Approved March 18, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

12:30 ~~a~~m./p.m. on February 25, 1985 in room 519-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Talkington and Winter.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

John Wachter, Federated Cash Management Systems
James Maag, Kansas Bankers Association
Jerel Wright, Kansas Credit Union League
Ron Smith, Kansas Bar Association
Richard McDonald, Fourth National Bank, Wichita
James Turner, Kansas League of Savings Institutions

Senate Bill 264 - Powers of fiduciaries with regard to investments.

John Wachter, Federated Cash Management Systems, explained he had requested the bill be introduced. He stated this is particularly aimed at their trust for U.S. Treasury Obligations. The Kansas Bankers Association has endorsed the bill. He explained the bill to the committee.

Senate Bill 266 - Exemption from process of articles used in production of income.

James Maag, Kansas Bankers Association, introduced Charles Henson, the legal counsel for the organization, who will be available for questions following the testimony. Mr. Maag testified the bill amends K.S.A. 60-2304 to authorize a judgment creditor to deposit the sum of $5,000 for payment to the defendant and thereupon the books, documents, furniture, instruments, tools, and other tangible means of production necessary for carrying on the person's business or occupation shall not be exempt from seizure and sale. A copy of his statements is attached (See Attachment I). Committee discussion with Mr. Henson followed.

Jerel Wright, Kansas Credit Union League, testified the organization favors improvements in the Kansas Code of Civil Procedure which balance the rights of creditors with those of debtors. A copy of his testimony is attached (See Attachment II).

Ron Smith, Kansas Bar Association, stated this law was last amended in 1980, and he asked the committee to consider the five percent inflation factor. Mr. Smith referred to lines 45 and 46 of the bill and explained these lines would exempt the $5,000 that was the intent, so long as they don't commingle it with other debts.

John Wachter testified life insurance proceeds are exempt from the levy. If a widow goes out and buys a boat, the insurance proceeds of the widow are exempt.

Senate Bill 261 - Contract for attorney fees incurred in foreclosure of mortgage.

James Maag testified the provisions of the bill allows notes, bonds, mortgages, and agreements given in connection with commercial loans to provide for the payment of attorney fees. A copy of his testimony is

Senate Bill 261 continued

attached (See Attachment III). Committee discussion with him followed.

Richard McDonald, Fourth National Bank, Wichita, stated he is speaking as an attorney. The principal of freedom of contract should prevail in a commercial loan setting. Competition between lenders in today's market place make it. A knowledgeable business person doesn't need that kind of protection. I see no reason freedom of contract not to apply to business loans. Borrowers do take advantage of the fee prohibition. This bill will put a stop to bad faith and delay tactics.

James Turner, Kansas League of Savings Institutions, testified in support of the bill. He stated it is an ongoing problem with first mortgages, and they bring to foreclosure, and there is a second mortgage. They are stuck with the attorney's fees. The chairman inquired if this would allow two attorney's fees on two foreclosures? Mr. Turner replied, this bill would allow you to write into contracts they would allow attorneys fees.

Ron Smith testified the Kansas Bar Association looked at the bill February 8. They determined to take no position on it. They have not become involved in attorney's fees legislation. A committee member inquired if the court would determine the reasonableness of the fee? Mr. Smith replied, yes, the court has the discretion.

The meeting adjourned.

Copy of the guest list is attached (See Attachment IV).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-25-85

12:30 pm

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
MARK KNACKENDOFFEL	BOX 5049 TOPEKA KS	KS Bankers Assn. - Trust Div.
JOHN H. WACHTER	1300 MNB TOPEKA KS	Federated Cash Mgmt
JEREL WRIGHT	TOPEKA	KS CREDIT UNION LEAGUE
Ron Smith	"	KS Bar Assn
Mike Slotsky	Lawrence	Eastern Sunflower
RICHARD J. McDONALD	WICHITA	FOURTH NATIONAL
Jim Mazz	Topeka	KS Bankers Assoc.
Charles Henson	Topeka	" "
John Spurgeon	Lawrence	Budget
Marjorie Van Buren	Topeka	OJA
Jim Turner	Topeka	KLSI

2/25/85
Attch. IV

2-25-85
P.M.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 25, 1985

TO: Senate Committee on Judiciary

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

RE: SB 266

Mr. Chairman and members of the committee:

Thank you for this opportunity to appear before the Committee concerning the provision of SB 266 which the Kansas Bankers Association requested for introduction earlier this session. The bill amends K.S.A. 60-2304 to authorize a judgment creditor to deposit the sum of $5,000 for payment to the defendant and thereupon the books, documents, furniture, instruments, tools, and other tangible means of production necessary for carrying on the person's business or occupation shall not be exempt from seizure and sale.

