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# Commercial Transactions

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# COMMERCIAL TRANSACTIONS

by

Vernon O. Teofan\*

DURING the survey period, six appellate decisions applying provisions of the Texas Uniform Commercial Code were rendered, bringing the total number to eight since the Code became law on July 1, 1966. Four were related to secured transactions<sup>1</sup> and two to sales.<sup>2</sup> In a number of cases involving commercial transactions entered into after the Code's effective date, no mention of the Code was made. Several significant pre-Code principles were announced in cases involving commercial transactions entered into prior to the Code's effective date. Some of those principles will be modified by applicable Code provisions, but others will remain unaffected. In addition, the Code was amended in several minor respects and miscellaneous legislation of a commercial nature was enacted.

## I. RECENT LEGISLATION

### A. *Uniform Commercial Code*

Effective September 1, 1969, the Texas Uniform Commercial Code was amended to incorporate several changes recommended by the Permanent Editorial Board of the Uniform Commercial Code and to increase filing and information fees.<sup>3</sup> The Code, as originally enacted, eliminated the cumbersome requirement of protesting the dishonor of a draft in order to charge its drawer and endorsers, unless the draft on its face appeared to be drawn or payable outside of the states and territories of the United States and the District of Columbia.<sup>4</sup> By the 1969 amendment, the protest requirement is also eliminated as to drafts drawn or payable in Puerto Rico and "dependencies and possessions" of the United States,<sup>5</sup> inasmuch as bank collections between these areas are increasingly being handled by federal reserve banks.<sup>6</sup> A second amendment to the Code dealt with secured transactions. The definitions sections of article 9<sup>7</sup> were amended to provide specifically that no type of ship charter is to be considered "chattel paper" and all rights under or incident to any such charter are "contract rights" and not "accounts" or "general intangibles."<sup>8</sup> A third amendment to the Code was required due to the increased costs of maintaining the

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<sup>1</sup> National Acceptance Co. v. Southwest Automotive Warehouse, Inc., 410 F.2d 1139 (5th Cir. 1969); Sheppard Fed. Credit Union v. Palmer, 408 F.2d 1369 (5th Cir. 1969); Abramson v. Printer's Bindery, Inc., 440 S.W.2d 326 (Tex. Civ. App.—Dallas 1969); Rangel v. Bock Motor Co., 437 S.W.2d 329 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*

<sup>2</sup> Parks v. Glidden Co., 433 S.W.2d 445 (Tex. Civ. App.—Texarkana 1968), *error ref. n.r.e.*; Blount v. Westinghouse Credit Corp., 432 S.W.2d 549 (Tex. Civ. App.—Dallas 1968).

<sup>3</sup> Tex. Laws 1969, ch. 830, at 2466.

<sup>4</sup> Tex. Laws 1965, ch. 721, § 3-501(3), at 74.

<sup>5</sup> Tex. Laws 1969, ch. 830, § 1, at 2466.

<sup>6</sup> UNIFORM COMMERCIAL CODE § 3-501(3), Editorial Board Note on 1966 Amendment.

<sup>7</sup> TEX. BUS. & COMM. CODE ANN. §§ 9.105, 9.106 (1968).

<sup>8</sup> Tex. Laws 1969, ch. 830, §§ 3, 4, at 2467.

filing system under the Code. In most instances the uniform fees for filing statements and obtaining information were increased.<sup>9</sup>

### B. Miscellaneous Legislation

By amendment<sup>10</sup> to the Consumer Credit Code,<sup>11</sup> effective September 1, 1969, contests and games, such as those frequently used by grocery stores and gasoline stations, are made unlawful and prohibited if the contest or game or the promotion of such contest or game (1) misrepresents, in any way, the chances of winning, (2) fails to disclose an accurate description, the minimum number and the minimum amount of each prize and the geographical area or number of outlets in which the game is proposed to be conducted, or (3) are rigged so that winnings are dispersed to predetermined individuals or retail establishments, unless in a uniform ratio to the total number of contest pieces distributed to those establishments. Producers, distributors and sellers of contests may be required to file detailed reports with the Consumer Credit Commission before, during, and after the contest. In addition, suppliers, wholesalers, distributors and manufacturers are prohibited from coercing any retailer, lessee, agent or dealer to use any contests or games. Violators are subject to injunction, and if such injunction is violated, to a civil penalty of not more than \$10,000 per violation.<sup>12</sup>

The Credit Union Act,<sup>13</sup> which replaces the Rural Credit Union Act,<sup>14</sup> became effective on May 13, 1969. It contains comprehensive and detailed provisions relating to the organization, existence and business operations of credit unions under the control and supervision of a Credit Union Commission and Credit Union Commissioner. Formerly, the Banking Commissioner had jurisdiction over credit unions.

