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COMMERCIAL TRANSACTIONS

by

Lennart V. Larson*

A NUMBER of interesting decisions have come down during the past year within the area of commercial transactions. Interpretation of the Uniform Commercial Code has been involved in many of these decisions, and while it is much too early to make positive pronouncements, there are indications that in Texas, as elsewhere, the Code gives clear-cut answers to many problems and uncertainties which existed in pre-Code days. The Code cases which will be discussed deal primarily with sales, bills and notes, and security interests. Apart from these subjects, cases of commercial interest are noted in the areas of bailments, carriers, suretyship, and assignment of contract rights.

I. SALES

Express Warranty. In *Elanco Products Co. v. Akin-Tunnell*¹ the partnership of Akin-Tunnell bought a herbicide (Treflan) for control of weeds in its cotton fields. When the product failed to control the weeds, the partnership sued the manufacturer. The trial court allowed recovery of the market value of the Treflan and the added cost of farming the cotton. On appeal the case was reversed and remanded for a new trial.

The jury had found that the Treflan sold to the plaintiff was "reasonably fit for the purposes for which it was intended to be used if used in accordance with the manufacturer's instructions."² The plaintiff conceded that this finding defeated any claim based on an implied warranty of fitness, but sought to uphold the judgment below on the basis of an express warranty.

With respect to the express warranty claim, the jury had determined that the defendant "represented that Treflan would control weeds in cotton," that the plaintiff "relied on such representations," and that "the Treflan failed to control the weeds in [plaintiff's] cotton."³ Finding these facts insufficient to sustain the plaintiff's burden of proof, the court of appeals held that the plaintiff must "allege and prove that the product failed to perform in accordance with the express warranties (affirmations or promises relating to the goods which were a basis of the bargain) and that such failure was not caused by its use contrary to the express warranty terms."⁴ Therefore, specific issues should have been submitted to the jury concerning what affirmations or promises had been made and had become a part of the "basis of the bargain," whether the product failed to perform in accordance with these warranties, and whether the failure was the result of a use contrary to the terms of the express warranty.

The court recognized the possibility that defendant might be liable under a broad express warranty:

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¹ 474 S.W.2d 789 (Tex. Civ. App.—Amarillo 1971), *error ref. n.r.e.*

² *Id.* at 791.

³ *Id.*

⁴ *Id.* at 793.

If [the defendant] could be shown to have warranted that Treflan would control weeds so long as it was applied in accordance with very broad and general instructions . . . , then its failure to do so would constitute a breach of the express warranty notwithstanding the fitness of the product for its intended use when used in accordance with some other instructions distributed by the manufacturer, which instructions were not sufficiently shown to have become a 'basis of the bargain,' as referred to in §2.313 of the Code.⁵

The court commented that section 2.313 did not appear markedly different from the policies of Texas decisions on express warranties prior to adoption of the Code. Therefore, to be successful in his suit, the plaintiff had to prove that he had applied the Treflan in compliance with the terms of the "contractual" express warranty.

Express Limitation on Warranty. In *Lankford v. Rogers Ford Sales*⁶ a limitation of warranty in the contract of sale of a new automobile was given full effect. The plaintiff bought a new automobile in 1968. During the next sixteen months about fifty different defects developed, causing the automobile to be in the repair shop a total of forty-five days. The plaintiff sued for breach of the warranty of merchantability, joining the retail dealer and the manufacturer as defendants. The defendants' motion for summary judgment was granted and affirmed on appeal.

The plaintiff received a written new vehicle warranty when he bought the car. Under the warranty the defendants warranted all parts to be free from defects in material and workmanship and agreed to repair or replace all defective parts free of charge. The warranty was "expressly IN LIEU OF any other express or implied warranty, including any implied WARRANTY of MERCHANTABILITY or FITNESS, and of any other obligations" on the part of the seller or manufacturer. It was undisputed that defendants had fully complied with the express warranty by replacing defective parts and making repairs.

The court discussed section 2-719 of the UCC.⁷ Under this section the parties to a sale may agree to remedies in addition to, or in substitution for, those provided in the Code, and may limit or alter the measure of damages, such as by limiting the buyer's remedies to repair and replacement of non-conforming goods. If, however, a limited remedy fails of its essential purpose, remedy may be had as otherwise provided in the Code. Similarly, consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.

Several pre-Code decisions were cited as upholding contract provisions limiting warranty obligations.⁸ The court was of the opinion that the express

⁵ *Id.* at 792. The "Code" reference is to TEX. BUS. & COMM. CODE ANN. § 2.313 (1968).

⁶ 478 S.W.2d 248 (Tex. Civ. App.—El Paso 1972), *error ref. n.r.e.*

⁷ TEX. BUS. & COMM. CODE ANN. § 2.719 (1968).

⁸ *E.F. Elmberg Co. v. Dunlap Hardware Co.*, 267 S.W. 258 (Tex. Comm'n App. 1924), *judgment adopted*; *John Deere Co. v. Tenberg*, 445 S.W.2d 40 (Tex. Civ. App.—Beaumont 1969); *Ford Motor Co. v. Puskar*, 394 S.W.2d 1 (Tex. Civ. App.—Houston 1965), *modified sub nom. Jack Roach-Bissonnet, Inc. v. Puskar*, 417 S.W.2d 262 (Tex. 1967); *Eastern Seed Co. v. Pyle*, 191 S.W.2d 708 (Tex. Civ. App.—San Antonio 1945), *modified*, 145 Tex. 385, 198 S.W.2d 562 (1946).

warranty in *Lankford* had not failed of its essential purpose and was not unconscionable. There was no allegation of fraud or overreaching. Accordingly, the warranty limitation was held to be valid.

Breach of Warranty. Measure of Damages. Proof. Four cases should be noted briefly. In *Mobile Housing, Inc. v. Moss*⁹ the defendant had sold the plaintiff a mobile home which was attached to the plaintiff's real property. Upon discovering physical injuries and defects in the mobile home, the plaintiff sued for damages and recovered \$660. The trial court held that the mobile home had become a fixture and measured the damages by the cost of repair. The court of appeals reversed and remanded because the trial court had applied the wrong measure of damages. The correct measure was the decrease in market value caused by the injury, as is normally the case with personal property. The circumstance that the mobile home had become a fixture did not justify the application of a different measure of damages. The court of appeals was puzzled that the trial court made no reference to the fact that the written contract provided for a sale "as is." Since the record was incomplete on this point, however, the court of appeals refused to consider whether this provision negated the seller's warranty.

