MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

Held in Room 526, at the Statehouse at 3:30 a. m./p. m., on March 14, 1979.

.ll members were present except:

The next meeting of the Committee will be held at 3:30 a. m./p. m., on March 15, 1979.

'hese minutes of the meeting held on March 13, 1979 were considered, corrected and approved.

JOSEPH J. HOAGLAND
Chairman

The conferees appearing before the Committee were:

Senator Pomeroy
Senator Hein
Helen Jaggers, Register of Deeds, Salina
Beverly Gavin, Register of Deeds, Hill City
James W. Sloan, Attorney, Topeka
L. M. Cornish, Kansas Library Association
Max Moses, Kansas County and District Attorneys Association
Roy Fox, Kansas Library Association
Frances Kastner, Kansas Food Dealers Association

Chairman Hoagland called the meeting to order at 3:30 p.m. and the minutes of the last meeting were approved.

Senator Pomeroy then explained SB 57, which he sponsored. This is a bill relating to release or assignment of certain real estate mortgages. He filed two letters regarding SB 57, with Chairman Hoagland. (See Attachment # 1 and 2).

Helen Jaggers, Register of Deeds from Lyons County, indicated they favor SB 57, but would prefer to limit it to releases of mortgages.

Senator Pomeroy then explained SB 123, which he sponsored. This bill concerns exemptions to mortgage registration fee.

Helen Jaggers testified in favor of SB 123, because many of the Register of Deeds were having problems with so many different kinds of mortgage forms coming from different finance companies.

Beverly Gavin, President of Register of Deeds Association, voice their approval of SB 123.

SB 4 was then explained by Sponsor, Ron Hein, as a bill concerning probate code and introduced James W. Sloan, a Topeka attorney, who further explained the background on SB 4. There were no questions from the committee.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Bud Cornish, Kansas Library Association, testified in favor of SB 73 and introduced the librarians attending the hearing today. He said the bill would amend two statutes and asked for questions from the committee. He next introduced Duane F. Johnson, Hutchinson, a member of the Kansas Library Association who testified in favor of SB 73.

Max Moses, Kansas County and District Attorneys Association, testified that at the present time, there have been no cases filed against librairians, so the association feels there is not much need for this bill.

Roy Fox, Johnson County Library Association testified that he feels SB 73 is very necessary and he wants the protection of this bill.

SB 43, a bill concerning the crime for giving a worthless check was heard next. Shirley Atteberry, Research and Date, gave a brief statement in favor of the bill and explained the need for passing SB 43.

Wayne Morris passed out Attorney General's Opinion # 78-5, concerning SB 43. (See Attachment # 3). He also handed out copies of the Court of Appeals case dealing with the civil penalty being approved for $3.00 service charges. (See Attachment # 4).

Frances Kastner, Kansas Food Dealers Association stated the associations support for SB 43.

Max Moses, Kansas County and District Attorneys Association requested the committee to raise the limit in SB 43, on Line 64, from $50.00 to $100.00, and if amended so, the association would be in favor of SB 43.

This concluded the hearings for today, and the committee moved on to taking action on several bills previously heard.

Rep. Frey moved to amend SB 22 (juvenile code bill) by inserting the words "or warrant" after "order" in Lines 29, 31, 34 and 37. Seconded by Rep. Baker. Motion carried and amendment was adopted. Motion was made by Rep. Crow to report SB 22 favorably as amended. Seconded by Rep. Douville. Motion passed.

SB 42, a bill dealing with criminal code and procedure, changes in involuntary manslaughter, expungements, sentencing when firearm is involved, was discussed next. Rep. Frey indicated that possibly the Judicial Council study this bill because of having more than one subject matter in the bill.

SB 231 was discussed next. Rep. Miller moved to amend it by changing from a Class "C" to a Class "A" on Line 33. Seconded by Rep. Stites. Motion passed to amend SB 231. Rep. Miller then moved to pass SB 231 favorably as amended. Seconded by Rep. Harper. Motion Carried.

Rep. Heinemann moved to recommend SB 221 favorably. Seconded by Rep. Sullivan. Following a brief discussion the motion passed.

The committee adjourned at 5:10 p.m.