Effective June 12, 1969, the Business and Commerce Code was amended to prohibit additionally (1) the solicitation of advertising in the name of a club, association or organization without its written consent, and (2) the distribution of any publication purporting to represent officially a club, association or organization without the club's written authorization or a contract and without listing in the publication its complete name and

<sup>9</sup> *Id.* §§ 6-10, at 2468-69. The new fee schedule is as follows:

	Old Fee	New Fee
Standard Financing Statement	\$1.00	\$2.00
Standard Financing Statement with Assignment	1.50	2.00
Standard Financing Statement with Attachment	2.00	2.00
Standard Financing Statement with Assignment and Attachment	3.00	2.00
Non-Standard Financing Statement	2.00	4.00
Non-Standard Financing Statement with Assignment	3.00	4.00
Standard Amendment or Termination	1.00	2.00
Non-Standard Amendment or Termination	2.00	4.00
Standard Termination with Assignment	1.75	2.00
Non-Standard Termination with Assignment	3.50	4.00
Information Request: \$5.00 for the certificate plus \$1.00 for each statement listed over 10		

Copies: \$1.00 per page copied, but not less than \$5.00

<sup>10</sup> Tex. Laws 1969, ch. 794, at 2344.

<sup>11</sup> TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 to -50.06 (Supp. 1969).

<sup>12</sup> Tex. Laws 1969, ch. 452, §§ 10.04-.08, at 1506-08.

<sup>13</sup> *Id.* ch. 186, at 540.

<sup>14</sup> TEX. REV. CIV. STAT. ANN. arts. 2461-2484d (1965).

address. Violation constitutes a misdemeanor punishable by a fine of not less than \$10 nor more than \$200.<sup>15</sup>

If approved by the people at the November 3, 1970 election, the maximum value of the lot or lots comprising the urban homestead which is exempt from forced sale will be increased from the present \$5,000<sup>16</sup> to \$10,000 as of the time of the homestead designation, without reference to the value of any improvements thereon.<sup>17</sup>

The McGregor Act,<sup>18</sup> which relates to claims for labor and materials furnished for public works, was amended effective June 2, 1969, to provide for the recovery of reasonable attorney's fees in a suit on the payment bond executed by the prime contractor.<sup>19</sup> The provision is similar to that contained in the Hardeman Act<sup>20</sup> relating to private works and overcomes the prior Texas supreme court's holding in *New Amsterdam Casualty Co. v. Texas Industries, Inc.*<sup>21</sup>

## II. COURT DECISIONS

### A. Banks and Banking

The rights and liabilities of a bank which pays out or receives money on a forged item were considered in three cases decided under pre-Uniform Commercial Code law. In the first case,<sup>22</sup> the drawer's bookkeeper prepared a check in the sum of \$21,124.21 payable to a creditor in Georgia. The officer who approved and signed the check specifically instructed the bookkeeper to address and mail it to the creditors in Georgia. Instead, the bookkeeper mailed the check to an address in Fort Worth and the check, endorsed "for deposit only," was deposited in an account which had been opened in the creditor's name in a Fort Worth bank. The Fort Worth bank endorsed it, guaranteeing prior endorsements, and forwarded it to the payee bank in Dallas which debited the drawer's account. It was later learned that the Georgia creditor had not received the check, had not opened the Fort Worth account, had not authorized the endorsement and had not received the money. In the meantime, the drawer's bookkeeper and his employment file had disappeared. The drawer sued the Dallas bank which impleaded the Fort Worth bank. The banks entered a general denial and specially denied that the endorsement was a forgery. Summary judgment was entered for the drawer against the Dallas bank and for the Dallas bank against the Fort Worth bank. On appeal both banks contended that since the bookkeeper never intended that the creditor have any interest in the check, under the Negotiable Instruments Act,<sup>23</sup> it was payable to

<sup>15</sup> Tex. Laws 1969, ch. 701, at 2045.

<sup>16</sup> TEX. REV. CIV. STAT. ANN. art. 3833 (1966).

<sup>17</sup> Tex. Laws 1969, ch. 841, at 2518.

<sup>18</sup> TEX. REV. CIV. STAT. ANN. art. 5160 (1962).

<sup>19</sup> Tex. Laws 1969, ch. 422, § 1, at 1390.

<sup>20</sup> TEX. REV. CIV. STAT. ANN. art. 5472d(6) (Supp. 1969).

<sup>21</sup> 414 S.W.2d 914 (Tex. 1967), discussed in Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 79, 86 (1968).

<sup>22</sup> *Mercantile Nat'l Bank v. Electrical Supply Corp.*, 434 S.W.2d 907 (Tex. Civ. App.—Dallas 1968), error ref. n.r.e.

<sup>23</sup> Tex. Laws 1919, ch. 123, at 190.

bearer and no endorsement was needed. The court of civil appeals, in affirming the judgment, held that since the undisputed proof showed that the check was signed with the intent that it be delivered to the creditor, the unauthorized endorsement made the check wholly inoperative. Further, the court noted in dictum that the banks had waived any other defense by failing affirmatively to plead it.