Damages for loss of profits on a collateral contract were denied in *Head & Guild Equipment Co. v. Bond*.¹⁰ Buyer was digging ponds for a fish farm but did not have a contract for a definite number of ponds. He needed better equipment for the work and bought a dragline from seller, who knew of the intended use. The dragline was defective, and as a result, the buyer was unable to dig the last fifteen or sixteen ponds required by the fish farm. The trial court awarded the buyer damages for lost profits as well as for breach of warranty.

On appeal the judgment was affirmed on condition that the buyer remit the amount of the lost profits. The court stated that loss on a collateral contract caused by a breach of warranty in a sales contract could not be recovered unless the collateral contract was contemplated by the parties when they entered into the sales contract. The court noted that there are few cases in Texas in which recovery of lost profit under a collateral contract has been allowed. The court held that the evidence was insufficient to support a finding that seller knew the terms of the buyer's collateral contract and that the buyer was entering into the purchase contract in order to perform the digging contract.

In *Ryan v. Galveston Model Dairy*¹¹ the plaintiff had purchased a quart of chocolate milk from a retail food store on October 14, 1968. The milk was spoiled, and the plaintiff became ill after taking two swallows. He sued the wholesaler for breach of the warranty that the product was fit for human consumption. The date or place of delivery could not be determined from the markings on the carton. Deliveries had been made to the retail store between October 1 and 4, but sales records were no longer available for the period

⁹ 483 S.W.2d 56 (Tex. Civ. App.—Tyler 1972).

¹⁰ 470 S.W.2d 909 (Tex. Civ. App.—Beaumont 1971).

¹¹ 473 S.W.2d 536 (Tex. Civ. App.—Houston [1st Dist.] 1971).

between September 15 and October 5. The defendant wholesaler was subject to regular city and federal inspections, and it had not had trouble with refrigeration on its trucks between September 15 and October 4. There was no evidence regarding the handling of the milk after delivery to the retailer's refrigerator. The trial court entered a take-nothing judgment which was affirmed on appeal. It was clear that the defendant's warranty of fitness pertained only to the condition of the chocolate milk when it left defendant's hands. The defendant was not responsible for defects occurring after delivery to the retailer. The plaintiff failed to sustain the burden of proof that the product was defective when the defendant wholesaler delivered it to the retailer. *McKisson v. Sales Affiliates, Inc.*¹³ was distinguished. If the plaintiff had proved that the retailer did not do anything which could have affected the quality of the chocolate milk, he would have established a good prima facie case.

*Villareal v. Boggus Motor Co.*¹³ is a pre-Code case. The plaintiffs purchased a new car in 1966. During the next eighteen months they had a variety of serious problems with the automobile. The defendant retailer replaced and repaired parts during this period. After driving the car 24,000 miles, the plaintiffs returned the car to the defendant's place of business, and claimed the right to rescind the contract and recover the purchase price. The trial court granted the defendant's motion for judgment *non obstante veredicto*, and this action was affirmed on appeal.

Plaintiff did not plead alternatively for damages, and so relied solely on their right to rescind. The court of appeals explained that in the absence of fraud, the right to rescind for breach of warranty existed only where the sale article proved wholly unsuitable for the use to which the seller knew the buyer intended to put it, or where the breach went to the identity of the article. The court was of the clear opinion that the automobile had proved useful to the plaintiffs to a substantial degree, even though its performance had been unsatisfactory. Generally, if a right of rescission exists, it must be exercised soon after the grounds for it are known. In this case there was at least doubt that plaintiffs had satisfied this requirement. Finally, when rescission is demanded, a tender must be made of the benefits received under the contract, and the plaintiffs had not done this. Under the UCC the remedies for breach of warranty are more flexibly arrayed than at common law or under the Uniform Sales Act.¹⁴ Under the pleadings and proof in the instant case, however, the same result would probably be reached.

Sale or Return. Risk of loss in a sale or return transaction was dealt with in *Collier v. B & B Parts Sales, Inc.*¹⁵ The plaintiff had delivered stereo equipment, cartridges, and tapes to the defendant who operated a gasoline station.

¹³ 416 S.W.2d 787 (Tex. 1967). In *McKisson* the supreme court stated that "[w]hen it is shown that the product comes in a sealed container, it is inferable that the product reached the consumer without substantial change in the condition in which it was sold." *Id.* at 792.

¹³ 471 S.W.2d 615 (Tex. Civ. App.—Corpus Christi 1971), *error ref. n.r.o.*

¹⁴ See TEX. BUS. & COMM. CODE ANN. §§ 2.601-.602, 2.606-.608, 2.711, 2.714 (1968).

¹⁵ 471 S.W.2d 151 (Tex. Civ. App.—Tyler 1971).

The invoices described the defendant as the buyer, and the plaintiff's agent wrote in "Terms 30-60-90 this equipment will be picked up if not sold in 90 days."¹⁶ There was conflicting testimony whether the defendant was to have the goods on consignment. Two weeks later, the defendant's station was burglarized and the stereo equipment stolen. The plaintiff sued for the price, and the trial court granted his motion for a directed verdict. The judgment was affirmed on appeal.

The trial court rejected the defendant's contention that the goods were held on consignment. The parol evidence rule prevented contradiction of the written invoices, which were held to create a sale or return transaction. According to section 2-326 of the UCC,¹⁷ if goods may be returned by a buyer even though they conform to contract, the transaction is a sale or return if the goods are delivered primarily for resale. The section applies even though the agreement of the parties uses such words as "on consignment" or "on memorandum." Under section 2-327, the return of goods in a sale or return is "at the buyer's risk and expense."¹⁸ Thus, the trial court had no choice but to direct a verdict for the plaintiff.

II. BILLS AND NOTES

Payee as Holder in Due Course. In *Riley v. First State Bank*¹⁹ payee bank sued two defendants as makers on a \$125,000 note. It was undisputed that the defendants' signatures were genuine and that the note was received for value. The payee was granted a summary judgment in the trial court. Defendant Riley appealed on the ground that his controverting affidavit raised fact issues which barred a summary judgment. The appellate court affirmed the trial court judgment.

In his affidavit defendant Riley stated that payee bank never communicated with him when it received the note; that when he signed the note it was blank except for printed material and the signature of the other maker; that he signed for the accommodation of the other maker; and that it was agreed between the makers that the amount of the note should not exceed \$10,000. The court held that none of these averments raised an issue of fact which might constitute a defense.

