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Creditors' Rights

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CREDITORS' RIGHTS

by

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THE debtor-creditor relationship encompasses a wide range of legal subjects. This Article constitutes an endeavor to present current developments in topics of general concern to attorneys who must struggle with problems of debtors and creditors. Coverage has been limited to subjects customarily discussed in courses entitled "Creditors' Rights," excluding bankruptcy matters.

The text of the Article has been classified under the headings of unreasonable collection efforts, fraudulent conveyances, extraordinary remedies and execution, sworn accounts, usury, and receivership. For developments in other related areas the *Survey* article entitled "Commercial Transactions" should be consulted.

I. UNREASONABLE COLLECTION EFFORTS

Several cases decided during the survey period have construed the recently enacted Texas Debt Collection Practices Act.¹ The Act provides a consumer² statutory remedies³ when a debt collector⁴ utilizes a prohibited practice or act⁵ in connection with the collection or attempted collection of any debt.⁶ In *Ledisco Financial Services, Inc. v. Viracola*⁷ the Act was construed in the context of an attempted retrieval of a cancelled credit card from a consumer by means of alleged violence and obscene telephone calls.⁸ Initially, the defendants argued that the Act's provisions were inapplicable to credit card retrieval because the defendant collection agency made no attempt to collect any money from the plaintiff. In rejecting this argument the court reasoned that the statutory remedies are available when an act or practice specifically

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1. TEX. REV. CIV. STAT. ANN. arts. 5069-11.01 to .11 (Vernon Supp. 1976-77).

2. "Consumer" is defined as "an individual who owes or allegedly owes a debt created primarily for personal, family, or household purposes." *Id.* art. 5069-11.01(d).

3. Any person may seek injunctive relief to prevent or restrain a violation of this Act and any person may maintain an action for actual damages sustained as a result of a violation of this Act. A person who successfully maintains such action shall be awarded attorneys' fees reasonable in relation to the amount of work expended and costs.

Id. art. 5069-11.10.

4. "Debt collectors" are persons "engaging directly or indirectly in debt collection." *Id.* art 5069-11.01(c).

5. The Act contains 31 specific prohibited practices or acts. *See id.* arts. 5069-11.02 to .06.

6. "Debt" is defined as "any obligation or alleged obligation arising out of a consumer transaction." *Id.* art. 5069-11.01(a).

7. 533 S.W.2d 951 (Tex. Civ. App.—Texarkana 1976, no writ).

8. TEX. REV. CIV. STAT. ANN. arts. 5069-11.02(a), -11.03(a) (Vernon Supp. 1976-77) which, *inter alia*, prohibit using or threatening to use violence or other criminal means to cause harm to the person or property of any person and using profane or obscene language or language that is intended to abuse the hearer or reader unreasonably.

proscribed by the Act is employed in connection with the collection of or attempt to collect any debt.⁹ Since the term "debt" is defined by the Act as "any obligation or alleged obligation arising out of a consumer transaction,"¹⁰ the court held that because the debtor was obligated to return the credit card upon its cancellation, it did not matter that the defendant collection agency was not employed by the credit card issuer to collect a monetary obligation.

The most significant aspect of the *Viracola* case deals with the availability of a damage remedy to the plaintiff who has suffered mental anguish, unaccompanied by physical injury, injury to property, or other pecuniary damage of that kind. Construing the Act as creating a new statutory tort, the court held that damages for mental anguish alone can be recovered even if the plaintiff has sustained no other damage.¹¹ Consequently, prior case law¹² which requires allegation and proof of a physical injury, injury to property, or other pecuniary loss before a cause of action based upon the common law tort of unreasonable collection efforts accrues, does not preclude recovery for mental anguish alone when the cause of action is based upon the use of a collection device disallowed by the Act.

In *Central Adjustment Bureau, Inc. v. Gonzales*¹³ the court considered the "bona fide error"¹⁴ defense asserted by the defendant. Not surprisingly, the defendant-appellant's contention that the defense does not require a showing that the debt collector adopted reasonable procedures to avoid the error was rejected. Consequently, reasonable procedures to avoid errors must be adopted by the debt collector before the affirmative defense of bona fide error will be available. In *Gonzales* the court of civil appeals also considered a request for appellate attorneys' fees made by the plaintiff-appellee's counsel for the first time in a cross-point. In rejecting the request the court held that although a recovery of reasonable attorneys' fees for appellate work, if such should be necessary, may be included in a judgment entered by a trial court,¹⁵ the request comes too late when made for the first time in the court of civil appeals. Consequently, the plaintiff should plead, prove, and secure a judgment for reasonable attorneys' fees for both trial and appellate work in the trial court.

The subject of attorneys' fees was also considered in *Rusk County Electric Corp. v. Flanagan*.¹⁶ The plaintiffs instituted suit to recover damages resulting from the termination of electricity after the nonpayment of a \$2.02 bill. Judgment was entered in accordance with the verdict of the jury, awarding the plaintiffs \$250 for actual damages and \$1,500 for attorney's fees. The

9. 533 S.W.2d at 955.

10. See note 6 *supra*.

11. 533 S.W.2d at 957. See also *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967).

12. See, e.g., *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954). See also *Anderson, Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?*, 13 HOUS. L. REV. 84 (1975).

13. 528 S.W.2d 314 (Tex. Civ. App.—San Antonio 1975, no writ).

14. "No person shall be guilty of a violation of this Act if the action complained of resulted from a bona fide error, notwithstanding the use of reasonable procedures adopted to avoid such error." TEX. REV. CIV. STAT. ANN art. 5069-11.08 (Vernon Supp. 1976-77).

15. See *International Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347 (Tex. 1971).

16. 538 S.W.2d 498 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

actual damages were sustained as a result of food spoilage in the plaintiffs' freezer and the loss of use of their home,¹⁷ but not, according to the appellate court's reasoning, as a result of the defendant's attempt to collect a debt by "unfair means."¹⁸ Concluding that attorney's fees are recoverable under the Act only in an action "for actual damages sustained as a result of a violation of this Act,"¹⁹ the court of civil appeals reversed the portion of the judgment awarding attorney's fees for the reason that the damages sustained by the plaintiffs resulted from the wrongful termination of electricity and were not a result of any unreasonable collection efforts. In other words, according to the court's construction of the statute, it is not a violation of the Act to disconnect a consumer's electricity in order to coerce the consumer to pay an obligation which is not due.²⁰ The court's apparent conclusion that the defendant was not attempting to collect extra and unusual charges when it terminated the transmission of electric power to the plaintiffs' home is difficult to accept.

One unreasonable collection case decided during the survey period does not involve an interpretation of the Texas Debt Collection Practices Act. In *Pullins v. Credit Exchange of Dallas, Inc.*²¹ the defendant's employee made several demands for payment of a hospital bill after it had been paid. The demands were accompanied by statements that immediate suit would be filed and that the alleged debtor would be unable to go to any hospital unless payment was made. The jury found that the debt collector made no unreasonable collection efforts. The trial court rendered judgment on the verdict. The court of civil appeals held that the jury finding was against the great weight and preponderance of the evidence and stated that "all defendant's collection efforts after the date of payment . . . [were] unreasonable."²² The statement should not be taken too literally. Although post-payment collection efforts are more likely to be actionable, a polite request for payment after payment has been made should not result in liability to the debt collector. Moreover,

17. *Id.* at 500.

18. TEX. REV. CIV. STAT. ANN. art. 5069-11.04 (Vernon Supp. 1976-77) states that "[n]o debt collector may collect or attempt to collect any debt by unfair or unconscionable means" The jury found that the defendant attempted to collect extra and unusual charges before reconnecting the electricity at plaintiff's home. 538 S.W.2d at 500.

19. *See* note 3 *supra*.

20. This construction of the statute is, however, an accurate one. TEX. REV. CIV. STAT. ANN. arts. 5069-11.01 to .11 (Vernon Supp. 1976-77) limit the prohibited acts to those specifically set forth in the statute. For example, art. 5069-11.02 states that "[n]o debt collector may collect or attempt to collect any debt alleged to be due and owing by any threats, coercion, or attempts to coerce which employ any of the following practices." The termination of electrical services is not included in the list of prohibited practices. Arts. 5069-11.03, "Harassment; Abuse," and 5069-11.04, "Unfair or Unconscionable Means," are similarly limited to specific practices which do not include the termination of electrical services. Consequently, it appears that the debt collector can utilize coercive tactics which he has no legal right to employ without committing a violation of the Act so long as the specific practice employed is not proscribed. In this connection, Professor Anderson has suggested that since the Act omits any specific reference to contacts by the creditor of the debtor's employer, the Act does not provide sufficient protection to consumers where they really need it. *See* Anderson, *supra* note 12, at 124. *But see* TEX. REV. CIV. STAT. ANN. art. 5069-11.02(c) (Vernon Supp. 1976-77). Although the Texas harassment tort is undoubtedly still available, no attorneys' fees can be recovered, except under the heading of punitive damages, unless the collection practice is also proscribed by the Act.

21. 538 S.W.2d 681 (Tex. Civ. App.—Waco 1976, no writ).

22. *Id.*

although several cases²³ apparently predicate recovery on the theory of negligence, the better reasoned cases require the defendant to inflict the injury suffered intentionally.²⁴ In this connection the *Pullins* case also reiterates prior holdings that a suit for damages for unreasonable collection efforts is not a suit for negligence and that contributory negligence, therefore, is not a defense.²⁵

The court of civil appeals also concluded that the record contained evidence that the collection efforts "upset" Mr. Pullins, who was sick with cancer and who died prior to trial, and that Mrs. Pullins was "upset, [and] took crying spells."²⁶ Although the nonstatutory unreasonable collection efforts tort requires that a physical injury or some other pecuniary damage be suffered in addition to mental anguish before a cause of action will accrue,²⁷ *Pullins* suggests that the requirement is very easily satisfied.

II. FRAUDULENT CONVEYANCES

Three cases decided during the survey period dealt with the subject of fraudulent conveyances. Although Texas has not adopted the Uniform Fraudulent Conveyances Act,²⁸ chapter 24 of the Texas Business and Commerce Code, based upon the Statute of Elizabeth,²⁹ does provide a remedy to creditors when their debtors transfer³⁰ property to third persons under certain circumstances.

If a transfer of real or personal property is made by a debtor who intends to delay, or hinder, or defraud "any creditor, purchaser, or other interested person from obtaining that to which he is, or may become entitled,"³¹ the transfer is void³² as to any "creditor, purchaser or other interested person."³³ The avoidance of the transfer, however, will be precluded if the real or personal property is transferred to a purchaser for value unless he purchases

23. *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 362 S.W.2d 298 (Tex. 1962); *Industrial Fin. Serv. Co. v. Riley*, 295 S.W.2d 498 (Tex. Civ. App.—Dallas 1956), *rev'd in part and aff'd in part*, 157 Tex. 306, 302 S.W.2d 652 (1957).

24. See *Anderson*, *supra* note 12, at 115-16.

25. 538 S.W.2d at 683.

26. *Id.*

27. *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954).

28. 9B UNIFORM LAWS ANN. 70 (1966).

29. 13 Eliz., c. 5 (1570).

