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Commercial Transactions

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COMMERCIAL TRANSACTIONS

By

Vernon O. Teofan*

DURING the survey period, the Supreme Court of Texas decided its first case under the Uniform Commercial Code since it became law in Texas on July 1, 1966. The number of appellate decisions referring to or applying provisions of the Code more than doubled. In most of these cases the courts were able to apply the provisions of the Code to the fact situations at hand without apparent difficulty. In a few cases the decision was not as easily reached. Although the legislature did not meet, the State Bar of Texas prepared a legislative program to be presented to the legislature in 1971, which includes some proposed legislation pertaining to commercial transactions.

I. SALES

Exclusive Dealing Agreements. The Texas Uniform Commercial Code expressly provides that unless otherwise agreed a lawful agreement between a seller and buyer for exclusive dealing in the kind of goods concerned imposes an obligation on the seller to use his best efforts to supply the goods and on the buyer to use his best efforts to promote their sale.¹ This provision may be misleading, for in most cases such an agreement would be violative of the Texas antitrust laws² and, therefore, void and unenforceable.³ The effect of such agreements was considered in three civil appeals cases.⁴ In each instance, the agreement was held to contravene the Texas antitrust laws, and judicial enforcement of any rights arising out of or in connection with the contract was denied. In two of the cases,⁵ the seller was denied the right to recover the purchase price of the goods sold to the buyer under the contract. In the other case⁶ the buyer was prohibited from recovering for an alleged breach of warranties contained in the contract. The courts simply left the parties where they found them. Where the contract sued upon shows illegality on its face, it has been held that affirmative pleadings to that effect are unnecessary,⁷ and the question may be raised at any stage of the proceedings or by the appellate court sua sponte.⁸

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¹ TEX. BUS. & COMM. CODE ANN. § 2.306(b) (1968).

² *Id.* §§ 15.02, 15.03.

³ *Id.* § 15.04(b).

⁴ *After Hours, Inc. v. Sherrard*, 456 S.W.2d 227 (Tex. Civ. App.—Austin 1970), *error granted*; *Lawler v. Aramco, Inc.*, 447 S.W.2d 189 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*; *Pram Laboratories, Inc. v. Pram Laboratories-South, Inc.*, 445 S.W.2d 533 (Tex. Civ. App.—Dallas 1969).

⁵ *Lawler v. Aramco, Inc.*, 447 S.W.2d 189 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*; *Pram Laboratories, Inc. v. Pram Laboratories-South, Inc.*, 445 S.W.2d 533 (Tex. Civ. App.—Dallas 1969).

⁶ *After Hours, Inc. v. Sherrard*, 456 S.W.2d 227 (Tex. Civ. App.—Austin 1970), *error granted*.

⁷ *Lawler v. Aramco, Inc.*, 447 S.W.2d 189 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

⁸ *After Hours, Inc. v. Sherrard*, 456 S.W.2d 227 (Tex. Civ. App.—Austin 1970), *error granted*.

The committee on antitrust matters of the section on corporation, banking, and business law of the State Bar of Texas is of the opinion that the *in pari delicto* doctrine embodied in Texas antitrust laws operates as a trap for the unwary and an arbitrary source of unjust enrichment for many. Accordingly, the committee has proposed an amendment to the antitrust laws under which obligations incurred under such violative agreements may be enforceable unless such judicial relief would enforce the precise conduct made unlawful, or unless the court finds as a matter of law that the contract is otherwise unenforceable.⁹

Formation of the Contract of Sale. The provisions of article 2 of the Code which relate to the formation and modification of the contract of sale of goods¹⁰ represent a major departure from pre-Code contract law and its strict, technical requirements on offer and acceptance, definiteness, consideration, and parol evidence. Generally, a contract of sale can be made in any manner that is sufficient to show an agreement—including conduct of the parties and usage of trade. This is so even though one or more terms are left open, the exact time of its making cannot be determined,¹¹ and the writings of the parties do not establish a contract.¹² A written agreement may be supplemented by evidence of consistent additional terms unless the court finds the writing was intended as a complete and exclusive statement of the terms of the agreement.¹³ Such a situation was presented in a case¹⁴ where a buyer of yearling steers rejected delivery on the basis that the seller had failed to feed the steers pursuant to an oral agreement entered into prior to the execution of the written contract of sale which was silent as to the feeding of the cattle. The court held that where (1) it was established that neither seller nor buyer intended that the written agreement embody all the terms of the transaction, (2) it was the usual practice to have an agreement as to the manner of feeding yearling steers intended for future delivery, and (3) that such agreements were usually oral and collateral to any written instrument, parol evidence was admissible to establish the oral agreement as to the rations to be fed the steers prior to their delivery. Since the written agreement evidenced a contract for the sale of goods, was signed by the party to be charged, and specified a quantity, it was held that the statute of frauds provision of the Code¹⁵ did not prevent enforcement of the additional oral terms.

