



---

January 1957

## Does the Hatridge Case Legalize Usury - *Hatridge v. Home Life & (and) Accident Co.* Revisited

Harvey L. Davis

---

### Recommended Citation

Harvey L. Davis, *Does the Hatridge Case Legalize Usury - Hatridge v. Home Life & (and) Accident Co. Revisited*, 11 Sw L.J. 433 (1957)  
<https://scholar.smu.edu/smulr/vol11/iss4/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

DOES THE HATRIDGE CASE "LEGALIZE" USURY?  
(HATRIDGE V. HOME LIFE & ACCIDENT CO.  
REVISITED)<sup>†</sup>

by

Harvey L. Davis\*

**H**atridge v. Home Life & Acc. Ins. Co.,<sup>1</sup> a Court of Civil Appeals case (writ of error was not applied for in the Supreme Court), held the Texas Credit Insurance Act<sup>2</sup> to be constitutional. In view of the conclusions reached by the writer in a previous article<sup>3</sup> that Section 6 of the Credit Insurance Act is unconstitutional, a detailed study of all possible aspects of the *Hatridge* case has been made. As a result of this study, it has become apparent to the writer that the *Hatridge* case has no real validity as authority for the constitutionality of the Credit Insurance Act. There are at least three reasons why the case should not be considered as valid authority.

*First.* The *Hatridge* case was, to use the politest term possible, a "test" case.<sup>4</sup> It was not a real adversary proceeding, which is essential for a valid judgment.<sup>5</sup>

*Second.* The stipulated facts in the *Hatridge* case did not actually raise a valid issue as to the constitutionality of Section 6 of the Credit Insurance Act.<sup>6</sup>

---

† This article is the second of a series of articles considering Texas laws pertaining to the regulation of the small loan and consumer finance business. The author acknowledges with appreciation assistance in the form of a research grant from the Southwestern Legal Foundation.

\* A.B., University of Akron; LL.B., Southern Methodist University; Professor of Law and Director of Moot Court Activities, School of Law, Southern Methodist University.

<sup>1</sup> 246 S.W.2d 666 (Tex. Civ. App. 1951).

<sup>2</sup> TEXAS INS. CODE ANN. art. 3.53 (Supp. 1956).

<sup>3</sup> Davis, *Does the Texas Credit Insurance Act "Legalize" Usury?* 11 Sw. L.J. 139 (1957) (hereinafter cited as Davis).

<sup>4</sup> The plaintiff, before and at the time the suit was instituted, was employed by the legal firm that represented the defendants. The plaintiff's actions in connection with the suit were directed by a member of the said legal firm. Legal documents filed in the suit on behalf of both the plaintiff and defendants were prepared in the office of the legal firm that represented the defendants.

<sup>5</sup> See *U. S. v. Johnson*, 319 U. S. 302 (1942); *Texas & P. R. R. v. Gay*, 86 Tex. 571, 26 S.W. 599, 612 (1894); *Wolf v. Butler*, 81 Tex. 86, 16 S.W. 794 (1891).

<sup>6</sup> See Plaintiff's Original Petition and Stipulation Between Plaintiff and Defendants filed in said case. Although Plaintiff's Original Petition alleged that the defendants "have conspired together and devised a scheme for the selling of life, health and accident insurance in conjunction with the making of loans for the sole purpose of creating a subterfuge in order that said defendant, V. L. Ware, can receive an unlawful and usurious rate of interest through commissions paid to him by defendant, Home Life & Accident Insurance Company," none of these allegations or any facts supporting them were made a part of the Stipulation Between Plaintiff and Defendants. The Stipulation Between Plaintiff and Defendants contained no facts showing that the defendants had obtained or contracted to obtain usurious interest from the plaintiff, so the plaintiff was not entitled to judgment

*Third.* The opinion reached an erroneous conclusion that Section 6 of the Texas Credit Insurance Act was constitutional despite the fact that every authority cited therein was either authority for its unconstitutionality or was irrelevant to that issue.

