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COMMERCIAL TRANSACTIONS

by

*Lennart V. Larson**

BUSINESS transactions in Texas have been subject to the Uniform Commercial Code¹ for nine years. As was expected, a steady stream of decisions is coming down from the Texas courts interpreting and applying the Code. In general, Texas courts, in common with courts elsewhere, have interpreted the Code soundly, finding valuable aid in the official comments. The Code is complicated legislation, and it is to be anticipated that provisions will be overlooked or misunderstood. The main purpose of this survey is informational, pointing up interesting and significant decisions. However, some attention will be given to what appear to be omissions or misconstruction of statutory language.

All decisions here discussed are classified under the headings of bills and notes, sales, and secured transactions. Most deal with problems involving the provisions of the UCC. However, some problems are touched lightly by the UCC, and the common law must furnish the solution.

I. BILLS AND NOTES

Accommodation Parties. In *Darden v. Harrison*² *D* executed two notes in favor of *T*, which were found in *T*'s safety deposit box after his death. Plaintiff executrix sued on the notes, and *D* defended that he signed the notes for the accommodation of *T*. The latter had been in partnership with *D*. In the trial court the jury found that *D* executed the notes so that *T* could make a financial statement with which to get a loan and settle his accounts with *D*. The record in the case did not indicate whether *T* actively actually sought the loan or ever paid *D* anything pursuant to the agreement found by the jury. Judgment was entered against *D* in the trial court, which was affirmed in the court of civil appeals. The Texas Supreme Court reversed and entered judgment for *D*.

Section 3-415 of the UCC³ defines the contract of an accommodation party, and subsection (5) states, "An accommodation party is not liable to the party accommodated" Official comment 1 under the section states, among other things, that parol evidence is admissible (except as against a holder in due course) to prove the fact of accommodation. Citing official comment 2, the supreme court ruled that whether or not *D* received

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1. Uniform Commercial Code, 1972 Text with Comments, hereafter referred to as "UCC" or "the Code." The UCC became effective in Texas in 1966 and is found in the Texas Business and Commerce Code. Article 9 of the Code, dealing with secured transactions, was amended in large part in 1973. Ch. 400, [1973] Tex. Laws 999.

2. 511 S.W.2d 925 (Tex. 1974).

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

consideration for his accommodation was immaterial. Section 3-415 had changed the old rule under the Uniform Negotiable Instruments Law⁴ that an accommodation party must act gratuitously.

Plaintiff contended that *D* never became an accommodation party because *T* did not negotiate the notes and receive credit for them. The court answered:

The essential element that the party claiming accommodation status must prove is that the party claimed to be accommodated received the signature of the surety *for the sole purpose of obtaining credit thereby*, under an agreement that the accommodated party is principally responsible for payment at maturity, or that the instrument was executed for a limited purpose. In the usual course of transactions wherein the payee of an instrument is the party accommodated, it is to be expected that the means by which he obtains credit will be by negotiation. However, we do not view that feature to be the controlling element.⁵

Two justices dissented, arguing that an accommodation party must be a surety and that this status does not come into being until a third party obligee extends credit. Because there was no evidence that the parties contemplated negotiation, *D* "did not lend his credit to . . . [*T*] on the instrument."⁶ The dissenters were of the opinion that parol evidence was not admissible to prove an agreement that the notes would not be enforced.

The presence of a fraudulent scheme to deceive prospective lenders might justify the result argued for by the dissent. But fraud was not mentioned in the majority or minority opinion. Apart from this consideration, the majority opinion seems preferable. Clearly, section 3-415(5) contemplates situations in which an accommodated party fails, for one reason or another, to negotiate and seeks to enforce the instrument against the accommodating party. Parol evidence is admissible to show the accommodation. The doctrine is extended only slightly to reach the result in *Darden*, where there was no intention from the beginning to negotiate.

Liability of Corporate Officer on Note. In *Seale v. Nichols*⁷ defendant executed a note which was signed "The Fashion Beauty Salon." In the next line defendant's name appeared in typewritten form, and on the following line defendant wrote his name, "Carl V. Nichols." Suit was brought against defendant individually. Defendant answered that The Fashion Beauty Salon was the assumed name of a now defunct corporation, Mr. Carl's Fashion, Inc., and that he signed the note as president, not in his individual capacity. Plaintiff payee recovered a summary judgment, which was reversed and remanded in the court of civil appeals. The Texas Supreme Court reversed the court below and affirmed the trial court's judgment.

Section 3-403(b) of the UCC declares:

4. Ch. 123, §§ 24-29, [1919] Tex. Laws 190 (repealed 1966).

5. 511 S.W.2d at 928 (emphasis in original).

6. *Id.* at 929.

7. 505 S.W.2d 251 (Tex. 1974).

An authorized representative who signs his own name to an instrument (1) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity; (2) *except as otherwise established between the immediate parties*, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.⁸

Defendant relied on the italicized expression in subsection (b)(2) as entitling him to prove his representative capacity by parol evidence.

The supreme court held that defendant's affidavit opposing the motion for summary judgment was insufficient to raise a fact issue concerning his affirmative defense. The italicized expression would allow evidence of a prior course of dealings or an understanding that defendant acted in a representative capacity. But defendant's summary judgment proof was only that he had an intention to sign in a representative capacity. He did not assert an understanding between the parties or a prior course of dealings, nor did he assert prior disclosure to plaintiff of his representative capacity.

Misappropriation of Checks. Two cases decided in the survey year involved fraudulent schemes on the part of employees. In *Womack Machine Supply Co. v. Fannin Bank*⁹ McIlwain, the general office manager of plaintiff corporation, had a personal checking account in defendant bank. The corporation had no account in the bank. In 1967 McIlwain presented to the bank a letter certifying that McIlwain had authority to cash and deposit checks made payable to the corporation. The letter bore the forged signature of the plaintiff corporation's president. During a period of two years McIlwain falsely indorsed and cashed or deposited in his account \$18,000 worth of checks belonging to his employer. Plaintiff sued defendant bank, and the trial court entered judgment for defendant. On appeal the court of civil appeals reversed and rendered judgment for plaintiff.¹⁰

The jury found that McIlwain's use of a rubber stamp in indorsing the checks was unauthorized, that the bank failed to determine McIlwain's lack of authority, and that the bank "failed to act in accordance with reasonable commercial standards."¹¹ Finding was also made that plaintiff was contributorily negligent in not investigating McIlwain's prior employment and not making timely inspection of its books.

8. TEX. BUS. & COMM. CODE ANN. § 3.403(b) (1968) (emphasis added).

9. 499 S.W.2d 917 (Tex. Civ. App.—Houston [14th Dist.] 1973), *rev'd*, 504 S.W.2d 827 (Tex. 1974).

10. *Id.* The trial court rendered judgment n.o.v. for defendant on the ground that the cause of action was barred by the two-year statute of limitation. TEX. REV. CIV. STAT. ANN. art. 5526 (1958). The original petition in the case misnamed plaintiff corporation, and a trial amendment in 1972 corrected the misnomer. The appeals court held that the original petition tolled the statute of limitation and that the amendment did not state a new cause of action. Upon subsequent appeal to the Texas Supreme Court the case was reversed and remanded solely for the purpose of determining the amount of prejudgment interest to which plaintiff was entitled. 504 S.W.2d 827 (Tex. 1974).

11. 499 S.W.2d at 921.

Section 3-406 of the UCC provides that a person who by his negligence substantially contributes to the making of an unauthorized signature is precluded from asserting lack of authority against a holder in due course, drawee, or other payor who pays the instrument in good faith and "in accordance with the reasonable commercial standards of the drawee's or payor's business."¹² Because defendant bank did not meet the quoted requirement, it was liable for the misappropriation.

In *Frost National Bank v. Nicholas & Barrera*¹³ the plaintiff professional corporation hired Penker, a public accountant. Part of his duties was to calculate withholding taxes and to arrange for their payment. Penker opened up a personal checking account (No. 038-342) in defendant bank. He then directed another employee, Mrs. Magnon, to prepare monthly checks for withholding taxes payable to "Depository Account No. 607." However, Penker supplied her with preprinted deposit slips showing the account number 038-342 instead of the number 607. He instructed Mrs. Magnon to bring the monthly checks to a regular teller and to use the preprinted deposit slips. In the past, Mrs. Magnon had prepared monthly checks drawn on the bank, which were payable to the bank, and had deposited them with a teller at a special window.

Seven checks were prepared over a period of several months, all payable to the order of "Depository Account No. 607" and signed by plaintiff corporation. The first check was taken by Penker to the special teller and the proceeds used to pay withholding taxes. A second check in the amount of \$2,141.20 was indorsed for deposit to Penker & Company and was credited to that company's account. Penker then expended the proceeds. The other five checks were not indorsed but simply deposited in Penker's account (No. 038-342). Penker later expended these funds.

Plaintiff obtained summary judgment against the bank for \$22,288.93 in the trial court. On appeal, the judgment was affirmed as to the second check but reversed and remanded as to the five unindorsed checks. Defendant argued that the six checks in question were bearer paper and that it properly paid Penker, as the holder. The court cited section 3-111 of the UCC as providing that an instrument is bearer paper if "it is payable to (1) bearer or the order of bearer; or (2) a specified person or bearer; or (3) 'cash' or the order of 'cash' or any other indication which does not purport to designate a specific payee."¹⁴ The court did not think that the checks fell within any of these categories. Rather, the instruments were order paper, as defined in section 3-110 of the Code.¹⁵ The reference in the checks to "Depository Account No. 607" was regarded as designation of the owner of the account as payee.