30. See TEX. BUS. & COMM. CODE ANN. § 24.01 (Vernon 1968). "In this chapter, unless the context requires a different definition, 'transfer' includes conveyance, gift, assignment and charge." *Id.*

31. *Id.* § 24.02(a).

32. Actually the transfer is "voidable." Only persons hindered, delayed or defrauded can attack it. For example, a fraudulent conveyance is valid as between the transferor and the transferee if it is otherwise valid under contract law.

33. TEX. BUS. & COMM. CODE ANN. § 24.02(a) (Vernon 1968) provides:

A transfer of real or personal property, a suit, a decree, judgment or execution, or a bond or other writing is void with respect to a creditor, purchaser, or other interested person if the transfer, suit, decree, judgment, execution, or bond or other writing was intended to

(1) delay or hinder any creditor, purchaser, or other interested person from obtaining that to which he is, or may become, entitled; or

(2) defraud any creditor, purchaser, or other interested person of that to which he is, or may become, entitled.

with notice of the intent of his transferor to hinder, delay, or defraud.³⁴ Since the remedy is unavailable unless the transferee has notice of the transferor's intent or the fraud that voided the title of his transferor, the interpretation of the purchaser for value requirement is of extreme importance to creditors.³⁵

*First Southern Properties, Inc. v. Gregory*³⁶ provides an analysis of the purchaser for value requirement. The transferor owned an individual one-half interest in a tract of land as his separate property and divorce proceedings were pending between the transferor and his spouse. During the course of the divorce proceedings a pendente lite order enjoining the transferor from selling any of his separate or community property had been entered. Subsequent to the entry of the injunctive order the transferor deeded his undivided one-half interest in the tract to his brother. The deed was retained by the transferor and was not recorded until over a year later. The transferor never disclosed the fact that he had made a conveyance of the property to his attorneys, his spouse, or the divorce court. Thereafter, the transferor's spouse was granted a divorce in the pending divorce proceedings. The divorce judgment awarded the undivided one-half interest in the land to the transferor and a monetary recovery to the transferor's spouse in the sum of \$2,500, secured by a lien on the transferor's interest in the land. After the entry of the divorce judgment a constable levied execution on the transferor's interest in the land. An execution sale was held at which First Southern Properties, Inc. purchased the realty. Subsequently, the transferor's brother, the transferee, brought an action in trespass to try title against First Southern Properties, Inc. and its president, who specially answered that the real property had been acquired by First Southern Properties, Inc. under an execution sale and that the prior purported conveyance from the transferor to his brother had been executed without consideration and as the result of a fraudulent conspiracy between the two brothers. The trial court determined that the transferor conveyed the subject property without intent to defraud, that the conveyance was made for a valuable consideration, and that the transferee brother did not know of or participate in any attempt to defraud the transferor's spouse or possible creditors of the transferor.³⁷ On appeal the court of civil appeals first considered whether the transferor spouse intended to defraud his former wife.³⁸ Holding that the trial court's finding that the transferor had no actual fraudulent intent was against the great weight and preponderance of the credible evidence, the court of civil appeals utilized a traditional "badges of

34. TEX. BUS. & COMM. CODE ANN. § 24.02(b) (Vernon 1968) states: "The title of a purchaser for value is not void under Subsection (a) of this section unless he purchased with notice of (1) the intent of his transferor to delay, hinder, or defraud; or (2) the fraud that voided the title of his transferor."

35. It must be noted that in at least one situation a transferee must also be shown to have not acted in "good faith." In *Hawes v. Central Texas Prod. Credit Ass'n*, 503 S.W.2d 234 (Tex. 1973), the supreme court concluded that a creditor seeking to avoid a preference under § 24.02 should present evidence of a lack of the transferee's good faith because it is a constituent element of the creditor's cause of action. It is not enough that the transferee has notice of the intent of an insolvent transferor to hinder, delay, and defraud other creditors while preferring the transferee. *Id.* at 236.

36. 538 S.W.2d 454 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

37. *Id.* at 455.

38. *Id.* at 457. See also TEX. BUS. & COMM. CODE ANN. § 24.02(a) (Vernon 1968).

fraud'' analysis.³⁹ The transferor's failure to record the transfer for more than a year, his retention of possession of the deed, his collection of rental from the property, his claim of ownership in proceedings which the transferor initiated to enjoin the constable's execution sale, and the fact that the transfer was an intrafamily transaction⁴⁰ convinced the appellate court that the finding of the trial court that the transferor did not intend to defraud anyone was against the great weight and preponderance of the evidence.⁴¹ The court of civil appeals then reviewed the finding of the trial court that the transferee brother was a purchaser for value without knowledge or notice of the fraudulent intent of the transferor. The appellate court determined that the trial court's finding that the statutory value requirement had been satisfied was supported by sufficient evidence.⁴²

In *First Southern Properties, Inc.* the trial court also determined that the transferee brother did not have knowledge or notice of the fraudulent intent of the transferor. This finding was also upheld in the court of civil appeals as being supported by sufficient evidence. The transferee did not have notice of the divorce proceedings⁴³ and, therefore, did not have constructive notice of the transferor's intent to hinder, delay, or defraud. The deposition testimony of the transferee reflected that he was not aware of his brother's involvement in the divorce proceedings, that he was not sure when he first learned about the divorce, that he did not know why the deed had not been recorded until 1971, that he had taken up payments on a first lien note and had paid interest on his own note annually, and that he had bought the property for investment purposes and to help his brother financially. Since there was no direct evidence that the transferee-brother knew of the fraudulent intent of the transferor, the court of civil appeals concluded that the transferee-brother was a bona fide⁴⁴ purchaser for value without notice.

39. See *Bryant v. Kelton & Uzzell*, 1 Tex. 415, 420 (1841); *Twyne's Case*, 76 Eng. Rep. 809 (K.B. 1601).

40. See *Texas Sand Co. v. Shield*, 381 S.W.2d 48, 53 (Tex. 1964).

41. 538 S.W.2d at 457.

42. The value consisted of a \$2,000 cash payment and the delivery of a promissory note in the principal amount of \$9,436.57. The nature of the value necessary to protect a purchaser in the context of fraudulent conveyance law is not equivalent to the concept of valuable consideration under the law of contracts. For example, the value requirement can be satisfied by the cancellation of an antecedent debt or obligation. *Quinn v. Dupree*, 157 Tex. 441, 303 S.W.2d 769 (1957); *Adams v. Williams*, 112 Tex. 469, 248 S.W. 673 (1923). However, when the debtor is insolvent, it is clear that the antecedent obligation cancelled must be of fair equivalent value to the property transferred in order to avoid being a fraudulent conveyance. *O'Banion v. Henry*, 128 Tex. 59, 96 S.W.2d 233 (1936); *Half v. Goldfrank*, 49 S.W. 1095 (Tex. Civ. App. 1899, writ ref'd). See also *Hawes v. Central Tex. Prod. Credit Ass'n*, 503 S.W.2d 234 (Tex. 1973).

43. No lis pendens was filed. See TEX. REV. CIV. STAT. ANN. art. 6640 (Vernon 1969); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 138 (1968), on the effect of TEX. FAM. CODE ANN. § 3.57 (Vernon 1975).

44. See, e.g., *Hawes v. Central Texas Prod. Credit Ass'n*, 503 S.W.2d 234 (Tex. 1973), discussed at note 35 *supra*. Nonetheless, since the case did not involve a preference it is clear that the court did not use the words "good faith" to mean something other than a lack of notice of the transferor's intent. The determination of the existence of the transferee's knowledge or notice of the transferor's intent, like the issue of the transferor's intent, should be made ordinarily by considering the "badges of fraud" that attend the transaction. The lack of recordation of the deed, the intrafamily character of the transfer, the retention of the deed by the transferor, and his collection of rents after the purported transfer come very close to being evidence of notice as a matter of law.

Section 24.03⁴⁵ also received interpretation in the context of an intrafamily transfer in *Pope Photo Records, Inc. v. Malone*.⁴⁶ The plaintiff instituted the action to recover the balance of a debt previously incurred by the defendant's husband from the lump sum proceeds of his life insurance received by the defendant, his surviving widow, after the husband's death. The creditor contended that the decedent-debtor did not have sufficient assets subject to execution at the time of his death in November 1973 to pay all of his existing debts, that it was an existing creditor on the date of death, that under Texas marital property law a gift of the policy rights to such beneficiary is presumed to have been intended and completed by the death of the insured,⁴⁷ and that since the beneficiary survived the decedent-debtor, a fraudulent transfer occurred on the date of his death. In rejecting this argument the court of civil appeals concluded that the date of the transfer is the date the beneficiary is designated, not the date when the gift is completed by the death of the insured owner of the policy.⁴⁸ Since no evidence was presented that the decedent was insolvent on the date he designated his spouse as beneficiary, the transfer was held not to be fraudulent.⁴⁹ This result makes sense when the right to change the beneficiary has not been retained by the debtor policy owner. It is clear, however, that the court's conclusion is not so limited.

The third case which treats the subject of fraudulent conveyance law is *Nobles v. Marcus*.⁵⁰ Judgment creditors of a corporation brought suit to set aside a deed and to affix a judgment lien on a tract of realty which had been deeded to third parties in 1971. The judgment creditors obtained a default judgment against the corporation in November 1972.⁵¹ The first theory upon which the conveyance evidenced by the deed was attacked was that the person who signed the deed purporting to act in behalf of the corporation was not authorized by the corporation to act in a representative capacity and that the deed was void as a forgery. The supreme court held that the deed was not forged because the purported agent had signed his true name. The fact that he had no authority and was not an agent of the corporation did not make his signature a forgery;⁵² hence the deed was not void.

The plaintiffs also asserted that the person who purported to act for the

45. TEX. BUS. & COMM. CODE ANN. § 24.03 (Vernon 1968) provides:

(a) A transfer by a debtor is void with respect to an existing creditor of the debtor if the transfer is not made for fair consideration, unless, in addition to the property transferred, the debtor has at the time of transfer enough property in this state subject to execution to pay all of his existing debts.

(b) Subsection (a) of this section does not void a transfer with respect to a subsequent creditor of a purchaser from the debtor.

46. 539 S.W.2d 224 (Tex. Civ. App.—Amarillo 1976, no writ).

47. *Id.* at 226; see *Brown v. Lee*, 371 S.W.2d 694, 699 (Tex. 1963).

48. 539 S.W.2d at 226; see *Parker Square State Bank v. Huttash*, 484 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

49. It appears that the policy (cash surrender value) was exempt from judicial process on the date the wife was designated beneficiary. See TEX. REV. CIV. STAT. ANN. art. 3836(a)(6) (Vernon Supp. 1976-77). Therefore, even if the husband was insolvent when he designated his wife beneficiary, the transfer would not be fraudulent if the policy was in effect for two years.

50. 533 S.W.2d 923 (Tex. 1976).

