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Lennart V. Larson

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COMMERCIAL TRANSACTIONS

by

Lennart V. Larson*

A VARIETY of questions in the area of commercial law came before the Texas courts during the past year. None of the cases was of earth-shaking character. Increasingly, decisions are coming down which interpret and apply the Uniform Commercial Code (UCC).¹

I. NEGOTIABLE INSTRUMENTS

Forgery. In *Exchange Bank & Trust Co. v. Kidwell Construction Co.*² a trusted employee and officer of the plaintiff Kidwell forged sixty-five checks on defendant bank over a period of three years. The checks were made payable to the employee, and \$63,000 was paid out. Monthly statements were sent by the bank to Kidwell, along with cancelled checks. Kidwell secured a judgment against the bank for \$25,725, the amount of money paid out on the forged checks during the year preceding notice of the forgeries. The judgment was affirmed on appeal.

Section 4.406(d) of the UCC states: "Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer . . . discover and report his unauthorized signature . . . is precluded from asserting against the bank such unauthorized signature . . ." Kidwell conceded that this provision barred recovery for losses incurred more than a year before it gave notice of the forgeries. On appeal from the judgment in the trial court, the bank urged that Kidwell's negligence barred all recovery. The fraud was accomplished because the dishonest employee had access to all of Kidwell's books and received the monthly bank statements. Some of the forged checks were taken from Kidwell's checkbook. The stubs for these were marked as voided. Others were written on blank checks secured from the printer of the checks. Each month, on receiving the bank statement, the employee removed the forgeries. No other employee or officer attempted to reconcile the cancelled checks with the check stubs or statements.

Section 3.406 of the UCC declares: "Any person who by his negligence substantially contributes . . . to the making of an unauthorized signature is precluded from asserting the . . . lack of authority against . . . a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business."⁴ Section 4.406(a) imposes upon a customer the duty to examine with reasonable care and promptness statements and items sent him, in order to discover unauthorized signatures. Subsection (b) precludes a customer from asserting that a signature was unauthorized if he has violated the duty imposed in subsection (a). Further,

* B.S., J.D., University of Washington; S.J.D., University of Michigan. Professor of Law, Southern Methodist University.

¹ TEX. BUS. & COMM. CODE ANN. tit. I (1968).

² 463 S.W.2d 465 (Tex. Civ. App.—Tyler), *error ref.*, 472 S.W.2d 117 (Tex. 1971).

³ TEX. BUS. & COMM. CODE ANN. § 4.406(d) (1968).

⁴ *Id.* § 3.406.

the preclusion operates with respect to subsequent forged items, after the first forged item and statement are received by the customer and retained for fourteen days. Nevertheless, under section 406(c) the preclusion under subsection (b) does not apply "if the customer establishes lack of ordinary care on the part of the bank in paying the item(s)."⁵

The court was of the opinion that Kidwell had failed in its duty to use reasonable care in discovering the forgeries. But the trial court had also found that the bank was negligent in failing to detect that the checks had been forged. Indeed, there was evidence that the bank did not take the time to compare the signatures on all the checks it paid. Accordingly, Kidwell was not precluded from recovering payments on the forged checks for the year in question. The court stated that this result was consistent with the rule that prevailed before the UCC was enacted.

Gambling as a Defense. Two cases dealt with gambling as a defense to suit on a written obligation.⁶ In one case a check for \$25,000 was sued on; the other involved a nonnegotiable writing in the amount of \$50,000. In neither case was the plaintiff a holder in due course. The evidence established that chips and other tokens of money were furnished the defendants for the purpose of gambling. This activity took place in Nevada, and, needless to add, the defendants were losers. In both cases the defendant had summary judgment, which was affirmed on appeal.

