Approved 4/9/85
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative Joe Knopp
Chairperson at

3:30PM a.m./p.m. on March 20, 1985 in room 526-S of the Capitol.

All members were present except:
Representative Buehler was excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Becca Conrad, Secretary

Conferees appearing before the committee:

Justice David Prager, Kansas Judicial Counsel
Ron Smith, Kansas Bar Association
Marjorie Van Buren, Office of Judicial Administrator
Tom Bell, Kansas Hospital Association
Judge William Carpenter, Shawnee County District Court
Charles Henson, General Counsel of Kansas Bankers Association
Jerry Goodell, Kansas Savings and Loan League
Don Stumbaugh, Acting Director of Crime Victims Reparations Board
John McCabe, Executive Director of the Uniform Law Commission

SB 37 - Concerning civil procedure; relating to subpoena of certain records.

Justice David Prager, Kansas Judicial Counsel, explained the changes in the code of civil procedure which have the purpose of avoiding requiring a custodian of business records to waste his or her time in taking a deposition to identify the business records.

Ron Smith, Kansas Bar Association, spoke in favor of this bill.

Marjorie Van Buren, Office of Judicial Administration, explained the amendments they proposed as shown in Attachment No. 1.

Tom Bell, Kansas Hospital Association, said they supported this bill as shown in his written testimony, Attachment No. 2.

SB 38 - Concerning court procedure; relating to change of judge.

Justice Prager explained the reasons for this bill saying that the main change is in Section 1. There was concern that this would make it too easy to get a judge to disqualify himself or herself because the threat would be "if you don't disqualify yourself, I will file this affidavit".

Ron Smith, Kansas Bar Association, said they have no problem with Section 1(a). He said the Executive Counsel of the Bar did not like the language changs in lines 64 and 65. He said this could force a client to go to trial with a prejudice judge and they don't feel that is a good option. He also pointed out that in lines 69 and 70 the word "counsel" is used instead of "attorney".

Judge William Carpenter, Shawnee County District Court, said he agreed with everything in SB 38 except for provision (c) (5), line 64, starting with "No party". He said he thought it restricted this provision to just (5).

SB 261 - Concerning stipulations for attorney fees in certain instruments.

Charles Henson, General Counsel of Kansas Bankers Association, spoke in favor of this bill. He referred the committee to Mr. Maag's testimony, Attachment No. 3.

Jerry Goodell, Kansas Savings and Loan League, spoke in favor of this bill. He said the original bill restricted it solely to the holder of a mortgage and this bill applies also to the owner of the property.

MINUTES OF THE House COMMITTEE ON Judiciary,

room 526-S, Statehouse, at 3:30 ~~xxxx~~a.m./p.m. on March 20, 1985.

SB 63 - Concerning certain governmental employees; relating to payment of attorney fees in civil rights actions.

Marjorie Van Buren, Office of Judicial Administration, spoke in favor of this bill as shown in Attachments No. 4 and 5.

Representative Solbach made a motion to pass this bill out favorably and it was seconded by Representative Walker. The motion carried.

SB 109 - Enacting the Kansas uniform transfers to minors act.

Ron Smith, Kansas Bar Association, introduced John McCabe who is the Executive Director of the Uniform Law Commission. Mr. McCabe spoke in favor of this bill as shown in Attachment No. 6.

Representative Vancrum made a motion to report SB 109 favorable for action. It was seconded by Representative Cloud and the motion carried.

SB 108 - Concerning docket fees; relating to the amount and disposition thereof.

Dno Stumbaugh, Acting Director of Crime Victims Reparations Board, presented information to the committee as shown in Attachments No. 7 and 8.

Marjorie Van Buren, Office of Judicial Administration, had written testimony on SB 108 as shown in Attachment No. 9.

The meeting adjourned at 5:00 p.m.

Testimony on Senate Bill No. 37
Before the House Judiciary Committee
By
Marjorie Van Buren
Office of Judicial Administration

The Office of Judicial Administration offers three sets of minor amendments to clarify and simplify the procedures set up in SB 37.

First, we propose making return of the copy of the record (ll. 193-195) optional upon request of the custodian of the record submitting the copy. In many cases, the documents submitted will probably be photocopies made only for submission in response to the subpoena and without other value. In those cases, the clerk might as well discard the copy instead of expending time and postage so that the custodian can throw it out.

The attached balloon version shows amendments at lines 68, 117, 130 and 194-95 to accomplish this.

Secondly, to facilitate the return of the copy when it is requested, we would suggest that the address of the witness submitting the record also be inscribed on the envelope in which the copy is delivered to the clerk. This could be accomplished by altering lines 67 and 116 as shown.

The last change we would like to suggest is in the language describing the giving of notice of inspection of the copy of the records (ll. 191-193). In purpose, this section of the bill is very like K.S.A. 60-230(b) which governs giving notice for taking depositions. That statute specifically requires the party wishing to depose a witness to notify the other parties. We suggest that similar language be used at lines 191-193 in order that no one involved be in any doubt about the notice procedure.

Attachment No. 1
House Judiciary
March 20, 1985

true and correct copy of all the records described in the subpoena and mails a copy of the affidavit accompanying the records to the party or attorney requesting them within 10 days after receipt of the subpoena.

The records described in the subpoena shall be accompanied by the affidavit of a custodian of the records, stating in substance each of the following: (1) The affiant is a duly authorized custodian of the records and has authority to certify records; (2) the copy is a true copy of all the records described in the subpoena; and (3) the records were prepared by the personnel or staff of the business, or persons acting under their control, in the regular course of the business at or about the time of the act, condition or event recorded.

If the business has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit and shall send only those records of which the affiant has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be delivered to the clerk of the court.

and address

If return of the copy is desired, the words 'Return requested' must be inscribed clearly on the sealed envelope or wrapper.

The reasonable costs of copying the records may be demanded of the party causing the subpoena to be issued. If the costs are demanded, the records need not be produced until the costs of copying are advanced.

(c) The subpoena shall be accompanied by an affidavit to be used by the records custodian. The subpoena and affidavit shall be in substantially the following form:

Subpoena of Business Records

State of Kansas

County of _____

(1) You are commanded to produce the records listed below before

_____

(Officer at Deposition) (Judge of the District Court)

at _____

(Address)

in the City of _____, County of _____, on the

_____ day of _____, 19____, at _____ o'clock ____ m., and to testify on behalf of the _____ in an action now pending between _____, plaintiff, and _____, defendant. Failure to comply with this subpoena may be deemed a contempt of the court.

