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## Commercial Transactions

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# COMMERCIAL TRANSACTIONS

by

*Lennart V. Larson\**

AN ever-increasing number of Texas decisions are coming down interpreting and applying the Uniform Commercial Code.<sup>1</sup> Business transactions in Texas have been subject to the Code for eight years, and the expectation is being realized that Code provisions would be cited and argued in commercial litigation. There is good assurance in Texas and elsewhere that the Code is producing certainty and uniformity in the law governing commercial transactions. However, the Code is massive and complicated legislation, and it is predictable that provisions will be overlooked or misunderstood. While the main purpose of this survey is informational, pointing up interesting and significant decisions, some attention will be given to what appear to be omissions or misconstruction of statutory language. Undoubtedly the diligence of counsel does not always bring to light all pertinent statutory provisions, and the persuasiveness of counsel may lead a court down the wrong road.

All decisions which will be discussed can be categorized under the rubrics of bills and notes, sales, and secured transactions. Within these topics are to be found a considerable variety of problems involving the UCC and its operation in changing old rules and procedures and in confirming and clarifying previously accepted rules and doctrines.

## I. BILLS AND NOTES

*Final Payment of Check.* In *Wertz v. Richardson Heights Bank & Trust*<sup>2</sup> Wertz was general manager for an insurance company and Baker was his assistant. Baker had borrowed \$1505 from the insurance company, and Wertz had guaranteed payment of the notes which evidenced Baker's indebtedness. Wertz paid and received possession of the notes, for which Baker gave Wertz a check for \$1505 payable to the insurance company. The check was drawn on the Richardson Heights Bank. Payment of the check was stopped and Wertz' secretary inquired on several successive days whether Baker's check was good. Two weeks after payment was stopped, the bank indicated that the check was good. Wertz' 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. 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

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1. Uniform Commercial Code, 1972 Official Text with Comments, hereafter referred to as "UCC." The UCC became effective in Texas in 1966 and is to be found in the Texas Business and Commerce Code.

2. 495 S.W.2d 572 (Tex. 1973), *rev'g* 482 S.W.2d 692 (Tex. Civ. App.—Dallas 1972).

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 eventually refused to pay it. The court of civil appeals reversed judgment in favor of Wertz for \$1505. The supreme court reversed the court of civil appeals and affirmed the judgment of the trial court.

The court of civil appeals reasoned 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."<sup>3</sup> The court denied that Wertz had lost anything by relying on the cashier's check because he had a judgment against Baker for \$1505 plus \$1000 exemplary damages.

In last year's *Survey* this writer suggested that the court of civil appeals had overlooked sections 3-418 and 4-213 of the UCC.<sup>4</sup> The insurance company was the payee on Baker's notes and check and qualified as a holder in due course. Wertz stood in the shoes of the insurance company and received "final payment" of Baker's check from the drawee bank. The purpose of sections 3-418 and 4-213 is to protect holders in due course and others who change their position in good faith upon receiving final payment from the payor on an instrument.<sup>5</sup>

In reversing the court of civil appeals, the supreme court made no mention of the above sections dealing with final payment, but rather discussed the nature of a cashier's check. The check was a bill of exchange, accepted when issued and constituting an agreement to pay according to the tenor on its face, hence it was not subject to a stop order under sections 4-303 and 4-403 of the UCC.<sup>6</sup> Plaintiff could not be charged with the failure of defendant bank "to timely respond to Baker's stop payment order."<sup>7</sup> The court concluded that Wertz was a holder in due course, having given value in paying Baker's notes and later surrendering them to Baker. Section 3-302 did "not require that the name of the holder be placed in the instrument," and Wertz was "'beneficial owner' of the cashier's check as well as the holder in due course."<sup>8</sup>

The dissenting opinion, concurred in by three justices, put the question of stop order to one side. No third party had asked defendant bank not to pay the cashier's check; hence, the question was simply one of whether defendant had a valid defense on the obligation represented by its cashier's check. Certainly the defense of fraud or lack of consideration could be set up against the payee of the check. Money paid in violation of a stop order could be recovered if the payee had not changed his position. Therefore,

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3. 482 S.W.2d at 694. The court relied on TEX. BUS. & COMM. CODE ANN. § 3.302 (1968).

4. Larson, *Commercial Transactions, Annual Survey of Texas Law*, 27 SW. L.J. 67, 72, 73 (1973). The cited sections may be found in TEX. BUS. & COMM. CODE ANN. §§ 3.418, 4.213 (1968).

5. In particular, see UNIFORM COMMERCIAL CODE § 3-418, Comments 2 & 3.

6. TEX. BUS. & COMM. CODE ANN. §§ 4.303, 4.403 (1968).

7. 495 S.W.2d at 574.

8. *Id.*

plaintiff could not recover unless he showed that he was a holder in due course or had changed his position in reliance on the cashier's check. Plaintiff was not a holder in due course under section 3-302 because he was not a "holder" as defined in section 1-201.<sup>9</sup> The conclusions of the court of civil appeals were quoted by the dissent to the effect that plaintiff had not changed his position in reliance on either Baker's check or the cashier's check. Since plaintiff did not question the lower court's holding that he had not made a detrimental change in position, the dissent argued that the lower court's judgment should be affirmed.

It appears that the dissenting opinion has the best argument as to plaintiff's status as a holder in due course. Plaintiff was not a payee or endorsee of either Baker's check or the cashier's check, and neither instrument was bearer paper. Nevertheless, the insurance company would have qualified as a holder in due course if it had taken Baker's check and had received the cashier's check in payment therefor.<sup>10</sup> While Wertz was not a holder in due course of Baker's check, he was a bona fide purchaser and beneficial owner, having paid Baker's debt. In receiving the cashier's check, Wertz obtained "final payment" of Baker's check under section 4-213. Under section 3-418 such payment is final in favor of "a person who has in good faith changed his position in reliance on the payment" as well as of a holder in due course. If the bank had caught Wertz' secretary as she was going out the door with the cashier's check, no doubt a valid demand for its return, based on mistake, could have been made. But the facts were such that Wertz was lulled into a sense of security. He deposited the check and returned Baker's notes, and two days elapsed before defendant bank asked for return of the cashier's check. This is a type of case to which sections 3-418 and 4-213 are addressed.

In summary, it is submitted that the dissent manifests a sounder understanding of what a holder in due course is than does the majority opinion. The key issue in the case was whether Wertz's reliance on the issuance of the cashier's check barred the bank's defense of mistake. On this issue the supreme court came to a correct result, although the pertinent sections of UCC were not relied upon.