It is clear that the courts of this state cannot be used to enforce debts arising out of gambling transactions. This is true whether the transactions occur within the state (and are unlawful) or in a state where they are permitted. The rule applies when a gambling proprietor loans money which is used to purchase chips and other tokens with which to participate in gambling transactions.⁷

Statute of Limitations on Checks. In *Ettl v. Rowe*⁸ a holder of a dishonored check sued the drawer. The check was dated December 8, 1962, and dishonored on December 18, 1962. Suit was commenced on December 12, 1966. Judgment was entered for the holder, which was affirmed on appeal. The question in the case was whether the two-year or four-year statute of limitations would be operative.⁹ The latter statute applies to "actions for debt where the indebtedness is evidenced by or founded upon any contract in writing."¹⁰ The court had no difficulty in deciding that the four-year statute applies to suits on checks. The plaintiff had no cause of action until the check was dishonored; hence, his suit was brought within four years after his action accrued.

⁵ *Id.* § 4.406(c).

⁶ *Gulf Collateral, Inc. v. George*, 466 S.W.2d 21 (Tex. Civ. App.—Tyler 1971); *Gulf Collateral, Inc. v. Cauble*, 462 S.W.2d 619 (Tex. Civ. App.—Fort Worth 1971).

⁷ See *Springer v. Sahara Casinos Co.*, 322 S.W.2d 33 (Tex. Civ. App.—Eastland 1959), *error dismissed*; *Garza v. Richmond*, 249 S.W. 889 (Tex. Civ. App.—San Antonio 1923). See also Annot., 53 A.L.R. 345, 372 (1957).

⁸ 462 S.W.2d 386 (Tex. Civ. App.—El Paso 1970).

⁹ TEX. REV. CIV. STAT. ANN. arts. 5526, 5527 (1958), respectively.

¹⁰ *Id.* art. 5527.

Usury. In *Chagas v. Irvin*¹¹ the defendant borrowed money from banks and loaned it to plaintiff. The defendant had excellent credit with banks, while plaintiff had none. In January 1965 the plaintiff needed \$30,000, and the defendant borrowed this amount and turned it over to the plaintiff. The plaintiff gave the defendant a note for \$35,000. The next month the plaintiff paid the defendant more than \$35,000, and the latter repaid his bank. In July 1965 the plaintiff needed \$28,000, and the defendant borrowed this amount and turned it over to plaintiff. At the same time the plaintiff gave the defendant a note for \$32,200 plus interest. This note was not paid as contemplated by the parties. In December 1965 the plaintiff made a new note to the defendant for \$39,000. This note was not paid, and in June 1966 the plaintiff gave a renewal note for \$45,500 plus interest. Apparently there were other like transactions between the plaintiff and the defendant.

Eventually the parties had a falling out, and the plaintiff sued for damages, alleging that usurious interest had been collected. In the trial of the cause the defendant testified that the excess of the notes and their renewals over the money delivered to the plaintiff was compensation for the use of his credit and for services rendered and to be rendered. The trial court gave judgment that the plaintiff take nothing. The court of civil appeals reversed and remanded because there was absence of proof showing that the defendant had given consideration other than the loan of money for payments in excess of lawful rates of interest.

The court took occasion to discuss *Greever v. Persky*.¹² In that case the Texas Supreme Court held that one may sell the use of one's credit (by indorsement, guaranty, or suretyship) to a borrower for a consideration in order to enable him to obtain a loan from a third person at the highest lawful rate of interest. On the other hand, a lender may not charge a borrower, in addition to the highest rate of interest, a commission for obtaining the funds from a third party. The trouble or hazard that a lender sustains in using his own funds or obtaining them from a third party in order to make a loan is fully compensated for by the borrower's payment of lawful interest. The supreme court went on to say that usurious interest could only be recovered when there had been a contract to pay the interest. Voluntary payment and acceptance of usurious interest was not actionable.