(2) Records to be produced: _____

(3) You may make written objection to the production of any or all of the records listed above by serving such written objection upon _____ (Attorney) at _____ (Attorney's Address) (within 10 days after service of this subpoena) (on or before _____, 19____). If such objection is made, the records need not be produced except upon order of the court.

(4) Instead of appearing at the time and place listed above, it is sufficient compliance with this subpoena if a custodian of the business records delivers to the clerk of the court by mail or otherwise a true and correct copy of all the records described above and mails a copy of the affidavit below to _____ (Requesting Party or Attorney) _____ (Address of Party or Attorney) within 10 days after receipt of this subpoena.

(5) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness and the date of this subpoena are clearly inscribed. The sealed envelope or wrapper shall be delivered to the clerk of the court.

and address

If return of the copy is desired, the words 'Return requested' must be inscribed clearly on the sealed envelope or wrapper.

(6) The records described in this subpoena shall be accompanied by the affidavit of a custodian of the records, a form for which is attached to this subpoena.

(7) If the business has none of the records described in this subpoena, or only part thereof, the affidavit shall so state, and the custodian shall send only those records of which the custodian has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

(8) The reasonable costs of copying the records may be demanded of the party causing this subpoena to be issued. If the costs are demanded, the records need not be produced until the costs of copying are advanced.

_____ Clerk of the District Court

(9) The copy of the records will not be returned unless requested by the witness.

[Seal of the District Court]

Dated _____, 19____.

Affidavit of Custodian of Business Records

State of _____

County of _____

I, _____, being first duly sworn, on oath, depose and say that:

(1) I am a duly authorized custodian of the business records of _____ and have the authority to certify those records.

(2) The copy of the records attached to this affidavit is a true copy of the records described in the subpoena.

(3) The records were prepared by the personnel or staff of the business, or

persons acting under their control, in the regular course of the business at or about the time of the act, condition or event recorded.

_____
Signature of Custodian

Subscribed and sworn to before the undersigned on _____.

_____
Notary Public

My Appointment Expires:

_____

Certificate of Mailing

I hereby certify that on _____, 19____, I mailed a copy of the above affidavit to

_____ at _____
(Requesting Party or Attorney) (Address of Party or Attorney)

by depositing it with the United States Postal Service for delivery with postage prepaid.

_____
Signature of Custodian

Subscribed and sworn to before the undersigned on _____.

_____
Notary Public

My Appointment Expires:

_____

(d) Any party may require the personal attendance of a custodian of business records and the production of original business records by causing a subpoena duces tecum to be issued which contains the following statements in lieu of paragraphs (4), (5), (6), (7) and (8) of the subpoena form described in subsection (c):

The personal attendance of a custodian of business records and the production of original records is required by this subpoena. The procedure for delivering copies of the records to the clerk of the court shall not be deemed sufficient compliance with this subpoena and should be disregarded. A custodian of the records must personally appear with the original records.

(e) Upon receipt of business records the clerk of the court shall so notify the party who caused the subpoena for the business records to be issued. If receipt of the records makes the taking of a deposition unnecessary, the party shall cancel the deposition and shall notify the other parties to the action in writing of the receipt of the records and the cancellation of the deposition.

~~After filing, the copy of the records may be inspected and~~

After the copy of the record is filed, a party desiring to inspect or copy it shall give reasonable notice to every other party to the action. The notice shall state the time and place of inspection.

~~copied by any party after reasonable notice to all parties of the time and place for inspection of the records~~. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of the records who submitted them destroyed or if return has been requested.

Sec. 2. K.S.A. 60-245 is hereby amended to read as follows: 60-245. (a) *For attendance of witnesses; form; issuance.* Every subpoena for attendance of a witness shall be issued by the clerk under the seal of the court or by a judge, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place specified in the subpoena.

(b) *For production of documentary evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated in the subpoena, but the court, upon motion made promptly and at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

Subpoena and production of records of a business which is not a party shall be in accordance with section 1.

(c) *Blank subpoenas.* Upon request of a party, the clerk shall issue a blank subpoena for the attendance of a witness or the production of documentary evidence. The blank subpoena shall bear the seal of the court, the title and file number of the action and the clerk's signature or a facsimile of the clerk's signature. The party to whom a blank subpoena is issued shall fill it in before service.

(d) *Service.* A subpoena may be served by the sheriff, by the sheriff's deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to the person and by tendering to the person the fees for one day's attendance and the mileage allowed by law. When the subpoena is not served by the sheriff or by the sheriff's deputy,

TESTIMONY OF THE KANSAS HOSPITAL ASSOCIATION
BEFORE THE HOUSE JUDICIARY COMMITTEE

MARCH 20, 1985

The Kansas Hospital Association appreciates the opportunity to appear before the House Judiciary Committee in support of Senate Bill 37.

Senate Bill 37 establishes a simplified procedure for the production of business records in an action in which the business is not a party. It allows the custodian of the records to comply with a subpoena duces tecum by delivering to the clerk of the court a correct copy of the records along with an affidavit verifying the records' validity. In those instances where the person issuing the subpoena wants to examine the original records or to depose the custodian of the records, Senate Bill 37 provides that the custodian must appear personally with the original records. This bill passed the Senate by a vote of 38-0.

The Kansas Hospital Association supports the provisions of Senate Bill 37. It would simplify the litigation process while allowing a savings of time and money for businesses, litigants, hospitals and attorneys.

Attachment No. 2
House Judiciary
March 20, 1985

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

March 20, 1985

TO: House Committee on Judiciary

FROM: James S. Maag, Director of Research
Kansas Bankers Association

RE: SB 261

Mr. Chairman and members of the Committee:

Thank you for the opportunity to appear before the Committee on the provisions of SB 261. As originally drafted, the bill would have allowed notes, bonds, mortgages, and agreements given in connection with commercial loans to provide for the payment of attorney fees. The bill further provided that any loan evidenced by a note secured by a first real estate mortgage could allow for judgment against the real estate for reasonable attorneys fees incurred to foreclose the mortgage by the holder of the note.

Banks are usually involved with attorney fees in connection with collection matters on deliquent promissory notes, both secured and unsecured. Many states allow such notes to contain a particular clause allowing the recovery of attorney fees by the bank if a suit is necessary to recover on the note. In fact, the Uniform Commercial Code, adopted by Kansas and 48 other states, does provide that the first item to be paid out of the proceeds from a sale of collateral is "reasonable attorneys' fees and legal expenses incurred by the secured party" unless such action is prohibited by other state law. Therefore, it would appear that under Kansas law, it is possible to allow attorney fees in connection with commercial loan and real estate transactions. However, this twentieth-century uniform law is preempted in Kansas by a nineteenth-century law first adopted in 1876 (K.S.A. 58-2312) which prohibits a bank from contracting for the payment of attorney fees in any note, bill of exchange, bond or mortgage.