51. The opinion unfortunately does not reflect when the judgment creditors became creditors of the corporate defendant.

52. 533 S.W.2d at 926.

corporation acted "without authority and/or . . . [that] the conveyance was made without any valuable consideration. . . ." ⁵³ In this connection the supreme court first stated that the plaintiffs pleaded both of these acts as frauds upon the corporation and not as a fraud upon their own rights as creditors. In a curious sentence, however, the court stated that "the plaintiffs lack standing to bring the present action, not because they incompletely pleaded the elements of a fraudulent conveyance but because they pleaded fraud, and under those pleadings they were not the defrauded party." ⁵⁴ Apparently, the court's reasoning was that a creditor of a defrauded corporation had no standing to institute the fraud action in its behalf and that the plaintiffs had not pleaded a fraudulent conveyance cause of action at all. Since pleading defects of form or substance may be waived if no special exception is leveled at the defective pleading, it seems likely that the court is suggesting that if the plaintiffs had pleaded a cause of action based on the fraudulent conveyance statutes, they would be entitled to prove it if they could. The opinion should not be construed to mean that if the transferor is defrauded in connection with the transfer, the transfer cannot also be fraudulent with respect to the transferor's existing creditors if all other elements of a fraudulent transfer as denied by statute exist.

III. EXTRAORDINARY REMEDIES AND EXECUTION

A. Garnishment

Not surprisingly, the constitutional validity of postjudgment garnishment was upheld during the survey period in *Ranchers & Farmers Livestock Auction Co. v. First State Bank*. ⁵⁵ The debtor, who intervened in a postjudgment garnishment proceeding, asserted that the procedure involved an unconstitutional taking of property without due process of law. ⁵⁶ Relying upon a dictum contained in *Southwest Warehouse Corp. v. Wee Tote, Inc.*, ⁵⁷ which declared article 4084 ⁵⁸ unconstitutional in the prejudgment garnishment con-

53. *Id.*

54. *Id.* at 927.

55. 531 S.W.2d 167 (Tex. Civ. App.—Amarillo 1975, no writ).

56. *See* *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Co.*, 395 U.S. 337 (1969).

57. 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). "Sniadach and Fuentes are clearly inapplicable to post-judgment garnishment." *Id.* at 594.

58. TEX. REV. CIV. STAT. ANN. art. 4084 (Vernon 1966):

From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects; nor shall the garnishee, if an incorporated or joint stock company in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment or delivery, sale or transfer shall be void and of no effect as to so much of said debt, effect, shares, or interest as may be necessary to satisfy the plaintiff's demand. The defendant may, at any time before judgment, replevy any effects, debts, shares, or claims of any kind seized or garnished, by giving bond, with two or more good and sufficient sureties to be approved by the officer who issued the writ of garnishment, payable to the plaintiff, in double the amount of the plaintiff's debt, and conditioned for the payment of any judgment that may be rendered against the said garnishee in such suit, which when properly approved shall be filed among the papers in the cause in the court in which the suit is pending. In all proceedings in garnishment where the defendant gives bond as herein provided for, such defendant may make any defense which the defendant in garnishment could make in such suit.

text because it required the debtor's property to be frozen in the hands of the garnishee without notice and hearing before judgment, the court of civil appeals clearly decided that articles 4076(3)⁵⁹ and 4084⁶⁰ pass constitutional muster in the postjudgment garnishment context. This result is in accordance with the United States Supreme Court opinion in *Sniadach v. Family Finance Corp.*,⁶¹ which held the Wisconsin wage garnishment statute unconstitutional because it permitted the prehearing seizure of the debtor's property before the "validity or probable validity" of the debt could be established.⁶² Once the judgment against the debtor in the primary suit has been entered, the validity or probable validity of the debt has been established and the defendant has been afforded notice and an opportunity to be heard.

Several other postjudgment garnishment cases were decided during the survey period. In *Addison v. Addison*⁶³ it was held that a state institution⁶⁴ was exempt from garnishment proceedings and that the judgment debtor had a direct interest in the garnishment proceedings instituted against the state agency and was entitled to attack the issuance of the writ by motion to quash. The basis for the exemption is public policy.⁶⁵

In *Go International, Inc. v. Big-Tex Crude Oil Co.*⁶⁶ the issue was whether a garnishing creditor could reach the unpaid proceeds of the purchase of production from oil and gas leases in the hands of a garnishee-oil company when the debtor-oil operator had no interest in any of the production at the time the writ of garnishment was served or when the garnishee has answered. The court of civil appeals held that although the debtor was to be paid one hundred percent of the proceeds by the garnishee, the fact that the debtor owned no interest in the production but merely acted as a disbursing agent for the purpose of distributing payment to the actual owners of the production supported the trial court's conclusion that the garnishee was not indebted to the judgment debtor.

*Dean v. K-C Fuel Co.*⁶⁷ involved an extremely interesting procedural tangle. In July 1974 a default judgment was obtained against an alleged debtor who, thereafter, timely sued out⁶⁸ a writ of error. The court of civil appeals reversed the judgment of the trial court and remanded the cause to the trial

59. *Id.* art. 4076(3):

The clerks of the district and county courts and justices of the peace may issue writs of garnishment, returnable to their respective courts in the following cases:

3. Where the plaintiff has a valid, subsisting judgment and makes affidavit that the defendant has not, within his knowledge, property in his possession within this State, subject to execution, sufficient to satisfy such judgment.

60. *Id.* art. 4084.

61. 395 U.S. 337 (1969).

62. *Id.* at 343 (Harlan, J., concurring). See also *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), noted in 29 Sw. L.J. 660 (1975).

63. 530 S.W.2d 920 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

64. Texas Southern University and its Board of Regents.

65. See also *Delta County Levee Improvement Dist. No. 2 v. Leonard*, 516 S.W.2d 911, 912 (Tex. 1974), cert. denied, 423 U.S. 829 (1976); *National Sur. Corp. v. Friendswood Ind. School Dist.*, 433 S.W.2d 690, 694 (Tex. 1968); *Willacy County Water Control & Improvement Dist. No. 1 v. Abendroth*, 142 Tex. 320, 321, 177 S.W.2d 936, 937 (1944).

66. 531 S.W.2d 208 (Tex. Civ. App.—Eastland 1975, no writ).

67. 524 S.W.2d 805 (Tex. Civ. App.—Austin 1975, no writ), rev'd following remand, 537 S.W.2d 491 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

68. TEX. REV. CIV. STAT. ANN. art. 2255 (Vernon 1971).

court for further proceedings.⁶⁹ The judgment creditor, however, had previously filed an application for a writ of garnishment against a bank where the judgment debtor's funds or effects were on deposit, and a judgment was entered in the garnishment proceeding against the garnishee-bank. This latter judgment became final and was never appealed or otherwise attacked until the debtor filed his "Motion to Recover Sums Paid Under Garnishment Pursuant to Judgment Afterwards Reversed" in the trial court to which the original or primary suit was remanded. The trial court granted the motion and ordered the garnishor to return to the debtor what it received by virtue of the judgment in the garnishment proceedings. The court of civil appeals reversed. The basis for the reversal was that the judgment against the bank in the garnishment proceedings was a final judgment⁷⁰ and the trial court was without authority to set it aside except by bill of review.⁷¹ The court also held that the debtor's motion did not qualify as a bill of review⁷² because he failed to prove that his failure to present a meritorious defense was unmixed with any fault or negligence of his own.

The result seems to lose sight of the function and character of the postjudgment garnishment proceedings. Despite the fact that a garnishment proceeding is docketed as a separate suit,⁷³ it is clear that a judgment in the garnishment proceeding cannot be rendered until judgment has been rendered against the defendant in the primary suit.⁷⁴ Moreover, article 4076⁷⁵ requires that the plaintiff have a "valid, subsisting judgment" before a postjudgment writ of garnishment may be issued. While the garnishment statutes and rules do not contemplate what should happen if the judgment in the primary suit is reversed after the judgment in the garnishment proceeding is entered, it is abundantly clear that the garnishment proceeding is ancillary to and dependent upon the primary suit. Moreover, postjudgment garnishment is in the nature of execution. While there is no question that a supersedeas bond is required to forestall levy of a writ of execution,⁷⁶ the defendant in execution may, of course, recover the full value of the property levied upon or surrendered if the judgment is later reversed on appeal. There is no requirement that the defendant in execution show a lack of negligence.⁷⁷

In *Bank of Dallas v. Republic National Bank*⁷⁸ the court of civil appeals considered the issues of whether the income and/or corpus of an irrevocable

69. 524 S.W.2d 805 (Tex. Civ. App.—Austin 1975, no writ).

70. TEX. R. CIV. P. 329b. A trial court judgment is final thirty days after it is entered if no timely motion for new trial is filed.

71. *Id.*

72. 537 S.W.2d at 493; see *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (1950); *Deen v. Deen*, 530 S.W.2d 913 (Tex. Civ. App.—Forth Worth 1975, no writ).

73. See *Cleveland v. San Antonio Bldg. & Loan Ass'n*, 148 Tex. 211, 223 S.W.2d 226 (1949).

74. TEX. R. CIV. P. 667.

75. TEX. REV. CIV. STAT. ANN. art. 4076(3) (Vernon 1966).

76. TEX. R. CIV. P. 364, 365.

77. See *Cleveland v. Tufts*, 69 Tex. 580, 584, 7 S.W. 72, 75 (1888):

The judgment does not protect the plaintiff in converting the defendant's property to his own use. He must account to the full extent of the injury he has inflicted, not for the amount merely that he or his agents have reaped as the fruits of the illegal act, or the sum at which this act has caused the property to be sacrificed.

See also *Texas Trunk R.R. v. Jackson*, 85 Tex. 605, 22 S.W. 1030 (1893); *Brinegar v. Henderson Hardware Co.*, 95 S.W.2d 740 (Tex. Civ. App.—Austin 1936, no writ).

78. 540 S.W.2d 499 (Tex. Civ. App.—Waco 1976, no writ).

spendthrift trust created by the settlor for the benefit of herself and her children could be reached by a postjudgment writ of garnishment. In holding that the interest of the settlor could be reached by the settlor's creditors, the court stated the familiar rule that although Texas recognizes the validity of spendthrift trusts,⁷⁹ when the settlor creates a trust for his own benefit and inserts a spendthrift clause, the clause is void as far as existing or future creditors are concerned. They can reach the settlor's interest by garnishment. Since the settlor in the instant case was to receive all the income of the trust during her lifetime for her "uncontrolled use and benefit,"⁸⁰ the income of the trust was subject to garnishment. Moreover, since the trust also gave the trustee discretion to invade the corpus for the benefit of the settlor, the entire corpus was subject to garnishment.⁸¹

*First Bank & Trust v. Goss*⁸² also involved a judgment creditor's attempt to garnish a spendthrift trust. This time, however, the judgment debtor was the beneficiary of the spendthrift trust created by another. Citing *State of California Department of Mental Hygiene v. Bank of the Southwest National Association*,⁸³ the court of civil appeals held that neither the principal nor the accumulated but unpaid income of the trust was subject to garnishment. The garnishor argued that because the income had been accumulated in a bank account, the beneficiary had unilaterally altered the terms of the trust and made himself the settlor of the accumulated income under his own revocable trust.⁸⁴ The court rejected this novel idea⁸⁵ as having no merit.