In another case,¹⁶ the court, in determining whether the contract as made had been for concrete containing five sacks or four-and-a-half sacks of cement per yard, considered the conduct of the parties in performing the contract and held that where the buyer had paid billings of the seller

⁹ Goldsmith, *Proposed Amendments to the State Antitrust Laws*, 33 TEX. B.J. 975-77 (1970).

¹⁰ TEX. BUS. & COMM. CODE ANN. §§ 2.201-210 (1968).

¹¹ *Id.* § 2.204.

¹² *Id.* § 2.207(c).

¹³ *Id.* § 2.202.

¹⁴ *Conner v. May*, 444 S.W.2d 948 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*

¹⁵ TEX. BUS. & COMM. CODE ANN. § 2.201 (1968).

¹⁶ *Droemer v. Transit Mix Concrete of Gonzales, Inc.*, 457 S.W.2d 332 (Tex. Civ. App.—Corpus Christi 1970).

with actual and constructive knowledge that they were based upon four-and-a-half sacks, such was the actual agreement of the parties.

Implied Warranties. The recent Texas supreme court decisions which extend the doctrine of implied warranty of suitability to cases in which a defective product caused physical harm to the user or damage to his property despite the absence of privity of contract were reviewed in previous surveys.¹⁷ During the present survey period, the Houston court of civil appeals held that the doctrine did not extend to cases involving only commercial loss where there was no physical harm to person or property, but that the principles of the law of sales controlled in which privity of contract is required.¹⁸

Unconscionable Contracts. Under the Code, if the court finds a sales contract or any clause thereof unconscionable as a matter of law at the time it was made, it may refuse to enforce the contract or the unconscionable clause or so limit the application of the clause as to avoid any unconscionable result.¹⁹ While the provision relates only to contracts for the sale of goods,²⁰ the Eastland court of civil appeals applied it to a real estate transaction. The court held that an "exclusive right to sell" contract provision under which a realtor was entitled to a commission on the sale of property sold by the vendor during the ninety-day period following the expiration of the contract if the purchaser's attention was called to the property by the realtor prior to the contract's expiration, was not unconscionable at the time it was made.²¹

II. SECURED TRANSACTIONS

Motor Vehicles. The first decision²² of the Texas supreme court pertaining to the Uniform Commercial Code involved a conflict between provisions of the Code²³ and the Texas Certificate of Title Act.²⁴ In the consolidated cases before the court, an automobile dealer had sold new, unregistered motor vehicles out of inventory to other dealers. The financing company underwriting the seller had been granted a security interest in the vehicles by the seller and had timely filed an appropriate financing statement with the secretary of state. In addition, it had retained the manufacturer's certificates of origin and they were never delivered to the purchasing dealers. The finance company contended that section 45 of the Act,²⁵ which provides that the rights of a mortgagee are not affected by

¹⁷ Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 24 Sw. L.J. 79, 85-86 (1970); Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 23 Sw. L.J. 88, 94 (1969); Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 79, 84-85 (1968).

¹⁸ *Melody Home Mfg. Co. v. Morrison*, 455 S.W.2d 825 (Tex. Civ. App.—Houston 1970).

¹⁹ TEX. BUS. & COMM. CODE ANN. § 2.302(a) (1968).

²⁰ *Id.* § 2.102.

²¹ *Kaye v. Coughlin*, 443 S.W.2d 612 (Tex. Civ. App.—Eastland 1969).

²² *Associated Discount Corp. v. Rattan Chevrolet, Inc.*, 14 Tex. Sup. Ct. J. 16 (1970).

²³ TEX. BUS. & COMM. CODE ANN. §§ 1.101-9.507 (1968).

²⁴ TEX. PEN. CODE ANN. art. 1436-1 (1953).

²⁵ *Id.* art. 1436-1, § 45.

exposure of the vehicle for sale, governed and that consequently the purchasers acquired the vehicles subject to its security interest. The purchasing dealers, on the other hand, asserted that they were buyers in the ordinary course of business and that under section 9.307 of the Code²⁶ they took title free and clear of the security interest. While no part of the Act was expressly repealed by the Code, the Code did provide for the repeal of all inconsistent acts and parts of acts.²⁷ After noting that the purpose of the Code was to simplify, clarify, and modernize the law governing commercial transactions, that it was intended as a unified coverage of its subject matter, and that it expressly governed some transactions in motor vehicles, the supreme court held that the provisions of the Code were controlling and would afford protection to a buyer of the vehicles in the ordinary course of business. The court also concluded that the purchasing dealers were not necessarily prevented from being buyers in the ordinary course of business because they had purchased at wholesale rather than in a retail transaction. Since, under the Act, the transfer of the manufacturer's certificates of origin was not essential to the validity of the sale from dealer to dealer,²⁸ the court expressly declined to decide the question of whether the failure to comply with some requirement of the Act essential to the validity of a sale of a motor vehicle would prevent the purchaser from being a buyer in the ordinary course of business.