A different result would have been reached under the Texas Uniform Commercial Code, which now specifically places the loss in such fact situations on the drawer.<sup>24</sup> The drafters of the Code reasoned that the drawer is in a better position to prevent such forgeries by using reasonable care in selecting and supervising his employees and to cover any possible loss by fidelity insurance.<sup>25</sup>

The second case<sup>26</sup> involved a suit by a savings and loan association against a bank to recover money paid the bank under a purported pledge of a savings account and subsequent purported assignments to the bank which the bank furnished the association. The assignments took the form of notarized letters authorizing the bank to withdraw funds in differing amounts from the savings and loan account. The signatures of the account holder on the letters were notarized, but they were forgeries. The jury found the bank was negligent in failing to verify the signatures on the letters and that the association was not. The trial court entered judgment n.o.v. for the bank under the general common law rule that a payor is held to know the signature of its depositor and, if a forged draft is accepted and paid, it will not be heard to assert a mistake as to the signature. The court of civil appeals reversed and rendered judgment for the association, holding that the general rule did not apply if the party receiving the money in any way contributed to the success of the fraud or if the loss can be traced to his fault or negligence.

A modified version of the general rule and exception is contained in the Texas Uniform Commercial Code which provides that any person who obtains payment or acceptance of an item warrants to a good faith payor or acceptor that he has no knowledge that the signature of the maker or drawer is unauthorized. However, this warranty is not given by a holder in due course acting in good faith to the drawer or maker with respect to the signature of such drawer or maker or to an acceptor if the holder in due course took the draft after acceptance or procured the acceptance without knowledge of the drawer's unauthorized signature.<sup>27</sup>

In the third case,<sup>28</sup> the Dallas court of civil appeals held that under the Texas Banking Code<sup>29</sup> a customer is under a duty to examine his cancelled checks and statements within a reasonable time and notify the bank of any forged signatures, and that his failure to do so might excuse the bank

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<sup>24</sup> TEX. BUS. & COMM. CODE ANN. § 3.405 (1968).

<sup>25</sup> UNIFORM COMMERCIAL CODE § 3-405(1)(c), Draftsmen's Comment No. 4.

<sup>26</sup> First Fed. Sav. & Loan Ass'n v. Northside State Bank, 436 S.W.2d 393 (Tex. Civ. App.—San Antonio 1969).

<sup>27</sup> TEX. BUS. & COMM. CODE ANN. §§ 3.417, 4.207 (1968).

<sup>28</sup> Oak Cliff Bank & Trust Co. v. Aetna Cas. & Sur. Co., 436 S.W.2d 165 (Tex. Civ. App.—Dallas 1968).

<sup>29</sup> Tex. Laws 1943, ch. 97, at 157 (repealed 1966).

from liability for paying forged checks if it were prejudiced by not receiving timely notice. The court expressly rejected a prior opinion of the Fort Worth court<sup>30</sup> that the customer was given a one-year period during which he had no such duty. The duty imposed by the Uniform Commercial Code is similar to that announced by the Dallas court.<sup>31</sup>

### B. Commercial Paper

*Accord and Satisfaction by Check.* A common business practice in making payment by check is to note on the check or an attached voucher that it constitutes payment in full or is in payment of specific listed items. The effect of such notation where the check is for an amount less than the claim but is cashed by the creditor, was considered during the survey period in four Texas court decisions. Under common law principles, the rule is well established that when there is a bona fide dispute as to the amount due and a debtor tenders a check for less than the full amount claimed, expressing his intention that the check is offered in full settlement and not merely as a partial payment, the cashing of the check by the creditor operates as a full satisfaction even though the creditor marks out the notation or expressly notifies the debtor that he accepts the check only as a partial payment.<sup>32</sup> In two of the cases decided, the judgments were based upon jury verdicts. Thus, where the jury found a bona fide dispute and acceptance of the check as payment in full, the judgment for the debtor was affirmed<sup>33</sup> and where it found no bona fide dispute, the judgment for the creditor was affirmed.<sup>34</sup>

The Texas supreme court, however, considered this the common law rule in *Jenkins v. Henry C. Beck Co.*<sup>35</sup> and *H. L. "Brownie" Choate, Inc. v. Southland Drilling Co.*<sup>36</sup> In the first case, the checks involved were issued as progress payments under a construction subcontract. The attached vouchers contained the statement "This check is tendered in full payment of the items listed below." Listed were the amount of the progress payment claimed and various chargeback claims for defective workmanship. The check was for the amount of the claim less the chargebacks. The trial court rendered summary judgment for the debtor on the basis that the creditor was bound by the notation on the vouchers and it was unreasonable for him to fail to understand that the check was offered in full satisfaction of the debt. The court of civil appeals affirmed. The supreme court reversed and remanded, reasoning that as a matter of law the voucher notations did not give unequivocal notice to Jenkins that the checks were conditionally tendered in full and final satisfaction of Beck's obligation to him at the time, the acceptance of which would bind Jenkins to an accord

<sup>30</sup> *Hillcrest State Bank v. Evis-Southwest, Inc.*, 402 S.W.2d 276 (Tex. Civ. App.—Fort Worth), error ref. n.r.e., 409 S.W.2d 841 (Tex. 1966), discussed in Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 79, 86 (1968).

<sup>31</sup> TEX. BUS. & COMM. CODE ANN. § 4.406 (1968).