Kansas, by prohibiting clauses in loan transactions for attorney fees is, in effect, placing a restriction on freedom of contract between parties. K.S.A. 58-2312 has been strictly construed by the courts on the grounds attorney fees provisions in debt instruments are against Kansas public policy. However, there are currently some 75 Kansas statutes which allow for attorney fees. I would direct the Committee's attention to an article from the Kansas Bar Journal (Fall, 1984) by Ron Leslie in which he gives a Kansas historical perspective on the recovery of attorney fees. That article lists the numerous sections of the statutes which have allowed for recovery of attorneys fees in certain circumstances. It should also be noted that under the Kansas Uniform Consumer Credit Code a bank which violates

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any of the provisions of the Code can be sued by the debtor and the debtor can recover attorney fees. However, such action by a creditor under the Consumer Credit Code is expressly prohibited.

The Senate Committee on Judiciary amended SB 261 to permit any loan evidenced by a note secured by real estate to include a provision allowing the court to enter judgment in rem for reasonable attorney's fees for the noteholder in foreclosure actions. The KBA has no objection to the Senate action, but we did want the committee to be aware that the bill, as originally drafted would have restricted the attorney's fee provision to commercial loans and notes secured by first real estate mortgages.

While an outright repeal of K.S.A. 58-2312 can certainly be justified, we are well aware of the political realities of such an approach and are simply asking that the century old prohibition be lifted on certain types of transactions. There is precedent for this approach in our state usury laws when then the legislature has eliminated usury limits on commercial and ag loans, but has kept a ceiling on consumer loans. The law in Kansas as it presently exists is grossly unfair to the creditor and is one factor which all creditors must consider when determining what interest rates can be charged by the institution.

We truly believe that it is time for the legislature to review this antiquated law and, in light of the legislative actions over the past years concerning the awarding of attorney fees, adopt the amendments to K.S.A. 58-2312 as contained in SB 261. We appreciate very much the opportunity to appear on this important matter.

Recovery of Attorney Fees—An Historical Perspective

By Ron Leslie

Trial lawyers and general practitioners are frequently asked by clients whether attorney fees can be recovered in litigation. The answer to that question is affirmative in a surprising, and increasing, number of cases.

The passage of K.S.A. 60-2007 by the 1982 Kansas Legislature called the attention of the trial bar to the subject of recovery of attorney fees in contested litigation. That statute, of course, provides for the possible assessment of attorney fees by the trial court against a party when the party's attorney asserts a claim or defense "without a reasonable basis in fact and not in good faith." An attorney may also be held personally liable if the court finds that the attorney knowingly and not in good faith asserted a claim or defense. While the content of that rule is similar to Disciplinary Rule 7-102 of the Code of Professional Responsibility, K.S.A. 60-2007 has added new and more immediate sanctions against lawyers and parties who file cases without substantial merit. However, that statute is merely the latest in a long line of legislative enactments providing for recovery of attorney fees in contested litigation under certain circumstances.

The purpose of this article is to examine the history of the recovery of attorney fees in litigated cases in Kansas, and to give trial lawyers and general practitioners an overview of the current status of the law in the field.

The following topic areas are excluded:

a) Where the litigant attempting to recover fees is a governmental agency. For example, K.S.A. 22-3901 *et seq* sets out certain categories of common nuisances which may be abated upon a complaint by the Attorney General or a county attorney. K.S.A. 22-3904 (3) mandates that the court award a reasonable fee to the prosecuting attorney in the event of a judgment for the state.

b) Where attorney fees are sought under Federal law.

c) Where the amount an attorney can charge his own client is subject to the approval of the court. The most common example is K.S.A. 59-1717, providing that an attorney who has represented the administrator or executor of a decedent's estate must have his or her fees approved by the court.

COMMON LAW RULE

Much of our common law traces its antecedents to the English common law. Under English common law, the prevailing party normally must pay the attorney fees of both parties. However, American courts have generally held that attorney fees are not recoverable absent statutory authorization. Furney, *Recovery of Attor-*

neys Fees in Kansas, 18 W.L.J. 534 (1979).

Kansas departed from the English rule very early in its history. In *Swartzell v. Rogers*, 3 Kan. 374 (1866), the primary issue was whether attorney fees should be assessed as part of the costs of the case. The court denied plaintiff's request for fees and stated: "That matter is conclusively settled by statutory enactment." The court also raised an interesting argument—the policy of the law should not be that the more doubtful plaintiff's claim is, the more exposure the defendant should have for plaintiff's attorneys fees. As we shall soon see, this policy argument has been given little weight by the Kansas Legislature in the intervening years.

In 1872, *Stover v. Johnnycake*, 9 Kan. 367 (1872) gave additional emphasis to the developing rule of Kansas. In that case the Kansas Supreme Court held that a judgment for attorney fees would not be allowed in litigation unless stipulated for or unless expressly allowed by statute.

While some jurisdictions have, on occasion, created an exception to the American rule in cases of bad faith or fraud, Kansas has not recognized this exception. The general rule has been routinely followed, with only the following exceptions:

In *Columbia Knickerbocker Trust Co. v. City of Atchison*, 93 Kan. 302, 144 Pac. 222 (1914) the court allowed recovery of fees in a mandamus action wherein citizens of the City of Atchison filed suit to compel officers of the City to levy a tax for the payment of defaulted bonds issued by the City. Even this allowance was based on a statutory authorization that stated that plaintiff in a mandamus action could recover damages and costs. The court evidently reasoned that attorney fees were an element of costs.

In *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 438 P.2d 732 (1968), plaintiff sought mandamus against a watershed district to force the holding of an election on a method of financing a plan of improvement. The court reaffirmed its earlier ruling, held that the action on the part of the board in refusing to hold an election was unreasonable, and allowed damages and attorney fees to plaintiff.

Kansas has also allowed recovery absent statutory authorization where an attorney has, through services to the attorney's client, created a fund in which others besides the attorney's client will share.

Kansas has also allowed recovery

About the Author

RONALD L. LESLIE *earned his J.D. in 1965 from the University of Kansas where he was on the editorial staff of the Kansas Law Review. He is a partner in Hess, Leslie, and Brown of Hutchinson, a firm engaged in general practice. He is a member of the Reno County, Kansas, and American Bar Associations, and is a past president of the Reno County Bar Association.*

absent statutory authorization where an attorney has, through services to the attorney's client, created a fund in which others besides the attorney's client will share. In *Quesenbury v. Wichita Coca Cola Bottling Company*, 229 Kan. 501, 625 P.2d 1129 (1981), the court ruled that plaintiff's attorney is entitled to a fee on the insurer's subrogated portion of settlement proceeds recovered for property damage.