The second check was drawn at a time when Penker had no depository account. Thus the check was payable to a fictitious payee. The court said

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

13. 500 S.W.2d 906 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

14. TEX. BUS. & COMM. CODE ANN. § 3.111 (1968).

15. *Id.* § 3.110.

that such an instrument was bearer paper under the old Negotiable Instrument Law, but the UCC omitted this as a category within the classification of bearer instruments. Because the check was order paper and was paid to Penker & Company without a proper indorsement by the payee, defendant bank could not charge plaintiff's checking account.

With respect to the other five checks, defendant bank had no right ordinarily to charge plaintiff's checking account unless the bank paid the payee or someone who succeeded to the payee's rights. However, a fact issue appeared as to whether plaintiff's negligence had misled defendant. The checks were deposited by Mrs. Magnon, a person with whom the bank had dealt many times before. There was evidence that plaintiff had employed Penker without investigation of his credentials. On the other hand, there was evidence of defendant's negligence in accepting the checks for deposit in Penker's account. Hence, the action on the five notes was remanded for trial for determination of the factual issues.

Negotiation "for Value." Whether plaintiff qualified as a holder for value was the question in *Wilson Supply Co. v. West Artesia Transmission Co.*¹⁶ *D* company executed a check to *P* as final payment on a drilling contract. *P* breached the contract, and *D* stopped payment on the check. Shortly thereafter, the check was endorsed to *H*. At that time *P* was indebted to *H*. When the check was dishonored, *H* sued *D*. Judgment for *D* in the trial court was affirmed on appeal.

The court of civil appeals said that the narrow issue was whether there was evidence "to support the trial court's implied finding that the check was not accepted by . . . [*H*] in payment of said antecedent claim."¹⁷ *H* pleaded that the check was received "to obtain the funds represented thereby, and apply the same toward payment of the indebtedness of . . . [*P*] to the plaintiff."¹⁸ *H*'s credit manager testified that the check was received with the understanding that it "could be collected and the proceeds applied to pay on this account."¹⁹ The court held that the record supported the implied finding that the check was not accepted with the intent to extinguish *P*'s debt or a part thereof but only to enable *H* to collect the check and apply the proceeds, if any, to the debt. Therefore, *H* was not a holder for value and was subject to *D*'s defense of breach of contract.

Section 3-303 of the UCC declares that a holder takes for value "when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due."²⁰ The court of civil appeals rejected authorities under the old Negotiable Instruments Law that taking an instrument in conditional satisfaction of a debt is a taking for value. The court read the expression "in payment" as excluding conditional pay-

16. 505 S.W.2d 312 (Tex. Civ. App.—San Antonio, 1974), writ *ref'd n.r.e.*, 511 S.W.2d 261 (Tex. 1974).

17. 505 S.W.2d at 313 (emphasis in original).

18. *Id.*

19. *Id.*

20. TEX. BUS. & COMM. CODE ANN. § 3.303(2) (1968) (emphasis added).

ment. The supreme court in a per curiam opinion affirmed this reasoning.²¹

A dissenting opinion in the court of civil appeals argued that section 3-303(2) did not exclude taking a check in conditional payment of a pre-existing debt. The authorities under the Negotiable Instrument Law clearly supported *H*'s claim as a holder for value. Further, *H* could be regarded as taking the instrument as security for the antecedent debt. According to the dissent, the majority holding meant that "a creditor who takes a negotiable paper to apply on a pre-existing debt when paid, must thereupon cease any effort to collect from his debtor or lose his rights against the maker."²²

It appears that the dissenting opinion is much to be preferred. Section 3-303 of the UCC was not intended to restrict the holder for value doctrine as developed under the Negotiable Instrument Law. The distinction between taking an instrument by indorsement "merely" to collect and apply it to a debt and taking it "in payment" of a debt is paper thin. Generally, when an instrument is received "in payment" of a claim, the taking is conditional in the sense that the holder may sue on the claim if the instrument is not paid. Indeed, section 3-802 of the UCC,²³ not cited in the opinion, provides that the holder has an election to sue on the instrument or the underlying claim.

Demand Notes. In *Williams v. Cooper*²⁴ *D* made a note payable to *P* or order dated February 1, 1967. The first part of the note read: "At the earliest possible time after date, without grace, . . . I . . . promise to pay" Suit was brought on the note on December 20, 1972, and *D* set up the four-year statute of limitation.²⁵ *D* contended that the instrument was a demand note, which was due on February 1, 1967. The court of civil appeals held that the instrument was not a demand note. Section 3-104 of the UCC states in part: "Any writing to be a negotiable instrument . . . must . . . (3) be payable on demand or at a definite time."²⁶ Section 3-108 provides, "Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated."²⁷ It was clear that the instant instrument was not payable at a definite time, or at sight, or on presentation. The determinative question was whether the legal effect of "at the earliest possible time" was the same as if no time for payment was stated. The court's answer was in the negative. The phrase was similar to such expressions as "when I am able" and "as soon as circumstances permit," and negated an immediate duty to pay. The finding of the trial court was that the earliest possible date *D* could pay was in December 1971. The finding was supported by evidence, and *P*'s action was not barred.

21. 511 S.W.2d 261 (Tex. 1974).

22. 505 S.W.2d at 316.

23. TEX. BUS. & COMM. CODE ANN. § 3.802 (1968).

24. 504 S.W.2d 564 (Tex. Civ. App.—Eastland 1973, no writ).

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

26. TEX. BUS. & COMM. CODE ANN. § 3.104(a) (1968).

27. *Id.* § 3.108.

In *Gill v. Commonwealth National Bank*²⁸ *Ds* signed a note reading as follows: "[W]e . . . promise to pay to the order of . . . [P] . . . the sum of . . . [\$1620 with 8% annual interest] in monthly installments as follows: twelve (12) installment(s) of \$135.00 and one installment of \$_____ the first payment to be due_____and subsequent payments to be due the same day of each month thereafter . . . until paid."²⁹ *P* negotiated the note to plaintiff bank, which took for value and without actual notice of defenses. Plaintiff bank obtained judgment against *Ds*, which was affirmed on appeal.

Section 3-115(a) of the UCC states that if an instrument is signed while incomplete "in any necessary respect, it cannot be enforced until corrected."³⁰ The court of appeals held that the blanks in the instant note did not make the instrument incomplete in a "necessary respect." The court cited section 1-108³¹ which provides "that an instrument in which no time for payment is stated is payable on demand."³² The court went on to hold that plaintiff took the demand note within a reasonable time after its issue (fourteen days), and the fact that *Ds* signed for the accommodation of *P* was no defense even if plaintiff knew of it at the time of negotiation.

One may question that the note was correctly treated as a demand note. As between *Ds* and *P* the instrument could surely have been shown to be incomplete. Did not the note appear incomplete to plaintiff bank? The provision for installment payments would seem to give notice of the original parties' intention not to execute a demand note. If the note was incomplete, plaintiff bank could not be a holder in due course.³³

Impairment of Collateral: Discharge of Indorser. In *Arlington Bank & Trust v. Nowell Motors, Inc.*³⁴ plaintiff automobile dealer had assigned and indorsed a contract of sale to defendant bank. The purchaser of the vehicle defaulted on his note, and the bank called upon plaintiff to pay. Plaintiff fulfilled his surety obligation and made all payments. Thereafter plaintiff learned that defendant had allowed an insurance policy on the vehicle to lapse, resulting in an uninsured loss of \$3291. Plaintiff recovered this sum from defendant on the theory of payment under a mistake of fact.

The trial court found that the lapsed insurance policy was collateral for the note and that defendant had possession of the policy and was under a contractual duty to maintain it. Finding was also made that insurance was available to protect the lienholder. The court of civil appeals in affirming the lower court decision relied on section 3-606(1) of the UCC, which provides: "The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . (b) unjustifiably impairs any

28. 504 S.W.2d 521 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

29. *Id.* at 522.

30. TEX. BUS. & COMM. CODE ANN. § 3.115(a) (1968).

31. *Id.* § 1.108.

32. 504 S.W.2d at 523.

33. UNIFORM COMMERCIAL CODE § 3-304(1)(a); TEX. BUS. & COMM. CODE ANN. § 3.304(a)(1) (1968).

34. 511 S.W.2d 415 (Tex. Civ. App.—Fort Worth 1974, no writ).

collateral for the instrument given by or on behalf of the party or any person against whom he has a right to recourse."³⁵

Obligee's Duty to Surety To Sue Obligor. Texas' statutory adaptation of *Pain v. Packard*³⁶ was applied in *First National Bank v. Hargrove*.³⁷ Defendant automobile dealer took notes from purchasers and sold them to plaintiff bank. Payee on the notes was plaintiff bank, and defendant signed on the backs as accommodation indorser. Some of the purchasers defaulted in their payments, and plaintiff sued defendant.

Promptly after being served with citation, defendant wrote plaintiff demanding that it sue the makers on the notes. The demand was in accordance with a statute authorizing a surety, when a right of action has accrued, to require the obligee forthwith to sue the obligor.³⁸ If suit is not brought during the first term of court after notice is received, or during the second term if good cause is shown for delay, the surety is discharged. Because plaintiff did not take action against the purchasers, defendant had judgment in the trial court, which was affirmed on appeal.