<sup>32</sup> 1 TEX. JUR. 2D *Accord and Satisfaction* §§ 33-37 (1959).

<sup>33</sup> *Troup Feed & Farm Supply Co. v. Nash*, 442 S.W.2d 408 (Tex. Civ. App.—Tyler 1969).

<sup>34</sup> *Parmeter v. Delk*, 433 S.W.2d 941 (Tex. Civ. App.—Texarkana 1968).

<sup>35</sup> 440 S.W.2d 85 (Tex. Civ. App.—Dallas 1969), *rev'd and remanded*, 13 Tex. S. Ct. J. 100 (Nov. 26, 1969).

<sup>36</sup> 447 S.W.2d 676 (Tex. 1969).

and satisfaction. Without such notice to the creditor, there could be no accord and satisfaction.

In the *Southland Drilling Co.* case, the check was issued as a monthly payment for transportation services. The voucher attached contained a "description of payment" setting out the sum claimed due for transportation and deducting therefrom the amount of a disputed damage claim. The creditor contended that he did not understand that the check was tendered on condition that its acceptance would acknowledge and constitute full settlement of the disputed amounts offset, but he believed that such charges were left open for resolution at some later date. The trial court found that the account had been discharged by accord and satisfaction and entered a take nothing order. The supreme court reversed and remanded, holding that there was no evidence that the check was tendered on condition that acceptance would constitute full settlement of the disputed claim.

These holdings by the Texas supreme court are in harmony with current commercial practices. In most cases, the "payment in full" notation is printed on all the company's checks or vouchers. The listing is made by a bookkeeper from a ledger sheet and for accounting purposes. Payment of disputed items may be delayed to hold the matter open and not for the purpose of effecting any final settlement.

While there are no cases directly deciding the issue, it appears that the harsh effect of the common law rule has been substantially modified by section 1-207 of the Texas Uniform Commercial Code, which provides that: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient."<sup>37</sup> Thus, a creditor can avoid the "payment in full" condition on a check by merely endorsing on it words such as "under protest"<sup>38</sup> and "with reservation of all our rights."<sup>39</sup>

*Payment and Discharge.* In a case<sup>40</sup> of first impression in Texas, the court of civil appeals held that where a promissory note secured by credit life insurance on the maker was assumed by another with no reference being made to the insurance, after the maker's death, the payment of the note with the proceeds of the insurance did not discharge the note but inured to the benefit of the maker's widow who became subrogated to the noteholder's rights.

A supreme court decision<sup>41</sup> involved a noteholder's suit against the guarantor of a promissory note which was secured by a first chattel mortgage lien on apartment furniture when the guaranty was executed. The

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<sup>37</sup> TEX. BUS. & COMM. CODE ANN. § 1.207 (1968).

<sup>38</sup> *Hanna v. Perkins*, 2 UCC REP. SERV. 1044 (Westchester, N.Y. County Ct. 1965) (dictum).

<sup>39</sup> *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969) (dictum).

<sup>40</sup> *La-Rey, Inc. v. Kowalski*, 433 S.W.2d 530 (Tex. Civ. App.—San Antonio 1968).

<sup>41</sup> *Finger Contract Supply Co. v. Webb*, 447 S.W.2d 906 (Tex. 1969).

guaranty provided that the guarantor's obligation was unconditional and primary and would continue in effect as to any "renewal, modification or extension" of the chattel mortgage, whether consented to or not. Thereafter, the plaintiff subordinated its first lien to a second chattel mortgage lien on the same furniture without the consent of the guarantor. The second mortgage holder foreclosed and, there being no excess, the guaranteed note was left wholly unsecured. After stating the general rule that a release or impairment of security without the consent of the guarantor operates as a pro rata discharge of the guarantor's obligation, the court of civil appeals held that, in view of the specific terms of the guaranty, the "modification" of the chattel mortgage by its subordination did not affect the guarantor's liability, and rendered judgment for the plaintiff noteholder. The Supreme Court of Texas reversed the civil appeals court and affirmed a trial court judgment for the guarantor. The supreme court reasoned that "modification" does not imply a power to substitute a thing entirely different or a power to destroy. In effect, under the facts of the case the subordination completely nullified all the security for the guaranteed debt.

Under the Uniform Commercial Code, whenever the holder, without the consent of a party to the note, unjustifiably impairs any collateral given by or on behalf of such party or by any person against whom such party has a right of recourse, to that extent the party is discharged from liability.<sup>42</sup>

### C. Sales

*Title.* The established rule in Texas, as set forth in *Athens Commission Co. v. Lufkin Livestock Exchange, Inc.*,<sup>43</sup> has been that where a "cash sale" is involved and the seller delivers the goods to the buyer in exchange for a check, a rebuttable presumption exists that the parties intended that title to the goods should not pass until the check is honored by the drawee bank. And, in the absence of waiver or estoppel, if the check is dishonored, the seller could recover the goods from the buyer, his transferees or even an innocent purchaser for value.<sup>44</sup> Thus, the Beaumont court of civil appeals held in the *Athens* case that where the bill of sale specifically recited that title would not pass until the funds were actually received, and the check of the purchaser had been dishonored, the seller's right to recover the goods was superior to that of the purchaser's attaching creditor.