To eliminate the risk of confusion and the possible miscarriage of justice which may result from the continued presence of provisions of the Texas Certificate of Title Act which are inconsistent with those of the Code, the State Bar of Texas has proposed certain remedial legislation. Specifically, the legislation seeks to remove from the Act those provisions which are impliedly repealed by the Code, make its provisions and terminology consistent with the Code's, and make it clear that in the event of any conflict between the Act and the Code, the Texas Uniform Commercial Code controls.²⁹

Conflict of Laws. The issue of which jurisdiction's laws apply when property subject to a security interest in one jurisdiction is removed and sold to an unknowing purchaser in another jurisdiction was considered in two civil appeals decisions. The first case³⁰ involved conflicting claims to equipment of a type normally used in more than one jurisdiction. After the plaintiff had perfected its security interest under the New Mexico Uniform Commercial Code, the debtor moved the equipment to Texas where it was sold to the defendant. The plaintiff then filed suit to foreclose its security interest in the equipment. The jury found that the chief place of business of the debtor was in New Mexico when the financing

²⁶ TEX. BUS. & COMM. CODE ANN. § 9.307 (1968).

²⁷ Ch. 721, § 10-102, [1965] Tex. Laws 179.

²⁸ Motor Inv. Co. v. Knox City, 141 Tex. 530, 174 S.W.2d 482 (1943).

²⁹ Ruud, *Amendment of the Texas Certificate of Title Act To Conform It to the Uniform Commercial Code*, 33 TEX. B.J. 968 (1970).

³⁰ Moody Day Co. v. Westview Nat'l Bank, 452 S.W.2d 572 (Tex. Civ. App.—Waco 1970), error ref. n.r.e.

statement was filed there. The court of civil appeals affirmed the plaintiff's judgment of foreclosure and held that the prior perfection under New Mexico law remained effective. The governing Code section was section 9.103(b),³¹ which provides that the law of the jurisdiction where the debtor's chief place of business is located governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to goods of a type which are normally used in more than one jurisdiction.

The second case³² involved the conflicting claims of an Oklahoma secured party and a Texas purchaser to an automobile which had been surreptitiously removed from Oklahoma to Texas. The security interest was perfected under Oklahoma law which did not require its notation on the certificate of title. Thereafter, the vehicle was taken to Texas, and a Texas certificate of title was issued on it which did not reflect the Oklahoma security interest. Ultimately it was resold to the Texas purchaser. Within four months of the vehicle's removal to Texas, the secured party discovered its location and caused it to be repossessed. In a suit by the purchaser against the secured party for conversion, the secured party contended that the repossession was lawful because its Oklahoma security interest continued perfected in Texas for a four-month period under subsection (c) of section 9.103 of the Code.³³ The purchaser asserted that subsection (c) was not applicable since the security interest was not noted on the Texas certificate of title, as required under Texas law as a condition to perfection, and since subsection (d) of section 9.103 provides, notwithstanding subsection (c), that if the property is covered by a certificate of title issued under a statute of Texas or any other jurisdiction that requires indication on the certificate as a condition of perfection, the law of the jurisdiction issuing the certificate controls. The court of civil appeals rejected the contention and held that since Oklahoma law did not require notation of the security interest on a certificate of title, subsection (d) did not modify the effect and continuation of the superior Oklahoma security interest. The supreme court has granted the purchaser's application for writ of error.

Classification of Goods. At the time the security interest is taken, a proper classification of collateral into one of the categories set out in the Code³⁴ is vitally important in many situations, since it governs the method and the effect of perfection of the security interest.³⁵ Generally, proper classification of the collateral involves a consideration of the capacity of the debtor and the primary use to be made of the property.³⁶ For example, a chair is "inventory" in the hands of a dealer, "consumer goods" in the

³¹ TEX. BUS. & COMM. CODE ANN. § 9.103(b) (1968).

³² *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 454 S.W.2d 465 (Tex. Civ. App.—San Antonio 1970), *error granted*.

³³ TEX. BUS. & COMM. CODE ANN. § 9.103 (1968).

³⁴ *Id.*, §§ 9.105-.109.

³⁵ *Id.*, §§ 9.301-.318.