The Court of Civil Appeals evidently was not aware that the *Hatridge* case was a test case, and its opinion makes no reference to the argument by the Junior Bar Association of Dallas as *amicus curiae* that the stipulated facts did not actually raise a valid issue as to the constitutionality of the Credit Insurance Act. Therefore this article will not further consider these two aspects of the case, but will direct full concentration to the merits of the opinion itself.

Such concentration requires a minute analysis and a careful paragraph-by-paragraph and sentence-by-sentence reading of that part of the opinion dealing essentially with Section 6 of the Texas Credit Insurance Act (hereinafter referred to as "Section 6"). For the convenience of the reader every paragraph and sentence so analyzed will be quoted verbatim. To avoid repetition, frequent reference will be made to the writer's article "Does the Texas Credit Insurance Act 'Legalize' Usury?"<sup>7</sup> where, set out in detail, are legal principles and authorities pointing to the conclusion that Section 6 of the Texas Credit Insurance Act is unconstitutional.

The facts as placed before the trial court sitting without a jury, in the "Stipulation Between Plaintiff and Defendants," were essentially as follows: Plaintiff Hatridge received \$200 cash as a loan from defendant Ware and signed a note for \$246.12 payable in twelve monthly installments of \$20.51. The total amount due included \$10.77 as interest collected in advance, \$17.10 as the premium for the purchase of "a credit life, health and accident policy" and \$18.25 as the premium for "a hospitalization and surgical expense policy," said policies being issued by defendant Home Life & Accident Co.<sup>8</sup> It was stipulated that the purchase of credit life, health and accident insurance with Ware as "first beneficiary" was a condition of loan but Hatridge was advised he was free to purchase such insurance

---

regardless of whether the Credit Insurance Act is or is not constitutional. The *amicus curiae* brief filed by the Junior Bar Association of Dallas argued this point in some detail.  
<sup>7</sup> 11 Sw. L.J. 139 (1957).

<sup>8</sup> This stipulation seems to treat the credit life insurance and the credit health and accident insurance as one policy and the hospitalization and surgical expense insurance as one policy, apparently in an effort to get a ruling that Section 5 of the Texas Credit Insurance Act did not prohibit such insurance as being "more than one policy of credit life insurance or more than one policy of credit health and accident insurance." The *Hatridge* opinion, beginning at page 670, rejected the defendants' arguments on this point and held the writing of the hospitalization and surgical expense insurance to be prohibited under express language of Section 5. Because the writer believes this part of the opinion is correct no further analysis of it will be made.

from any reputable company.<sup>9</sup> It was stipulated that Hatridge requested the purchase of the hospitalization insurance from Ware and agreed that the premium charged could be added to the face amount of the note.<sup>10</sup> It was stipulated that Ware received the commission on all the policies from the insurance company but the amount of such commission was not stated.<sup>11</sup>

About two months after the note was signed and before Hatridge made any payments thereon his Petition was filed. Hatridge asked for cancellation of the note upon tender of \$200. The defendants filed a general denial and Ware filed a cross action on the note. The trial court rendered judgment against plaintiff for the full amount of the note less unearned interest, holding the Credit Insurance Act in all respects constitutional.

The Court of Civil Appeals affirmed the trial court's holding that the Credit Insurance Act is constitutional. It reformed the judgment, however, after finding that the transaction violated Section 5 of the Texas Credit Insurance Act by selling more than "one policy of credit life, or more than one policy of credit health and accident insurance" in connection with one loan.<sup>12</sup> This article will consider only that part of the opinion dealing with the constitutionality of the Credit Insurance Act.

It is difficult to pinpoint in the opinion the exact basis for the court's conclusion that Section 6 is constitutional. Section 11 of Article XVI of the Constitution of Texas provides that "All contracts for a greater rate of interest than ten per centum per annum, shall be deemed usurious" and the Legislature "shall provide pains and penalties to prevent the same." Despite that constitutional ban on usury, the Hatridge opinion held that the Legislature has the power to enact a valid statute such as Section 6, which declares that commissions received by the lender for compulsory credit insurance<sup>13</sup> "shall be considered for all purposes as compensation for

---

<sup>9</sup> This stipulation carefully complies with the "option" requirement of Section 4 of the Texas Credit Insurance Act.

