

Approved

5-2-91

Date

MINUTES OF THE House COMMITTEE ON Judiciary

The meeting was called to order by Representative John M. Solbach at
Chairperson

12:30 ~~xxx~~/p.m. on March 8, 1991 in room 123 -S of the Capitol.

All members were present except:

Representative Douville, Gomez, Vancrum and Carmody

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Office of Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

John Wine, Secretary of State's Office
Ed Redmon, State Fire Marshall
Bill Walker, Reno Fire District # 2, Hutchinson, Ks.
Representative Gilbert Gregory
John R. Wine, Jr. representing Kansas Child Abuse Prevention Council
Jan Waide, SRS
Representative Michael O'Neal

*NOTE: The meeting scheduled for 3/7/91, was cancelled due to conflict with the Committee of the whole. Guest list signed by conferees on 3/7/91 and testimony distributed on 3/7/91 is included as a part of these minutes.

The Chairman called for hearing on HB 2535, amendments relating to corporations, limited liability companies and limited partnerships.

John Wine, Secretary of State's office, appeared in support of HB 2535. (See Attachment # 1). Mr. Wine requested that the bill be amended and passed.

There being no further conferees, the hearing on HB 2535 was closed.

The Chairman called for action on HB 2535.

Representative Everhart made a motion that HB 2535 be amended by deleting Sections 7 through 10. Representative Sebelius seconded the motion. The motion carried.

Representative Everhart made a motion that HB 2535 be passed as amended. Representative Sebelius seconded the motion. The motion carried.

The Chairman called for hearing on HB 2328, statute of limitations on arson and aggravated arson 5 years.

Ed Redmon, State Fire Marshal, appeared in support of HB 2328. Mr. Redmon referred to testimony from the State Fire Marshal's Department. (See Attachment # 2).

Committee questions followed.

Bill Walker, Reno County Fire District # 2, Hutchinson, Kansas, appeared to support HB 2328. (No written testimony was submitted.) Mr. Walker said although the bill is controversial, he believes common sense will prevail in expanding the statute of limitations for arson from two years to five years. Mr. Walker said problems of investigating arson include (1) cause or orgin (2) prosecution; that the two years puts a lid on getting all pertinent information needed for a final prosecution; that a number of surrounding states have a longer time frame on statute of limitations regarding arson.

Committee questions followed.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,
room 123 S, Statehouse, at 12:30 ~~am~~/p.m. on March 8, 1991.

There being no further conferees, the hearing on HB 2328 was closed.

The Chairman called for hearing of HB 2288, prohibiting the use of the defense of intoxication in certain crimes, and HB 2289, repealing the involuntary intoxication defense.

Representative Gregory, sponsor of HB's 2288 and 2289, appeared to testify in support of the bills. Representative Gregory also distributed copies of SB 233, eliminating voluntary intoxication as a defense. (See Attachment # 3).

Committee questions followed.

John R. Wine, Jr., representing the Kansas Child Abuse Prevention Council, appeared in support of HB 2288. (See Attachment # 4).

Committee questions followed.

Jan Waide, representing SRS, appeared in support of HB 2288. (See Attachment # 5).

There were no committee questions.

A committee member said that although the intent of HB 2288 is good, there may be some constitutional problems with the bill.

There being no further conferees, the hearings on HB's 2288 and 2289 were closed.

The Chairman appointed a sub-committee to study HB's 2288 and 2289. Members of the sub-committee are Representative Gregory, Representative Garner and Representative O'Neal.

Written testimony in support of HB's 2288 and 2289 was submitted by Reverend Richard Taylor, Kansans for Life at It's Best. (See Attachment # 6).

Written testimony in opposition to HB's 2288 and 2289 by Rick Kittel, Assistant Appellate Defender. (See Attachment # 7).

The Chairman called for hearing on HB 2500, juvenile felons considered adults when convicted of lesser included offenses, and HB 2464, consumer protection act; door to door sales.

Representative Michael O'Neal appeared in support of HB 2500 and distributed a letter, dated October 29, 1990, from Nick A. Tomasic, District Attorney, Wyandotte County to himself, which letter requests amendment of K.S.A. 38-1636. (See Attachment # 8).

Revisor's staff noted that HB 2500 is included in HB 2532.

Testimony from Jim Clark, regarding HB 2532, heard on 3/5/91, is made part of these minutes, per Chairman's and Mr. Clark's agreement on 3/5/91. (See Attachment # 9).

Committee questions followed.

There being no further conferees, the hearing on HB 2532 was closed.

Representative Snowbarger made a motion that HB 2532 be passed. Representative Allen seconded the motion.

Representative Everhart made a substitute motion that HB 2500 be passed. Representative Hochhauser seconded the motion.

The substitute motion carried.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,
room 123-S, Statehouse, at 12:30 ~~xx~~ a.m./p.m. on March 8, 1991

Representative Michael O'Neal appeared in support of HB 2464 and distributed a letter, dated November 21, 1990, from Barkley Clark, Shook, Hardy and Bacon Law Offices, to himself, regarding a door to door sales problem. (See Attachment # 10).

Committee questions followed.

There being no further conferees, the hearing on HB 2464 was closed.

The Chairman called for action on HB 2464.

Representative O'Neal made a motion to amend HB 2464 on Page 4, Line 12, by adding the word "real" after the word "buyers".

Representative Heinemann seconded the motion.

A committee member requested that HB 2464 not be acted upon until the committee had more time for consideration.

The Chairman in deference to the member's request said that HB 2464 would be sent into an exempt committee so that it could be acted upon after the deadline for passing bills.

The Chairman called for action on HB 2101, notifying grandparents in child in need of care statutes.

Representative Heinemann made a motion to pass HB 2101. Representative Snowbarger seconded the motion.

Committee discussion followed.

Representative Rock made a substitute conceptual motion to amend HB 2101, under Section 1 under B, so that such notice would contain a statement that if or when no response is incurred from a person, that person will not get further notices even though the child may be placed for adoption. Representative Everhart seconded the motion.

Committee discussion followed.

The motion carried.

The Chairman called for action on the bill as amended.

Representative Smith made a motion that HB 2101 be tabled. Representative Rock seconded the motion. The motion carried.

The Chairman called for action on HB 2515, emergency divorce.

Representative Snowbarger made a motion that HB 2515 be passed. Representative Parkinson seconded the motion.

Representative Hochhauser made a substitute motion that HB 2515 be tabled. Representative Smith seconded the motion. The motion failed.

The original motion to pass carried.

The Chairman called for action on HB 2353, blood alcohol content lowered to .08 for DUI.

Representative O'Neal made a motion to amend HB 2353, technically, throughout the statute so the language will reflect "of the legal limit" or "greater than the legal limit". and that the .04 limit be included for motor carriers. Representative Everhart seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,
room 123-S, Statehouse, at 12:30 a.m./~~p.m.~~ on March 8, 1991.

Representative O'Neal made a motion that HB 2353 be passed as amended. Representative Everhart seconded the motion.

Committee discussion followed.

The motion carried.

The Chairman called for action on HB 2376, permissive joinder of parties pursuant to code of civil procedure for limited actions.

Representative O'Neal made a motion that HB 2376 be amended as per balloon bill furnished by Elwaine Pomeroy, on behalf of Kansas Collectors Association. (See Attachment # 11).

Representative Heinemann seconded the motion. The motion carried.

Representative O'Neal made a motion that HB 2376 be passed as amended. Representative Parkinson seconded the motion. The motion carried.

The Chairman called for action on HB 2212, cigarettes, prohibitions regarding minors, sample cigarettes and vending machines.

Written recommendations of Cheryl DeBrot were noted (See Attachment # 12).

Representative Allen made a motion that HB 2212 be amended as per balloon furnished by staff. (See Attachment #13). Representative Snowbarger seconded the motion. The motion carried.

Representative Rock made a motion that the range of the fine for violations be set at \$10 to \$50. Representative Everhart seconded the motion.

Committee discussion followed.

Representative Garner made a substitute motion that new Section 3 of HB 2212 be amended to take out the criminal language for minors in possession of tobacco products; that the language for the civil fine be retained of "not less than \$200". Representative Everhart seconded the motion.

Committee discussion followed.

Representative Garner amended his substitute motion, with the consent of his second, that new Section 3 of HB 2212 be amended to delete all reference to any criminal penalties for minors in possession of tobacco products; that the language for the civil fine be revised to "not less than \$10 nor more than \$50."

Committee discussion followed.

Representative Garner withdrew his substitute motion.

Representative Sebelius made a motion that HB 2212 be tabled. Representative Garner seconded the motion. The motion carried.

The meeting adjourned at 3:15 P.M. The next meeting is scheduled March 8, 1991, at 3:30 P.M. in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY

DATE: 3/7/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
RICHARD TAYLOR	TOPEKA	LIFE AT ITS BEST
Tom Gross	"	: KHA
Jim Teasley	Topeka	KDOC
Dave McKune	"	"
Patricia Henshall	Topeka	OJA
Kay Farley	Topeka	OJA
Rick Kittel	"	Appellate Defender Office
JAY W. WATSON	"	State Fire Marshal's office
DONALD L. KIMSEY	WINFIELD	KANSAS CHAPTER ARSON INVESTIGATORS
WILLIAM L. WELLS	BONNER SPRINGS	KANSAS CHAPTER IAIFI
DENNIS CRANOR	KANSAS CITY K.S.F.D	ISS CHAPTER INTERNATIONAL ISS OF FIRE
RICHARD BARR	LAURENCE KS	KANSAS STATE INJUST. ASSOC. OF FIRE CHIEFS
Jan Waide	Topeka	X-2 - SRS

HOUSE JUDICIARY COMMITTEE MEETING
 FOR 3/7/91 CANCELLED PRIOR TO
 TESTIMONY - RESCHEDULED FOR
 12:30 P - 3:15 P RM. 123-S 3/8/91

Bill Graves
Secretary of State



2nd Floor, State Capitol
Topeka, KS 66612-1594
(913) 296-2236

STATE OF KANSAS

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

March 7, 1991

House Bill No. 2535

H.B. 2535 would simplify and clarify several corporate filings with the office of the Secretary of State.

Sections one, four, five and six would make it easier for corporations to get extensions of time for filing annual reports. Currently they must obtain the extension prior to the initial due date of the report. This bill would give corporations an additional 90 days to file extensions.

Sections one, four, five and six would also delete the requirement that annual reports contain information about a corporation's authorized shares, date of election of officers, and places of business. The information is either available elsewhere or rarely enquired about. The current requirement wastes public and private time and expenses when annual reports are returned for correction.

Section two changes the statutory definition to conform to the forms that we have used since 1972. Recently we changed our forms to comply with the current statutory definition. The formula in the bill would restore general revenue fund collections to the previous level.

Section three would reduce the financial burden of organizing a nonprofit organization by decreasing the fee that a nonprofit pays to file its articles of incorporation from \$75 to \$20. The reduction in revenue would be offset by Section five's increase in annual fees from \$5 to \$20. To assist nonprofits which recently incorporated, the increase would be delayed until 1993.

We are proposing that the committee delete sections seven through eleven. After initially recommending these changes, we learned of additional related issues that are somewhat controversial and require more study.

We ask that the committee favorable recommend H.B. 2535 for passage. Thank you.

John Wine
Assistant Secretary of State

HJUD
Attachment #1
3-8-91



Kansas State Fire Marshal Department
700 S.W. Jackson, Suite 600
Topeka, Kansas 66603-3714
Phone (913) 296-3401
FAX (913) 296-0151

"Serving Kansans Through Fire Safety Education,
Fire Prevention Inspections and Investigation"

TESTIMONY
ASSISTANT ATTORNEY GENERAL JAY W. WATSON
STATE FIRE MARSHAL DEPARTMENT
BEFORE THE HOUSE JUDICIARY COMMITTEE
MARCH 7, 1991
RE: HOUSE BILL 2328

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Jay Watson, and in my capacity as Assistant Attorney General assigned to the office of the State Fire Marshal it is my pleasure to be here today on behalf of General Stephan and Marshal Redmon. I am here to testify on behalf of House Bill 2328.