*King v. Floyd*⁸⁶ construed article XVI, section 28 of the Texas Constitution⁸⁷ and article 4099⁸⁸ of the Texas Revised Civil Statutes in the context of a postjudgment garnishment action. The central issue in the case involved the interpretation of the requirement that the unpaid wages constitute current wages. The debtor had been employed by a professional football team as a player. In August 1968 he suffered an injury and was placed on the team's

79. No part of a spendthrift trust estate can be taken on execution or garnishment by creditors of the beneficiary. *Highland State Bank v. Gonzales*, 340 S.W.2d 828 (Tex. Civ. App.—Waco 1960, no writ).

80. 540 S.W.2d at 501.

81. Relying upon RESTATEMENT (SECOND) OF TRUSTS § 156, Comment e (1959), the court stated:

Where by the terms of the trust a trustee is to pay the settlor or apply for his benefit as much of the income or principal as the trustee may in his discretion determine . . . creditors can reach the maximum amount which the trustee could pay to him or apply for his benefit.

540 S.W.2d at 502.

82. 533 S.W.2d 93 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

83. 163 Tex. 314, 354 S.W.2d 576 (1962). See also *Huestis v. Manley*, 110 Vt. 413, 8 A.2d 644 (1939).

84. The facts revealed that the trustee had been unable to locate the beneficiary for a number of years. Consequently the accumulated income had been deposited in a savings account in the trustee's name.

85. The settlor had foreseen the possibility that the income might not be distributed each year and made provision in the trust for its deposit at a bank in a savings account.

86. 538 S.W.2d 166 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

87. "No current wages for personal service shall be subject to garnishment." TEX. CONST. art. XVI, § 28.

88. "No current wages for personal service shall be subject to garnishment; and where it appears upon the trial that the garnishee is indebted to the defendant for such current wages, the garnishee shall nevertheless be discharged as to such indebtedness." TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966). See also the reference to current wages in art. 3833 as discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 86 (1974).

inactive player list. Shortly after he was returned to the active player list his contract was terminated. Alleging a breach of his employment contract, the debtor sued the team and recovered a judgment which was appealed. Appellate proceedings did not end until the Supreme Court of Texas refused an application for a writ of error in 1975. Six days later the application for the writ of garnishment was filed against the team as garnishee by the ex-player's judgment creditor. The garnishee answered that it was indebted and tendered the amount of indebtedness into the registry of the court, interpleading the judgment debtor who asserted that the debt was exempt from garnishment. Since the debtor had not voluntarily left the amount owed in the hands of the team and never was in control of the fund, the court held that the funds, if wages, constituted current wages.⁸⁹ The court also rejected the garnishor's contention that the judgment debtor was an independent contractor⁹⁰ and the contention that the judgment was for money damages and not wages.⁹¹

B. Execution

In *Collum v. DeLougher*⁹² the court of civil appeals set aside a sale under execution. *Pantaze v. Slocum*⁹³ was cited for the general principle that an execution sale will not be set aside upon proof that it was made for a grossly inadequate price; the sale must also be accompanied by irregularities which tend to contribute to the inadequacy of the price. The price paid for the realty sold at the execution sale in the instant case was less than fifteen percent of its value.⁹⁴ Moreover, the levying officer failed to make any attempt to give the judgment debtor an opportunity to designate property, as required by rule 637.⁹⁵ These two factors constituted a sufficient basis for setting the execution sale aside.

The appellate court also held that inadequacy of price, standing alone, is sufficient to justify the setting aside of the sale when the judgment debtor promptly offers to make the purchaser at the execution sale whole by returning his investment in the property and paying all costs.⁹⁶ Since the judgment debtor had made a proper tender, the judgment of the trial court awarding the judgment creditor who purchased the property at the execution sale the amount tendered together with attorney's fees and his costs was affirmed.

The duty of a levying officer to exercise due diligence in levying a writ of execution was considered in *Mooney v. Producers Grain Corp.*⁹⁷ With regard to an officer who fails or refuses to levy upon or sell any property subject to

89. See *Bell v. Indian Live-Stock Co.*, 11 S.W. 344 (Tex. 1889); *Smith v. Bradshaw*, 105 S.W.2d 340 (Tex. Civ. App.—Dallas 1937, no writ); *J.M. Radford Grocery Co. v. McKean*, 41 S.W.2d 639 (Tex. Civ. App.—Fort Worth 1931, no writ).

90. The term "wages for personal service" necessarily implies a relationship of master and servant, or employer and employee, and excludes compensation due to an independent contractor. See *Brasher v. Carnation Co.*, 92 S.W.2d 573 (Tex. Civ. App.—Austin 1936, no writ).

91. 538 S.W.2d at 169.

92. 535 S.W.2d 390 (Tex. Civ. App.—Texarkana 1976, no writ).

93. 518 S.W.2d 407 (Tex. Civ. App.—Fort Worth 1974, no writ).

94. 535 S.W.2d at 393.

95. Tex. R. Civ. P. 637.

96. See *Prudential Corp. v. Bazaman*, 512 S.W.2d 85 (Tex. Civ. App.—Corpus Christi 1974, no writ); *Moore v. Miller*, 155 S.W. 573 (Tex. Civ. App.—San Antonio 1913, writ ref'd).

97. 531 S.W.2d 699 (Tex. Civ. App.—Amarillo 1975, no writ).

execution, article 3825⁹⁸ provides that "when the same might have been done, he and his sureties shall be liable to the party entitled to receive the money collected on such execution for the full amount of the debt, interest and costs" Although the liability is not absolute if the officer pleads and proves that he had a reasonable excuse for failure to levy,⁹⁹ his failure in this case to plead excuse affirmatively precluded the officer from introducing evidence in explanation of his failure to levy.

C. Homestead

The issue of whether a purchase money mortgage should be satisfied out of the excess or nonexempt portion of an urban homestead was considered by a federal district court in the context of a bankruptcy proceeding in *In re Bobbitt*.¹⁰⁰ The bankrupts purchased a home in 1969 for over \$120,000 at a time when the lot, exclusive of any improvements, was valued at \$20,000. At the time of bankruptcy the lot had increased in value to \$25,000. Applying principles derived from *Hoffman v. Love*¹⁰¹ and *Valley Bank v. Skeen*,¹⁰² the court concluded that the Bobbitts' exemption was limited to \$5,000, the amount of the exemption in effect when they purchased the property.¹⁰³ Consequently, the amount of the exemption was one-fourth of \$25,000, or \$6,250, and the amount of the excess, three-fourths of \$25,000, or \$18,750.

The instant case, however, presented a question not raised in either *Hoffman* or *Skeen*. The bankrupts had a purchase money mortgage indebtedness secured by a first lien deed of trust on the property in the amount of \$62,000. The court held that the amount of the first mortgage lien should first be applied to the excess or nonexempt portion, \$18,750, of the bankrupts' homestead, leaving nothing for the bankrupts' general creditors. The impact of this decision is substantial. Although a great many urban homesteads have some excess or nonexempt portion due to an increase in real property values in the last several years, it will be a rare case in which the monetary value of the excess exceeds the purchase money mortgage indebtedness. The authority supporting the result reached is surprisingly not cited in the district judge's opinion. The opinion of the bankruptcy judge, however, indicates that primary reliance is placed upon *Kerens National Bank v. Stockton*.¹⁰⁴ Although the question will not be settled until the Texas Supreme Court considers the problem, it is unlikely that they will come to a different conclusion.

98. TEX. REV. CIV. STAT. ANN. art. 3825 (Vernon 1966).

99. See *Underwood v. Russell*, 4 Tex. 175 (1849) (excuse was that sheriff could find no property upon which to levy the execution); *Hackler v. Kohnstamm & Co.*, 227 S.W.2d 347 (Tex. Civ. App.—Dallas 1950, no writ) (excuse was that sheriff's investigation revealed no property upon which to levy). See also TEX. ATT'Y GEN. OP. NO. H-827 (1976).

100. No. BK-3-74-373-F (N.D. Tex., Mar. 29, 1976).

101. 494 S.W.2d 591 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). See also *Whiteman v. Burke*, 286 S.W. 350 (Tex. Civ. App.—Galveston 1926, writ ref'd).

102. 401 F. Supp. 139 (N.D. Tex. 1975).

103. No. BK-3-74-373-F (N.D. Tex., March 29, 1976).

104. 120 Tex. 546, 40 S.W.2d 7 (1931). See also *Lambhan v. Alliance Life Ins. Co.*, 134 S.W.2d 788 (Tex. Civ. App.—Amarillo 1939, no writ); *Burg v. Hitzfeld*, 89 S.W.2d 272 (Tex. Civ. App.—San Antonio 1935, writ dismissed); *Colwick v. Wright*, 275 S.W. 152 (Tex. Civ. App.—Waco 1925, writ dismissed w.o.j.); *Chandler v. Young*, 216 S.W. 484 (Tex. Civ. App.—Austin 1919, no writ); *Pugh v. Whitsitt & Guerry*, 161 S.W. 953 (Tex. Civ. App.—Fort Worth 1913, no writ).

Several other homestead cases were decided during the survey period. In *O'Neil v. Mack Trucks, Inc.*¹⁰⁵ the constitutional prohibition against placing voluntary encumbrances¹⁰⁶ upon one's homestead was considered. In 1970 O'Neil gave a deed of trust covering 4.09 acres of land to secure a promissory note. O'Neil contended that the land constituted his business homestead because he was a truck distributor who had operated a distributorship on the property as his business since 1965.¹⁰⁷ The court of civil appeals agreed that the deed of trust was invalid with respect to the business homestead.¹⁰⁸

Of course, in subsequent cases which involve a business homestead valuation, principles derived from *Hoffman* and *Skeen* will be applicable in determining whether the debtor has an excess or nonexempt portion available for creditors. The valuation of the urban homestead exemption should proceed by considering both the residential and urban homesteads as one unit.¹⁰⁹ In the case presently under consideration, however, the creditor did not allege and prove that any excess existed. He did not, therefore, satisfy his burden of proof with respect to the nonexempt portion of the debtor's homestead. Lastly, the court restated the rule that the designation of a tract with the assessor-collector for purposes of securing a tax exemption does not determine the character of the property as a homestead¹¹⁰ one way or the other.

IV. SWORN ACCOUNTS AND ATTORNEYS' FEES

The subject of sworn accounts, governed by rule 185,¹¹¹ continued to plague practitioners during the survey period. In *Cal-Tex Beef Processors v. Frozen Food Express, Inc.*¹¹² the defendant's answer stated that "[t]he claim alleged in Plaintiff's petition which is the foundation of Plaintiff's action is *wholly not just or true*."¹¹³ The court of civil appeals properly concluded that the defendant's sworn answer neutralized the plaintiff's affidavit and destroyed its character as prima facie evidence, thereby placing the burden on the plaintiff to prove his case as at common law. In addition, the appellate

105. 533 S.W.2d 832 (Tex. Civ. App.—El Paso 1976, no writ).

106. TEX. CONST. art. XVI, § 50:

The homestead of a family, or a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon

No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

107. 533 S.W.2d at 837.

108. See *Mays v. Mays*, 43 S.W.2d 148 (Tex. Civ. App.—Beaumont 1931, writ ref'd); *Purdy v. Grove*, 35 S.W.2d 1078 (Tex. Civ. App.—Eastland 1931, writ ref'd), for a definition of the business homestead as being part of the urban homestead which need not be on a lot contiguous to the residence of the homestead claimant, as long as the head of the family has a calling or business to which the property is adapted and is reasonably necessary for the operation of the business.

