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Contracts

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CONTRACTS

by

*The Board of Editors**

THE MANY contract cases decided by Texas courts during the survey period reveal little change in Texas law. However, several cases discussed in this Article contain novel issues which are of interest to students and practitioners of law. Also of interest is a statute¹ enacted by the 61st Legislature of Texas dealing with the problem of unsolicited goods. This statute, which became effective on September 1, 1969, should raise interesting questions in the future.

I. OFFER AND ACCEPTANCE: UNSOLICITED GOODS

Under general principles of contract law, the delivery of unsolicited goods to a person may create an implied contract to pay.² The contract may be either implied in fact, as from acts of the recipient amounting to acceptance, or implied in law, as from acceptance of benefits from the goods, even without intention to pay.³ Although liability for payment may be avoided by returning the goods or the benefits from them,⁴ in practice such goods often are accepted and paid for. The recipient may pay either to avoid inconvenience or because he is ignorant of his legal status. Article 29c-1,⁵ recently enacted by the Texas Legislature, should have a significant effect on this problem. The statute provides that "unless otherwise agreed" the recipient of unsolicited goods may refuse to accept delivery without an obligation to return the goods to the sender. Although the Act provides that goods received due to a bona fide mistake must be returned, the burden of proving such a mistake is upon the sender. Finally, the Act stipulates that unsolicited goods "addressed to or intended for the recipient" are deemed to be a gift.

Several questions are raised by the statute. First, there is a discrepancy between the caption of the statute and the language of the text. The caption refers to "anyone receiving anything unordered in the *mail*." No such limitation on the manner of delivery is found in the body of the statute, which simply provides for "unsolicited goods delivered . . . addressed to or intended for the recipient." Although this discrepancy should not nullify the statute,⁶ it remains to be determined whether the caption may have the effect of narrowing its application. As a general rule a court

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¹ Tex. Laws 1969, ch. 700, at 2044.

² *Ferrous Prods. Co. v. Gulf States Trading Co.*, 323 S.W.2d 292 (Tex. Civ. App.—Houston 1959); 1 S. WILLISTON, *LAW OF CONTRACTS* § 91D (3d ed. 1957).

³ *RESTATEMENT OF CONTRACTS* § 72 (1932).

⁴ *Id.*

⁵ Tex. Laws 1969, ch. 700, at 2044.

⁶ *TEX. CONST.* art. III, § 35; *Independent School Dist. v. Central Educ. Agency*, 247 S.W.2d 597 (Tex. Civ. App.—Austin 1952).

may refer to the caption or title in construing a statute.⁷ Although it has been held that where the caption and body of a statute conflict, the caption must yield,⁸ there are cases to the contrary.⁹ Accordingly, whether this statute applies only to unsolicited goods received in the mail, or to all modes of delivery, will not be known until the question is presented to the courts.

Another aspect of the statute which raises questions is the introductory phrase, "unless otherwise agreed." In the situation of continued subscriptions to papers, magazines, books or records, the obligations of the recipient are often unclear since they are controlled for the most part by oral or ambiguously worded written agreements. Despite the salutary effect which the statute should have in many situations, it may provide, by the introductory phrase, an exemption for institutions such as book and record clubs which provide in the initial agreement for renewals, further orders, and the manner of terminating the agreement.

Unfortunately, the statute will remedy only a part of the problem at which it is aimed. Although it may have the effect of clearly delineating the rights of parties to whom unsolicited goods are delivered, it may fail to reduce the incidence of acceptance and payment because of ignorance on the part of the recipient, or his acquiescence to avoid inconvenience. Perhaps the statute will serve at best as a deterrent to persons delivering unsolicited goods solely with the expectation of payment for them.

II. STATUTE OF FRAUDS

During the period surveyed, three cases of significance were decided which involved the Statute of Frauds.¹⁰ In the first of these cases, *Cooper Petroleum Co. v. LaGloria Oil & Gas Co.*,¹¹ the Texas supreme court found that an oral contract which failed to come within the "main purpose" exception¹² to the Statute of Frauds may be enforceable. *Cooper* involved transactions between three corporations, LaGloria Oil and Gas Company (LaGloria Oil), International Marketing Corporation (IMI), and Cooper Petroleum Company (Cooper Petroleum). Fagan was the owner¹³ and president of Cooper Petroleum and Clark, his son-in-law, was vice-president of both Cooper Petroleum and IMI. LaGloria Oil was persuaded by Fagan and Clark to make credit sales of oil and gas to IMI, a company with which Cooper Petroleum did a substantial amount of business. To insure that the credit sales would be made by LaGloria Oil to IMI, Cooper

⁷ *Trawalter v. Shaefer*, 142 Tex. 521, 179 S.W.2d 765 (1944); *Corpus Christi v. Southern Community Gas Co.*, 368 S.W.2d 144 (Tex. Civ. App.—San Antonio 1963).

