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COMMERCIAL TRANSACTIONS

by

Vernon O. Teofan*

TEXAS Uniform Commercial Code watchers found little to view during the survey period. The Waco court of civil appeals rendered the first two (and only) appellate decisions applying provisions of the Code since it became law in Texas on July 1, 1966. Many courts acknowledge the existence of the Code only to note that the transactions under consideration occurred prior to its effective date, and thus pre-Code law applied. A plethora of cases involving commercial transactions were decided. A few are significant in their own right, others are significant because the issues would be treated differently under the Code.

I. RECENT LEGISLATION

The Sixtieth Texas Legislature met in special session in 1968, increased the state sales and use taxes from two per cent to three per cent,¹ increased corporate franchise taxes,² and passed an appropriations bill.³ No legislation directly pertaining to commercial transactions was enacted.

II. COURT DECISIONS

A. Bills and Notes

Alteration and Filling in Blanks. The first appellate decision⁴ under the Texas Uniform Commercial Code involved a bank form promissory note which, when executed and delivered to the payees, provided in part: "_____after date, I, we, or either of us, promise to pay to the order of Mary and Robert L. Anderson The Harlingen National Bank at its Banking House in Harlingen, Texas." Thereafter, the payees inserted the words "on demand" in the blank and the word "at" in the space before "The Harlingen National Bank." In a suit on the note by the payees, the maker contended that the insertions were unauthorized, added a time and place of payment, and thereby materially altered and discharged the note. The trial court rendered summary judgment for the payees. The court of civil appeals affirmed, holding that there was no material alteration inasmuch as the Code provides that an instrument in which no time for payment is stated is payable on demand⁵ and the note as originally executed provided for payment "at its Banking House in Harlingen, Texas." The court went on to state that if a place of payment had been added, under the rule announced in *Republic National Bank v. Streatly*⁶ the payees had prima facie authority to fill in the place of payment

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¹ Tex. Laws 1968, ch. 2, at 4.

² *Id.* at 2.

³ *Id.* ch. 5, at 13.

⁴ *Holliday v. Anderson*, 428 S.W.2d 479 (Tex. Civ. App. 1968).

⁵ TEX. BUS. & COM. CODE § 3.108 (1967).

⁶ 163 Tex. 36, 350 S.W.2d 914 (1961).

and such implied authority could not be negated by testimony that the maker did not give authority to insert the place of payment, but could only be overcome by evidence of an express agreement as to a particular place of payment or that no place was to be filled in the blank. The court noted that the *Streatly* rule was based upon section 14 of the Uniform Negotiable Instruments Act,⁷ which specifically provided for such "prima facie authority" and that such provision was not brought forward in the Uniform Commercial Code.⁸ However, since section 14 was merely declaratory of the common law, it was the court's opinion that the rule remains in effect.

The rule of *Streatly*, nevertheless, was not applied⁹ where the promissory note in issue was part of a loan transaction governed by the Texas Regulatory Loan Act,¹⁰ (now repealed) which prohibited the taking of an instrument in which blanks were left to be filled in after the loan was made. Identical provisions are now contained in the Texas Consumer Credit Code¹¹ but there are no provisions relating to the effect of a violation of such prohibition or any penalty therefor. The Uniform Commercial Code, on the other hand, provides for the completion of incomplete instruments under certain circumstances and the extent to which they can be enforced when the completion is unauthorized as well as when it is authorized.¹² In light of the rule that courts will avoid a conflicting construction when they can reasonably do so,¹³ the prohibitory provision of the Consumer Credit Code should not be held to vitiate the provisions of the Uniform Commercial Code when the instrument involved is a negotiable one. However, it may be one of the facts to be considered in determining whether or not a completion was authorized.