109. See *McSwain, The Texas Business Homestead*, 15 BAYLOR L. REV. 39 (1963).

110. 533 S.W.2d at 837. The court appears to restrict its analysis here to a business homestead. The designation can, however, be by use in any event.

111. TEX. R. CIV. P. 185.

112. 530 S.W.2d 143 (Tex. Civ. App.—Waco 1975, no writ). See also *New Trends, Inc. v. Stafford-Lowdon Co.*, 537 S.W.2d 778 (Tex. Civ. App.—Fort Worth 1976, no writ).

113. 530 S.W.2d at 144 (emphasis supplied by the court).

court stated that a sworn denial is not necessary when the defendant is a stranger to the transactions upon which the sworn account is based.¹¹⁴

In dealing with the subject of attorneys' fees, the court overruled the contention of the defendant that there was no evidence to support the trial court's finding of fact with respect to reasonable attorneys' fees because the trial court took judicial notice of the State Bar Minimum Fee Schedule as permitted by article 2226.¹¹⁵

In *Boysen v. Security Lumber Co.*¹¹⁶ the defendant's unsworn answer was accompanied by a sworn affidavit which stated that the "cause of action, account and claim against him and in favor of Security Lumber Company, Inc., is not a just and due amount and that all just and lawful offsets, payments and credits have not been allowed."¹¹⁷ The court of civil appeals properly held that the verified pleading was insufficient to deny the account because the defendant did not specify in his answer the precise objection he had to the plaintiff's allegations.¹¹⁸

The court also held that the stranger-to-the-account exception to the requirement of an appropriate written denial under oath has only been applied where the plaintiff's own pleadings, or the invoices or other evidence exhibited as the basis of the obligation, reflected that the defendant was not a party to the original transaction. Since the invoices were addressed to "Fred Boysen, Bissonet Roofing Co.," the court held that the stranger-to-the-account exception did not apply. Similarly, in apparent disagreement with *Cal-Tex* the court held that the defendant's defense that he was merely an officer of the corporation that owed the debt could not be proved in the absence of a proper sworn denial under rule 185.¹¹⁹

The stranger-to-the-account exception was also considered in *Booher v. Criswell*.¹²⁰ In a well reasoned opinion the court stated that the strict requirements of denial in accordance with rule 185 do not apply to a defendant who is not liable in the capacity in which he was sued, and who is thus a stranger to the transaction. In such a case a written denial under oath is, however, still required by rule 93(c) "unless the truth of such matters appear of record."¹²¹ The logic of the opinion serves to reconcile *Cal-Tex* and *Boysen*. The sworn

114. See *Gorrell v. Tide Prods., Inc.*, 532 S.W.2d 390 (Tex. Civ. App.—Amarillo 1975, no writ); *Hilton v. Musebeck Shoe Co.*, 505 S.W.2d 341 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.). But see *Collins v. Kent-Coffey Mortgage Co.*, 380 S.W.2d 59 (Tex. Civ. App.—Eastland 1964, writ ref'd).

115. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1976-77) provides:

The amount prescribed in the current State Bar Minimum Fee Schedule shall be prima facie evidence of reasonable attorney's fees. The court, in non-jury cases, may take judicial knowledge of such schedule and the contents of the case file in determining the amount of attorney's fees without the necessity of hearing further evidence.

See *Coward v. Gateway Nat'l Bank*, 525 S.W.2d 857 (Tex. 1975); *Edinburg Meat Prods. Co. v. Vernon Co.*, 535 S.W.2d 432 (Tex. Civ. App.—Corpus Christi 1976, no writ); *O'Brien v. Cole*, 532 S.W.2d 151 (Tex. Civ. App.—Dallas 1976, no writ); *Stafford v. Brennan*, 498 S.W.2d 703 (Tex. Civ. App.—Corpus Christi 1973, no writ).

116. 531 S.W.2d 454 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

117. *Id.* at 455.

118. See, e.g., *Duncan v. Butterowe, Inc.*, 474 S.W.2d 619 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

119. See cases cited at note 114 *supra*.

120. 531 S.W.2d 844 (Tex. Civ. App.—Dallas 1975, no writ).

121. TEX. R. CIV. P. 93(c).

denial is required by rule 93(c) unless the plaintiff's pleadings indicate that the defendant is a stranger to the transaction upon which the account is based. If the defendant has properly pleaded that he is not liable in the capacity in which he is sued under oath, he need not deny under oath the justness or truth of the account in accordance with rule 185 to controvert the account and to put the plaintiff on proof of his claim.

The requirements of the defendant's answer were also considered in *Jeffrey v. Larry Plotnick Co.*¹²² The defendant filed a sworn denial alleging that "[t]he account sued on is not just or true in whole or in part."¹²³ The court again properly held that this answer did not satisfy rules 185 and 93(k)¹²⁴ because it did not state that each and every item was not just or true, or specify the items that were not just and true. The defendant also pleaded the affirmative defense of accord and satisfaction. Although this affirmative defense need not be pleaded under oath, since the defendant failed to tender summary judgment evidence in support of it, summary judgment was properly granted to the plaintiff.¹²⁵

In *Edinburg Meat Products Co. v. Vernon Co.*¹²⁶ the defendant's sworn denial was considered insufficient because it stated that "each and every item in Plaintiff's Petition which is the foundation of Plaintiff's action . . . is not just *and* true."¹²⁷ Elevating form over substance, the court of civil appeals held that the denial was insufficient because the rules require that a denial of the whole claim state that each and every item is not just *or* true. The court further held that the affidavit attached to the denial did not affirmatively show that the affiant had any personal knowledge of the facts set out in the body of the denial and was insufficient for this reason. The latter holding is also questionable in the absence of a special exception by the plaintiff.¹²⁸

Similarly, in *P.T. Poultry Growers, Inc. v. Darr Equipment Co.*¹²⁹ the defendant's verified answer consisted of a general denial and a special denial in which defendant alleged that the account was "not reasonable or just, in whole or in part."¹³⁰ An affidavit attached to the answer stated: "[T]he account which Plaintiff seeks to recover is neither just nor fair."¹³¹ The defendant also set up an affirmative defense in the nature of a breach of an implied warranty. However, by failing to introduce summary judgment evidence in support of the affirmative defense, the defendant failed to take the necessary action to avoid summary judgment.¹³²

The suit on a sworn account was also considered in the context of a default judgment. In *O'Brien v. Cole*¹³³ the defendant appealed from a default judgment complaining *inter alia*, that the trial court erred in rendering

122. 532 S.W.2d 99 (Tex. Civ. App.—Dallas 1975, no writ).

123. *Id.* at 101.

124. TEX. R. CIV. P. 185, 93(k).

125. *See, e.g.,* *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50 (Tex. 1970).

126. 535 S.W.2d 432 (Tex. Civ. App.—Corpus Christi 1976, no writ).

127. *Id.* at 434 (emphasis added).

128. *See* *Youngstown Sheet & Tube Co. v. Penn.*, 363 S.W.2d 230 (Tex. 1962).

129. 537 S.W.2d 773 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

130. *Id.* at 774.

131. *Id.*

132. *See* *Hidalgo v. Surety Sav. & Loan Ass'n*, 462 S.W.2d 540 (Tex. 1971); *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50 (Tex. 1970).

133. 532 S.W.2d 151 (Tex. Civ. App.—Dallas 1976, no writ).

judgment without hearing evidence and making a record. The court held that a proper sworn account petition is prima facie evidence of the amount due and that no further evidence was required. Hence no record was necessary.¹³⁴ On the other hand, in *General Leasing Co. v. Saxon Business Products, Inc.*¹³⁵ the Eastland court of civil appeals held that a defective petition which failed to specify the items of goods sold and delivered would also support a default judgment because the judgment reflected that the trial court considered other evidence.¹³⁶ Since, however, no statement of facts was made, the result seems to be squarely at odds with *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*¹³⁷ The damages are not "liquidated and proved by an instrument in writing."¹³⁸ Consequently, the trial judge should have heard evidence of the goods allegedly sold and delivered,¹³⁹ since such evidence was not supplied by a proper petition under rule 185.

V. USURY

A. Guaranty/Suretyship Obligations

An assertion that a loan transaction was usurious was made by a guarantor of payment of a corporate obligation in *Loomis Land & Cattle Co. v. Diversified Mortgage Investors*.¹⁴⁰ The court of civil appeals held that the guarantor was prohibited from asserting a defense of usury in connection with his guaranty of an instrument¹⁴¹ evidencing a corporate obligation because the interest rate contracted for did not exceed the statutory limit of one-and-one-half percent for loans to corporations and article 1302-2.09¹⁴² precludes a

134. The defendant relied upon *Morgan Express, Inc., v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd), which the court considered inapplicable to proper suits on sworn account. *Morgan Express* was premised, in part, upon the duty of a court reporter to attend all sessions of court and to take full testimony under TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon 1971). It should be noted that the statute was amended in 1975 to provide that the reporter shall attend all sessions "upon request." TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-77). See, e.g., *Bledsoe v. Black*, 535 S.W.2d 795 (Tex. Civ. App.—Eastland 1976, no writ). See, however, *Smith v. Smith*, 544 S.W.2d 121 (Tex. 1976), which appears to back off from *Morgan Express* at least to the extent that the appellant is apparently required to request the trial judge to prepare a narrative statement of facts. The supreme court does not mention either *Morgan Express* or the amendment to the statute.

135. 533 S.W.2d 870 (Tex. Civ. App.—Eastland 1976, no writ).

136. *Id.* at 871. "[I]t would be presumed in the absence of a statement of facts, that the trial judge had before him sufficient evidence to support the judgment since the judgment itself did not affirmatively disclose that it was based on the exhibit alone or that no other evidence was heard." *Id.*; see note 134 *supra*.

137. See note 134 *supra*.

138. TEX. R. CIV. P. 241.

139. See TEX. R. CIV. P. 243; *Southern S.S. Co. v. Schumacher Co.*, 154 S.W.2d 283, 284 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.).

140. 533 S.W.2d 420 (Tex. Civ. App.—Tyler 1976, no writ).

141. *Id.* at 426.

142. TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Vernon Supp. 1976-77):

Notwithstanding any other provision of law, corporations, domestic or foreign, may agree to and stipulate for any rate of interest as such corporation may determine, not to exceed one and one-half percent (1½%) per month, on any bond, note, debt, contract or other obligation of such corporation under which the original principal amount is Five Thousand Dollars (\$5,000) or more, or on any series of advances of money pursuant thereto if the aggregate of sums advanced or originally proposed to be advanced shall exceed Five Thousand Dollars (\$5,000), or on any extension or renewal thereof, and in such instances, the claim or defense of usury by such corporation, its successors, guarantors, assigns or anyone on its behalf is prohibited; however, nothing contained herein shall prevent any charitable or religious corporation from asserting the claim or interposing the defense of usury in any action or proceeding.

guarantor of a corporate debt from raising a defense of usury if the corporation cannot do so. Moreover, the fact that the lender refused to make the loan unless the claimant agreed to act as guarantor of payment did not render the loan transaction usurious.¹⁴³ Therefore, although it has been held that when an individual and a corporation execute a "joint and several" note as co-makers the individual has a cause of action for usury,¹⁴⁴ a guarantor of a corporate obligation has no such cause of action or defense unless the statutory corporate rate has been exceeded.¹⁴⁵

A similar fact pattern emerged in *Pinemont Bank v. DuCröz*.¹⁴⁶ The trial court had granted summary judgment in behalf of the plaintiffs in the following context. A note in the amount of \$180,000 bearing interest at thirteen-and-one-fourth percent per annum was signed by two corporate entities and five individuals. The interest rate exceeded the ten percent maximum set by statute for individuals¹⁴⁷ but did not exceed the maximum corporate rate.¹⁴⁸ The individuals argued that they were co-makers entitled to assert usury as both a defense and an affirmative claim for relief. An award of twice the usurious interest contracted for¹⁴⁹ was given to *each* of the three plaintiffs.¹⁵⁰ The court of civil appeals held that the maximum "forfeiture" which could be awarded pursuant to article 5069-1.06(a) was twice the total interest contracted for, regardless of how many makers are individually liable on the note.¹⁵¹

Another argument of defendant bank on appeal was that individual plaintiffs signed the instrument as "guarantors" of the corporate loan which the defendant had offered to prove at trial by the introduction of oral testimony. Citing section 3.415(c)¹⁵² for the proposition that such proof would be permissible, the appellate court reversed the trial court's grant of summary judgment and remanded the case for new trial.

143. See *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no writ).

144. *Sud v. Morris*, 492 S.W.2d 335 (Tex. Civ. App.—Beaumont 1973, no writ).

145. See *Micrea v. Eureka Life Ins. Co.*, 534 S.W.2d 348 (Tex. Civ. App.—Fort Worth 1976, no writ), for the same result based upon convoluted reasoning.

146. 528 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

147. TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1971).

148. See *id.* art 1302-2.09 (Vernon Supp. 1976-77), quoted at note 142 *supra*.

149. TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1971) provides:

Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor twice the amount of interest contracted for, charged or received, and reasonable attorneys' fees fixed by the court provided that there shall be no penalty for a violation which results from an accidental and bona fide error.

See also *Johns v. Jaeb*, 518 S.W.2d 857 (Tex. Civ. App.—Dallas 1974, no writ), discussed in Henderson, *Commercial Transactions, Annual Survey of Texas Law*, 30 SW. L.J. 118, 137-38 (1976).

150. The note was paid before judgment was entered. Therefore, no question of setting off the amount of the unpaid principal of the note arose. See, e.g., *Johns v. Jaeb*, 518 S.W.2d 857 (Tex. Civ. App.—Dallas 1974, no writ).

151. The award apparently will be made "collectively." Compulsory joinder problems will necessarily arise in connection with usury claims as a result of the "one cause of action" position espoused by the court. See Dorsaneo, *Compulsory Joinder of Parties in Texas*, 14 HOUS. L. REV. 345 (1977).

152. TEX. BUS. & COMM. CODE ANN. § 3.415(c) (Vernon 1968). "As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof." *Id.*

Section 3.415 deals with accommodation parties. An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.¹⁵³ He is a surety liable on the instrument who has a right of recourse on the instrument against the party accommodated if the surety pays the instrument,¹⁵⁴ as well as the benefit of certain suretyship defenses.¹⁵⁵

In the context of the Texas Business and Commerce Code a guarantor is also a surety¹⁵⁶ entitled to the suretyship defenses. Whether one is a guarantor on an instrument depends upon whether words of guarantee are added to the signature of a party to an instrument on which at least one other party is primarily liable. For example, a guarantor on an instrument who places the words "payment guaranteed" or their equivalent on the instrument agrees that if the instrument is not paid when due, he will pay it according to its tenor without resort by the holder to any other party including the party who actually was accommodated by the guarantor.¹⁵⁷ If, however, the words "collection guaranteed" or their equivalent are used, conditions precedent to the guarantor's liability must be satisfied.¹⁵⁸ Lastly, "[w]ords of guaranty which do not otherwise specify guarantee payment."¹⁵⁹

In the case under consideration no words of guarantee appeared on the instrument. Therefore, strictly speaking, the five individuals who signed the note were not guarantors within the meaning of section 3.416.¹⁶⁰ Undoubtedly, oral proof could be utilized by the holder-payee to show that they signed as accommodation makers. The Uniform Commercial Code, however, does not contemplate that oral proof of the status of a signer of an instrument as a guarantor will be necessary, presumably because as far as liability on the instrument is concerned, the position of the guarantor and the accommodation maker are the same so long as the instrument does not reflect the words, "collection guaranteed" or their equivalent. Both are sureties who engage to pay the instrument according to its tenor without resort by the holder to any other party.

Quite obviously, the bank in the instant case wished to show that the five individuals signed as an accommodation to the corporate signers in order to take advantage of article 1302-2.09,¹⁶¹ which precludes a business corporation, its successors, guarantors, assigns, or anyone in its behalf from asserting a claim or defense of usury unless the corporate rate is exceeded. The statutory section does not, however, explicitly state that accommodation makers cannot do so. Despite problems of nomenclature, it should make no difference whether the sureties of a corporate obligation are labeled as guarantors of payment, guarantors of collection, or accommodation makers

153. *Id.* § 3.415(a); see *Jones v. San Angelo Nat'l Bank*, 518 S.W.2d 622 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.), discussed in Henderson, *supra* note 149, at 129.

154. See TEX. BUS. & COMM. CODE ANN. § 3.415(e) (Vernon 1968).

155. See *id.* § 3.606.

156. See *id.* § 1.201(40). "Surety includes guarantor." *Id.*

157. *Id.* § 3.416(a).

158. *Id.* § 3.416(b).

159. *Id.* § 3.416(c).

160. *Id.* § 3.416(d).

161. TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Vernon Supp. 1976-77), quoted at note 142 *supra*.

in the context of a defense or claim of usury.¹⁶² Guarantors of payment and accommodation makers stand on the same footing with respect to primary liability on an instrument. Consequently, their positions should be the same in the context of a claim or defense of usury. Guarantors of collection have additional protection by virtue of the fact that they are required to fulfill their guarantee only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.¹⁶³ However, these conditions precedent to the liability of a guarantor of collection do not provide a basis for treating guarantors of collection differently from guarantors of payment in the usury context.

*Universal Metals & Machinery, Inc. v. Bohart*¹⁶⁴ presented an opportunity for the supreme court to construe Texas usury law in the context of suretyship obligations. Universal instituted suit against the Boharts to recover approximately \$220,000, which was the unpaid principal of a promissory note. The note was purportedly signed by Beneficiadora de Minerales de Tlaxcola, SA (BMT), by Manuel Cortes, "Presidente of the Corporation."¹⁶⁵ It provided for interest at the rate of "(12%) per annum on the unpaid balance hereof from time to time outstanding."¹⁶⁶ On the same instrument the Boharts agreed:

FOR VALUE RECEIVED, the undersigned _____ as primary obligor(s), hereby (jointly and severally unconditionally guarantee(s) the prompt payment of principal and interest on the foregoing promissory note when and as due in accordance with its terms, and hereby waive(s) diligence, presentment, demand, protest or notice of any kind whatsoever, as well as any requirement that the holder exhaust any right or take any action against the maker of the foregoing promissory note and hereby consent(s) to any extension of time or renewal thereof.

/s/ James T. Bohart

/s/ Jean Bohart (Mrs. James T. Bohart)

(Name of Guarantor)

(Name of Guarantor)¹⁶⁷

BMT was not sued since Universal sought judgment against the Boharts as primary obligors.¹⁶⁸ The trial court rendered judgment for Universal as the holder-payee of the note and denied the Boharts' counterclaim that Universal charged usurious interest.¹⁶⁹ The court of civil appeals¹⁷⁰ reversed the judg-

162. See, e.g., *Raby v. Commercial Banking Corp.*, 208 Pa. Super. Ct. 52, 220 A.2d 659 (1966).

163. TEX. BUS. & COMM. CODE ANN. § 3.416(b) (Vernon 1968).

164. 539 S.W.2d 874 (Tex. 1976).

165. *Id.* at 876.

166. *Id.*

167. *Id.*

168. Compare TEX. REV. CIV. STAT. ANN. arts. 1986, 1987 (Vernon 1964), and TEX. BUS. & COMM. CODE ANN. § 34.02 (Vernon 1968), with *id.* §§ 3.416(a), .416(b). Compare also *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460 (Tex. Civ. App.—Beaumont 1976, no writ), with *Bohart*. *Cook* concludes that a guarantor who unconditionally guarantees payment on a debt and becomes absolutely liable cannot be sued without the joinder of the original debtor if the guarantor raises his absence at trial. Reliance is placed on art. 1987 as construed in *Wood v. Canfield Paper Co.*, 117 Tex. 399, 5 S.W.2d 748 (1928). See also TEX. R. CIV. P. 31. *Cook* does not mention either TEX. BUS. & COMM. CODE ANN. § 3.416(a) (Vernon 1968), or the *Bohart* opinion and appears in conflict with both of them. See also *Yandell v. Tarrant State Bank*, 538 S.W.2d 684 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.), for an attempted reconciliation of *Bohart* and *Cook*.

169. 523 S.W.2d 279, 283 (Tex. Civ. App.—Dallas 1975).

170. *Id.*

ment of the trial court and rendered judgment that Universal take nothing on the theory that the instrument reflected that the Boharts were primary obligors and also guarantors, that the two terms are mutually exclusive, that the instrument should be construed in favor of its being a guaranty which imposed only secondary liability, and, since BMT could not be liable,¹⁷¹ the Boharts were not liable either.

In its first opinion¹⁷² the supreme court reversed judgments of both the trial court and the court of civil appeals and remanded the cause to the trial court for another trial. Citing section 3.416(a) of the Texas Business and Commerce Code,¹⁷³ the supreme court concluded that the Boharts had unconditionally guaranteed payment and waived any requirement that the holder of the note exhaust its rights or take action against the maker as a condition precedent to their liability. Thus, the Boharts were held to be "guarantors who are primarily liable, who are jointly, severally and unconditionally liable for the prompt payment of principal and interest, when due and whether any action is taken against the maker or not"¹⁷⁴ *and whether or not the maker has any enforceable obligation*.¹⁷⁵ Having found the Boharts liable on the instrument, the supreme court next considered their counterclaim for double the amount of interest charged pursuant to article 5069-1.06.¹⁷⁶

Universal contended that article 1302-2.09¹⁷⁷ prohibited the usury claim by its express items. The supreme court held that the Boharts were co-obligors rather than mere guarantors and that as individuals who were liable as makers the Boharts correctly invoked the claim and defense of usury.¹⁷⁸ In a judicial *volte-face* the court's opinion was withdrawn.¹⁷⁹

On rehearing the supreme court concluded that the term "guarantors" in article 1302-2.09¹⁸⁰ included "guarantors of all kinds" and affirmed the trial court judgment that Universal recover from the Boharts on the note. Henceforward, guarantors of payment of corporate loans evidenced by notes may not assert a claim or defense of usury despite their primary liability unless the corporate interest rate is exceeded.