³⁶ C. BUNN, H. SNEAD, & R. SPEIDEL, AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE 328-36 (1964).

hands of a householder, and "equipment" in the hands of a doctor. In a case³⁷ involving a haybind in the hands of a retail business owner who operated a commercial hay cutting and baling business in connection with his retail business, the Waco court of civil appeals held the "primary capacity and use" test inapplicable. There, the seller of the haybind³⁸ took a security interest in the haybind to secure the purchase price but did not file a financing statement. Thereafter, the debtor gave his bank a security interest in the haybind, and the bank filed its financing statement with the secretary of state. The seller's assignee contended that the haybind was "farm equipment" and that under section 9.302 of the Code³⁹ its security interest was perfected without filing a financing statement. The bank argued that since the debtor was not a farmer and the haybind was used in connection with his retail business, it should be classified as equipment used in a retail store operation, and that, under section 9.401 of the Code,⁴⁰ the filing of a financing statement in the office of the secretary of state was necessary to perfect the security interest. The court held that since the haybind was designed and marketed for the purpose of mowing and conditioning hay and since the debtor bought it for and used it for that purpose, the haybind was "farm equipment," and the seller's security interest was perfected without filing.

Non-Judicial Foreclosure. The Code specifically provides for and sets down minimum requirements for non-judicial foreclosure sales of collateral that is subject to a security interest after default.⁴¹ In a case⁴² in which it was contended that the foreclosure sale was invalid because the debtor was not sent notice of the sale, the court of civil appeals upheld the sale on the basis that the evidence showed that the debtor waived such notice and consented to and agreed to the sale and its terms. The holding of waiver is not consistent with the provisions of the Code⁴³ which provide that the rules therein stated dealing with disposition of collateral and requiring that notice be sent to the debtor may not be waived or varied to the extent that they give rights to the debtor and impose duties on the secured party. The court further held that the debtor, by his actions subsequent to the sale, was estopped from complaining of the foreclosure sale. However, even in the absence of an estoppel, the sale would not be invalid.⁴⁴ Instead, the debtor would have a right to recover from the secured party for any loss caused by the failure of the secured party to give him the required notice.⁴⁵

³⁷ *Citizens Nat'l Bank v. Sperry Rand Corp.*, 456 S.W.2d 273 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

³⁸ The haybind sold for \$2,366. TEX. BUS. & COMM. CODE ANN. § 9.302(a)(3) (1968) provides that a financing statement is not required to perfect a purchase money security interest in farm equipment priced not in excess of \$2,500.

³⁹ TEX. BUS. & COMM. CODE ANN. § 9.302 (1968).

⁴⁰ *Id.* § 9.401.

⁴¹ *Id.* §§ 9.504, 9.505.

⁴² *Texas Land Drilling Co. v. First State Bank & Trust Co.*, 445 S.W.2d 571 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

⁴³ TEX. BUS. & COMM. CODE ANN. § 9.501(c)(2) (1968).

⁴⁴ *Id.* § 9.504(d).

⁴⁵ *Id.* § 9.507(a).

On occasion, after a non-judicial foreclosure sale, the secured party is sued by the debtor or a third person for conversion of the collateral. In addition to actual damages, substantial punitive damages may be sought. The supreme court has now made it clear that proof of an unlawful or wrongful foreclosure, or that the secured party acted in bad faith under circumstances showing improper motive, is not sufficient to support recovery of exemplary damages—but that the act must also partake of a wanton and malicious nature.⁴⁶ In addition, the exemplary damages, when awarded, must be reasonably proportioned to the actual damages found.⁴⁷

Superiority of Possessory Liens. Under the Code, a lien given by statute or rule of law upon goods in the possession of a person furnishing services or materials with respect to the goods in the ordinary course of his business is given priority over a prior perfected security interest, unless the lien is statutory and the statute expressly provides otherwise.⁴⁸ In a case of first impression,⁴⁹ the Fifth Circuit construed similar provisions contained in the Federal Tax Lien Act of 1966.⁵⁰ The court held that a harvester and ginner of the taxpayer's cotton had equitable liens on the cotton under Texas law, which secured the reasonable price of their services, superior to previously filed federal tax liens. This was in spite of a lack of actual possession, because local custom was for the cotton gin to hold warehouse receipts representing the ginned cotton until the cotton was sold, to pay off all charges against the cotton with the proceeds of sale, and then to remit to the landowner only the net amount remaining. This procedure was on the basis of an implied agreement that the harvester and ginner would maintain possession of the cotton until charges for harvesting and ginning were paid. In reaching such a holding, the court concluded that "improvement" as used in the Act required nothing more than that the lien claimant add value to the property, and that in circumstances in which the improvement required a chain of improvers, the possession of one was the possession of all so long as those in the chain intend to withhold the property from the owner until all improvement charges against the property are satisfied. Actual possession was not required and constructive possession of goods in storage was sufficient to meet the continuous possession requirement of the Act.