In *Continental Oil Co. v. Lane Wood & Co.*<sup>45</sup> this basic "cash sale" rationale was expanded to cover a non-cash sale situation. There, a manufacturer, upon receipt of its wholesaler's check, released a shipment of pipe for immediate delivery to the wholesaler's customer. The check tendered at the time of delivery of the pipe specifically recited that it was on past due account. The pipe was delivered and a factor which held a protected assignment covering all of the wholesaler's accounts receivable, advanced funds to the wholesaler on the strength of the sale to the customer. The check

<sup>42</sup> TEX. BUS. & COMM. CODE ANN. § 3.606(a)(2) (1968).

<sup>43</sup> 439 S.W.2d 427 (Tex. Civ. App.—Beaumont 1969), error ref. n.r.e.

<sup>44</sup> *Luse v. Crispin Co.*, 344 S.W.2d 926, 930 (Tex. Civ. App.—Houston 1961), error ref. n.r.e.

<sup>45</sup> 443 S.W.2d 698 (Tex. 1969).



was dishonored, the wholesaler adjudged a bankrupt, and the customer, being faced with conflicting claims for payment from the manufacturer, the factor, and the trustee in bankruptcy, interpleaded the sum it had agreed to pay the wholesaler for the pipe. The trial court found that the sale from the manufacturer to the wholesaler was a cash sale and rendered judgment for the manufacturer for the amount of the dishonored check. The court of civil appeals<sup>46</sup> reversed and rendered judgment for the factor, holding that the sale was not a cash sale since the check was for a past due account and not the purchase price of the pipe. It further held that any cash sale requirement was waived by the manufacturer when it made a voluntary, complete and unconditional delivery of the pipe with full knowledge that it was to be immediately resold. The Supreme Court of Texas ruled that if the sale and delivery by the manufacturer were conditioned upon the payment of the past due account, unless the condition were waived, title to the pipe would not pass until payment was made. In such a case the manufacturer's right to recover the pipe or its value from the customer would be superior to the factor's rights under its protected assignment. Also, it was held that knowledge that the pipe was to be immediately resold did not establish waiver as a matter of law. Finding the case had been tried on the wrong theory, the court remanded it for a new trial to the district court. Thus, it now appears that the "cash sale" presumption applies any time goods sold are delivered in exchange for a check even though the check is not tendered in payment for the goods.

This rationale is expressly modified by the Texas Uniform Commercial Code when the goods have been resold to a third party.<sup>47</sup> The Code specifically provides that when goods are delivered under a transaction of purchase, the purchaser has power to transfer good title to a good faith purchaser for value even though the delivery was in exchange for a check which is subsequently dishonored. Previously, to be a purchaser for value, it was necessary that the purchaser actually pay for the goods.<sup>48</sup> Now, he gives value by accepting the goods under a pre-existing contract for purchase or in return for any consideration sufficient to support a simple contract, which would include a promise to pay for the goods.<sup>49</sup> Also, the Code provides that where possession of goods is entrusted to a merchant who deals in that kind of goods, the merchant has power to transfer all rights of the entruster to a buyer in the ordinary course of business.<sup>50</sup> Since neither a trustee in bankruptcy nor an involuntary lien creditor falls under the definition of a buyer or a purchaser, the seller's rights to the goods would be superior to theirs.

*Credit Card Sales.* The supreme court in a case<sup>51</sup> of first impression in Texas, set down the following basic rules relating to liability for pur-

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<sup>46</sup> Lane Wood & Co. v. Continental Oil Co., 431 S.W.2d 625 (Tex. Civ. App.—Tyler 1968).

<sup>47</sup> TEX. BUS. & COMM. CODE ANN. § 2.403 (1968).

<sup>48</sup> Luse v. Crispin Co., 344 S.W.2d 926, 930 (Tex. Civ. App.—Houston 1961), *error ref. n.r.e.*

<sup>49</sup> TEX. BUS. & COMM. CODE ANN. §§ 1.201(9), (32), (44) (1968).

<sup>50</sup> *Id.* § 2.403(b).

<sup>51</sup> Sears, Roebuck & Co. v. Duke, 441 S.W.2d 521 (Tex. 1969).

chases made through the unauthorized use of a credit card, in the absence of a contrary agreement:

- (1) If the issuer puts the card into the mail without a prior agreement with its intended holder, the issuer assumes the larger part of the risk of improper use.
- (2) If the holder accepts the card or agrees to pay for purchases made through its use, the risk of misuse is on the holder unless and until he notifies the issuer otherwise.
- (3) If the card is lost or stolen and the holder so notifies the issuer, the risk of misuse shifts back to the issuer.
- (4) In making sales, the issuer is entitled to rely upon the card alone for identification unless the appearances or circumstances would raise a question in the mind of a reasonable seller.
- (5) The seller's failure to use ordinary care in identifying the purchaser is a defense to the holder's liability and the burden of proof on the issue is on the holder.

