

MINUTES OF THE SENATE COMMITTEE ON JUDICIARYThe meeting was called to order by Senator Elwaine F. Pomeroy at  
Chairperson10:00 a.m./~~p.m.~~ on March 4, 1983 in room 514-S of the Capitol.~~All~~ members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaines, Hein, Hess, Mulich, Steineger and Werts.Committee staff present: Mary Torrence, Revisor of Statutes  
Mike Heim, Legislative Research Department  
Mark Burghart, Legislative Research Department

## Conferees appearing before the committee:

Phil Winter, Office of Lyon County Attorney  
Harvey Snapp, Kansas Bar Association  
Judge James Buchele, Shawnee County District Court  
Bert Cantwell, Office of the Governor  
Dwayne Sackman, Department of Budget  
Jon Josserand, Office of Secretary of StateSenate Bill 370 - Venue of divorce, separate maintenance and annulment actions.

The chairman explained the bill is a cleanup to make venue statutes consistent with the divorce venue statutes.

Senate Bill 371 - Crime of threatening to contaminate food, drink or drugs.

Phil Winter appeared in support of the bill. He explained the amendment that has been proposed adds the type of crime that we have recently seen take place in Louisiana with threatening the water supply; there was another case where there was a threat to adulterate meat. Mr. Winter suggested adding the words "or corporation" in Section (b). During committee discussion, the chairman suggested deleting "public" in line 28 of the bill. Mr. Winter said he had no objection. A committee member inquired of Mr. Winter, striking the wording in lines 31-34 ending with "reputation of any person". Mr. Winter agreed with that suggestion. Another committee member suggested adding "damage to property of another". Mr. Winter thought that would work. Mr. Winter explained when his particular case comes up, he questions whether the law as written gives him grounds.

Senate Bill 346 - Time period of determining marketable record title of real property.

John Brookens introduced Harvey Snapp, who is on the Title Standards Committee of the Kansas Bar Association.

Mr. Snapp explained the bill. He stated they think 40 years is too long; they think it is time to lower the standard from 40 to 25 years. They are just reducing the period. A committee member inquired if the committee took action, could that cause a severed mineral interest to expire after 20 years. Mr. Snapp replied, mineral interests are included in this act. Mr. Snapp stated it is consistent with what has been done in other states, that 25 years is more acceptable to title attorneys without getting a great deal of opposition. The committee member suggested raising the mineral interests to 25, rather than 20. Mr. Snapp thought that would be advisable.

Senate Bill 350 - Registration of process servers.

Judge Buchele explained he had requested the bill be introduced. He stated this would eliminate some paperwork. He suggested a process server be registered the way a notary public is registered. He suggested the application form by the secretary of state be attested to by the county sheriff or maybe the judge or clerk of the

CONTINUATION SHEET

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 room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on March 4, 1983.

Senate Bill 350 continued

district court. He suggested the secretary of state's office, upon registering the applicant, notify the clerk of the district court of that county. He suggested the period be longer. Judge Buchele referred to the surplus language on page 2, line 56. Committee discussion with him followed.

The chairman recognized Bert Cantwell during the discussion concerning providing process servers. Mr. Cantwell commented he is not sure it is being done; not sure attorneys like it. He stated process servers are not making the money they thought they would.

During the discussion, Judge Buchele stated the problem with lawyers is finding people who are willing to do it.

Dwayne Sackman testified the fiscal impact of the bill would net out to about zero, because the secretary of state can charge fees to cover this. Committee discussion followed concerning what the charge should be.

Jon Josserand stated the fee for notary publics was raised to \$25, and the charge to register process servers should be consistent with the notary publics. A committee member inquired what a \$1,000 bond cost. Mr. Josserand answered it is \$25.

Senate Bill 370 - Venue of divorce, separate maintenance and annulment actions.

A staff member explained the bill to the committee. Senator Winter moved to report the bill favorably; Senator Mulich seconded the motion, and the motion carried.

Senate Bill 371 - Crime of threatening to contaminate food, drink or drugs.

Senator Burke moved to amend the bill by deleting the word "public" in line 28; Senator Werts seconded the motion. Senator Winter made a substitute motion to amend the bill to make it broader by striking all of (b) and inserting "cause damage to property or bodily injury to any person"; Senator Burke seconded the motion. Following committee discussion, the motion carried. Senator Winter moved to report the bill favorably as amended; Senator Burke seconded the motion, and the motion carried.