The court had no doubt that payee bank qualified as a holder in due course under section 3-302 of the UCC.²⁰ Previous law in Texas that a payee could not be a holder in due course was changed by repeal of the Negotiable Instruments Act.²¹ Under section 1-201(19), which defines good faith as "honesty in fact in the conduct or transaction concerned,"²² the defendant's affidavit was not regarded as sufficient to raise the issue whether payee bank had knowledge of facts and circumstances amounting to bad faith. "Even if the instrument

¹⁶ *Id.* at 152.

¹⁷ TEX. BUS. & COMM. CODE ANN. § 2.326 (1968).

¹⁸ *Id.* § 3.327.

¹⁹ 469 S.W.2d 812 (Tex. Civ. App.—Amarillo 1971), *error ref. n.r.e.*

²⁰ TEX. BUS. & COMM. CODE ANN. § 3.302 (1968).

²¹ See Act of Sept. 1, 1967, ch. 785, § 3.303, [1967] Tex. Laws 2420, *repealing* ch. 123, § 52, [1919] Tex. Laws 196.

²² TEX. BUS. & COMM. CODE ANN. § 1.201(19) (1968).

were blank when appellant signed it, all the proof is that it was completed when delivered to appellee; and, further, even if appellee knew appellant had signed as a surety . . . , such knowledge does not impart notice of a defense or claim."²³

Final Payment of Check. The wrong section of the UCC may have been applied in *Richardson Heights Bank & Trust v. Wertz*.²⁴ Wertz was general agent for an insurance company and Baker was his assistant. Baker had borrowed \$1,505 from the insurance company, and Wertz had guaranteed payment of the notes. Wertz paid and received possession of the notes. Baker gave Wertz a check for \$1,505 payable to the insurance company. The check was postdated August 15 and drawn on the Richardson Heights Bank. On August 10 Baker stopped payment on the check. Wertz's secretary inquired on several successive days whether Baker's check was good. On August 25 the bank inadvertently acknowledged that the check was good. Wertz's office then endorsed the check in the insurance company's name, presented it to the bank, and received a cashier's check payable to the insurance company for deposit in a second bank. Wertz returned the notes to Baker and deposited the cashier's check in the insurance company's account at a second bank. Two days later the Richardson Heights Bank wrote Wertz and the insurance company that Baker's check should not have been paid because of a stop order. A computer error had been made. The bank asked for return of the cashier's check and subsequently stopped payment on the cashier's check. Wertz sued the bank and recovered \$1,505. This judgment was reversed on appeal.

The court of appeals stated that Wertz could not assert that he was damaged by anything the bank did "because he had already paid the insurance company and received the notes from it before either check was issued. Being neither payee nor endorsee of either check, he was not a holder in due course."²⁵ To the argument that Wertz had changed his position in reliance on the issuance of the cashier's check, the court answered that he had lost nothing because he had a judgment against Baker for \$1,505 plus \$1,000 exemplary damages. Because Wertz was not a holder in due course of either check, the bank's defense of lack of consideration was valid.

One can readily agree that Wertz was not a holder in due course of either Baker's check or the cashier's check, since he was not a payee or endorsee. But consider the situation that would have arisen if the insurance company had received and sued on the cashier's check. Would not the insurance company be deemed to have received final payment as a holder in due course of Baker's check? Would not the insurance company be protected under sections 3-418 and 4-213 of the UCC?²⁶ The purpose of these sections is to protect holders in due course (and others who change their position in good faith) when they receive final payment from the payor on an instrument. Under

²³ 469 S.W.2d at 817.

²⁴ 482 S.W.2d 692 (Tex. Civ. App.—Dallas 1972), *error granted*.

²⁵ *Id.* at 694. The court relied on TEX. BUS. & COMM. CODE ANN. § 3.302 (1968).

²⁶ TEX. BUS. & COMM. CODE ANN. §§ 3.418, 4.213 (1968).

the evidence was not Wertz a successor to the insurance company's rights and thus entitled to enforce the cashier's check?

The court of appeals ruled that the judgment in the trial court did not conform to the pleadings because Wertz did not allege that he was an assignee of either check or that he had any interest in the checks. This ruling seems highly technical, since the trial court had concluded that, as a matter of law, Wertz was the beneficial owner of the cashier's check.

Misappropriation of Checks. A bank was held not liable to a depositor in *Palmer & Ray Dental Supply, Inc. v. First National Bank*²⁷ when checks made out to the depositor were cashed by an employee. The plaintiff was a dental supply company, and its office manager was authorized to deposit checks received. The office manager made out deposit slips and used a rubber stamp to endorse the checks in blank. Over a period of time the office manager omitted listing thirty-five checks on the deposit slips and simply cashed them. The plaintiff sued defendant bank for converting the checks. Summary judgment was entered in favor of the bank and affirmed by the court of appeals. The court pointed out that the blank endorsement was authorized, and when cash was delivered to the office manager, "the Bank was not guilty of conversion."²⁸ The court might have added that the office manager was the holder of the checks and that no contention was made that the bank had not paid the items in good faith.²⁹

*Exchange Bank & Trust v. Kidwell Construction Co.*³⁰ involved wrongdoing of a different sort. In a per curiam decision the Texas Supreme Court affirmed a lower court holding that a negligent depositor was not barred from recovering against his bank for paying out money on forged checks if the bank's payment was not in accordance with reasonable commercial standards. Sections 3-406 and 4-406 of the UCC were cited and applied.³¹

Prepayments as Curing Later Defaults. The Texas Supreme Court made an interesting application of language in a promissory note in *Bradford v. Thompson*.³² The Bradfords assumed payment of a note for \$1,553.34 secured by a second lien on real estate they were buying.³³ The Bradfords voluntarily

²⁷ 477 S.W.2d 954 (Tex. Civ. App.—Eastland 1972).

²⁸ *Id.* at 955.

²⁹ TEX. BUS. & COMM. CODE ANN. § 3.603 (1968) discharges a payor (maker or drawee) who makes payment in good faith to a holder after an instrument becomes due.

³⁰ 472 S.W.2d 117 (Tex.), *aff'g* 463 S.W.2d 465 (Tex. Civ. App.—Tyler 1971).

³¹ TEX. BUS. & COMM. CODE ANN. §§ 3.406, 4.406 (1968).

³² 470 S.W.2d 633 (Tex. 1971), *cert. denied*, 405 U.S. 955 (1972).