SB 57

HARRY T. COFFMAN
STEPHEN JONES
DELTON M. GILLILAND
MARK BESHEARS

COFFMAN, JONES & GILLILAND
ATTORNEYS AT LAW
TIFFANY BUILDING
LYNDON, KANSAS 66451

TELEPHONE
AREA CODE 913
828-4431

22 January 1979

Senator Elwaine F. Pomeroy
Senate Chamber
State House
Topeka, Kansas 66612

Re: SB 57

Dear Elwaine:

Thanks for a copy of your 16 January letter to Clyde Hill. I am glad you are taking care of this. The need is seldom, but extremely acute when it does arise. I suggest you might want to consider -

(i) deletion of "a notation" after the word "by" in line 59 and insert in lieu thereof "an endorsement";

(ii) deletion of "or" after the word "record" in line 61 and inserting "," in lieu thereof;

(iii) insertion of ", heirs, legatees or surviving joint tenants with full rights of survivorship," after the word "representative" in line 61;

(iv) insertion of "so" after the word "when" in line 63; and

(v) deletion of the "." after "(a) in line 65 and insertion of ", (b) and (c)."

See the enclosed machine copy of the second page of the bill.

With regards.

Yours truly

Harry

Harry T. Coffman
For the Firm

HTC/aw
Enclosure

cc: Mr. Clyde Hill
Attorney at Law
Box 202
Yates Center, Kansas 66783

Mr. Morris Moon
Attorney at Law
103 East 5th Street
Augusta, Kansas 67010

Atch. 1

CLYDE HILL
ATTORNEY AT LAW
Box 202
111 South State
YATES CENTER, KANSAS 66783

Telephone 316-625-2145

24 January 1979

Senator Elwaine F. Pomeroy
Kansas State Senate
Capitol Building
Topeka, KS 66612

re: S.B. 57

Dear Elwaine:

This will reply to your letter of January 16 on the above captioned.

The bill as originally drafted takes care of my original suggestion.

However, I would concur in Harry Coffman's suggested changes.

Also, after letting this lay around a while and thinking about it, it occurred to me that it is entirely possible such a mortgage could have been assigned as the one sent you, but that the assignment was not recorded.

You might consider enlarging the scope of the bill to also cover assignments (not recorded) on any such instruments.

Thanks for your help.

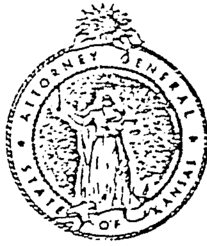
Yours very truly,

Clyde Hill

jcs
cc: Mr. Harry T. Coffman
Coffman, Jones and Gilliland
Tiffany Building
Lyndon, KS 66451

Morris Moon
Attorney at law
103 East 5th Street
Augusta, KS 67010

Atch. 2



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

January 6, 1978

Curt T. Schneider
Attorney General

ATTORNEY GENERAL OPINION NO. 78- 5

The Honorable Michael G. Glover
State Representative
1719 West 20th Terrace
Lawrence, Kansas 66044

Re: Crimes and Offenses--Worthless Checks--Presumptions

Synopsis: When the maker of a check payment of which is refused by a bank or other depository due to insufficient funds thereupon promptly and within seven days of notification that payment of the check had been refused, pays the amount thereof to the holder of said check, failure to pay, in addition, any service charge sought to be assessed by the holder of the check affords no basis for prosecution under K.S.A. 21-3707. The holder of such a check may lawfully assess such a service charge, but may not enforce payment thereof through use of the criminal law processes of the state.

* * *

Dear Representative Glover:

You inquire concerning the validity of the statutory presumption provided by K.S.A. 21-3707(2) insofar as the presumption is based upon failure of the accused to pay a service charge assessed by the holder of a check, payment of which has been refused by a bank due to insufficient funds or no account.

K.S.A. 21-3707 defines the offense of giving a worthless check as

> "making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order

Atch. 3

> or draft on any bank or depository for the payment of money or its equivalent with intent to defraud and knowing, at the time of the making, drawing, issuing or delivering of such check, order or draft as aforesaid, that the maker or drawer has no deposit in or credits with such bank or depository or has not sufficient funds in, or credits with, such bank or depository for the payment of such check, order or draft in full upon its presentation."

To establish the offense, the prosecution must prove, first, that the accused did in fact issue the check in question, that payment of the check was refused by the bank or other depository for no account or lack of sufficient funds, and that in issuing the check, the accused acted with intent to defraud and with knowledge of the lack of sufficient funds for payment of the check upon its presentation. Prior to 1972, if the prosecution established that the accused had failed to pay the holder of the check the amount thereof within seven days after receiving notice that payment of the check had been refused for insufficient funds, that showing constituted "prima facie evidence" of intent to defraud and of knowledge of the lack of sufficient funds.

