



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

June 16, 1988

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88- 82

The Honorable Jessie M. Branson
State Representative, Forty-fourth District
800 Broadview Drive
Lawrence, KS 66044-2423

Re: Hotels, Lodging Houses and Restaurants -- Liens of
Hotels and Lodging House Keepers--Applicability of
Defrauding an Innkeeper Statute to Tenants

Synopsis: K.S.A. 1987 Supp. 36-206 and 36-207, add
"dwelling unit" to penal statutes of defrauding an
innkeeper or owner. K.S.A. 1987 Supp. 36-206 and
36-207, as applied to tenants, do not violate
Section 16 of the Bill of Rights of the
Constitution of the State of Kansas nor do they
violate the due process provisions of the
Fourteenth Amendment of the United States
Constitution. Cited herein: K.S.A. 1987 Supp.,
26-206; 36-207; Kan. Const., Bill of Rights,
§16; U.S. Const., Fourteenth Amendment.

* * *

Dear Representative Branson:

You request our opinion concerning the 1987 amendments to
K.S.A. 36-206 and 36-207. See L. 1987, ch. 148.
Specifically you ask:

1. Does the new act violate Section 16 of the Bill
of Rights of the Kansas Constitution which
prohibits a person from being imprisoned for debt
except in case of fraud?

2. Does the new act violate the due process or equal protection clauses of the Fourteenth Amendment of the United States Constitution?

Before turning to the issue of the constitutionality of these Statutes, as amended, we first restate the basic principals applicable when our courts consider constitutionality of statutes.

"This court adheres to the proposition that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done." (Quoting State v. Huffman, 228 Kan. 186, Syl. § 1, 612 P.2d 630 [1980]). Federal Land Bank of Wichita v. Bott, 240 Kan. 624, 628, 629.

K.S.A. 1987 Supp. 36-207 provides:

"The following shall be prima facie evidence of the intent to defraud an owner or innkeeper as provided in K.S.A. 36-206 and amendments thereto:

- (1) Obtaining lodging, food or other accommodations by false pretense or by false or fictitious show or pretense of any baggage or other property;
- (2) paying for such food, lodging or other accommodation by a check or other negotiable paper on which payment had been refused;
- (3) leaving the inn, restaurant, hotel, boardinghouse, apartment house, dwelling unit or rooming house without paying or offering to pay for such food, lodging, or other accommodation;

(4) surreptitiously removing or attempting to remove baggage or other property; or

(5) registering under a fictitious name."

Section 16 of the Kansas Constitution, Bill of Rights states: "No person shall be imprisoned for debt, except in cases of fraud." The plain language of K.S.A. 26-206 as amended clearly applies only to cases of fraud and thus is not violative of §16.

We must now consider whether the prima facie provisions of K.S.A. 1987 Supp. 36-207, violate the due process provisions of the Fourteenth Amendment of the United States Constitution:

"The general rule universally applied throughout the United States is that a statutory presumption will be upheld as constitutional if, in accordance with the experience of mankind, there is a natural and rational evidentiary relation between the fact proved and the one presumed; if the defendant has more convenient access to evidence relating to the fact to be presumed; and if, by requiring defendant to go forward with evidence to rebut the presumption, he is not thereby being subjected to unfairness or hardship.

(Torcia, Wharton's Criminal Evidence, 13th Ed., Vol. 1, §94) (emphasis added)." State v. Haremza, 213 Kan. 201, 204 (1973).

To establish guilt, the intent to defraud must exist when the accommodation is obtained. In other words, there must be fraudulent intent at the inception of the event, to establish guilt. In State v. Harris, 6 Kan. App. 2d 721 (1981), the Court of Appeals considered whether Harris' surreptitious removal of luggage and personal property from a motel room without paying his bill was sufficient evidence to prove that he intended to defraud the owner. The appellate court, in reversing the trial court decision based on the facts, said:

"We are of the opinion the state has suffered a failure of proof. It is not a crime to fail to pay a motel bill. Our Kansas Constitution prohibits any person

being imprisoned for debt except in cases of fraud. Bill of Rights §16. It is the fraud of the accused that constitutes the crime, not the failure to pay a debt, even if the accused unjustly and willfully refused to pay his or her obligations."
6 Kan. App. 2d at 723 (Emphasis added).

"There is no evidence the defendant did anything that could be construed as furnishing the intent to defraud an innkeeper prior to his being locked out of the motel room. The state relies on an incident that occurred after the lockout (removal of luggage and personal property from the room) to trigger the presumption afforded by K.S.A. 36-207 that Harris intended to defraud when he checked into the motel a month earlier. . . . We are, however, unwilling to say that a jury should have been permitted to imply from the record before us that Harris obtained the accommodations by means of a trick or deception, or false representation, statement or pretense with the intent to defraud the owners or keeper of the motel when he obtained the accommodations. To hold otherwise would allow a jury to speculate and return a guilty verdict, thus enabling a debtor to be imprisoned for nothing more than the inability to pay a just debt on demand." 6 Kan. App. 2d at 723, 724 (emphasis added).

The message is clearly stated by the court that to establish guilt, the intent to defraud must exist when the accommodation is obtained. Regarding the prima facie provisions in K.S.A. 1987 Supp. 36-207, no criminal action can be maintained on the provisions alone. The facts must rationally relate back to fraudulent intent at the time of obtaining. Ordinarily a guest of a hotel or restaurant can reasonably be expected to know, at the time of obtaining, his or her ability to pay. The tenant of a dwelling unit, however, may encounter changing conditions over time which common sense tells us might result in inability to pay. The facts of each case should be carefully analyzed. If there is no intent to defraud at the

time the dwelling unit is obtained, there can be no criminal liability.

We now consider whether passage of these statutes violate the equal protection clause of the Fourteenth Amendment of the United States Constitution. Two standards have generally been used to determine whether state legislation violates the federal equal protection clause. Ferguson v. Garman, 643 F. Supp. 335, 338 (D. Kan. 1986) provides:

"The Equal Protection Clause generally provides that all persons similarly situated should be treated alike. Edwards v. Valdez, 789 F.2d 1477, 1482 (10th Cir. 1986) (citing Pyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). Traditionally, two standards have been used to determine whether state legislation runs afoul of that clause. The first, and by far the most commonly applied, is the rational basis test. Under this test, the court seek[s] only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. Pyler, 457 U.S. at 216, 102 S.Ct. at 2394.

"The second standard, labeled strict scrutiny, is applied when the challenged classification involves a suspect class or impinges upon a fundamental rights.:

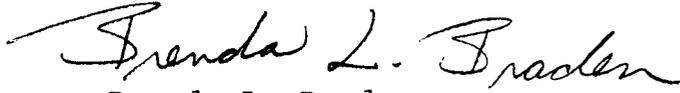
Because tenants are not a suspect class and no fundamental right is implicated, the rational basis test is applied. These two statutes, as amended, do bear a fair relationship to a legitimate public purpose. The purpose of the amendments is to discourage defrauding of landlords by tenants. In our opinion the statutes, as amended, do not violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

In conclusion, K.S.A. 1987 Supp. 36-206 and 36-207 as amended, do not violate Section 16 of the Constitution of the State of Kansas nor do they violate the Fourteenth Amendment of the United States Constitution.

Very truly yours,



Robert T. Stephan
Attorney General of Kansas



Brenda L. Braden
Deputy Attorney General

RTS:BLB/cy