MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 10:00 a. m./~~p. m.~~, on January 16, 1979.

All members were present except:

The next meeting of the Committee will be held at 10:00 a. m./~~p. m.~~, on January 17, 1979.

~~These minutes of the meeting held on ________, 19__ were considered, corrected and approved.~~

[signature]
Chairman

The conferees appearing before the Committee were:

Randy Hearrell - Kansas Judicial Council
Max Moses - Kansas County and District Attorneys Association

Staff present:

Art Griggs - Revisor of Statutes
Jerry Stephens - Legislation Research Department
Wayne Morris - Legislation Research Department

Senate Bill 56 - Amendment to robbery statute. Senator Pomeroy explained that he had introduced the bill at the request of the Kansas Judicial Council. He gave background concerning the policy questions involved in the proposed change. Technically, the present statute would make it a crime for a person to use any force or threat of force to recover his own property from a person who had just taken that property from the owner. How much self-help should be encouraged is the policy question.

Mr. Randy Hearrell, of the Kansas Judicial Council, appeared in support of the bill. He explained that the bill had been recommended at the request of the Pattern Instructions Committee. He indicated that the statutes dealing with robbery had included the words "of another" until the 1969 revision which took effect July 1, 1970. He also explained the present difference in the wording with regard to robbery and theft. Committee discussion followed.

Mr. Max Moses, of the Kansas County and District Attorneys Association, testified with regard to the bill; a copy of his comments are attached hereto. He raised various questions concerning the bill. His association recommends that instead of the proposed change in this bill, the committee should consider creating an affirmative defense to the crime of robbery.

Following further committee discussion, Senator Steineger moved that the bill not be passed; Senator Simpson seconded the motion. Following further committee discussion, the motion carried, with six voting in favor of the motion and three voting in opposition.

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Senate Bill 57 - Real estate, recording release or assignment of certain mortgages. Senator Pomeroy explained this bill is designed to ease a problem created by the passage in 1977 of the statute requiring mortgages to be released by a separate document. He referred to a letter from Clyde Hill, a practicing attorney in Yates Center, explaining a particular situation where a mortgage had been released on the original document itself, but that release had not been recorded. At the time the release was given, it was done in a perfectly acceptable manner, and in a manner which could have been recorded at that time. However, since the passage of the 1977 legislation, the Register of Deeds would not accept the recording of the mortgage release, and in the instance recited by Mr. Hill the mortgagee had since died. Following committee discussion, Senator Steineger moved that the bill be reported favorably; Senator Hein seconded the motion, and the motion carried.

Senate Bill 43 - Crime of giving a worthless check, notice and service charges. Mr. Griggs distributed a copies of the attorney general's opinion dealing with the service charge, and the recent Kansas Court of Appeals decision, and a copy of K.S.A. 21-3702; copies are attached to the minutes. The chairman asked that each committee member study these documents and announced that we would take further consideration of this bill at a later date.

Senate Bill 42 - Criminal code and procedure, changes in involuntary manslaughter, expungements, diversion agreements and lesser included offenses. Mr. Stephens reported that he had discussed the matter of instructions for lesser included crimes with Justice Prager and Judge Foth. Those judges reported that although it does not happen very often, it has happened occasionally. In answer to a question, the chairman reminded the committee that the committee had previously amended the bill by striking the docket fee provision on page 3, in Section 3 of the bill, and had further amended the bill by striking all of Section 4. Senator Allegrucci moved to strike Section 1; Senator Hein seconded the motion. Following committee discussion, the motion carried. Senator Burke moved to report the bill favorably as amended; Senator Mulich seconded the motion. Following further committee discussion, the motion was withdrawn, with the consent of the second. The chairman announced that further action would be taken on the bill at a later date.