*Unauthorized Endorsement by Payee's Employee.* In *DoAll Dallas Co. v. Trinity National Bank*<sup>11</sup> an employee received checks payable to his employer (plaintiff). The employee endorsed the checks in the name of the employer, endorsed in his own name, and deposited them to his own account in defendant bank. The employee misappropriated \$25,000 before he was apprehended. Plaintiff was denied recovery in the trial court because of accord and satisfaction between the plaintiff and the employee. On appeal, the court of civil appeals rendered judgment against defendant bank.

The appellate court construed the jury's findings as not discharging defendant to the extent that the accord and satisfaction had not been performed. With respect to the bank's liability for collecting the deposited

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

10. A payee can qualify as a holder in due course under *id.* § 3.302.

11. 498 S.W.2d 396 (Tex. Civ. App.—Texarkana 1973).

checks and putting the proceeds to the employee's credit, the trial court submitted issues of negligence and "contributing cause" under section 3-406 of the UCC.<sup>12</sup> The employer was found negligent, but the jury also found that the bank "failed to act in accordance with existing reasonable commercial standards of the banking community."<sup>13</sup> Hence the bank was not entitled to the benefit of section 3-406. Defendant argued that plaintiff's negligence offset the bank's negligence and proximate cause. The court answered: "We do not agree. The cause of action against the bank was for conversion, as well as for negligence. Contributory negligence is not a defense to liability for conversion."<sup>14</sup> Plaintiff's negligence had to be the proximate cause for loss in order for defendant to be excused from liability.

Statutory authority for treating defendant bank as a converter is found in section 3-419 of the UCC,<sup>15</sup> which was not cited by the court. Conversion occurs when a depository (collecting) bank pays an item on a forged or unauthorized endorsement. Of course, apparent authority or estoppel, of which negligence may be a part, may result in treatment of the endorsement as authorized. In such a case conversion would not occur when the item is paid and the proceeds collected.

It is doubtful that section 3-406 should have been applied in the case. The section contemplates situations in which a maker draws an instrument in such a way that alteration or addition of names or figures is facilitated.<sup>16</sup> In the instant case the checks were drawn by customers who were not negligent, and plaintiff's employee endorsed the checks. Ordinarily, a drawee or other paying bank must ascertain that a person presenting a check for payment is the owner of the item as payee, endorsee, or assignee, or his agent. Unless ownership, or apparent ownership or authority binding on the owner, is made out, payment on the item is conversion.

*Payment of Forged Check; Banker's Blanket Bond.* Recovery on a banker's blanket bond was denied in *Aetna Life & Casualty Co. v. Hampton State Bank*,<sup>17</sup> where the insured collecting bank returned monies paid by a drawee bank on a forged check. Check forms were furnished by Northwest Bank to Pizza Inn, Inc. A stolen form was executed in the amount of \$4000 by forging the drawer's signature and writing in "Pizza Inn, Inc., Number 32" as payee. An account was opened in the plaintiff Hampton Bank and the forged check was deposited in the name of the payee. Plaintiff sent the check through banking channels, and drawee Northwest Bank paid the check. Plaintiff permitted withdrawals which exhausted the account. Upon subsequently learning of the forgery, plaintiff so advised Northwest, repaid the \$4000, and asked for and received the forged check. Plaintiff made claim of loss to defendant company on a "banker's blanket bond" insurance contract.

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12. TEX. BUS. & COMM. CODE ANN. § 3.406 (1968).

13. 498 S.W.2d at 402.

14. *Id.*

15. TEX. BUS. & COMM. CODE ANN. § 3.419 (1968).

16. See UNIFORM COMMERCIAL CODE § 3-406, Comment 2.

17. 497 S.W.2d 80 (Tex. Civ. App.—Dallas 1973).

Under the terms of the bond, defendant insurance company agreed to indemnify plaintiff for certain losses including "any loss through FORGERY . . . of, on or in any checks."<sup>18</sup> The trial court found that plaintiff breached its warranty of title because the endorsement under which it took the check was forged. The judgment was that plaintiff was bound to repay Northwest Bank and had a valid claim against defendant. On appeal, the judgment was reversed.

The court of civil appeals rejected the assertion that the payee's endorsement was forged. The payee was fictitious, and "[a]n indorsement by any person in the name of a named payee is effective if . . . a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument."<sup>19</sup> The forger's endorsement of the payee's name on the check passed title to plaintiff bank. True, the check was unenforceable against the drawer and should not have been paid by the drawee, but title to the instrument passed. The drawee's loss in paying the check was not due to lack of title but to its mistake in paying on a forged signature of its depositor. In forwarding the check for collection, plaintiff bank endorsed, "Pay Any Bank, P.E.G.," the latter letters meaning "prior endorsements guaranteed." The court was of the opinion that these words did not add to the warranties of a collecting bank already existent under section 4-207 of the UCC.<sup>20</sup>

Section 3-418<sup>21</sup> was cited as sustaining plaintiff's right to retain the \$4000 received from Northwest Bank. Under this section, which follows the rule of *Price v. Neal*,<sup>22</sup> plaintiff had received "final payment" of the check. Plaintiff qualified as a holder in due course for value, having received the check in good faith without notice of defects and having allowed withdrawal of the proceeds of collection. Plaintiff was in the peculiar position of trying to establish the contrary in order to show that it was obliged to return the \$4000. Because plaintiff had a right to retain the \$4000 paid on the drawee's forged signature, it suffered no loss because of the forgery and had no cause of action against defendant insurance company.

*Statute of Limitations on Overdraft.* The question of whether the two-year or four-year statute of limitations<sup>23</sup> was applicable to a suit on an overdraft was raised in *First State Bank v. Tanner*.<sup>24</sup> Plaintiff bank by mistake paid checks in excess of the drawer's account. Suit was filed two years and ten months later. The court held that the action was brought on an indebtedness evidenced by a contract in writing and that the four-year statute of limitations applied. The court stated:

A strict construction should not be applied by the courts in determining what does and what does not constitute a contract in writ-

18. *Id.* at 83.

19. UNIFORM COMMERCIAL CODE § 3-405(a)(2); TEX. BUS. & COMM. CODE ANN. § 3.405(a)(2) (1968).

20. TEX. BUS. & COMM. CODE ANN. § 4.207 (1968).

21. *Id.* § 3.418.

22. 3 Burr. 1354, 97 Eng. Rep. 871 (1762).

23. TEX. REV. CIV. STAT. ANN. arts. 5526-27 (1958). The former applies to oral obligations, while the latter to contracts in writing.