⁸ *Felton v. Johnson*, 112 Tex. 412, 247 S.W. 837 (1923).

⁹ *Southwestern Bell Tel. Co. v. Houston Ind. School Dist.*, 397 S.W.2d 419 (Tex. 1966); *Misouri-Kan.-Tex. Ry. v. Mahaffey*, 105 Tex. 394, 150 S.W. 881 (1912).

¹⁰ TEX. REV. CIV. STAT. ANN. art. 3995 (1966). These provisions are now contained in TEX. BUS. & COMM. CODE § 26.01 (1968).

¹¹ 436 S.W.2d 889 (Tex. 1969).

¹² The "main purpose" exception is a judicial doctrine which allows certain promises to be enforced despite their failure to meet the requirements of the Statute of Frauds. See text accompanying note 17 *infra*.

¹³ Even though Fagan did not own all of the stock in Cooper Petroleum Co., the remaining stock was owned by his immediate family.

Petroleum guaranteed in writing payment of all accounts arising from such sales. As sales to IMI increased, LaGloria insisted upon further security before new sales contracts were negotiated. Clark orally promised LaGloria Oil that any further sales to IMI would be guaranteed personally by Fagan. In reliance on this promise LaGloria Oil continued to make credit sales to IMI. Although Fagan probably knew of Clark's promise, he did not sign a written guaranty sent to him by LaGloria Oil, nor did he tell LaGloria Oil that he had no intention of making the guaranty. Clark, however, continued to promise LaGloria that Fagan would guaranty the accounts. In the meantime, Clark and Fagan successfully arranged to have IMI's oil and gas purchase contracts transferred to Cooper Petroleum. Subsequently, Fagan individually purchased all of IMI's assets.¹⁴ About one month later, IMI was adjudged bankrupt. When LaGloria Oil was unable to collect on the accounts of IMI in the bankruptcy proceeding, it attempted to hold Fagan and Cooper Petroleum liable on their guaranties.

The court of civil appeals affirmed the trial court's decision in favor of LaGloria Oil against both Fagan and Cooper Petroleum.¹⁵ Although the supreme court reversed the decision because of the failure of LaGloria to prove the indebtedness of IMI, the court remanded the case to be decided in favor of LaGloria if the indebtedness were properly shown.¹⁶ Because Cooper Petroleum's guaranty was in writing, no problem was presented by the attempt to hold it liable as a guarantor. More significant, however, was the supreme court's decision that Fagan could be held liable as a guarantor even though the promise of guaranty was oral, and not made by Fagan himself. Because of the business and family relationship existing between Clark and Fagan, the court found that Fagan could be expected to know of Clark's promise, and of LaGloria's reliance on it. Accordingly, the court determined that Fagan was estopped to deny that Clark had the authority to make such a promise. However, LaGloria Oil did not contend that Clark had actual authority, and the jury did not find that Clark had apparent authority. The supreme court's determination was based solely on Fagan's conduct in failing to repudiate his son-in-law's unauthorized statement.

Although he was estopped to deny Clark's authority to promise his guaranty, Fagan contended that the Statute of Frauds makes unenforceable the oral promise to guaranty the debt of another. LaGloria, however, contended that the oral promise was enforceable either under the "main purpose" exception to the Statute of Frauds, or because of LaGloria's reliance on Clark's promise. The court acknowledged the existence in Texas of the main purpose exception,¹⁷ but found it to be inapplicable in the instant situation. That exception applies when a person has made an oral

¹⁴ The only assets of any value which IMI owned were office furniture and the stock in a wholly owned subsidiary, Texas Transport, Inc. Fagan purchased all of the stock in this subsidiary corporation.

¹⁵ 423 S.W.2d 645 (Tex. Civ. App.—Houston 1967).