The force and effect of section 14 of the Uniform Negotiable Instruments Act was also considered in *Seaman v. Seaman*.¹⁴ There, the defendant had executed and delivered a printed form demand note to the plaintiff and her husband. The date of the note and the date from which interest would accrue were left blank. In May 1963, plaintiff's husband, when on his deathbed, wrote in the date "May 6, 1963." Trial was to the court without a jury. The defendant contended that the filling in of the date was unauthorized and the note, being a demand note from the date it was made, was barred by limitations. The plaintiff asserted that the completion was authorized and the period of limitations did not begin to run until May 6, 1963, less than four years prior to the filing of the suit. Judgment was entered for the plaintiff. The court of civil appeals affirmed.¹⁵ The supreme court held that perforce section 14, the plaintiff, having received the note prior to its completion, had the burden of prov-

⁷ TEX. REV. CIV. STAT. ANN. art. 5932, § 14 (1962), repealed.

⁸ TEX. BUS. & COM. CODE § 3.115 (1967).

⁹ *Arlington Acceptance Corp. v. Taylor*, 426 S.W.2d 567 (Tex. Civ. App. 1968).

¹⁰ TEX. REV. CIV. STAT. ANN. art. 6165b (1962), repealed.

¹¹ *Id.* arts. 5069-3.20(f), -4.04(f), -5.05(4) (Supp. 1968).

¹² TEX. BUS. & COM. CODE §§ 3.115, 3.407(b) (1967).

¹³ 53 TEX. JUR. 2D *Statutes* § 164 (1964).

¹⁴ 425 S.W.2d 339 (Tex. 1968).

¹⁵ Opinion discussed in last year's *Survey*, Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 83 (1968).

ing that it was filled up strictly in accordance with authority given and within a reasonable time, but that also perforce section 14, the completed note itself was prima facie evidence that it was filled up in accordance with authority. Thus, the statute helps bear the burden it creates. Finding that under the circumstances, the ten-to-eleven year delay in filling in the blanks was not unreasonable as a matter of law, the supreme court also affirmed the judgment.

Under the Uniform Commercial Code, the burden of establishing that any completion is unauthorized is on the party so asserting.¹⁶

The alteration provisions of the Code¹⁷ and of its predecessor, the Uniform Negotiable Instruments Act,¹⁸ pertain only to negotiable instruments. When the instrument is non-negotiable, common law rules control. These rules were reviewed and clarified by the supreme court in *United Concrete Pipe Corp. v. Spin-Line Co., Inc.*¹⁹ In that case, suit was brought by the payee against the maker and eight endorsers of a non-negotiable note which provided that it was subject to the terms of a contemporaneously executed agreement between the maker and payee. At the time the note was executed, endorsed and delivered to the payee, the agreement, as signed by the maker, provided that the payee required the maker to sell its concrete pipe fabricating facilities outside the United States. After receipt, the payee retyped the first few pages, omitting the restrictive provisions. He inserted the retyped pages in the original instrument, signed it and mailed a copy of the redone agreement to one of the endorsers. The other endorsers were not advised of the change. Thereafter, the payee fully performed under the changed agreement. The trial court entered judgment for the payee against the maker and all endorsers. The court of civil appeals, relying on the "well settled" principles (1) that a material alteration renders an instrument void and unenforceable by the altering party as to nonconsenting parties, (2) that any alteration which works some change in the obligation of the parties is material, and (3) that whether the altered contract is more favorable or beneficial to the nonconsenting party is not pertinent or material in determining the validity of the contract, held that the deletion of the maker's obligation to sell its facilities outside the United States was material and reversed and rendered judgment as to the nonconsenting endorsers. The supreme court, after examining the foundation of the rule and noting that it had never been applied to discharge a surety where the change was manifestly beneficial and involved no possibility of damage, held that where the change, as a matter of law, can only be beneficial to the surety, he is not discharged, the question being not one of quantum of injury or risk of injury but whether a possibility of injury exists. Since the change could only serve to expand the market for the maker's facilities, the judgment of the trial court was affirmed.

Under the Uniform Commercial Code, any alteration which changes

¹⁶ TEX. BUS. & COM. CODE § 3.115(b) (1967).

¹⁷ *Id.* §§ 3.407, 3.102(5) (1967).

¹⁸ TEX. REV. CIV. STAT. ANN. art. 5939, § 124 (1962), repealed.