The validity of the statutory presumption was considered in *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973). Applying the general test that "a statutory presumption will be upheld as constitutional if, in accordance with the experience of mankind, there is a natural and rational evidentiary relation between the fact proved and the one presumed," the court found just such a "natural and rational evidentiary relation" between nonpayment of a dishonored check by the accused within seven days after being notified that payment of the check had been refused by the bank due to insufficient funds, and the fraudulent intent and guilty knowledge which the statute permits to be inferred from that nonpayment:

> "Where a person has written an insufficient funds check and receives property or other consideration therefor from the payee of the check, and further, where the maker of the check has been notified that the check has not been paid and fails to make payment with seven days after such notice, we find that

> there is nothing unreasonable or arbitrary in making such fact prima facie evidence of fraudulent intent or guilty knowlege. It appears to us that in the usual course of things where one person gives another a check, he intends to induce such person to give up some property right in reliance that the check will be paid on presentation. The notice provision gives to the drawer of the check a final opportunity in which to make the check good and is peculiarily for his benefit." 213 Kan. at 207.

The conviction which was affirmed in this case was based upon K.S.A. 1971 Supp. 21-3707, prior to its amendment by the 1972 legislature. As amended, subsection (2) provides in pertinent part thus:

> "In any prosecution against the maker or drawer of a check, order or draft payment of which has been refused by the drawee on account of insufficient funds, the making, drawing, issuing or delivering of such check shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank or depository, providing such maker or drawer shall not have paid the holder thereof the amount due thereon <u>and a service charge not exceeding three dollars ($3) for each check</u>, within seven (7) days after notice has been given to him that such check, draft, or order has not been paid by the drawee." [Underscored language added by 1972 amendment.]

Clearly, this amendment was not enacted to cure any constitutional infirmity or weakness in the then-existing statute, nor was it added in order to enhance the utility of the statute from a prosecutorial perspective. The sole apparent purpose of the amendment was to lend to the commercial and mercantile community the leverage of the criminal law processes of the state to enforce the assessment and collection of service charges on insufficient fund checks.

Pursuant to that amendment, two facts, established conjunctively, constitute "prima facie evidence" of two elements of the offense, knowledge at the time of making or drawing the check that there was either no account or insufficient funds for payment thereof, and an intent to defraud the recipient of the check, those facts being failure of the drawer to pay the amount of the check to the holder thereof within seven days after being given notice that payment of the check had been refused, and failure within a like period to pay a service charge assessed by the holder of the check not exceeding three dollars. As the court found in *State v. Haremza, supra*, there is an obvious "natural and rational evidentiary relation" between one of the facts proved, the maker's failure to pay the check promptly when given an opportunity to do so, and the facts to be inferred therefrom, that the maker in fact issued the check with fraudulent intent and guilty knowledge that insufficient funds were on hand at the time to permit payment of the check on presentation. If, however, the maker of a check promptly pays the holder thereof upon being notified that payment by the bank has been refused, such timely payment in and of itself negatives the existence of the intent to defraud and guilty knowledge of insufficient funds which are elements of the offense. Timely payment of a dishonored check, in and of itself, negatives essential elements of the offense, an intent to defraud and guilty knowledge at the time of making the check. The assessment of a service charge by the holder thereof at the time the maker pays it is a transaction entirely separate and independent from the facts which constitute the offense itself, the giving of a worthless check. An individual who promptly pays a check upon being notified that it had been refused by the bank might reasonably object to payment of any service charge by the holder of the check, and that objection hardly supports an inference that despite the maker's prompt action to honor the check, he acted with fraudulent intent and guilty knowledge in its issuance. There is no "natural and rational evidentiary relation" whatever between the maker's refusal to pay a service charge assessed by the holder of the check when making timely payment thereof, and the existence of any fraudulent intent at the time of issuing the check "to induce the recipient to give up some property right in reliance that the check will be paid on presentation." *State v. Haremza, supra* at p. 207. Nonpayment of a service charge, standing alone, is not naturally and rationally probative of any element of the offense as defined by subsection (1) of K.S.A. 21-3707.