24. 495 S.W.2d 267 (Tex. Civ. App.—Houston [1st Dist.] 1973).

ing within the meaning of Art. 5527. . . . It is not indispensable that the written instrument relied upon contain an express promise to do the things for the nonperformance of which the action is brought. It is sufficient if the obligation or liability grows out of a written instrument, not remotely but immediately, or if the written instrument acknowledges a state of facts from which, by fair implication, the obligation or liability arises.<sup>25</sup>

*Joint Payees.* In *Hinojosa v. Love*<sup>26</sup> plaintiff brought suit on a printed note form signed by defendant. National Bank of Commerce appeared as payee on the form, and above its name was lettered plaintiff Love's name. Plaintiff obtained a default judgment. The trial court denied a new trial, but this ruling was reversed on appeal and the cause remanded for trial. The court of civil appeals held that on its face the note was payable to joint payees. Section 3-116 of the UCC<sup>27</sup> was cited: "An instrument payable to the order of two or more persons . . . is payable to all of them and may be . . . enforced only by all of them."<sup>28</sup> Therefore, National Bank of Commerce was an indispensable party, and fundamental error was made in entering judgment below.

*Usury.* In *Texas Tool Traders v. W.E. Grace Manufacturing Co.*<sup>29</sup> *T* and *G* were engaged in the machinery business. *T* owed *G* \$10,000. *T* sold two machines to a purchaser in California but could not get them out of a warehouse except upon payment of \$18,000. *G* agreed to advance \$18,000 to *T* in order to secure release of the machines, and in return, *T* agreed to give *G* the \$25,000 check received from the purchaser. The \$25,000 was to be used to repay the \$18,000 advance, to pay *G* \$500 as a "handling charge," and to apply \$6500 on the earlier \$10,000 debt. A writing was drawn up setting out the understanding of the parties.

The agreement was carried out, and in about 22 days *G* received the purchaser's check for \$24,750 (\$25,000 less 1% discount). *G* made other loans to *T*. Subsequently, *G* sued on the debts owed by *T*, who counterclaimed for statutory penalties alleged to be due because of the exaction of usury. While the suit was pending, *T* became bankrupt and a trustee in bankruptcy was substituted as defendant. The trial court rendered judgment for *G* for the debts sued upon plus \$10,000 exemplary damages and denied the counterclaim for usury. On appeal the counterclaim was upheld.

*G* conceded that the \$500 "handling charge" was interest. *T* as a corporation could lawfully contract for interest at the rate of 1½% a month, or 18% a year.<sup>30</sup> But \$500 for the use of \$18,000 for 22 days amounted to well

25. *Id.* at 268.

26. 496 S.W.2d 224 (Tex. Civ. App.—Corpus Christi 1973).

27. TEX. BUS. & COMM. CODE ANN. § 3.116 (1968).

28. *Id.*

29. 488 S.W.2d 498 (Tex. Civ. App.—Dallas 1972). The court of appeals judgment has recently been modified by the Texas Supreme Court. 506 S.W.2d 580 (Tex. 1974). The supreme court held that of the \$24,750 paid for the machines only \$250 was received by *G* as interest. While this lesser amount was usurious, it was not in excess of double the maximum rate. Accordingly, the trustee in bankruptcy was allowed judgment for twice the interest received (\$500) plus \$2500 attorney's fees.

30. TEX. REV. CIV. STAT. ANN. art. 1302—2.09 (Supp. 1973).

over 40% interest. A statute provided that one "who contracts for, charges or receives interest which is greater than the amount authorized by this subtitle, shall forfeit to the obligor twice the amount of interest contracted for, charged or received . . ."; and that one "who contracts for, charges or receives interest which is in excess of double the amount of interest allowed by this Subtitle shall forfeit as an additional penalty, all principal as well as interest and all other charges . . ."<sup>31</sup>

The court of civil appeals held that the trustee in bankruptcy should recover the principal actually repaid (\$17,750 with cancellation of the remaining \$250 debt) plus double the interest charged (\$1000) plus attorney's fees (\$2500). Usury was found in that the contingency existed under the contract that *G* might receive more than the maximum legal rate of interest. Further, the contingency had come to pass. Still further, the reality of the \$18,000 loan was that it was expected to be repaid in a matter of days. The court had no difficulty in construing the statutes as making the penalties applicable to excessive interest charged a corporation, even though the pertinent sections were in different subtitles.

*G* tried to avoid the penalties of usury by showing that on its books of account the whole amount of the \$24,750 check was applied to the principal owed by *T*. *G* contended that it had a right to do this because *T* had given no directions as to application of the check. The court rejected the argument as contrary to the clear agreement of *T* and *G* as to how the proceeds of sale should be used.

To cap the adversity suffered by *G* in this litigation, the court held that *G*'s claims for loans and deceit in other transactions could not be set off against the claim of the trustee in bankruptcy for the penalties of usury. The claims were not mutual debts or credits which could be set off against the other.<sup>32</sup> The result would have been otherwise if *T* had not been adjudged bankrupt.

Two other cases in which usury questions arose should be noticed. In *Sud v. Morris*<sup>33</sup> plaintiff sued for double usurious interest paid on a promissory note. He alleged that the note was backdated half a year and 7½% interest paid in advance. The note was signed by plaintiff and MPS Production Company as joint and several makers. Defendants answered by plea in abatement, asserting that necessary parties had not been joined as plaintiffs. The plea was sustained, and plaintiff appealed. The judgment was reversed and remanded because defendants did not plead facts with particularity showing that other parties should have been joined as plaintiffs.

The court stated that if MPS was a corporation, it was not a necessary party because it could agree to interest not exceeding 1½% per month. Defendants did not aver that MPS was not a corporation, and no proof was offered that persons not appearing on the note were primary obligors. The court approved holdings of other jurisdictions that where a corporation and

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31. *Id.* art. 5069—1.06 (1971).

32. Bankruptcy Act, 11 U.S.C. § 108a (1970).

33. 492 S.W.2d 335 (Tex. Civ. App.—Beaumont 1973).



an individual are joint makers on a note which is usurious, the individual may prosecute the penalty action without joinder of the corporation.<sup>34</sup>

In *Maloney v. Andrews*<sup>35</sup> suit was brought to recover unpaid rentals on a lease. The lease agreement provided that the lessee should pay a "late charge" of \$1 a day for each day he was delinquent in paying monthly rent, and charges were cumulative from month to month. The lessee counter-claimed for usury. The court held that the constitutional and statutory prohibitions applied to loans and lenders of money and not to lease agreements. Judgment was affirmed for \$600 unpaid rentals plus attorney's fees. Evidence supported the jury's finding that \$600 was due "after allowance of all credits." One may argue that the late charges were excessive and unconscionable.

*Miscellaneous.* *Waters v. Waters*<sup>36</sup> illustrates that a negotiable instrument can be transferred as a gift by simple delivery. Neither endorsement nor written assignment is necessary.

In *Gulf Collateral, Inc. v. Johnston*<sup>37</sup> plaintiff was assignee of checks given to purchase gambling chips in a Nevada casino. The checks were dishonored, and plaintiff induced defendant to enter into a compromise agreement and to execute twelve new checks, each dated one month apart. Payment was stopped after two checks were paid. The court held that the ten remaining checks were unenforceable because plaintiff stood in the same shoes as the gambling casino and was not purchaser for value without notice. Gaming tainted the compromise transaction.