¹⁹ 430 S.W.2d 360 (Tex. 1968).

the contract of any party in any respect is material. However, before the alteration will discharge a party whose contract is thereby changed, it must be both material and fraudulent. Even then, a subsequent holder in due course can enforce the instrument according to its original tenor or, if it was an incomplete instrument which has been completed, he may enforce it as completed.²⁰

*Payment and Satisfaction. Neeley v. Southwestern Investment Co.*²¹ concerned the effect of a payee's unilateral mistake in computing the pay-off figure for an unmatured installment note and accepting such sum as full payment. The court of civil appeals was of the opinion that since the correct amount due could be mathematically ascertained by anyone possessing information as to the payments made, in the absence of a bona fide dispute there could be no accord and satisfaction. The supreme court disagreed, holding that accord and satisfaction is established as a matter of law when a debtor, before the debt is due, pays his creditor an amount less than would be required if the debt were paid in accordance with its terms, and the creditor accepts such lesser amount as payment in full. The court further held that the creditor's unilateral mistake in computing the pay-off figure afforded no basis for avoiding the accord and satisfaction.

Section 3-601(2)²² of the Uniform Commercial Code provides that any act or agreement which would discharge a simple contract for the payment of money also discharges liability on a negotiable instrument. An accord and satisfaction is such an agreement.²³ In the second appellate decision²⁴ under the Texas Uniform Commercial Code, it was held that by reason of section 3-601(2), a September 1966 letter from the payee to the maker of a December 1965 note acknowledging an understanding that the last \$2,000 of the note was to be applied against the debt of a third party to the maker and in exchange such third person would pay payee the \$2,000, effectively discharged the maker's liability for the last \$2,000 of the note.

Since the note was executed prior to the effective date of the Code, it is doubtful that its provisions are applicable.²⁵ However, pre-Code law was substantially identical and the result would be the same.²⁶

²⁰ TEX. BUS. & COM. CODE § 3.407 (1967).

²¹ 430 S.W.2d 465 (Tex. 1968).

²² TEX. BUS. & COM. CODE § 3.601(b) (1967).

²³ *Hickox v. Hickox*, 151 S.W.2d 913 (Tex. Civ. App. 1941).

²⁴ *Ferguson v. D.S.A., Inc.*, 430 S.W.2d 553 (Tex. Civ. App. 1968).

²⁵ Tex. Laws 1965, ch. 721, § 10-102(2), at 179-80, provided:

Transactions validly entered into before the effective date specified in Section 10-101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.

This provision was omitted when the Uniform Commercial Code was incorporated in the Texas Business and Commerce Code. However, Tex. Laws 1967, ch. 785, § 5(b), at 279, provides that the Texas Business and Commerce Code does not affect an amendment of a statute by the 60th Legislature. Since UNIFORM COMMERCIAL CODE § 10-102(2) was amended by the 60th Legislature, Tex. Laws 1967, ch. 735, at 1986, such provision, as amended, remains in effect.

²⁶ *Reagan v. National Bank of Commerce*, 418 S.W.2d 593 (Tex. Civ. App. 1967).

Anticipatory Breach. In a civil appeals case²⁷ plaintiff sued for anticipatory breach or repudiation of a promissory note on which only an interest payment, in an amount not within the jurisdiction of the court, was past due. The note contained no acceleration clause. Dismissal of the suit as prematurely filed was affirmed on the basis that a default in the payment of interest does not entitle the plaintiff to mature the principal of the note.

This holding is in keeping with the rule that the doctrine of anticipatory breach applies only to bilateral contracts and not to mere promises to pay money.²⁸ This rule holds true even though the payor denies liability on the note, transfers his property without consideration, and renders himself insolvent.²⁹ In such a case, however, the payee is not without a remedy, for an attachment or sequestration can be sued out on a debt before it is due although judgment cannot be taken until maturity.³⁰

B. Banks and Banking

Revocation of Acceptance. The time within which a drawee bank has unrestricted power to revoke its acceptance of a check under pre-Uniform Commercial Code law was considered in a case of first impression.³¹ The plaintiff, prior to depositing into her account with defendant bank a check drawn on another depositor's account, had a bank officer verify that there were sufficient funds in the drawer's account to cover the check. Later that day, the bank officer called plaintiff and advised her that the drawer was going to stop payment on the check. On the following banking day, the check was returned to plaintiff and charged back against her account. The court of civil appeals reversed the plaintiff's trial court judgment and rendered judgment for the defendant bank. In so doing, it held that the Texas Collection Act,³² which is ambiguous on the point, gave the drawee bank unrestricted power of revocation on the day of presentment, which power the bank exercised when it advised plaintiff that payment of the check would be stopped.