This new section (2)(b) which expands the Statute of Limitations for arson and aggravated arson from two years to five years is a true "pro-victim" rights addition to the law. And, though many times the victim is a corporate entity (insurance company), the status of the victim should not negate the equity of the legal protection provided it. And too, many arson fires do result in death and disfigurement to citizen and fire-fighter alike. Arson is a crime of violence; cowardly violence. The arsonist is the criminal worlds moral equivalent of the covert terrorist.

Due to the unique nature of arson, its sui generis characteristics if you will, I urge that this piece of legislation be judged with a different standard, and be given a different fate, than last years House Bill 2059 which died in committee. Last years bill would have expanded the Statute of Limitations for all crimes to five years. Last years effort may have been the "all inclusive", generic, heavy "scud" compared to this years narrowly crafted and finely tuned

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HJUD
Attachment # 2
3-8-91

"smart bomb." As explained below, the legitimate reasons for voting against last years bill may not exist when examining House Bill 2328.

BRIEF HISTORICAL/"BLACK LETTER" EXCURSUS

Although it has been stated that there are some exceptions, it would seem that the common law rule is that there is no limitation as to the time within which offenses may be prosecuted (indeed, jurisdictions differ widely on an appropriate S.O.L. for arson, see Attachment 1). Unless a period of prescription or limitation is fixed by law for a particular offense or crime, or where a statute expressly provides that there is no period of limitation thereof, a prosecution is not barred by lapse of time.

Statutes limiting the time within which prosecutions for crime may be commenced (such as K.S.A. 21-3106) have been enacted, and where such statutes exist, the prosecution in the absence of circumstances specifically considered, creating an exception to the statute or suspending the running thereof (eg: 21-3106(4)), must be brought within the time limited.

The purpose of a Statute of Limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts which the legislature has decided to punish by criminal sanctions. A Statute of Limitations balances the governments interest in prosecution with the need to protect those who may lose their means of defense. Such statutes provide a safeguard against possible prejudice resulting from delay and the prosecution of stale charges. (see 22 CJS Sec. 196 Crim Law, p.240).

ARGUMENT

The gist of my argument to you this afternoon, is not being propounded solely by Jay Watson the prosecutor, the state attorney, or the "government man" spouting the standard "government line." My reasoning is equally being put forth by Jay Watson the former criminal defense attorney who for almost four years represented accused

rapists, thieves, and assault defendants. Having worked both sides of the aisle I argue my position from, what I hope, is a more ideological and philosophical viewpoint. And that view is that arson is one of those offenses which should be accorded a larger window of prosecutorial opportunity. Why?

Arson is one of the few crimes that 99/100 times (when you can even convince a County Attorney to prosecute it) is based solely on circumstantial evidence. There usually are no eye-witnesses who can testify that the alleged perpetrator poured the gasoline and struck the match (save for the occasional co-conspirator who turns state witness). The evidence that is accumulated by the eight arson investigators working for the State Fire Marshal is based on crime-scene fire cause & origin analysis of the remaining structure, potential witness interviews, and examination of financial records to corroborate possible motives.

By examining the statutory language itself of 21-3718(b), one is made aware of the fraudulent underpinnings of most arsons. Most arsons are not committed to cover up the results of other crimes, or out of spite against the property owner. Most arsons are committed by the property owner to collect the proceeds of a home-owners fire policy. Arson when committed properly (from the criminals point of view) is the closest thing to a perfect crime one could ever hope for-- for it will appear that there has been no crime. Arson, to defraud one's insurance carrier, by its very nature has to appear not to be arson; not to be a criminal offense. It is inherently, structurally, and congenitally a crime of Concealment.

Unfortunately, the courts have never agreed with this common-sense interpretation, or at least my research indicates that there are no cases on record wherein this concealment argument vis a vis arson has been decided. K.S.A. 21-3106(4)(c) proves to be no fall-back for the prosecutor. Arson is treated like any other crime, to toll the two-year clock, the fact of the crime must be concealed. As Judge Michael Barbara states in his Kansas Criminal Law Handbook :

"The concealment must be the result of positive acts on the part of the accused and calculated to prevent discovery of the crime. Mere silence, inaction or non-disclosure does not constitute concealment. State v. Grauerholz, 232 Kan. 221 (1982). Concealment of the "fact of the crime" refers to those criminal acts constituting the crime."

While this type of language would appear to be "tailor-made" for the crime of arson, it has never been so applied. If a fire occurs on January 1, 1991, and which subsequently turns out to be arson, it had better be filed by January 1, 1993 or be ever barred by the Statute of Limitations-- period. The starting date is two years from the time of the fire-- not two years from the time of discovery, or even "the reasonable time in which discovery should have been made." So the fact is, that the smart arsonist sets the fire in a room (a home office for example) purposely cluttered with papers and other combustible debris with a pack of cigarettes and a book of matches, near an electrical outlet or a frayed appliance cord. A technically proficient arsonist can cause such a scene, when it's examined hours later (after the fire has raged and the water has been sprayed etc.) by even the best cause & origin investigator to resemble an accidental fire. There are professional "torches" that can burn down a warehouse in such a way that an army of investigators could not determine it was the result of criminal activity. Nevertheless, this has not been considered the type of "concealment" as envisioned by 21-3106(4)(c).

This type of an arson offense is qualitatively different from say a classic embezzlement wherein the financial books of a bank are falsified. Here the very res gestae, the scene itself may be so consumed and altered as to be beyond recognition. A good bank examiner should catch the embezzler; a good arson investigator may never suspect the fire was incendiary.

CONCLUSION

In closing I would like to address two legitimate and contrary concerns:

1) Last year, in opposing House Bill 2059, Mr. Ron Smith of the Kansas Bar Association correctly pointed out that the bill addressed a relatively small number of cases, and the longer the time involved the harder the cases are to prosecute.

and,

2) There is a perception among many other knowledgeable legal scholars that any extension of the Statute of Limitations only makes for lazy police and prosecutors.

First, in response to the de minimis effect of not expanding the Statute of Limitations. It is unknown how many arson cases are lost, or not filed in Kansas due to the two year statute. The office of the State Fire Marshal knows of three specific cases (all from south east Kansas) in which probable arsonists were not prosecuted due to the expiration of the Statute of Limitations. All three cases were the result of confessions/accomplice statements coming after two years from the date of the fires had elapsed. Three arsonists escaped Kansas justice, through no fault or negligence of the original investigating agents. That is three too many.

Secondly, does an expansion of the Statute of Limitations make for lazy and dilatory police investigation and prosecution? Yes, in most cases ~~it~~ probably does tend to lead to this result. But probably not in arson cases. Due to the United States Supreme Court's two controlling cases (Michigan v. Tyler & Clifford) on the duration in which a fire scene may be initially investigated without obtaining a warrant, after suppression of the fire, all of the State's arson investigators have usually wrapped up their arson investigation (including followup interviews) within a week of the fire. As to prosecutorial delay (or for that matter defense delay), this is problem in some counties and not so in others. The correctness of your favorably voting this bill out of committee should not be victimized

by anecdotal reports or, as yet, unrealized shoddy tactics of the potentially un-professional prosecutor.

Thank you all for your attention and concern.

ARSON STATUTE OF LIMITATIONS
SURROUNDING JURISDICTIONS

2 YEARS
Kansas

7 YEARS
Arizona

3 YEARS
Oklahoma
Colorado
Missouri

NO LIMIT
Illinois
Nebraska
Missouri (Aggravated Arson)

4 YEARS
Nevada

5 YEARS
Texas
Federal Courts

GILBERT ERNEST GREGORY
 REPRESENTATIVE, FOURTH DISTRICT
 BOURBON, CRAWFORD
 AND LINN COUNTIES
 STATE CAPITOL
 TOPEKA, KANSAS 66612
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TOPEKA

HOUSE OF
 REPRESENTATIVES
 March 7, 1991

COMMITTEE ASSIGNMENTS
 MEMBER APPROPRIATIONS
 JUDICIARY

120 S. NATIONAL
 FORT SCOTT, KANSAS 66701
 (316) 223-5025

TESTIMONY FOR THE HOUSE COMMITTEE ON JUDICIARY

RE: HOUSE BILL 2288

House Bill 2288, House Bill 2289, and Senate Bill 233 all are the result of a recent criminal trial in the District Court of Bourbon County, Kansas wherein the defendant was charged with indecent liberties with a child pursuant to K.S.A. 21-3503 Supp. A twelve person jury found the defendant not guilty based upon his successful presentation of the defense of voluntary intoxication pursuant to K.S.A. 21-3208 (2). A similar case is presently pending in the same court and the same defense is expected to be pursued.

The House and Senate Bills referred to above represent a spectrum of approaches for eliminating such unconscionable outcomes. House Bill 2289 would repeal the entire statute whereby both involuntary and voluntary intoxication would no longer be an available defense to any crime. At the other end of the spectrum, House Bill 2288 was intended to be more narrowly drafted to provide that the defense of voluntary intoxication only is no longer available as a defense to criminal charges of sex offenses against children. Somewhere between the House Bill lies Senate Bill 233, co-sponsored by 37 Senators, which would prohibit the use of voluntary intoxication as a defense to any crime where criminal intent is a necessary element.

Rather than risk instigating a full blown philosophical debate on the appropriateness of allowing any state of intoxication as a defense to any crime and thereby passing no legislation on this issue, I would prefer to focus on the more narrowly drafted measure, House Bill 2288 and at least resolve the specific problem. However, as it is evident the Senate Bill has wide support and provides relief beyond House Bill 2288, I would welcome it as an amendment or substitute to House Bill 2288 subject to the wisdom of the House Committee.

Respectfully submitted,

Gilbert Ernest Gregory
 State Representative
 District Four

GEG:hlh

HJD
 Attachment # 3
 3-8-91



**Kansas
Child Abuse
Prevention Council**

715 West 10th Street
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Wichita, Kansas 67202
(316) 262-8434

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Shawnee Mission
- Rick Bloomer, President
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Great Bend

EXECUTIVE DIRECTOR
James McHenry, Ph.D.

Testimony in Support of HB 2288
House Judiciary Committee
March 7, 1991

The Kansas Child Abuse Prevention Council supports the intention of HB 2288. We are particularly interested in seeing voluntary intoxication removed as a defense in crimes involving the physical and sexual abuse of children.

A case last year in Fort Scott drew our attention forcefully to this issue. I am attaching to our testimony copies of editorials representative of the strong public reaction that reached our office.

Research reported by the National Committee for Prevention of Child Abuse indicates that "when drinking is used as a response to stress, alcohol may act as a physiological disinhibitor thereby making it easier for child abuse to occur. For example, research suggests that alcohol is frequently present in cases of sexual abuse because it allows a person to ignore the social taboos against child molestation." (See David Finkelhor, A Sourcebook on Child Sexual Abuse. California: Sage Publications, 1986)

While reasonable people may differ in their assessment of the damage done to children by corporal punishment, there is no room for debate regarding child sexual abuse. A recent article by a multidisciplinary team of experts concluded: "At the present time, it cannot be denied that child sexual abuse often has devastating long-term consequences. The terrible damage caused by sexual abuse has been described most eloquently by the adult survivors of child sexual abuse." (See "Expert Testimony in Child Sexual Abuse Litigation" by John Myers, et. al., reprinted from the Nebraska Law Review, Vol. 68, 1989, p. 53)

Naturally we would all prefer to devote more time and attention to prevention strategies. However, when serious crimes against children do occur, it is imperative that their abusers be held fully accountable before the law. That a perpetrator would be allowed to hide behind a defense of voluntary intoxication ought to offend our sense of justice and motivate us to seal off that means of evading responsibility.

Testimony submitted by James McHenry, Ph. D.
Executive Director

HJUD
Attachment # 4
3-8-91

DATE: _____

11-25-90

- TOPEKA CAPITAL JOURNAL
- WICHITA EAGLE
- KANSAS CITY STAR
- EMPORIA GAZETTE
- GARDEN CITY TELEGRAM

- HAYS DAILY NEWS
- HUTCHINSON NEWS
- LAWRENCE JOURNAL WORLD
- LEAVENWORTH TIMES
- MANHATTAN MERCURY

- OLATHE DAILY NEWS
- PARSONS SUN
- PITTSBURG MORNING SUN
- RUSSELL DAILY NEWS
- SALINA JOURNAL

DAILY COURIER

Opinions

Bad precedent on child abuse

"Drunkenness is not an excuse, but you can be so drunk that you can't be held responsible for having the intent to do anything wrong," said John Solbach, a Lawrence Democrat and member of the House Judiciary Committee. "A crime requires intent."