*Hill v. Citizens National Bank*<sup>38</sup> is a case in which lenders made deposits in defendant bank to be used by a borrower for a specified purpose. Having this knowledge, defendant was held liable to the lenders when it placed the deposits in the borrower's general account and applied them to other debts of the borrower. The opinion sets out the characteristics of a special deposit as distinguished from a general deposit.

## II. SALES

*Warranties of Quality.* A frequent subject of contention in sales litigation is the scope and operation of warranties. In *Mobile Housing, Inc. v. Stone*<sup>39</sup> plaintiffs, purchasers of a mobile home, sued for rescission. The trial court found that defendant seller showed a model mobile home to illustrate what plaintiffs would receive; that a mobile home which had many defects and did not conform to the model home in important details was delivered to plaintiffs; that plaintiffs promptly rejected the mobile home; and that defendant failed to correct the defects and took back the home twelve weeks after delivery. Plaintiffs won a judgment for return of their down payment, and this was affirmed on appeal.

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34. *Meadow Brook Nat'l Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969), *Grove v. Chicago Title & Trust Co.*, 166 N.E.2d 630 (Ill. Ct. App. 1960).

35. 483 S.W.2d 703 (Tex. Civ. App.—Eastland 1972), *error ref. n.r.e.*

36. 498 S.W.2d 236 (Tex. Civ. App.—Tyler 1973).

37. 496 S.W.2d 123 (Tex. Civ. App.—Waco 1973), *error ref. n.r.e.*

38. 495 S.W.2d 615 (Tex. Civ. App.—Tyler 1973).

39. 490 S.W.2d 611 (Tex. Civ. App.—Dallas 1973).

The purchase agreement stated that buyer took the new mobile home "as is," that no express or implied warranties were made, and that no warranty of merchantability or fitness was made. It was further agreed that "there have been no descriptions, samples or models used or regarded as a part of this contract." The court of civil appeals said that the record was clear that plaintiffs did not buy a mobile home on the basis of any descriptions other than those relating to the model shown. Therefore, defendant made warranties under sections 2-313(a)(1), (2), and (3) of the UCC.<sup>40</sup> The disclaimer provisions of the purchase agreement were inconsistent with the express warranties, and a problem of interpretation was presented. The court had no difficulty in concluding that the express warranties rested on "dickered" aspects of the individual bargain and that the words of disclaimer should be rejected as repugnant to the basic bargain.<sup>41</sup> The parol evidence rule was inapplicable because the purchase agreement was incomplete and ambiguous. Indeed, the agreement made reference to the model house, and parol evidence was admissible to remove ambiguities in the description.

In the course of its opinion, the court had occasion to contrast the remedies of a buyer for breach of warranty before and after the UCC was enacted. Under section 2-601<sup>42</sup> a buyer has a right to reject goods if the tender of delivery fails "in any respect" to conform to the contract.

A similar problem of conflict between disclaimer provision and specific warranty was presented in *S-C Industries v. American Hydroponics Systems, Inc.*<sup>43</sup> S-C became a dealer for American and bought hydroponic equipment and greenhouse components.<sup>44</sup> The components were assembled into a greenhouse, which was used to grow tomatoes. After two years the greenhouse collapsed, and S-C recovered judgment against American, which was affirmed on appeal.

The purchase form signed by S-C in buying the greenhouse components stated that no express or implied warranty was made except a printed warranty accompanying the goods on delivery. The printed warranty was to the effect that the goods were free from defects in materials and workmanship under normal use and service for one year. For breach of the warranty American agreed to give credit or replace defective parts. Prior to purchase, American supplied S-C with a set of plans and specifications for the greenhouse. One specification was for a steel truss: "42' Rigid Steel Frame all bolt connections—20 PSF Snowload, 16 PSF Windload." This language was interpreted to mean that the truss would withstand a vertical load of twenty pounds per square foot. The trial court found that the greenhouse collapsed because the steel truss weakened under a load of less than twenty pounds per square foot.

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40. TEX. BUS. & COMM. CODE ANN. §§ 2.313(a)(1), (2), (3) (1968).

41. Citing UNIFORM COMMERCIAL CODE § 2-316(a), TEX. BUS. & COMM. CODE ANN. § 2.316(a) (1968).

42. TEX. BUS. & COMM. CODE ANN. § 2.601 (1968).

43. 468 F.2d 852 (5th Cir. 1972).

44. Hydroponics is the science of growing plants in chemicals and water without the use of soil.

It was clear that the truss specification standing alone was a warranty. The question was whether the disclaimer and printed warranty superseded the specification. The court held that "while the special warranty form provided the exclusive remedy should any component be defective, it did not supersede the specific express warranty which extended to the design capability of nondefective structural members intended to perform as an integral part of the greenhouse building."<sup>45</sup> The court also held that the implied warranty of merchantability was breached, since the purchase order and printed warranty did not mention merchantability and the disclaiming language was not conspicuous.<sup>46</sup> To the argument that defendant was liable only for replacement of the inadequate truss the court answered that it would be unreasonable to fragment the greenhouse sale into separate sales of constituent parts. Defendant was held to a specific warranty that if the greenhouse was constructed according to plans, it would withstand a certain load.

In *W.G. Tufts & Son v. Herider Farms, Inc.*<sup>47</sup> plaintiff bought a weed killer from defendant. The latter knew that the weed killer would be sprayed on plaintiff's pasture. Representation was made that the weed killer was the same product plaintiff had used under a different label. The weed killer was arsenical and was applied to the pasture. The results were loss of hay and cattle, and incurring of veterinary fees. Plaintiff recovered judgment on express warranty, which was affirmed on appeal.

The drums of weed killer bore labels which directed that cattle should not be permitted to graze after application. Findings were made that plaintiff's employees were contributorily negligent in not reading and following the printed directions. Nevertheless, the court was of the opinion that the judgment below should be sustained on a warranty theory. The instructions on the labels were not a "basis of the bargain"<sup>48</sup> between the parties and were irrelevant to the determination that an express warranty was made that the weed killer was the same as plaintiff had used previously.

A buyer was unsuccessful in setting up breach of warranty in *Tracor, Inc. v. Austin Supply & Drywall Co.*<sup>49</sup> Defendant ordered a quantity of "one inch" sheetrock from plaintiff. Nothing was said about how the material was to be used. The sheetrock was delivered, and defendant rejected it because defendant's building project required homogeneous sheetrock rather than the laminated type delivered. The trial court found that the sheetrock delivered was of fair average quality and fitted the ordinary purposes for which it was used. Since the material fitted the description of goods ordered by defendant, a contract was entered into which defendant had breached.