*Implied Warranties.* Under the Code,<sup>52</sup> unless excluded or modified in the manner provided therein,<sup>53</sup> if the seller at the time of contracting has reason to know that the buyer requires the goods for a particular purpose and is relying on the seller's skill or judgment to select or furnish suitable goods, there arises an implied warranty that the goods are fit for such purpose. Thus, in a civil appeals case<sup>54</sup> where the evidence tended to show that a paint seller's representative had reason to know of the particular purpose for which a painting subcontractor required the paint and that the subcontractor relied on the representative's skill and judgment, a directed verdict for the paint seller was set aside.

The recent Texas supreme court decisions extending the doctrine of implied warranty of suitability to cases in which a defective product caused physical harm to the user or damage to his property, despite the absence of privity of contract, were reviewed in the 1968 and 1969 *Surveys*.<sup>55</sup> During the present survey period, the doctrine was applied in cases involving defective truck<sup>56</sup> and automobile brakes.<sup>57</sup> Also, in *C. A. Hoover & Son v. O. M. Franklin Serum Co.*<sup>58</sup> the supreme court held that, since liability does not turn on the producer's knowledge or lack of knowledge of the unfitness of the product, whether or not the damage or injury was foreseeable is immaterial.

In a civil appeals case<sup>59</sup> decided under pre-Code law, it was held that the two-year statute of limitations<sup>60</sup> is applicable to a cause of action based

<sup>52</sup> TEX. BUS. & COMM. CODE ANN. § 2.315 (1968).

<sup>53</sup> *Id.* § 2.316.

<sup>54</sup> *Parks v. Glidden Co.*, 433 S.W.2d 445 (Tex. Civ. App.—Texarkana 1968), *error ref. n.r.e.*

<sup>55</sup> Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 79, 84-85 (1968); *id.*, 23 Sw. L.J. 88, 94 (1969).

<sup>56</sup> *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969).

<sup>57</sup> *Sharp v. Chrysler Corp.*, 432 S.W.2d 131 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

<sup>58</sup> 444 S.W.2d 596 (Tex. 1969).

<sup>59</sup> *Richker v. United Gas Corp.*, 436 S.W.2d 215 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

<sup>60</sup> TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

on implied warranties. It appears that this limitation period has been lengthened to four years by the Texas Uniform Commercial Code, which provides that an action for breach of any contract of sale of goods must be commenced within four years after the cause of action accrues.<sup>61</sup>

*Unconscionable Contracts.* Under the Code, if the court finds a sales contract or any clause thereof unconscionable as a matter of law at the time it was made, it may refuse to enforce the contract or the unconscionable clause or so limit the application of the clause as to avoid any unconscionable result.<sup>62</sup> In a case<sup>63</sup> involving the financing of mobile home sales, the Dallas court of civil appeals held that a contract personally guaranteeing the faithful performance of the corporate seller's obligation to repurchase any mobile homes repossessed by the finance company because of the buyer's default under the installment sales contract was not unconscionable. The court noted that other jurisdictions define an unconscionable contract as one "which no man in his senses and not under a delusion would enter into and no honest and fair person would accept."<sup>64</sup>

#### D. Secured Transactions

*Acceleration.* In a wrongful repossession case,<sup>65</sup> the secured party accelerated payment and repossessed the collateral, purporting to act under the terms of the security agreement authorizing such action if the secured party deemed itself insecure. The Uniform Commercial Code provides that such power can be exercised only if the secured party "in good faith believes that the prospect of payment or performance is impaired," and places the burden of establishing lack of good faith on the debtor.<sup>66</sup> In this case, the trial court had placed the burden of proof on the secured party. The Fifth Circuit Court of Appeals reversed the debtor's judgment and rejected his contention that the Code was inapplicable since his action was in tort rather than contract, and held that any tort action which previously existed for unlawful repossession has been displaced to the extent it conflicts with the applicable provisions of the Code.

*Non-Judicial Foreclosure.* In *Rangel v. Bock Motor Co.*<sup>67</sup> an automobile buyer defaulted under an installment sales contract, which was also a security agreement, and abandoned possession of the car to the dealer. The dealer thereafter repurchased the contract from the finance company under a repurchase agreement. The buyer contended that such repurchase constituted a non-judicial foreclosure without notice to him and therefore extinguished his debt. The court of civil appeals rejected the contention, citing section 9.504(e) of the Code<sup>68</sup> which specifically provides that a

<sup>61</sup> TEX. BUS. & COMM. CODE ANN. § 2.725 (1968).

<sup>62</sup> *Id.* § 2.302.

<sup>63</sup> Blount v. Westinghouse Credit Corp., 432 S.W.2d 549 (Tex. Civ. App.—Dallas 1968).

<sup>64</sup> *Id.* at 554.

<sup>65</sup> Sheppard Fed. Credit Union v. Palmer, 408 F.2d 1369 (5th Cir. 1969).

<sup>66</sup> TEX. BUS. & COMM. CODE ANN. § 1.208 (1968).