HISTORICAL TRENDS

The Kansas Legislature has steadily eroded the Kansas common law rule. Seventy-five statutes were found allowing recovery of attorney fees in litigation, usually at the discretion of the trial judge. An analysis of these statutes shows three trends.

First, the Kansas Legislature has sought to add emphasis to rights that it has deemed of particular importance by means of attorney fee provisions. Early in the state's history, before transportation and communication facilities were highly developed, the Legislature responded to factors arising within Kansas. In the twentieth century, however, as Kansas became an integral part of the national economy and political system, many of the enactments have been responses by the Kansas Legislature to national conditions.

Prior to 1910, nearly all legislative enactments addressed to recovery of attorney fees were concerned with some aspect of agriculture, reflecting the agrarian nature of the Kansas economy. For example, the Legislature's first venture into this area, in 1868, concerned the subject of partition fences. The duty to erect or maintain a partition fence between adjoining landowners was enforced by recovery of attorney fees provisions, as was the assessment of damages by appointed fence viewers. (K.S.A. 29-303, 29-305, 29-310 and 29-404). The general practicing attorney will rarely, if ever, see a case involving partition fences today.

Other early attorney fee provisions were concerned with such matters as the liability of railroads for failure to pay full value for death of livestock (K.S.A. 66-296), liability of one controlling a canal or reservoir who charged more for use of the water than the county commissioners allowed (K.S.A. 42-389), and against a purchaser of grain who defrauded the seller concerning the actual weight of the grain (K.S.A. 83-140).

As Kansas began the process of shifting to a mixed agricultural and industrial economy, the first attorney fee enactment governing employer-employee relations came into law in 1897. K.S.A. 44-117 prohibited blacklisting by any employer who would seek to prevent a former employee from regaining work, and K.S.A. 44-119 provided that an employer found liable under 44-117 would also be liable for the employee's attorney fee.

In the early 1930's, as the Great Depression deepened its hold on the nation, financial institutions began to encounter difficulties. The Legislature responded by making it unlawful for an insurance company to unjustly refuse to pay the full amount of a just claim. If the insured recovered judgment against the insurance company, the court was authorized to award attorney fees to the insured. (K.S.A. 40-256).

In the 1930's and early 1940's, the nation began enacting various components of the modern welfare state. In 1943, Kansas joined that trend by adopting its worker's compensation law. As part of its package of laws, the Legislature adopted K.S.A. 44-512(a), providing that an employer failing to pay compensation to an in-

jured worker when due could be assessed attorney fees by the court.

In the early 1970's a wave of consumerism swept the country. This was motivated, in part, by President Johnson's Great Society. Kansas, again responding to national trends, adopted a number of consumer rights provisions with attorney fees components. For example, K.S.A. 16A-5-201 provides that if the Uniform Consumer Code is violated by the creditor, the consumer shall be awarded damages and reasonable attorney fees.

The second trend clearly discernible is that the Legislature has adopted attorney fees provisions with increasing frequency in recent years.

The second trend clearly discernible is that the Legislature has adopted attorney fees provisions with increasing frequency in recent years.

In fact, 47 of the 75 statutes analyzed were passed after 1960. Thirty of them were passed in the 1970's and early 1980's, more than all the attorney fee statutes enacted from the founding of the state through 1950.

The third historical trend is apparently, in part, a response to the second trend. The Legislature, over the years, has done much by way of enactment of attorney fee provisions to encourage individuals to enforce rights favored by the Legislature. Kansans have accepted the invitation to seek judicial determination of their claims all too frequently.

The Legislature has responded to the increasingly litigious nature of Kansas citizens by passing a number of statutes imposing sanctions, including attorney fees, for actions which courts consider frivolous or which serve to cause delays. For example, in 1963, K.S.A. 60-256(g) was enacted, providing that if affidavits were presented in bad faith or for the purpose of delay in a summary judgment proceeding, the court might award reasonable attorney fees to the other party. Many other sections of the code of civil procedure adopted in 1963 contained similar provisions with respect to various aspects of discovery. The logical culmination of this trend was the passage of K.S.A. 60-2007, which encompasses all civil cases and applies to all components of such cases.

PRESENT STATUTORY LAW

An analysis is now presented of the current status of the statutory law with respect to recovery of attorney fees in Kansas. This section is intended to be a helpful reference guide for the general practitioner. The analysis is, of course, no substitute for a detailed examination of an applicable statute by counsel.

The statutory enactments can be categorized as follows: civil procedure, consumer rights, domestic relations, insurance companies, labor relations, motor vehicles, public utilities and common carriers, railroads, real estate, and unfair commercial practices. In addition, eight statutes appear to be isolated enactments, and therefore have been placed in a miscellaneous category by the writer.

For ease of reference the ten major categories are presented in alphabetical order, followed by the miscellaneous category. The statutes within each section are presented in the sequence in which they are found in Kansas Statutes Annotated.

1. Civil Procedure.

Statute	Date	Description
60-211	1982	Attorney willfully signs pleading without good grounds.
60-230	1963	Failure of a party to attend a deposition.
60-237	1963	Failure to allow discovery.
60-256(g)	1963	Use of affidavits in bad faith in summary judgment proceeding.
60-721	1978	Answer to a garnishment contraverted without good cause.
60-905(b)	1963	Posting of a bond to cover damages and attorney fees for a temporary injunction.
60-910(b)	1963	Motion to vacate permanent injunction not in good faith.
60-2007	1982	Court determines that an action, pleading, or component of a case was frivolous in nature.
61-1713	1969	Refusal to admit truth of facts or genuineness of documents under limited actions procedures.
61-2709	1979	To an appellee successful on an appeal from a small claims decision.

2. Consumer Rights.

16a-5-201	1973	Consumer Credit Code violated by creditor.
16a-5-203	1973	Disclosure provisions of the Consumer Credit Code violated by the creditor.
50-634	1973	Supplier found guilty under the Consumer Protection Act, or where the consumer has brought a groundless action.
50-639	1973	Supplier disclaims implied warranties under Consumer Protection Act.
50-715	1973	Reporting agency willfully fails to comply with the provisions of the Fair Credit Reporting Act.
50-716	1973	Reporting agency negligently fails to comply with the provisions of the Fair Credit Reporting Act.

3. Domestic Relations.

38-131	1971	Visitation rights by grandparents are denied.
38-1103	1970	Complaining witness in a paternity case prevails and has been represented by private counsel.
38-1307	1978	Moving party has selected a clearly inconvenient forum under the Uniform Child Custody Jurisdiction Act.