In the instant case it was clear that the defendant did not sell his credit to the plaintiff in order to enable her to borrow money from a bank. On the contrary, the defendant was the lender, and he used his credit to obtain funds that he loaned. Thus, he could not charge a fee or commission for use of his credit in addition to the highest lawful interest rate. The usury laws could easily be evaded if lenders were permitted to charge fees for having used their credit in borrowing funds. The court considered the defendant's proof that charges were made for "services rendered" and for "services to be rendered" to be defective. As to "services rendered," their value was not specified. As to "services to be rendered," they were "wholly nebulous and undefined, and incapable of any

¹¹ 458 S.W.2d 840 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

¹² 140 Tex. 64, 165 S.W.2d 709 (1942).

reasonable ascertainment."¹³ There was no proof that the payment of sums in addition to principal was for any reason unrelated to the promise to repay loans.

A dissenting opinion set out the findings of the trial judge. Among them were findings of services performed by the defendant for plaintiff in the period during which he made loans. The services included consultation and advice and the taking of business trips. The dissenting justice thought there was ample evidence in the record to sustain the judgment below. The *Greever* case was cited as permitting a lender to make extra charges for considerations distinct and separate from the lending of money.

*Cash—Time Price Option. Avant v. Gulf Coast Investment Corp.*¹⁴ upheld a finding that the plaintiff-buyer had the choice of a cash price or a higher credit price for the installation of carpeting. Accordingly, the take-nothing judgment in the plaintiff's suit for usury was affirmed.

II. SURETYSHIP

*Main Purpose Exception to Statute of Frauds. In Haas Drilling Co. v. First National Bank*¹⁵ B & B operated several oil leases, including the Cantu Lease. Haas sold jetting gas to B & B for the Cantu Lease. In July 1964 the bank made a \$250,000 loan to B & B secured by mortgage on various leases including the Cantu Lease. During the latter part of 1965 B & B became indebted to Haas for \$7,500. At this time B & B became in default in its payments to the bank. In January 1966 the bank assumed operation of the leases mortgaged by B & B. On several occasions Haas notified the bank that it wanted B & B's account paid and that it would cease providing jetting gas unless it were paid. On March 1, 1966, a bank official (vice president) conducted a foreclosure sale of the B & B leases. On the same day he had a conversation with Haas. The official was interested in having Haas continue to supply jetting gas in order to prevent deterioration of the oil wells. The bank wanted eventually to sell the leases at the best price possible. Haas was unwilling to continue supplying jetting gas without assurance that the account with B & B would be paid. A Haas officer testified that he obtained this assurance from the bank official.

Thereafter the bank spent several thousand dollars in an effort to improve production, and then sold the several leases. Haas tried to collect the account owed by B & B and sued the bank. The Texas Supreme Court, reversing the court of civil appeals, affirmed the judgment of the trial court in Haas' favor. The trial court found that the bank had agreed to assume payment of B & B's debt and that the promise was made in consideration of Haas' promise to continue furnishing jetting gas to the Cantu Lease.

The supreme court stated that the undisputed evidence established "that (a) a benefit did flow to the Bank, and (b) that such benefit was the main purpose of the Bank in making the promise."¹⁶ "The main purpose of the Bank in assuming primary responsibility for the debt of B & B . . . was to protect the value

¹³ 458 S.W.2d at 846.

¹⁴ 457 S.W.2d 134 (Tex. Civ. App.—Dallas 1970).

¹⁵ 456 S.W.2d 886 (Tex. 1970).

¹⁶ *Id.* at 890.

of the property which it had bought in at the foreclosure sale."¹⁷ Since B & B had lost its title through foreclosure, the benefit of continued supply of jetting gas could only flow to the bank. The conclusion was that the bank's oral promise came within the main purpose exception to the Statute of Frauds.

Strictissimi Juris. In *McKnight v. Virginia Mirror Co.*¹⁸ a seller sued a buyer on sworn account of \$4,768 for mirrors delivered in Dallas. McKnight, who had issued a letter of guaranty, was joined as defendant. The letter guaranteed payment for five cases of mirrors to be delivered to the buyer on an apartment project. The guaranty was conditioned as follows: "Each week a check is to be made on volume used and the following Friday, that part used is to be paid for. The total volume will be not more than \$5,000.00."¹⁹ Instead of complying with these conditions, the seller made deliveries and billed the buyer on open account invoices providing for payment within thirty days. There was no requirement of weekly inventories or weekly payment for mirrors used. The trial court entered judgment for McKnight, and the supreme court affirmed, reversing the court of civil appeals.