¹⁶ Records offered by La Gloria Oil to evidence the debt were found improperly admitted because of a failure to satisfy the business records exception to the hearsay rule.

¹⁷ The court cited *Gulf Liquid Fertilizer Co. v. Titus*, 163 Tex. 260, 354 S.W.2d 378 (1962).

promise of guaranty, otherwise unenforceable under the Statute of Frauds, with the main purpose of obtaining a benefit accruing to him personally as part of the consideration.¹⁸ Despite the close ties between Fagan and IMI, and the personal interest which Fagan had in insuring the credit of IMI, the court determined that the benefits which may have accrued to Fagan formed no part of the consideration given by LaGloria. However, the court did hold that Fagan was estopped to deny the enforceability of the oral promise to the extent that it was relied upon by LaGloria Oil.

The decision in *Cooper* is undoubtedly correct, although the result may initially appear to be a significant extension of principles mitigating the effects of the Statute of Frauds. First, it is difficult to disagree with the court's application of the main purpose exception to the Statute of Frauds. The court properly recognized that the test should not be one of mere benefit to the promisor, but rather should be one of benefit received *as part of the consideration*. Second, the court properly found that Fagan was estopped to assert that the oral promise was unenforceable under the Statute of Frauds. The *Restatement (Second) of Contracts* has adopted this theory.¹⁹ Perhaps the most significant aspect of the decision is the court's determination that Fagan was estopped to deny the authority of Clark. Although this determination is well supported by Texas decisions,²⁰ the theory is sometimes misunderstood. As the court indicated, estoppel in this instance does not depend on the existence of actual or apparent authority. Therefore, the close relationship between Fagan and Clark was important not because LaGloria could rely on Clark's authority, but because it indicated a high probability that Fagan knew of the promise and subsequent reliance upon it by LaGloria. Seemingly, an estoppel could arise where the person making the promise was not closely related to the purported guarantor if other evidence showed that the purported guarantor knew of the promise and that it was being relied upon. However, in most cases, as in *Cooper*, estoppel has been found applicable where the person making the promise and the purported guarantor are closely related.²¹

In contrast to *Cooper* is the decision in *Owen v. Hendricks*,²² where the court made more stringent the test for compliance with the Statute of Frauds in another area of the law. In that case, Owen wrote to Hendricks, asking whether Owen could sell "your 960 acres in Dallam County" and asking for an answer by return letter. Hendricks answered, saying in part, "The 960 acres in Dallam County is [*sic*] for sale. The price is \$225.00 per acre net to me." Owen later sold the land but Hendricks refused to pay him his commission.

The Real Estate Dealers License Act provides that no action shall be

¹⁸ 2 A. CORBIN, CONTRACTS § 366 (1950).

¹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Draft No. 4, 1968).

²⁰ See *A.R. Clark Inv. Co. v. Green*, 375 S.W.2d 425 (Tex. 1964); *Johnson v. Sovereign Camp, W.O.W.*, 125 Tex. 329, 83 S.W.2d 605 (1935); *Burnett v. Atteberry*, 105 Tex. 119, 145 S.W. 582 (1912).

²¹ *A.R. Clark Inv. Co. v. Green*, 375 S.W.2d 425 (Tex. 1964) (husband-wife relationship); *Johnson v. Sovereign Camp, W.O.W.*, 125 Tex. 329, 83 S.W.2d 605 (1935) (husband-wife relationship); *Burnett v. Atteberry*, 105 Tex. 119, 145 S.W. 582 (1912) (principal-agent relationship).

²² 433 S.W.2d 164 (Tex. 1968).

brought for the recovery of a real estate commission unless a written agreement upon which the action is brought is signed by the person to be charged with the commission.²³ To satisfy the requirements of the statute, the written agreement must provide a description of the property which satisfies the Statute of Frauds with respect to specificity. Such a description may also be contained in another existing writing to which the signed writing refers.²⁴ Although the description of the property in the writing signed by Hendricks was not sufficient, the writing signed by Owen sufficiently described the property.

The court of civil appeals affirmed a decision in favor of Owen.²⁵ On writ to the supreme court, Owen maintained that the letter which he had signed could be incorporated by reference into that signed by Hendricks. He relied upon the fact that both letters related to the same transaction and one was in response to the other. However, the court held that one letter must expressly refer to the other before the doctrine of incorporation may be invoked.²⁶ This case makes it clear that a real estate dealer entering an informal agreement to sell land should be certain that a sufficient description of the land is signed by the landowner, or in the alternative, that a writing signed by the landowner expressly refers to another writing which sufficiently describes the land.

