]

Revisor's Note:

For Judicial Council comment, see 21-3502.

21-3502. Rape. (1) Rape is the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed under any of the following circumstances:

(*a*) When a woman's resistance is overcome by force or fear; or

(*b*) When the woman is unconscious or physically powerless to resist; or

(*c*) When the woman is incapable of giving her consent because of mental deficiency or disease, which condition was known by the man or was reasonably apparent to him; or

(*d*) When the woman's resistance is prevented by the effect of any alcoholic liquor, narcotic, drug or other substance administered to the woman by the man or another for the purpose of preventing the woman's resistance, unless the woman voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(2) Rape is a class C felony. [L. 1969, ch. 180, § 21-3502; July 1, 1970.]

Source or prior law: 21-424, 21-425.

Judicial Council, 1968: Rape was not defined in the former statutes of Kansas. The crime was described as "carnally and unlawfully knowing" and as "forcibly ravishing" any female. While these terms have accepted common law meanings, it seems desirable that the crime should be more specifically defined. Also, the term "sexual intercourse" is specifically defined for the sake of clarity. The section does not change the former law relating to forcible rape. It simply seeks to clarify.

The section contains elements of New Mexico Criminal Code, 9-1 and 9-2.

CASE ANNOTATIONS

1. Conviction upheld; due process not violated by lineup procedure; counsel present during viewing. State v. Kelly, 210 K. 192, 499 P. 2d 1040.

2. Conviction hereunder affirmed; search not objectionable; prior rapes admissible; lesser included crimes instruction not required. State v. Masqua, 210 K. 419, 502 P. 2d 728.

3. Cited; conviction under prior statute set aside as being duplicitous. Jarrell v. State, 212 K. 171, 510 P. 2d 127.

4. Conviction hereunder upheld; statement of accused not inadmissible solely because counsel not present. State v. Nichols, 212 K. 814, 512 P. 2d 329.

21-3503. Indecent liberties with a child. (1) Indecent liberties with a child is engaging in either of the following acts with a child under the age of sixteen (16) years who is not the spouse of the offender:

(*a*) The act of sexual intercourse;

(*b*) Any fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

(2) Indecent liberties with a child is a class C felony. [L. 1969, ch. 180, § 21-3503; July 1, 1970.]

Source or prior law: 21-424.

Judicial Council, 1968: This section is in lieu of the former provision relating to statutory rape. The name of the crime has been changed. The prohibited conduct includes not only sexual intercourse, but other indecent sexual conduct. Moreover, the section applies to the one who submits to as well as performs indecent acts with a child. Thus, the female participant in a sexual relationship with a child might be prosecuted under this section.

The section adopts part of the Illinois Criminal Code, 11-4.

Law Review and Bar Journal References:

Cited in "Walton's Castle: The Spectrum of 'I Am Curious—Yellow'," Edwin P. Carpenter, 10 W. L. J. 163, 174 (1970).

CASE ANNOTATIONS

1. Failure to give aiding and abetting instruction not error in prosecution hereunder. State v. Ingram, 211 K. 587, 506 P. 2d 1148.

2. Cited in dismissal of state reserved question appeal arising from prosecution hereunder. State v. Chittenden, 212 K. 178, 510 P. 2d 152.

3. Conviction hereunder upheld; statement of accused not inadmissible solely because counsel not present. State v. Nichols, 212 K. 814, 512 P. 2d 329.

21-3504. Indecent liberties with a ward. Indecent liberties with a ward is either of the following acts when committed with a child under the age of sixteen (16) years by any guardian, proprietor or employee of any foster home, orphanage, or other public or private

institution for the care and custody of minor children, to whose charge such child has been committed or entrusted by any court, probation officer, department of social welfare or other agency acting under color of law:

(*a*) The act of sexual intercourse;

(*b*) Any fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender or both.

Indecent liberties with a ward is a class B felony. [L. 1969, ch. 180, § 21-3504; July 1, 1970.]

Source or prior law: 21-909.

Judicial Council, 1968: The advisory committee was of the view that the crime of indecent liberties with a child is more reprehensible when committed by a person in whose charge the child has been placed by a court or other agency acting pursuant to law. Hence, the crime of indecent liberties with a ward is defined and a more severe penalty is provided.

CASE ANNOTATIONS

1. Conviction hereunder upheld; victim was defendant's ward although not placed in his custody by department of social welfare. State v. Dunham, 213 K. 469, 470, 472, 475, 476, 517 P. 2d 150.

21-3505. Sodomy. Sodomy is oral or anal copulation between persons who are not husband and wife or consenting adult members of the opposite sex, or between a person and an animal, or coitus with an animal. Any penetration, however slight, is sufficient to complete the crime of sodomy.

Sodomy is a class B misdemeanor. [L. 1969, ch. 180, § 21-3505; July 1, 1970.]

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3506.

CASE ANNOTATIONS

1. Sufficient evidence of penetration for reasonable inference that defendant committed aggravated sodomy. State v. Kelly, 210 K. 192, 499 P. 2d 1040.

21-3506. Aggravated sodomy. Aggravated sodomy is sodomy committed:

(*a*) With force or threat of force, or where bodily harm is inflicted on the victim during the commission of the crime; or

(*b*) With a child under the age of sixteen (16) years.

Aggravated sodomy is a class B felony. [L. 1969, ch. 180, § 21-3506; July 1, 1970.]

Source or prior law: 21-907.