<sup>10</sup> This stipulation laid the basis for the freedom of contract argument by defendants, *i.e.*, that Hatridge was free to purchase hospitalization insurance from anyone he chose. This argument was rejected by the Hatridge opinion. 246 S.W.2d at 671.

<sup>11</sup> This stipulation is significant for what it fails to stipulate. The theory of the suit was that insurance commissions received by lender Ware constituted an unlawful and usurious rate of interest. See quotation from Plaintiff's Original Petition, note 6, *supra*. Yet nowhere in the record is the amount of the commissions stated.

<sup>12</sup> See notes 8 and 10 *supra*.

<sup>13</sup> Section 4 of the Credit Insurance Act permits the lender to require the borrower to purchase credit life or credit health and accident insurance, or both, as a condition for making the loan.

services rendered to such insurer and shall not be taken to be an interest charge on the money borrowed."

Essentially, the basis for such a conclusion seems to be that the Legislature has power to change the definition of "interest" or power to declare what shall and what shall not be considered as "interest." It is obvious that the Legislature does not have such power, for that would be tantamount to having power to nullify Section 11 of Article XVI of the constitution.<sup>14</sup> The *Hatridge* opinion does not seek to explain or overcome the hydra of error thus made.

The *Hatridge* opinion begins as follows: "The suit in sum is an attack on Art. 4764c, V.A.C.S. [TEX. INS. CODE ANN. art. 6.13 (1952)], as unconstitutional." However, in the five-page opinion, the following paragraph is the only one that seems to deal specifically with the constitutionality of the statute:

As to validity of this legislation, even if doubtful, we would be required to sustain it. 9 Tex. Jur., p. 478. Neither are we at liberty to invalidate it, though in our opinion same may be inexpedient or unwise. 9 Tex. Jur., p. 490. It may be said in favor of the measure that prima facie it protects the small borrower from exorbitant rates, and coercion of insurance that bears no reasonable relation to the benefits conferred. Appellant has not demonstrated that Art. 4764c is anyway in conflict with the constitutional inhibition against usury; and considered as a whole in view of its emergency clause, the Act evidences a valid exercise of legislative power.<sup>15</sup>

It seems unfortunate that such scant treatment was given to the constitutionality of this important statute. In the above paragraph not one case is cited. There are two references to Texas Jurisprudence, which upon examination are found to contain generalities not at all applicable to the problem under consideration. However, to place the above paragraph in its proper perspective, a detailed analysis of the opinion leading up to this paragraph will be made so that the validity of the conclusions in the above paragraph can be tested.

After summarizing the stipulated facts, the opinion quotes article 16, section 11 of the Texas constitution and part of TEXAS REVISED CIVIL STATUTES ANNOTATED article 5071 (1947). It then states that it is appellant's contention, in view of the constitutional prohibition just quoted, that payment to defendant Ware of commissions incident to the issuance of credit insurance constituted usury or additional compensation to the lender for the loan of money and that Section 6, which recites that such payment of commissions "shall not

<sup>14</sup> See Davis, *supra* note 3, at 143-49, 156.