Under the Uniform Commercial Code, a payor bank now has until midnight on its next banking day to return the check or send notice of dishonor.³³ Such notice may be oral.³⁴

C. Bulk Transfers

Limitations. In what also appears to be a case of first impression,³⁵ the court of civil appeals held that a suit under the Bulk Sales Act is a suit primarily to declare and establish a trust and recover title to property or damages for conversion thereof and, therefore, is governed by the four-year rather than two-year Statute of Limitations. Thus, it appears that, as

²⁷ *Winfrey v. Luttrell*, 419 S.W.2d 406 (Tex. Civ. App. 1967).

²⁸ 12 AM. JUR. 2D *Bills and Notes* § 1030 (1964).

²⁹ *Upham v. Shattuck*, 151 Kan. 966, 101 P.2d 901 (1940).

³⁰ TEX. REV. CIV. STAT. ANN. art. 278 (1959).

³¹ *Frost Nat'l Bank v. Dobbs*, 423 S.W.2d 145 (Tex. Civ. App. 1967), *error ref. n.r.e.*

³² TEX. REV. CIV. STAT. ANN. art. 342-704 (1959), repealed.

³³ TEX. BUS. & COM. CODE § 4.301(b) (1967).

³⁴ *Id.* §§ 4.104(c), 3.508(c).

³⁵ *Hicks v. Hoover*, 422 S.W.2d 613 (Tex. Civ. App. 1967), *error ref. n.r.e.*

in the case of a written guarantee of an unwritten debt,³⁶ suit could be maintained against the bulk transferee even though suit against the bulk transferor on the original debt may be barred. However, the future existence of such a state of affairs has been virtually eliminated by the Uniform Commercial Code, which prescribes a six-month limitation period from the date of the transfer or, if the transfer was concealed, from the date of its discovery.³⁷

D. Sales

Limitations. In *Certain-Teed Products Corp. v. Bell*,³⁸ involving a construction contract, the supreme court concluded that a warranty which the law implies from a written contract is as much a part of the writing as its express terms and, therefore, a suit to enforce the warranty is governed by the four-year Statute of Limitations pertaining to written agreements.³⁹ While the contract involved real estate, the principle announced would be equally applicable to contracts for the sale of personalty.

In *University Savings and Loan Ass'n v. Security Lumber Co.*,⁴⁰ an extremely significant case on priority and relation-back of statutory mechanics' and materialmen's liens, the supreme court indicated that on an action for the purchase price of materials sold on open account for the construction or repair of an improvement to realty, the two-year Statute of Limitations begins to run, not from the date of each delivery as prescribed by article 5526(5),⁴¹ but rather from the date the cause of action "accrued" as defined in article 5467, which, generally speaking, for material suppliers is the tenth day of the month next following the month in which the last delivery was made.⁴² This appears to disregard the fact that the definitions in article 5467 are for the specific purpose of establishing a time limit within which notices must be given and an affidavit claiming lien must be filed to perfect a lien and not to prescribe a time limit for filing a suit on the debt as does article 5526.⁴³ Inasmuch as the suit on the account was filed well within two years of the first delivery of materials, the court's statements are dicta.

It appears that the Statute of Limitations on actions for the purchase price of goods, wares, merchandise and materials sold on open account has been lengthened from two to four years by the Uniform Commercial Code, which provides that an action for breach of any contract for sale of "goods" must be commenced within four years after the cause of action has accrued.⁴⁴ Each delivery of goods on the open account would be under

³⁶ 27 TEX. JUR. 2D *Guaranty* § 47 (1961).

³⁷ TEX. BUS. & COM. CODE § 6.111 (1967).