Judicial Council, 1968: Former K. S. A. 21-907 prohibited the "detestable and abominable crime against nature, committed with mankind and with beast." The elements of the crime were not specified. Section 21-3505 identifies the conduct ordinarily included in the crime of sodomy or crime against nature. It probably does not materially change the former law. It only seeks to clarify. Some of the new codes have abandoned the term "sodomy" and instead employ the terms "deviate sexual conduct" or "sexual perversion." See Illinois Criminal Code, 11-2 and Wisconsin Criminal Code, 944.17.

Sexual crimes involving violence and those against children are usually regarded as more serious. Hence, section 21-3506 defines a distinct crime of aggravated sodomy and permits a more severe penalty.

The language is similar to New Mexico Criminal Code, 9-6.

21-3507. Adultery. (1) Adultery is sexual intercourse by a person with another who is not his spouse if

(*a*) Such person is married; or

(*b*) Such person is not married and knows that the other person involved in such intercourse is married.

(2) Adultery is a class C misdemeanor [L. 1969, ch. 180, § 21-3507; July 1, 1970.]

Source or prior law: 21-908.

Judicial Council, 1968: Adultery was not defined in the laws of Kansas, although it was made criminal (former K. S. A. 21-908). Hence, the courts adhered to the common law concept and held that adultery cannot be committed by an unmarried person (*State v. Chafin*, 80 Kan. 653). The section is applicable to extramarital sexual intercourse committed both by a married person and by a single person who has knowledge that his partner in the amorous frolic is married.

Law Review and Bar Journal References:

Former K. S. A. 21-908 mentioned in discussing the legal problems concerning heterologous insemination, M. Martin Halley, 69 J. K. M. S. 487, 488 (1968).

Cited as example of certain crimes being a felony in some jurisdictions and a misdemeanor in others, Lawrence J. Beilman, 9 W. L. J. 469 (1970).

21-3508. Lewd and lascivious behavior. (1) Lewd and lascivious behavior is:

(*a*) The commission of an act of sexual intercourse or sodomy with any person or animal with knowledge or reasonable anticipation that the participants are being viewed by others; or

(*b*) The exposure of a sex organ in the presence of a person who is not the spouse of the offender or who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another.

(2) Lewd and lascivious behavior is a class B misdemeanor. [L. 1969, ch. 180, § 21-3508; July 1, 1970.]

Source or prior law: 21-908.

Judicial Council, 1968: This section and the preceding one restate the substance of former K. S. A. 21-908. The former statute uses such epithets as "lewdness," "lascivious behavior," "indecency," "grossly scandalous," etc., without defining the terms. This section attempts to identify the conduct to which the epithets apply.

The section is adapted from the Wisconsin Criminal Code, 944.20.

Law Review and Bar Journal References:

Former K. S. A. 21-908 mentioned in discussing the legal problems concerning heterologous insemination, M. Martin Halley, 69 J. K. M. S. 487, 488 (1968).

21-3509. Enticement of a child. Enticement of a child is inviting, persuading or attempting to persuade a child under the age of sixteen (16) years to enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the person of said child.

Enticement of a child is a class D felony. [L. 1969, ch. 180, § 21-3509; July 1, 1970.]

Revisor's Note:

For Judicial Council comment, see 21-3511.

21-3510. Indecent solicitation of a child. Indecent solicitation of a child is the accosting, enticing or soliciting of a child under the age of sixteen (16) years to commit or to submit to an unlawful sexual act.

Indecent solicitation of a child is a class A misdemeanor. [L. 1969, ch. 180, § 21-3510; July 1, 1970.]

Revisor's Note:

For Judicial Council comment, see 21-3511.

21-3511. Aggravated indecent solicitation of a child. Aggravated indecent solicitation of a child is the accosting, enticing or soliciting of a child under the age of twelve (12) years to commit or to submit to an unlawful sexual act.

Aggravated indecent solicitation of a child is a class E felony. [L. 1969, ch. 180, § 21-3511; July 1, 1970.]

Judicial Council, 1968: Sexual crimes against children are often committed in vehicles, buildings or secluded places. Section 21-3509 is intended to protect the child from exposure to the danger of being induced to enter such a place by a person who intends to abuse the child sexually. Under this section, the gist of the crime is the invitation to enter, coupled with the unlawful intent.

Sections 21-3510 and 21-3511 prohibit the solicitation or invitation to the child to participate in the unlawful act. The solicitation may be in a public as well as in a private place. It involves no effort to obtain control over the child's person in a secluded location.

New Mexico Criminal Code, 9-10, and Wisconsin Criminal Code, 944.12, have been used as guides in drafting. Also, note that 21-3510 and 21-3511 cover substantially the same conduct as former K. S. A. 38-711.

21-3512. Prostitution. Prostitution is performing an act of sexual intercourse for hire, or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire.

Prostitution is a class B misdemeanor. [L. 1969, ch. 180, § 21-3512; July 1, 1970.]

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3515.

21-3513. Promoting prostitution. (1) Promoting prostitution is:

(*a*) Establishing, owning, maintaining or managing a house prostitution, or participating in the establishment, ownership, maintenance, or management thereof; or

(*b*) Permitting any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; or

(*c*) Procuring a prostitute for a house of prostitution; or

(*d*) Inducing another to become a prostitute; or

(*e*) Soliciting a patron for a prostitute or for a house of prostitution; or

(*f*) Procuring a prostitute for a patron; or

(*g*) Procuring transportation for, paying for the transportation of, or transporting a person within this state with the intention of assisting or promoting that person's engaging in prostitution; or

(*h*) Being employed to perform any act which is prohibited by this section.