The supreme court noted that at the trial both parties interpreted the stated conditions as a limitation on the liability and responsibility of McKnight. "Hence, there was no identity between the terms of the McKnight guaranty and the terms of the sales contract between . . . [seller and buyer]."²⁰ The seller's contract with the buyer did not require payment as stated in the conditions of the guaranty. Therefore, the letter of guaranty was inoperative.

The rule of *strictissimi juris* protects a guarantor from risks that he did not intend to assume. A guarantor is discharged when the agreement between the debtor and creditor is changed in any material particular without his assent. In the instant case the guarantor never became obligated because seller and buyer did not enter into the type of contract that he undertook to guarantee.

The *strictissimi juris* rule was held not applicable in *Flato Brothers, Inc. v. Builders Loan Co.*²¹ There a debtor gave a note for \$206,000 but borrowed only \$85,000. Defendant guarantors were unsuccessful in claiming that the principal obligation had been materially altered.

Liability of Accommodation Maker. The plaintiffs sued three accommodation makers on a note in *Musey v. Dickinson Social Club.*²² The accommodated maker could not be sued because a chapter XI arrangement in bankruptcy court had been started, and a restraining order had issued against suits by creditors. The defendants urged that the suit against them should be abated until the accommodated maker could be made a defendant. The plaintiffs obtained a summary judgment, which was affirmed on appeal. The court said that it was "well settled that an accommodation maker is bound on the instrument without any resort to his principal."²³ The plaintiffs were not precluded from suing

¹⁷ *Id.* at 890-91.

¹⁸ 463 S.W.2d 428 (Tex. 1971).

¹⁹ *Id.* at 429.

²⁰ *Id.* at 430.

²¹ 457 S.W.2d 154 (Tex. Civ. App.—Dallas 1970).

²² 466 S.W.2d 84 (Tex. Civ. App.—Houston [1st Dist.] 1971).

²³ *Id.* at 87.

by the circumstance that the defendants did not have immediate recourse against the accommodated party.

III. SALES

Implied Warranty and Privity of Contract. Lack of privity of contract was held a good defense to a suit for breach of implied warranty in *Thermal Supply of Texas, Inc. v. Aseel*.²⁴ The plaintiff bought a compressor for an air-conditioning unit from General Air Conditioning. The latter had bought it from the defendant distributor and had received papers stating a twelve-month warranty against faulty workmanship or defects in material. Within a year the compressor began to malfunction, and soon all cooling ceased. The plaintiff sued the distributor and recovered judgment. On appeal the parties treated the case as one involving the question of implied warranty. The court of civil appeals reversed and remanded.

The court recognized that "in the products liability cases involving harm to the user or consumer or to his property, the requirement of privity has been dispensed with."²⁵ *McKisson v. Sales Affiliates, Inc.*²⁶ and section 402A of the *Restatement (Second) of Torts* were cited. But the instant case was not one in which the product in question was dangerous to the consumer or his property. The court said that "[i]n the better reasoned cases the doctrines [*sic*] of strict liability in tort has not been extended to situations involving economic loss only, but instead those cases apply the principles of the law of sales, in which privity of contract is required."²⁷ The court expressed the fear that eliminating the requirement of privity would broaden the liability of manufacturers and distributors to an unknown and unlimited extent.

Seller's Incidental Damages. Section 2.710²⁸ of the UCC was applied in *Hudgens v. Bain Equipment & Tube Sales, Inc.*²⁹ Hudgens contracted to buy pipe from Bain to be used in an oil well. The pipe was delivered, and Hudgens used it at two locations. Hudgens did not pay for the pipe, and Bain was allowed to repossess. Bain then sued for expenses reasonably incurred, including the cost of pulling the pipe and transporting it. Judgment in Bain's favor was affirmed. The cited UCC section provides that incidental damages to an aggrieved seller include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods . . ."³⁰

Forged Certificate of Title—Estoppel. In *Yousey v. Bogle*³¹ the plaintiff adver-

²⁴ 468 S.W.2d 927 (Tex. Civ. App.—Austin 1971).