However, in *Clements v. Withers*,²⁷ a tort case involving the Real Estate Dealers License Act²⁸ and the Statute of Frauds, the court allowed a real estate dealer to recover his commission where the writing signed by the landowner neither described the land sufficiently, nor referred to another writing which did so. In *Clements* an exclusive listing agreement was made between Hall, the landowner, and Withers, the real estate broker. The agreement described the land as "situated in the County of Henderson, State of Texas: approximately 475 acres, more or less, adjoining Koon Kreek Klub." Had the agreement read "my 475 acres," the description would have been sufficient.²⁹

Defendants Clements and Perryman, purchasers of the land, agreed with Hall in the written agreement to "take care" of Withers. However, they did not pay Withers his commission. Withers subsequently sued Clements and Perryman to recover damages for the tort, *i.e.*, inducement of breach of contract. They contended that the commission could not be collected because the written listing agreement between Hall and Withers would not support a claim for the commission by Withers against Hall under the Real Estate Dealers License Act and the Statute of Frauds. Judgment in favor of Withers was entered by the trial court and the court of civil appeals. The supreme court, presented with the issue for the

²³ TEX. REV. CIV. STAT. ANN. art. 6573a, § 28 (1969).

²⁴ *Id.*

²⁵ *Owen v. Hendricks*, 426 S.W.2d 955 (Tex. Civ. App.—Eastland 1968).

²⁶ See 4 S. WILLISTON, LAW OF CONTRACTS § 582 n.4 (3d ed. 1961).

²⁷ 437 S.W.2d 818 (Tex. 1969).

²⁸ TEX. REV. CIV. STAT. ANN. art. 6573a (1969).

²⁹ In *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1949), it was held that a signed writing which referred to "my land" or "land owned by me" was sufficient if extrinsic evidence could be used to show that the signer of the memorandum owned only one tract of land which could fit the description in the memorandum.

first time, affirmed the judgment in favor of Withers. It found that the Statute of Frauds is intended to "prevent fraud by those who would misrepresent verbal promises," but does not "give third parties the right to interfere with the performance of oral contracts."³⁰ Thus, even though a broker may not be able to recover his commission from a landowner because of a deficiency in the written description of the land, he may be able to recover in tort from one who induces the landowner not to pay the commission. Although it is not clear whether the *Clements* decision can apply to contracts unenforceable for reasons other than the Statute of Frauds, the decision in many instances should discourage collusion between purchasers and sellers, or unilateral action by purchasers to avoid payment of brokers' commissions.

III. DAMAGES

Only one case was decided by the Texas courts during the survey period which dealt with a significant contract damages question. *P. G. Lake, Inc. v. Sheffield*³¹ involved the question of whether the proper measure of damages for a mining lessee's breach of an agreement to repair and restore land is (1) the diminution in market value resulting from the non-performance, or (2) the cost of such repair. In *Lake* the defendant, assignee of an oil and gas lease, entered plaintiff's land for the purpose of drilling a well. Prior to entry it was agreed that if the well was dry, defendant would repair certain damage done to the land in connection with the drilling. After the well was found to be dry, defendant left the land without making the repairs in question. Thereafter, plaintiff successfully sued to recover the reasonable cost of repairs. On appeal, defendant contended that the measure of damages properly should have been the diminution in market value of the land, although evidence of this amount was not introduced by either party in the trial court.

Although the court of civil appeals found no Texas cases dealing with precisely the same situation, it approved a rule announced by the Oklahoma supreme court in a case with similar facts.³² In that case the Oklahoma court declared:

[T]he measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to the lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the nonperformance.³³

Accordingly, the court of civil appeals agreed that the proper measure of damages should have been the diminution in market value. However, it

³⁰ 437 S.W.2d 818, 821 (Tex. 1968).

³¹ 438 S.W.2d 952 (Tex. Civ. App.—Tyler 1969).

³² *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963).