(2) Promoting prostitution is a class A misdemeanor. [L. 1969, ch. 180, § 21-3513; July 1, 1970.]

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3515.

Law Review and Bar Journal References:

Cited in discussion of civil remedies in "The Obscenity Law's Application in Kansas: Issues and Procedures," Stan N. Wilkins, 12 W. L. J. 185, 196 (1973).

21-3514. Habitually promoting prostitution. Habitually promoting prostitution is the commission of any act constituting promoting prostitution, as defined in section 21-3513, by a person who has, prior to the commission of such act, been convicted of a prior violation of said section 21-3513.

Habitually promoting prostitution is a class

E felony. [L. 1969, ch. 180, § 21-3514; July 1, 1970.]

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3515.

Law Review and Bar Journal References:

Discussed and analyzed in "The Kansas Habitual Criminal Act," Bruce E. Miller, 9 W. L. J. 244, 258 (1970).

Cited in discussion of civil remedies in "The Obscenity Law's Application in Kansas: Issues and Procedures," Stan N. Wilkins, 12 W. L. J. 185, 196 (1973).

21-3515. Patronizing a prostitute. (1) Patronizing a prostitute is either:

(*a*) Knowingly entering or remaining in a house of prostitution with intent to engage in sexual intercourse or any unlawful sexual act with a prostitute; or

(*b*) Knowingly hiring a prostitute to engage in sexual intercourse or any unlawful sexual act.

(2) Patronizing a prostitute is a class C misdemeanor. [L. 1969, ch. 180, § 21-3515; July 1, 1970.]

Source or prior law: 21-426, 21-427, 21-428, 21-937, 21-938, 21-939, 21-940, 21-942, 38-705.

Judicial Council, 1968: Prostitution, *per se*, was not prohibited by the laws of Kansas. Penalties were provided for keeping a place of prostitution, soliciting, taking a woman for purposes of prostitution, etc. However, there were both gaps and overlaps to be encountered. The sections attempt to cover the ground more completely and, at the same time, to collect and systematize material formerly scattered through several sections and articles.

Section 21-3515 creates a new crime. The view of the committee is simply that both parties to a prohibited transaction share in the culpability and both should be dealt with accordingly.

Note that the persistent violation of section 21-3513 is to be treated as a felony under 21-3514. Proof of a crime under 21-3514 would include proof of a prior conviction under 21-3513.

The section draws upon Illinois Criminal Code, 11-14, and New Mexico Criminal Code, 9-12 and 9-13.

Article 36.—CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

21-3601. Bigamy. (1) Bigamy is any of the following:

(*a*) Marriage within this state by any person who shall have another spouse living at the time of such marriage;

(*b*) Marriage within this state by an unmarried person to a person known to such unmarried person to be the spouse of some other person;

(*c*) Cohabitation within this state after marriage in another state or country under circumstances described in subsection (1) (*a*) or subsection (1) (*b*) of this section.

(2) It shall be a defense to a charge of bigamy that the accused reasonably believed the prior marriage had been dissolved by death, divorce or annulment.

(3) Bigamy is a class E felony. [L. 1969, ch. 180, § 21-3601; July 1, 1970.]

Source or prior law: 21-901, 21-902, 21-903, 21-905.

Judicial Council, 1968: The section substantially restates the law of Kansas. Note, however, that fewer defenses are stated in the new statute. Also, the definition of bigamy includes the crime of cohabiting within the state after a bigamous marriage without, now prohibited by a separate section.

The section follows former K. S. A. 21-901 and 21-905 and Illinois Criminal Code, 11-12.

Revisor's Note:

Procedural aspects, see K. S. A. 22-2613.

21-3602. Incest. Incest is marriage to or engaging in sexual intercourse with a person known to the defendant to be related to him as brother or sister of the one-half as well as the whole blood, uncle, aunt, nephew or niece.

Incest is a class E felony. [L. 1969, ch. 180, § 21-3602; July 1, 1970.]

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3603.

21-3603. Aggravated incest. (1) Aggravated incest is sexual intercourse or any unlawful sexual act by a parent with a person he knows is his child.

(2) Parent for the purposes of this section means a natural father or mother, an adoptive father or mother, a stepfather or stepmother or a grandfather or grandmother of any degree.

(3) Child for the purposes of this section means a son, daughter, grand son or granddaughter, regardless of legitimacy or age; and also means a stepson or stepdaughter or adopted son or adopted daughter under the age of eighteen (18).

(4) Aggravated incest is a class D felony. [L. 1969, ch. 180, § 21-3603; July 1, 1970.]

Source or prior law: 21-906.

Judicial Council, 1968: Two grades of incest are included in the new sections. It is the view of the committee that sexual intercourse between parent and child is more reprehensible than similar acts between others within the prohibited degrees of relationship. The definition of the term "child" does not include an adopted child or stepchild who is 18 years of age or older. It was the drafting committee's thought when the child has reached the

age of consent and discretion and is not related by blood to the other partner in the enterprise, the matter should be treated as any other sexual conduct between consenting, non-related adults.

In drafting, the committee relied upon former K. S. A. 21-906 and K. S. A 23-102 and Illinois Criminal Code, 11-11.

21-3604. Abandonment of a child. Abandonment of a child is the leaving of a child under the age of sixteen (16) years, in a place where such child may suffer because of neglect, by the parent, guardian or other person to whom the care and custody of such child shall have been entrusted, when done with intent to abandon such child.