³³ The note stated:

The principal of this note is payable in equal monthly installments of \$10.00 each including interest, said installments to be credited first to the interest accrued to date of such installments and the balance to the reduction of principal; the first installment being due and payable on or before the 15th day of November 1964 and one installment to become due and payable on or before the 15th day of each succeeding month thereafter for a period of 136 months; at that time the payments will be increased to \$60 per month until interest and principal is paid in full. The interest on this note is payable as set out above and all past due principal and interest shall bear interest from maturity at the rate of ten per cent per annum.

Id. at 635 (emphasis by the court).

increased their monthly payments from \$10 to \$70 in 1966. In February 1967, they had paid \$700 while required to have paid only \$280. When they were refused the right to prepay the note in its entirety without penalty in January 1968, the property was sold at a trustee's foreclosure sale. On the date of sale, \$390 was due on the note. The purchaser (who was the holder of the note) sued the Bradfords in trespass to try title. The principal question was whether the Bradfords were in default on the second lien note. The supreme court held that they were not in default, and the trustee's deed should be cancelled.

The court acknowledged that there were few cases dealing with this particular question. Two decisions from other jurisdictions were cited as holding that prepayment did not excuse or cure subsequent defaults.³⁴ These cases relied on language in the notes involved which stated that the obligor should pay a certain sum "or more" at regular intervals. A California case was cited for its contrary holding that any amount paid in excess of a normal monthly payment should be considered as a payment "on or before" any date on which the obligor failed to make a payment.³⁵

Persuaded by the logic of the California decision, the Texas Supreme Court held that prepayment by an obligor under the language of the instant note had a double aspect. Presumptively, any prepayment is applied to accrued interest and part of the principal; but if default occurs later, the prepayment of principal is applied to later installment obligations, consisting of both interest and principal. The case has more than bookkeeping significance. Since the Bradfords were not in default when they quit paying in January 1968, undoubtedly the statute of limitations did not start running in their favor.

*Goldfield v. Kasoff*³⁶ is a limitations case which involved installment payments. Defendant debtors executed a note for \$10,481 in favor of plaintiff creditor. The note provided for weekly payments covering principal and accrued interest. The defendants stopped making payments in 1967, and plaintiff brought suit on September 30, 1969. The court held that suit for installments not paid before September 30, 1965, was barred by the four-year statute of limitations.³⁷ "When recovery is sought on a note or other obligation payable in installments the statute of limitations runs against each installment from the time it becomes due . . ."³⁸

Parol Evidence Rule. In *Aetna Casualty & Surety Co. v. Watson*³⁹ the defendants had signed a negotiable note payable to Ottis in the amount of \$5,082.96. Ottis endorsed the note to the plaintiff. When the plaintiff brought suit on the note, the defendants pleaded failure of consideration. At the trial Ottis testified that the defendants signed the note in order to help him recover money which he had paid the plaintiff in discharge of a debt owed by a bank-

³⁴ *DeVilliers v. Balcomb*, 79 N.M. 572, 446 P.2d 220 (1968); *McBride v. Stewart*, 68 Utah 12, 249 P. 114 (1926).

³⁵ *Los Angeles Inv. Co. v. Wilson*, 181 Cal. 616, 185 P. 853 (1919).

³⁶ 470 S.W.2d 216 (Tex. Civ. App.—Houston [14th Dist.] 1971).

³⁷ TEX. REV. CIV. STAT. ANN. art. 5527 (1958).

³⁸ 470 S.W.2d at 217.

³⁹ 476 S.W.2d 868 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*

rupt corporation. The defendants were shareholders in the corporation. Ottis also testified that there was an understanding that the defendants would pay the note only out of funds received from the bankrupt corporation. The trial court held that the plaintiff was not a holder in due course and entered judgment for the defendants. On appeal the judgment was reversed.

The court of appeals ruled that the defendants had contended that consideration for the note had failed, not that there was a total lack of consideration. Proof that the consideration failed rested on parol evidence. Such evidence could not vary the terms of the promissory note even when admitted without objection. Therefore, there was no evidence in the record raising the issue of failure of consideration. Whether the plaintiff was a holder in due course was immaterial. The plaintiff had proved ownership of the note and no valid defense had been proved. "It is only after it is shown that a defense exists that one claiming the rights of a holder in due course has the burden of establishing that fact."⁴⁰

Usury. Two civil appeals cases dealt with the impact of recent changes in the Texas usury laws. The question of retroactive application was raised in *Hockley County Seed & Delinting, Inc. v. Southwestern Investment Co.*⁴¹ On November 1, 1965, defendant corporation and others executed a promissory note payable to the plaintiff. The plaintiff sued on the note and a court settlement was reached in 1968 under which the defendant paid the note without prejudice to its claims under the usury laws. The defendant then amended its pleadings and sought to recover statutory penalties for usury under legislation which was in effect on November 1, 1965.⁴² The plaintiff countered by citing 1967 legislation which repealed the earlier statutes and permitted corporations to contract for the payment of interest not exceeding one-and-one-half percent a month (eighteen percent a year).⁴³ The plaintiff was successful in the trial court but the judgment was reversed and remanded on appeal.

The issue before the court of appeals was whether the 1967 legislation applied to a note executed in 1965. The court recognized that the legislature could enact a statute with retroactive effect if it did not impair vested property rights, but there is a presumption against retroactivity. The repealer clause in the 1967 legislation declared that the new law should "not affect any right accrued or established, or any liability or penalty incurred under the provisions of any such other laws prior to the amendment or repeal thereof."⁴⁴ The court found language in the new statute which indicated that the authorization of higher interest where corporations were concerned was prospective in nature. Two cases were cited in which courts assumed that the 1967 legislation did

⁴⁰ *Id.* at 869-70. The court relied on TEX. BUS. & COMM. CODE ANN. § 3.307(3) (1968).

⁴¹ 476 S.W.2d 38 (Tex. Civ. App.—Amarillo 1971), *error ref. n.r.e.*

⁴² Ch. 6, § 1, [1892] Tex. Laws 368 (repealed 1967); ch. 143, § 1, [1907] Tex. Laws 277 (repealed 1967). One of the remedies under these statutes was recovery of double the interest paid if the interest exceeded 10% a year.

⁴³ Ch. 274, § 5, [1967] Tex. Laws 659 (codified at TEX. REV. CIV. STAT. ANN. arts. 5069-1.02 to .06 (1971)); ch. 296, § 1, [1967] Tex. Laws 713 (codified at *id.* art. 1302-2.06 (Supp. 1972)). Article 1302-2.06 deals with corporate undertakings.

⁴⁴ Ch. 274, § 5, [1967] Tex. Laws 660.

not apply to transactions occurring in earlier years.⁴⁵ The court concluded that the defendants could claim penalties under the usury statutes as they existed in 1965.