The court of civil appeals held that plaintiff had complied with express and implied warranties. Defendant admitted that homogeneous and lami-

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45. 468 F.2d at 855.

46. TEX. BUS. & COMM. CODE ANN. § 2.316(b) (1968).

47. 485 S.W.2d 300 (Tex. Civ. App.—Tyler 1972), *error ref. n.r.e.*

48. TEX. BUS. & COMM. CODE ANN. § 2.313 (1968).

49. 484 S.W.2d 446 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*

nated types of sheetrock were standard products. However, defendant urged that there was no meeting of minds since a latent ambiguity existed as to defendant's use of the term "one inch" sheetrock, while plaintiff knew there was a patent ambiguity. The court responded that the problem was not one of latent or patent ambiguity but one concerning the particular purpose for which buyer intended the sheetrock. Since defendant did not inform plaintiff of his particular purpose, the implied warranty of fitness for the purpose did not arise.

Another type of mistake was made by the buyer in *Monarch Marking Systems Co. v. Reed's Photo Mart, Inc.*<sup>50</sup> Breach of warranty was not involved. Defendant's vice president began filling out a purchase order for five different types of adhesive labels. He filled in the blank spaces for four types of labels, noting the quantity of each as "2 M." He was then interrupted and did not come back to the order form for several hours. Later, he completed the order, writing in "4 MM" in the quantity column for the fifth type of labels. Plaintiff received the order and shipped defendant four million labels of the fifth type, weighing 622 pounds. Because its vice president thought he was ordering 4000 labels of the fifth type, defendant refused the labels, and plaintiff sued for the price. The Texas Supreme Court upheld the judgment for plaintiff in the trial court.

The trial court found that "MM" by custom and usage meant "one million." The jury refused to find that plaintiff knew that the order for "4 MM" labels was a mistake. The supreme court was of the opinion that defendant had made a unilateral mistake. Relief from the mistake could only be had if the mistaken party could put the other party in the same situation he was in prior to the transaction in question. In the instant case there was no proof of any effort on the defendant's part to restore plaintiff to its former situation.

*Bass v. General Motors Corp.*<sup>51</sup> is a products liability case in which the buyer was denied recovery. Plaintiff was injured when her new Buick automobile struck a light pole. Plaintiff sued the manufacturer and the selling dealer. At the trial plaintiff testified about her accident, which occurred two months and 4000 miles after the automobile was purchased. She had stopped the automobile, preparing to back out of a private driveway. She shifted into reverse, depressed the accelerator, and the car shot backward. Being frightened, she shifted into drive, and the car shot forward and hit a light pole. The trial court withdrew the case from the jury and rendered judgment for defendants. The judgment was affirmed on appeal.

The court of civil appeals reviewed the evidence in the trial court. Expert witnesses who had inspected and tested the car could not find any defect which would cause unexpected acceleration. Plaintiff and her husband gave testimony that after the accident each had had an experience in which the automobile had suddenly accelerated without reason.

The court commented that the Texas Supreme Court had committed itself

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50. 485 S.W.2d 905 (Tex. 1972).

51. 491 S.W.2d 941 (Tex. Civ. App.—Corpus Christi 1973), *error ref. n.r.e.*

to the rule of strict liability expressed in section 402A of the *Restatement of the Law of Torts*,<sup>52</sup> but that section requires proof that the product causing harm was in a defective condition when it left the hands of the manufacturer or seller. Plaintiff was held not to have sustained the burden of proving that some part of her automobile was defective. Mere proof of the accident was not enough. *Henningsen v. Bloomfield Motors, Inc.*<sup>53</sup> was distinguished. There, plaintiff's automobile swerved off the road into a brick wall. It was impossible to determine after the accident whether parts of the steering wheel mechanism had been defective. Expert witnesses advanced the opinion that something went wrong between the steering wheel and the front wheels. This testimony along with plaintiff's testimony, was held sufficient to raise a fact issue for jury determination. The instant case was different in that the automobile was intact and expert witnesses could find nothing wrong in the accelerating mechanisms.<sup>54</sup>

*Measure of Damages for Breach of Warranty.* Calculation of damages for breach of warranties of quality was involved in *Neuman v. Spector Wrecking & Salvage Co.*<sup>55</sup> and *General Supply & Equipment Co. v. Phillips*.<sup>56</sup> In the *Neuman* case defendant sold to plaintiff a used truck scale for \$3700 plus \$553 installation charges. An implied warranty of fitness for purpose and an express "new scale warranty" providing for replacement of defective parts were made. The scale collapsed on its fifth use, and defendant refused to repair or replace the scale. The trial court gave plaintiff judgment for \$4500, the net cost of replacement of the scale. The court of civil appeals reversed and remanded because of error in the measure of damages. The court said that the usual measure of damages in a case of this kind is the difference in market value of the equipment in the condition in which it was delivered and in the condition it should have been in according to the contract. This measure is stated in section 2-714(b) of the UCC.<sup>57</sup> The concluding phrase in the section allows a different measure if "special circumstances show proximate damages of a different amount." However, plaintiff's pleading and proof did not support a recovery under this exception. Error was also found in that the judgment was in excess of the purchase price and put plaintiff in a better position than if the contract had been properly performed.

In the *Phillips* case plaintiff operated four large greenhouses and was in the business of growing and selling plants, principally chrysanthemums. He bought and installed plastic panels as covering for his greenhouses. Defendant seller represented that the panels would last five to seven years and would not darken. Actually, the panels darkened within two years, cutting off light from the plants in the greenhouses. As a result, plants failed to

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52. Citing *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

53. 32 N.J. 358, 161 A.2d 69 (1960).

54. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), was similarly distinguished.

55. 490 S.W.2d 875 (Tex. Civ. App.—Beaumont 1973).

56. 490 S.W.2d 913 (Tex. Civ. App.—Tyler 1972), *error ref. n.r.e.*

57. TEX. BUS. & COMM. CODE ANN. § 2.714(b) (1968).

grow and blooms failed to mature. Plaintiff's judgment for \$176,000 in the trial court was reversed and remanded because of errors in instructions as to damages.

The evidence in the case amply supported findings of express and implied warranties and of their breach. The court said that the ordinary measure of damages stated in section 2-714(b) of the UCC, the difference between value of goods accepted and value if they had been as warranted, was not applicable. Plaintiff was entitled to incidental and consequential damages under section 2-715.<sup>58</sup> Plaintiff replaced the defective panels on two of the greenhouses, and no structural damage was done. Thereafter, he went out of business and sold the four greenhouses. The court did not think that diminution in market value of the greenhouses was a proper measure of damages. The court was of the opinion "that the incidental damages involved here would be the reasonable cost of replacing the defective paneling with equal quality as that represented by appellant, less the salvage value, if any, of the defective paneling."<sup>59</sup>

Consequential damages were regarded as including loss of profits, but the loss had to be a natural and probable consequence of the breaches of warranties, and the amount had to be shown with reasonable certainty. Plaintiff had no previous record of profits in producing and selling chrysanthemums. His estimate of lost profits was based on the assumption that he could have grown a crop every fourteen weeks and would have made five cents on each plant sold. The court said that this testimony was "purely conjectural and speculative."<sup>60</sup> The proper measure of damages was "the difference between the reasonable market value of each crop of mums as actually raised and sold and the reasonable market value of the crop which would have been produced and sold had the . . . paneling been as warranted."<sup>61</sup> This measure would allow for fluctuation in market prices.