³⁸ 422 S.W.2d 719 (Tex. 1968).

³⁹ TEX. REV. CIV. STAT. ANN. art. 5527 (1958).

⁴⁰ 423 S.W.2d 287 (Tex. 1968).

⁴¹ TEX. REV. CIV. STAT. ANN. art. 5526(5) (1958).

⁴² TEX. REV. CIV. STAT. ANN. art. 5467 (Supp. 1968).

⁴³ The statements also raise the interesting question of which provision would control if the materials were furnished for the improvement of realty, but the lien not perfected.

⁴⁴ TEX. BUS. & COM. CODE § 2.725 (1967).

a "contract of sale" breached by the purchaser by his failure to pay the purchase price.

Implied Warranty of Suitableness. The recent Texas supreme court decisions extending the doctrine of implied warranty of suitability, despite the absence of privity of contract, to cases in which a defective product caused physical harm to the user or damage to his property were reviewed in last year's *Survey*.⁴⁵ During the present survey period that court refused to extend the doctrine to the prescription, fitting and sale of contact lenses where there was no claim that the lenses were defective in themselves.⁴⁶ In so doing, the court noted that the failure, if any, was not attributable to the lenses, but rather to the professional acts of the defendants as licensed optometrists in fitting the lenses. One court of civil appeals,⁴⁷ however, in a venue case, extended the doctrine to an action by a truck purchaser against the manufacturer for damages arising by reason of the truck's unsuitability for the purpose for which it was sold. The court stated that it is clear in Texas that privity is no longer required when the action is for breach of warranty of suitability. Such a broad statement overlooks the limitation of the doctrine to cases involving a "product in a defective condition unreasonably dangerous"⁴⁸ to the user or his property.

In *Humber v. Morton*⁴⁹ the supreme court further limited the doctrine of *caveat emptor*, holding that the builder-vendor of a newly constructed house impliedly warrants that the house was constructed in good workmanlike manner and is suitable for human habitation.

The Uniform Commercial Code, as adopted in Texas, contains detailed provisions as to the existence and effect of warranties, including implied warranties of fitness for a particular use or purpose;⁵⁰ but the Code is neutral on the issue of privity of contract, leaving it to the courts for determination.⁵¹

Disclaimer of Warranties. The effect of provisions disclaiming warranties and limiting liability was considered in four civil appeals decisions. In two cases⁵² involving the rental and sale of equipment, the provisions were contained in written agreements signed by the parties. It was held that in the absence of a showing of artifice or trick the disclaimer was binding and evidence of verbal representations and warranties was precluded by the parol evidence rule.

⁴⁵ Keeton, *Torts, Annual Survey of Texas Law*, 22 Sw. L.J. 4 (1968); Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 79, 84 (1968).

⁴⁶ *Barbee v. Rogers*, 425 S.W.2d 342 (Tex. 1968).

⁴⁷ *Ford Motor Co. v. Lemieux Lumber Co.*, 418 S.W.2d 909 (Tex. Civ. App. 1967).

⁴⁸ RESTATEMENT (SECOND) OF TORTS § 402A (1964).

⁴⁹ 426 S.W.2d 554 (Tex. 1968).

⁵⁰ TEX. BUS. & COM. CODE §§ 2.312-317 (1967).

⁵¹ *Id.* § 2.318.

⁵² *Shaw Equipment Co. v. Hoople Jordan Constr. Co.*, 428 S.W.2d 835 (Tex. Civ. App. 1968); *Griffin v. H.L. Peterson Co.*, 427 S.W.2d 140 (Tex. Civ. App. 1968).