III. NEGOTIABLE INSTRUMENTS

Time Payable. While it is clear that the four-year statute of limitations⁵¹ begins to run on an action on a note from the date the note becomes due and payable, the date the note becomes due is not always easily deter-

⁴⁶ *Southwestern Inv. Co. v. Alvarez*, 453 S.W.2d 138 (Tex. 1970). See also *Ogle v. Craig*, 14 Tex. Sup. Ct. J. 189 (1971).

⁴⁷ *Southwestern Inv. Co. v. Neeley*, 455 S.W.2d 785 (Tex. Civ. App.—Fort Worth 1970), error dismissed w.o.j.

⁴⁸ TEX. BUS. & COMM. CODE ANN. § 9.310 (1968).

⁴⁹ *Citizens Co-op Gin v. United States*, 427 F.2d 692 (5th Cir. 1970).

⁵⁰ 26 U.S.C. § 6323(b)(5) (1966).

⁵¹ TEX. REV. CIV. STAT. ANN. art. 5527 (1958).

mined. During the survey period, four courts of civil appeals considered due date issues. In the first case⁵² the Dallas court held that the maker, who had asserted under oath that the note had been extended by the payee in a prior action, was judicially estopped from contending in the subsequent suit that the statute of limitations ran from the original due date of the note. In the second case⁵³ the note was dated September 30, 1964, and provided in its body that it was payable on demand. However, it bore a marginal notation which provided for thirty-six monthly payments to commence on November 15, 1964. In answer to a suit filed on January 21, 1969, the maker contended that the demand provisions of the note controlled, under the rule that where there is a discrepancy between that which is noted in the margin and that which is in the body of a note, the latter controls. Consequently, the maker claimed the payee's suit was barred by limitations. The court rejected this contention and held that the provisions were not necessarily in conflict. The court reasoned that the note was capable of being construed as obligating the payor to make installment payments and giving the payee the right to accelerate payment of the whole note upon notice and demand.

In the third case⁵⁴ the Tyler court considered a note dated March 25, 1961, said note providing that interest was payable from date bi-weekly, and that the note was payable in seventy-eight installments of \$38.46 each. No date or dates were set out for the payment of any installment. The trial court found that the note was due and payable in bi-weekly installments, the first payment to be due on or before April 10, 1961, and subsequent payments each two weeks thereafter. The court of civil appeals disagreed, holding that since there was no maturity date or dates or fixed time of payment of any installment the note was payable on demand. The appellate court further found that the provision for the bi-weekly payment of interest did not fix the time for the payment of the principal installments.

The fourth case⁵⁵ involved an unusual situation. On May 21, 1969, the jury found that the loans sued upon were not due as originally made until September 1, 1969, and the trial court rendered final judgment in the plaintiff's favor on September 8, 1969. The defendant contended that under the jury's finding the suit was prematurely brought and should have been dismissed. No statement of facts was contained in the record on appeal. The court of civil appeals affirmed the judgment on several grounds, including a deemed finding by the trial court that the debt became due by reason of an anticipatory breach of the loan agreement between the plaintiff and the defendant which occurred prior to the date of trial. Such a deemed finding is contrary to the established rule that the doctrine of anticipatory breach applies only to bilateral contracts and not to mere promises to pay money.⁵⁶

⁵² *Yarber v. Pennell*, 443 S.W.2d 382 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*

⁵³ *Greiner v. Rogers*, 450 S.W.2d 665 (Tex. Civ. App.—Eastland 1969).

⁵⁴ *Davis v. Dennis*, 448 S.W.2d 495 (Tex. Civ. App.—Tyler 1969).

⁵⁵ *Sanders v. Machicek*, 453 S.W.2d 511 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

⁵⁶ *Teofan, Commercial Transactions, Annual Survey of Texas Law*, 23 Sw. L.J. 88, 96 (1969).

Liability of Parties. Under the Code, commercial paper may be signed by an authorized representative and such representative will not be personally obligated if the instrument shows that he signed in a representative capacity and indicates the name of the person represented. If neither fact is shown, he is personally obligated, and if only one fact is shown and not the other, he may be personally obligated unless otherwise established between the immediate parties.⁵⁷ Thus, in a venue case⁵⁸ personal liability was found where the signatory's "office" or representative capacity was absent. The instruments were signed:

s/ *Roy Vickers*
Roy Vickers

Vickers Construction Company.