In *Lafferty v. A.E.M. Developers & Builders Co.*⁴⁶ the plaintiff corporation executed a real estate lien note for \$7,500 payable to the defendant. The note was to be paid in monthly installments of \$659.37 or more, including ten percent interest on the face amount. In consideration of this note, the defendant advanced plaintiff \$7,000, retaining \$500 as a charge for securing the loan for plaintiff. After eight months, the plaintiff paid off the entire note. Subsequently, the plaintiff sued the defendant for penalties under the current usury statute.⁴⁷ The plaintiff recovered double the interest he had paid (\$1,587.18) plus the principal he had paid (\$7,000). This judgment was affirmed on appeal.

The defendant stated that he had borrowed money in order to make it available to the plaintiff. He argued that the \$500 fee was for use of his credit and services in obtaining money to loan to plaintiff. The court had no difficulty in disposing of this argument. An agent or broker may charge for his services in arranging a loan, but a lender may not charge for use of his credit in addition to the maximum legal rate of interest.⁴⁸

The court calculated that the interest paid by the plaintiff exceeded twenty percent. He had repaid a loan of \$7,000 in about eight months, paying \$835.94 interest. The statute under which plaintiff sued provides for forfeiture of double interest where interest in excess of ten percent is received. Further, a lender who receives interest in excess of double the maximum rate "shall forfeit as an additional penalty, all principal as well as interest and all other charges . . ."⁴⁹ Defendant's argument that the latter forfeiture refers only to unpaid principal was rejected.

On motion for rehearing the defendant contended that the plaintiff was a corporation and could lawfully contract for one-and-one-half percent per month interest. The court refused to consider the point because it had not been raised previously in trial court or on appeal.

III. SECURITY INTERESTS

Several cases have been decided during the survey period in which holders of security interests have asserted conflicting rights. The easiest case is *White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co.*,⁵⁰ in which conflicting claims were made under the UCC. Plaintiff retail seller sold two television sets to Redding. The sets were sold as consumer goods. The plaintiff retained security interests in the sets and no financing statement was filed. Redding immediately resold the goods to the defendant, a pawnshop and retail store. The

⁴⁵ *Garrett v. Whalen*, 470 S.W.2d 632 (Tex. 1971); *Gulf Coast Inv. Corp. v. Prichard*, 438 S.W.2d 658 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*

⁴⁶ 483 S.W.2d 279 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*

⁴⁷ TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (1971).

⁴⁸ The court cited *Greever v. Persky*, 140 Tex. 64, 165 S.W.2d 709 (1942); *Chagas v. Irvin*, 458 S.W.2d 840 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

⁴⁹ TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (1971).

⁵⁰ 477 S.W.2d 658 (Tex. Civ. App.—Houston [14th Dist.] 1972).

defendant had dealt with Redding in the past and had no reason to believe that anyone else had an interest in the goods. The defendant subsequently sold the sets. When the plaintiff learned that the defendant had bought and resold the sets, the plaintiff sued in conversion and recovered \$1,000. The judgment was affirmed on appeal.

The court relied on the fact that under the UCC a financing statement need not be filed to perfect a purchase money security interest in consumer goods.⁵¹ Further, section 9-306(2)⁵² provides that a security interest continues in the collateral notwithstanding its sale, unless the sale is authorized. Although a buyer in the ordinary course of business takes free of a security interest,⁵³ pawnbrokers are excluded by section 1-201(9)⁵⁴ from the definition of "buyer in ordinary course of business," and Redding was not in the business of selling television sets. Under section 9-307(2)⁵⁵ a purchaser from a retail buyer takes free of the retail seller's unfiled security interest if he buys for his own personal, family, or household purposes. But the defendant did not buy for such purposes and could not claim protection under this section. The defendant's argument that the technical elements of conversion were not established was rejected.

The remaining cases to be discussed involve the conflict of rights under the UCC and other statutes. In *Texas State Bank v. Foremost Insurance Co.*⁵⁶ plaintiff bank loaned \$10,000 to Goodbar, a dealer in mobile homes. Goodbar executed a security agreement covering "[a]ll other new and used mobile homes now owned or hereafter purchased," and filed a financing statement. Goodbar simultaneously delivered to the bank a manufacturer's certificate of origin on a 1970 Prudential mobile home. The certificate was issued by Design Homes Corporation to the defendant insurance company as first owner. While the defendant had not endorsed the certificate, Goodbar represented to the plaintiff that he had authority to pledge it as security for a loan. Thereafter, Goodbar left the state and defaulted on the loan. Unable to locate other collateral, the plaintiff claimed the 1970 Prudential mobile home or its value. The court of appeals agreed with the holding of the trial court that the plaintiff should take nothing in its suit.

The evidence indicated that Goodbar had agreed with the defendant that he would try to sell the mobile home and could keep anything he received above a certain price. Goodbar obtained the manufacturer's certificate on the representation that he had sold the home and needed the certificate to arrange for financing. The court distinguished cases in which an agent was in possession of an endorsed certificate of title. Here, the plaintiff had not complied with a section of the Texas Certificate of Title Act which requires liens to be noted on the manufacturer's certificate.⁵⁷ It was clear that the plaintiff had notice of the defendant's title to the mobile home. The plaintiff could and should have

⁵¹ TEX. BUS. & COMM. CODE ANN. § 9.302(1) (1968).

⁵² *Id.* § 9.306(2).

⁵³ *Id.* § 9.307(1).

⁵⁴ *Id.* § 1.201(9).

⁵⁵ *Id.* § 9.307(2).

⁵⁶ 477 S.W.2d 652 (Tex. Civ. App.—Corpus Christi 1972), *error ref. n.r.e.*

⁵⁷ Act of May 10, 1971, ch. 123, § 5, [1971] Tex. Laws 896, *amending* TEX. PEN. CODE ANN. art. 1436-1, § 41 (1953); *see* 477 S.W.2d at 655.

inquired of the defendant as to its interest. Goodbar did not transfer any security interest to the plaintiff because he never owned the mobile home, a fact reflected in the manufacturer's certificate.

In *Beneficial Finance Co. v. Shaw*⁵⁸ the contest was between a landlord and a security holder under the UCC. The tenant purchased a flower box refrigeration unit, plaintiff finance company advancing the price and taking a security interest. The plaintiff prepared and filed a financing statement in Potter County. However, because the refrigeration unit was not used as a consumer good, but rather as equipment, the statement should have been filed in Austin with the secretary of state.⁵⁹ The equipment was located on premises leased from the defendant. At a later date the defendant perfected a landlord's lien on the refrigeration unit. It was undisputed that the defendant actually knew of the plaintiff's security interest before the landlord's lien was perfected. The court of appeals held that the summary judgment for the defendant should be reversed and the cause remanded for trial.