Midnight Deadline for Documentary Draft. In *Marfa National Bank v. Powell*³⁹ *S* sold ninety steers to *B* and received a "bill of sale draft." This instrument was drawn by *B* on *M*, defendant bank, for the price of the steers, payable to the order of *S*. The face of the draft bore words denoting a bill of sale of the steers from *S* to *M*. *S* warranted unencumbered title, and *M* had the option to refuse to honor the draft unless the bill of sale was executed and any prior lienholder consented to the sale.

S mailed the draft to *M*, and it was received on April 16, 1970. Because of a withdrawal two days before, funds in *B*'s checking account were insufficient to pay the draft. *M* retained the draft beyond April 17 without paying or returning it. On April 20, the third banking day after receipt, *M* advised *S* of the insufficiency of funds. *S* sued *M* and obtained judgment for the amount of the draft. The court of civil appeals reversed and rendered.

Under section 4-302(a) of the UCC⁴⁰ a payor bank is accountable for a demand item if it does not pay or return the item or send notice of dishonor until after its midnight deadline. UCC section 4-104(h) defines "midnight deadline" as "midnight on the next banking day following the banking day on which it receives the relevant item."⁴¹ By virtue of these provisions the trial court held that *M* was liable to *S*.

The court of civil appeals noted that section 4-302(a) deals with a demand item "other than a documentary draft."⁴² Section 4-104(1)(f) defines documentary draft as any draft "with accompanying documents, securities or

35. TEX. BUS. & COMM. CODE ANN. § 3.606(a)(2) (1968).

36. 13 Johns 174, 7 Am. Dec. 369 (N.Y. 1816).

37. 503 S.W.2d 856 (Tex. Civ. App.—Texarkana 1973, no writ).

38. TEX. BUS. & COMM. CODE ANN. § 34.02 (1968).

39. 512 S.W.2d 356 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.).

40. TEX. BUS. & COMM. CODE ANN. § 4.302(1) (1968).

41. *Id.* § 4.104(a)(8).

42. 512 S.W.2d at 357.

other papers to be delivered against honor of the draft."⁴³ Section 5-103 (1)(b) further defines such a draft as "one honor of which is conditional upon the presentation of a document or documents."⁴⁴ "Document" means "any paper including document of title, security . . . and the like."⁴⁵ Section 5-112(1)(a) allows a bank to defer honor of a documentary draft "until the close of the third banking day following receipt of the documents."⁴⁶ The court of civil appeals was of the clear opinion that the bill of sale draft was a documentary draft. Therefore, there was no dishonor at midnight, April 17, and *M* had until the close of the third banking day (April 20) to refuse to honor the instrument. As an additional ground for its holding the court relied on the finding below that on April 20, *S* and *M* agreed that *M* should hold the item for future payment.⁴⁷

Necessity for Delivery. *Rex Smith Propane, Inc. v. National Bank of Commerce*⁴⁸ applied the elementary rule that a payee has no interest in an instrument until it is issued or delivered. *N* oil company ordered defendant bank to draw a cashier's check in plaintiff's favor and to charge *N*'s account. The cashier's check was typed up, signed by defendant's vice president, and a debit slip drawn on *N*'s account. *N*'s president then called defendant and advised that *N* was going into involuntary bankruptcy. Defendant then prepared a credit slip countering the debit slip and cancelled the cashier's check. Plaintiff sued on the cashier's check, and defendant obtained summary judgment. Payee never had possession and was not a holder. The court cited section 1-201(14), 1-201(20), 3-102(1)(a), 3-202(1), and 3-409(1) of the UCC.⁴⁹

Usury. The drastic effect of the Texas statute⁵⁰ on usurious loans between individuals is illustrated in *Townsend v. Adler*.⁵¹ *P* sued *Ms* on a one-year note payable in the amount of \$4000. The proven facts were that *Ms* received a loan of \$3000 and that *P* intended to receive \$1000 for the use of his money. Although it appeared that *P* was ignorant of the usury laws, the court held that he forfeited all recovery on the note. "While we appreciate the harsh result brought about by our statute, we are not at liberty to disregard its clear mandate."⁵²

In *Southwest Investment Co. v. Hockley County Seed & Delinting, Inc.*⁵³ the court considered the effect of the Texas usury laws as they existed prior

43. TEX. BUS. & COMM. CODE ANN. § 4.104(a)(6) (1968).

44. *Id.* § 5.103(a)(2).

45. *Id.*

46. *Id.* § 5.112(a)(1).

47. *Id.* § 5.112(a)(2) states that a bank may further defer honor "if the presenter has expressly or impliedly consented thereto."

48. 372 F. Supp. 499 (N.D. Tex. 1974).

49. TEX. BUS. & COMM. CODE ANN. §§ 1.201(14), (20), 3.102(a)(1), 3.202(a), 3.409 (1968).

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

51. 510 S.W.2d 175 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

52. *Id.* at 176.

53. 511 S.W.2d 724 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.). Earlier proceedings are reported in 476 S.W.2d 38 (Tex. Civ. App.—Amarillo 1971), noted in Larson, *Commercial Transactions, Annual Survey of Texas Law*, 27 Sw. L.J. 67, 75 (1973).

to 1967, when the ten percent maximum annual interest rate was applicable to corporate debtors as well as natural persons. On November 1, 1965, defendants executed a note to plaintiff for \$41,000. Plaintiff sued on the note in 1968, and defendants counterclaimed for usury. During the course of litigation defendants paid the note, along with \$10,583.15 interest, in order to secure the release of liens. The trial court found that defendants paid more than ten percent interest during the first and second six-month periods of 1966, and during single six-month periods in 1967 and 1968. Judgment was entered in favor of defendants for double the amount of interest paid (\$5083.53) in the two-year period preceding the filing date of their counterclaim. Attorney's fees of \$4000 were also allowed. Deducted from defendants' recovery were attorney's fees allowed plaintiff (\$4285.05) in suing on the principal obligation. The judgment was affirmed on appeal.

The court said that "whether a contract is usurious is to be determined as of the time of its inception."⁵⁴ Hence the renewal and extension of the note after the 1967 statute was enacted did not remove the taint of usury. Plaintiff argued that over the life of the loan the interest rate was actually less than ten percent. The court answered that usury did not depend on actual receipt of more than the legal rate of interest. "[A] loan contract is considered usurious if for the first year or first few years it requires the payment of more than the lawful rate, even though the interest calculated over the entire loan period does not exceed the statutory limit."⁵⁵ A saving clause in the deed of trust securing the note stated that in no event should the borrower be obligated to pay interest in excess of ten percent per annum. The court held that the clause did not save the loan contract from usury where the note provided for a usurious rate and there was no mutual mistake.

*Cherry v. Berg*⁵⁶ dealt with the question whether usurious interest paid in the first year of a loan is to be treated as a payment of principal, with the result that subsequent interest payments calculated at ten percent of the loan become usurious. *Bs* borrowed \$25,000 from *C* in 1958 and executed a note for \$27,250 bearing six percent annual interest. A year later *Bs* paid *C* \$4,150 by check and executed a new one-year note for \$25,000 bearing ten percent interest. The check was marked "interest," and *Bs* and *C* treated the payment as interest in their income tax returns. During the next twelve years *Bs* executed a series of renewal notes. *Bs* paid ten percent interest on the notes, and the last note showed that the principal had been reduced to \$16,300. *Bs* sued to cancel the indebtedness and for penalties, alleging usury. *Bs* obtained judgment in the trial court, which was reversed in part on appeal.

The court of civil appeals held that the taint of usury in the first note extended to all the renewals. There was no novation when the second note was executed. Hence the applicable statutes were those in existence in

54. 511 S.W.2d at 731.

55. *Id.* at 732.

56. 508 S.W.2d 869 (Tex. Civ. App.—Corpus Christi 1974, no writ).

1958.⁵⁷ The court refused to allow *Bs* to treat the \$4,150 check in 1959 as a payment of principal so as to cause interest payments in later years to be usurious. Both *Bs* and *C* had treated the check as a payment of interest. *Bs* could have recovered twice the amount of the check if suit had been brought within two years. However, *Bs* could not "lay [*sic*] behind the log for twelve years before bringing suit and then attempt to use such first payment to restructure the entire loan transaction."⁵⁸

However, *Bs* were allowed to set off all the interest payments against the principal debt, because from the beginning the agreement for interest was usurious and void. The result was that no principal debt remained, and *Bs* were entitled to cancellation of the last note and deed of trust. *Bs* were not entitled to any penalty because *C* had not received more than ten percent interest on the principal debt during the two-year period preceding the suit. Nor were *Bs* allowed to recover payments made after the principal debt was discharged by application of interest payments. In the first place, "there was nothing to which to apply usurious interest,"⁵⁹ and the penalty statute did not apply. In the second place, "there cannot be any recovery for interest voluntarily paid by the plaintiffs after the principal indebtedness was thus satisfied."⁶⁰ The court summarized:

It is settled now that a borrower who pays interest on a usurious contract is entitled to have all such payments credited upon principal. Where he brings himself within the provisions of Article 5073, he is entitled to recover the penalties therein provided. However, where he voluntarily pays this interest and principal, he cannot thereafter recover as overpayment of principal the interest theretofore so voluntarily paid by him.⁶¹

The trial court had awarded *Bs* twice the amount of interest payments made during the two years preceding the filing of suit. Since the payments were made under the constraint of a usurious loan, the award seemed well supported by the pertinent statutes. The usury statutes are directed against "voluntary" payments of excessive interest, and the penalties, limited to a two-year period, would seem to be called for even though the principal debt is discharged through application of earlier interest payments.