From a review of the foregoing cases it appears that the question of the availability of claims and defenses of usury has been for the most part resolved during the survey period. Such claims are not available to guarantors of payment or guarantors of collection of corporate obligations evidenced by instruments when the corporate rate has not been exceeded. Similarly, accommodation parties are dealt with on the same basis as guarantors. A problem is presented, however, by case authority which holds that certain makers are not accommodation parties because they exercise control over the

171. The jury found that BMT's signature was forged. *Id.* at 284-85.

172. 19 Tex. Sup. Ct. J. 212 (March 13, 1976).

173. TEX. BUS. & COMM. CODE ANN. § 3.416(a) (Vernon 1968). " 'Payment guaranteed' or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party." *Id.*

174. 19 Tex. Sup. Ct. J. at 212-13; see note 168 *supra*.

175. See Winship, *Commercial Transactions*, p. — *supra*.

176. See note 149 *supra*.

177. See note 142 *supra*.

178. 19 Tex. Sup. Ct. J. at 215.

179. 539 S.W.2d 874, 879 (Tex. 1976).

180. See note 142 *supra*.

corporate borrower ostensibly accommodated.¹⁸¹ In order to avail themselves of the defense or claim of usury, persons liable on instruments will now argue that they are co-makers within the meaning of *Sud v. Morris*.¹⁸² On the other hand, lenders confronted with potential usury claims will contend that the individual claimants are guarantors or accommodation parties who may not assert a claim or defense of usury unless the corporate entity accommodated could assert it.

The *Bohart* decision was followed in *Hartnett v. Adams & Holmes Mortgage Co.*¹⁸³ It is now clear that guarantors of payment can be sued without the joinder of the party accommodated because they are independently liable. Moreover, they may not assert a claim or defense of usury in situations where the party accommodated cannot do so.

B. Compensating Balances

In *Hurley v. National Bank of Commerce*¹⁸⁴ a borrower instituted an action against the bank to recover twice the amount of the interest paid on a loan in the amount of \$454,669.32, represented by a note dated July 14, 1967. Although the note provided for interest at the rate of seven-and-one-half percent per annum, the borrower contended that as a part of the original transactions he was required by the lender to maintain bank balances totalling \$100,000 at the bank. Consequently, he argued that the principal amount of the loan was reduced by \$100,000 and that the interest rate actually exceeded ten percent.¹⁸⁵ Unfortunately for the borrower, the court held that the claim for usury was limited to the interest paid¹⁸⁶ to the bank before April 14, 1969, when the bank ceased to receive interest payments as a result of an assignment of the note and that the usury claim was barred by the two-year statute of limitations. Hence the compensating balances requirement was not considered. In order to avoid the bar of the statute of limitations the borrower argued that the rule of *locus poenitentiae*,¹⁸⁷ which permits the lender to treat the loan at maturity as one for the principal amount actually advanced, provided he collects no more than lawful interest, applied and, therefore, that no cause of action for usury accrued until the aggregate of the payments made exceeded the principal advanced. The court held that under the federal statute the limitation period on a claim for usury penalties begins to run on each payment from the time it is made.¹⁸⁸

181. See notes 156-62 *supra* and accompanying text.

182. 492 S.W.2d 335 (Tex. Civ. App.—Beaumont 1973, no writ).

183. 539 S.W.2d 181 (Tex. Civ. App.—Texarkana 1976, no writ).

184. 529 S.W.2d 788 (Tex. Civ. App.—Dallas 1975, no writ).

185. See 12 U.S.C. § 85 (1970), which allows a national bank to charge interest "at the rate allowed by the laws of the State . . . where the bank is located."

186. See *id.* § 86:

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

187. See *Smith v. First Nat'l Bank*, 42 Neb. 687, 60 N.W. 866, 867 (1894).

188. See *McCarthy v. First Nat'l Bank*, 223 U.S. 493, 499 (1912).

In *Commerce Savings Association v. GGE Management Co.*¹⁸⁹ Gertner, individually and as president of GGE Management Company (GGE), executed a promissory note to Angleton Savings Association¹⁹⁰ (the Association) dated April 17, 1970, in the principal amount of \$600,000, bearing interest at the rate of twelve percent per annum over a ten-year period in consecutive monthly installments of \$6,607. The loan was guaranteed by Merrell and Westmoreland.¹⁹¹

The consideration for the execution of the note and guarantee agreement was the purchase price (\$400,000) of certain real property conveyed by the Association to GGE and funds to be advanced by the Association to GGE for construction on the real property.

Several factors complicated the determination of the amount of interest involved in the loan transaction:

(1) The Association purchased the real property from Merrell for \$349,000 as part of the same financing transaction. This resulted in an immediate front-end profit to the Association of \$51,000.

(2) The Association required GGE to maintain a compensating balance of \$600,000 in the form of brokered certificates of deposit. GGE was compelled to pay a fee of \$21,000 to independent brokers.

(3) The Association also required \$200,000 of brokered certificates to be placed on deposit at another lending institution (Angleton Bank of Commerce). GGE was compelled to pay a fee of \$5,912.50 for them to independent brokers.

(4) On August 25, 1972, Gertner and GGE entered into a "Modification and Extension Agreement" which provided for a reduction of principal on the note from \$600,000 to \$539,226.28, a reduction of the interest rate from twelve to eight-and-one-half percent, and an extension of maturity from August 17, 1980, to September 17, 1996.

(5) Gertner's personal liability on the note was restricted to such loss as might be realized by the Association with respect to stated percentages of the unpaid principal balance at the time of foreclosure "in case of default or foreclosure" on the deed of trust and security agreement executed contemporaneously with the \$600,000 promissory note.

On February 22, 1974, the Association brought suit on the note as modified, seeking recovery of the sum of \$528,878.98 with interest thereon from December 17, 1973, against Gertner, GGE, Westmoreland, and Merrell, jointly and severally.

Gertner, GGE, and Westmoreland filed verified answers asserting that the loan transaction was usurious. Merrell answered that he had been released from liability by reason of the limitation on Gertner's liability and the

189. 539 S.W.2d 71 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

190. In December 1973 Angleton changed its name to Commerce. *Id.* at 74.

191. The guarantee agreement guaranteed:

[T]he full and prompt payment to the Association at maturity, and at all time thereafter, and also at the time hereinafter provided, of the indebtedness, liabilities and obligations of said Debtor to the Association to the extent of:

SIX HUNDRED THOUSAND AND NO/100 (\$600,000.00) DOLLARS as is or the remaining balance on one certain note and deed of trust

Id. at 78.

modification agreement and asserted a right of indemnification against Westmoreland.

Subsequently, on August 21, 1974, Gertner and GGE filed a counterclaim against the Association, asserting that the note was usurious on its face because it required Gertner, an individual, to pay interest at the rate of twelve percent per annum, that the \$51,000 profit realized by Commerce was interest, that the \$21,000 brokerage fee was interest, and that the \$5,912.50 brokerage fee benefited the officers and shareholders of the Association in an effort to acquire the Association. They thus sought to recover penalty interest together with exemplary damages and attorneys' fees.

After a jury trial judgment was rendered that the Association take nothing on its suit to recover on a promissory note and for foreclosure of liens and security interest, that Gertner and GGE recover \$569,010.26 in penalty interest, and that GGE recover all principal payments on the note (\$71,121.02) plus \$5,912.50 as actual damages for conversion of the cost of the certificates of deposit on deposit with the Angleton Bank of Commerce.

The court of civil appeals held that as to Gertner the loan transaction was not usurious because his liability was limited to the payment of certain amounts of unpaid principal. In addition, the jury finding that the \$51,000 real estate profits constituted interest was found to be supported by the evidence, but it was held that the \$51,000 loan charge should be allocated over the period beginning April 20, 1970, the date of the initial cash advance, and ending August 30, 1972, the last day before the charge was "restored" by a credit against principal made on August 31, 1972, pursuant to the provisions of the modification and extension agreement. The total charges received by the Association during such period were thus rendered within the corporate rate permitted by article 1302-2.09,¹⁹² despite the fact that certain payments on the note exceeded the statutory limit of one-and-one-half percent per month.¹⁹³ The court also held that since the brokerage fees were not paid to the Association, they did not constitute interest. Consequently, the court of civil appeals, concluding that the loan transaction was not usurious as to GGE, held that the Association recover judgment against GGE, Merrell, and Westmoreland for \$528,878.98 representing unpaid principal,¹⁹⁴ against GGE for interest at the rate of ten percent,¹⁹⁵ for interest against the guarantors at the rate of six percent from the date of their default,¹⁹⁶ and against Gertner for \$120,000, the applicable limit of his liability under the limitation of liability

192. TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Vernon Supp. 1976-77).

193. 539 S.W.2d at 82:

In our opinion, it would be manifestly unfair and beyond the obvious intent of the legislature in the enactment of the usury statute, to impose the severe penalties afforded by Article 5069-1.06, Tex. Rev. Civ. Stat. Ann., solely upon proof that one monthly payment exceeded the statutory limit, where over the effective period of the loan, payments did not, in the aggregate, exceed the amount authorized by law. Such an arbitrary basis of computation would, in our opinion, permit a borrower, unilaterally, to establish a usurious charge, where no such charge had been exacted or required by the lender.

194. The court had held previously that the guarantor's guarantee restricted their obligation to principal only. See note 191 *supra*.

195. This is curious in light of the modification agreement.

196. See TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971).

agreement. Merrell's argument that the modification agreement released his obligation was rejected because he had given advance consent thereto under the terms of the guaranty.¹⁹⁷

The treatment of the compensating balance in the instant case is troublesome. Although the fees were paid to independent brokers, the bank was certainly benefited by a substantial increase in its deposits. It would be more sensible to treat the broker's commission as interest because the bank received the benefit of the expenditure.

In *Moss v. Metropolitan National Bank*¹⁹⁸ the court of civil appeals held that a bank entitled to summary judgment on two promissory notes despite the fact that the defendants filed a sworn answer setting up a counterclaim for usury¹⁹⁹ and an affidavit in opposition to the bank's motion for summary judgment. The affidavit stated that the defendants were required to place a compensating balance in the amount of \$50,000 with the bank as a further consideration and charge for the loans and that the borrowers had to pay three other parties \$1,250 to make the deposit. Citing *Commerce Savings Association v. GGE Management Co.*,²⁰⁰ the court of civil appeals held that since the three other parties who received the \$1,250 to supply the compensating balance were not agents of the bank, the lender did not receive the service charge and it did not constitute interest. Hence no summary judgment evidence was presented that the loan transaction was usurious.²⁰¹ The court of civil appeals also held that the holder of a note is prima facie entitled to recover the amount of attorney's fees stipulated in a note when the note is in default.²⁰²

C. Commitment Fees

The question of whether a commitment fee constitutes interest was considered in *Gonzales County Savings & Loan v. Freeman*.²⁰³ The supreme court clearly indicated that a fee which commits a lender to make a loan at some future date is not interest.²⁰⁴ The fee purchases an option which permits the borrower to obtain a loan in the future.²⁰⁵ However, only a bona fide

197. 539 S.W.2d at 82-83. The guarantee agreement provided:

Authority and consent are hereby expressly given said Association from time to time, and without any notice to the undersigned, to give and make such extensions, renewals, indulgences, settlements and compromises as it may deem proper with respect to any of the indebtedness, liabilities and obligations covered by this guaranty, including the taking or releasing of security and surrendering of documents.