38-1308	1978.....	Jurisdiction under the uniform act declined by reason of conduct of the petitioner.
38-1315	1978.....	A party violates a custody decree of another state, making it necessary to enforce the decree in this state under the uniform act.
60-1610	1963.....	Fees to either party in a divorce action.
4. Insurance.		
40-256	1931.....	Insurance company refuses without just cause to pay a claim.
40-908	1927.....	Insurance company insuring against fire, tornado, lightning, or hail fails to pay insured.
40-1517	1927.....	Mutual hail insurance company fails to pay insured.
40-2004	1949.....	Unauthorized or foreign insurer fails to pay claim.
5. Labor Relations		
44-119	1897.....	Employer blacklisting.
44-831	1975.....	Right to work provisions violated.
6. Motor Vehicles.		
40-3111(b)	1974.....	Insurance company fails to make timely payments on P.I.P. benefits.
60-2006	1969.....	Automobile negligence case involving damages of less than $750.00
7. Public Utilities and Common Carriers.		
17-1917	1974.....	Failure of a public utility to move lines when requested.
66-176	1923.....	Utility or common carrier violating regulatory laws.
8. Railroads.		
66-165	1901.....	Unauthorized charges.
66-203	1905.....	Failure to supply railroad cars.
66-233	1885.....	Damages caused by fire.
66-259	1893.....	Failure to give bill of lading.
66-266	1898.....	Causing death to cattle in transit.
66-269	1905.....	Failure to allow owners or agents to accompany shipments of livestock.
66-296	1874.....	Death of livestock.
66-305	1911.....	Failure to pay damages upon demand.
66-310	1885.....	Refusal to build fence.
66-318	1909.....	Shipment delays.
66-522	1907.....	Confiscation or diversion of coal.
9. Real Estate.		
26-509	1972.....	Jury award exceeds appraisers' award in condemnation.

29-303	1868.....	Party failing to rebuild partition fence.
29-305	1868.....	Failure to erect or maintain assigned part of partition fence.
29-310	1868.....	Failure to divide land where a partition fence should be built.
29-404	1868.....	Failure to repair a partition fence.
55-202	1909.....	Failure to release an oil and gas lease within 60 days of forfeiture.
58-2257	1941.....	Failing to return real estate document in possession to rightful possessor.
58-2309a	1971.....	Failure to release mortgage when required.
58-3410	1973.....	Under Marketable Record Title Act against one slandering title to real estate.
60-1003(c)	1963.....	Against owners of land in a partition action.

10. Unfair Commercial Practices.

17-1268	1967.....	Selling securities in violation of law.
16-720(b)	1972.....	Pawn brokers refusing to redeliver stolen property on presentation of proper evidence of ownership.
34-229	1931.....	Surety on a warehouseman's bond fails to pay on demand.
41-701(4)	1974.....	Suppliers of alcoholic liquor, beer, or cereal malt beverage who fix the resale price.
50-108	1897.....	Against those involved in unlawful trusts, agreements, or other combinations in restraint of trade.
50-130	1899.....	Injunction violated relating to illegal futures dealings.
50-137	1887.....	Grain dealers and buyers who unlawfully agree to pool prices.
50-505	1957.....	Unfair practices involving dairy products.
50-801	1973.....	Violations of any section of Chapter 50 of Kansas Statutes Annotated.
58-3316(a)	1967.....	Selling subdivided lands in violation of the Uniform Land Sale Practices Act.
65-741	1961.....	Violation of dairy regulatory laws.
83-121e	1963.....	Using inaccurate or false weighing devices.
83-140	1905.....	Grain dealer underweighing grain.
84-7-601	1965.....	Bailee losing a warehouse receipt or bill of lading.

11. Miscellaneous.

16-207(d)	1975	Lenders exceeding the maximum interest rate.
22-2518	1974	Unlawful interception of wire and oral communications.
40-3114	1977	Against employers, doctors, and hospitals, for failure to furnish required information to insurers.
42-389	1891	Requiring that illegal consideration be paid as a condition to a right to obtain water.
44-512a	1943	Against an employer failing to pay compensation to an injured workman when due under the worker's compensation law.

59-1504	1975.....	In favor of any person named in a Will or Codicil who defends it, or prosecutes any proceedings in good faith and with just cause, for the purpose of having it admitted to probate, whether successful or not, or any person who successfully opposes the probate of any Will or Codicil. Also in favor of any heir-at-law or beneficiary under a Will who, in good faith and for good cause, successfully prosecutes or defends any other action for the benefit of the ultimate recipients of the Estate.
60-2604	1963.....	Amercement against a sheriff or court clerk failing to perform an official duty.
74-7311	1978.....	In favor of a claimant under the Crime Victims Reparations Act.

CONCLUSIONS

What can we expect from the Kansas Legislature in the future in the area of recovery of attorney fees? History tells us that two of the trends previously discussed may safely be projected into the future.

It is likely that national political and economic trends will continue to be reflected in enactments of the Kansas Legislature. History shows us that the Legislature, often responding to national trends, will continue providing for recovery of attorney fees in selected areas of particular concern.

It is also likely that the trend for an increasing number of such legislative enactments will continue. Nearly every session of the Kansas Legislature produces further attorney fee enactments.

The third trend, however—sanctions against harassing and delaying tactics—seems to have been laid to rest. The revisions of K.S.A. 60-211 and the passage of K.S.A. 60-2007 now encompass all issues in civil cases where there was no substantial basis for filing suit, raising a particular defense, or where delaying tactics were used in the conduct of litigation.

KANSAS COMMENT 1983

Just as the previous section sets forth the rules governing collection of third-party obligations, so does this section authorize physical repossession of tangible collateral. The Kansas version of this section does not vary from the 1972 Official Text. The creditor can achieve repossession in three ways: (1) the debtor can turn over the collateral voluntarily; (2) the creditor can use self-help to recover the collateral so long as there is no "breach of the peace;" and (3) the creditor can obtain the collateral "by action," i.e., a writ of replevin under K.S.A. 60-1005 or 60-1006.