When a party signs an instrument in any capacity for the purpose of lending his name to another party to it, he is an accommodation party.⁵⁹ Generally, he is liable on the instrument in the capacity in which he has signed unless the holder is the party accommodated. If he pays the instrument, he has a right of recourse against the accommodated party.⁶⁰ The rights and liabilities of accommodation parties were considered in three civil appeals decisions. In the first decision⁶¹ the accommodation party's defense that the plaintiff was the party accommodated was rejected by the jury and the judgment affirmed under pre-Code law.

In the second case⁶² a promissory note was payable to a bank and signed as follows:

"Candy Lane" Margaret Van Kleef dba Headhunters, Inc. [typed]

BY s/ *Candy Lane*

BY s/ *Marge Van Kleef*

s/ *John Shamaley*

s/ *Louis J. Rubin.*⁶³

This note was secured by a security agreement signed only by Lane and Van Kleef specifically providing that Candy Lane and Margaret Van Kleef, dba Headhunters, Inc. was the debtor. After the note became delinquent, Rubin paid off the balance and brought suit against the other signatories. He recovered judgment by default against Lane and Van Kleef for the full amount of the balance due, and the court directed a verdict for contribution against Shamaley for one-half of the balance. Shamaley contended that he was an accommodation maker and that Rubin was the party accommodated since Rubin arranged for the note and received part of its proceeds in payment for equipment which he had sold to Headhunters, Inc. After reviewing the provisions of the Code relating to accommodation parties, the court of civil appeals held that under the instruments in ques-

⁵⁷ TEX. BUS. & COMM. CODE ANN. § 3.403 (1968).

⁵⁸ *Vickers v. Fireman's Fund Am. Ins. Co.*, 445 S.W.2d 530 (Tex. Civ. App.—Waco 1969), error dismissed w.o.j.

⁵⁹ TEX. BUS. & COMM. CODE ANN. § 3.415 (1968).

⁶⁰ *Id.*

⁶¹ *Donald v. Fort Worth Nat'l Bank*, 445 S.W.2d 598 (Tex. Civ. App.—Fort Worth 1969).

⁶² *Shamaley v. Rubin*, 454 S.W.2d 776 (Tex. Civ. App.—El Paso 1970), error ref. n.r.e.

⁶³ *Id.* at 778.

tion Rubin and Shamaley were clearly sureties for the principal obligors, Lane and Van Kleef, and were jointly and severally liable in such capacity. Therefore, Rubin was entitled to the judgment of contribution against Shamaley for one-half of the amount paid on the instrument.

In the third case⁶⁴ it was held that until the accommodation maker is required to pay the instrument his rights against the party accommodated are merely contingent. Therefore, he would not be entitled to an injunction preventing the accommodated party from disposing of property pending the accommodation maker's action to cancel the notes.

In another case⁶⁵ the court upheld the venue of a suit filed in Dallas County against a Wichita County resident who had endorsed with recourse notes payable at Dallas, Texas. The court applied the provisions of the Code⁶⁶ that every endorser, if the note is dishonored, and unless the endorsement otherwise specifies, agrees to pay the instrument according to its tenor at the time of his endorsement.

Holder in Due Course. The rights and burden of proof of a holder in due course under the Code were considered in a civil appeals case.⁶⁷ In a suit by an assignee to recover on a note and lien instrument securing it, the maker raised defenses of failure of consideration, fraud and usury. In support of a motion for summary judgment, the assignee submitted sworn pleadings and depositions establishing the following facts: (1) that the assignee had purchased the note from the payee for value in good faith and without notice of any defense against it, and (2) the assignee had received a completion certificate from the maker certifying that the work for which the note was given had been satisfactorily completed and accepted, that no statement or promise had been made regarding the note which in any way would affect its payment, that there were no counterclaims to the obligation, and that the note would be paid according to its terms. In addition, a defendant admitted receiving a payment book and making payments on the note for approximately a year and a half. Summary judgment was rendered for the holder. After reviewing the summary judgment evidence, the court of civil appeals held that the plaintiff had discharged the burden placed on it under the Code⁶⁸ to establish that he was in all respects a holder in due course, and that, therefore, his rights were not subject to being defeated by the defenses alleged. The supreme court has granted the maker's application for writ of error.

Drafts. In another venue case⁶⁹ it was held that the payee of drafts drawn on the defendant by one of defendant's creditors failed to prove that it had a cause of action against the defendant. The decision was based on the

⁶⁴ Garland v. Shepherd, 445 S.W.2d 602 (Tex. Civ. App.—Dallas 1969).

⁶⁵ Laukhuf v. Associates Discount Corp., 443 S.W.2d 725 (Tex. Civ. App.—Dallas 1969).