³³ 438 S.W.2d 952, 955 (Tex. Civ. App.—Tyler 1969), citing *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963).

declined to reverse the decision, finding that the defendant had the burden in the trial court to plead and prove facts showing that damages equal to the cost of repair would exceed the pecuniary injury sustained by the plaintiff. The court seemed to find apposite certain Texas cases dealing with breach of building and construction contracts.³⁴ It observed that if defects in construction cannot be remedied without an expenditure disproportionate to the end to be attained, which might constitute economic waste, the proper measure of damages is the diminution in value of the building.

A serious question is raised by the decision in this case. First, it seems clear that no issue of economic waste is involved. *Lake* is easily distinguished from a breach of construction contract situation where a builder might be required to tear down an entire house in order to remedy a minor defect. In a situation such as that in *Lake*, the landowner should be entitled to the performance promised by the lessee. Often, the diminution in the actual value of the land is negligible. However, the speculative value of the land or the value of the land to the owner may have been greatly diminished by the nonperformance and the landowner's right to insure such value is largely taken away by this manner of calculating damages. Finally, it seems persuasive that the lessee knew the potential cost of repair at the time of entering into the agreement. To disallow damages equal to the cost of repair may allow the lessee to breach a repair agreement with impunity whenever the cost of repair seems to exceed the diminution in value of the land.

IV. PAROL EVIDENCE

One case decided during the survey period seems to add confusion to the parol evidence rule. In *Pargas of Canton, Inc. v. Clower*³⁵ plaintiff, a large out-of-state corporation, purchased the stock of a Texas butane gas company through an intermediary. The stock was purchased from defendant and the other owners of the gas company. In connection with this transaction plaintiff orally agreed to continue defendant in its employ for as long as his work was satisfactory. A written purchase agreement signed by defendant contained a covenant not to compete which prohibited defendant from engaging in the gas business within fifty miles of the purchased company for a period of five years. Having terminated defendant's employment one and one-half years after the purchase, plaintiff brought suit in district court to restrain defendant from entering into competition in violation of the covenant not to compete. The jury found that plaintiff breached its oral agreement with defendant in terminating his employment and could not enforce the covenant not to compete. On appeal, plaintiff contended that it was error for the district court to have admitted evidence of the oral agreement. However, the court of civil appeals, affirming, determined that the evidence was proper for the purpose

³⁴ *Hutson v. Chambliss*, 157 Tex. 193, 300 S.W.2d 943 (1957); *Totton v. Houghton*, 2 S.W.2d 530 (Tex. Civ. App.—Eastland 1927).

³⁵ 434 S.W.2d 192 (Tex. Civ. App.—Tyler 1968).

of showing additional consideration for the written contract which would not contradict any of the written recitals of consideration and held accordingly that because of the purchaser's failure to honor the agreement of employment it could not, in a court of equity, enforce the covenant not to compete.

Despite the court's quick dismissal of the purchaser's contention, it seems clear that other questions are fairly raised by the case. Although the general rule in Texas allows parol evidence to be admitted for the purpose of showing the real consideration for a written agreement,³⁶ the rule is not without exceptions. Where the consideration recited is either promissory or contractual in nature, admissibility of parol evidence is often restricted. Part of the consideration recited in the written covenant not to compete, the cancellation of certain notes executed by defendant and other stockholders, would seem to be contractual. It is generally accepted that parol evidence is inadmissible to vary or contradict contractual consideration, especially if the result would be to change or defeat the legal operation and effect of the instrument.³⁷ Although the court properly decided that the oral agreement, as additional consideration, would not contradict the recited consideration, it is not so clear that the additional consideration failed to change the effect of the entire written instrument. Indeed, if the parol evidence rule is to have any effect, it would seem that the most important factor is the effect which admission of parol evidence has on the entire agreement rather than merely on the recited consideration.

Two other theories have been suggested for admission of evidence such as that involved in the instant case. The first is that proof of additional consideration in the form of promises may be admitted because the contract does not disclose an intent to embody the entire transaction.³⁸ The second is that parol evidence of a "collateral agreement" may be admitted provisionally to show that the writing embodied only a part of the parties' agreement.³⁹ Either theory would seem to be more acceptable than a general rule that additional consideration may always be shown if it does not contradict written recitals of consideration. Because the parol evidence rule exists principally to protect the sanctity of written instruments against later introduction of less reliable extrinsic evidence, and because the rule presumes that the parties' intentions are wholly embodied in the writing, the admission of parol evidence in cases such as *Pargas* should rest upon a showing that the writing does not fully embody the parties' agreement. Although the court's admission of the parol evidence may have been proper, its summary answer to the question of admissibility is of doubtful precedential value in an already confused area of law.