*Fredonia Broadcasting Corp. v. RCA Corp.*<sup>62</sup> is a lengthy and involved case in which a television station sued RCA, as a seller of equipment, for breach of contract and seller counterclaimed for equipment delivered. Plaintiff alleged fraud, late and insufficient performance on RCA's part, and breaches of warranty resulting in delay in getting the television station on the air and leading eventually to shutdown. Plaintiff had a judgment for \$1 million in the district court. On appeal the cause was reversed and remanded because of erroneous instructions by the lower court and inconsistent findings by the jury.

The appellate court had occasion to discuss remedies for fraud, the binding effect of disclaimer provisions, remedies for repudiation of a sales con-

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58. *Id.* § 2.715: Incidental damages include "any other reasonable expense incident to the delay or other breach." Consequential damages include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . ."

59. 490 S.W.2d at 920.

60. *Id.* at 921.

61. *Id.*

62. 481 F.2d 781 (5th Cir. 1973).

tract under sections 2-610 and 2-711 of the UCC,<sup>63</sup> and the measure of damages for repudiation under section 2-713(a).<sup>64</sup> Allowance of lost profits was held error because plaintiff's business was new and their determination was wholly speculative. The court recognized that the parties could agree to substitute for or modify a remedy for breach of warranty and to limit liability for consequential damages.<sup>65</sup> But both provisions were subject to section 2-302,<sup>66</sup> which authorizes a court to refuse enforcement of unconscionable terms. The lower court was directed to make express findings on the question of unconscionability.

*Products Liability Indemnity Contract.* In *K & S Oil Well Service, Inc. v. Cabot Corp.*<sup>67</sup> *S*, a manufacturer, sold *B* a work-over rig. *P*, an employee of *B*, suffered severe injuries while working on the rig. *P* obtained judgment against *S* for \$238,600 because of defects in the rig causing the accident, and *S* obtained judgment against *B* for the same amount. On appeal the latter judgment was reversed.

*P*'s recovery against *S* was based on the strict liability imposed on a manufacturer who sells and delivers machinery containing defects rendering it dangerous to life and limb of a user. Section 402A of the *Restatement of the Law of Torts* was cited. Lack of privity of contract between *P* and *S* was no defense. The face of the sales order form signed by *S* and *B* contained the expression "subject to the terms and conditions on the reverse side." The fourth paragraph on the reverse side stated a warranty of merchantability for ninety days. There followed in capital letters a limitation of liability to replacement of parts and correction of defects. This warranty was in lieu of all other warranties, express or implied. Then followed the statement, still in capital letters: "We shall not be liable for indirect, special, general or consequential damages or injuries and you agree to indemnify us from loss, injury or damage to third parties."<sup>68</sup>

The court commented that the fourth paragraph was entitled "WARRANTY" and that the agreement to indemnify was a different subject surrounded by unrelated terms. Ordinarily, an agreement to indemnify does not protect an indemnitee against the consequence of his own negligence unless this obligation is unequivocal in terms. Fairness requires that an indemnitor be aware that he has assumed such an obligation. The court was of the opinion that the indemnity agreement was "hidden." Because it was a small part of a larger contract, the indemnity agreement had to be "conspicuous" in order to impart fair notice to the indemnitor. The holding was that the indemnity agreement should be regarded as of no effect. A supreme court decision<sup>69</sup> was cited as saying that Texas has moved very close

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63. TEX. BUS. & COMM. CODE ANN. §§ 2.610, 2.711 (1968).

64. *Id.* § 2.713(a).

65. Citing UNIFORM COMMERCIAL CODE § 2-719, TEX. BUS. & COMM. CODE ANN. § 2.719 (1968). The court said that the substituted remedy—replacement of defective parts—did not fail of its essential purpose under § 2-719(b).

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

67. 491 S.W.2d 733 (Tex. Civ. App.—Corpus Christi 1973), *error ref. n.r.e.*

68. *Id.* at 736.

69. *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972).

to the "express negligence" rule. Exculpatory provisions and indemnity agreements are narrowly construed, and if one is to be excused from liability for one's own negligence, or to be indemnified for liability for such fault, the language should be clear. Preferably, the word "negligence" should be used, as well as a "save harmless" clause. In the present case the indemnity language failed to say in direct terms that the indemnitor should indemnify the manufacturer if the latter were held liable for injuries resulting from defects in the work-over rig.

*Sale of False Warehouse Receipts.* The warranty made when a seller negotiates false warehouse receipts was involved in *Simon v. Estate of Allen*.<sup>70</sup> *B* was a buyer and seller of cotton and owned several warehouses. *A* and *S* financed *B*, taking warehouse receipts as security. *S*'s arrangements with *B* were structured so that when loans were repaid, warehouse receipts were returned, and it appeared that sales were made. The cotton involved was stored in *B*'s warehouses, and he was able to remove cotton from storage without redeeming or canceling warehouse receipts held by *A* and *S*.

*B* got into financial difficulties, and he dishonored two drafts drawn by *S* amounting to \$576,000. A few days later, *B* gave checks to *A* for \$550,000, which were dishonored. Consultations were had among the parties. It was agreed that *A* would borrow from his bank and purchase the cotton represented by the warehouse receipts attached to *S*'s drafts, as well as an additional group of warehouse receipts representing cotton bales held by *B* for *S*. The agreement was carried out, and *S* received \$870,000 for the warehouse receipts. Several weeks later, *A* discovered that 7459 bales of cotton covered by the warehouse receipts were missing. *A* recovered judgment against *S* for \$678,000, the value of the missing bales of cotton, and this was affirmed on appeal. The court of civil appeals held that *S* made express warranties of quantity by stating on its three invoices to *B* the number of bales "sold." When *S* sold nonexistent cotton to *A*, he breached both express and implied warranties.<sup>71</sup> Section 7-507 of the UCC<sup>72</sup> was cited: "Where a person . . . transfers a document of title for value otherwise than as a mere intermediary . . . unless otherwise agreed he warrants to his immediate purchaser . . . *in addition to any warranty made in selling goods* . . . (3) that his . . . transfer is rightful and fully effective with respect to the title to the document and the goods it represents." In quoting this section, the court omitted the italicized portion. This seems to have been an inadvertence because it is this expression, rather than phrase (3), which declares the source of the seller's warranties concerning the quality and quantity of the goods sold.