There is no constitutional prohibition against self-help repossession because seizure of the goods by the creditor alone (or through an agent) does not involve sufficient "state action" to trigger the Fourteenth Amendment. Benschoter v. First Nat'l Bank of Lawrence, 218 K. 144, 542 P.2d 1042 (1975). However, this does not mean that notice prior to repossession will not be required in some cases. For example, in Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971) the secured party was held guilty of conversion because the security agreement appeared to require notice prior to repossession, and none was given. Similarly, a line of judicial decisions holds that the secured party may be liable for repossessing without prior notice after establishing a pattern of accepting late payments. See, e.g., Lee v. Wood Products Credit Union, 551 P.2d 446 (Ore. 1976). Finally, the Kansas Uniform Consumer Credit Code imposes a duty on the secured creditor to give notice of the consumer's right to cure a default caused by a missed installment; failure to give the statutory notice of right to cure triggers liability for attorney's fees. K.S.A. 16a-5-110, 16a-5-111 and 16a-5-201(8). Moreover, failure to give the UCCC notice of right to cure might well trigger liability in conversion, as well as the minimum civil penalty found in 84-9-507(1). See D.E.B. Adjustment Co. v. Cawthorne, 623 P.2d 82 (Colo. App. 1981).

Nothing in this section or elsewhere in Article 9 defines the term "breach of the peace." The courts are left with that job. The leading Kansas case is Benschoter v. First Nat'l Bank of Lawrence, supra, where the court held that "stealth" does not constitute a breach of the peace. On the other hand, there are cases holding that a secured creditor accompanied by the sheriff, leaving the impression that a court order has been issued when in fact it hasn't, is a breach of the peace because of the misrepresentation which is created. Stone Mach. Co. v. Kessler, 463 P.2d 651 (Wash. App. 1970). Forced entry into the debtor's premises would almost certainly be considered a breach of the peace, and the UCCC expressly so provides for consumer repossessions. K.S.A. 16a-5-112. A wise creditor will back off and get a writ of replevin rather than trying to repossess over active debtor or third-party protest. There are also numerous cases involving the "golden glove compartment," where the creditor repossesses a motor vehicle but fails to make sure that all the other personal property of the debtor has been removed.

The provisions in this section concerning assembly of collateral and rendering equipment unusable were not found in pre-UCC Kansas law. This can be a handy tool for the foreclosing creditor. The leading judicial decision illustrating the utility of the tool is Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54 (5th Cir. 1970), cert. denied 402 U.S. 909 (1971).

Once repossession has occurred (through replevin or self-help), the duty of the secured party to take reasonable care of the collateral under 84-9-207 arises, just as it does from the moment a pledgee takes possession of the collateral prior to default.

Statutory Reference:

Former K.S.A. 58-307.

Research and Practice Aids:

Chattel Mortgages⇐162.
Pledges⇐53 et seq.
Sales⇐479.
C.J.S. Chattel Mortgages § 183 et seq.
C.J.S. Pledges § 52 et seq.
C.J.S. Sales § 597 et seq.
Vernon's Kansas U.C.C.—Howe & Navin, 84-9-503.
Retaking possession of property sold under conditional sales contract. Am. Jur. 1st ed., Sales § 938 et seq.
Effect of taking of possession of goods subject to trust receipt. Am. Jur. 1st ed., Trust Receipts § 10.

Law Review and Bar Journal References:

U.C.C. remedies upon default of security agreement discussed in "Survey of Kansas Law: Secured Transactions," Gerald D. Haag, 21 K.L.R. 107, 114 (1972).
Constitutionality of self-help repossession discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 151 (1973).
Changes in repossession law under the UCCC discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 197 (1973).
"Summary Repossession, Replevin, and Foreclosure of Security Interests," Thomas V. Murray, 46 J.B.A.K. 93, 98, 100 (1977).
Applicability of implied waiver doctrine to article 9 transactions, "Uniform Commercial Code: Farm Creditor Protection," Brian McMahill, 18 W.L.J. 199 (1978).
"Survey of Kansas Law: Secured Transactions," J. Eugene Balloun, 27 K.L.R. 301, 303 (1979).

CASE ANNOTATIONS

1. Self-help repossession provisions not violative of due process; no state action present; subrogation entitlement. Benschoter v. First National Bank of Lawrence, 218 K. 144, 145, 147, 148, 149, 150, 151, 152, 154, 155, 542 P.2d 1042.

2. Cited in holding enforceable lien existed between original parties; no action for damages for breach of contract when damage not a result of such breach. Kansas State Bank v. Overseas Motosport, Inc., 222 K. 26, 28, 29, 563 P.2d 414.

3. Voluntarily surrendered secured property not obtained through "legal process"; tax lien does not attach to buyer of same. Robbins-Leavenworth Floor Covering, Inc. v. Leavenworth Nat'l Bank & Trust Co., 229 K. 511, 514, 515, 516, 625 P.2d 494.

4. Secured creditor sale of collateral not in "commercially reasonable manner"; test; deficiency not barred. Westgate State Bank v. Clark, 231 K. 81, 86, 642 P.2d 961 (1982).

84-9-504. Secured party's right to dispose of collateral after default; effect of disposition. (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

History: L. 1965, ch. 564, § 396; L. 1975, ch. 514, § 34; Jan. 1, 1976.

OFFICIAL UCC COMMENT

Prior Uniform Statutory Provision:

Section 6, Uniform Trust Receipts Act; Sections 19, 20, 21, and 22, Uniform Conditional Sales Act.

Purposes:

1. The Uniform Trust Receipts Act provides that an entruster in possession after default holds the collateral with the rights and duties of a pledgee, and, in particular, that he may sell such collateral at public or private sale with a right to claim deficiency and a duty to account for any surplus. The Uniform Conditional Sales Act insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the Trust Receipts Act. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods (Section 2-706). Subsection (1) does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of—subject of course to the general requirement of subsection (2) that all aspects of the

dollars ($500), together with a reasonable attorney's fee for preparing and prosecuting the action. The plaintiff in such action may recover any additional damages that the evidence in the case warrants. Civil actions may be brought under this act before any court of competent jurisdiction, and attachments may be had as in other cases.

(e) The mortgagee or assignee of a mortgagee entering satisfaction or causing to be entered satisfaction of a mortgage under the provisions of subsection (a) shall furnish to the office of the register of deeds the full name and last known post office address of the mortgagor or the mortgagor's assignee. The register of deeds shall forward such information to the county clerk who shall make any necessary changes in address records for mailing tax statements.

History: L. 1971, ch. 189, § 1; L. 1980, ch. 163, § 1; July 1.

Law Review and Bar Journal References:

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 544, 546, 547 (1979).

CASE ANNOTATIONS

1. Applied; title insurance companies held liable for punitive damages for failure to exercise care in disbursing purchaser's funds. Ford v. Guarantee Abstract & Title Co., 222 K. 244, 264, 553 P.2d 254.

58-2310. Same; application to mortgages heretofore paid. K.S.A. 58-2309 shall be construed so as to apply to mortgages heretofore paid, but not discharged of record: *Provided,* That if the residence of the holder of such mortgage can be ascertained, no action shall be brought until demand is made in accordance with said section; but such demand need not be in writing, and will be excused if the residence of the holder of such mortgage cannot, with due diligence, be ascertained.