Kansas bankers believe that the provisions of the existing statute which allows a debtor to exempt "tools of the trade" up to a value of $5,000 is being abused and is to the detriment not only of the creditor, but in the long run it can affect those who will be requesting credit where they are pledging "tools of the trade" as collateral. In some instances, it has been necessary for the bank to require appraisals on exempted equipment so as to contest the exemption values being taken by the bankrupt party. In return the bankrupt party often gets his or her own appraisals to support the lower values claimed and this, in turn, causes further delay in settling the bankruptcy action.

We believe the amendments being proposed to K.S.A 60-2304 will make it a more equitable statute to the benefit of all the parties involved. It simply allows the creditor to have the option of purchasing the exempt collateral for $5,000--which is the maximum amount allowed by law--or allowing the items to be exempted without protest. This would assure that the debtor either receives the maximum dollar amount or the "tools" which they wish to have exempted. In addition, creditors would be assured that they would be treated fairly and, in any future credit negotiation, the creditor should be more willing to accept "tools of the trade" as collateral.

We appreciate very much, Mr. Chairman, this opportunity to appear before the committee and discuss the possible changes in K.S.A. 60-2304 and we request that the existing abuse of this statute be corrected by the passage of SB 266.

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PM 2/25/85 Attch. I

2-25-85
P.M

TESTIMONY ON S.B. 266
AN ACT concerning civil procedure;
relating to exemptions from process

Presented to the
SENATE COMMITTEE ON JUDICIARY

February 25, 1985
by the

KANSAS CREIDT UNION LEAGUE

Mr. Chairman, members of the Committee:

I am Jerel Wright, Legislative spokesperson for the Kansas Credit Union League (KCUL). Our association represents 97% of the 168 state-chartered and 46 federally-chartered credit unions located in Kansas. Credit unions are non-profit financial cooperatives chartered under state or federal law which are owned by the people who save and borrow there. Kansas credit unions serve the personal financial needs of over 400,000 individual credit union members and have almost $1 billion in combined assets. Kansas credit unions range in asset size from approximately $26,000 to $61 million and range in size of membership from 57 members to 25,000 members.

KCUL POSITION

I appreciate having the opportunity to appear before the Committee to support the passage of SB 266, the bill designed to give a judgment creditor the right to possession of a person's "tools of the trade" if the judgment creditor deposits the sum of $5,000 with the clerk of the court for payment to the defendant.

KCUL favors improvements in the Kansas Code of Civil Procedure which balance the rights of creditors with those of debtors. SB 266 provides a judgment creditor with an option to pay $5,000 to the clerk of the court. This option certainly seems equitable where there is a question about the actual value of a person's "tools of the trade". By allowing a creditor a case by case choice, SB 266 moves toward a balancing of debtor and creditor rights in cases involving exemption of personal property from process.

Thank you. Mr. Chairman, for this opportunity to appear before the Committee.

I will respond to questions at your direction.

2/25/85
Attch. II

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 25, 1985

TO: Senate 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 which allows notes, bonds, mortgages, and agreements given in connection with commercial loans to provide for the payment of attorney fees. The bill also provides that any loan evidenced by a note secured by a first real estate mortgage may provide 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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2/25/85 Attch. III

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.

SB 261 is restricted to commercial loan and first mortgage real estate transactions. 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.

Attch. III

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	1897.....	Grain dealers and buyers who unlawfully agree to pool prices.
50-505	1957.....	Unfair practices involving dairy products.
50-801	1953.....	Violations of any section of Chapter 50 of Kansas Statutes Annotated.
58-3316(a)	1957.....	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	1965.....	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 ⇐179.
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 ( ) 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 ( ) 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