Abandonment of a child is a class E felony. [L. 1969, ch. 180, § 21-3604; July 1, 1970.]

Source or prior law: 21-441.

Judicial Council, 1968: The section is similar in content to former K. S. A. 21-441, but it has been broadened. Also, the maximum age of protected children is stated in the statute.

The idea is found in many statutes. The language "in a place where he may suffer because of neglect," comes from Wisconsin Criminal Code, 940.28.

21-3605. Nonsupport of a child or spouse. (1) (*a*) Nonsupport of a child is a parent's failure, neglect or refusal without lawful excuse to provide for the support and maintenance of his child in necessitous circumstances.

(*b*) As used in this section, "child" means a child under the age of sixteen (16) years, and includes an adopted child or a child born out of wedlock whose parentage has been judicially determined or has been acknowledged in writing by the person to be charged with the support of such child.

(*c*) At any time before the trial, upon petition and notice, the court, or a judge thereof, may enter such temporary order as may seem just providing for support of such child, and may punish for violation of such order as for contempt.

(*d*) At any stage of the proceeding, instead of imposing the penalty hereinafter provided, or in addition thereto, the court, in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order which shall be subject to change by the court from time to time, as circumstances may require, directing the defendant to pay a certain sum periodically, for a term not exceeding the period during which the obligation to support shall continue, to the guardian, conservator or custodian of said child or to an organization or individual approved by the court as trustee; and shall also have the power to release the defendant from custody on probation for the period so fixed, upon his entering into a recognizance, with or without surety in such sum as the court or a judge thereof may order and approve. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court whenever ordered to do so, and shall further comply with the terms of such order of support, or of any subsequent modification thereof, then such recognizance shall be void, otherwise of full force and effect.

(*e*) If the court be satisfied by due proof that at any time during the period while the obligation to support continues the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her under the original conviction, or enforce the suspended sentence as the case may be.

(*f*) A preponderance of the evidence shall be sufficient to prove that the defendant is the father or mother of such child. In no prosecution under this act shall any existing statute or rule of law prohibiting the disclosure of confidential communications between husband and wife apply, and both husband and wife shall be competent witnesses to testify against each other to any and all relevant matters, including the parentage of such child. Proof of the nonsupport of such child in necessitous circumstances or neglect or refusal to provide for the support and maintenance of such child shall be prima facie evidence that such neglect or refusal is willful.

(*g*) Nonsupport of a child is a class E felony.

(2) (*a*) Nonsupport of a spouse is an individual's failure without just cause to provide for the support of his spouse in necessitous circumstances.

(*b*) At any time before the trial in a prosecution for non-support of a spouse, upon petition and notice, the court, or a judge thereof, may enter such temporary order as may seem just providing for support of such spouse, and may punish for violation of such order as for contempt.

(*c*) At any stage of the proceeding, instead of imposing the penalty hereinafter provided, or in addition thereto, the court, in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order which shall be subject to change by

the court from time to time, as circumstances may require, directing the defendant to pay a certain sum periodically, for a term not exceeding the period during which the obligation to support shall continue, to the spouse or to the guardian or conservator of said spouse or to an organization or individual approved by the court as trustee; and shall also have the power to release the defendant from custody on probation for the period so fixed, upon his entering into a recognizance, with or without surety in such sum as the court or a judge thereof may order and approve. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court whenever ordered to do so, and shall further comply with the terms of such order of support, or of any subsequent modification thereof, then such recognizance shall be void, otherwise of full force and effect.

(*d*) If the court be satisfied by due proof that at any time during the period while the obligation to support continues the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her under the original conviction, or enforce the suspended sentence as the case may be.

(*e*) Nonsupport of a spouse is a class E felony. [L. 1969, ch. 180, § 21-3605; L. 1970, ch. 124, § 4; July 1.]

Source or prior law: 21-442, 21-443, 21-444, 21-445, 21-446.

Judicial Council, 1968: The former law of Kansas protected both the wife and children. It was based upon the Uniform Desertion and Non-Support Act which was drafted in 1910. The proposal substantially follows the former law.

Subsection (1) (*b*) makes the act specifically applicable to adopted children and illegitimate children whose paternity has been judicially established or acknowledged in writing. Note, under the present statutes of Kansas, paternity is regularly and normally an issue only in a bastardy proceeding. It may be proper to provide for a special proceeding in which a preliminary determination of paternity may be made. Such a section probably should be located in the chapter on procedure.

The section was based largely on former K. S. A. 21-442 through 21-447, as modified.

Law Review and Bar Journal References:

Mentioned; definition of "nonsupport of a spouse" limited; under prior law, it was failure to support where the individual knew of an existing legal obligation to provide support, Robert F. Bennett, 39 J. B. A. K. 107, 185 (1970).

21-3606. Criminal desertion. Criminal desertion is a husband's or wife's abandonment or willful failure without just cause to provide for the care, protection or support of a spouse who is in ill health or necessitous circumstances.

Criminal desertion is a class E felony. [L. 1969, ch. 180, § 21-3606; July 1, 1970.]

Judicial Council, 1968: This section supplements section 21-3605. Penalties are imposed for desertion of either spouse who is ill or in necessitous circumstances.