⁶⁶ TEX. BUS. & COMM. CODE ANN. § 3.414 (1968).

⁶⁷ Hidalgo v. Surety Sav. & Loan Ass'n, 457 S.W.2d 341 (Tex. Civ. App.—El Paso 1970), error granted.

⁶⁸ TEX. BUS. & COMM. CODE ANN. §§ 3.302, 3.307(c) (1968).

⁶⁹ Lubbock Nat'l Bank v. Producer's Grain Corp., 452 S.W.2d 957 (Tex. Civ. App.—Eastland 1970).

provisions of the Code that no person is liable on an instrument unless his signature appears thereon, a draft does not of itself operate as an assignment of any funds in the hands of the drawee, and the drawee is not liable on a draft until he accepts it.

IV. INVESTMENT SECURITIES

The first appellate decision⁷⁰ under section 8 of the Code involved a suit by a client against a stock brokerage firm for failure to perform under an agreement to deliver stock. On August 19, 1966, the client requested the stock brokerage firm to purchase thirty shares of common stock of Westec Corporation at the market price and have the certificate issued in his name and mailed to him. That same day the firm purchased the stock and mailed a confirmation notice of the purchase to the client. This confirmation stated in part that all transactions were subject to the construction, rules, regulations, customs, usages, rulings, and interpretations of the stock exchange. On August 25, 1966, the client paid for the stock. On August 29, 1966, before the stock was actually transferred on the books of the transfer agent for Westec, the stock exchange suspended all trading in the stock, and the transfer agents were enjoined by a federal district court from making further transfers. Each month thereafter the firm mailed its statement to the client reflecting that it held such shares for the client's account. The trial court entered judgment for the stock brokerage firm and the plaintiff appealed. The court of civil appeals held that under the provisions of the Code⁷¹ that delivery to the purchaser occurs when the broker sends a confirmation of the purchase and by book entry or otherwise identifies a specific security in the broker's possession as belonging to the purchaser, delivery of the shares to the plaintiff was complete although the physical act of delivering the certificate could not be performed until a later date due to the suspension and injunction procedures. In reply to the client's contention that the trial court erred in finding that the transaction was subject to all of the terms of the confirmation statement, the appellate court referred to section 8.319 of the Code.⁷² That section provides that a contract for the sale of securities is not enforceable unless a written confirmation of the sale and purchase sufficient against the sender has been received within a reasonable time by the other party and he has failed to send a written objection to its contents within ten days after its receipt. In affirming the judgment of the trial court, the appellate court noted that the client was in constructive receipt of the stock from the date of such notice. The client could have sold or disposed of the stock at any time thereafter had he chosen to do so. Any loss sustained, the court concluded, was not as a result of the failure of the broker to deliver the certificate, but of the loss in market value of the stock and the action of the

⁷⁰ *Weiss v. Dempsey-Tegeler & Co.*, 443 S.W.2d 934 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

⁷¹ TEX. BUS. & COMM. CODE ANN. § 8.313(a)(3) (1968).

⁷² *Id.* § 8.319.

stock exchange and the federal district court in restraining the actual transfer of the shares on the books of the corporation.

V. CREDIT REPORTS

In today's far-reaching credit economy, the use of credit reports in connection with commercial transactions has become a practical necessity. Most businesses dealing in credit transactions retain the services of retail or commercial credit reporting agencies. Unfortunately, the information furnished by these agencies is not always complete or accurate.

In *Dun & Bradstreet v. O'Neil*⁷³ Dun & Bradstreet had issued a "special notice" advising that Alvin Truman O'Neil had filed a voluntary petition in bankruptcy. Pursuant to its "continuing service" contract, Dun & Bradstreet sent this notice to all subscribers who had requested credit information on Alvin Truman O'Neil during the preceding twelve months. This information was false. The bankruptcy petition had been filed by a brother, Alvin Numan O'Neil. In answer to the libel action brought by Alvin Truman O'Neil, Dun & Bradstreet alleged conditional privilege as a defense. At the close of the plaintiff's evidence, the trial court ordered an instructed verdict for the defendant. The court of civil appeals first reviewed the general rules of law under which credit reports furnished in good faith to those having a legitimate interest in the information are conditionally privileged. Such privilege is lost if the notice is sent indiscriminately to subscribers generally, or to those not interested in the condition and financial standing of the person reported upon, or if the notice is published with actual malice. The court then held that the defendant's conditional privilege had not been shown to exist because there was no showing that the subscribers to whom the "special notice" had been sent had any interest in the financial status of the plaintiff on the date the "special notice" was sent out, even though they had inquired about such status during the preceding twelve months. Accordingly, it reversed the judgment of the trial court and remanded the cause for re-trial. The supreme court, while agreeing with the general rules of law expressed by the court of civil appeals, held that the defendant's one year "continuing service" policy was sufficient to meet the requirement that the libelous statement be sent only to "persons interested at the time the information is given," and that such statements were therefore conditionally privileged. The court further held that failure to investigate the truth or falsity of the statement or negligence in failing to verify the information before it was published is not sufficient to raise a fact issue regarding actual malice, *i.e.*, that the defendant acted with knowledge that the statement was false, or with reckless disregard of whether it was false or not. Therefore, the supreme court affirmed the judgment of the trial court.⁷⁴