Solbach was speaking in general terms, but with reference to the acquittal of a Fort Scott man accused of taking indecent liberties with a 13-year-old girl. The man's defense was simply that he had been so drunk he didn't remember molesting the girl, as she alleged. He was found guilty on a charge of furnishing alcoholic beverages to a minor, having given her beer at a private club and later vodka at his home. But he said he couldn't remember molesting her. So he is protected under a Kansas law pertaining to voluntary intoxication, and the judge therefore instructed the jurors that they must consider whether intoxication had impaired the defendant's mental faculties to the point at which he was incapable of forming the necessary intent to commit a crime. If so, regardless of whether the 13-year-old girl was telling the truth about what had happened to her, it wasn't a crime.

Some ethicists argue that intoxication, and especially *voluntary* intoxication, in no way relieves one of responsibility for one's actions while intoxicated. But responsibility is a broad term, and in practice, of course, moral responsibility is altogether different from legal responsibility. Diminished capacity resulting from voluntary intoxication is widely accepted as mitigating the severity of a crime.

But authorities in child-abuse prevention say that up to 90 percent of sexual-abuse cases are linked to alcohol or drug abuse; indeed, that alcohol and illicit drugs might almost be considered catalysts for such behavior. As James McHenry, executive director of the Kansas Child Abuse Prevention Council, points out, "It's common knowledge that people inclined toward sexual abuse will use substance abuse to lower their inhibitions."

That intoxication, then, should be found an acceptable defense in cases of child abuse is quite disturbing indeed.

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4-2

DATE: Dec. 12-11-90

- TOPEKA CAPITAL JOURNAL
- WICHITA EAGLE
- KANSAS CITY STAR
- EMPORIA GAZETTE
- GARDEN CITY TELEGRAM
- HAYS DAILY NEWS
- HUTCHINSON NEWS
- LAWRENCE JOURNAL WORLD
- LEAVENWORTH TIMES
- MANHATTAN MERCURY
- OLATHE DAILY NEWS
- PARSONS SUN
- PITTSBURG MORNING SUN
- RUSSELL DAILY NEWS
- SALINA JOURNAL
- WINFIELD DAILY COURIER

Editorials

Too drunk Intoxication defense at best questionable; at worst tragic

When is molesting a child not a crime? Apparently when you're drunk enough not to be deemed capable of criminal intent. And that's what a Fort Scott jury found to be a reasonable defense in its Nov. 14 verdict in the case of a man accused of molesting a 13-year-old girl.

Defying all logic, Kansas allows the intoxication defense as part of the law involving criminal intent.

That'll change if two Kansas legislators have their way. State Rep. Gilbert Gregory, D-Fort Scott, has said he will introduce a bill at the 1991 legislative session that would outlaw the intoxication defense. Sen. Wint Winter Jr., R-Lawrence, will ask that similar legislation be drafted in the Senate.

Let's hope this legislation passes without a whimper. It's tough enough to prosecute child molestation cases. Throwing in evidence that suggests a defendant's judgment

was so impaired by alcohol that he or she could not form necessary intent is as outrageous as suggesting that alcohol abuse is a mitigating factor in murder and robbery.

To add irony to outrage, alcohol abuse adds to the severity of many driving violations. Our judiciary is unforgiving, indeed, toward those who would drink and drive.

Certainly, any case carries with it exceptions. But when a person really commits a crime, that person shouldn't be able to hide behind the bottle. If there is a time for leniency, a time to consider mitigating factors, it is when passing sentence.

Accountability is a gray issue. But when one out of three girls and one out of seven boys are sexually abused by age 18, the haunting question remains:

Should alcohol abuse be used as an excuse for child abuse? Or for any other serious crime?

Department of Social and Rehabilitation Services

Testimony before

House Judiciary Committee

Regarding

House bill 2288

On

March 7, 1991

Presented on behalf of:

Carolyn Risley Hill Acting Commissioner
Youth and Adult Services
Kansas Department of Social and Rehabilitation Services

HJUD
Attachment #5
3-8-91

Department of Social and Rehabilitation Services
Robert C. Harder, Acting Secretary

Testimony in Support of H.B. 2288

AN ACT CONCERNING CRIMES AND PUNISHMENT;
RELATING TO THE DEFENSE OF INTOXICATION

(Mr. Chairman), Members of the Committee, I appear today to offer my general support to House Bill 2288.

There is clear evidence to support that intoxication alters the the state of mind and impairs rational and intentional thought and action. This fact is well advertised and the general population knows this to be true. Voluntary intoxication is a choice people make and it should not be a defense when that person has caused specific harm to another. It is a common scenario that sexual offenses, and especially incest, occur when the perpetrator is in a state of intoxication. The harm to the victim is not lessened by the fact that the perpetrator had a diminished capacity and this should not be allowed as an excuse for such behavior and should not be permitted as a defense.

In behalf of the victims, I urge you favorable consideration of this bill.

Carolyn Risley Hill
Acting Commissioner
Youth and Adult Services
Department of Social and
Rehabilitation Services
(913) 296-3284

March 7, 1991 3:30 p.m.
Hearing on House bill 2288 & 2289
House Judiciary Committee

Rev. Richard Taylor
KANSANS FOR LIFE AT ITS BEST

Concerned citizens support both bills. Please approve both because HB 2288 is a good back up in case HB 2289 is not approved by the legislature and signed by the Governor.

Kansas became a state in 1861. I understand KSA 21-3208 was passed in 1969. How could such a recent session pass such a bad piece of legislation? Abraham Lincoln said liquor has many defenders, but no defense. Alcohol defenders in 1969 not only defended alcohol, they defended criminal acts caused by drinkers of alcohol.

In 1969, informed people knew that alcohol caused more human misery than all other drugs combined. That was said by the medical community and government agencies. This law permits alcohol to cause even more suffering by excusing those who commit crimes when their brain is drugged.

According to this brochure distributed by the Kansas Board of Regents, ALCOHOL IS DIRECTLY INVOLVED IN 80% of criminal court cases. Why would any legislature permit being drugged on alcohol an argument given to a defense attorney?

How does a person become "involuntarily" drunk? (HB 2288, line 16)

Dr. Morris Chafetz promotes and defends drinking in his book, LIQUOR THE SERVANT OF MAN. Yet even his book tells us that drinking produces the hulking man with the one-inch forehead who is psychically roving alone - course, reckless, predatory, dangerous, and possibly criminal, because the criminal life of today comes close to the normal life of primitive man. CRIMINAL ACTIONS ARE NORMAL WHEN DRUNK.

Drinkers end up with the "intent or state of mind" that is criminal. (Line 24, 2288) Therefore this law is absurd, ridiculous, inconsistent with common sense or reason. It is like the highly promoted industry slogan, KNOW WHEN TO SAY WHEN. The beer people know that after 4 or 5 beers a drinker has so dulled his brain that he does not know when to say when or when to say anything intelligent.

At breakfast this morning with my wife and sixth grade grandson, we were talking about the legislature. They were interested in bills before committees. I told them of the two measures before this committee today that would end or change a Kansas law that permits a person to argue that being drunk should excuse him from a crime committed. Grandson Jacob immediately said, "THAT'S DUMB!"

I will long remember hearing President Bush at a White House Briefing saying these firm words, "WE MUST TEACH OUR CHILDREN THAT CHOICES HAVE CONSEQUENCES." We must teach adults that choices have consequences. Every person who makes the choice to injest the drug alcohol must be required to accept all consequences.

IF YOU LET DRUNKENNESS BE AN EXCUSE FOR CRIMINAL BEHAVIOR, YOU'RE INVITING PEOPLE TO GET DRUNK AND COMMIT CRIMES, AND THAT'S ABSURD.

Respectfully yours,

Richard Taylor

*14JUD
Attachment # 6
3-8-91*

"alcohol is the drug most associated with crime, violence, auto accidents, marital problems and child abuse."
 - Dr. Malt Menninger
 Persons drink alcoholic beverages to enjoy the brain of an animal and a savage. (Read Psalm 8)

Chafetz - LIQUOR THE SERVANT OF MAN 1965
 "This cerebral cortex, this new brain. . . has risen up comparatively recently. . . It is this tension of concentration - the ability to put the mind on something and keep it there - which demarcates man from animal and civilized man from savage."

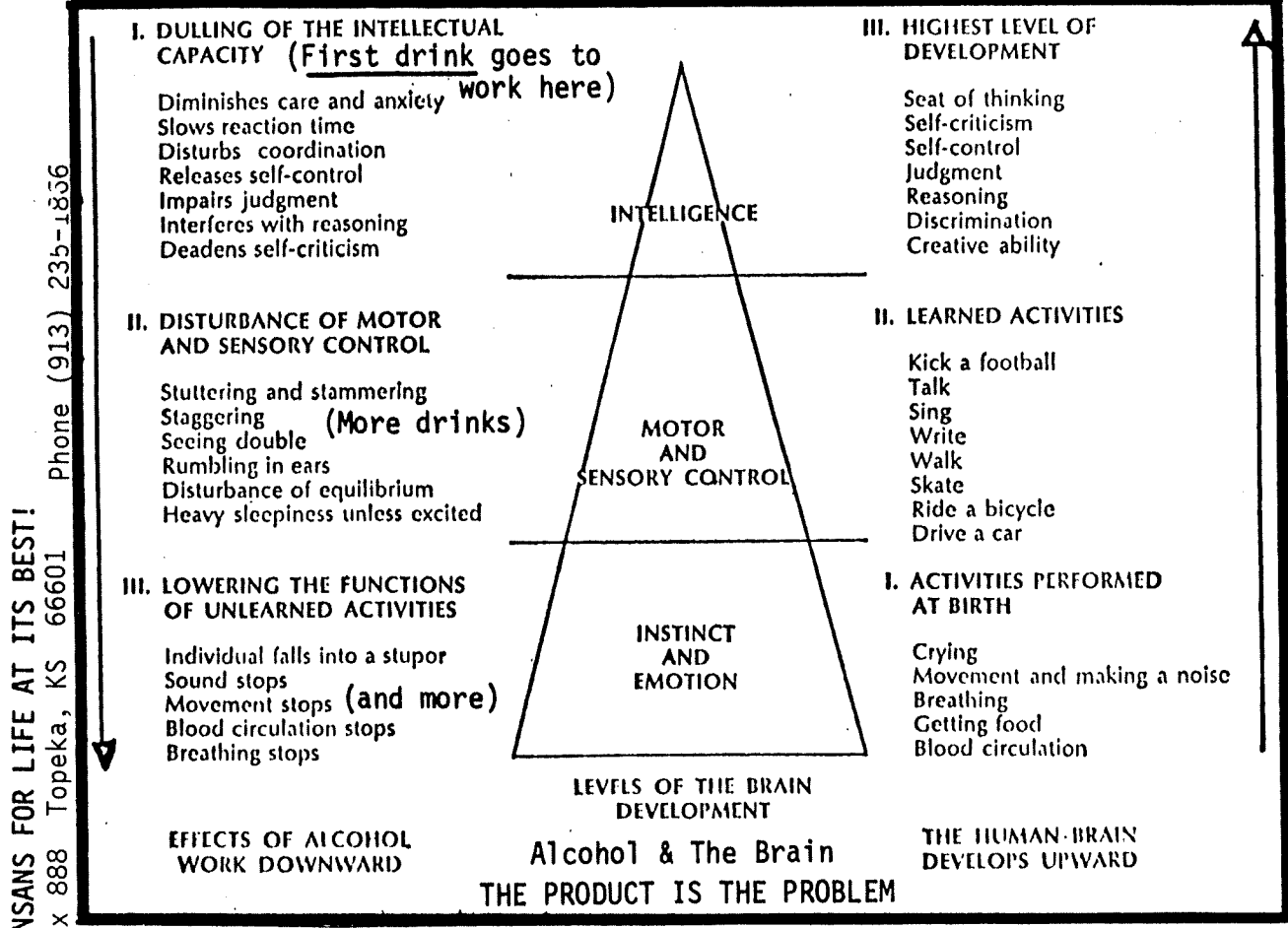
"Now, this 'new brain' we have been discussing occupies the top spot in the psychology of alcohol because it, like any newborn, needs more rest than any part - AND ALCOHOL HAS THE ABILITY TO GO DIRECTLY TO IT AND PUT IT TO SLEEP."