<sup>15</sup> 246 S.W.2d at 670.

be taken to be an interest charge on the money borrowed," is in conflict with the constitution.<sup>16</sup> The opinion then relates that the question narrows to a determination of whether said article is a valid exercise of legislative power and in that connection the following general discussion is pertinent:

First, 'Whereas the Congress of the United States has only such powers as are granted by the Federal Constitution, the state legislature is conceded to be at liberty to pass any act which is not in violation of some provision of the state or federal constitution.' 9 Tex.Jur., p. 444. 'All power which is not limited by the Constitution inheres in the people, and an act of a state legislature is legal when the Constitution contains no prohibition against it.' 11 Am.Jur., p. 619. *Watts v. Mann*, Tex.Civ.App., 187 S.W.2d 917, writ ref.<sup>17</sup>

These general observations are true. It is axiomatic that the state legislature is at liberty to pass any act which is not in violation of the state or Federal Constitution and that any such act is legal when the constitution contains no prohibition against it. But the above quotation is an indication of the assumption made throughout the opinion that Section 6 is not in violation of the state constitution and that the constitution contains no prohibition against it. Yet these were the very questions in issue and to be decided. *Watts v. Mann*,<sup>18</sup> cited in the above quotation, is certainly no authority for upholding the constitutionality of Section 6 of the Act. It upheld that portion of Article 4646b<sup>19</sup> giving injunctive powers to the state against loan brokers as being within the power of the legislature because the statute carried out the constitutional mandate to the legislature to prevent usury. The *ratio decidendi* of *Watts v. Mann* makes it strong authority against the constitutionality of Section 6 which permits usury in face of the prohibition in the constitution against usury.<sup>20</sup> The reasoning in *Watts v. Mann* sustains the argument that the Legislature has the power to use means other than "pains and penalties" to carry out the constitutional mandate to prevent usury; therefore, in the face of such mandate it cannot have power to use any means to permit usury.<sup>21</sup>

The opinion then continues:

Second, aforesaid constitutional provision is self-executing only to the extent of rendering illegal all usurious contracts. 9 Tex.Jur., p. 423;

<sup>16</sup> 246 S.W.2d at 667, 668.

<sup>17</sup> 246 S.W.2d at 668.

<sup>18</sup> 187 S.W.2d 917 (Tex. Civ. App. 1945) *error ref.*

<sup>19</sup> TEX. REV. CIV. STAT. ANN. (Supp. 1956).

<sup>20</sup> For detailed analysis of the effect of Section 6, see Davis, *supra* note 3, at 149-152.

<sup>21</sup> For detailed treatment of *Watts v. Mann* with relation to the Texas Credit Insurance Act reference is made to Davis, *supra* note 3, at 147-48.

Carder v. Knippa Mercantile Co., Tex.Civ.App., 1 S.W.2d 462; Watts v. Mann, *supra*; as illustrated by Watson v. Aiken, 55 Tex. 536, and Hemphill v. Watson, 60 Tex. 679, where the contract itself disclosed a prohibited rate of interest.<sup>22</sup>

The opinion, in quoting 9 Texas Jurisprudence 423, that the constitutional provision is "self-executing only to the extent of rendering illegal all usurious contracts," did not include the next sentence which reads: "The power and duty of fixing penalties for violation of the constitutional provision is delegated to the legislature." *Carver v. Knippa Mercantile Co.*<sup>23</sup> is cited by *Texas Jurisprudence* as authority for the latter sentence. That case indicates that the legislature may have the power to fix a penalty where more than 6 per cent interest is charged in situations where there is no agreement between the parties as to the interest rate. Also the case is authority for the fundamental proposition that the legislature cannot pass legislation to convert usurious contracts into legal ones. It recognizes that the constitutional provision is self-executing to the extent of rendering illegal *all* usurious contracts and that the legislature has the duty to fix penalties for usury. The exact statement of the court was:

This provision is self-executing to the extent only of rendering usurious contracts illegal, and to the Legislature was delegated the power and duty of fixing penalties for violations of the constitutional provision. Hemphill v. Watson, 60 Tex. 679; Quinlan's Estate v. Smye, 21 Tex.Civ.App. 156, 50 S.W. 1068.<sup>24</sup>

The use of the qualifying word "only" was to make it clear that the constitution itself does not provide penalties for usury but placed with the legislature the power—and the duty—to provide penalties.