History: L. 1889, ch. 175, § 2; March 6; R.S. 1923, 67-310.

58-2311. Same; joinder of actions. In any action commenced in the district court to recover damages under the provisions of this act, the plaintiff may unite with such claim a cause of action to cancel the mortgage and remove the cloud from the title; and if plaintiff recovers damages in such action, he or she shall be entitled to a further judgment canceling such mortgage and quieting the title to the mortgaged premises; and where personal service of summons cannot be had on the defendant or defendants within this state, judgment canceling such mortgage may be rendered in the action upon proof of due service by publication, or upon due personal service obtained out of this state.

History: L. 1889, ch. 175, § 3; March 6; R.S. 1923, 67-311.

58-2312. Stipulation for attorney's fees void. Hereafter it shall be unlawful for any person or persons, company, corporation or bank, to contract for the payment of attorney's fees in any note, bill of exchange, bond or mortgage; and any such contract or stipulation for the payment of attorney's fees shall be null and void; and that hereafter no court in this state shall render any judgment, order or decree by which any attorney's fees shall be allowed or charged to the maker of any promissory note, bill of exchange, bond, mortgage, or other evidence of indebtedness by way of fees, expenses, costs or otherwise: *Provided,* That in all existing mortgages wherein no amount is stipulated as attorney's fees, not more than eight percent on sums of two hundred and fifty dollars or under, and not more than five percent on all sums over two hundred and fifty dollars, shall be allowed by any court as attorney's fees: *And provided further,* That this act shall not apply to existing mortgages wherein any sum has been stipulated as attorney's fees.

History: L. 1876, ch. 77, § 1; March 1; R.S. 1923, 67-312.

Cross References to Related Sections:

Contracts and promises, see ch. 16.

Research and Practice Aids:

Hatcher's Digest, Mortgages § 161.

Attorney's fees, Kansas Practice Methods § 1247.

Execution of mortgage note, attorney fees, Kansas Practice Methods § 297.

Law Review and Bar Journal References:

Secured transactions under UCC, J. Eugene Balloun, 5 W.L.J. 192, 215 (1966).

Impact of the Uniform Consumer Credit Code upon Kansas, Barkley Clark, 18 K.L.R. 277, 291 (1970).

Prohibition against provision allowing creditor to collect attorney fees on promissory note, does not change law hereunder, Barkley Clark, 42 J.B.A.K. 147, 199 (1973).

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 538, 543, 544, 545 (1979).

"The U.C.C.C. and Real Estate Financing: A Square Peg in a Round Hole," Thomas L. Griswold, 28 K.L.R. 601, 614 (1980).

CASE ANNOTATIONS

1. Provisions in bond which violate this section

Testimony on Senate Bill No. 63

Offered by Marjorie Van Buren

Office of Judicial Administration

March 20, 1985

Senate Bill No. 63 does not change current Kansas law; it clarifies it. Under current law, if a government official or employee is sued under the civil rights act for an action within the scope of his or her employment, the agency for which he or she works must pay for the legal defense of the suit. If the employee has acted in good faith, the agency is responsible for any judgments entered against him or her.

Senate Bill No. 63 specifies that attorney fees, if awarded, are part of such a judgment. The bill does not increase the opportunities for attorney fees to be awarded.

In some cases, attorney fees can have the same impact as an award of damages. Unless it is clearly understood that these fees are to be paid as part of a judgment in a civil rights case, the protection to government employees acting in good faith currently afforded by Kansas law cannot be said to be complete.

Attachment No. 4
House Judiciary
March 20, 1985

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
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February 7, 1985

The Honorable Robert G. Frey
Chairperson
Senate Committee on Judiciary
The Capitol, Room 128-S
Topeka, Kansas 66612

Dear Mr. Frey:

This office is aware of Senate Bill No. 63 which amends K.S.A. 75-6116 by adding "including any award of attorney fees" to the last sentence of the first paragraph of said statute.

In our opinion, that addition makes no change in the statute. An award of attorney fees is a "judgment," and the statute clearly requires payment or reimbursement for judgments already.

We also understand this change was requested because of the unrest caused by the 1984 United States Supreme Court decision in Pulliam v. Allen. This office supports the amendment to K.S.A. 75-6116 because it does clarify what we believe the statute already states.

Very truly yours,

ROBERT T. STEPHAN
Attorney General

MC

Attachment No. 5
House Judiciary
March 20, 1985

UNIFORM TRANSFERS TO MINORS ACT

In 1956, the Uniform Law Commissioners (ULC) promulgated the Uniform Gifts to Minors Act. It was derived from an earlier Model Act sponsored by the New York Stock Exchange and the Association of Stock Exchange Firms. There were further amendments in 1965 and 1966. All states and jurisdictions in the United States have adopted this Act in one of its prior forms. Some states have, also, added non-uniform amendments, expanding the scope of the Gifts to Minors Act. In response to these non-uniform amendments, the ULC promulgated the Uniform Transfers to Minors Act (UTTMA) in 1983. Although it incorporates the predecessor Gifts to Minors Acts, its expanded provisions require it to be treated as more than an amended Gifts to Minors Act. It is a different Act, superseding all the earlier Gifts to Minors Acts.

Transfers of property to minors create significant problems. To begin with, most transferors do not wish to place valuable property under the control of inexperienced children. The probability of mismanagement or no management, whatsoever, remains a significant spectre to those who would make such transfers. Somehow, control of the property must be retained in competent hands. Further, third parties often will not deal with minors, even if they are technically competent to manage their own affairs. Minors can disaffirm contracts, and third parties do business with them only with some risk. Yet, certain transfers to minors are very advantageous, particularly for the purposes of estate planning.

A trust, in which control and management reside with a trustee, for the designated beneficiaries, offers one solution. But trusts are complex and expensive to create and manage. For smaller property transfers, they are not a satisfactory alternative. Formal guardianships or conservatorships are, also, not generally useful for the purpose. What the Gifts to Minors Acts proposed, and what the new UTTMA continues, is a custodianship, in an adult or appropriate institution, of property that otherwise transfers directly to the minor. The custodianship remains until the minor becomes twenty-one. The custodial relationship is created by executing a rather simple document, the form of which is provided in the Act itself. The minor does not obtain control of the property. The custodian has certain statutory authority to deal with it on the minor's behalf, and third parties have no occasion to be uncertain about dealing with the custodian. And the transfer is a complete and irrevocable transfer to the minor, satisfying the requirements of tax law.