In any case, it is not necessary to see a man drink himself to death in order to observe the interesting spectacle I am about to describe. For it is under the influence of alcohol that we are a witness to the retracing of the whole life history of the race - in one man, in one evening - all the way back down the evolutionary stairway. First, his herd-group tendencies disappear (these are the last tendencies man has acquired and are recognizable as the following: consideration of other people, restraints, refinements and niceties). Next to go are anxiety, prudence, modesty, reserve, and all the rest of what psychologists call "group logic," the orthodox rules of group or civilized conduct. Older, more basic impulses push up from below: jerky speech, roaring laughter, excessive sentimentality. By now he has gone a good way down; he has left the herd and is imitating the procedures of the hulking man with the one-inch forehead who was his forebear. Psychically he is roving alone - coarse, reckless, predatory, dangerous, and possibly criminal, because the criminal life of today comes close to the normal life of primitive man.

(Pages 177, 181, 182. This book promotes and defends alcohol consumption.)

Lincoln visited Kansas in 1859. Captain J. R. Fitch tells of a reception in Leavenworth where alcohol was served and most partook except Lincoln. When asked why, Abraham Lincoln used his knowledge of Shakespeare and told Captain Fitch, "My young friend, do not put an enemy in your mouth to steal away your brains."

"O that men should put an enemy in their mouths to steal away their brains! that we should, with joy, pleasance, revel, and applause, transform ourselves into beasts!"
 - Othello, Act 2, scene 3



ALCOHOL & THE BODY



MOUTH AND ESOPHAGUS

Alcohol irritates the delicate linings of the throat and esophagus; that's why it causes a burning sensation as it goes down.

STOMACH AND INTESTINES

Alcohol also irritates the stomach's protective lining and can result in gastric or duodenal ulcers. In the small intestine, alcohol blocks absorption of substances such as thiamine, folic acid, xylose, fat, vitamin B1, vitamin B12, and amino acids.

BLOODSTREAM

Ninety-five percent of the alcohol taken into the body is absorbed into the bloodstream through the lining of the stomach and duodenum. Alcohol causes a slowing of the circulation systems and deprives tissues of oxygen. Alcohol also slows the ability of white blood cells to engulf and destroy bacteria and the clotting ability of blood platelets.

PANCREAS

Alcohol irritates the cells of the pancreas and can lead to acute hemorrhagic pancreatitis. Pancreatitis can destroy the pancreas and create a lack of insulin.

LIVER

Alcohol inflames and destroys the cells of the liver. This condition prevents bile from being properly filtered through the liver. Jaundice develops, turning the whites of the eyes and the skin yellow.

HEART

Alcohol causes inflammation of the heart muscle.

URINARY BLADDER AND KIDNEYS

Alcohol inflames the lining of the urinary bladder. In the kidneys, alcohol causes an increased loss of fluids through its irritating effect.

SEX GLANDS

Swelling of the prostate gland caused by alcohol interferes with the ability of the male to perform sexually. It also interferes with the ability of the male and female to climax during intercourse.

BRAIN

The most dramatic and noticed effect alcohol has is on the brain. It produces lack of coordination, confusion, disorientation, stupor, anesthesia, coma, and finally death.

SELF EVALUATION

YES NO

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Are you in financial difficulty as a result of drinking or drugs? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you drink or do drugs alone? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you require more alcohol/other drugs to achieve the same effects? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you have the intention of getting drunk/high when going out for an evening? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you drink/do drugs more often now than you used to? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you sometimes gulp your drinks? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you drink/do drugs to relax? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you ever forget things while high? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you keep alcohol/drugs hidden for a quick pick-me-up? |
| <input type="checkbox"/> | <input type="checkbox"/> | Is your drinking and/or drug use jeopardizing your academic performance? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you ever injured yourself or other persons after drinking/drug use? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you drive after using alcohol or other drugs? |
| <input type="checkbox"/> | <input type="checkbox"/> | Is your alcohol and/or other drug use affecting your interpersonal relationships? |

ARE YOUR CHANCES FOR SUCCESS AT RISK?

"Athletics is a mental game as much as a physical . . . drug and alcohol use limit your potential."

Gene Stegeman
Pittsburg State University

"Dry rush parties enable us to get to know future members as they really are rather than as alcohol makes them appear."

John Anderton
Wichita State University

"The decision you make pertaining to drug and alcohol use is a decision that will have an impact on the rest of your life."

Maureen Borland
University of Kansas

STATE & NATIONAL RESOURCES

Kansas Alcohol & Drug Abuse Services
2700 West 6th
Biddle Building
Topeka, Kansas 66606
913-296-3925

Kansas Alcoholic Beverage Control
Jayhawk Tower-2nd Floor
700 Jackson
Topeka, Kansas 66612
913-296-3946

University of Kansas Medical Center
Information Hot Line
1-800-332-4199

National Institute on Drug Abuse
Information Hot Line
1-800-662-4357

National Cocaine Hot Line
1-800-COCAINE

CAMPUS RESOURCES

For additional information or referral resources on your campus please consult:



Campus Directory
Dean of Student Life Office
Student Affairs
Student Health Service
Counseling Center

"Don't jeopardize your future with the misuse of alcohol or other drugs."

Ray Cessna
Kansas College of Technology

"Getting an education in today's fast paced world is hard enough—I can't afford to let alcohol or other drugs slow me down."

Mike Trusty
Kansas State University

This brochure is a publication
of the Kansas Board of Regents



WE WANT YOU TO SUCCEED . . .

6-3



Dear Students:

As a student at one of our Regents institutions you are demonstrating your commitment to learning, to an improved quality of life, and ultimately to a better future for yourself and others.

The abuse of alcohol and other drugs is one of the greatest threats to learning, your future, and the quality of your life. You can meet this threat by taking personal responsibility to get the facts and to live your life free from substance abuse. This brochure provides information about abused drugs and about resources that offer assistance and information.

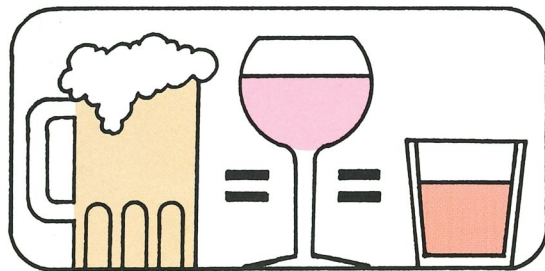
We are fortunate in Kansas to have a Board of Regents, students, and staff committed to combating substance abuse. Your ongoing work to curb substance abuse is greatly appreciated. We must make every effort to ensure that our campuses are drug-free learning environments. It is a significant challenge, but one to which I dedicate myself. Together, let us strive toward a drug-free Kansas.

Sincerely,

MIKE HAYDEN
Governor

LEGAL DRINKING AGE

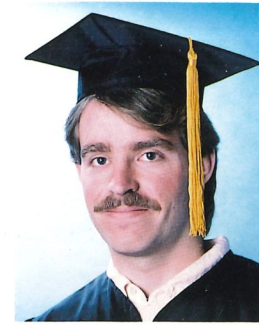
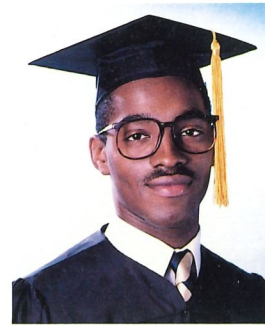
No person under 21 years old shall purchase, possess, or consume cereal malt beverages or alcoholic liquor.



"I believe that responsible use of alcohol starts with understanding the risks."

Annette Noll
Emporia State University

DON'T LET ALCOHOL & DRUG ABUSE PUT YOU AT RISK



ALCOHOL IS DIRECTLY INVOLVED IN . . .

- 20% of all freezing deaths
- 25% of all choking deaths
- 36% of all pedestrian deaths
- 50% of all deaths from falls
- 50% of all teenage motor vehicle deaths
- 52% of all fire deaths
- 60% of all suicides
- 64% of all murders
- 69% of all drownings
- 76% of all recreational aircraft deaths
- 33% of all motor vehicle injuries
- 34% of all child abuse cases
- 40% of all divorces
- 50% of all fractures
- 50% of all work place problems
- 50% of all rapes
- 65% of all motorcycle crashes
- 69% of all recreational boating injuries
- 72% of all assaults and robberies
- 80% of all criminal court cases

"I play basketball for Fort Hays State University. I like to set a good example and I don't like to embarrass myself. It makes me feel good to know that kids know that I don't use alcohol or other drugs."

Mark Harris
Fort Hays State University

OTHER DRUGS

Hallucinogens are very unpredictable. On some occasions euphoria may result; on other occasions disorientation, depression, or panic may prevail. A reaction or "trip" can occur without warning weeks or months after taking the drug.

Heroin/Narcotics are opiates and are used to relieve pain. Narcotics are both physically and psychologically addictive.

Marijuana, when smoked or burned, breaks down into over 2,000 chemicals entering the body. Two to three marijuana "joints" per day do as much damage to the body as a pack of cigarettes a day.

Nicotine is the active chemical found in tobacco. Its chief hazards are cancer of the lungs, larynx, and mouth. It is estimated that nicotine kills approximately 340,000 Americans every year.

Sedatives/Barbiturates cause motor activities and coordination to be hampered and brain functions to decrease. It is very dangerous, as well as unlawful, to drive while under the influence of any sedative.

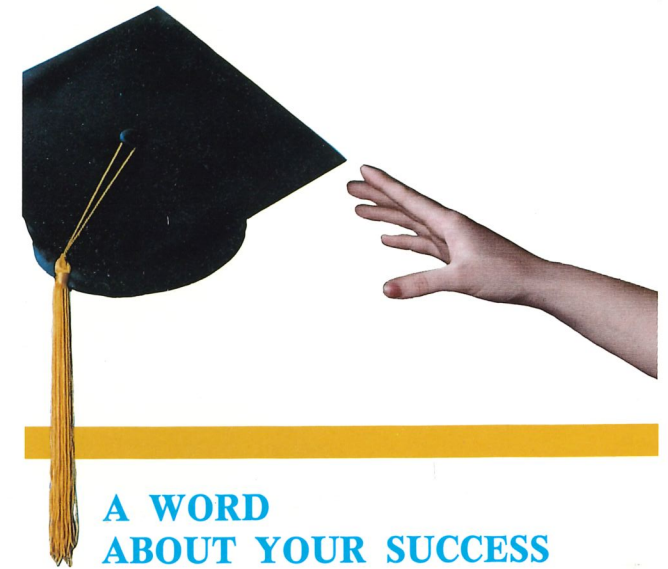
Amphetamines/Stimulants often provide a feeling of euphoria initially. However, these feelings usually change to anxiety, depression, and fatigue—often quickly and without warning.

Anabolic Steroids (artificial male hormones) suppress the gonadotropic functions of the pituitary. Some side effects include: liver and kidney dysfunction, testicular atrophy, premature closure of bone growth plates, hair loss, and acne.

Caffeine is found in coffee, tea, cocoa, cola drinks, some aspirin and diet pills, and some non-prescription cough and cold remedies. High doses may cause nausea, diarrhea, sleeplessness, headache, nervousness, and trembling.

Cocaine/Crack is extremely physically and psychologically addictive. The effects of crack are especially intense, immediate, and potentially deadly. There is no antidote for a cocaine or crack overdose.

FOR ILLEGAL DRUGS, THERE IS NO SUCH THING AS RESPONSIBLE USE.