²⁵ *Id.* at 929.

²⁶ 416 S.W.2d 787 (Tex. 1967).

²⁷ 468 S.W.2d at 929, citing *Melody Home Mfg. Co. v. Morrison*, 468 S.W.2d 505 (Tex. Civ. App.—Houston [1st Dist.] 1971), *aff'g* 455 S.W.2d 825 (Tex. Civ. App.—Houston [1st Dist.] 1970); *John Deere Co. v. Tenberg*, 445 S.W.2d 40 (Tex. Civ. App.—Beaumont 1969).

²⁸ TEX. BUS. & COMM. CODE ANN. § 2.710 (1968).

²⁹ 459 S.W.2d 873 (Tex. Civ. App.—Corpus Christi 1970).

³⁰ TEX. BUS. & COMM. CODE ANN. § 2.710 (1968).

³¹ 457 S.W.2d 595 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

tised her automobile for sale and allowed a third person, Taylor, to drive the car away. She also delivered her certificate of title and license receipts. Thereafter, without authority Taylor sold the automobile to the defendant, a used car dealer. The plaintiff's name was forged on the title assignment on the certificate of title, and a notary public's certificate of acknowledgment was forged. The dealer accepted the certificate with the name of the purchaser (assignee) left blank. The plaintiff sued the dealer for title and possession. The court of civil appeals reversed the trial court and rendered judgment for the plaintiff.

The jury found that the plaintiff had failed to exercise ordinary care in dealing with Taylor. The court of civil appeals recognized that when the owner of a chattel places another in possession and clothes him with indicia of ownership, the former may be estopped to claim title and possession against a bona fide purchaser. However, this rule did not apply when the assignment of the certificate of title was forged. While the case was one of first impression in Texas, the authorities elsewhere were uniform in denying the dealer's claim.

IV. SECURED TRANSACTIONS

*Priority of Liens. GMC Superior Trucks, Inc. v. Irving Bank & Trust Co.*³³ presented the question of whether a recorded lien was superior to a subsequent mechanic's lien. The debtor executed a note and granted a security interest in a truck to the bank. The security interest was recorded on the certificate of title to the vehicle. A year later the debtor took the truck to GMC for repairs. The cost of the repairs and parts was \$3,709. The debtor was unable to pay the bill, and GMC retained possession. Subsequently, the debtor became in default on his note. Irving Bank sued to foreclose on the truck and joined GMC as defendant. The court of civil appeals held that the bank's lien was superior to that of GMC.

Article XVI, section 37 of the Texas Constitution declares that mechanics and artisans of every class have liens on the articles made or repaired by them. This provision is self-executing, and the liens exist without the aid of statute.³³ However, the legislature has passed statutes in aid of the constitutional provision.³⁴ The Texas Certificate of Title Act³⁵ provides for recordation of liens on certificates of title. Section 43 of the Act states that "[a]ll liens on motor vehicles shall take priority according to the order of time same are recorded on the . . . certificate of title . . ."³⁶

Section 9.310 of the UCC declares that when a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, "a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly

³² 463 S.W.2d 274 (Tex. Civ. App.—Waco 1971).

³³ *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896).

³⁴ TEX. REV. CIV. STAT. ANN. arts. 5503, 5506 (1958). Mechanics have a right to retain possession of chattels on which they have worked, and in certain circumstances sell the property, applying the proceeds to the amount of the lien charges.

³⁵ TEX. PEN. CODE ANN. art. 1436-1 (1953).