*Laid Rite, Inc. v. Texas Industries, Inc.*⁶² was a suit on a note for \$47,000 payable to plaintiff *TXI* on which defendants Russell and Laid Rite were makers. At the time of signing the note, Russell was personally liable to *SFC* on four other notes totaling \$242,000 and bearing six percent interest. Russell brought a cross-action and alleged that he was not originally liable

57. TEX. REV. CIV. STAT. ANN. arts. 5071, 5073 (1925), *as amended*, TEX. REV. CIV. STAT. ANN. arts. 5069-1.04, -1.06 (1971).

58. 508 S.W.2d at 875, citing *Stacks v. East Dallas Clinic*, 409 S.W.2d 842 (Tex. 1966).

59. 508 S.W.2d at 876.

60. *Id.*

61. *Id.*, citing, *e.g.*, *Ingram v. Temple Trust Co.*, 108 S.W.2d 306 (Tex. Civ. App.—Austin 1937), *aff'd*, 126 S.W.2d 951 (Tex. 1939); *Thompson v. Kansas City Life Ins. Co.*, 102 S.W.2d 285 (Tex. Civ. App.—Waco 1937, writ ref'd).

62. 512 S.W.2d 384 (Tex. Civ. App.—Fort Worth 1974, no writ).

on the \$47,000 obligation and that he was forced to sign the renewal note by conspiracy on the part of *TXI* and *SFC* and threats that payment of the four notes for \$242,000 would be called due. Russell alleged that *SFC* was a wholly owned subsidiary and alter ego of *TXI*. Plaintiff obtained judgment on an instructed verdict in the trial court. The court of civil appeals affirmed the judgment against Laid Rite but remanded the case for new trial of Russell's cross-action.

The appeals court was of the opinion that Russell had proved a prima facie case of usury in the trial court. Apart from conspiracy and duress, there was evidence that *TXI* and *SFC* had agreed to extend time on the four notes for \$242,000 in consideration of Russell's becoming co-maker on two notes executed for obligations on which Russell was not personally liable. The second note, not sued on in this proceeding, was for \$18,500 and was signed by Russell and another obligor. At the time of signing the two notes, Russell was under obligation to pay commitment fees to *SFC* on the sale of lots securing two of the four notes representing Russell's original obligations.

The court stated that the commitment fees clearly fell within the definition of interest set out in the Texas usury statutes.⁶³ With respect to the notes on which Russell became comaker, the court said: "There are many cases that hold that where a lender, as a condition for a loan and as a consideration for making it, requires the borrower to assume or pay in whole or in part, the debt that another owes to the same lender; that the amount of the assumed or paid-off debt will be considered as interest in determining whether or not the loan is usurious."⁶⁴ Several cases from other jurisdictions were cited, there being no Texas authority on the point.

II. SALES

Breach of Contract; Buyer's Remedies. Whether a late payment for a delivery of hides was a breach of contract giving the seller cause to terminate the contract was the question in *Laredo Hides Co. v. H & H Meat Products Co.*⁶⁵ *B* contracted to buy *S*'s entire cattle hide production between March and December 1972. Among the terms was, "Cash upon delivery - deliveries to be made at least twice a month." A trucking company was *B*'s agent in receiving a load of hides from *S* on March 3 and making payment by delivering *B*'s check. This procedure was consistent with practice under previous contracts.

On Saturday, March 18, the truck driver forgot to pick up *B*'s check for \$9,000 when he was dispatched to get a load of hides from *S*. *B* immediately telephoned *S*, 170 miles away, and asked what to do. *S* responded, "Don't worry about it. Just mail it." There was testimony that the check was mailed the same morning (the postmark date on the envelope was illegible). *S* did not receive the check by Tuesday morning, March 21, and telephoned *B*. *S* advised, "[G]et me the money by four-thirty, in my posses-

63. TEX. REV. CIV. STAT. ANN. art. 5069-1.01 (1971).

64. 512 S.W.2d at 389.

65. 513 S.W.2d 210 (Tex. Civ. App.—Corpus Christi 1974, error ref'd n.r.e.).

sion, or I won't sell you another hide." *B* made arrangements to transfer \$9,000 directly to *S*'s account in a local bank. Telegrams were sent to *S* advising of the arrangements and that payment had been stopped on the check which had been mailed. Credit for the \$9,000 was received by *S*'s bank on Thursday, March 23. In the meantime, *S* received *B*'s check on Wednesday morning, returned this check to *B* and refunded \$1237, since the \$9,000 bank credit more than paid for the hides delivered on March 18. *S* refused to make further deliveries of hides, treating the failure to pay before 4:30 p.m. on March 21 as a breach of contract giving cause for canceling the contract. The price of hides went up markedly during the rest of the year. *B* was under the necessity of buying hides elsewhere and sued for damages. *S* had judgment in the trial court, but this was reversed on appeal.

The court of civil appeals held that the contract provision for cash on delivery did not make time of the essence, justifying cancellation of the contract for the delay which had occurred. Past practice established that payment by check was acceptable. Delay in the mails was at *S*'s risk after it directed that the check should be mailed. Assuming that the check was mailed on Monday, March 20, this was within a reasonable time. Finally, even if the contract was breached because *S* did not receive the check until Wednesday, sufficient cause did not exist for cancelling the contract. Because *B* had done all he could after the conversation with *S* on March 18, *S* could not on March 21 suddenly put *B* in default by demanding payment that same afternoon. Since *S* unequivocally repudiated the contract, *B* was under no duty to tender performance during the rest of the year. Under sections 2-711 and 2-712 of the UCC,⁶⁶ *B* had a right to purchase hides elsewhere and to have damages measured by the difference between the contract price and the cost required to "cover." The measure of damages was applied to *S*'s hide production during the year, and *B* recovered in excess of \$152,000.

A dissenting opinion expressed the view that the telephone conversation of March 21 was a modification of the written contract, to which *B* agreed by immediately attempting to transfer funds to *S*'s bank. The modification was considered effective under section 2-201(2) of the UCC⁶⁷ because it was followed up by *B*'s telegram to *S*. Since *B* failed to pay by 4:30 p.m., *S* had a right to cancel the contract. The dissenting justice was of the opinion that implied findings of the trial judge supported the take-nothing judgment.

The majority opinion's analysis of the parties' conversations and acts on March 18 and 21 seems preferable to that of the dissenting opinion. It is clear that the parties did not intend to modify the contract with respect to later deliveries and payments. It is doubtful that they intended to enter into a special contract affecting the payment which was due on March 18. Rather, strict performance as to one payment was waived, and the question for the court was the extent of the waiver.

Sale or Return. *Lipshutz v. Gordon Jewelry Corp.*⁶⁸ was a suit for the price

66. TEX. BUS. & COMM. CODE ANN. §§ 2.711-.712 (1968).

67. *Id.* § 2.201(b).

68. 373 F. Supp. 375 (S.D. Tex. 1974).

of jewelry sent by plaintiff wholesaler to defendant retailer under an "all-risk" memorandum. The retailer was the victim of a million-dollar robbery in which \$273,500 worth of jewelry belonging to the wholesaler was taken. Being satisfied that no controversy existed as to a material fact, the court granted plaintiff's motion for summary judgment.

Plaintiff did business in New York City and defendant in Dallas, Texas. When jewelry was sent to defendant, the latter signed an "all-risk" memorandum. The memorandum described the goods, listed prices, and acknowledged delivery. The memorandum stated that the jewelry remained the wholesaler's property and subject to its order. However, the retailer assumed "full and unqualified responsibility for the absolute return of the said property, or the cash proceeds to you on demand, without any excuse or defense whatsoever."⁶⁹ The retailer had authority to display the jewelry for sale and to set retail prices.

The court found that trade practice was that retailers were liable for the prices listed in the "all-risk" memorandum. There was no evidence of any trade practice that indicated the retailer would be liable only for actual cost plus a small percentage. The court treated the memorandum deliveries as "sale or return" transactions.⁷⁰ Ordinarily, risk of return of goods is on the buyer,⁷¹ but plaintiff and defendant had specially agreed that the risk of loss should rest on defendant only while it had possession. Assuming title to the jewelry had not passed, the agreement that the retailer, as bailee, would be absolutely liable for the goods while in its possession was valid under both New York and Texas law.

Warranties. The measure of damages for breach of warranty was dealt with in *Melody Home Manufacturing Co. v. Morrison*.⁷² Defendant sold plaintiffs a defective mobile home. Plaintiffs recovered \$4000, which represented "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted."⁷³ The fact that plaintiffs continued living in the mobile home did not refute the finding that the mobile home was not fit for the ordinary purposes of such type of property. The jury could find that extraneous circumstances caused plaintiffs to stay in the mobile home.

In *Chaq Oil Co. v. Gardner Machinery Corp.*⁷⁴ *S* sold *B* a used "crawler tractor." *B*'s managing partner was an engineer, and the machinery was run in his presence before the sale. Later, *B* had to make extensive repairs and sued for breach of warranties of merchantability and fitness for a particular purpose. A take-nothing judgment was entered against *B*, which was affirmed on appeal.

69. *Id.* at 378.