*Watts v. Mann*<sup>25</sup> is again cited in this quotation. That case affirmed *Carder v. Knippa Mercantile Co.* in holding that the constitution itself makes *all* usurious contracts illegal and that the legislature has a mandate to prevent such contracts. Therefore both cases stand for legal principles contrary to the *Hatridge* decision and Section 6.<sup>26</sup>

The cited cases of *Watson v. Aiken*<sup>27</sup> and *Hemphill v. Watson*<sup>28</sup> contain no authorities or principles favorable to the *Hatridge* decision or to Section 6, for the contracts in each case were found to be usurious under the self-executing provision of the constitution

---

<sup>22</sup> 246 S.W.2d at 668-69.

<sup>23</sup> 1 S.W.2d 462 (Tex. Civ. App. 1927) *error dismiss.*

<sup>24</sup> 1 S.W.2d 462 at 463.

<sup>25</sup> See note 18, *supra*.

<sup>26</sup> See notes 20 and 21, *supra*.

<sup>27</sup> 55 Tex. 536 (1881).

<sup>28</sup> 60 Tex. 679 (1884).

alone. When these cases arose the legislature had not yet passed acts setting out "pains and penalties" to prevent usury. On the other hand, these cases are clearly authority for holding usurious such contracts as Section 6 attempts to legalize, under the self-executing provisions of the constitution alone. It is to be noted that the *Hatridge* opinion, in citing *Hemphill v. Watson*, follows with the statement that ". . . the contract itself disclosed a prohibited rate of interest."<sup>29</sup> This statement could be taken to mean that *Hemphill v. Watson* is authority that the constitutional provision is self-executing only when a contract shows on its face that it is for a usurious rate of interest. But no such limitation is found in that case or any of the other cases holding article 16, section 11 of the constitution to be self-executing.<sup>30</sup> Also, there are many Texas cases in which the courts have looked behind the contracts to determine whether the contracts were in fact usurious regardless of the words used on their face.<sup>31</sup>

The opinion then states:

Nor does the Constitution define 'interest,' Art. 16, sec. 11, not being worded so as to create actionable rights and enforceable remedies in all cases without the aid of legislation.<sup>32</sup>

The meaning of this sentence or its application to the facts of the case is not immediately apparent. The implication of this sentence, coupled with later statements in the opinion,<sup>33</sup> seems to be that the legislature has the power to say what is or is not "interest," since "interest" is not defined in the constitution; and that in some circumstances there may be usurious contracts where no actionable rights and enforceable remedies exist under the constitution because not given "aid of legislation."

While it is true the constitution does not define interest, the use of the word "interest" in the usury provision of the constitution was necessarily with a definite and specific meaning.<sup>34</sup> And it may be true that article 16, section 11 does not of itself create actionable rights and enforceable remedies in all cases of usury, without the aid

<sup>29</sup> See p. 438, *supra*.

<sup>30</sup> *Carder v. Knippa Mercantile Co.*, 1 S.W.2d 462 (Tex. Civ. App. 1957) *error dismissed*; *Watts v. Mann*, 187 S.W.2d 917 (Tex. Civ. App. 1945) *error ref.*; *Glenn v. McCarty*, 130 S.W.2d 295 (Tex. Civ. App. 1939), *aff'd*, 138 Tex. 16, 155 S.W.2d 912 (1941).

<sup>31</sup> *Schmid v. City Nat'l Bank*, 132 Tex. 115, 114 S.W.2d 854 (1938); *Graham & Locke Investment Co. v. Madison*, 295 S.W.2d 234, 243 (Tex. Civ. App. 1956) *error ref. n.r.e.*; *Autocredit of Ft. Worth, Inc. v. Pritchett*, 223 S.W.2d 951 (Tex. Civ. App. 1949) *error dismissed*; and cases cited in 42 TEX. JUR., *Usury* § 8 (1936).

<sup>32</sup> 246 S.W.2d at 669.

<sup>33</sup> See p. 443, *infra*.