Another rather subtle question presented by *Pargas* was not discussed

³⁶ *Rubin v. Adams*, 368 S.W.2d 42 (Tex. Civ. App.—Amarillo 1963), *error ref. n.r.e.*

³⁷ *Jackson v. Hernandez*, 155 Tex. 249, 285 S.W.2d 184 (1955); *Trantham v. Roper*, 308 S.W.2d 195 (Tex. Civ. App.—Texarkana 1957), *error ref. n.r.e.*; *D. Sullivan & Co. v. Schreiner*, 222 S.W. 314 (Tex. Civ. App.—San Antonio 1920), *error ref. n.r.e.*

³⁸ 2 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1613, at 460 (2d ed. 1956).

³⁹ *Id.* § 1631.

by the court. In *Pargas* the gas company of which defendant was a stockholder was sought to be acquired by Pargas of Maryland, a foreign corporation. The purchase was accomplished through another Texas corporation, Butane Supplies, Inc. Pargas of Maryland arranged for Butane Supplies to purchase the stock of defendant's company, and subsequently for Butane Supplies and defendant's company together to be transferred to Pargas of Maryland. The written purchase agreement which included the covenant not to compete was signed by two representatives of Butane Supplies, defendant, and the other stockholders of defendant's company. Although one of the representatives of Butane Supplies had been authorized by Pargas of Maryland to negotiate for the purchase of defendant's company, no officer of Pargas of Maryland actually signed the purchase agreement containing the covenant not to compete. The statement has been made that the parol evidence rule applies only as to parties to an instrument.⁴⁰ Although many of the cases which support this statement involve admission of parol evidence offered *by*, rather than *against*, "strangers" to a written contract, at least one Texas case indicates an application of this theory where evidence is offered *against* one not a party to an instrument.⁴¹ In that case the defendant, a real estate broker acting as agent for a landowner, negotiated a contract for the purchase and sale of the land with the plaintiffs. It was alleged that the defendant orally agreed with the plaintiffs to procure a loan in aid of the purchase. In a suit by the plaintiffs to recover damages resulting from the defendant's failure to procure the loan, the court permitted the plaintiffs to introduce evidence of the parol agreement. The court reasoned that the parol contract could be shown as being a collateral agreement "independent of and not inconsistent with the written agreement."⁴² It has been suggested that the rationale underlying this decision is that the defendant, in promising to procure the loan, was acting in his individual rather than representative capacity, and accordingly, was not a party to the contract.⁴³ There seems to be no reason why this rationale could not also control the decision in *Pargas*. Although the evidence in *Pargas* showed that the parol employment agreement was communicated to the defendant by a representative of Butane Supplies who was also a signatory to the written agreement, the situation suggests that the defendant may not have considered the oral agreement to have been a proper subject for the written agreement. Just as the purchase agreement and covenant not to compete logically composed a contract between the defendant and Butane Supplies, so the oral agreement of employment was logically an agreement between defendant and Pargas of Maryland. Accordingly, whether the collateral nature of the oral agreement is shown by the fact that the agreement was one between the defendant and a "stranger" to the instrument, or whether the agreement having been made with a "stranger" tends to show that the agreement was collateral, the parol evidence would be admissible.

⁴⁰ See note 38 *supra*.

⁴¹ *Evers v. Arnold*, 210 S.W.2d 270 (Tex. Civ. App.—Austin 1948).

⁴² *Id.* at 271.

⁴³ 2 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1621, at 479 n.76 (2d ed. 1956).

V. OTHER DEVELOPMENTS

Arbitration Under Insurance Contract. In *Carpenter v. North River Insurance Co.*⁴⁴ the Houston court of civil appeals was presented with the problem of whether the Texas General Arbitration Act⁴⁵ precludes common law arbitration of a dispute arising under an insurance contract. Before amendment of the Act in 1965,⁴⁶ article 238 expressly provided that "[N]othing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such mode as they select."⁴⁷ Accordingly, common law arbitration was held to be valid.⁴⁸ However, that provision was not re-enacted in 1965, nor did any of the 1965 amendments similarly provide that statutory arbitration was not exclusive. Also, the new amendments expressly excluded from the Act contracts of insurance and disputes arising thereunder.⁴⁹ Because of these two factors a question existed whether disputes arising under insurance contracts could validly be submitted to arbitration—specifically, to common law arbitration.