70. UNIFORM COMMERCIAL CODE §§ 2-326(1), (3); TEX. BUS. & COMM. CODE ANN. §§ 2.326(a), (c) (1968).

71. UNIFORM COMMERCIAL CODE § 2-327(2)(b); TEX. BUS. & COMM. CODE ANN. § 2.327(b)(2) (1968).

72. 502 S.W.2d 196 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

73. UNIFORM COMMERCIAL CODE § 2-714(2); TEX. BUS. & COMM. CODE ANN. § 2.714(b) (1968).

74. 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

Section 2-314(1) of the UCC⁷⁵ declares that a warranty of merchantability is implied in a sale if the seller is a merchant with respect to the goods sold. Official comment 3 to section 2-314 states that a specific designation of goods by the buyer does not exclude the seller's obligation that the goods are merchantable. "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description."⁷⁶ This expression seems to allow for a warranty of merchantability in the sale of used goods. However, the court of civil appeals rejected this: "Under Texas law no implied warranty of merchantability is appropriate in the case of goods purchased with the knowledge that they are used or secondhand."⁷⁷ The court relied on section 1-103⁷⁸ as authorizing the application of pre-Code law to supplement Code provisions. One may query the court's rationale. Section 2-314 is broad, and the implication of the official comment is that sales of used goods can carry an implied warranty of merchantability.

With respect to the implied warranty of fitness for a particular purpose, the court held that *B* had failed to plead or prove proper damages. *B* sought to recover the purchase price and cost of repairs. The correct measure of damages was the difference between market value of the equipment as delivered and as warranted. Further, under section 2-316(3)(b)⁷⁹ the warranty of fitness was excluded because *B* had full opportunity to examine the equipment and an examination would have revealed the defects.

In *Bowen v. Young*⁸⁰ a buyer sought to rescind a contract of purchase of a mobile home. *B* entered into contract to buy from *S*, a dealer, after seeing display models in El Paso. Delivery was to be made in South Carolina, where *B* was moving to take a new job. The back of the written contract contained a disclaimer of warranties of merchantability and fitness, stated that the buyer took the mobile home "as is," and certified that the buyer had read and agreed to these terms. Provision was made for the manufacturer's warranty and for individual warranties by the makers of accessories on the mobile home.

B was actually required to pick up the mobile home in Augusta, Georgia. When he moved it to South Carolina and hooked it up, he discovered many defects. He telephoned *S* and the manufacturer in fruitless efforts to get the defects remedied. Three weeks later, *B* wired *S* that he cancelled the order. Receiving no response, *B* moved into the trailer to reduce and eliminate rental and storage expense. He repaired the heating system and converted it to gas. After a year, *B* moved back to El Paso and sued *S*. The trial court found that *B* rightfully rejected the mobile home as not conforming to the contract of sale and awarded \$2000 damages. The court of civil appeals reversed and remanded.

75. TEX. BUS. & COMM. CODE ANN. § 2.314(a) (1968).

76. UNIFORM COMMERCIAL CODE § 2-314, Comment 3.

77. 500 S.W.2d at 878, citing pre-Code decisions.

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

79. *Id.* § 2.316(c)(2).

80. 507 S.W.2d 600 (Tex. Civ. App.—El Paso 1974, no writ).

The court of civil appeals was of the opinion that the language on the back of the contract complied with section 2-316 of the UCC⁸¹ in excluding and modifying express and implied warranties. Nevertheless, *B* had a possible cause of action. Section 2-313(1)(c) states that a sample or model which is made "part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."⁸² In the new trial, if such a finding were to be made, then the express warranty would "go so clearly to the essence of that bargain that words of disclaimer in the purchase agreement are repugnant to the basic dickered terms."⁸³

Assuming that the mobile home did not conform to the contract, *B* had a right, within a reasonable time and with notice to *S*, to reject it.⁸⁴ Since neither *S* nor the manufacturer responded to *B*'s cancellation, *B* had a right "to store the rejected goods for the seller's account or reship them to him or resell them for the seller's account"⁸⁵ *B* did none of these things but instead moved into the mobile home and spent nearly \$600 to repair and alter the heating unit. Thus *B* accepted the goods and became obligated to pay the contract price,⁸⁶ subject to deduction for breach of warranty.

Privity of Contract. Lack of privity of contract was held not a bar to suit on an express warranty in *Veretto v. Eli Lily & Co.*⁸⁷ Plaintiff farmer applied Treflan, a weed control substance, to his cotton acreage. The weeds were not controlled, and plaintiff sued defendant manufacturer. Plaintiff purchased the Treflan from retail dealers. Plaintiff sought to recover the price paid plus consequential damages, which consisted of the cost of applying the Treflan, hoeing the weeds, and plowing up unharvestable cotton.

The court stated that lack of privity of contract did not bar recovery of the purchase money from defendant where an express warranty was made by defendant in an advertising campaign, as well as on the labels and pamphlets accompanying the cans of Treflan. However, consequential damages could not be recovered because of the lack of contractual relationship and because the express warranty limited the buyer's recourse to refund of the purchase price. Of course, conditions of use in the warranty had to be complied with by the buyer. Defendant obtained a judgment notwithstanding the verdict due to the lack of proof that plaintiff followed directions in applying the Treflan.

Lack of privity of contract was held a good defense to an action against a manufacturer in *Foremost Mobile Homes Manufacturing Corp. v. Steele.*⁸⁸

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

82. *Id.* § 2.313(a)(3).

83. 507 S.W.2d at 605, citing *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App.—Dallas 1973, no writ).

84. UNIFORM COMMERCIAL CODE §§ 2-601(a), -602(1); TEX. BUS. & COMM. CODE ANN. §§ 2.601(1), 2.602(a) (1968).

85. UNIFORM COMMERCIAL CODE § 2-604; TEX. BUS. & COMM. CODE ANN. § 2.604 (1968).

86. UNIFORM COMMERCIAL CODE §§ 2-606(1)(c), -607(1); TEX. BUS. & COMM. CODE ANN. §§ 2.606(a)(3), 2.607(a) (1968).

87. 369 F. Supp. 1254 (N.D. Tex. 1974).

88. 506 S.W.2d 646 (Tex. Civ. App.—Fort Worth 1974, no writ).

Plaintiff bought a mobile home from a retailer dealer. Defendant was the manufacturer. The mobile home was defective, and plaintiff recovered the difference between actual and expected value. On appeal the judgment was reversed and rendered.

The court of civil appeals noted that the judgment in the trial court was not based on any theory that the dealer was manufacturer's agent in making representations, nor was the case tried on the basis of express warranty. The only warranty made by the manufacturer was exclusive and limited to replacement of defective parts. Without citation of authority, the court stated: "Under present Texas law plaintiff lost no right by reason of her acceptance of the written warranty. In this case we can and do treat it as a nullity."⁸⁹ Nevertheless, plaintiff had no cause of action against defendant on any implied warranty because of absence of privity of contract with the manufacturer. The case was not one in which plaintiff's action sounded in tort. The court distinguished cases in which a manufacturer is held liable on express warranties communicated to the buyer. Plaintiff's cause of action "lay wholly within and must be decided by principles of contract law exclusively and in such a situation proof of contractual privity is a necessary prerequisite to any recovery."⁹⁰ The court did not think that the rationale of the products liability decisions extended to the instant case.

*Products Liability. Borel v. Fibreboard Paper Products Corp.*⁹¹ explores in depth the subject of products liability for occupational disease and defenses thereto. Borel worked as an insulation worker for various employers, most of them in Texas, between the years 1936 and 1969. In this employment he was regularly exposed to heavy concentrations of asbestos dust. In 1969 he was disabled by the disease of pulmonary asbestosis. In 1970 it was determined that he had lung cancer, and a lung was removed. Borel brought action against eleven companies which had supplied his several employers with asbestos insulation materials. He settled with four defendants before trial, and a verdict was directed for a fifth defendant. Before the trial against the remaining defendants began, Borel died. His widow was substituted as plaintiff under the Texas wrongful death statute.⁹² Plaintiff received a verdict for \$79,500, which was reduced by the settlement with the four defendants. Judgment was entered against the six defendants jointly and severally for \$58,500. This was affirmed on appeal.

The appeals court noted that Texas had adopted⁹³ the theory of strict liability as expressed in the *Restatement (Second) of Torts*: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate consumer or user."⁹⁴ Liability is imposed despite lack of privity of

89. *Id.* at 648.

90. *Id.* at 649.

91. 493 F.2d 1076 (5th Cir. 1973).

92. TEX. REV. CIV. STAT. ANN. art. 4671 (1940); *id.* art. 5525 (1958).

93. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967).

94. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

contract with the consumer or user and even though the seller has exercised all possible care. The court recognized that a product might have both utility and danger. A product was "unreasonably dangerous" if its utility did not outweigh the magnitude of danger. The evidence supported the finding that defendants should have known from the 1930's that asbestos insulation materials were a peril to persons working with them over a substantial period of time. The asbestos insulation materials were "unreasonably dangerous" to workers like Borel, and defendants were subject to strict liability. Even if the utility of the asbestos insulation materials justified their marketing despite the danger to users or consumers, defendants owed a duty to inform of the risk of harm. Thus, users or consumers would have a choice to expose themselves to risk or not. In the present case adequate warning was not communicated to Borel.

The jury found that Borel was contributorily negligent in continuing to work with asbestos insulation materials in the 1960's. The appeals court was of the opinion that under Texas law⁹⁵ contributory negligence was not generally a defense to strict product liability. Assumption of risk was a defense, but only if it amounted to an unreasonable election to encounter the risk with full knowledge of its nature and extent. The jury found that Borel had not assumed the risk of using the asbestos insulation materials. The finding was supported by evidence that Borel in his working days never realized the extent of the danger to which he was exposed.