³⁶ Law of Apr. 11, 1939, ch. 4, § 43, [1939] Tex. Laws 608 (repealed 1971).

provides otherwise.”³⁷ Section 9.302 states that filing is required to perfect security interests, except that “[t]he filing provisions of this Chapter do not apply to a security in property subject to a statute: . . . (2) of this state which provides for central filing of or which requires indication on a certificate of title of, such security interests in such property”³⁸ The court was of the opinion that all the statutes were *in pari materia*. In a case of conflict between provisions, the more general was controlled or limited by the special. The court held that the provisions of the Certificate of Title Act were more specific than those in the UCC and should be given precedence. Thus, the bank’s lien had priority.

Perfection of Lien in Foreign Jurisdiction. The Texas Supreme Court has handed down an important decision affecting automobile titles in *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Insurance Co.*³⁹ The original buyers bought an automobile from a dealer in Oklahoma. They executed a security agreement and financial statement, which secured a note for \$2,800. These papers were assigned to Security Investment Corporation (SIC), which filed the security agreement in the county in which the buyers were domiciled. This filing perfected SIC’s security interest under Oklahoma law. The buyers received an automobile title certificate from the Oklahoma Tax Commission. They transferred this instrument to Dignan by signing the reverse side. Dignan then got an original certificate of title in his own name. This certificate said nothing of SIC’s security interest. However, under Oklahoma law notation of the security interest had no bearing on its perfection. Dignan took the car to Texas and applied for and obtained a Texas certificate of title. Dignan did not give any notice to the original buyers or SIC. The certificate of title did not show SIC’s security interest. Thereafter, Dignan sold the automobile to Phillips Ford. Dignan executed a power of attorney authorizing Phillips to transfer title to the car. Later, Phillips received Dignan’s unsigned certificate of title. Phillips placed the car on its lot for resale. However, SIC got possession of the automobile and brought it to Oklahoma. Phillips sued SIC for conversion. Defendant’s motion for summary judgment was granted. On appeal the judgment was affirmed.

The first question was whether a bona fide purchaser from Dignan could obtain a title free and clear of SIC’s security interest. Section 9.103(c) of the UCC states that if a security interest is perfected in another jurisdiction (where the property was located when the security interest attached), “the security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state.”⁴⁰ (In the instant case the sale by Dignan to Phillips occurred within four months of the date SIC perfected its security interest.) Section 9.103(d) goes on: “Notwithstanding subsections (b) and (c), if personal property is covered by certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security interest in the property

³⁷ TEX. BUS. & COMM. CODE ANN. § 9.310 (1968).

³⁸ *Id.* § 9.302(c).

³⁹ 465 S.W.2d 933 (Tex. 1971).

⁴⁰ TEX. BUS. & COMM. CODE ANN. § 9.103(c) (1968).

as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate."⁴¹

The supreme court reviewed authorities elsewhere and language appearing in the Official Comments to the Code. The language of section 9.103(d) was described as something less than a perfect example of clear draftsmanship. "However, its language plainly states without exception, that if the property is, at the time of a transaction, covered by a certificate of title issued under a statute which requires notation on the title to perfect security interest, perfection will be determined under the law of the state which issued the certificate."⁴² Accordingly, a bona fide purchaser and transferee of Dignan's certificate of title would have obtained a clear title.

Unfortunately for Phillips, however, there was another hurdle to overcome. Dignan's certificate of title was never assigned to Phillips. The power of attorney was not exercised before SIC repossessed the automobile. Section 33 of the Certificate of Title Act states that title to a motor vehicle cannot be passed except by transfer of the certificate of title.⁴³ Further, the transfer must include an affidavit by the transferor that there are no liens against the vehicle except those shown. While the sale between Dignan and Ford may have been valid between the parties, it was void as to third parties. Because the sale was void, SIC's interest, even though unperfected, was not subordinated to Phillip's interest. Summary judgment was properly given against Phillips.