*Statute of Frauds.* In *LTV Aerospace Corp. v. Bateman*<sup>73</sup> plaintiff entered into oral contract to build 8000 shipping crates for defendant within a year's period. The crates were to be built to specifications and to be used

70. 497 S.W.2d 800 (Tex. Civ. App.—Waco 1973), *error ref. n.r.e.*

71. Citing UNIFORM COMMERCIAL CODE §§ 2-313, 2-314, 2-711, TEX. BUS. & COMM. ANN. §§ 2.313, 2.314, 2.711 (1968).

72. TEX. BUS. & COMM. CODE ANN. § 7.507 (1968).

73. 492 S.W.2d 703 (Tex. Civ. App.—Tyler 1973), *error ref. n.r.e.*



as containers for all-terrain vehicles to be exported to Southeast Asia. Plaintiff hired workmen, purchased raw materials and plant equipment, and began building the crates. Defendant gave notice and stopped ordering after 653 crates and 450 container bottoms were built and delivered. Plaintiff sued for lost profits and recovered \$25,000. The judgment was affirmed on appeal.

Section 2-201 of the UCC<sup>74</sup> makes a sales contract for the price of \$500 or more unenforceable unless a sufficient writing is executed and signed by the party against whom enforcement is sought. An exception states that an oral contract may be enforced "if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement."<sup>75</sup> The court held that the facts were clear that the exception was satisfied. Issuance of a purchase order by defendant for 900 crates, unsigned by plaintiff, was a request to deliver a certain number of containers under the oral contract and not a superseding written contract. The finding as to lost profits was supported by the evidence, and defendant failed to show that plaintiff could have mitigated his damages.

*Miscellaneous.* Section 2-403(b) of the UCC states: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."<sup>76</sup> In *Gallagher v. Unenrolled Motor Vessel River Queen*,<sup>77</sup> the court held that the section had no application where plaintiffs rented a stall at Smith's marina and placed in it their 38-foot pleasure motor boat. Smith operated a business of selling boats separately and apart from the business of renting stalls. Smith sold plaintiffs' boat to defendants. Plaintiffs obtained judgment for possession of the boat, which was affirmed on appeal. The court was of the opinion that there was no entrusting to a merchant within the meaning of section 2-403(b).

Proper tender of the price in a sale was the issue in *Modern Aero Sales, Inc. v. Winzen Research, Inc.*<sup>78</sup> Plaintiff exercised an option to purchase an aircraft by mailing an "envelope draft" for the price, which was received by defendant within the time limited by contract. Defendant returned the draft, professing unfamiliarity with it and stating that a bill of sale would be delivered if "timely legal tender" were presented. Plaintiff received the draft a day after the option period expired. Plaintiff then sent an employee by air to defendant's city in a vain attempt to deliver a cashier's check. The court of civil appeals reversed the trial court and rendered judgment

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

75. *Id.* § 2.201(c)(1).

76. *Id.* § 2.403(b).

77. 475 F.2d 117 (5th Cir. 1973).

78. 486 S.W.2d 135 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

for plaintiff for breach of contract. Citing section 2-511(b) of the UCC,<sup>79</sup> the court held that the tender of the envelope draft was a means of payment "current in the ordinary course of business," that defendant had a right to insist on payment in legal tender but was required to allow a reasonable extension of time, that the cashier's check was tendered within a reasonable time, and that the refusal to accept the check was based not on objection to the medium of tender but on a mistaken belief that the option period had expired. The court observed that if defendant had refused the cashier's check and insisted on money, there was time during the day to meet defendant's requirement.

*Ideal Builders Hardware Co. v. Cross Construction Co.*<sup>80</sup> holds that section 2-725 of the UCC<sup>81</sup> has lengthened to four years the statute of limitations for commencing a suit on an open account for sales. The older two-year statute<sup>82</sup> applicable to actions on open accounts has been superseded by section 2-725 with respect to sales transactions.

### III. SECURED TRANSACTIONS

*Financing Statement as Security Agreement.* The question whether a financing statement can have the effect of a security agreement was raised in *Mosley v. Dallas Entertainment Co.*<sup>83</sup> Plaintiff sold a private club to *B*. Among items of personal property sold was a cash register. A financing statement was filed with the secretary of state showing plaintiff as creditor and *B* as debtor. The financing statement recited that it covered "all inventory, equipment, furniture, fixtures, machines . . . now owned or hereafter acquired . . . in connection with the operation of a private club . . . together with all goods, chattels and property described in . . . the Security Agreement of even date herewith."<sup>84</sup> Subsequently, defendant, who was in the cash register business, bought the cash register and resold it. Defendant had no actual knowledge of plaintiff's interest in the cash register when he bought it. Plaintiff recovered judgment against defendant for conversion, but this was reversed on appeal.

Section 9-203(a) of the UCC<sup>85</sup> provides that a "security interest is not enforceable against the debtor or third parties" unless "the debtor has signed a security agreement which contains a description of the collateral." The court of civil appeals quoted from the official comment to section 9-203 to the effect that the formal requisites for a security agreement are in the nature of a Statute of Frauds. Oral evidence was insufficient to establish a security agreement.

The financing statement was written on a standard form supplied by the

79. TEX. BUS. & COMM. CODE ANN. § 2.511(b) (1968).

80. 491 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1973); *accord*, W.W. Price Lumber Co. v. Cook, 497 S.W.2d 505 (Tex. Civ. App.—Eastland 1973), *error granted*.

81. TEX. BUS. & COMM. CODE ANN. § 2.725 (1968).

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

83. 496 S.W.2d 237 (Tex. Civ. App.—Tyler 1973), *error dismissed w.o.j.*

84. *Id.* at 238.

85. TEX. BUS. & COMM. CODE ANN. § 9.203(a) (1968).

secretary of state. It was signed by plaintiff and a party alleged to be the agent of debtor. The court stated that the Code makes no provision for a naked financing statement to be enforced as a security agreement. "A financing statement cannot serve as a security agreement where it does not grant the creditor an interest in the collateral and does not identify the obligation owed to the creditor."<sup>86</sup>

The result in the case is sound. A good deal more than the financing statement was needed to establish the nature and bounds of the security agreement. The notice given by the filed financing statement should have reference to a written agreement and not to an oral one, which is frequently uncertain.

*Assignment of Accounts Receivable.* In *Manes Construction Co. v. Wallboard Coatings Co.*<sup>87</sup> defendant general contractor entered into contract with A, a subcontractor, to do sheetrock work on three apartment projects. A assigned its accounts receivable to plaintiff, its principal supplier, to secure past and future sales on open account. A financing statement was executed and filed with the secretary of state. Actual notice was communicated to defendant of the assignment. Thereafter defendant paid monies directly to A. Plaintiff recovered judgment for \$45,000 for monies so paid.