Attachment No. 6
House Judiciary
March 20, 1985

The new UTTMA differs significantly from the earlier Acts in these ways:

1. Any kind of property may be transferred to a minor under this Act, whether real or personal, tangible or intangible. The earliest Gifts to Minors Act permitted gifts of securities only. An expansion of property subject to that Act came with the 1965 and 1966 amendments to the Gifts to Minors Act. UTTMA eliminates all restrictions on kinds of property.

2. The earlier Gifts to Minors Acts contemplated present gifts from adult persons only. UTTMA permits transfers based on the occurrence of a future event. It allows transfers by powers of appointment. Transfers may be made by a personal representative or a trustee pursuant to the authorization of a will or trust instrument. Anybody obligated to a minor for property held, or for a liquidated debt, can make a transfer under UTTMA. A gift, as a kind of transfer, does not encompass all the possible transfers contemplated under the new Act.

3. UTTMA provides for jurisdiction over transfers under this Act and choice-of-law rules. None of the Gifts to Minors Acts dealt with these conflict-of-law problems. UTTMA applies to a transfer in any enacting state, if that state is the residence of the transferor, the minor, or the custodian, or if the custodial property is located in that state. Any transfer made pursuant to the law of another state that has adopted UTTMA, a version of the Gifts to Minors Act, or anything substantially similar, remains subject to that law.

4. Under UTTMA, because the kinds of property which may be transferred have been expanded, the liability of custodians is, also, to be limited.

Although UTTMA makes these significant changes over the earlier Gifts to Minors Acts, the new Act still serves the same purposes as the earlier Acts. Irrevocable transfers can be made to minors to satisfy tax requirements. Control can be placed in responsible hands until the minor comes of age. These matters can be accomplished by the execution of a simple, inexpensive document. The new Act simply makes marked improvements on these basic functions.

CRIME VICTIMS REPARATIONS BOARD

SB 108 * * BILL BRIEF

I. Summary:

The Crime Victims Reparations Board currently receives $1.00 from each docket fee collected in criminal court cases. Criminal court cases include felony, misdemeanor, fish and game, water craft, and traffic violations. These funds can be used solely for the purpose of reimbursing victims of violent crime for medical expenses, funeral expenses, or wage loss, when certain eligibility requirements are met. This bill proposes an increase from $1.00 to $3.00 in the portion of the docket fee earmarked for victims reparations.

II. Why is this increase needed?:

A. FY 85 claim filings have increased 33% over FY 84.

B. FY 85 docket fee receipts have decreased 21% when compared to FY 84.

C. An unusually large number of awards made in FY 84 were paid in FY 85, substantially reducing funds available to pay FY 85 claims.

D. There has been a substantial increase in the number of $10,000 awards over the past fiscal year.

III. How much money will the increase generate?:

A. Due to the 21% decrease in docket fee receipts, it is projected that only $209,000 will be collected in FY 85. This amount falls far short of the funding needed to meet claim demands this fiscal year.

B. If the decrease in docket fee receipts remains constant at 21%, this proposal would generate an additional $418,000 for FY 86, accomodating both the FY 85 shortfall and the projected FY 86 increase in claim filings.

Attachment No. 7
House Judiciary
March 20, 1985

CRIME VICTIMS REPARATIONS BOARD

PROGRAM DATA: PART I

Table I: Claims Data

	FY82	FY83	FY84	FY85 (projected)	FY86 (projected)
Claims filed	138	206	252	*384	500
Claims awarded	90	115	155	**230	300
Average per claim award = $2,100					

* based on an average of 32 claim filings per month through Feb. 1, 1985
** based on a ratio of claims filed to awards paid of 60%

Table II: Docket Fee Data

	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
FY84	32,410	25,277	22,729	26,041	20,923	19,880	16,777	17,416	20,339	19,585	22,007	21,205
FY85	19,009	20,380	19,837	17,933	19,650	18,444	13,882					

FY84 Docket Fee Receipts: $264,596
FY85 Docket Fee Receipts: $129,135
(through 2/1/85)

CRIME VICTIMS REPARATIONS BOARD

PROGRAM DATA: PART II

1.	FY84 Docket Fee receipts:	$264,596
2.	FY85 Docket Fee receipts: (July 1, '84 - Feb. 1, '85)	129,135
3.	FY85 projected Docket Fee receipts: (based on 21% decrease during first 7 months)	209,031
4.	FY85 projected claim expenditures:	483,000
5.	FY85 funds available for FY85 claims: (Includes DF & SGF)	264,400
6.	FY85 shortfall:	218,600
7.	FY86 funds available for FY86 claims: (includes DF & SGF)	515,856
8.	FY86 claim awards: (projection based on 30% increase)	300
9.	FY86 claim expenditures: (projection based on $2,100 average per claim award)	630,000
10.	FY86 shortfall:	114,144

SUMMARY DATA

	FY 1982	FY 1983	FY 1984	FY 1985 as of 3/7/85
CLAIMS FILED	138	206	252	260
CLAIMS AWARDED (Includes claims from prior FYs)	90	115	155	130
AMOUNT OF NEW CLAIMS AWARDED	*$179,440.65	*$309,686.58	*$333,167.61	*$209,391.72
AVERAGE AWARD PER CLAIM	$1,994.00	$2,698.00	$2,150.00	$1,610.71
CLAIMS DENIED	18	25	43	18
CLAIMS DISMISSED OR WITHDRAWN	15	25	26	30
CLAIMS PENDING	57	105	126	FY85 195 Prev. Yrs. 35
CLAIMS CONSIDERED FOR ADDITIONAL AWARDS FROM PREVIOUS YEARS	9	3	17	37
AMOUNT AWARDED	*$1,218.50	*$8,636.61	*$17,165.96	$29,760.02
***GRAND TOTAL**	**$182,453.65**	**$319,610.12**	**$351,253.07**	**$239,151.74**

Plus Carry Over from FY84	$57,000.00
TOTAL OBLIGATION TO DATE	**$296,151.74**

Attachment No. 8
House Judiciary
March 20, 1985

Testimony On SB 108

Offered By Marjorie Van Buren

Office Of Judicial Administration

March 20, 1985

The Judicial Administrator opposes in principle the creation of special funds out of docket fee monies to operate noncourt programs, however worthy the programs are.

The docket fee is a "user fee" charged to citizens to partially offset the cost of a general government function--the court system. Although the legislature raises and allocates both groups of funds--general fund revenues and special funds--it may be argued when docket fee monies are directed from the general fund to noncourt related special funds, they become a tax on a particular group of citizens--i.e., persons who use the courts.

To avoid this, the Judicial Administrator respectfully recommends that such monies be channeled into and appropriated from the state general fund.

Attachment No. 9
House Judiciary
March 20, 1985