Senate Bill 372 - Money and property required to be held by garnishee.

The chairman explained the bill. Following committee discussion, Senator Werts moved to report the bill favorably; Senator Gaines seconded the motion, and the motion carried. A copy of a Court of Appeals case is attached (See Attachment #1).

Senate Bill 346 - Time period of determining marketable record title of real property.

Senator Gaines moved to report the bill favorably; Senator Winter seconded the motion. Following committee discussion, the motion carried.

Senate Bill 350 - Registration of process servers.

Following committee discussion, Senator Burke made a motion to amend the bill in line 43 by changing \$10 to \$25; Senator Gaines seconded the motion, and the motion carried. Senator Burke made a conceptual motion to further amend the bill to provide that the individual has to be attested to by the secretary of state's office, sheriff or district court; Senator Gaines seconded the motion, and the motion carried. Senator Burke moved to amend the bill in line 56 by striking "or pleading guilty or nolo contendere to"; Senator Werts seconded the motion, and the motion carried. Following committee discussion, Senator Burke moved to report the bill favorably as amended; Senator Gaines seconded the motion, and the motion carried.

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Senate Bill 246 - Defense of governmental employees in civil rights cases.

A staff member explained the committee report on the bill. The chairman asked for the committee's direction whether to provide in the bill to allow counsel for state and public officials. Following committee discussion, the committee directed staff to allow and approve the state employees to hire counsel.

The meeting adjourned.

3-4-83

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Alvin Brooks	Topeka	K B A
Harvey Gump	Newton	K B A
Philip Wanta	Emporia	Squam co atty office
Jim Buchele	Topeka	Self
WAYNE JACKMAN	"	BUDGET DIV.
Hon Muller	Topeka	Assoc. Credit Bureau
Ed [unclear]	"	Kang. Assoc of AC Inc Co.
Jan Casserand	Topeka	Secretary of SA.
DAVID CALOVICH	"	KIN

SB 372  
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✓  
No. 54,232

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
Appellee,

v.

CHARLES D. ERBACHER,  
Appellant.

SYLLABUS BY THE COURT

K.S.A. 41-2719 which states that no person shall transport an open container of cereal malt beverage in a vehicle on the highway or street, applies to passengers as well as the driver of the vehicle.

Appeal from Ellis District Court; TOM SCOTT, judge. Opinion filed October 7, 1982. Affirmed.

Edward E. Bouker, of Martin & Coffelt, of Hays, for the appellant.

Robert E. Diehl, assistant county attorney, and Robert T. Stephan, attorney general, for the appellee.

Syl.

Atch. 1

Before FOTH, C.J., ABBOTT and PARKS, JJ.

PARKS, J.: Defendant Charles Erbacher appeals his bench trial conviction of transporting an open container of cereal malt beverage in violation of K.S.A. 41-2719. The parties filed an agreed statement pursuant to Rule 3.05; thus the facts are undisputed.

On November 22, 1981, defendant was a passenger in an automobile operated by a friend. Trooper Schrag of the Kansas Highway Patrol, who was running a driver's license check lane, stopped the vehicle. While he was returning the operator's license, the Trooper spotted what he believed to be containers of beer on the front floor of the car. When he opened the door on the passenger side where defendant was seated, he found an open container of 3.2 beer under the defendant's legs on the floor of the car.

The sole issue on appeal is whether K.S.A. 41-2719 authorizes the prosecution of a passenger for transportation of an open container of cereal malt beverage in a vehicle.

K.S.A. 41-2719 provides that no person shall transport in any vehicle upon a highway or street any cereal malt beverage unless such beverage is (1) in the original unopened container, the seal of which has not been opened; (2) in the locked rear trunk or any locked outside compartment which is not accessible to any person in the vehicle while it is in motion; or (3) in the exclusive possession of a passenger in a vehicle which is a recreational vehicle (K.S.A. 1980 Supp. 75-1212) or a bus (K.S.A. 8-1406) who is not in the driving compartment or portion of the vehicle which is accessible to the driver. The statute is patterned after K.S.A. 41-804 which prohibits the transportation of an open container of alcoholic liquor.

This statute is penal in nature and must be strictly construed. This simply means that ordinary words are to be given their ordinary meaning; it does not permit or justify a disregard of manifest legislative intention appearing from plain and unambiguous language. State v. Howard, 221 Kan. 51, 54, 557 P.2d 1280 (1976).