In a case relating to seed,⁵³ and in another involving paint,⁵⁴ the disclaimer provisions were not contained in any formal written agreement, but were printed on shipping instructions, invoices, containers or order acknowledgment forms. Not only did they disclaim express and implied warranties, but also any responsibility for the end result of the use of the product. It was held that the buyer was bound by the disclaimer if it had been brought to his attention or if he should have read it in the exercise of ordinary care prior to using the product, provided the disclaimer did not violate law or public policy. In the paint case, the court of civil appeals further stated that the disclaimer was sufficiently broad to preclude a recovery for the seller's negligence in giving instructions and advice as to the application and use of the paint. The supreme court expressly declined to approve or disapprove this conclusion.⁵⁵

The manner and extent to which warranties, express and implied, and the remedies for their breach can be excluded or modified are dealt with in detail in the Uniform Commercial Code.⁵⁶ Additionally, if a court as a matter of law finds the disclaimer to have been unconscionable when made, it may refuse to enforce the contract, enforce the contract without the disclaimer, or limit its application to avoid any unconscionable result.⁵⁷

E. Secured Transactions

Secured Party's Right To Take Possession of Collateral. Under the Uniform Commercial Code, unless otherwise agreed the secured party has the right, upon default, to take possession of the collateral. He may proceed without judicial process if this can be done without breach of the peace.⁵⁸ Most security agreements further provide that the secured party may enter any premises upon which the collateral may be situated and remove it therefrom. Just what will constitute a "breach of the peace" is not always clear. A Texas court of civil appeals,⁵⁹ in construing such provisions contained in a lease and security agreement, held that the taking of possession was not peaceable but by force and violence when the secured party entered the building by picking the lock. In a similar case, a New York court⁶⁰ held that entry by use of a key unauthorizably obtained was not a breach of the peace. Any significant difference between the two methods of entry is not discernable. For all practical purposes, under the narrow construction of the Texas court the consent of the debtor would be required unless he had abandoned the premises and collateral.

Priority of Claims. The priority of conflicting claims in the same collateral was in issue in two cases. In the first,⁶¹ the court held that a perfected pre-

⁵³ *Asgrow Seed Co. v. Gulick*, 420 S.W.2d 438 (Tex. Civ. App. 1967), *error ref. n.r.e.*

⁵⁴ *Sherwin-Williams Co. v. Perry Co.*, 424 S.W.2d 940 (Tex. Civ. App. 1968), *error ref. n.r.e.*

⁵⁵ *Perry Co. v. Sherwin-Williams Co.*, 431 S.W.2d 310 (Tex. 1968) (refusing motion for rehearing on application for writ of error).

⁵⁶ TEX. BUS. & COM. CODE §§ 2.316-.317, 2.718-.719 (1967).

⁵⁷ *Id.* § 2.302.

⁵⁸ *Id.* § 9.503.

⁵⁹ *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262 (Tex. Civ. App. 1968), *error dismissed.*

⁶⁰ *Cherno v. Bank of Babylon*, 54 Misc. 2d 277, 282 N.Y.S.2d 114 (1967).

⁶¹ *Creditors Exch. Serv., Inc. v. United States*, 277 F. Supp. 885 (S.D. Tex. 1967).

Code assignment of all of the debtor's accounts receivable which gave the assignee the right to receive, collect, sue for, compromise and receipt payment for all monies due or to become due was "choate" and took priority over a subsequently attaching federal tax lien.

In the second case,⁶² the debtor pledged and delivered to his creditor a life insurance policy naming the creditor as beneficiary, but reserving to the debtor the unqualified right to change the beneficiary. Ten days prior to his death, the debtor, without notifying the creditor, changed the beneficiary. The court of civil appeals affirmed the trial court's judgment for the new beneficiary, holding that the creditor took the policy as written and the only vested right, if any, he acquired in the policy was to demand payment of the proceeds to the extent of his claim, provided he was still the beneficiary at the time of the debtor's death. The supreme court has granted the creditor's application for writ of error.

F. Recovery of Attorney's Fees

In most lawsuits involving commercial transactions, the plaintiff sues to recover attorney's fees in addition to his claim and costs. In some cases, recovery is sought under the terms of the note or contract sued upon; in others, recovery is sought under the terms of a statute. During the past few years, the appellate courts have closely scrutinized the awarding of attorney's fees and have placed limitations on their recovery.⁶³ The past year proved to be no exception.