Plaintiff was unable to prove to what extent each of the defendants had caused injury to Borel. Following *Landers v. East Texas Salt Water Disposal Co.*,⁹⁶ the court declared that where all the defendants contributed materially to the injury but failed to prove how the wrong should be apportioned, they should be held jointly and severally liable.

Bailments. In *Allright Parking System, Inc. v. Deniger*,⁹⁷ *Jugoslavenska Oceanska v. Gulf Atlantic Warehouse Co.*,⁹⁸ and *National Moving & Storage, Inc. v. Vargo*⁹⁹ bailees for hire were held liable for presumed negligence when articles in their possession were stolen or lost. The *Jugoslavenska* case contains extended analysis of whether a wharfinger or a steamship company was the bailee in possession when the goods disappeared. In the *Vargo* case the court struck from a judgment an amount allowed for loss of use of undelivered household goods. The measure of damages for failure to deliver was "the fair market value at the point of destination with legal interest from the date when the goods should have been delivered. . . . Where the articles lost are secondhand household goods and clothing, the measure of damages is not market value but is the value to the owner of the articles especially adapted to the use of himself and his family."¹⁰⁰ The court did not think that the shipper brought himself within the rule that spe-

95. *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967).

96. 151 Tex. 251, 248 S.W.2d 731 (1952).

97. 508 S.W.2d 127 (Tex. Civ. App.—Eastland 1974, no writ).

98. 507 S.W.2d 892 (Tex. Civ. App.—Houston [1st Dist.] 1974, error ref'd n.r.e.).

99. 501 S.W.2d 452 (Tex. Civ. App.—Amarillo 1973, no writ).

100. *Id.* at 454.

cial damages may be recovered if at the time of delivery to the carrier the shipper gives notice of special circumstances which will result in injury not ordinarily contemplated by the parties.¹⁰¹

Misdelivery of goods by a bailee was involved in *Scobey Moving & Storage Co. v. Turner*.¹⁰² Household goods were held by *S* for *H* and *W* under a nonnegotiable warehouse receipt. *H* and *W* decided to get a divorce, and *H* executed a written release in *W*'s favor and sent it to *S*. Subsequently, *W* paid storage charges and told *S* not to release the goods to *H*. After a year, *H*'s father presented to *S* a written release from *W* to *H* and a written authorization from his son to get the goods. The father paid the storage charges and took possession of the goods. The purported release by *W* was unauthorized. She was in possession of the nonnegotiable warehouse receipt. *W* sued *S* for conversion of the goods. Judgment for *W* was reversed by the court of civil appeals. The court relied on section 7-204(1) of the UCC: "A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care."¹⁰³ The jury had found that *S* acted in good faith and in observance of reasonable commercial standards in releasing the goods. He had "exercised such care as a reasonably careful person would have exercised under like circumstances."¹⁰⁴

The decision is at odds with the general rule that a bailee is bound to return a bailed article to the bailor or his authorized representative.¹⁰⁵ The court overlooked section 7-403(1) of the UCC: "The bailee must deliver the goods to a person entitled under the document . . ."¹⁰⁶ Section 7-403(4) defines "person entitled under the document" as a "holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document."¹⁰⁷ Section 7-204(1),¹⁰⁸ cited by the court, does not deal with the duty of delivery but with the care and preservation of goods in the bailee's possession.

Liability for Freight Charges. In *Tex-Wood Overhead Door Co. v. Southern P.T. Co.*¹⁰⁹ goods were sent "collect" to defendant. Plaintiff common carrier did not collect freight charges at the time of delivery because defendant was on a credit list. Defendant failed to pay, and plaintiff sued and recovered.

101. *Id.*

102. 502 S.W.2d 884 (Tex. Civ. App.—Beaumont 1973), *rev'd*, 515 S.W.2d 253 (Tex. 1974).

103. TEX. BUS. & COMM. CODE ANN. § 7.204(a) (1968). The Texas Supreme Court in reversing stated that the section was "not applicable." 515 S.W.2d at 255.

104. 502 S.W.2d at 885.

105. R. BROWN, THE LAW OF PERSONAL PROPERTY § 86 (2d ed. 1955).

106. TEX. BUS. & COMM. CODE ANN. § 7.403(a) (1968). On appeal the supreme court recognized the applicability of this section. 515 S.W.2d at 255.

107. TEX. BUS. & COMM. CODE ANN. § 7.403(d) (1968).

108. *Id.* § 7.204(a).

109. 513 S.W.2d 87 (Tex. Civ. App.—Waco 1974, no writ).

"A consignee who accepts goods shipped to it collect thereby implicitly agrees to pay the freight charges relating to that shipment, and becomes liable therefor, whether such are demanded at the time of delivery, or not until later."¹¹⁰

The same rule was applied in *Lyon Van Lines, Inc. v. Ogden*.¹¹¹ Defendant's employer moved him from Michigan to Houston. The employer made arrangements with plaintiff carrier to ship defendant's household goods to Houston. Defendant had no part in the arrangements, but his wife acknowledged receipt of the goods. The bill of lading designated plaintiff as shipper and consignee and bore the notation "charge to . . . [employer]." The freight charges were not paid because the employer became bankrupt. Plaintiff sued defendant and recovered. The court said that the Interstate Commerce Act¹¹² imposes on a consignee who accepts a shipment liability for payment of freight without regard to contract and even though he relies on a third party's promise to pay. The rule is recognized as having harsh results but is justified as carrying out congressional policy against discrimination in freight rates.

Sale Without Certificate of Title. In *Apeco Corp. v. Bishop Mobile Homes, Inc.*¹¹³ a manufacturer (*A*) sold a mobile home to a dealer (*B*). The mobile home was shipped to *B*, who was allowed to have possession without paying for it. *A* did not execute a manufacturer's certificate. Within a few days, *B* contracted to sell the mobile home to *C*, and the latter made complete payment a week later. The sale was in the ordinary course of *B*'s business. *C* did not ask for a certificate of title until he made the final payment. *B* did not pay for the mobile home, and *A* sued alternatively for possession and title or the price. *A* obtained judgment against *B* for the price but was ordered to issue its manufacturer's certificate to *C*.

The main question was whether the Texas Certificate of Title Act¹¹⁴ or the UCC applied. The court noted the definitions in the former act of "first sale," "subsequent sale," "owner," "manufacturer's certificate," and "certificate of title." A "first sale" is a sale of a vehicle which has not previously been registered in the state, while a "subsequent sale" is any sale occurring after a vehicle has been registered or should have been registered. An "owner" is any person other than a manufacturer or dealer who claims title after the "first sale." A "manufacturer's certificate" is issued by a manufacturer to a purchaser "whether importer, distributor, dealer or owner." A "certificate of title," of course, issues from the State Highway Department.

Section 27 of the Certificate of Title Act requires that an "owner" apply for registration before he sells,¹¹⁵ and section 28 prohibits issuance of a certificate of title to a new vehicle unless a manufacturer's certificate is tendered.¹¹⁶ In a "subsequent sale," according to sections 33 and 53, title does

110. *Id.* at 88, citing 49 U.S.C.A. § 3(2) (1959).

111. 503 S.W.2d 632 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

112. 49 U.S.C. §§ 3(2), 323 (1970).

113. 506 S.W.2d 711 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

114. TEX. REV. CIV. STAT. ANN. art. 6687-1 (Supp. 1974).

115. *Id.* § 27.

116. *Id.* § 28.

not pass unless the "owner" transfers the certificate of title.¹¹⁷ The court quoted from *Motor Investment Co. v. Knox City*: "[W]e think it clear that every transfer of a motor vehicle, regardless of the number thereof, from manufacture to dealer, dealer to dealer, and from dealer to 'owner' . . . constitutes a 'first sale,' and that it is not necessary that the vehicle be registered and a certificate of title thereto obtained as a condition precedent to the validity of such 'first sale.'"¹¹⁸ The court added: "A sale to an 'owner' is a 'first sale.' A sale by an 'owner' is a 'subsequent sale.'"¹¹⁹

The court concluded that obtaining a manufacturer's certificate or certificate of title was not necessary for the validity of the "first sales" to *B* and *C*. It was immaterial that *C* could not transfer title in a "subsequent sale" without getting the manufacturer's certificate and a certificate of title. The UCC governed in determining *C*'s title was good against *A*.¹²⁰ *A*'s retention of title was ineffective against the operation of section 2-403(2) of the UCC: "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."¹²¹ *C* was held to be a bona fide purchaser in the ordinary course of business even though he failed to request a certificate of title at the time of purchase.

The decision seems consistent with earlier judicial construction. On the other side, one may argue that any buyer in a "first sale" ought to ask for the manufacturer's certificate. An "owner" ought particularly to ask because he will need it, if he wants to resell, in order to get a certificate of title. But perhaps the failure to ask for or insist on the manufacturer's certificate is merely negligence that does not affect the "owner's" good faith.