Senator Hess inquired as to whether any legislation had been proposed concerning the funding of the Crime Victims Reparations Act, since the funding mechanism provided in the legislation last year had been ruled to be unconstitutional by an opinion of the attorney general, and a subsequent administrative ruling of the court. The chairman replied that he knew of no legislation presently being drafted, and further commented that he did not know whether this was the appropriate committee to consider it, or whether it should be considered by the Federal and State Affairs Committee, or the Ways and Means Committee, since apparently funding would have to come directly from the general fund. Following committee discussion,

continued -

SB 42 continued -

Senator Hess stated that he would discuss the matter with Senator Winter and see if it could not be handled as a Ways and Means Committee matter. The chairman reported that at the last meeting of the Judicial Council, a committee was appointed to look into the subject of court costs, and the tendency toward using court costs as a taxing mechanism.

Senate Bill 4 - Probate code, social security benefits, refusal to grant letters of administration. Mr. Griggs distributed to the committee two handouts, copies of which are attached hereto. Committee discussion followed. The hour of adjournment having arrived, further discussion of the bill was postponed to a later date.

The meeting adjourned.

These minutes were read and approved by the committee on 1-18-79.

1-16-79

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Tracy Harrell	Topeka	Ks Jud. Con.
Max G. Moses	"	KCDAA
Jon Kessler	Intern w/ Don Allegrucci	
Joanne Elliott	Topeka	intern with Don Hein
John Deardoff	Dodge City	Intern
Tim Underwood	Topeka	Ks. Assoc. Realtors
Frances Kastner	Topeka	Ks Food Dealers Assn
Marvin C. Uhlhorst	Lawrence	KCUL
Marlen Hoover	Topeka	Topeka Daily Capital
Mike Hrycewich	KSLL	Topeka

1-16-79

REPORTS OF STANDING COMMITTEES

MR. PRESIDENT:

Your committee on Judiciary

Recommends that Senate Bill No. 56

"AN ACT relating to crimes; concerning the crime of robbery; amending K.S.A. 21-3426 and repealing the existing section."

Not be passed.

Elwaine F. Pomeroy Chairman

S-150

1-16-79

REPORTS OF STANDING COMMITTEES

MR. PRESIDENT:

Your committee on Judiciary

Recommends that Senate Bill No. 57

"AN ACT relating to real property; concerning the release or assignment of certain mortgages; amending K.S.A. 1978 Supp. 58-2306 and repealing the existing section."

Be passed.

Elwaine F. Pomeroy Chairman

Elwaine F. Pomeroy

S-13b 2-70-2M

1-16-79

Kansas County & District Attorneys Association

Townsite Office Plaza #3 • Suite 240 • 200 E. 6th St. • Topeka, Kansas 66603 • (913) 357-6351

EXECUTIVE DIRECTOR - MAX G. MOSES

TO: Senator Elwaine Pomeroy, Chairman Senate Judiciary Committe

RE: Senate Bill 56

The thrust of the Amendment to Senate Bill 56 is that you cannot rob someone of your own property. This is to be accomplished by adding the words "of another" after the word "property" on line 20 of the Bill.

What does "property of another" contemplate?

Does it include jointly held property such as household items which cannot be easily divided much less identified? How does that phase relate to jointly held cash assets or safe deposit box contents?

Further does it contemplate situations in which a question as to ownership exists? Courts are constantly being asked to decide conflicting claims of ownership arising both out of contract and property law.

Does "property of another" contemplate legal title or also lawful possession as may present itself under such statutes as KSA 58-201 (Liens for materials and services).

How will the phrase "property of another" operate when the property in question is on the surface unidentifiable due to a lack of identifying marks or numbers.

It appears that this Amendment would require the prosecuto to prove that the property was not that of the defendant's.

In fact what the Bill appears to do is establish a justification for defendant's action, namely that he believed the property to be his.

The concept appears to be a logical one. However the approach to accomplishing this end should be changed.
to

We recommend that instead of making the question of ownership an element of crime, the Committee consider creating

an affirmative defense to the crime of robbery. That affirmative defense would be that it shall be a defense if the defendant prove that he was the owner (or had legal title) to the property inquestion.