⁷³ 448 S.W.2d 153 (Tex. Civ. App.—El Paso 1969), *rev'd*, 456 S.W.2d 896 (Tex. 1970).

⁷⁴ *Id.*

VI. RECOVERY OF ATTORNEYS' FEES

In most lawsuits involving commercial transactions, the creditor sues to recover, in addition to his basic claim, attorneys' fees under the provisions of a statute or of the note or contract sued upon.

Statutory Provisions. Under article 2226⁷⁵ a reasonable amount as attorneys' fees may be recovered, under specific conditions, by a person having a valid claim against a person or corporation for personal services rendered, labor done, or material furnished. In *Tenneco Oil Co. v. Padre Drilling Co.*⁷⁶ a divided supreme court held that a corporation cannot have a claim for "personal services rendered" or for "labor done" within the meaning of the statute. After reviewing the legislative history of article 2226, the majority of the court was convinced that it was intended to apply only to claims for personal services rendered, labor done, or materials furnished by the claimant for or to the person against whom the claim was asserted. When a corporation's employees render personal services and do labor in the performance of the corporation's contracts, such labor is done and such services rendered, the court reasoned, not for the person against whom the claim is asserted, but rather for the corporation asserting such claim. In so ruling, the court expressly disapproved numerous conflicting decisions of the courts of civil appeals.

Contractual Provisions. In an action to recover the balance due on a note⁷⁷ secured by a deed of trust, the note provided for the recovery of reasonable attorneys' fees, and the deed of trust provided for the recovery of ten per cent of the amount of the indebtedness as attorneys' fees. In its petition, the plaintiff prayed for the recovery of reasonable attorneys' fees, alleging the provisions of the note. No reference was made to the ten per cent provision contained in the deed of trust. The trial court awarded attorneys' fees in the amount of ten per cent of the balance owing. The court of civil appeals deleted the award of the attorneys' fees, holding that there was no evidence in the record that the ten per cent figure or any other amount was a reasonable fee, and that there was no pleading to support a recovery based upon the provision in the deed of trust.

When reasonable attorneys' fees are recoverable, what constitutes a reasonable fee is a question of fact. The amount is to be based upon what would be reasonable for a litigant himself to pay his own attorney prose-

⁷⁵ TEX. REV. CIV. STAT. ANN. art. 2226 (1964), which provides:

Any person having a valid claim against a person or corporation for personal services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured, or suits founded upon a sworn account or accounts, may present the same to such person or corporation or to any duly authorized agent thereof; and if, at the expiration of thirty (30) days thereafter, the claim has not been paid or satisfied, and he should finally obtain judgment for any amount thereof as presented for payment to such person or corporation, he may also recover, in addition to his claim and costs, a reasonable amount as attorney's fees, if represented by an attorney.

⁷⁶ 453 S.W.2d 814 (Tex. 1970).

⁷⁷ *B & B Pharmacy & Drug, Inc. v. Lake Nat'l Bank*, 449 S.W.2d 340 (Tex. Civ. App.—Waco 1969), error dismissed *w.o.j.*

cuting the case and not upon a speculative or contingent fee based upon the uncertainty of the litigation.⁷⁸

VII. CONCLUSION

The Uniform Commercial Code has now been the law of Texas for approximately four and one-half years. While every appellate decision thus far may be characterized as a case of first impression in Texas, only two of these decisions have any particular significance.⁷⁹ Both involved liens on motor vehicles and apparent conflicts between the provisions of the Code and other legislation. Such conflicts will probably be cured by remedial legislation during the coming year. As anticipated, the number of decisions under the Code has increased but remains relatively small. While it may yet be too early to make any definite conclusion, it does appear that the Code may be succeeding in its objective of clarifying the law and reducing litigation.

⁷⁸ *Smith v. Davis*, 453 S.W.2d 340 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

⁷⁹ *Associated Discount Corp. v. Rattan Chevrolet, Inc.*, 14 Tex. Sup. Ct. J. 16 (1970); *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 454 S.W.2d 465 (Tex. Civ. App.—San Antonio 1970), *error granted*.