Contractual Provisions. The established rule in Texas is that the usual contractual attorney's fee clause is in the nature of a contract of indemnity and cannot be regarded as providing for liquidated damages or a penalty. Where the provision itself fixes the amount of the fee, in the absence of an issue affirmatively tendered by the defendant, it is not necessary for the plaintiff to prove an agreement to pay such fee to an attorney or that the same is reasonable. But, if the issue is raised, the fee must be shown to be both compensatory and reasonable.⁶⁴ Thus, in a case⁶⁵ where the referee in bankruptcy allowed a \$25,000 attorney's fee as part of a claim on a note containing a ten per cent attorney's fee clause, it was held that the fee set, while binding between the holder and the trustee in bankruptcy, was not binding between the holder and its attorney. Thus, should it appear that the holder owed the attorney less than the amount collected under the allowance, the holder would have to return the excess to the bankrupt estate.

Statutory Provisions. The principal statute providing for the recovery of attorney's fees in commercial cases is article 2226.⁶⁶ In construing this

⁶² McAllen State Bank v. Texas Bank & Trust Co., 423 S.W.2d 932 (Tex. Civ. App. 1967), *rev'd*, 433 S.W.2d 167 (Tex. 1968).

⁶³ Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 79, 85 (1968).

⁶⁴ Kuper v. Schmidt, 161 Tex. 189, 338 S.W.2d 948 (1960).

⁶⁵ LeLaurin v. Frost Nat'l Bank, 391 F.2d 687 (5th Cir. 1968).

⁶⁶ TEX. REV. CIV. STAT. ANN. § 2226 (1964) which provides:

Any person having a valid claim against a person or corporation for personal services

statute, the supreme court, in *Trinity Universal Insurance Co. v. Ponsford Brothers*,⁶⁷ stated that the article was enacted for the benefit of those who supplied labor and materials and not for the benefit of one who furnished the funds to pay such suppliers. It should be noted that the plaintiff in *Ponsford Brothers* was not asserting any rights under an assignment of the supplier's claim. When a claim is assigned, the assignee stands in the same position as his assignor⁶⁸ and can file and maintain a suit on the claim in his own name or in the name of his assignor.⁶⁹ In such a case, it is believed that the assignee may recover attorney's fees to the same extent as could his assignor had the claim not been assigned.⁷⁰

In *Southwestern Motor Transport Co. v. Valley Weathermakers, Inc.*⁷¹ an interstate shipper sued the initial carrier for the value of labor and materials furnished by the shipper in repairing and replacing its air conditioning equipment which was damaged by a connecting carrier. The supreme court held that in the absence of an independent repair contract between the parties, the liability of the carrier for damage to the interstate shipment was to be computed under the Interstate Commerce Act,⁷² and that, despite the express provisions of article 2226, attorney's fees were not recoverable since they would constitute a burden upon interstate commerce.

On the positive side, it was held that where an attorney hires another attorney to sue for past-due legal fees, he is entitled to recover an additional reasonable attorney's fee since his suit is for "personal services rendered" or "labor done."⁷³

III. CONCLUSION

Thus far, the appellate courts have decided only two cases under the Uniform Commercial Code. Both were appeals from a summary judgment. Both summary judgments were affirmed. From this, one might surmise that either the Code is succeeding in its objective of clarifying the law and reducing litigation, or the normal period of gestation of an appellate decision, from commercial transaction to rendition, is greater than twenty-four months. If the latter is the case and the period of gestation is less than thirty-six months, Texas Uniform Commercial Code watchers can expect a broader view during the coming survey period.

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

⁶⁷ 423 S.W.2d 571 (Tex. 1968).

⁶⁸ *Houk v. Commissioner*, 173 F.2d 821 (5th Cir. 1949); 6 TEX. JUR. 2D *Assignments* §§ 39-44 (1959).

⁶⁹ 6 TEX. JUR. 2D *Assignments* §§ 55-56 (1959).

⁷⁰ *Indemnity Ins. Co. of N. America v. W.L. Macatee & Sons*, 129 Tex. 166, 101 S.W.2d 553 (1937).

⁷¹ 427 S.W.2d 597 (Tex. 1968).

⁷² 49 U.S.C. § 20(11) (1964).

⁷³ *Magids v. Dorman*, 430 S.W.2d 910 (Tex. Civ. App. 1968), *error ref. n.r.e.*