The legislative aim of this state is clearly demonstrated by the scope of the exclusions from its coverage. K.S.A. 41-2719 is intended to indirectly prevent the intoxication of motor vehicle drivers by prohibiting the presence of open containers of beer within the reach of a driver. Thus, so long as the beer is unopened or in a place in the vehicle which is inaccessible to the driver, it may be transported or consumed. However, although the legislative goal of the statute is readily apparent, it is the breadth of the prohibition and specifically whether someone other than the driver may be found guilty under its provisions which is at issue here.

The statute's initial prohibition is that "[n]o person shall transport in any vehicle" an open container of cereal malt beverage. Clearly, the phrase "no person" is broad enough to include passengers as well as the driver of the vehicle. Cf. Freach v. Commonwealth, 471 Pa. 558, 568, 370 A.2d 1163 (1977). Moreover, had the legislature intended the statute to only apply to drivers, this intention could have been clearly expressed by simply prohibiting drivers instead of persons from transporting an open container.

Defendant contends, however, that the use of the term "transport" confines the prohibition to driver conduct because only the person in control of the vehicle may be said to be transporting the open container. This was the view adopted by the attorney general opinion on this subject where it was stated as follows:

"We believe that the term 'transport' is not a technical term, but rather is one which is in common usage and, accordingly, should be given its natural and ordinary meaning in the English language. The definition of 'transport' in The American College Dictionary, (1960) is, 'to carry or convey from one place to another.' When the foregoing definition is considered in conjunction with the language 'in any vehicle,' it is our conclusion that only the driver of the vehicle may be charged with transporting an open container. It is the driver who causes the vehicle to be in motion, thereby carrying or conveying the contents thereof from one place to another."  
Att'y Gen. Op. No. 82-73.

We agree that "transport" must be given its ordinary meaning but we are unconvinced that its meaning only embraces the conduct of the driver. A pedestrian who holds a can of beer while walking home is certainly transporting that beer from one place to another. He does not surrender control over that act of transporting something on his person simply because he is picked up along the way by a friend in a car. We conclude that to confine the meaning of "transport" to the actions of a driver of a vehicle would, in the context of this statute, betray the ordinary meaning of the word as a synonym for "carry" or "convey".

Defendant also argues that as a passenger, he should not have been convicted under this statute because the sanctions for violating its provisions are all related to the driving privilege. While it is true that K.S.A. 41-2719 (b) and (f) mandate suspension or restriction of the defendant's driver's license or privilege to operate a motor vehicle, the statute also states that this sanction



shall be "in addition to any other disposition ordered pursuant to law." K.S.A. 41-2719 (b).

K.S.A. 41-2711 is a general provision which classifies violations of the 1937 act pertaining to cereal malt beverages as a misdemeanor punishable by a fine or imprisonment or both. K.S.A. 41-2719 was not enacted until 1981 and would not be included within the recited scope of section 41-2711 were it not for subsection (e) of the more recent statute. K.S.A. 41-2719 (e) provides that the statute shall be part of and supplemental to article 27 of chapter 41 of the Kansas Statutes Annotated. This subsection, coupled with the authorization of "any disposition ordered pursuant to law," must have been intended to engraft the general misdemeanor penalties prescribed by K.S.A. 41-2711 on to the sanctions specifically set out in K.S.A. 41-2719. Thus, defendant's argument that there would be no actual penalty which could be imposed against a person found guilty of violating the open container statute if that person did not have a driver's license is incorrect. The court is authorized to fine or imprison anyone found guilty of violating the statute by virtue of K.S.A. 41-2711. In fact, a fine of \$25 and costs of \$10 were imposed against this defendant and he makes no contention on appeal that the fine is not authorized by law. In addition, the sanctions against the driving privilege are not limited to persons who already have a license since the court may either suspend the person's license or suspend their privilege to obtain a license.

In sum, we cannot ignore the plain implication of the phrase "No person shall . . ." and hold that the legislature meant no driver shall. When this court is faced with the construction of a statute, its function is to interpret the statute and not to rewrite legislation. Dougan, Administratrix v. McGrew, 187 Kan. 410, 415, 357 P.2d 319 (1960).

Since there is no issue in this case concerning the defendant's knowledge or possession of the open container of beer, we hold that he was properly convicted under K.S.A. 41-2719.

Affirmed.