It may doubtless be argued that, as stated in *Haremza, supra*, "a person intends all the natural and probable consequences of

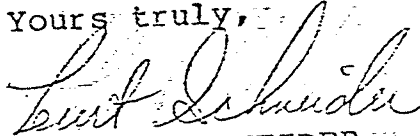
his voluntary acts," and that accordingly, the maker of an insufficient fund check should reasonably foresee that if payment is refused upon its presentation to the bank, that the holder will incur some expense in contacting the maker and collecting on the item. We are not concerned here with what the maker of the check might reasonably be deemed to have foreseen, but what the maker may reasonably be deemed to have intended, as an element of a criminal offense. The prosecution must prove that in issuing the check, the maker intended, with fraudulent purpose, to induce the payee to give up some property right in reliance that the check will be paid on presentation. That fraudulent intent is negatived by timely payment of the dishonored check. It will surely be the most extraordinary instance in which the maker of an insufficient funds check who has promptly and upon notification paid the amount thereof to the holder may be claimed to have intended, by refusing to pay a service charge, to defraud the holder out of the cost of collection.

Certainly, the merchant who accepts a check which is subsequently refused payment by the bank is authorized to assess a service charge against the maker of the check. However, refusal to pay such a service charge, standing alone, is clearly insufficient to support a prosecution under K.S.A. 21-3707 against the maker of an insufficient funds check who has promptly and within the seven day period paid the amount of the check to the holder thereof. The processes of the criminal law are not available merely to enforce the assessment and collection of service charges for insufficient fund checks, but rather, to punish persons found guilty of issuing such checks with an intent to defraud and guilty knowledge that the check would not be paid upon presentation.

As Attorney General, it is my responsibility to furnish my official opinion in writing upon questions of law submitted by the legislature or either house thereof. By a custom of many years' standing, attorneys general have furnished such opinions upon questions of law submitted by individual members of the legislature. Nonetheless, I find no authority for this office to furnish formal legal opinions and assistance to legislators concerning matters which are unrelated to the conduct of official state business. The question which is presented in your letter was posed to a member of my staff several weeks ago by a legislative staff assistant. At that time, there was no suggestion that the inquiry was made other than at the request of a legislator, and certainly, no suggestion that the inquiry arose out of the assistant's personal affairs. Since that time, it has come to my attention that the earlier inquiry may have been prompted not by any legislative concern, but by the assistant's personal

interest in the question arising out of entirely personal matters. It is not entirely coincidental, I judge, that your letter raises formally the identical question. It has been an overriding concern of my office to provide prompt and careful responses to all members of the legislature concerning the many questions which arise in its deliberations. Obviously, when any member uses his or her official capacity as a pretext for obtaining legal opinions from this office for the personal and private benefit of particular individuals, the resources of my staff are necessarily diverted from the official business of the state. I hope that the practice will be discouraged in the future. The personal legal affairs of legislative staff members are just that, their personal affairs, and the taxpayers of the state should not be called upon to subsidize free legal counsel to any person for private gain or advantage.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

No. 49,331

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LESLIE MERREL,
for himself and all
others similarly situated,
Appellant,

v.

RESEARCH & DATA, INC., et al.,
Appellees.

SYLLABUS BY THE COURT

1.

Where a sign setting forth the fees to be charged on returned checks is conspicuously posted in a place of business so that a person cashing a check or giving a check for merchandise cannot help but see it, there is a presumption of fact that one giving a check in that place of business saw the sign and assented to its terms.

2.

A party cannot overcome the logical inferences to be drawn from affidavits supporting a motion for summary judgment by remaining silent or relying on his pleadings.

3.

Duress inducing a person to perform his exact legal duty does not give him power to avoid his act. Thus coercion exercised through the threat of criminal prosecution affords no grounds for recovering payments made to satisfy a valid and liquidated obligation.

Atch. 4

4.

K. S. A. 21-3707, authorizing the holder of a bad check to demand and receive a service charge of not more than three dollars in addition to the face amount of the check, does not by its terms or by implication prohibit the parties from expressly contracting for a larger service charge. The only limitation on such an express agreement is the common law rule that it may not be unconscionable.

5.

A contract whereby the maker of a check agrees to pay a fee of $5.00 plus 10% of the face amount if over $20.00 if the check is returned is not unconscionable.

6.

In an action by the maker of bad checks to recover under a theory of unjust enrichment fees paid to a collection agency under threat of prosecution it is <u>held</u>: the trial court correctly found an express contract to pay the challenged fees, and that there were no factors which would relieve plaintiff of his obligation under the contract. Hence defendants were not unjustly enriched when plaintiff fulfilled that obligation, and the trial court properly rendered summary judgment for defendants.