21-3607. Encouraging juvenile misconduct. Encouraging juvenile misconduct is knowingly:

(a) Encouraging any person subject to the Kansas juvenile code to violate any law of the state; or

(*b*) Causing or permitting any person subject to the Kansas juvenile code to be or remain in any house of prostitution or any room or place where intoxicating liquor is unlawfully kept, possessed, sold or bartered or any gambling place.

Encouraging juvenile misconduct is a class B misdemeanor. [L. 1969, ch. 180, § 21-3607; July 1, 1970.]

Source or prior law: 38-712.

Judicial Council, 1968: Part of the substance of the section was formerly found in the Juvenile Code, former K. S. A. 38-712. However, one who actually causes a child to commit a crime would be liable under 21-3205. "Gambling place" is defined in 21-4302 (5).

21-3608. Endangering a child. (1) Endangering a child is willfully:

(a) Causing or permitting a child under the age of eighteen (18) years to suffer unjustifiable physical pain or mental distress; or

(*b*) Unreasonably causing or permitting a child under the age of eighteen (18) years to be placed in a situation in which its life, body or health may be injured or endangered.

(*c*) Nothing in this section shall be construed to mean a child is endangered for the sole reason his parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child.

(2) Endangering a child is a class A misdemeanor. [L. 1969, ch. 180, § 21-3608; July 1, 1970.]

Source or prior law: 38-713.

21-3609. Abuse of a child. Abuse of a child is willfully torturing, cruelly beating or inflicting cruel and inhuman corporal punish-

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umpire, referee, judge or otherwise to officiate at a sports contest.

(3) Sports bribery is a class E felony. [L. 1969, ch. 180, § 21-4406; July 1, 1970.]

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-4408.

21-4407. Receiving a sports bribe. Receiving a sports bribe is:

(*a*) Accepting, agreeing to accept or soliciting by a sports participant of any benefit from another person upon an understanding that such sports participant will thereby be influenced not to give his best efforts in a sports contest; or

(*b*) Accepting, agreeing to accept or soliciting by a sports official any benefit from another person upon an understanding that he will perform his duties improperly.

Receiving a sports bribe is a class A misdemeanor. [L. 1969, ch. 180, § 21-4407; July 1, 1970.]

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-4408.

21-4408. Tampering with a sports contest. Tampering with a sports contest is seeking to influence a sports participant or sports official, or tampering with any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages governing such contest and with intent to influence the outcome of such contest.

Tampering with a sports contest is a class E felony. [L. 1969, ch. 180, § 21-4408; July 1, 1970.]

Source or prior law: 21-2469, 21-2470.

Judicial Council, 1968: The Kansas legislature of 1963 passed legislation prohibiting bribery and receiving bribes in connection with sports contests. The provisions were found in former K. S. A. 21-2469 and 21-2470. Sections 21-4406 and 21-4407 cover the same offenses.

Section 21-4408 is new. It covers meddling or interference other than by means of bribery.

The language for all these sections is drawn from New York Penal Law, 180.35 to 180.50.

21-4409. Knowingly employing an alien illegally within the territory of the United States. (*a*) Knowingly employing an alien illegally within the territory of the United States is the employment of such alien within the state of Kansas by an employer who knows such person to be illegally within the territory of the United States.

(*b*) Knowingly employing an alien illegally within the territory of the United States is a class C misdemeanor. [L. 1973, ch. 140, § 1; July 1.]

Part III.—Classification of Crimes and Sentencing

Article 45.—CLASSIFICATION OF CRIMES AND PENALTIES

Law Review and Bar Journal References:

Discussed and analyzed in "The Kansas Habitual Criminal Act," Bruce E. Miller, 9 W. L. J. 244, 251, 252, 256, 263, 266 (1970).

21-4501. Classification of felonies and terms of imprisonment. For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

(*a*) Class A, the sentence for which shall be death or imprisonment for life. If there is a jury trial the jury shall determine which punishment shall be inflicted. If there is a plea of guilty or if a jury trial is waived the court shall determine which punishment shall be inflicted and in so doing shall hear evidence;

(*b*) Class B, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than five (5) years nor more than fifteen (15) years and the maximum of which shall be life;

(*c*) Class C, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one (1) year nor more than five (5) years and the maximum of which shall be twenty (20) years;

(*d*) Class D, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one (1) year nor more than three (3) years and the maximum of which shall be ten (10) years;

(*e*) Class E, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be one (1) year and the maximum of which shall be five (5) years;

(*f*) Unclassified felonies, which shall include all crimes declared to be felonies without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no sentence is provided in such law, the offender shall be sentenced as for a class E felony. [L. 1969, ch. 180, § 21-4501; July 1, 1970.]

Revisor's Note:

For Judicial Council comment, see 21-4503.

Law Review and Bar Journal References:

Cited in an article on sentencing felons under the criminal code, Raymond W. Baker, 10 W. L. J. 269, 274 (1971).

Cited in article concerning obscenity law, Michael J. Lichty, 19 K. L. R. 789, 792 (1971).

Cited in "Arrest Under the New Kansas Criminal Code," Keith G. Meyer, 20 K. L. R. 685, 720 (1972).

Cited in article concerning parole eligibility for prisoners serving consecutive sentences in Kansas, Malcolm E. Wheeler, 21 K. L. R. 167, 173 (1973).

CASE ANNOTATIONS

1. Search with warrant for narcotics not unconstitutional. State v. Loudermilk, 208 K. 893, 494 P. 2d 1174.

2. Construed; class B felonies; minimum and maximum sentences; error in fixing minimum term; conviction affirmed; sentence modified. State v. Frye, 209 K. 520, 522, 496 P. 2d 1403.