Section 9-401(2) of the UCC states that a statement filed in an improper place is "effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement."⁶⁰ The defendant argued that the financing statement was defective and, therefore, did not cover the equipment in question. The financing statement described the address where the collateral was located as the debtors' residence, when actually it was the debtors' retail flower shop. The description of the collateral was "[a]ll of the household furniture and furnishings . . . including . . . refrigerators, etc. . . . now owned or hereafter acquired . . ."⁶¹ The court considered the notice theory which lies behind the filing requirements of the UCC and concluded that the filing was sufficient. The financing statement included "refrigerators" and the equipment in question was actually located at the given address.

Prior to enactment of the UCC, it was held that a perfected landlord's lien was superior to an unregistered chattel mortgage, even though the landlord knew when he acquired his lien that the distrained property was subject to an earlier unregistered lien.⁶² Section 9-301(1)(b) of the UCC states that, with certain exceptions, "an unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor without knowledge of the security interest and before it is perfected."⁶³ However, article 9 does not apply to a landlord's lien.⁶⁴ Accordingly, defendant landlord argued that the earlier rule remained intact.

The court of appeals disagreed. The earlier decisions were based on language in registration statutes which had been repealed by the UCC.⁶⁵ The court held

⁵⁸ 476 S.W.2d 772 (Tex. Civ. App.—Eastland 1972).

⁵⁹ TEX. BUS. & COMM. CODE ANN. § 9.401(1) (1968).

⁶⁰ *Id.* § 9.401(2).

⁶¹ 476 S.W.2d at 773.

⁶² *Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, 81 Tex. 135, 16 S.W. 807 (1891); *Brothers v. Mundell, Munzeshheimer & Co.*, 60 Tex. 240 (1883).

⁶³ TEX. BUS. & COMM. CODE ANN. § 9.301(1)(b) (1968).

⁶⁴ *Id.* § 9.104 (1968).

⁶⁵ *See* ch. 73, § 1, [1885] Tex. Laws, 9 H. GAMMEL, LAWS OF TEXAS 696 (1889); ch. 159, § 1, [1925] Tex. Laws 368, *as amended*, ch. 261, § 1, [1947] Tex. Laws 459.

that "an unperfected security interest is not subordinate to a landlord's lien where the landlord has actual knowledge of such unperfected security interest before the landlord's lien is perfected."⁶⁶

It is likely that the ruling would apply even when there has been no filing of a financing statement. The court's discussion of the content of the improper filing should not imply that the holder of the security interest is limited to what appears in a filed financing statement. The opinion does not indicate that the defendant landlord knew of the plaintiff's security interest merely because he had seen the improperly filed statement. The defendant may have known of the security interest without knowing of the existence of the improperly filed statement. There is no valid reason to limit the holder of a security interest to what appears in some improperly filed financing statement, where the lien creditor knows of the security interest before getting his lien. Indeed, the latter part of section 9-401(2) deals only with the effectiveness of an improperly filed financing statement where the contents are known by a later party.

In *Texas Oil & Gas Corp. v. United States*⁶⁷ the question was whether a federal tax lien took precedence over a security interest filed earlier. The taxpayer was engaged in servicing and repairing oil wells and related equipment. In 1967 he entered into a security agreement with Pecos County State Bank under which he pledged his accounts receivable as soon as they arose. A financing statement describing the collateral was promptly filed. Between 1967 and 1970 the bank made advances on the basis of the security agreement. In 1969 and 1970 the Government made assessments against the taxpayer for federal withholding and FICA tax liability. In February 1970 the Government filed notice of a federal tax lien with the county clerk in the taxpayer's county of residence. In September 1970 the taxpayer completed certain work for the plaintiff oil company. As a result, the plaintiff became indebted to the taxpayer for \$14,690.10. The Government caused a notice of levy to be served on the plaintiff, and shortly thereafter the Pecos bank served notice on the plaintiff that it claimed the sum owed. The plaintiff then tendered the \$14,690.10 into the registry of the court and petitioned for determination of the rights of the parties. The trial court held that the Government had a prior claim to the entire sum.

The court stated that the issue in the case was controlled by federal law, specifically section 6323 of the Internal Revenue Code.⁶⁸ A Notice of Federal Tax Lien is entitled to priority over a state-created security interest unless the security interest meets the following requirements: (1) the lien's identity must be established; (2) the amount of the loan must be in existence within forty-five days subsequent to the filing of the notice; and (3) the property to which the security interest attaches must be in existence within the same forty-five-day period. The court found that the Pecos bank's lien was not in an established amount, nor was there identifiable property to which it attached until the taxpayer completed his work in September 1970, more than forty-five days

⁶⁶ 476 S.W.2d at 775.

⁶⁷ 340 F. Supp. 409 (W.D. Tex. 1971).

⁶⁸ INT. REV. CODE of 1954, § 6323.

after the Notice of Federal Tax Lien was filed. Therefore, the Government's claim had priority.

Whether there was a minimum indebtedness which existed through the forty-five day period and whether the inchoate right to be reimbursed for performance of a contract was property to which the bank's security interest attached are questions that remain unsolved. Still, the importance of the taxing power is such that it should not easily be frustrated by security devices that anticipate and drain off the taxpayer's income and assets. Assuming that the statute was properly interpreted, the result in the instant case was correct in view of the supremacy of federal law.

In *General Electric Supply Co. v. Epco Construction, Inc.*⁶⁹ conflicting rights were asserted under the UCC and the McGregor Act.⁷⁰ Epco was a prime contractor on a construction project for academic facilities in Pasadena, Texas. In compliance with the McGregor Act, Epco furnished performance and payment bonds. The payment bonds were for the benefit of all materialmen who furnished material to Epco or a subcontractor. In 1967 Epco contracted with A-All for the supply of electrical materials and performance of electrical work. A-All purchased materials and equipment from General Electric. On May 10, 1968, General Electric mailed notices and sworn statements of account to Epco, A-All, and the surety. The notices were timely and in compliance with the McGregor Act with respect to materials delivered on or after January 1, 1968.