Appeal from Shawnee district court, division No. 6; TERRY L. BULLOCK, judge. Opinion filed January 12, 1979. Affirmed.

<u>Steven Rupp</u> and <u>Fred W. Phelps</u>, of Fred W. Phelps, Chartered, of Topeka, for the appellant.

<u>Robert D. Hecht</u>, of Scott, Quinlan and Hecht, of Topeka, for the appellees.

Before FOTH, C.J., SPENCER and MEYER, JJ.

FOTH, C.J.:

Defendants Research and Data, Inc., and its president Leland W. Atteberry are in the business of collecting bad checks on behalf of merchants who engage their services. They endeavor to collect the face amount of the checks, plus a fee of $5.00 per check and ten percent of the face amount of those over $20.00. They do this in large part by writing letters threatening the makers with prosecution if the checks and fees are not paid. Upon collection defendants retain the fees as their compensation, remitting the face amount of the checks to the merchants.

In the summer of 1974 plaintiff wrote a number of insufficient fund checks to Topeka merchants. After receiving a series of defendants letters plaintiff paid some of his bad checks and the corresponding fees to defendants, and then brought this action. His petition was originally framed as a class action in three counts: blackmail, outrage, and unjust enrichment. It sought punitive as well as actual damages. At a discovery conference, however, he dropped both tort claims, leaving only the claim of unjust enrichment as to the fees paid to and retained by defendants. On that claim the trial court rendered summary judgment for defendants, and plaintiff appeals.

The trial court's decision was based in large part on a finding that plaintiff had expressly contracted to pay the fees in question. The correctness of this finding is plaintiff's first point on appeal, and in our view is the controlling issue.

The trial court found as a matter of fact that "[i]n each of such merchants' business establishment[s] there was posted in a conspicuous place a sign indicating that a $5.00 charge would be made on all 'returned checks'." It concluded as a matter of law:

"Under the facts of this case, the merchants posted their sign announcing to the public that a charge of $5.00 would be made on returned checks. Plaintiff was not compelled to do business with these merchants nor was he compelled to pay by check. Further, and most importantly, he was not compelled to give the merchant, an unlawful, insufficient fund check. By doing so the Court finds that he accepted the merchants' terms as clearly stated in their posted notices thereby contracting to pay the charge set out."

Plaintiff challenges the finding and conclusion on the ground that there is a question of fact as to whether he agreed to the charges which cannot properly be resolved on summary judgment. He points to the absence of proof that he actually saw the signs and thereby assented to their terms.

The finding was based on a series of uncontradicted affidavits which had been duly served on plaintiff's counsel and filed in the case. These affidavits, made by the defendant Atteberry and the managers of the various businesses which had accepted plaintiff's checks, stated that all the signs were so placed that a person cashing a check or giving a check for merchandise "could not help but see the sign." These assertions, made under oath, raised a presumption of fact that plaintiff saw the signs when he presented his checks. To overcome the logical inference to be drawn from the affidavits and thus raise an issue of material fact so as to preclude summary judgment plaintiff was required to present some rebutting evidence, such as a statement under oath that he did <u>not</u> see the signs. He could not, as he did, remain silent or rely on his pleadings. <u>Stovall v. Harms</u>, 214 Kan. 835, 838, 522 P. 2d 353 (1974); <u>Ebert v. Mussett</u>, 214 Kan. 62, Syl. ¶ 3, 519 P. 2d 687 (1974); <u>Meyer, Executor v. Benelli</u>, 197 Kan. 98, Syl. ¶ 1, 415 P. 2d 415 (1966).

On the basis of defendants' uncontradicted affidavits the trial court was fully justified in finding that plaintiff, when giving the

checks, agreed to the merchants' conditions and agreed to pay the specified fees upon dishonor.

In his second point plaintiff argues that he should recover the fees because they were paid under the coercion of defendants' threats to prosecute.

He offers no authority for the proposition that a debtor who pays a debt legally due can recover the amount paid because the payment was coerced. The authorities he does cite deal with the coerced settlement of an unliquidated or disputed claim; e.g., Thompson v. Niggley, 53 Kan. 664, 35 Pac. 290 (1894) where a mortgage was given under coercion to settle a tort claim; Williamson v. Ackerman, 77 Kan. 502, 94 Pac. 807 (1908), where a father gave a mortgage to settle an embezzlement claim against his son. In those cases it was held that the coercive effect of threats of prosecution, resulting in the creation of the obligation, was a good defense and made the obligation unenforceable. As the trial court noted, some doubt is cast on the proposition that the threat of prosecution is per se coercive by the decision in Western Paving Co. v. Sifers, 126 Kan. 460, 268 Pac. 860 (1928). We need not decide that question, however, and decide this case on the assumption that defendants' letters were coercive.