One further consideration may be worth raising. Will the Bill as drafted or the alternative of an affirmative defense encourage self-help in returning property which wrongly believes to be his and thus give rise to conflict and confrontation in the retrieval of that property.

I cannot answer that question, but I urge the Committee to consider this question in its deliberations.

Respectfully submitted,

Max G. Moses
Executive Director

1-16-79

STATE OF KANSAS

Office of the Attorney General

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

Curt T. Schneider
Attorney General

January 6, 1978

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

> 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 quilty 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

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

11-16-79

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.

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 held: 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.

Steven Rupp and Fred W. Phelps, of Fred W. Phelps, Chartered, of Topeka, for the appellant.

Robert D. Hecht, 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 not see the signs. He could not, as he did, remain silent or rely on his pleadings. Stovall v. Harms, 214 Kan. 835, 838, 522 P. 2d 353 (1974); Ebert v. Mussett, 214 Kan. 62, Syl. ¶ 3, 519 P. 2d 687 (1974); Meyer, Executor v. Benelli, 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., plaintif 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.

1-16-79

SB 43

21-3702. Prima facie evidence of intent to permanently deprive owner or lessor of possession, use or benefit of property. (1) In any prosecution under this article, the following shall be prima facie evidence of intent to permanently deprive the owner or lessor of property of the possession, use or benefit thereof:

(a) The giving of a false identification or fictitious name, address or place of employment at the time of obtaining control over the property; or

(b) the failure of a person who leases or rents personal property to return the same within ten (10) days after the date set forth in the lease or rental agreement for the return of said property, if notice is given to the person renting or leasing said property to return said property within seven (7) days after receipt of said notice, in which case the subsequent return of said property within the seven-day period shall exempt such transaction from consideration as prima facie evidence as provided in this section.

(2) The word "notice" as used herein shall be construed to mean notice in writing and such notice in writing will be presumed to have been given two (2) days following deposit of said notice as registered or certified matter in the United States mail, addressed to such person who has leased or rented said personal property as it appears in the information supplied by him or her at the time of such leasing or renting, or his or her last known address.

History: K.S.A 21-3702; L. 1975, ch. 197, § 1; July 1.

1-16-79

Session of 1979

SENATE BILL No. 4

By Senator Hein

11-28

AN ACT amending the Kansas probate code; amending K.S.A. 59-1507a and 59-2287 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 59-1507a is hereby amended to read as follows: 59-1507a. (a) If not less than ~~thirty~~ ~~(30)~~ *one hundred eighty (180)* days after the death of an individual entitled at the time of death to a monthly benefit or benefits under title II of the social security act, all or part of the amount of such benefit or benefits, not in excess of one thousand dollars ($1,000), is paid [~~by the United States~~] to (1) the surviving spouse, (2) one or more of the deceased's children, or descendants of his or her deceased children, (3) the deceased's father or mother, or (4) the deceased's brother or sister, preference being given in the order named if more than one request for payment shall have been made by or for such individuals, such payment shall be deemed to be a payment to the legal representative of the decedent and shall constitute a full discharge and release from any further claim for such payment to the same extent as if such payment had been made to an executor or administrator of the decedent's estate.

or under any veterans administration program or public or private retirement or annuity plan

(b) The provisions of subsection (a) hereof shall apply only if an affidavit has been made and filed with the [~~United States department of health, education, and welfare~~] by the surviving spouse or other relative by whom or on whose behalf request for payment is made and such affidavit shows (1) the date of death of the deceased, (2) the relationship of the affiant to the deceased, (3) that no executor or administrator for the deceased has qualified or been appointed, and (4) that, to the affiant's knowledge, there exists at the time of the filing of such affidavit, no relative of a closer degree of kinship to the deceased than the affiant.