<sup>67</sup> 437 S.W.2d 329 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*

<sup>68</sup> TEX. BUS. & COMM. CODE ANN. § 9.504(e) (1968).

transfer of the collateral to a person liable to a secured party under a repurchase agreement does not constitute a sale or disposition of the collateral.

*Purchased Accounts.* Expressly exempted from the filing requirements of article 9 of the Code are assignments of accounts which do not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor.<sup>69</sup> In construing this provision, the court of civil appeals,<sup>70</sup> relying heavily on the Code commentary,<sup>71</sup> held that where an assignee did not regularly take assignments of debtors' accounts, but did so on the occasion in question to help a good customer of long standing meet pressing short term debts, the assignment was casual or isolated and within the exemption. The ratio of the amount of the accounts assigned to the outstanding accounts of the debtor did not appear to be a significant or determining factor.

*Inventory.* The Texas Factors Lien Act,<sup>72</sup> which governed pre-Code liens on merchandise inventory, enabled a lender who complied with its provisions to obtain a lien on merchandise in the possession of the debtor as was from time to time designated in separate written statements dated and signed by the debtor and delivered to the lender. In an opinion of the Fifth Circuit Court of Appeals,<sup>73</sup> it was held that under the liberal construction provisions of the Act, a designation of goods by dollar amount only was sufficient to subject the goods to the lien and thus defeat the claim of the debtor's trustee in bankruptcy that the lien was invalid.

Under the Code, where a security interest is taken in all present and future inventory, no subsequent designations of inventory are required.<sup>74</sup>

*Conflicting Claims in the Same Collateral.* Prior to the effective date of the Code in Texas, an assignment of existing and future accounts could be "protected" by filing for record a "Notice of Assignment" signed and acknowledged by the assignor.<sup>75</sup> This notice, which could be effective for up to three years as of the date of its filing, protected from all adverse claimants the written assignment of accounts arising during such effective period, regardless of whether the account was in the contemplation of the parties when the notice was executed.<sup>76</sup> Thus, where the basic assignment agreement was executed on March 31, the notice filed on April 30, a schedule assigning a specific account executed on June 25, a writ of garnishment served on the account debtor on July 7, and a schedule assigning another account executed on July 9, the supreme court<sup>77</sup> held that the assignments related back to April 30, and were prior and superior to the

<sup>69</sup> *Id.* § 9.302(a)(5).

<sup>70</sup> *Abramson v. Printer's Bindery, Inc.*, 440 S.W.2d 326 (Tex. Civ. App.—Dallas 1969).

<sup>71</sup> *Id.* at 328.

<sup>72</sup> Tex. Laws 1947, ch. 180, at 294 (repealed 1966).

<sup>73</sup> *National Acceptance Co. v. Southwest Automotive Warehouse, Inc.*, 410 F.2d 1139 (5th Cir. 1969).

<sup>74</sup> TEX. BUS. & COMM. CODE ANN. § 9.204(c) (1968).

<sup>75</sup> Tex. Laws 1945, ch. 293, at 463 (repealed 1966).

<sup>76</sup> *Id.*

<sup>77</sup> *Filley Enterprises, Inc. v. Youngstown Sheet & Tube Co.*, 441 S.W.2d 509 (Tex. 1969).

garnishment lien. A similar result was reached in a civil appeals case<sup>78</sup> involving conflicting claims to funds due under a construction contract. In that case the court held that the claim of the protected assignee was superior to the claims of subsequent materialman lien claimants and the assignor's trustee in bankruptcy. Under the Code, the result would have been substantially the same.<sup>79</sup>

However, in *Continental Oil Co. v. Lane Wood & Co.*<sup>80</sup> the supreme court ruled that where the account arose out of the resale of goods which had been obtained by the assignor-wholesaler from the manufacturer in consideration of a check which was thereafter dishonored, the claim of the protected assignee would be subject to the manufacturer's right to reclaim the goods or recover their value from the ultimate purchaser, absent waiver or estoppel. This ruling is based upon the court's holding that, if the sale from the manufacturer was conditioned on the check being paid, until it was paid title to the goods would not pass from the manufacturer. As discussed previously, the result would be different under the provisions of the Code.

In *McAllen State Bank v. Texas Bank & Trust Co.*<sup>81</sup> a debtor pledged and delivered to his creditor a life insurance policy naming the creditor as beneficiary, but reserving to the debtor the 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<sup>82</sup> affirmed the trial court's judgment for the new beneficiary, reasoning that the creditor took the policy as written and the only vested right, if any, he acquired was to demand payment of the proceeds to the extent of his claim, provided he was still beneficiary at the time of the debtor's death. The supreme court disagreed with such analysis. After noting the differences in the interests of a pledgee and a beneficiary in the policy, it held that the rights of a pledgee are not dependent on its being named beneficiary and are superior to those of the beneficiary to the extent of the indebtedness secured. Judgment was reversed and rendered for the creditor-pledgee.