A WORD ABOUT YOUR SUCCESS

The years ahead are extremely important ones for you and your future. The fact that you are in college demonstrates that you have considered and care about that future. On behalf of the Kansas Board of Regents and the seven Regents institutions, we would like you to spend a few minutes reading this brochure. We also encourage you to *think* about what you read and to discuss and share the information with your friends and family. This brochure has been prepared and is being sent to you by many people who care about you and your opportunity for success in life. Your reading and consideration of this brochure will make those efforts worthwhile.

We do not want substance abuse to put your success, or your life, at risk!

Donald C. Slawson, Chairman
Kansas Board of Regents

Stanley Z. Koplik, Exec. Dir.
Kansas Board of Regents

Gene Budig, Chancellor
University of Kansas

Jon Wefald, President
Kansas State University

Warren B. Armstrong, President
Wichita State University

Robert E. Glennen, President
Emporia State University

Donald W. Wilson, President
Pittsburg State University

Edward H. Hammond, President
Fort Hays State University

Anthony L. Tilmans, President
Kansas College of Technology

Summary of Testimony Opposing House Bills 2288, 2289
Submitted by Rick Kittel, Assistant Appellate Defender

- I. Nature of Criminal Intent
 - A. Historical Aspects of Intent in Criminal Law
 - B. General Criminal Intent (21-3201)
 - C. Specific Criminal Intent (21-3208(2))

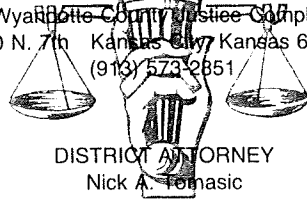
- II. Voluntary Intoxication as a Defense to Specific Intent Crimes
 - A. Rationale for the Defense
 - B. Kansas Case Law History
 - C. Other Jurisdictions

- III. Current Status of the Defense in Kansas
 - A. Evidence Sufficient to Warrant a Jury Instruction
 - B. Success of Defense
 - C. Elimination of Defense Eliminates Specific Intent Elements
 - D. Comments on State v. LaRoche

Attachment # 7

Office of The
DISTRICT ATTORNEY
Of The 29th Judicial District of Kansas

Wyandotte County Justice Complex
710 N. 7th Kansas City, Kansas 66101
(913) 573-2851



DISTRICT ATTORNEY
Nick A. Tomasic

October 29, 1990

Representative Michael O'Neal
P. O. Box 2977
Hutchinson, Kansas 67504

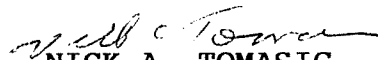
RE: ²⁵⁰⁰ ~~2464~~ House Bill Number ~~2666~~
K.S.A. 38-1636

Dear Mike:

You might want to consider an amendment to the above referred legislation that will specifically provide for the retention of jurisdiction by the adult criminal court after the waiver. I am referring to situations where a person is fourteen or fifteen years old, is waived for adult prosecution on an A or B felony and is found guilty of a lesser included crime.

Attached is a memo covering the situation.

Yours truly,


NICK A. TOMASIC
District Attorney

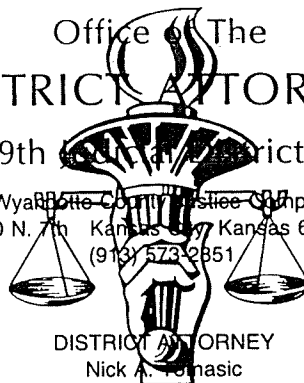
NAT/lkf

CC: Mr. James Clark
Executive Director

HJUD
Attachment # 8
3-8-91

Office of The
DISTRICT ATTORNEY
Of The 29th Judicial District of Kansas

Wyandotte County Justice Center
710 N. 7th Kansas City, Kansas 66101
(913) 573-2851



DISTRICT ATTORNEY
Nick A. Tomasic

K.S.A. 38-1636

F A C T S

The facts are undisputed.

The fifteen year old defendant was originally charged in Juvenile Court with the commission of an act while a juvenile, which if done as an adult would constitute the commission of a class B felony.

Pursuant to K.S.A. 38-1636, the District Attorney filed a Motion requesting that the court authorize prosecution as an adult. Pursuant to K.S.A. 38-1636(F), after a hearing, the court directed the defendant to be prosecuted as an adult and that the juvenile proceedings be dismissed.

After being charged with a class B felony and prior to trial, the defendant entered a guilty plea to a class E felony. He is awaiting disposition.

It is the State's position that the District Court has jurisdiction to sentence the defendant under the applicable criminal statute.

A R G U M E N T

K.S.A. 38-1602 (1989 Supp.), definition (a) "juvenile" means a person ten or more years of age but less than eighteen years of age.

(b) "Juvenile Offender" means a person who does an act while a juvenile which if done by an adult would constitute the commission of a felony or misdemeanor - - - but does not include:

(5) a person whose prosecution as an adult is authorized pursuant to K.S.A. 38-1636 and amendments thereto.

"K.S.A. 38-1636 is hereby amended to read as follows: 38-1636. (a) At any time after commencement of proceedings under this code against a respondent who was: (1) 14 or 15 years of age at the time of the offense or offenses alleged in the complaint, if any such offense is or offenses are a class A or B felony, and prior to entry of an adjudication or the beginning of an evidentiary hearing at which the court may enter adjudication as provided in K.S.A. 38-1655 and amendments thereto, or (2) 16 or more years of age at the time of the offense alleged in the complaint and prior to entry of an adjudication or the beginning of an evidentiary hearing at which the court may enter adjudication as provided in K.S.A. 38-1655 and amendments thereto, the county or district attorney may file a motion requesting that the court authorize prosecution of the respondent as an adult under the applicable criminal statute.

(1) The court may authorize prosecution as an adult upon completion of the hearing if the court finds that the respondent was (1) 14 or 15 years of age at the time of the alleged commission of the offense, if the offense is a class A or B felony, and that there is substantial evidence that the respondent should be prosecuted as an adult for the offense with which the respondent is charged, (2) 16 or more years of age at the time of the alleged commission of the offense and that there is substantial evidence that the respondent

should be prosecuted as an adult for the offense with which the respondent is charged. In that case, the court shall direct the respondent be prosecuted under the applicable criminal statute and that the proceedings filed under this code be dismissed."

Thus, it is obvious that the defendant, age fifteen, was a juvenile as defined in the Kansas Juvenile Offenders Code, but not a juvenile offender by reason of the exception in K.S.A. 1989 Supp. 38-1602(B)(5). K.S.A. 1990 Session Laws, 38-1636 was amended to provide a procedure by which a juvenile, fourteen or fifteen years of age, may be tried as an adult upon a proper showing and a waiver of jurisdiction by the court to proceed against the juvenile as a juvenile offender.

By reason of K.S.A. 38-1636, the fifteen year old was not a juvenile offender as defined in the Juvenile Offender Code, due to the exception set forth above, K.S.A. 38-1602 (B)(5). The District Court properly has jurisdiction to proceed against the fifteen year old after his guilty plea to a class E felony under the Kansas Criminal Code K.S.A. 21-3101 and the Kansas Code of Criminal Procedure K.S.A. 22-2101 et seq. and lacked jurisdiction to proceed under the Juvenile Offenders Code.

No procedure is contained in the Juvenile Offenders Code for making a jurisdictional showing under the exceptions found in K.S.A. 1989 Supp. 38-1602(B)(1) through (6). It has been recognized that the legislature may exclude any person from juvenile jurisdictions under certain circumstances. LeVier v. State, 214 Kan. 287, 520 P.2d 1325 (1974).

The legislature has determined that juveniles, who would otherwise be subject to the Juvenile Offenders Code, under certain circumstances are not subject to that code. Here, because the defendant was fifteen years old at the time of the commission of the offense alleged in the complaint and the offense was a class B felony, the court after finding that there was substantial evidence that the respondent should be prosecuted as an adult and pursuant to Section (3)(F) K.S.A. 38-1636 1990 Session Laws, directed that the defendant be prosecuted under the applicable criminal statute and that the proceedings filed under the Juvenile Code be dismissed.

New Section (11) of K.S.A. 38-1636 defines the term "juvenile felon" as "those persons who are 14 or 15 years of age at the time of the offense alleged in the complaint, such

offense is a class A or B felony, such person was prosecuted as an adult and such person has been found guilty of such offense."

The legislature has also provided that the authorization for prosecution as an adult is specifically limited to the offense alleged in the complaint unless he is convicted then the court may order that the authorization for prosecution also applies to any future acts. K.S.A. 38-1636(h).

DOUBLE JEOPARDY

"K.S.A. 21-3107. Multiple prosecutions for same act. (1) When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes. Each of such crimes may be alleged as a separate count in a single complaint, information or indictment.

(2) Upon prosecution for a crime, the defendant may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

- (a) A lesser degree of the same crime;
- (b) an attempt to commit the crime charged;
- (c) an attempt to commit a lesser degree of the crime charged; or
- (d) a crime necessarily proved if the crime charged were proved.

(3) In cases where the crime charged may include some lesser crime, it is the duty of the trial court to instruct the jury, not only as to the crime charged but as to all lesser crimes of which the accused might be found guilty under the information or indictment and upon the evidence adduced."

It is the common-law rule that when an indictment charges an offense which includes within it another lesser offense, or one of a lower degree of the same general class, the accused, although acquitted of the higher offense, may be convicted of the lesser.

Lesser included offenses fall into three categories:

- (1) a lower degree of the offense charged;
- (2) the offense which is necessarily committed by the defendant in perpetrating the crime charged;
- (3) an attempt to commit the crime charged.

A defendant cannot be convicted of a lesser offense as well as the greater offense under the principles of duplicity. A conviction of the greater bars prosecution on the lesser. An acquittal of the greater crime bars prosecution for the lesser crime. Jarrell v. State, 212 Kan. 171, 510 P.2d 127 (1973).

Black's Law Dictionary defines lesser included offense as, "one composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense. - - - In any case in which it is legally possible to attempt to commit a crime, such attempt constitutes a lesser included offense with respect thereto." (p. 812).

K.S.A. 21-3108 provides:

"21-3108. Effect of former prosecution.
(1) A prosecution is barred if the defendant was formerly prosecuted for the same crime, based upon the same facts, if such former prosecution:

(a) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction.

A conviction of an included offense is an acquittal of the offense charged.

and

(5) In no case where a conviction for a lesser included crime has been invalidated, set aside, reversed or vacated shall the defendant be subsequently prosecuted for a higher degree of the crime for which such defendant was originally convicted."

It is clear that before double jeopardy attaches there must have been a former prosecution which was terminated after jeopardy attached.

The case against the defendant under the Juvenile Code was based upon the same facts as those presented under the Adult Criminal Code.

The defendant was found guilty of a lesser included offense of the one charged pursuant to Section (11) of K.S.A. 38-1636, the defendant is a juvenile felon.

Since a conviction of a lesser included crime bars a subsequent prosecution for the greater crime, the conviction of an attempt, for all practical purposes, is a conviction of the crime charged as contemplated in K.S.A. 38-1636.

C O N C L U S I O N

The District Court has jurisdiction to proceed with sentencing under the Kansas Criminal Code K.S.A. 21-3101 and the Kansas Code of Criminal Procedure, K.S.A. 22-2101.

#2

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James Flory, Vice-President
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Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX # (913) 357-6352
EXECUTIVE DIRECTOR • JAMES W. CLARK, CAE

Testimony in Support of

HOUSE BILL NO. 2532

The Kansas County and District Attorneys Association appears in support of House Bill No. 2532, as we requested such a measure in the first place. The bill simply clarifies the intent of the Legislature where jurisdiction is dependent on the nature of the offense, and the nature of the offense is changed by jury verdict. For example: 1) It amends the statute of limitations in criminal cases to extend the exemption for murder to cases in which a defendant initially charged with first or second-degree murder is convicted of a lesser included offense. This extension of jurisdiction is important, as Kansas law requires giving jury instructions on lesser included offenses if there is any evidence to support them. If a jury returns a verdict of voluntary or involuntary manslaughter, without the amendment, the court no longer has jurisdiction if the incident occurred more than two years prior to the filing of charges; and 2) continues jurisdiction of the adult court over a juvenile felon charged with an A or B felony, where a jury returns a verdict of a lesser included offense. The amendment is needed because it is not clear in such cases what happens to the juvenile. Would the case be referred back to juvenile court for adjudication, or would double jeopardy attach, precluding further proceedings.