appropriate governmental office or private company responsible for the benefit

§ 630. Summary probate proceedings: Affidavit of right

When a decedent leaves no real property, nor interest therein nor lien thereon, in this state, and the total value of the decedent's property in this state, excluding any motor vehicle of which the decedent is the owner or legal owner, over and above any amounts due to the decedent for services in the armed forces of the United States, and over and above the amount of salary not exceeding three thousand dollars ($3,000), including compensation for unused vacation, owing to decedent for services from any employment, does not exceed twenty thousand dollars ($20,000), the surviving spouse, the children, lawful issue of deceased children, a parent, brothers or sisters of the decedent, the lawful issue of a deceased brother or sister, or the conservator of the property of any person bearing such relationship to the decedent, or the guardian of the estate of any minor or insane or incompetent person bearing such relationship to the decedent, or the trustee named under a trust agreement executed by the decedent during his lifetime, the primary beneficiaries of which bear such relationship to the decedent, if such person or persons has or have a right to succeed to the property of the decedent, or is the sole beneficiary or are all of the beneficiaries under the last will and testament of the decedent, may, without procuring letters of administration, or awaiting the probate of the will, collect any money due the decedent, receive the property of the decedent, and have any evidences of interest, indebtedness or right transferred to such person or persons upon furnishing the person, representative, corporation, officer or body owing the money, having custody of such property or acting as registrar or transfer agent of such evidences of interest, indebtedness or right, with an affidavit or declaration under penalty of perjury showing the right of the person or persons to receive such money or property, or to have such evidences transferred.

§ 630.5. Estates under $5,000: Collection of bank deposit by surviving spouse: Affidavit

Whether a person dies testate or intestate, and irrespective of the character of his or her property, if the value of the estate does not exceed five thousand dollars, the spouse of the decedent, if entitled by succession or by the last will and testament of the decedent ot any money of the decedent on deposit in bank, may collect such money, not to exceed the total sum of five hundred dollars, without procuring letters testamentary or of administration, upon furnishing the bank with an affidavit showing the right of the affiant to receive such money.

§ 631. Receipt as discharge: Effect on administration

1-16-79

The receipt of such affiant or affiants shall constitute sufficient acquittance for any payment of money or delivery of property made pursuant to the provisions of this article and shall fully discharge such person, representative, corporation, officer or body from any further liability with reference thereto, without the necessity of inquiring into the truth of any of the facts stated in the affidavit. But such payment or transfer shall not preclude administration when necessary to enforce payment of the decedent's debts.

Under Section 204 of the Social Security Act, as amended by the Social Security Amendments of 1965 (Public Law 89-97), the Secretary of Health, Education, and Welfare can only pay underpayments due deceased social security beneficiaries, not resulting from actual error on the Secretary's part, to the legal representative of the deceased's estate, unless there is a surviving spouse who was living in the same household with the deceased at the time of death. Indeed, even a surviving spouse may be paid this underpayment only if it does not exceed the amount of the monthly benefit to which the deceased was entitled for the month before he died. If the underpayment is a greater amount, it may only be paid to the legal representative of the deceased's estate.

In applying this rule, the Secretary has undertaken, to the extent that he can, to minimize the expense and possible inconvenience to the public. Thus, while the term "legal representative" generally refers to a formally appointed administrator or executor, the Secretary will pay an underpayment to any individual who qualifies as such under a state "small estate" statute, where formal and relatively expensive probate procedures do not apply. In some states, including California (see 53 Cal. Code 630) and New York (see section 103 of the Decedent Estate Law), the Secretary can pay certain closely related survivors (e.g., spouse, children) of the deceased on the basis of an affidavit.

Most states have no provision for expeditious payment of small amounts of money such as are so often involved in underpayments under title II of the Social Security Act and in such instances the Secretary is obliged to require formal or informal administration of the decedent's estate, with its attendant delay and expense to the individual claiming the underpayment. Adoption of the accompanying suggested legislation by a state which does not now have an affidavit procedure in its decedent's estate law would save close relatives of decedents due social security benefits at the time of death the time and money that would be involved in more formal proceedings to secure what would generally be very small payments.