A different situation in which the bona fide purchaser was not protected is seen in *Chapman Motors, Inc. v. Taylor*.¹²² *D1*, a dealer, repossessed a Cadillac and obtained the certificate of title. The certificate was in the name of a third party, and the name of the purchaser was left blank in the assignment so that *D1* could insert the name of a subsequent purchaser (an "open title"). The Cadillac and certificate of title were stolen and sold to *D2*, another dealer, in trade for two Fords. (The person making the trade, *T*, then sold one of the Fords to *D1* for cash.) Learning later that *D2* had the Cadillac, *D1* sued for title and possession. Judgment for *D2* in the trial court was reversed and rendered. The court of civil appeals stated, "A purchaser of property from one who has acquired possession thereof by theft acquires no title thereto."¹²³ The decision seems sound since a certificate of title is not a negotiable instrument and no facts of estoppel were made out.

117. *Id.* §§ 33, 53.

118. 506 S.W.2d at 715, citing 141 Tex. 530, 535, 174 S.W.2d 482, 486 (1943).

119. 506 S.W.2d at 715.

120. UNIFORM COMMERCIAL CODE § 9-307(1); TEX. BUS. & COMM. CODE ANN. § 9.307(a) (1968).

121. TEX. BUS. & COMM. CODE ANN. § 2.403(b) (1968).

122. 506 S.W.2d 724 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

123. *Id.* at 726.

III. SECURED TRANSACTIONS

Sufficiency of Written Agreement. Whether a certificate of title of itself constitutes a sufficient writing to create a security interest was the question in *Clark v. Vaughn*.¹²⁴ Vaughn loaned Clark money to pay a lien on the latter's automobile. Clark signed the transfer form on the certificate of title and delivered it to Vaughn, who obtained a new certificate in her name. The understanding was that Vaughn would transfer the title back to Clark when he paid the debt. Clark defaulted in paying the debt, and Vaughn peacefully repossessed the automobile. Eleven months later, Vaughn sold the automobile because she did not think Clark would pay his debt. Clark sued for conversion. A take-nothing judgment in the trial court was affirmed on appeal.

The findings established that the parties agreed that Vaughn should have a security interest in the automobile. Ordinarily, the security interest would have attached immediately, since value was given and there was no agreement postponing the time of attaching.¹²⁵ But was there a sufficient writing? Section 9-203 of the UCC¹²⁶ states that if a debtor retains possession of collateral, the security interest is not enforceable unless the debtor has signed a security agreement describing the collateral. The court held that the certificate of title signed by Clark and delivered to Vaughn was a sufficient written agreement. The court referred to comment 4 to section 9-203, which recognizes the "deeply rooted" doctrine that an absolute transfer may be shown to have been given as security for a debt.¹²⁷

Perfection of Security Interest. *Southview Corp. v. Kleberg First National Bank*¹²⁸ holds that a security interest can be perfected in a certificate of deposit. Plaintiff sought to garnish funds of defendant in K bank. S bank intervened and claimed that funds represented by two certificates of deposit were not subject to garnishment. Before the action was brought, defendant had assigned and delivered the certificates to S bank as security for certain debts. A security agreement was entered into listing the certificates as collateral. The court held that S bank had the superior right.

At the time the garnishment action was filed, section 9-104 of the UCC read: "This chapter does not apply . . . (k) to a transfer in whole or in part of any of the following: . . . any deposit, savings, passbook or like account maintained with a bank . . ." ¹²⁹ Plaintiff argued from this that a security interest could not be created in a certificate of deposit. The court answered that a certificate of deposit is a promissory note issued by a bank and is an "instrument," which may be negotiable or nonnegotiable.¹³⁰ Sec-

124. 504 S.W.2d 550 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

125. The court cited UNIFORM COMMERCIAL CODE § 9-204; TEX. BUS. & COMM. CODE ANN. § 9.204 (1968). 504 S.W.2d at 552.

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

127. UNIFORM COMMERCIAL CODE § 9-203, Comment 4.

128. 512 S.W.2d 817 (Tex. Civ. App.—Corpus Christi 1974, no writ).

129. TEX. BUS. & COMM. CODE ANN. § 9.104(11) (1968) (emphasis added).

130. 512 S.W.2d at 819, citing UNIFORM COMMERCIAL CODE §§ 3-104(2)(c), (3), 9-105(g); TEX. BUS. & COMM. CODE ANN. §§ 3.104(b)(3), (c), 9.105(7) (1968). Af-

tion 9-304(1) of the UCC states that a "security interest in instruments . . . can be perfected only by the secured party's taking possession . . ." ¹³¹ Section 9-102 states that article 9 applies "to any transaction . . . which is intended to create a security interest in . . . instruments . . ." ¹³²

The court noted that amendments to the UCC became effective in Texas on January 1, 1974. Section 9-104 now states that article 9 does not apply "(1) to a transfer of an interest in any deposit account." ¹³³ "Deposit account" is defined in section 9-105(1)(e) to include "demand, time, savings, passbook or like accounts . . . other than an account evidenced by a certificate of deposit." ¹³⁴ Plaintiff argued that the language of exclusion changed previous law. The court disagreed, citing section 11-108 ¹³⁵ to the effect that the amendments were presumed to be declaratory of previous law.

It should be remarked that exclusion from article 9 by section 9-104 does not mean that the interest or transaction cannot be the subject of a valid security agreement. Special legislation may be applicable, or common law rules may make the security interest enforceable. This is recognized in comment 7 to the section. ¹³⁶

Protection of Purchasers. Section 1-201(9) of the UCC defines a "buyer in ordinary course of business" as a person "who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind." ¹³⁷ Section 9-307(1) provides that a buyer in ordinary course of business "takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." ¹³⁸ In *International Harvester Co. v. Glendenning* ¹³⁹ the court held that there was no evidence of probative force to support the jury's verdict that defendant was a buyer in ordinary course of business and rendered judgment against him. The court's appraisal of the evidence at the trial is indicated by the following excerpt from the opinion:

Appellee Glendenning's own testimony immediately removes him from the category of an innocent Collin County farmer who seeks to purchase one or more tractors in the ordinary course of business. By his own testimony he has had many years of experience as a tractor dealer, a salesman and one of the most active traders of farm equipment in Collin County. Based upon this experience he is knowledgeable in the very nature of business done by International by 'floor-planning' its

ter the 1972 amendments of the UCC, the text of § 9-105(g) is found in § 9-105(i) (TEX. BUS. & COMM. CODE ANN. § 9.105(9) (Supp. 1974)).

131. TEX. BUS. & COMM. CODE ANN. § 9.304(a) (1968).

132. *Id.* § 9.102.

133. *Id.* § 9.104(12).

134. *Id.* § 9.105(a)(5).

135. *Id.* § 11.108.

136. UNIFORM COMMERCIAL CODE § 9-104, Comment 7.

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

138. *Id.* § 9.307(a).

139. 505 S.W.2d 320 (Tex. Civ. App.—Dallas 1974, no writ).

equipment. With all of this knowledge and information in his possession he purchased the equipment for considerably less than its value, made no investigation of International's security interest, acquiesced in the falsification of the retail order form showing nonexistent trade-ins, and misrepresented the particulars of the transaction to International's representative by stating that there were, in fact, trade-ins. He confesses that his actions were dishonest.¹⁴⁰

The court went on to say that defendant's statement that he acted in good faith was completely negated by his own testimony as to the details of the purchase transaction.

In *Chrysler Credit Corp. v. Malone*¹⁴¹ defendant failed to qualify as a buyer in ordinary course of business because he received the goods in partial satisfaction of a pre-existing debt. *WF* company was an automobile dealer and had as part of its inventory a 1970 Chrysler. Plaintiff had a perfected security interest in the automobile for money loaned. *WF* also owed defendant, an insurance agent, \$10,000 for premiums. On the morning of May 20, 1970, *WF* issued and delivered a check to defendant for \$5000 as part payment. In the afternoon defendant endorsed the check back to *WF* in payment for the 1970 Chrysler. The check exceeded the total price and costs, and defendant received \$68 in change. Defendant drove the automobile as a family car. The court held that defendant was liable for conversion of plaintiff's security interest.

The UCC definition of "buyer in ordinary course of business" includes a statement that "[b]uying' . . . does not include a transfer . . . as security for or in total or partial satisfaction of a money debt."¹⁴² Thus, defendant's rights depended on whether he took the Chrysler in partial satisfaction of a debt. The court reasoned that when defendant took the \$5000 check, *WF* was still indebted for \$10,000. The check merely changed the form of the pre-existing debt. Accordingly, defendant was not a buyer in ordinary course of business, even though the jury found that defendant did not intend to exchange the check for the Chrysler when he first received it.

Priorities Among Creditors. *Gulf Oil Co. v. First National Bank*¹⁴³ involved conflicting claims of an attaching creditor and a secured party in the proceeds of sale of milo maize grown by defendant debtor. The grain was grown in 1971 on two tracts of land, one owned by defendant and the other leased. Judgment went against defendant, and the trial court awarded the proceeds of the grain grown on the owned land to Gulf and the proceeds from the leased land to the bank. On appeal, the bank was awarded the proceeds of all the grain.

The bank filed a financing statement on July 5, 1966, and a continuation statement on June 28, 1971, with respect to the crops on the leased land. A security agreement was executed by the bank and the debtor on February

140. *Id.* at 324-25.

141. 502 S.W.2d 910 (Tex. Civ. App.—Fort Worth 1973, no writ).

142. UNIFORM COMMERCIAL CODE § 1-201(9); TEX. BUS. & COMM. CODE ANN. § 1.201(9) (1968); *see* 502 S.W.2d at 912.

143. 503 S.W.2d 300 (Tex. Civ. App.—Amarillo 1973, no writ).