V. MISCELLANEOUS

Contract Performance Excused. In *Toyo Cotton Co. v. Cotton Concentration Co.*⁴⁴ cotton merchants directed a warehouse to remove cotton from storage in order that it might be shipped overseas. The warehouse was unable to deliver the cotton because of a labor dispute and strike. The storage agreement provided that the warehouse should not be liable for delays or other consequences resulting from labor disputes and work stoppages. Thus, it was clear that the warehouse was not liable to the cotton merchants for losses resulting from the delay in delivery. However, the warehouse insisted on charging the cotton merchants at the daily rate for storage after they requested delivery of the cotton and until the cotton was delivered after the strike. The Texas Supreme Court held that the charges were not supported by the contract. The clause excusing the warehouse "is a shield for the defendant from claims against it, not a sword to affix liability on others for continued unwanted storage."⁴⁵

Sufficient Writing Under Four-Year Statute of Limitations. For default on an oral contract the statute of limitations prescribes a two-year period.⁴⁶ On a written contract the period is four years.⁴⁷ The latter statute provides in substance that actions for debt when the indebtedness is evidenced or founded upon

⁴¹ *Id.* § 9.103(d).

⁴² 465 S.W.2d at 937.

⁴³ TEX. PEN. CODE ANN. art. 1436-1, § 33 (Supp. 1972).

⁴⁴ 461 S.W.2d 116 (Tex. 1970).

⁴⁵ *Id.* at 118.

⁴⁶ TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

⁴⁷ *Id.* art. 5527.

any contract in writing shall be commenced within four years after the action accrues. In *Jackson v. Paulsel Lumber Co.*⁴⁸ orders for lumber were made orally. The lumber company prepared invoices for the items sold and delivered. A representative of the buyer signed a copy of the invoice after receiving and checking a delivery. Seventeen of such invoices were signed. After a delivery the lumber company wrote in prices and totals on the invoice and sent a copy of the extended invoice to the buyer. No objection was made to these invoices. The court of civil appeals held that sufficient writings were executed by the buyer to make the lumber company's suit an action on a written contract. Express promises to pay were not necessary when the fair inference from the writings was that the buyer promised to pay for what he received. The signature of one of the parties to the contract was enough.

Application of Payment to Several Debts. *Fuqua v. Moody & Clary Co.*⁴⁹ recognized that when a creditor receives a payment from a debtor, in the absence of other direction he may apply the payment to the oldest debt. However, the debtor has a right to direct how the payment should be applied. In *Fuqua* the debtors had marked their checks with specific invoice numbers. The amounts of the checks were the same as the invoices. Further, the checks bore the legend "By endorsement this check when paid is accepted in full payment of the following account." A jury finding that payments were not made on specific invoices was held without support in the record.

Garnishment of Certificate of Title. A garnishment proceeding was brought against a bank in *Mobil Oil Corp. v. Commercial National Bank.*⁵⁰ The bank answered that it held \$5,091 belonging to the judgment debtors, but offset \$5,033 owed by the debtors on a note. The bank had a lien on an automobile which secured the note. The bank released this lien and delivered a clear certificate of title to the judgment debtors. Plaintiff in the garnishment proceeding sought to recover the full amount of its judgment. The writ of garnishment required the bank to answer what "effects" of the debtors it held. "Effects" is defined as including "all personal property and interest therein."⁵¹ The question in the case was whether the certificate of title was an "effect" that should have been retained until the judgment creditor's right was determined. The court spoke of the purpose of the Certificate of Title Act to lessen and prevent traffic in stolen cars.⁵² But a certificate of title is not equated with the motor vehicle itself. The conclusion was that a certificate of title is not such property as is liable to execution and, therefore, is not subject to garnishment.

⁴⁸ 461 S.W.2d 161 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

⁴⁹ 462 S.W.2d 321 (Tex. Civ. App.—Houston [14th Dist.] 1970).

⁵⁰ 460 S.W.2d 249 (Tex. Civ. App.—Dallas 1970).

⁵¹ TEX. REV. CIV. STAT. ANN. art. 23, item 17 (1969).

⁵² 460 S.W.2d at 250.