As previously discussed, the obligation here was already incurred and was liquidated before the coercion was applied; i.e., plainti had expressly contracted to pay the fees. Hence our only question is whether the threats voided the contract and required defendants to repay the amounts paid to satisfy it. We find no Kansas cases directly in point, but the general rule is set forth in the Restatement of Contracts § 495 (1932):

> "Where the duress of one party induces another to enter into a transaction, the nature of which he knows or has reason to know, and which he was under no

duty to enter into, the transaction is voidable against the former and all who stand in no better position, subject to the qualifications stated in § 499.

"Comment:

"a. Duress inducing a person to perform his exact legal duty does not give him power to avoid his act; but where a claim is unliquidated or the subject of an honest dispute, even a reasonable settlement induced by duress is voidable.

. . . .

"Illustrations:

. . . .

"1. A has a claim against B for $100. The debt is liquidated and undisputed. By duress A coerces B to pay him the debt. The transaction cannot be avoided." (Emphasis added.)

Williston concurs:

"One who had misappropriated money or property, and who was, therefore, under a civil as well as criminal liability, made restitution. Under such circumstances, even though there was unquestionable duress, the debtor if compelled to pay the exact amount of a liquidated debt, cannot be allowed to recover the payment because in making the payment he has done no more than he was legally bound to do.

> "The situation is legally different where the debtor is compelled to transfer property in satisfaction of his civil liability, or to pay a fixed sum to satisfy a claim of uncertain amount, from what it is where the payment exacted is the exact amount of a liquidated debt, since in the former case the parties are attempting an accord and satisfaction, not exactly fulfilling an existing obligation." 13 Williston on Contracts § 1615 (3d ed. 1970).

See also 70 C. J. S., Payment § 146; 66 Am. Jur. 2d, Restitution and Implied Contracts § 98.

The Kansas cases cited above apply that part of the rule which voids obligations incurred under coercion where the claim is unliquidated or disputed. The other side of the rule is applicable here; coercion affords no grounds for recovering payments made to satisfy a liquidated obligation or, as Williston puts it, "exactly fulfilling an existing obligation."

The reason for such a rule rests in the time honored doctrine of avoiding a multiplicity of suits. If in this case it were held that plaintiff could recover the fees paid because of the coercion, the result would be an unpaid contractual obligation. In a lawsuit against him to collect the fees he would have no defense. Economy of the judicial system forbids such a result.

Plaintiff also contends that, because the underlying instrument was a negotiable instrument, he could in no event be liable for more than the face amount of the checks. The argument ignores the express contract to pay fees in case of dishonor, as discussed above.

It also ignores the import of K. S. A. 21-3707, our bad check law, which expressly authorizes the holder to write the maker of a bad check demanding the face amount plus a service charge of not more than $3.00. Failure of the maker to pay both the check and service charge raises a presumption that the check was given with intent to defraud. Two things may be said about the statute. First, it is a clear legislative recognition of a holder's right to recover more than the face amount of the check, even in the absence of a specific agreement -- thus demolishing plaintiff's argument that the face amount is the maximum recoverable. Second, that statute is part of the criminal code, and contains nothing which by its terms or by implication limits the right of the parties to enter into a specific contract such as we have here. Cf. State v. Haremza, 213 Kan. 201, 515 P. 2d 1217 (1973).

The trial court recognized that the fee contracted for might in some cases be so large as to be unconscionable, but found no element of unconscionability here. We agree. The fees charged seem quite modest just for the letter writing involved, not to mention the unexpected bookkeeping and inconvenience of having what was intended as a cash transaction involuntarily turned into the extension of credit. The fees were not even arguably unconscionable. Cf. Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 757-60, 549 P. 2d 903 (1976).

In summary, we hold that the trial court correctly found an express contract to pay the challenged fees, and that there were no factors which would relieve plaintiff of his obligation under the contract. Hence defendants were not unjustly enriched when plaintiff fulfilled that obligation, and the trial court properly rendered summary judgment for defendants. In view of our holding on those issues,

we do not reach the question of whether plaintiff had unclean hands. Neither, of course, do we pass on the legality or propriety of defendants' conduct or their possible liability therefor in tort.

Affirmed.