We respectfully request the House Judiciary Committee to approve this bill in order to clarify the question of jurisdiction in homicide and juvenile felon cases.

HJUD
Attachment # 9
3-8-91

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November 21, 1990

VIA FAX - 316/662-2160

Greg Meredith, Esq.
 BRANIME, CHALFANT & HILL
 Box 2027
 Hutchinson, Kansas 67504

RE: HB 2464

Re: Door-to-Door Sales

Dear Greg:

In line with our phone conversation yesterday, I have reviewed the door-to-door sale problem we discussed. You indicated that your client is a construction company which fixed a homeowner's roof after providing an estimate and having the customer sign a contract. The roof required repair as a result of a hail storm last spring. The homeowner called your client on the phone and requested that they come out to examine the roof, provide an estimate, and bid on the job. Your client followed their request. The contract was not signed in your client's place of business, but on the premises of the homeowner. No attempt was made to provide a door-to-door three-day rescission notice. Subsequently, after the work was completed and the homeowner was billed, the parties got into a dispute concerning the job. As a result of nonpayment, your client placed a mechanics lien on the property, pursuant to Kansas statute. In response, the homeowner is claiming that he does not have a duty to pay anything for the roofing job because he had a right to cancel under K.S.A. 50-640.

After a close review of the statute and its legislative history, I have concluded that we do have a serious problem. The term "door-to-door sale" is defined at K.S.A. 50-640(c)(1) to include a sale of services with a purchase price of \$25 or more, "in which the seller or the seller's representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement to offer or purchase is made at a place other than the place of business of the seller." (Emphasis added.) That definition is quite broad, and would seem to cover this case, even though your client simply responded to an invitation by the homeowner.

There are five exclusions from the general definition, the only one of which that would seem to apply is subsection (E).

HJD

*Attachment #10
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The term "door-to-door sale" does not include a sale in which "the buyer has initiated the contract [contact] and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property." (Emphasis added.) In your case, although the buyer initiated the contact and specifically requested that your client visit his home to bid on the roofing job, the visit was not for the purpose of repairing "personal property" but was instead for the purpose of repairing his real property. Although the term "personal property" is not defined in K.S.A. 50-640, that section is part of the Kansas Consumer Protection Act, which runs from K.S.A. 50-623 to 50-642. See, in particular, K.S.A. 50-642. As such, the general definitions found in the KCPA (K.S.A. 50-624) apply to the home solicitation sale provision. In particular, K.S.A. 50-624(g) defines "property" to include real estate, goods and intangible personal property. In other words, a statutory distinction seems to be drawn between personal property and real estate. This point is emphasized by use of the phrase "real property" in other parts of K.S.A. 50-640, such as subsection (c)(F). Therefore, failure of the legislature to use the broader term "property" or "real or personal property" in section (c)(E) seems to bring back within the scope of the statute sales of services performed on real estate even though the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing the real estate. A technical argument could be made that use of the term "personal property" rather than "goods" was intended to include real estate, but this argument is highly artificial and would probably fail.

Nor does it appear that the reference to "personal property" in subsection (c)(E) was a drafter's error. Both the definition of "door-to-door sale" and the exclusions are taken directly from federal law. The FTC's Trade Regulation Rule that contains the same coverage is found at 16 C.F.R. Part 429. The upshot seems to be that anyone performing services on real estate can avoid the rule only if: (1) the agreement is signed at the seller's place of business, or (2) the "emergency" exception applies and the seller signs the required waiver. In sum, it appears to me that, based on the plain language of the statute, the transaction you describe is a "door-to-door sale" within the scope of the three-day rescission rule set forth in K.S.A. 50-640.

Given the likelihood of coverage, what can your client now do? Do we have any arguments that the homeowner does not have the legal right under the Kansas statute to cancel the contract and not pay anything in return? I think we have two such arguments. First, we can argue that, although K.S.A. 50-640(a) establishes a consumer's right to cancel, it is subsection (b) that provides the remedy. Subsection (b) makes failure to give the three-day

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cancellation notice a deceptive trade practice under K.S.A. 50-626. In turn, a court could award civil penalties under K.S.A. 50-636. However, these remedies are exclusive. If the notice is not given, the consumer does not have a right to cancel. Limiting the consumer's right to suing for a deceptive trade practice is parallel to the federal law after which the Kansas provision is modeled. See 16 C.F.R. 429. The weakness of this argument is that the language of K.S.A. 50-640(a) is somewhat broader than the FTC Trade Regulation Rule, and subsection (a) might be construed as creating a right of cancellation independent of the deceptive trade practice theory under subsection (b). There have been no cases on this point, so we are in uncharted territory.

The second argument is stronger. Although the final paragraph of the Kansas Comment to K.S.A. 50-640 suggests that a seller who has already performed services forfeits the value of those services, this Comment was placed in the statute books in error. You will note that it refers to subsection (d)(3), a subsection which was never included in the Kansas version of the statute. In fact, this Comment was taken from the Comment to § 2.505(3) of the original uniform version of the Consumer Credit Code. That subsection provided that, if a seller has performed services prior to cancellation, the seller is entitled to no compensation. It is significant that this remedy was never included as part of the Kansas statute, or the FTC rule for that matter. I would argue that this omission was deliberate and that the Kansas legislature intended not to impose such a severe penalty for failure to give notice of the right of cancellation.

In fact, I think you can strongly argue that, although the homeowner has the right to cancel the contract and eliminate the contractor's profit, your client still has a right to collect the fair market value of the services it provided, along with the mechanics lien to enforce that right. We have an analogy here in the form of the three-day right to rescind under Truth-in-Lending, 15 U.S.C. 1635. There is strong case law under Truth-in-Lending to the effect that the homeowner must always pay the reasonable value of the work performed, even if he never receives the cancellation notice. For representative cases, see Smith v. Capital Roofing Company of Jackson, Inc., 622 F. Supp. 191 (S.D. Miss. 1985); Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980) (court conditions rescission on homeowner's payment of fair market value of siding placed on house); Etta v. Seaboard Enterprises, Inc., 674 F.2d 913 (D.C. Cir. 1982); and Powers v. Sims & Levin, 542 F.2d 1216 (4th Cir. 1976).

A Kansas court might be particularly willing to limit the homeowner's remedy in this way, given the fact that the transaction here is not the typical high-pressure home solicitation sale at

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which the statute is aimed. In fact, in the only Kansas case dealing with the statute, Moore v. R.Z. Sims Chevrolet-Subaru, Inc., 241 Kan. 542 (1987), the Kansas Supreme Court made the following significant comment:

Kansas Comment 1973 to K.S.A. 50-640 makes it clear that the main target of the statute is the home solicitation sale. In such circumstances, a person may be quietly watching his or her television set, answer the unexpected door bell, and within 30 minutes have signed up for ten years of dancing lessons. The statute gives the gullible consumer an opportunity to consider and reflect upon such a purchase and cancel the same if desired. 241 Kan. at 553.

That language from the Kansas Supreme Court suggests that a Kansas court should be limited in framing remedies for violation of the statute in situations which do not raise the kind of evil the legislature was intending to eliminate. Therefore, although your case seems to fall within the four corners of the statute, I think you have an excellent chance at least to recover for the fair market value of the roof improvement job. In a similar vein, a Kansas court would probably limit any civil penalty which might be imposed under K.S.A. 50-636.

In light of these findings, my strong suggestion would be to work out a settlement with the homeowner, something in the neighborhood of the fair market value of the roofing job. I also think that your case suggests the need to get some relief for home contractors from the Kansas legislature. I hope this adequately answers your questions. If you have any further questions, please let me know.

Sincerely,


Barkley Clark

BC:ved

goods under K.S.A. 84-2-314. To be effective, such a disclaimer must be "conspicuous" (K.S.A. 84-1-201 (10)) and may not be unconscionable (K.S.A. 84-2-719). Although there are many Kansas cases giving effect to warranty disclaimers (see, e.g., *Allen v. Brown*, 181 K. 301, 310 P.2d 923 (1957)), the Kansas Supreme Court has evidenced sympathy with consumers whose installment contracts contain fine-print disclaimer provisions. See *Steele v. J. I. Case Co.*, 197 K. 554, 419 P.2d 902 (1966). Under subsection (a) (1), a supplier may disclaim neither express nor implied warranties. This does not greatly change the law with respect to the implied warranty of fitness for a particular purpose (K.S.A. 84-2-315) or an express warranty (K.S.A. 84-2-313); a supplier may avoid these warranties simply by not making them, but if he does make them he should abide by them. With respect to the implied warranty of merchantability, however, sales of a product "as is," "with no warranty express or implied," or with an express warranty "in lieu of all other warranties express or implied," are precluded except as provided in subsection (c).

2. Another provision often appearing in boiler plate forms is one which limits the remedy a consumer has for breach of an express warranty. Subsection (a) (2) prohibits any exclusion or modification of the remedies the consumer otherwise has at law. Nothing, of course, prohibits a supplier from giving additional remedies, such as replacement or repairs. These, however, may not displace the other remedies found in the UCC and elsewhere. Under the UCC (K.S.A. 84-2-719 (3)), limiting consequential damages for personal injury is *prima facie* unconscionable; subsection (a) (2) extends this concept to remedy limitations generally.

3. Subsection (b) eliminates once and for all the concepts of "vertical" and "horizontal" privity. "Vertical privity" has in some states precluded a warranty suit by a consumer against a manufacturer or distributor with whom he had no direct contractual relationship in the purchase of a defective product. Since the Kansas Supreme Court has already eliminated any such barrier by judicial decision (*Chandler v. Anchor Serum Co.*, 198 K. 571, 426 P.2d 82 (1967)), this subsection does not substantially change present Kansas law. "Horizontal privity" has in some states precluded a warranty suit against a seller by any plaintiff other than the immediate purchaser of a defective product; for example, bystanders who are injured by the product have been barred from a warranty action because of the absence of any contractual relationship. Under the Kansas version of the UCC (K.S.A. 84-2-318), a seller's warranty extends "to any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty." This broad language has eliminated most "horizontal privity" barriers to claimants injured by defective products. Subsection (b) would carry the UCC approach one step further to include suits brought by bystanders who suffer property or economic loss as a result of a defective product. For example, under this subsection, the owner of a parked car which is damaged by another parked car whose handbrake was defective could sue the dealer, distributor or manufacturer without the barrier of "privity." Such a claimant would be a third party beneficiary of the implied warranty of merchantability which arose as a result of a prior consumer sale.

4. Subsections (c) and (d) establish realistic limitations on a supplier's liability for breach of warranty.

Under subsection (c), a supplier may disclaim implied warranties (except with respect to personal injury or property damage) if he can establish that the consumer had actual knowledge of a defective condition which became the basis of the bargain. This provision is intended to cover sales of "marked down" or "irregular" goods which are sold "as is" and where the consumer is aware of the defective condition; disclaimers in such sales will of course often be reflected in lower prices. Subsection (d) makes it clear that the concept of implied warranty is a relative one: A 1949 Ford is not unmerchantable simply because it requires more maintenance than a new car. Similarly, this section is not intended of itself to give rise to implied warranties which otherwise may not exist under the law at the present time, e.g., an implied warranty in the sale of real estate.

5. In interpreting this section on warranty disclaimers, careful attention should be given to the related definitions of "merchantable" and "warranty" under section 50-624.