Under the Code, unless otherwise agreed, the secured party has the right to take possession of the collateral on default.<sup>83</sup> In an action<sup>84</sup> to foreclose under a security agreement, it was held that a non-resident third party in adverse possession of the collateral was a "necessary party"<sup>85</sup> for venue purposes since the secured party could not obtain the complete relief to which he is entitled unless the adverse possessor is also joined in the suit.

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<sup>78</sup> *University State Bank v. Gifford-Hill Concrete Corp.*, 431 S.W.2d 561 (Tex. Civ. App.—Fort Worth 1968), *error ref. n.r.e.*

<sup>79</sup> TEX. BUS. & COMM. CODE ANN. § 9.312(e) (1968).

<sup>80</sup> 443 S.W.2d 698 (Tex. 1969).

<sup>81</sup> 433 S.W.2d 167 (Tex. 1968).

<sup>82</sup> *McAllen State Bank v. Texas Bank & Trust Co.*, 423 S.W.2d 932 (Tex. Civ. App.—Dallas 1967), *discussed in* Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 23 Sw. L.J. 88, 96 (1969).

<sup>83</sup> TEX. BUS. & COMM. CODE ANN. § 9.503 (1968).

<sup>84</sup> *Moody Day Co. v. Westview Nat'l Bank*, 441 S.W.2d 294 (Tex. Civ. App.—Waco 1969), *error dismissed*.

<sup>85</sup> TEX. REV. CIV. STAT. ANN. art. 1995, § 29a (1964).

### E. Recovery of Attorneys' Fees

In most lawsuits involving commercial transactions, the creditor sues to recover, in addition to his basic claim, attorneys' fees under the provisions of a statute or of the note or contract sued upon.<sup>86</sup> The principal statute authorizing an award of attorneys' fees in certain commercial cases is article 2226.<sup>87</sup> Such an award is authorized only when the creditor finally obtains a judgment for any amount of the claim presented. Occasionally, after suit is filed, a procrastinating debtor will tender payment in the amount of the basic claim in an attempt to avoid liability for attorneys' fees and court costs. If the amount is tendered as full payment and is accepted by the creditor, no attorneys' fee can be recovered.<sup>88</sup> But, where the amount is tendered into court more than thirty days after the demand for payment<sup>89</sup> or if the tender is for less than the amount due or is conditional,<sup>90</sup> attorneys' fees and statutory interest can be recovered.

In the past, several courts in rendering judgment for reasonable attorneys' fees have provided for an additional sum or sums in the event an appeal were taken to the court of civil appeals and the supreme court.<sup>91</sup> In these cases, the conditional awards were ruled to be unauthorized. In what appeared to be an attempt to circumvent these cases, one court, instead of making a conditional award, provided for a remittitur of a portion of the fee if no appeal were taken. This also was held to be unauthorized. However, the judgment in the amount less the remittitur was held to be final and affirmed.<sup>92</sup>

### III. CONCLUSION

The Uniform Commercial Code has now been the law of Texas for approximately three and one-half years. Of the appellate decisions under the Code, none has been by the supreme court and none can be characterized as unusual or of great significance. The small number of cases decided appears as the most significant development. The judges have thus

<sup>86</sup> For a more detailed discussion on the problems and principles involved in making such recovery, see Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 22 Sw. L.J. 79, 85-88 (1968); *id.*, 23 Sw. L.J. 88, 96-97 (1969).

<sup>87</sup> TEX. REV. CIV. STAT. ANN. art. 2226 (1964), which provides:

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

<sup>88</sup> *National Homes Corp. v. C.J. Builders, Inc.*, 393 S.W.2d 949 (Tex. Civ. App.—Houston 1965), *error dismissed*.

<sup>89</sup> *Boaz Well Serv., Inc. v. Carter*, 437 S.W.2d 38 (Tex. Civ. App.—Fort Worth 1969).

<sup>90</sup> *Hoot v. Quality Ready-Mix Co.*, 438 S.W.2d 421 (Tex. Civ. App.—Corpus Christi 1969).

<sup>91</sup> *Southwestern Motor Transp. Co. v. Valley Weathermakers, Inc.*, 427 S.W.2d 597 (Tex. 1968); *Cooksey v. Jordan*, 104 Tex. 618, 143 S.W. 141 (1912); *Preferred Life Ins. Co. v. Dorsey*, 281 S.W.2d 368 (Tex. Civ. App.—Waco 1955), *error ref. n.r.e.* However, where the amounts are agreed upon and no complaint made of the award, the judgment has been allowed to stand. *Liberty Sign Co. v. Newsom*, 426 S.W.2d 210 (Tex. 1968).

<sup>92</sup> *Security Life Ins. Co. v. Executive Car Leasing Co.*, 433 S.W.2d 915 (Tex. Civ. App.—Texarkana 1968), *error ref. n.r.e.*

far been able to apply the law without apparent difficulty and have not found it necessary as did Referee Snedecor to make reference to Hamlet's plaintive lines:

"The time (law) is out of joint; O cursed spite  
That ever I was born to set it right;"<sup>98</sup>

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<sup>98</sup> *In re* Portland Newspaper Publishing Co., 3 UCC REP. SERV. 194, 215 (D. Ore. 1966).