Carpenter involved an insurance policy containing an uninsured motorist clause. The insured, Carpenter, was involved in a collision with a driver who had no public liability insurance. Subsequently, Carpenter made a claim under the uninsured motorist clause of the policy. Because Carpenter and the insurer were unable to agree on either the liability or the amount of damages, arbitration of the claim was agreed to as provided in an arbitration clause of the policy. The arbitration hearing resulted in an award of damages to Carpenter, but the insurer refused to pay. The trial court dismissed a suit by Carpenter to reduce the award to judgment, holding that common law arbitration is no longer valid in Texas under the Texas General Arbitration Act. The court of civil appeals reversed, basing its decision on several grounds. First, the court found that common law arbitration was recognized in Texas even before the enactment of an arbitration statute.⁵⁰ It reasoned that because repealed article 238 referred to "the existing right of parties to arbitrate," the legislature considered parties to have that right at the time of enactment of the statute. Second, the court found article 1⁵¹ to be significant, providing that the common law, so far as not inconsistent with Texas law, shall continue in force until altered or repealed by the legislature. Thus the court determined that in the absence of statutory language rendering common law arbitration invalid, it does not necessarily follow that failure to re-enact article 238 removes this right. Finally, the court observed that in other states providing for statutory arbitration, and in Texas under the labor arbitration sta-

⁴⁴ 436 S.W.2d 549 (Tex. Civ. App.—Houston 1968).

⁴⁵ TEX. REV. CIV. STAT. ANN. arts. 224-38 (1959).

⁴⁶ *Id.* art. 238.

⁴⁷ *Id.*

⁴⁸ *Ferguson v. Ferguson*, 93 S.W.2d 513 (Tex. Civ. App.—Eastland 1936); *Bell v. Campbell*, 143 S.W. 953 (Tex. Civ. App.—Amarillo 1911); *Hill v. Walker*, 140 S.W. 1159 (Tex. Civ. App.—Austin 1911).

⁴⁹ TEX. REV. CIV. STAT. ANN. art. 224 (Supp. 1969).

⁵⁰ *Rector v. Hunter*, 15 Tex. 380 (1855).

⁵¹ TEX. REV. CIV. STAT. ANN. art. 1 (Supp. 1969).

tute,⁵³ common law arbitration remains available. Although the decision seems correct, it may be contrary to the intention of the legislature in excluding insurance disputes from arbitration. There is evidence that the legislature excluded insurance contract arbitration from the Act in an attempt to avoid problems created by the use of form contracts in insurance sales.⁵³ Such contracts containing arbitration clauses force an insured to accept an agreement to arbitrate along with the policy of insurance. Because an arbitration clause may be written to favor the insurer, the problem is one which merits consideration. It has been suggested that state officials have the requisite authority to prevent the use of such clauses when they unfairly favor the insurer.⁵⁴ By this view, the exemption of all insurance arbitration seems unnecessary. Under *Carpenter* the many salutary uses of arbitration remain available. However, it may now become necessary to carve out new rules and methods of preventing abuse of arbitration in the insurance industry.

Contracts With Public School Districts. In *National Surety Corp. v. Friendswood Independent School District*⁵⁵ the supreme court held that where a school district had eligible funds available at the time of entering into a contract for construction, subsequent exhaustion of those funds does not affect the right of the contractor to obtain an enforceable judgment against the district for sums payable under the contract. By statute,⁵⁶ the trustees of a public school district are prohibited to enter into contracts which create a "deficiency debt" against the district.⁵⁷ This statute was interpreted by the supreme court in 1955 to preclude the payment of otherwise valid contractual claims unless funds for the current year of the claim were available.⁵⁸ Accordingly, even though a school district had sufficient funds available in the year when it entered into a contract, no liability was created if the funds had been expended at the time when a claim was presented. In *Friendswood* the court expressly overruled this decision. Although the court acknowledged that sufficient funds must have been available at the time of the making of the contract, it held that a valid claim or judgment may be enforced against the school district at a later time, and paid out of surplus funds of other years.⁵⁹

Oral Modification of Financing Contract. One case decided by the court of civil appeals provides an interesting discussion of the effect which

⁵³ *Id.* arts. 239-49 (1959).