The court cited section 9-318(3) of the UCC<sup>88</sup> and held that defendant had subjected itself to double liability. "The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee."<sup>89</sup> After defendant received notice of the assignment, it made payments to A at its peril to the extent of the debt owed to plaintiff.

*Perfection of Security Interest in Proceeds of Notes.* *Bierschwale v. Oakes*<sup>90</sup> is a complicated case in which plaintiffs sued to impose a constructive trust on notes received by defendants. Bank of Texas and Smith held perfected security interests in some of the notes by virtue of possession. Payments on the notes, however, were made to defendant Oakes, and the pledge agreement with Smith stated that Oakes had a right to collect so long as no default occurred on his main obligation. The trial court ordered the obligor on the notes to make payments into the registry of the court. Subsequently, Bank of Texas intervened in the suit. Still later, defendant Oakes defaulted on his notes to the bank and Smith.

Plaintiffs were successful in proving fraud on defendants' part and in establishing a constructive trust. With respect to the notes pledged to the bank, plaintiffs asserted prior rights to payments into the registry of the court before the bank intervened. With respect to the notes pledged to Smith, plaintiffs asserted prior rights to payments made before Oakes defaulted on his note to Smith. Both claims were upheld by the court.

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86. 496 S.W.2d at 240.

87. 497 S.W.2d 334 (Tex. Civ. App.—Houston [14th Dist.] 1973).

88. TEX. BUS. & COMM. CODE ANN. § 9.318(c) (1968).

89. *Id.*

90. 497 S.W.2d 506 (Tex. Civ. App.—Houston [1st Dist.] 1973), *error granted*.

The payments into the court's registry were "proceeds" of the notes, but they were not in the possession of the bank or Smith. The bank had not filed a financing statement; Smith had filed such a statement, but it did not mention "proceeds." Citing sections 9-203, -301, -302 and -306 of the UCC,<sup>91</sup> the court held that plaintiffs were in the position of a lien creditor and that the bank and Smith had not perfected their security interests in the proceeds of the notes. Accordingly, plaintiffs were allowed prior rights to the proceeds deposited in the court before the bank intervened and before Oakes defaulted on his obligation to Smith.

*Miscellaneous Liens.* Plaintiffs, who were painting contractors, brought suit in *Inman v. Clark*<sup>92</sup> for foreclosure of their mechanic's and materialman's lien. Defendants were the purchasers of a townhouse on which plaintiffs worked. The seller and builder of the townhouse contracted with plaintiffs for their services. Plaintiffs began work before the house was sold and finished after defendants moved in and received their deed. Thereafter defendants recorded their deed, and two days later plaintiffs recorded their mechanic's and materialman's lien affidavit. Reversing the judgment below, the court of civil appeals held that plaintiffs' lien was enforceable against the townhouse.

The court stated that after furnishing work and materials to the seller of the townhouse, plaintiffs

had 120 days after completion of their work to secure their lien. . . . [Defendants] bought the property before the expiration of the 120 day period and . . . therefore had constructive notice of . . . [plaintiffs'] existing right to file their affidavits. . . . When there are newly constructed improvements on property the purchaser is under a duty to determine whether there are any outstanding mechanic's and materialman's liens against the property.<sup>93</sup>

Defendants conceded that plaintiffs filed their lien affidavit within the statutory period.<sup>94</sup> Defendants could not qualify as bona fide purchasers without notice, for when they moved into the townhouse, they could plainly see that plaintiffs were furnishing labor and materials within the period for filing the affidavit. The fact that plaintiffs did not mail notices<sup>95</sup> to defendants was immaterial.

In *Flores v. Didear Van & Storage Co.*<sup>96</sup> plaintiffs stored household goods with defendant company. A storage agreement was executed, and plaintiff husband gave his wife's mother's address as the address through which he could always be reached. Plaintiff husband then went into military service for three years and was assigned outside the United States for the greater part of the time. His wife accompanied him during substantial parts of his service.

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91. TEX. BUS. & COMM. CODE ANN. §§ 9.203, 9.301, 9.302, 9.306 (1968).

92. 485 S.W.2d 372 (Tex. Civ. App.—Houston [1st Dist.] 1972).

93. *Id.* at 374.

94. TEX. REV. CIV. STAT. ANN. art. 5453 (Supp. 1974).

95. *Id.* art. 5453(3).

96. 489 S.W.2d 406 (Tex. Civ. App.—Corpus Christi 1972).

Two years and three months after plaintiff husband went into service, his wife went to defendant's place of business to pay storage charges. She was told that the goods had been sold for nonpayment of charges. The only storage charge that had been paid was for the first month. Plaintiffs sued for conversion, and the defense was that the goods had been foreclosed upon for default in payment of charges. Judgment for defendant in the lower court was reversed and rendered on appeal.

Section 7-210 of the UCC<sup>97</sup> authorizes a warehouseman to foreclose on stored goods for nonpayment of charges. All persons known to claim interests in the goods must be notified, and the notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified. Among other matters, the notification "must include . . . a demand for payment within a specified time not less than ten days after receipt of the notification" and a statement that unless the storage claim is paid within the stated time, the goods will be advertised for sale and sold by auction at a specified time and place. Defendant sent a notice of sale by certified mail to the address given by plaintiff husband. The notice was returned to defendant unopened and marked "unclaimed." The notice was dated April 15, 1968, and demanded payment of accrued claims by April 24. It went on to say that public sale of the goods would take place at a later specified date if the demand were not paid.

The court of appeals held that defendant's notification was effective and valid. However, the demand in the notice was defective. The statute requires that demand for payment should be within a specified time "not less than ten days after receipt of the notification." The instant demand was for payment within less than ten days after the date of the notice. The court said that a warehouseman's remedy for collection of charges is provided by statutory law only. The enforcement of a warehouseman's lien "must be accomplished in strict compliance with the terms of the statute upon which such power is granted."<sup>98</sup> The notice sent plaintiffs did not comply with the statute, and the sale was, therefore, void. Defendant was liable for conversion.

*Recent Legislation Affecting Secured Transactions.* During the past year the Texas Legislature amended and revised article 9 of the UCC.<sup>99</sup> The changes are extensive and became effective on January 1, 1974. A cataloguing of the changes cannot be attempted here. Obviously, careful examination of the 1973 amendments is called for on the part of anyone who counsels concerning security interests in personal property.

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97. TEX. BUS. & COMM. CODE ANN. § 7.210 (1968).

98. 489 S.W.2d at 409.

99. Ch. 400, [1973] Tex. Laws 999. Amendments were also made to certain sections in articles (chapters) 1, 2, and 5. *Id.* at 997.