As early as July 1966, Citizens National Bank filed a financing statement reflecting a security agreement between it and A-All. In June 1968 A-All executed a note for \$10,000 and pledged its accounts receivable in connection with its Epco contract. On June 9, 1969, the bank obtained a judgment against A-All for \$11,880. When A-All did not pay General Electric, suit was brought against Epco and its surety for over \$12,000. Citizens Bank intervened, claiming priority rights in the money owed and retained by Epco. The court held that General Electric had a prior right to the fund.

Laborers and materialmen have long enjoyed a preferred position in the determination of priorities in the distribution of retained funds in public works construction. The McGregor Act was patterned after federal legislation and was intended to provide a simple and direct method of giving notice and perfecting claims of laborers and materialmen. Although intervenor bank had fully satisfied the requirements of the UCC in perfecting its security rights in A-All's claims against Epco, the court held that the Code did not impair the rights of General Electric to the funds in Epco's hands.

The court referred to section 1-103 of the UCC⁷¹ which states that, unless displaced by a particular provision, principles of law and equity shall operate. Those who are responsible for the physical completion of a building have a peculiarly equitable claim to be paid from retained moneys ahead of those whose claims arise out of the advance of money.⁷² The court found "that the claim of General Electric was fixed prior to the time the assignment to the

⁶⁹ 332 F. Supp. 112 (S.D. Tex. 1971).

⁷⁰ TEX. REV. CIV. STAT. ANN. art. 5160 (1968).

⁷¹ TEX. BUS. & COMM. CODE ANN. § 1.103 (1968).

⁷² See *Framingham Trust Co. v. Gould-National Batteries, Inc.*, 427 F.2d 856 (1st Cir. 1970); *National Shawmut Bank v. New Amsterdam Cas. Co.*, 411 F.2d 843 (1st Cir. 1969).

Bank was made and that it has a prior right on all moneys that remain in the hands of the prime contractor"⁷³ This probably means that a claim perfected under the McGregor Act is superior to a claim perfected under the UCC, even though the latter is filed first.

IV. MISCELLANEOUS

Bailment in Excess of Two Years. Interpretation of a statute dealing with lengthy bailments was required in *Thompson v. Adams*.⁷⁴ Thompson loaned a pool table to Allen on May 31, 1968. Allen sold the table to Adams on November 13, 1969, for valuable consideration. Thompson became aware of Adams' possession of the table in May 1970, and sued to recover the table on February 10, 1971. Adams obtained a summary judgment in the trial court, and that judgment was affirmed on appeal.

Thompson argued that under the pertinent statute creditors and purchasers must be distinguished from possessors, and possession must continue two or more years before a creditor or purchaser will be protected.⁷⁵ The court of civil appeals noted cases in which the original possessor was not allowed to avail himself of the statute,⁷⁶ and in which a mortgagee was apparently denied protection of the statute where he took the mortgage from a possessor of less than two years.⁷⁷ However, the court decided to follow a third case in which possession of a "loanee" or vendee, or those claiming under him for a two-year period, was held to have satisfied the statute.⁷⁸ Therefore, the statute "vested absolute title in the property in Adams since suit was not filed within two years after the loan to Allen."⁷⁹

The court's review of precedent and its analysis of statutory language are sketchy. The logic of the decision is that a buyer for valuable consideration from a bailee of one month gains absolute title twenty-three months later. One may question whether the drafters of the statute had this intent. The language of the statute seems to indicate that after a possessor (bailee) and his successors hold for two years, then, with respect to a creditor or purchaser, the possessor or his successor is to be treated as having the absolute title. The two-year statute of limitations applicable to conversion⁸⁰ is available to the original possessor and those who become his successors.

⁷³ 332 F. Supp. at 116.

⁷⁴ 480 S.W.2d 510 (Tex. Civ. App.—Austin 1972).

⁷⁵ (a) With respect to a creditor or purchaser from the possessor of tangible personal property, a pretended loan of tangible personal property is fraudulent and the absolute title to the tangible property is in the possessor, if

- (1) the possessor, or someone claiming under him, has possessed the tangible property for two years; and
- (2) the lender of the tangible personal property has not, during those two years, made and pursued by law a demand for the tangible personal property

TEX. BUS. & COMM. CODE ANN. § 24.05 (1968).

⁷⁶ See, e.g., *San Antonio Brewing Ass'n v. Arctic Ice Mach. Mfg. Co.*, 81 Tex. 99, 16 S.W. 797 (1891).

⁷⁷ *Strawn Nat'l Bank v. Marchbanks*, 74 S.W.2d 447 (Tex. Civ. App.—Eastland 1934), error ref.

⁷⁸ *Hastings v. Kellogg*, 36 S.W. 821 (Tex. Civ. App. 1896).

⁷⁹ 480 S.W.2d at 512.

⁸⁰ TEX. REV. CIV. STAT. ANN. art. 5526 (1968).

Liability of Consignee for Freight Charges. A carrier sought unsuccessfully to recover unpaid freight charges from a consignee in *Tom Hicks Transfer Co. v. Ford, Bacon & Davis Texas, Inc.*⁸¹ Consignee had been receiving shipments of machinery from consignor f.o.b. job site and had been paying consignor in full for the machinery and freight charges. Consignee received the goods and bills of lading showing that the freight charges were "prepaid" on the shipment in question. Actually, the charges were not prepaid and the carrier had extended credit to the consignor. Consignee paid the consignor for the machinery and the cost of shipping. Subsequently, the consignor became insolvent, and the carrier brought suit against the consignee. Summary judgment was entered for the consignee and was affirmed on appeal.

The carrier cited sections of the Interstate Commerce Act⁸² which could be read as imposing strict liability on a consignee to pay freight charges for goods received if the consignor did not pay. The consignee argued that the carrier was estopped from denying that the consignor had paid the charges. The court cited many cases, the larger number of which appeared to support the carrier. The reason for this view was that the shipper, carrier, and consignee "are all agents and trustees for the public, and no complications arising out of the agreements between them, or shuffling, should defeat the purpose of the act requiring the full and exact payment of the freight."⁸³ Nevertheless, the court accepted a recent federal decision to the contrary as controlling.⁸⁴ The consignee was not obliged to inquire of the consignor and to hold up reimbursement for freight charges when the carrier represented on its bill of lading that the charges had been paid. Thus, the carrier could not shift the risk of its credit transaction to an innocent party.

The judgment accords with common sense. One can understand the strictness of language in the pertinent statutes which requires that no discrimination or favoritism occur in the collection of freight charges. But the policy of the statutes fails in a case of the instant kind, and estoppel is a valid ground for denying recovery.