Law Review and Bar Journal References:

- "The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 191, 192 (1973).
- Landlord-tenant implied warranty of habitability, 22 K.L.R. 666, 682 (1974).
- Consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J.B.A.K. 67, 71, 72 (1975).
- "U.C.C.—Limitations on Personal Injury Damages for Breach of Warranty," 14 W.L.J. 714 (1975).
- "Torts: Strict Liability in Tort and Assumption of Risk," William T. Kilroy, 15 W.L.J. 503 (1976).
- Strict liability in tort as adopted in Kansas, 25 K.L.R. 462, 467, 468 (1977).
- "Lemon Aid for Kansas Consumers," Barkley Clark, 46 J.B.A.K. 143, 144, 147, 149 (1977).
- "Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 560 (1979).
- "Survey of Kansas Law: Consumer Law," John C. Maloney, 27 K.L.R. 197, 208 (1979).
- "Housing Defects: Homeowner's Remedies—A Time for Legislative Action," William J. Fields, 21 W.L.J. 72, 87, 88 (1981).

CASE ANNOTATIONS

1. Referred to; action to recover on implied warranty; application of commercial code; contract upheld. *Christopher and Son v. Kansas Paint and Color Co.*, 215 K. 185, 215 P.2d 709. Modified, 215 K. 510, 511, 525 P.2d 626.

2. Mentioned in case holding notice requirement of 84-2-607 applicable only where ordinary buyer-seller relationship exists. *Carson v. Chevron Chemical Co.*, 6 K.A.2d 776, 784, 635 P.2d 1248 (1981).

3. Section does not allow supplier to use limited express warranty to exclude implied warranties of merchantability and fitness. *Stair v. Gaylord*, 232 K. 765, 766, 771, 659 P.2d 178 (1983).

50-640. Door-to-door sales; cancellation; required disclosures; notice of cancellation; definition. (a) *Consumer's right to cancel.* Except as provided in subsection (c) (1) (C), in addition to any right otherwise to revoke, a consumer has the right to cancel a door-to-door sale made within this state until midnight of the third business day

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after the day on which the consumer signs an agreement or offer to purchase which includes the disclosures required by this section.

(b) *Required disclosures.* In connection with any door-to-door sale made within this state, it constitutes an unfair and deceptive act or practice within the meaning of K.S.A. 50-626, and amendments thereto, for any seller to:

(1) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, Spanish, for example, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

"YOU THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

(2) Fail to furnish each buyer, at the time he or she signs the door-to-door sales contract or otherwise agrees to buy consumer property or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and be easily detachable, and which shall contain in 10-point boldface type the following information and statements in the same language, Spanish, for example, as that used in the contract:

NOTICE OF CANCELLATION
(Enter date of transaction)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR

SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY PROPERTY DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE PROPERTY AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE PROPERTY AVAILABLE TO THE SELLER, AND IF THE SELLER DOES NOT PICK SUCH PROPERTY UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE PROPERTY WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE PROPERTY AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE PROPERTY TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO

_____ (Name of Seller)

AT _____ (Address of Seller's Place of Business)

NOT LATER THAN MIDNIGHT OF

_____ (Date)

I HEREBY CANCEL THIS TRANSACTION:

_____ (Date) _____ (Buyer's Signature)

(3) Fail, before furnishing copies of the "notice of cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business

day following the date of the transaction, by which the buyer may give notice of cancellation.

(4) Include in any door-to-door sale contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this section including specifically his or her right to cancel the sale in accordance with the provisions of this section.

(5) Fail to inform each buyer orally, at the time he or she signs the contract or purchases the property or services, of his or her right to cancel.

(6) Misrepresent in any manner the buyer's right to cancel.

(7) Fail or refuse to honor any valid notice of cancellation by a buyer and within ten (10) business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(8) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the property or services were purchased.

(9) Fail, within ten (10) business days of receipt of the buyer's notice of cancellation, to notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered property.

(c) *Definitions.* For the purposes of the section the following definitions shall apply:

(1) *Door-to-door sale.* A sale, lease, or rental of consumer property or services with a purchase price of twenty-five dollars (\$25) or more, whether under single or multiple contracts, in which the seller or the seller's representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "door-to-door sale" does not include a transaction:

(A) Made pursuant to prior negotiations

in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the property is exhibited or the services are offered for sale on a continuing basis; or

(B) In which the consumer is accorded the right of rescission by the provisions of the consumer credit protection act (15 USCS 1635) or regulations issued pursuant thereto; or

(C) In which the buyer has initiated the contract and the property or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three (3) business days; or

(D) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the property or performance of the services; or

(E) In which the buyer has initiated the contract and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or property other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of the additional property or services would not fall within this exclusion; or

(F) Pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the securities and exchange commission.

(2) *Consumer property or services.* Property or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken.

(3) *Seller.* Any person, partnership, corporation, or association engaged in the door-to-door sale of consumer property or services.

(4) *Place of business.* The main or per-

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manent branch office or local address of a seller.

(5) Purchase price. The total price paid or to be paid for the consumer property or services, including all interest and service charges.

(6) Business day. Any calendar day except Sunday, or the following business holidays: New year's day, Washington's birthday, memorial day, independence day, labor day, Columbus day, veterans' day, thanksgiving day, and Christmas day.

History: L. 1973, ch. 217, § 18; L. 1974, ch. 230, § 6; L. 1976, ch. 236, § 9; July 1.

KANSAS COMMENT, 1973

1. A consumer has a right to cancel a home solicitation sale pursuant to subsection (a). The notice of cancellation must be in writing, given to the seller at the address stated in the agreement signed by the buyer, and given prior to midnight of the third business day after the day the buyer signs an agreement or offer to purchase which complies with subsection (b). These are the only formal requirements of the act with respect to the buyer's cancellation. This right to cancel is new to Kansas law.

Although the act does not require that a notice of cancellation be mailed, it is assumed that this will be the normal method of cancellation. Notice of cancellation is given at the time of mailing. The risk of non-receipt of a mailed notice of cancellation is placed on the seller, but the buyer has the burden of proving that the notice was properly mailed.

Goods and services are frequently sold to a buyer at his home because of an emergency. Common examples are emergency repairs to broken water pipes, furnaces, appliances and the like. Since such transactions may come within the definition of home solicitation sales, sellers may be reluctant to perform services or deliver goods before expiration of the 3-day cancellation period. Application of the right to cancel to emergency situations would have the undesirable effect of seriously deterring sellers from performing in time to deal with emergencies. Subsection (a) (5) therefore provides that the buyer may not cancel a sale if the stated conditions are met. The word "emergency" is not defined; the intention of the subsection is to protect the seller who in good faith relies on the statement of the buyer that an emergency exists and who performs immediately at the request of the buyer.

The right to cancel provided by subsection (a) is not exclusive. It in no way affects the right that the buyer may have independent of the act to revoke an offer to purchase which has not been accepted by the seller, or to rescind because of fraud, duress, breach of warranty or other causes.

2. The 3-day period for cancellation does not begin to run until the buyer signs a written agreement or offer to purchase complying with subsection (b). To comply, the agreement or offer must contain the date on which the buyer actually signs it and the caption and statement required by subsection (b) (2). Under subsection (b) (3), the seller may use forms prescribed by the Federal Trade Commission in any statute, rule or regulation which becomes effective at the federal level; compliance with the federal form is compliance with

this section. The purpose of subsection (b) (3) is of course to avoid duplication and overlap.

3. Under subsection (c) (1), the 10-day period during which the seller must tender to the buyer any payments and any evidence of indebtedness runs from the time the sale has been cancelled, *i. e.*, from the time the buyer delivers a written notice of cancellation to the seller or deposits the notice in a mailbox.

Under subsection (c) (2), if the seller took a trade-in as part of a home solicitation sale which has been cancelled he must tender the goods traded in. The risk of loss of damage to the goods rests with the seller. If he cannot tender the goods in substantially as good condition as when received, the buyer may elect to take in cash the trade-in allowance fixed by the parties in the contract. This provision is designed to protect the buyer where goods traded in have not been tendered or have been damaged. In such a case he is given an election to sue either for return of the goods or for the trade-in allowance.

As a means of assuring compliance by the seller, subsection (c) (3) provides that the buyer may retain possession of any goods delivered to him by the seller with respect to a sale cancelled under subsection (a) (1) until the seller complies with his obligations under subsection (c). While in possession of the goods the buyer has a lien as security for his claim against the seller.

4. Subsections (d) (1) and (2) state the obligations of the buyer in the case of a cancelled home solicitation sale. To protect the buyer from the seller who may seek to impose an obligation on the buyer by unreasonable delays in demanding delivery of the goods the seller must demand possession within a reasonable time and 30 days is presumed to be a reasonable time. Goods not demanded within a reasonable time become the property of the buyer without obligation to pay for them. To protect the seller the section imposes on the buyer a duty to take reasonable care of the goods while they are in his possession. Except for this duty of care, under subsection (d) (2) the goods delivered under a home solicitation sale are at the seller's risk both prior to and after cancellation by the buyer; a buyer may cancel a sale after destruction of the goods without his fault if the destruction occurred during the 3-day cancellation period.

With respect to home solicitation sales involving the sale of services it is not possible to restore the parties to their original positions if services have been performed prior to cancellation. Subsection (d) (3) discourages a seller from performing any services during the 3-day cancellation period by requiring him to act entirely at his own risk.

Law Review and Bar Journal References:

"The New Kansas Consumer Legislation," Barkley Clark, 42 J.B.A.K. 147, 190 (1973).

Consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J.B.A.K. 67, 71 (1975).

"A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W.L.J. 623, 634 (1975).

50-641.

History: L. 1973, ch. 217, § 19; Repealed, L. 1974, ch. 230, § 7; July 1.

50-642. Citation of act. This act may be cited as the Kansas consumer protection act.

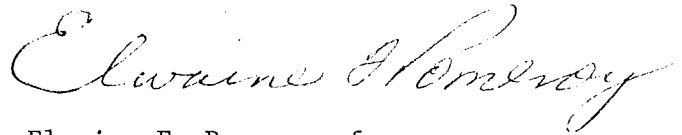
March 5, 1991

SUGGESTED AMENDMENT TO HOUSE BILL 2376
HOUSE JUDICIARY COMMITTEE

As discussed at the hearing on House Bill 2376 before the House Judiciary Committee on March 4, 1991, I have prepared a suggested amendment to the bill. I would suggest that the bill be amended on page 1, line 19, by inserting, after the word "persons" the following: "join in the original petition and".

I believe this would eliminate the concern raised at the hearing by Rep. O'Neal that other, completely unrelated plaintiffs might wish to join in an action when they learn that a defendant they had been searching for had been located.

Attached is a balloon copy showing the proposed amendment.



Elwaine F. Pomeroy, for
Kansas Collectors Association, Inc.

HJUD
Attachment # 11
3-8-91

11-2

HOUSE BILL No. 2376

By Committee on Judiciary

2-18

8 AN ACT concerning civil procedure; relating to permissive joinder
9 of parties; amending K.S.A. 60-220 and 61-1707 and repealing the
10 existing sections.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 60-220 is hereby amended to read as follows:
14 60-220. (a) *Permissive joinder.* All persons may join in one action as
15 plaintiffs if they assert any right to relief jointly, severally, or in the
16 alternative in respect of or arising out of the same transaction, oc-
17 currence, or series of transactions or occurrences and if any question
18 of law or fact common to all these persons will arise in the action,
19 *or if these persons have claims against the same defendants.* All
20 persons may be joined in one action as defendants if there is asserted
21 against them jointly, severally, or in the alternative, any right to
22 relief in respect of or arising out of the same transaction, occurrence,
23 or series of transactions or occurrences and if any question of law
24 or fact common to all these persons will arise in the action. A plaintiff
25 or defendant need not be interested in obtaining or defending against
26 all the relief demanded. Judgment may be given for one or more
27 of the plaintiffs according to their respective rights to relief, and
28 against one or more defendants according to their respective
29 liabilities.

30 (b) *Separate trials.* The court may make such orders as will pre-
31 vent a party from being embarrassed, delayed, or put to expense
32 by the inclusion of a party against whom he *such party* asserts no
33 claim and who asserts no claim against ~~him~~ *such party*, and may
34 order separate trials or make other orders to prevent delay or
35 prejudice.