3. Aggravated robbery; maximum sentence under subsection (*b*); no prejudice shown without a reasonable question of partiality. State v. Skinner, 210 K. 354, 356, 503 P. 2d 168.

4. Subsection (*a*) discussed; although death penalty provision constitutionally impermissible, life imprisonment imposed under section upheld. State v. Randol, 212 K. 461, 462, 470, 471, 513 P. 2d 248.

5. Sentences imposed hereunder for convictions under 21-3502 and 21-3503 upheld; statement of accused properly admitted. State v. Nichols, 212 K. 814, 512 P. 2d 329.

6. Sentence imposed hereunder falling within statutory limits cannot be said to be excessive. State v. Miles, 213 K. 245, 247, 515 P. 2d 742.

7. Mentioned; code has no application to crimes committed prior to effective date. State v. Ralls, 213 K. 249, 251, 515 P. 2d 1205.

8. Judgment revoking probation and defendant's sentencing under subsection (*b*) affirmed; evidence supported trial court's judgment. State v. Dunham, 213 K. 469, 470, 517 P. 2d 150.

9. Sentencing hereunder for conviction under felony murder rule; exclusion of jurors opposed to capital punishment not error. State v. Shepherd, 213 K. 498, 499, 516 P. 2d 945.

10. Assault in federal penitentiary; Assimilative Crimes Act has no application if act is made penal under federal statutes. United States v. Patmore, 475 F. 2d 753, 754.

21-4502. Classification of misdemeanors and terms of confinement. (1) For the purpose of sentencing, the following classes of misdemeanors and the punishment and the terms of confinement authorized for each class are established:

(*a*) Class A, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one (1) year;

(*b*) Class B, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed six (6) months;

(*c*) Class C, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one (1) month;

(*d*) Unclassified misdemeanors, which shall include all crimes declared to be misdemeanors without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no penalty is provided in such law, the sentence shall be a definite term of confinement in the county jail fixed by the court which shall not exceed one (1) year.

(2) Upon conviction of a misdemeanor, a person may be punished by a fine, as provided in section 21-4503, instead of or in addition to confinement, as provided in this section. [L. 1969, ch. 180, § 21-4502; July 1, 1970.]

Revisor's Note:

For Judicial Council comment, see 21-4503.

Law Review and Bar Journal References:

Discussed and analyzed in "The Kansas Habitual Criminal Act," Bruce E. Miller, 9 W. L. J. 244, 252 (1970).

Cited in article concerning obscenity law, Michael J. Lichty, 19 K. L. R. 789, 792 (1971).

Mentioned in "State Control of Local Government in Kansas: Special Legislation and Home Rule," Barkley Clark, 20 K. L. R. 631, 672 (1972).

Cited in "Arrest Under the New Kansas Criminal Code," Keith G. Meyer, 20 K. L. R. 685, 718, 720 (1972).

21-4503. Fines. A person who has been convicted of a felony may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(*a*) For a class B or C felony, a sum not exceeding $10,000;

(*b*) For a class D or E felony, a sum not exceeding $5,000;

(2) A person who has been convicted of a misdemeanor may, in addition to or instead of the confinement authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(*a*) For a class A misdemeanor, a sum not exceeding $2,500;

(*b*) For a class B misdemeanor, a sum not exceeding $1,000;

(*c*) For a class C misdemeanor, a sum not exceeding $500;

(*d*) For an unclassified misdemeanor, any sum authorized by the statute that defines the crime; if no penalty is provided in such law, the fine shall not exceed $2,500;

(3) As an alternative to any of the above, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain

derived from the crime by the offender. [L. 1969, ch. 180, § 21-4503; July 1, 1970.]

Judicial Council, 1968: By classifying crimes of like gravity within a single category and providing a single stautory penalty for all crimes within each class, the section seeks to establish a rational and consistent system of penalties. Where punishments are provided separately, in connection with each definition of criminal conduct, apparent disparities may often be observed. The classification is intended to eliminate those disparities.

The idea here implemented is suggested by the Model Penal Code, 6.06.

The following characteristics of the penalty provisions should be observed:

(*a*) The alternative penalties of death or life imprisonment are retained for Class A felonies (first-degree murder and aggravated kidnapping).

(*b*) Other felony penalties are indeterminate within the limits fixed by the statute.

(*c*) In each case the maximum term is fixed by law.

(*d*) In the cases of Class B, C and D felonies, the Court shall fix the minimum term within the limits provided.

(*e*) In its discretion the court may select an appropriate minimum penalty, after giving consideration to the criteria suggested in section 21-4606. Note that the defendant's history of prior criminal activity is one of the circumstances that may be considered by the court in fixing the penalty. From the standpoint of the convicted person, the minimum term is the most significant part of the sentence, as it determines the period that must be served before he becomes eligible for parole.

(*f*) Fines are authorized in felony cases. Criteria for the imposition of fines are found in section 21-4607.

(*g*) Maximum penalties are prescribed for misdemeanors of each class. Within these limits, a court may impose any appropriate sentence of confinement or fine or both.

(*h*) Unclassified crimes are those which are defined and made punishable in chapters other than the crimes act. There are more than 1500 such offenses, found in virtually every chapter of the statute book. These are mainly intended to implement regulatory legislation and are not appropriate subjects for a criminal code. Hence, this revision of the crimes act does not affect them either as to content or penalty.