Existence of Surety Undertaking. In *Fidelity & Deposit Co. v. Felker*⁸⁵ the Texas Supreme Court reversed the judgment of the trial court and the court of appeals that an electrical contractor on a construction site should recover from the general contractor's surety. Center Enterprises contemplated building a shopping center, and after rejecting bids by several general contractors, it undertook to put the project together by contracting for different parts of the work. Center Enterprises accepted Felker's bid for the electrical work and Johnston's bid for the concrete work. Subsequently, Johnston offered to act as general contractor at a price approximately equal to the total cost of the contracts which Center had made for different parts of the work. Apparently, Center needed a general contractor in order to satisfy requirements of its financing agency and, therefore, accepted Johnston's proposal. Johnston

⁸¹ 482 S.W.2d 364 (Tex. Civ. App.—Texarkana 1972).

⁸² 49 U.S.C. §§ 317, 323 (1970).

⁸³ See, e.g., *Great N. Ry. v. Hyder*, 279 F. 783, 786 (W.D. Wash. 1922).

⁸⁴ *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971).

⁸⁵ 469 S.W.2d 389 (Tex. 1971).

and the defendant bonding company then entered into a suretyship undertaking with Center to protect the latter from claims for labor, subcontracts, material, and specially fabricated materials performed or furnished under the general contract. This undertaking was entered into under the Hardeman Act⁸⁶ as a substitute for the relief that otherwise might be available directly against the shopping center by subcontractors supplying labor and materials. Under the statute and suretyship contract, the subcontractors had direct recourse against Johnston and the bonding company. After difficulties arose in the construction of the shopping center, Felker was not paid and he sued Johnston and the bonding company. The principal issue was whether Felker was covered by the suretyship undertaking.

The pertinent statute provided that whenever a written contract exists "between the owner and an original contractor" and the original contractor furnishes a proper bond, the condition of the bond being "for the prompt payment of all labor, subcontracts, materials," then the payment bond inures to the benefit of all claimants and no suit may be brought against the owner or his property.⁸⁷ The bond must be in the amount of the total of the original contract amount and must be filed. Persons who have demands must file prescribed notices and claims.

The supreme court held that the case was controlled by its decision in *Trinity Universal Insurance Co. v. Barlite*.⁸⁸ Felker was an original contractor with Center and did not become a subcontractor claimant when Johnston became the general contractor. Felker testified that he periodically billed Center Enterprises, that he never submitted a bid to Johnston, and that he did not know, when he contracted with Center, who the general contractor would be. The court said that these facts led to the conclusion that Felker was an original contractor as a matter of law.

Felker argued that the whole scheme changed when Johnston became general contractor and added his name to the contract between Felker and Center Enterprises. The court disagreed because there was no evidence that the contract between Felker and Center was abandoned. The court recognized that some elements of estoppel appeared in the case. (This was not so in the *Barlite* decision.) The bonding company participated in the arrangements for subcontracts made by Johnston as general contractor, and received a premium which included the amount of Felker's bid. Nevertheless, the court insisted that the bond was written under the Hardeman Act for the benefit of subcontractors and did not cover Felker, who was an original contractor.

It is likely that the lower courts accurately judged what the parties intended to do. One may ask why the intentions of the parties should not have been carried out on a theory of novation. Another consideration, however, gives support to the supreme court's judgment. As an original contractor, Felker had an important right of recourse directly against Center Enterprises' shopping center. If the right of an original contractor is to be converted

⁸⁶ TEX. REV. CIV. STAT. ANN. arts. 5452, 5472d (1968).

⁸⁷ *Id.* art. 5472d.

⁸⁸ 435 S.W.2d 849 (Tex. 1969).

into the right of a subcontractor under the Hardeman Act, his intent, as well as that of the other parties, should be expressed unequivocally.

Defenses to Assignment. A section of the Texas Consumer Credit Code was applied in *Commercial Credit Corp. v. Williams*.⁸⁹ Williams had purchased a 1966 Dodge Polara from a retail dealer, and executed a retail installment contract for \$1,200 which was assigned to Commercial Credit Corporation (CCC). Williams did not know of the assignment and CCC gave no notice. Williams became dissatisfied with the Polara and brought it back to the retail seller before the first installment payment was due. It was agreed that the Polara would be traded in on a 1966 Dodge Monaco, and Williams executed a second retail installment contract for \$1,500. The retail dealer agreed to accept the Polara in satisfaction of the first contract. The second contract was also assigned to CCC. Williams made several payments on the Monaco and then traded it to another retail dealer, who paid off the second contract in full.

When Williams failed to pay on the Polara contract, CCC communicated with him and learned for the first time that he had traded in the Polara for the Monaco. CCC sued Williams on the Polara contract and lost in the trial court. The court of appeals had no difficulty in affirming. If the retail seller had sued Williams, the trade-in was clearly a satisfaction of the Polara contract. Under article 7.08 of the Texas Consumer Credit Code, "[n]o . . . defense of a buyer arising out of a retail installment sale which would be cut off by negotiation, shall be cut off by negotiation of the contract to any third party unless such holder . . . gives notice of the negotiation to the buyer . . ."⁹⁰ The court said that the failure of CCC to give notice to Williams deprived it of its status as a holder in due course.

In *Taubenhaus v. Jung Factors, Inc.*⁹¹ J & R Sales Company (JARCO) had furnished artificial plants and arranged them in planter boxes in an office building constructed by the defendant. JARCO sold the account, along with others, to the plaintiff, which was a corporation engaged in purchasing accounts receivable. The evidence revealed that the plaintiff sent copies of JARCO's invoices to the defendant bearing a stamp notifying it of the assignment and advising that payment should be made to the plaintiff. The defendant continued to pay JARCO and the plaintiff sued. A judgment was obtained for payments made after the defendant first received notice of the assignment. The court of appeals affirmed, citing section 9-318(3)⁹² of the UCC, under which an account debtor is authorized to pay the assignor until he receives notification that the account has been assigned and that payment should be made to the assignee. On motion for rehearing the defendant called attention to the fact that the UCC was enacted after the events in the instant case arose. The court answered that pre-Code law concerning notice of assignment to a debtor was substantially the same as section 9-318(3).

⁸⁹ 474 S.W.2d 751 (Tex. Civ. App.—Eastland 1971).

⁹⁰ TEX. REV. CIV. STAT. ANN. art. 5069-7.08 (1968).

⁹¹ 478 S.W.2d 149 (Tex. Civ. App.—Houston [14th Dist.] 1972).

⁹² TEX. BUS. & COMM. CODE ANN. § 9.318(3) (1968).