18, 1971, covering crops on both the owned and leased land, but this was not the subject of a filing statement until November 12, 1971. Plaintiff Gulf began suit against defendant on May 6, 1971, and obtained a default judgment which was filed for record on November 11, 1971. On November 18, 1971, the default judgment was vacated, on defendant's motion. In the meantime, the bank had intervened. The judgment dividing the proceeds of the grain was entered in the trial court in 1973.

Because the bank had perfected its security interest in the crops on both owned and leased land before Gulf obtained a lien by an effective levy, the court of civil appeals held that the bank was entitled to all the proceeds. Apart from this holding, the court was of the opinion that the 1966 filing and 1971 continuation statement were effective with respect to the leased land. Plaintiff Gulf contended that the bank did not have a lien on the 1971 crops because section 9-204(4)(a) of the UCC¹⁴⁴ provides that no security interest attaches with respect to crops becoming such more than three years¹⁴⁵ after a security agreement is executed. The court answered that the parties executed a security agreement on February 18, 1971, and that they had done this in previous years. The filing in 1966 and the continuation statement on June 28, 1971, gave notice to the world of the bank's security interest in the leased land. As to the owned land, the security agreement was effective between the parties, although it was not perfected. This security interest could be defeated by a person who became a lien creditor without knowledge of the security interest.¹⁴⁶ The evidence indicated that plaintiff Gulf knew of the bank's security interest in all the crops long before plaintiff sought to levy. The court was of the opinion that there was no evidence of probative force supporting an implied finding that plaintiff was not on notice.

Lease or Security Agreement? The rights of a lessor of goods against a defaulting lessee can be made more drastic and peremptory than the rights of a holder of a security interest against a defaulting debtor. Hence the courts have been under the necessity of distinguishing "true" leases from security agreements. In *Davis Bros. v. Misco Leasing, Inc.*¹⁴⁷ defendant brothers leased farm lands under the contractual necessity of installing two irrigation sprinkler systems. Plains Supply Company placed two such systems on the lands and proposed that the brothers enter into a leasing arrangement with Misco Leasing, Inc., as lessor. The latter company was agreeable on learning that Plains Supply Company would guarantee payments by defendants. A contract was entered into indicating that the cost of the equipment was \$15,000. Defendants leased the equipment for sixty months at a rental of \$1024 quarterly, plus a security deposit of \$3071. At the end of the term

144. TEX. BUS. & COMM. CODE ANN. § 9.204(d)(1) (1968). The 1972 amendment of the UCC (effective in Texas on Jan. 1, 1974) omits subsection (4)(a) (subsection (d)(1) in the Texas statute). See TEX. BUS. & COMM. CODE ANN. § 9.204 (Supp. 1974), amending ch. 785, § 1, [1967] Tex. Laws 2343.

145. The UCC said "one year," the Texas act "three years."

146. The court quoted UNIFORM COMMERCIAL CODE §§ 9-301, 1-201(25); TEX. BUS. & COMM. CODE ANN. §§ 9.301, 1.201(25) (1968). 503 S.W.2d at 307.

147. 508 S.W.2d 908 (Tex. Civ. App.—Amarillo 1974, no writ).

the lease could be renewed yearly for an annual rental of \$450. A separate agreement allowed the brothers at the end of the lease to buy the equipment for its then fair market value, not exceeding ten percent of its original price. Plains Supply Company sold the irrigation sprinkler systems to Misco Leasing, Inc., and received a \$15,000 check in payment. The supply company executed an agreement guaranteeing payment of the brothers' lease obligation.

Defendants used the sprinkler systems for two years and then lost their land leases. Defendants ceased making payments on the equipment lease, and plaintiff Misco repossessed and sold the sprinkler systems for \$4000 after publishing a notice of private sale. Plaintiff then brought suit against defendant brothers for \$10,333, being the difference between the total rent obligation and lease payments plus the proceeds of the sale. The trial court viewed the defendants' obligation as arising from a lease, and judgment was entered for plaintiff. On appeal, the case was reversed and remanded.

The court of civil appeals discussed various factors which determine whether a financing arrangement is a lease or a security agreement. Section 1-201(37) of the UCC¹⁴⁸ defines "security interest" and states that whether a lease is intended as security depends on the facts of each case. Inclusion of an option to purchase does not of itself make a lease one intended for security; but if on compliance with the terms of the lease the lessee has the option to become owner of the property for nominal or no consideration, the lease is one intended for security. This test may be stated another way: If the purchase price is substantially less than market value or if the only sensible alternative for the lessee is to buy, then the lease is intended as security for a sale on credit. If the initial term of the lease is materially less than the life of the property and renewal may be had for substantially less than the fair rental value, a security interest is indicated. Other significant facts are lessor's purchase of the equipment from a supplier, lessor's lack of storage and handling facilities, lessor's requirement of a guaranty by a third party, lessee's payment of taxes, insurance, and repairs, and lessee's payment of a security deposit. If the rent is fair and shows an intention to compensate the lessor for loss of value due to aging, wear and obsolescence, a lease is indicated. The ultimate question decided in weighing these factors is whether lessee has acquired an equity in the leased property.

In the present case the record contained no evidence of the fair market value of the sprinkler systems at the time when the option to purchase might be exercised; no evidence of a depreciation schedule or anticipated useful life of the equipment; and no evidence as to whether the rental payments were customary or indicative of acquisition of an equity. Because of the lack of necessary evidence, the case was remanded so that the parties might more fully develop their positions.

*American Lease Plan v. Ben-Krow Corp.*¹⁴⁹ is a lease case in which the security interest question was not raised. American Lease Plan leased office

148. TEX. BUS. & COMM. CODE ANN. § 1.201(37) (1968).

149. 508 S.W.2d 937 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

and printing equipment to Ben-Krow for thirty-six months at a monthly rental of \$81.49. Lessee made an advance deposit equivalent to three months' rent, made two regular monthly payments, and then defaulted for four months. Lessor gave notice of acceleration of maturity of unaccrued rentals and sued for their amount. At the same time, lessor obtained possession of the leased equipment through a writ of sequestration and sold it. Lessor asked judgment against lessee for the total of the accrued and unaccrued rentals less the proceeds of the sale. The trial court granted defendant lessee's motion for summary judgment. On appeal the case was reversed and remanded.

The lease contained extensive provisions dealing with default on lessee's part. The lessor could (a) sue for rents due and accruing, (b) take possession of the equipment without use of court process, (c) sell the equipment and sue for unpaid rent less the proceeds of the sale, (d) terminate the lease, (e) in case of termination, recover as to each item of leased equipment the worth of the rent for the balance of the term over the present rental value, and (f) pursue other remedies at law or in equity. Notwithstanding that the lessor repossessed the equipment, "lessee . . . [remained] liable for the full performance of all its obligations hereunder," but if the lessor terminated the lease as to an item, lessee was no longer liable for rent on it. The lessee remained liable in the event of loss or damage to the equipment.

The court commented that a covenant to pay rent periodically creates no obligation on the part of the lessee until the time for payment arrives. The absence of a clause authorizing acceleration of the entire debt was noted. The several remedies available to lessor on default did not carry with them the right to accelerate. The court stated that on default by lessee, lessor could either sue for rental payments as they accrued or sue for damages for anticipatory breach. As to the latter alternative, the damages would be measured by the difference between the present value of the rentals contracted for and the reasonable cash market value of the lease for its unexpired term. Lessor could take possession of the leased equipment under this alternative. But lessor could not repossess and recover the full amount of accrued and unaccrued rentals. The court held that repossession of the leased property through writ of sequestration was an election of a remedy inconsistent with the contractual terms of the lease, which provided for non-judicial repossession and sale. Therefore, lessor had elected to terminate the lease, and lessee was under no obligation to pay later accruing rents. Material fact issues remained, precluding summary judgment, and the court remanded the case.

Miscellaneous. *Ford Motor Credit Co. v. Cole*¹⁵⁰ is a venue case in which the court had occasion to say that, assuming default in payment of a secured obligation, repossession of an automobile while the debtor and his family were asleep was peaceful and lawful. On earlier dates the debtor had refused permission to take the automobile. The mortgage instrument stated that on de-

150. 503 S.W.2d 853 (Tex. Civ. App.—Fort Worth 1973, writ *dism'd*).

fault the creditor had a "right to repossess the property wherever the same may be found with free right of entry." Section 9-503 of the UCC¹⁵¹ allows a secured party to take possession of collateral when the debtor defaults. The secured party "may proceed without judicial process if this can be done without breach of the peace . . ." ¹⁵²

*McDonald v. Savoy*¹⁵³ illustrates the severe penalties which a seller-creditor may incur in failing to make disclosures in a proper way under the Texas Consumer Credit Code¹⁵⁴ and the Federal Truth-in-Lending Act.¹⁵⁵ *Sosa v. Fite*¹⁵⁶ is an action under the latter legislation in which the debtor was allowed to rescind and to keep benefits (home improvements) which were not repossessed within a proper time after debtor's tender.

151. TEX. BUS. & COMM. CODE ANN. § 9.503 (Supp. 1974).

152. *Id.*

153. 501 S.W.2d 400 (Tex. Civ. App.—San Antonio 1973, no writ).

154. TEX. REV. CIV. STAT. ANN. arts. 5069-7.01 to -7.10 (1971).

155. 15 U.S.C. §§ 1601-65 (1970).

156. 498 F.2d 114 (5th Cir. 1974).