⁵³ Note, *Arbitration and Award—Commercial Law—An Agreement To Submit an Existing or Future Dispute to Arbitration Is Valid and Enforceable*, 44 TEXAS L. REV. 372 (1965).

⁵⁴ Carrington, *The 1965 General Arbitration Statute of Texas*, 20 SW. L.J. 21, 38-39 (1966).

⁵⁵ 433 S.W.2d 690 (Tex. 1968).

⁵⁶ TEX. REV. CIV. STAT. ANN. art. 2749 (1965).

⁵⁷ Although art. 2749 prohibits creating a deficiency debt only in regard to contracts with teachers, this has been extended to apply to other types of contracts as well. *Campbell v. Jones*, 153 Tex. 101, 264 S.W.2d 425 (1954); *Stephenson v. Union Seating Co.*, 26 Tex. Civ. App. 16, 62 S.W. 128 (1901), *error denied*.

⁵⁸ *Aldine Ind. School Dist. v. Standley*, 154 Tex. 547, 280 S.W.2d 578 (1955).

⁵⁹ To enforce a claim against surplus funds of a prior or subsequent year, the court held that mandamus was the proper remedy. *National Sur. Corp. v. Friendswood Ind. School Dist.*, 433 S.W.2d 690 (Tex. 1968).

an oral agreement to accept late payments may have on a creditor's rights under a written note and security instrument. In *Southwestern Investment Co. v. Alvarez*⁶⁰ the defendant company financed the purchase of an automobile by the plaintiff. Under provisions in a promissory note and chattel mortgage, defendant was given the power to repossess and sell the automobile upon plaintiff's default in making payments. When plaintiff became delinquent in his payments, he contacted a collection agent of defendant, who orally agreed that if the car was delivered to defendant, and late payments tendered with a "late charge," the car would be returned to plaintiff. However, after delivering the car and tendering the late payments and "late charges," plaintiff found that the car had been sold. The court of civil appeals affirmed a decision by the trial court, awarding plaintiff damages for conversion of the automobile. Although the decision is undoubtedly correct, the reasoning of the court is not entirely clear. Plaintiff alleged that because defendant had often entered into similar late payment arrangements with him and other persons on prior occasions, defendant should be estopped to assert an inconsistent course of action. The court agreed, finding that "equitable estoppel" applied. However, the court further found that the oral agreement was amply supported by consideration because plaintiff obligated himself to pay a "late charge" in consideration for defendant's promise to forbear. In finding the existence of consideration, the court seemed to distinguish *Phoenix Furniture Co. v. McCracken*,⁶¹ an earlier case involving a promise of forbearance by a creditor. In that case the creditor agreed not to exercise any of its rights under a note and chattel mortgage while the delinquent debtor was out of town and before an itemized statement of the debtor's account was made available. There the court determined that because no consideration supported the promise, the creditor was not liable for repossession of the property under the mortgage. However, it is doubtful that the only distinction between the two situations is the existence of consideration in the instant case. If equitable estoppel properly applies to the facts in *Alvarez*, the earlier case may be distinguished by its facts. First, there was no showing of prior acts of forbearance by the creditor in *Phoenix* which would have induced the debtor to rely on the creditor's promise. Second, although in *Phoenix* the debtor left town after the creditor agreed to forbear, her doing so is arguably not the type of reliance contemplated by the doctrine of equitable estoppel.

Perhaps it is unfortunate that the court chose to discuss equitable estoppel. The sufficiency of finding that the agreement to forbear was supported by consideration seems clear. The court ultimately based its decision on the enforceability of the oral promise as a contract. It found simply that the defendant was estopped to deny that its obligations were affected by *that contract*. Accordingly, the doctrines of equitable estoppel and oral modification of a written contract become confused. The court found that defendant's collection agent had apparent authority to make the

⁶⁰ 442 S.W.2d 862 (Tex. Civ. App.—El Paso 1969).

⁶¹ 3 S.W.2d 545 (Tex. Civ. App.—Beaumont 1928).

promise of forbearance. Such authority is a necessary element in finding the existence of an enforceable agreement. However, the court also relied on the finding that defendant's manager knew or should have known of the promise, but failed to repudiate it. This determination is important only with respect to estoppel.⁶²

⁶² See text accompanying notes 20-21 *supra*.