198. 533 S.W.2d 397 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

199. TEX. R. CIV. P. 93.

200. 539 S.W.2d 71 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

201. In dictum the court stated that since the note was not usurious on its face, the borrower had to "establish that there was a corrupt agreement or scheme to cover usury and that such agreement or scheme was in the contemplation of the parties." *Id.* at 81; see *Richards v. Moody*, 422 S.W.2d 200 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

202. The note provided for attorneys' fees of "not less than ten percent." *Id.* at 78. See also *Kuper v. Schmidt*, 161 Tex. 189, 338 S.W.2d 948 (1960).

203. 534 S.W.2d 903 (Tex. 1976).

204. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1971): "'Interest' is the compensation allowed by law for the use or forbearance or detention of money; provided however, this term shall not include any time price differential however denominated arising out of a credit sale."

205. See *Greever v. Persky*, 140 Tex. 64, 165 S.W.2d 709 (1942).

commitment fee is not interest. As the supreme court stated, "whether or not a charge labeled a 'commitment fee' is merely a cloak to conceal usury may depend upon whether or not the fee is unreasonable in light of the risk to be borne by the lender."²⁰⁶ The commitment fee must be intended only as compensation for having the future loan available, and for no other purpose.²⁰⁷

The supreme court also considered the argument of the Savings and Loan Association that section 5.07 of the Texas Savings and Loan Act²⁰⁸ permitted the lender to charge borrowers an open-ended initial charge for the right to receive a loan. Although the supreme court's opinion is far from clear on this point, the court seems to be saying that only "reasonable" premiums can be charged a borrower for the making of loans. On the other hand, the opinion may be read to mean that insofar as premiums are concerned, section 5.07 is unconstitutional.²⁰⁹ The former reading is more likely, however, because the opinion reflects the supreme court's concern that a Savings and Loan Association should not be allowed a convenient avenue of escape from the usury laws by simply labeling a front end charge as a premium and, therefore, not interest.

Unfortunately, a third hybrid interpretation is plausible. The supreme court could be saying that section 5.07 would be constitutional if the word "reasonable" were inserted in the statute, but that as it is now written even "reasonable" premiums are interest.²¹⁰ Of course, even if "reasonable"

206. 534 S.W.2d at 906.

207. *Id.* The court's language is probably an overstatement of its position. What seems to be intended is that a "commitment fee" label cannot be utilized to insulate a transaction from being usurious.

208. TEX. REV. CIV. STAT. ANN. art. 852a, § 5.07 (Vernon 1974):

Every association may require borrowing members to pay all reasonable expenses incurred in connection with the making, closing, disbursing, extending, readjusting or renewing of real estate loans, which such charges may be collected by the association from the borrower and retained by it or paid to any persons, including any director, officer, or employee of the association rendering services in connection therewith, or paid directly by the borrower. In addition, associations may charge premiums for making such loans as well as penalties for prepayments or late payments; provided, that unless agreed in writing to the contrary, any prepayment of principal shall be applied on the final installment of the note or other obligation until fully paid, and thereafter on the installments in the inverse order of their maturity. The expenses, fees and charges authorized herein shall be in addition to interest authorized by law, and shall not be deemed to be a part of the interest collected or agreed to be paid on such loans within the meaning of any law of this State which limits the rate of interest which may be exacted in any transaction. No director, officer or employee of an association shall receive any fee or other compensation of any kind in connection with procuring any loan for an association, except for services actually rendered as above provided. A loan settlement statement shall be furnished by or on behalf of the association to each borrower upon the closing of every real estate loan, indicating in detail the expenses, fees and charges such borrower has paid or obligated himself to pay to the association or to any other person in connection with such loan. A copy of such statement shall be retained in the records of the association.

209. See TEX. CONST. art. XVI, § 11: "The Legislature shall have authority to . . . define interest and fix maximum rates of interest."

210. "In the absence of language setting a maximum rate for such charges or an appropriate modification of the definition of 'interest' [apparently meaning a workable definition of what is not interest], such 'premium' charges will be deemed to constitute interest when seeking to determine the existence or non-existence of usury." 534 S.W.2d at 908.

premiums are not interest, further elucidation of the factors to be considered in determining the issue of reasonableness must be awaited.

VI. RECEIVERSHIP

The harsh remedy of receivership also received judicial attention during the survey period. *Continental Homes Co. v. Hilltown Property Owners' Association, Inc.*²¹¹ involved an appeal from an interlocutory ex parte order appointing a temporary receiver to take over the possession and control of the business and the real and personal property belonging to the defendants. The court of civil appeals vacated the trial court's order because the applicant-plaintiff had failed to post a bond²¹² and because an ex parte appointment of a receiver is precluded when the appointment is to take charge of the defendant's "fixed and immovable" property²¹³ unless a specific dispensation from the notice and hearing requirement is provided by statute.²¹⁴

In *Best Investment Co. v. Whirley*²¹⁵ the court considered the impropriety of the appointment of a receiver without notice and hearing in the absence of a showing of extreme emergency and imperious necessity. A judgment creditor secured the ex parte appointment of a receiver to take possession of real and personal property allegedly being transferred by the judgment debtor to avoid satisfaction of the judgment. The verified petition of the plaintiff did not demonstrate that an extreme emergency existed or that no other remedy would be adequate to protect the plaintiff. Hence the ex parte appointment of a receiver was improper.

The petition also did not reflect that the plaintiff was a lien creditor with respect to the personalty placed in receivership by the trial court's order. Although article 2293²¹⁶ does not expressly state that a creditor *must* have a specific lien or security interest in the property or fund or proceeds sought to be placed in receivership, an unbroken line of cases supplies the requirement.²¹⁷ Moreover, the interest of a general unsecured creditor who asserts

211. 529 S.W.2d 293 (Tex. Civ. App.—Fort Worth 1975, no writ).

212. See TEX. R. CIV. P. 695a:

No receiver shall be appointed with authority to take charge of property until the party applying therefor has filed with the clerk of the court a good and sufficient bond, to be approved by such clerk, payable to the defendant in the amount fixed by the court, conditioned for the payment of all damages and cost in such suit, in case it should be decided that such receiver was wrongfully appointed to take charge of such property. The amount of such bond shall be fixed at a sum sufficient to cover all such probable damages and costs. In a divorce case the court or judge, as a matter of discretion, may dispense with the necessity of a bond.

See also TEX. REV. CIV. STAT. ANN. art. 2296 (Vernon 1971):

When a receiver is appointed, he shall, before he enters upon his duties, be sworn to perform them faithfully, and shall execute a good and sufficient bond, to be approved by the court appointing him, in the sum fixed by the court, conditioned that he will faithfully discharge his duty as receiver in the action (naming it) and obey the orders of the court therein.

213. See TEX. R. CIV. P. 695; *Erwin v. Steele*, 228 S.W.2d 882 (Tex. Civ. App.—Dallas 1950, writ ref'd n.r.e.).

214. See, e.g., TEX. REV. CIV. STAT. ANN. art. 581-25-1 (Vernon Supp. 1976-77).

215. 536 S.W.2d 578 (Tex. Civ. App.—Dallas 1976, no writ).

216. TEX. REV. CIV. STAT. ANN. art. 2293 (Vernon 1971).

217. See, e.g., *Carter v. Hightower*, 79 Tex. 135, 137, 15 S.W. 223, 224 (1887); *Parr v. First State Bank*, 507 S.W.2d 579 (Tex. Civ. App.—San Antonio 1974, no writ). But see TEX. BUS. CORP. ACT ANN. art. 7.05 (Vernon Supp. 1976-77).

that his debtor has fraudulently transferred property does not rise to the dignity of a lien for the purpose of article 2293.²¹⁸

Unfortunately, the court of civil appeals also stated in its opinion that a motion to vacate the receivership made to the trial judge would have constituted a waiver of irregularities in the original appointment. Although it cited several court of civil appeals opinions for the proposition,²¹⁹ the cases only stand for the proposition that the appearance of a defendant after the appointment of a receiver cures any error in the appointment as to notice.²²⁰ Other irregularities, such as the failure of the creditor to be a secured or lien creditor, should not be waived by a motion to vacate made to the trial judge.

In *Hughes v. Marshall National Bank*²²¹ the court of civil appeals also considered the appointment of a receiver pursuant to article 2293(1) in the context of the applicant's failure to allege or prove that it had no adequate remedy at law. Since, however, the appointment of the receiver was made after notice and hearing, the court of civil appeals correctly held that "when a receiver is sought on the basis of Subdivision 1 of the statute, allegations and proof of the inadequacy of a legal remedy is not necessary."²²²

In *First Southern Properties, Inc. v. Vallone*²²³ the supreme court held that a court-appointed receiver could set aside a foreclosure sale made to a bona fide purchaser for value without actual notice of the receiver's appointment of property which he has been appointed to "manage or sell." Since such property is in *custodia legis*, the supreme court held that the sale was void despite the fact that the receiver did not file a notice of *lis pendens*.²²⁴

In *Fuller v. Neel*²²⁵ the court of civil appeals characterized as dictum and refused to follow the broad language used by the supreme court that all sales of property held in *custodia legis* are void unless authorized by the court in which the receivership proceeding is pending. Citing cases holding that an owner of property in the hands of a receiver can be encumbered by the owner,²²⁶ the court of civil appeals held that a sale of property by the property owner is not void, but merely subject to the receivership in the sense that whatever interest the owner of the property would have left after the payment of all claims allowed in the receivership proceeding could be transferred by the owner during its pendency. This reading of *Vallone* is questionable.

218. See *Waples-Platter Co. v. Mitchell*, 35 S.W. 200 (Tex. Civ. App. 1895, writ ref'd).

219. *Ramsey v. Oliver*, 246 S.W.2d 332 (Tex. Civ. App.—Dallas 1952, no writ); *Batchelor v. Pacific Fin. Corp.*, 207 S.W.2d 857 (Tex. Civ. App.—Dallas 1947, no writ); *Lacey v. Dayton Rubber Mfg. Co.*, 270 S.W. 916, 917 (Tex. Civ. App.—San Antonio 1925, writ diss'd).

220. Even this sensible limitation is questionable in the light of *Fuentes v. Shevin*, 407 U.S. 67 (1972), and its progeny.

221. 538 S.W.2d 820 (Tex. Civ. App.—Tyler 1976, no writ).

222. *Id.* at 824. See also *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940); *Richardson v. McCloskey*, 228 S.W. 323 (Tex. Civ. App.—Austin 1920, writ diss'd).

223. 533 S.W.2d 339 (Tex. 1976). See also *Moody v. State*, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, no writ).

224. See TEX. REV. CIV. STAT. ANN. arts. 6640, 6642 (Vernon 1969), enacted in 1905 to modify the harsh common law doctrine of *lis pendens*.

225. 535 S.W.2d 719 (Tex. Civ. App.—El Paso 1976, no writ).

226. See *Lorraine v. Masterson*, 193 S.W. 708 (Tex. Civ. App.—Galveston 1917, writ ref'd); *United States & Mexican Trust Co. v. Delaware W. Constr. Co.*, 112 S.W. 447 (Tex. Civ. App. 1908, no writ).