Law Review and Bar Journal References:

Cited in "Constitutional Law—Imprisonment of Convicted Indigent for Nonpayment of Fine," John Terry Moore, 10 W. L. J. 120, 127 (1970).

Cited in article concerning obscenity law, Michael J. Lichty, 19 K. L. R. 789, 792 (1971).

Mentioned in "State Control of Local Government in Kansas: Special Legislation and Home Rule," Barkley Clark, 20 K. L. R. 631, 672 (1972).

21-4504. Conviction of second or more felonies; exceptions. Every person convicted a second or more time of a felony, the punishment for which is confinement in the custody of the director of penal institutions, upon motion of the prosecuting attorney, may be by the trial judge sentenced to an increased punishment as follows:

(1) If the defendant has previously been convicted of not more than one felony:

(*a*) The court may fix a minimum sentence of not less than the least nor more than twice the greatest minimum sentence authorized by K. S. A. 1972 Supp. 21-4501 for the crime for which the defendant stands convicted; and

(*b*) Such court may fix a maximum sentence of not less than the maximum provided by K. S. A. 1972 Supp. 21-4501 for such crime nor more than twice such maximum.

(2) If the defendant has previously been convicted of two (2) or more felonies:

(*a*) The court may fix a minimum sentence of not less than the least nor more than three times the greatest minimum sentence authorized by K. S. A. 1972 Supp. 21-4501 for the crime for which the defendant stands convicted; and

(*b*) Such court may fix a maximum sentence of not less than the maximum prescribed by K. S. A. 1972 Supp. 21-4501 for such crime, nor more than life.

(3) Subsections (1) and (2) of this section shall be applicable only to those convicted criminals initially sentenced after the effective date of this act. In the event that any defendant has been convicted prior to the effective date of this act and sentenced under K. S. A. 21-107a, and thereafter is for any reason returned to the court imposing the initial sentence, he shall be resentenced under the provisions of K. S. A. 21-107a as it existed prior to July 1, 1970.

(4) In the event that any portion of a sentence imposed under K. S. A. 21-107a, or under subsections (1) and (2) of this section, is determined to be invalid by any court because a prior felony conviction is itself invalid, upon resentencing the court may consider evidence of any other prior felony conviction that could have been utilized under K. S. A. 21-107a, or under subsections (1) and (2) of this section, at the time the original sentence was imposed, whether or not it was introduced at that time, except that if the defendant was originally sentenced as a second offender, he shall not be resentenced as a third offender.

(5) The provisions of this section shall not be applicable to: (*a*) Any person convicted of a crime for which the punishment is confinement in the custody of the director of penal institutions and where a prior conviction of a felony is a necessary element of

such crime; or (*b*) any person convicted of a felony for which the punishment is confinement in the custody of the director of penal institutions and where a prior conviction of such felony is considered in establishing the class of felony for which such person may be sentenced.

A judgment may be rendered pursuant to this section only after the court finds from competent evidence the fact of former convictions for felony committed by the prisoner, in or out of the state. [L. 1969, ch. 180, § 21-4504; L. 1970, ch. 124, § 10; L. 1973, ch. 141, § 1; July 1.]

Source or prior law: 21-107a.

Revisor's Note:
Section not included in proposed criminal code by judicial council.

Law Review and Bar Journal References:

Increased punishment for recidivists no longer mandatory upon the court, but within its discretion, Robert L. Heath, 9 W. L. J. 430, 441 (1970).

Mentioned in "Evidence — Admissibility of Prior Convictions of Similar But Independent Offenses," Lawrence E. Schauf, 9 W. L. J. 478, 480 (1970).

Mentioned; section inconsistent with policy of individualization and rehabilitation as set forth by legislative council, Raymond W. Baker, 10 W. L. J. 267, 274, 280 (1971).

Mentioned in comment concerning sentence increase upon second trial for same offense, John E. Caton, 11 W. L. J. 301 (1972).

Subsection (4) mentioned in article concerning parole eligibility for prisoners serving consecutive sentences in Kansas, Malcolm E. Wheeler, 21 K. L. R. 167, 172 (1973).

CASE ANNOTATIONS

1. Provisions of subsection (4) not contained in prior law (21-107a); in resentencing proceeding, sentence imposed under 21-107a after introduction of new evidence as to a prior conviction held improper. State v. Daegele, 206 K. 379, 382, 479 P. 2d 891.

2. Irregularity in service of notice to invoke Habitual Criminal Act not prejudicial error. State v. Stewart, 208 K. 197, 491 P. 2d 944.

3. No error where increased sentence for prior convictions imposed because subsequent legislature raised juvenile age limit. State v. Grimmett & Smith, 208 K. 324, 325, 491 P. 2d 549.

4. No error in imposing sentence under habitual criminal section. State v. Tillman, 208 K. 954, 961, 494 P. 2d 1178.

5. Mentioned; due process not violated by lineup procedure; defendant's right to participate in his defense discretionary with court. State v. Kelly, 210 K. 192, 499 P. 2d 1040.

6. Forgery complaint filed during petitioner's confinement in penitentiary; no apparent compliance with uniform mandatory disposition of detainers act. Hayes v. State, 210 K. 231, 499 P. 2d 515.

7. No error in imposing sentence under habitual criminal act; not unconstitutional as cruel and unusual punishment. Clinton v. State, 210 K. 327, 328, 329, 502 P. 2d 852.

8. Sentencing hereunder applicable only to criminals initially sentenced for offenses committed after effective date of new criminal code; subsection (3) construed. State v. Ogden, 210 K. 510, 520, 521, 502 P. 2d 654.