36 Sec. 2. K.S.A. 61-1707 is hereby amended to read as follows:
37 61-1707. The petition, and any other pleading which is filed that
38 sets forth a claim for relief, shall contain (1) a short and plain
39 statement of the claim showing that the pleader is entitled to relief,
40 and (2) a demand for judgment for the relief to which the pleader
41 deems ~~himself or herself~~ *such pleader's self* entitled. Relief in the
42 alternative or of several different types may be demanded. The
43 provisions of K.S.A. 60-209, 60-210 and 60-211 and 60-220, and

join in the original petition and

Re: HB 2212

March 7, 1991

TO: The House of Representatives Judiciary Committee

FROM: Cheryl DeBrot B.S.R.R.T, Chairperson Legislative Committee
Kansas Respiratory Care ~~Committee~~ Society

The following recommendations are being made after consultation with the following individuals.

1. Joe Tye, Executive Director of STOP TEENAGERS ADDICTION TO SMOKING, Springfield, Massachusetts
2. Pete Bialick, President of G.A.S.P. Denver
3. Louise Nett Presbyterian-St.Luke's Medical Center, Denver - National leader in Respiratory Care of Smoking Cessation and Pulmonary Rehabilitation
4. Don Richards, Director, Respiratory Care, VA Medical Center, Wichita
5. Suzanne Bollig R.R.T.
St. Anthony Hospital
Hays, Kansas
6. Jeff Greer R.R.T.
St. Johns Hospital
Salina, Kansas
7. Joe Glaze, R.R.T.
Stafford District Hospital

After calling these individuals and consulting local respiratory therapy associates, I found the recommendations listed below to be the general consensus of the group,

1. Don't apply monetary fine on minor unless he or she fails to cooperate with Numbers 2 and 3 listed below.
2. Perform 40 hours of community service to include time spent observing victims of Lung Disease and Lung Cancer.
3. There are many programs of education and smoking cessation which could be coordinated through Tobacco-Free Kansas Task Force.

HJD
Attachment # 12
3-8-91

4. Don't have minor listed as juvenile offender unless they do not cooperate with Numbers 2 and 3 listed above.
5. One-percent of the sale of all tobacco products will be put in fund to be used for the education of the young people of Kansas about the addictiveness of tobacco use and its harmful health effects.
6. Ban all cigarette vending machine sales using the New York City and Utah State laws as the model. (The only place vending machines would be allowed would be in bars and then must be at least 25 feet from the door.) Effective date January 1, 1993.
7. One-thousand dollar fine to be levied against any dealer who sells tobacco products to a minor as described in the HB2212.
8. Recommends family counselling for minors, parents, and guardians.

HOUSE BILL No. 2212

By Representatives Baker, Allen, Brown, Flottman,
Fuller, Lawrence and Samuelson

2-12

9 AN ACT concerning cigarettes and tobacco products; prohibiting
10 certain acts and providing penalties for violations; amending
11 K.S.A. 79-3309, 79-3321 and 79-3322 and repealing the existing
12 sections; also repealing K.S.A. 79-3390.

13
14 *Be it enacted by the Legislature of the State of Kansas:*

15 New Section 1. As used in sections 2 and 3:

16 (a) "Cigarettes" has the meaning provided by K.S.A. 79-3301 and
17 amendments thereto.

and includes sample cigarettes

18 (b) "Furnish" means sell, buy for, give or otherwise furnish.

19 (c) "Person" means any individual, association, partnership, lim-
20 ited partnership, corporation or other entity.

21 (d) "Retail dealer" has the meaning provided by K.S.A. 79-3301
22 and amendments thereto.

23 (e) "Retailer" has the meaning provided by K.S.A. 79-3370 and
24 amendments thereto.

25 (f) "Tobacco products" has the meaning provided by K.S.A. 79-
26 3370 and amendments thereto.

and includes sample tobacco products

27 New Sec. 2. (a) No person shall furnish or attempt to furnish
28 any cigarette or tobacco product to any person under 18 years of
29 age.

30 (b) Violation of this section is a class ~~A~~ misdemeanor for which
31 the fine shall be not less than ~~\$500~~ B \$200

32 (c) It shall be a defense to a prosecution under this section if:

33 (1) The defendant is a retailer or a licensed retail dealer, or an
34 employee thereof; (2) the defendant sold the cigarettes or tobacco
35 products to the person with reasonable cause to believe that such
36 person was 18 or more years of age; and (3) to purchase the cigarettes
37 or tobacco products, the person exhibited to the defendant a draft
38 card, driver's license, birth certificate or other official or apparently
39 official document purporting to establish that such person was 18 or
40 more years of age.

41 New Sec. 3. (a) No person under 18 years of age shall possess,
42 obtain, purchase or attempt to possess, obtain or purchase any cig-
43 arette or tobacco product.

HJUD
ATTACH #13
3-8-91

Attachment # ¹³ ~~12~~

1 (b) Any person who violates this section is a juvenile offender
2 under the Kansas juvenile offenders code. Upon adjudication thereof
3 and as a condition of disposition, the court shall require the offender
4 to pay a fine of not less than \$100 nor more than \$500.

5 (c) In addition to any other penalty provided for a violation of
6 this section, the court may order the offender to do either or both
7 of the following:

- 8 (1) ~~Perform 40 hours of public service~~ or
- 9 (2) attend and satisfactorily complete a suitable educational or
10 training program dealing with the effects of tobacco, drugs or other
11 chemical substances when ingested by humans

strike bracketed language

12 Sec. 4. K.S.A. 79-3309 is hereby amended to read as follows:
13 79-3309. (a) Whenever the director ~~shall have~~ *has* reason to believe
14 that any dealer in cigarettes has violated any of the provisions of
15 the cigarette tax law, *or whenever the director has reason to believe*
16 *that a retail dealer has violated section 2*, the director shall notify
17 such dealer by registered or certified mail of the director's intention
18 to suspend or revoke the license or licenses of such dealer. Within
19 10 days after mailing such notice, such dealer may request a hearing
20 in writing before the director. The hearing shall be conducted in
21 accordance with the provisions of the Kansas administrative procedure
22 act. If, after such hearing, it appears to the satisfaction of the
23 director that such dealer has violated any of the provisions of the
24 cigarette tax law, the director ~~is hereby authorized and empow-~~
25 ~~ered to~~ *may* suspend or revoke the license or licenses of any such
26 dealer and ~~may~~, in addition, *may* deny the application of any such
27 dealer for a license or licenses for a portion of the succeeding calendar
28 year for such period as the director determines is necessary but in
29 no case for a period ending more than one year following the date
30 upon which such license or licenses were suspended or revoked.

31 (b) The suspension or revocation of the vending machine oper-
32 ator's master license shall suspend or revoke all vending machine
33 permits issued to such vending machine operator for the term of
34 such suspension or revocation of such license.

35 (c) If any dealer ~~shall continue~~ *continues* to sell cigarettes at
36 any dealer establishment or from a vending machine, after having
37 notice or knowledge of the suspension or revocation of a license or
38 permit issued to such dealer for such establishment or vending ma-
39 chine, or ~~shall continue~~ *continues* for more than 10 days after
40 becoming delinquent in the payment of any tax, penalty or interest,
41 to sell cigarettes, the state shall be entitled, in any proceedings
42 brought for such purposes, to have an order and judgment restraining
43 and enjoining such unlawful sale and no bond shall be required for

1 the issuance of any such restraining order or injunction.

2 Sec. 5. K.S.A. 79-3321 is hereby amended to read as follows:
3 79-3321. It shall be unlawful for any person:

4 (a) To possess, except as otherwise specifically provided by this
5 act, more than 200 cigarettes without the required tax indicia being
6 affixed as herein provided.

7 (b) To mutilate or attach to any individual package of cigarettes
8 any stamp that has in any manner been mutilated or that has been
9 heretofore attached to a different individual package of cigarettes or
10 to have in possession any stamps so mutilated.

11 (c) To prevent the director or any officer or agent authorized by
12 law, to make a full inspection for the purpose of this act, of any
13 place of business and all premises connected thereto where cigarettes
14 are or may be manufactured, sold, distributed, or given away.

15 (d) To use any artful device or deceptive practice to conceal any
16 violation of this act or to mislead the director or officer or agent
17 authorized by law in the enforcement of this act.

18 (e) Who is a dealer to fail to produce on demand of the director
19 or any officer or agent authorized by law any records or invoices
20 required to be kept by such person.

21 (f) Knowingly to make, use, or present to the director or agent
22 thereof any falsified invoice or falsely state the nature or quantity
23 of the goods therein invoiced.

24 (g) Who is a dealer to fail or refuse to keep and preserve for
25 the time and in the manner required herein all the records required
26 by this act to be kept and preserved.

27 (h) To wholesale cigarettes to any person, other than a manu-
28 facturer's salesman, retail dealer or wholesaler who is:

29 (1) Duly licensed by the state where such manufacturer's sales-
30 person, retail dealer or wholesaler is located; or

31 (2) exempt from state licensing under applicable state or federal
32 laws or court decisions including any such person operating as a
33 retail dealer upon land allotted to or held in trust for an Indian tribe
34 recognized by the United States bureau of Indian affairs.

35 (i) To have in possession any evidence of tax indicia provided for
36 herein not purchased from the director.

37 (j) To fail or refuse to permit the director or any officer or agent
38 authorized by law to inspect a carrier transporting cigarettes.

39 (k) To vend small cigars, or any products so wrapped as to be
40 confused with cigarettes, from a machine vending cigarettes, nor
41 shall a vending machine be so built to vend cigars or products that
42 may be confused with cigarettes, be attached to a cigarette vending
43 machine.

1 (l) To sell cigarettes to any person under 18 years of age.
 2 (m) For any person under 18 years of age to purchase
 3 cigarettes.

4 (n) (l) To sell cigarettes to a retailer or at retail that do not bear
 5 Kansas tax indicia or upon which the Kansas cigarette tax has not
 6 been paid.

7 (o) (m) To sell cigarettes without having a license for such sale
 8 as provided herein.

9 (p) (n) To sell cigarette vending machines without having a li-
 10 cense as provided herein for sale of vending machines.

11 (o) Who is a dealer, or any person on behalf of a dealer, to give
 12 away, or distribute or sell for less than cost, any package of ciga-
 13 rattes, including packages of sample cigarettes, on premises open to
 14 the public, except that a dealer may, so long as not otherwise pro-
 15 hibited by law: (1) Give away cigarettes on premises which are closed
 16 to the public and which are owned, leased or rented by the dealer;
 17 or (2) give cigarettes to friends or family members of the dealer.

delete bracketed language

18 (p) Who is a retail dealer to fail to maintain in a conspicuous
 19 place at each dealer establishment a sign, in a size and form pre-
 20 scribed by the director, stating "We require ID for tobacco
 21 purchases."

(o)

do not sell tobacco products to persons under 18

22 (q) To vend cigarettes from a vending machine located on prem-
 23 ises open to the public unless such machine is in the view of and
 24 supervised by a person 18 or more years of age who is employed
 25 on such premises.

(p)

general

26 Sec. 6. K.S.A. 79-3322 is hereby amended to read as follows:
 27 79-3322. (a) Any person who violates any of the provisions of this
 28 act, except as otherwise provided in this act, shall be guilty of a
 29 misdemeanor and upon conviction shall be punished by a fine of
 30 not more than \$1,000 or imprisonment for not more than one year,
 31 or by both. In addition thereto any person found liable for any license
 32 or permit fee or tax imposed under the provisions of this act shall
 33 be personally liable for such license or permit fee or tax plus a
 34 penalty in an amount equal to 100% thereof.

35 (b) Any person who violates this act by distributing sample
 36 cigarettes or sample smokeless tobacco to any person under 18
 37 years of age shall be guilty of a misdemeanor and upon con-
 38 viction shall be punished by a fine of not less than \$500 nor
 39 more than \$2,500 or imprisonment for not more than one year,
 40 or by both.

41 (c) (b) Any agent, employees or others who aid, abet or otherwise
 42 participate in any way in the violation of this act or in any of the
 43 offenses hereunder punishable shall be guilty and punished as prin-

13-5

- 1 cipals to the same extent as any person violating the act.
- 2 Sec. 7. K.S.A. 79-3309, 79-3321, 79-3322 and 79-3390 are hereby
- 3 repealed.
- 4 Sec. 8. This act shall take effect and be in force from and after
- 5 its publication in the statute book.