9. On-the-scene identification; constitutional right to counsel not violated; prior conviction of auto theft properly admitted. State v. Kress, 210 K. 522, 502 P. 2d 827.

10. Sentence hereunder; record examined; no prejudicial error. State v. Calvert, 211 K. 174, 177, 505 P. 2d 1110.

11. Sentencing hereunder for conviction of uttering a forged instrument not cruel and unusual punishment. State v. Huesing, 211 K. 610, 506 P. 2d 1140.

12. Mentioned; section applicable only to those initially sentenced after effective date of new code. State v. Eaton, 213 K. 86, 90, 515 P. 2d 807.

13. Sentence imposed hereunder falling within statutory limits cannot be said to be excessive. State v. Miles, 213 K. 245, 247, 515 P. 2d 742.

Article 46.—SENTENCING

21-4601. Construction. This article shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law. [L. 1969, ch. 180, § 21-4601; July 1, 1970.]

Source or prior law: 62-2226.

Judicial Council, 1968: The above construction and purpose section is adopted from section 1 of the Model Sentencing Act prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency. The statement probably expresses the current objectives of the correctional process and relates to a stage in the criminal proceding where a relaxation of the usual rules of strict construction is proper.

The section has a partial counterpart in the former K. S. A. 62-2226.

Law Review and Bar Journal References:

Cited; shift towards rehabilitation as the primary goal of sentencing in the new criminal code, Raymond W. Baker, 10 W. L. J. 269, 273 (1971).

Act mentioned in "Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool," Richard M. Klinge, 13 W. L. J. 93, 102 (1974).

21-4602. Definitions. As used in this article: (1) "Court" means any court having jurisdiction and power to sentence offenders for violations of the laws of this state;

(2) "Suspension of sentence" is a proce-

knowing it to have been made, altered or signed by a person other than a practitioner; or

(c) possession of a prescription order with intent to deliver it and knowing it to have been made, altered or signed by a person other than a practitioner; or

(d) possession of a prescription-only drug knowing it to have been obtained pursuant to a prescription order made, altered or signed by a person other than a practitioner.

(2) Obtaining a prescription-only drug by fraudulent means is a class A misdemeanor for the first offense and a class E felony for a second or subsequent offense.

(3) As used in this section:

(a) "Pharmacist", "practitioner" and "prescription-only drug" shall have the meanings ascribed thereto by K.S.A. 65-1626 and amendments thereto.

(b) "Prescription order" means a written, oral or telephonic order for a prescription-only drug to be filled by a pharmacist. "Prescription order" does not mean a drug dispensed pursuant to such an order.

(4) The provisions of this section shall not be applicable to prosecutions involving prescription-only drugs which could be brought under the uniform controlled substances act and to which the provisions of K.S.A. 65-4127a or 65-4127b, and amendments thereto, would be applicable.

(5) This section shall be part of and supplemental to the Kansas criminal code.

History: L. 1979, ch. 86, § 1; L. 1980, ch. 100, § 1; July 1.

Cross References to Related Sections:

Uniform controlled substances act, see ch. 65, art. 41.
Pharmacy act, see ch. 65, art. 16.

21-4215. Obtaining a prescription-only drug by fraudulent means for resale. (1) Obtaining a prescription-only drug by fraudulent means for resale is the obtaining of a prescription-only drug by fraudulent means as defined in K.S.A. 21-4214, and:

(a) Selling the prescription-only drug so obtained; or

(b) offering for sale the prescription-only drug so obtained; or

(c) possessing with intent to sell the prescription-only drug so obtained.

(2) Obtaining a prescription-only drug by fraudulent means for resale is a class C felony.

(3) The provisions of this section shall not be applicable to prosecutions involving prescription-only drugs which could be brought under the uniform controlled substances act and to which the provisions of K.S.A. 65-4127a or 65-4127b, and amendments thereto, would be applicable.

(4) This section shall be part of and supplemental to the Kansas criminal code.

History: L. 1979, ch. 86, § 2; L. 1980, ch. 100, § 2; July 1.

Cross References to Related Sections:

Uniform controlled substances act, see ch. 65, art. 41.
Pharmacy act, see ch. 65, art. 16.

21-4216. Selling beverage containers with detachable tabs. (a) As used in this section:

(1) "Beverage container" means any sealed can containing beer, cereal malt beverages, mineral waters, soda water and similar soft drinks so designated by the director of alcoholic beverage control, in liquid form and intended for human consumption.

(2) "In this state" means within the exterior limits of the state of Kansas and includes all territory within these limits owned by or ceded to the United States of America.

(b) No person shall sell or offer for sale at retail in this state any metal beverage container so designed and constructed that a part of the container is detachable in opening the container.

(c) Any person violating the provisions of subsection (b) shall be guilty of a class C misdemeanor.

History: L. 1981, ch. 139, § 1; Jan. 1, 1982.

Article 43.—CRIMES AGAINST THE PUBLIC MORALS

21-4301. Promoting obscenity. (1) Promoting obscenity is knowingly or recklessly:

(a) Manufacturing, issuing, selling, giving, providing, lending, mailing, delivering, transmitting, publishing, distributing, circulating, disseminating, presenting, exhibiting or advertising any obscene material; or

(b) Possessing any obscene material with intent to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise such material; or

(c) Offering or agreeing to manufacture, issue, sell, give, provide, lend, mail, deliver,