<sup>34</sup> For development of this point of constitutional law see *Davis*, *supra* note 3, at 143-44.



of legislation. Nevertheless, by virtue of article 16, section 11, all contracts for a greater rate of interest than ten per cent per annum are usurious, whether there is or is not "aid of legislation."<sup>35</sup> In all such cases, because of the self-executing aspects of article 16, section 11, the borrower has been able to get relief from usurious interest, though technically he may not have been given "actionable rights and enforceable remedies" by "aid of legislation."<sup>36</sup>

The opinion, in the above quoted sentence, seems to be stating a converse proposition to the prime issue under consideration. Under the constitutional mandate to the legislature any "aid of legislation" is to "provide appropriate pains and penalties to prevent" usurious contracts. Under consideration by the court was whether Section 6, in saying commissions received by lenders "shall be considered for all purposes as compensation for services rendered to such insurer and shall not be taken to be an interest charge on the money borrowed" was legislation permitting usurious contracts. It is elementary that statements and authorities used to uphold legislation designed to carry out the mandate to prevent usurious contracts cannot be validly used to uphold legislation designed to circumvent the constitutional provision against usurious contracts.

The opinion concludes the paragraph the writer has been quoting from as follows:

. . . Following the 1891 amendment, sec. 11, Art. 16, the Legislature proceeded to define interest as 'compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money', with conventional interest at not exceeding 10%, Art. 5069, and legal interest at 6%, Art. 5070; usury being defined as 'interest in excess of the amount allowed by law;' with Art. 5071, already quoted in part, supplying other deficiencies.<sup>37</sup>

The definition of interest by the legislature in article 5069 as quoted above is the common law definition.<sup>38</sup> It is therefore a proper definition of interest because it conforms to the meaning of interest as used in the constitution. The legislature has not changed the definition of interest. It cannot legally change the constitutional meaning of interest in a manner that would permit usurious contracts.<sup>39</sup>

<sup>35</sup> *Hemphill v. Watson*, 60 Tex. 679 (1894); *Watson v. Aiken*, 55 Tex. 536 (1881).

<sup>36</sup> *Ibid* and the following cases: *Roberts v. Coffin*, 22 Tex. Civ. App. 127, 53 S.W. 597 (1899); *Quinlan's Estate v. Smye*, 21 Tex. Civ. App. 155, 50 S.W. 1068 (1899); *Dunman v. Harrison*, 41 S.W. 499 (Tex. Civ. App. 1897).

<sup>37</sup> 246 S.W.2d at 669.

<sup>38</sup> The element of "detention" of money first appeared in the Texas Revised Statutes of 1879 so the present constitutional provision against usury which became effective in 1891 adopted the element of "detention" in the definition of interest. See *Parks v. Lubbock*, 92 Tex. 635, 51 S.W. 322 (1899).

<sup>39</sup> For a detailed discussion of this point see *Davis*, *supra* note 3, at 143-49.

There is authority that the legislature may broaden the concept of interest for the purpose of carrying out the constitutional mandate to prevent usury,<sup>40</sup> just as it may create additional remedies for that purpose.<sup>41</sup>

However, the legislature in section 6 undertakes to decree that commissions received by lenders for compulsory credit insurance on the borrowers ". . . shall not be taken to be an interest charge on the money borrowed." Yet such commissions, when received as compensation for the use of money, come within the definition of interest in article 5069; come within the constitutional meaning of interest, and come within the meaning of interest in all previous court decisions. A crucial question in the *Hatridge* case was whether the legislature had the power to decree by statute that compensation in the guise of compulsory credit insurance commissions received by lenders for the use of money shall not be interest; this in the face of its own definition of interest as compensation for the use of money and in the face of the constitutional meaning of interest and as laid down by the courts. It is axiomatic that the legislature has no such power, because, if it did, article 16, section 11 of the constitution would be absolutely meaningless.<sup>42</sup>

The opinion proceeds:

Third, 'Admittedly a lender may, without violating the usury law, make an extra charge for any distinctly separate and additional consideration other than the simple lending of the money (42 Tex. Jur. 932; *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046; 109 A.L.R. 1464); \* \* \*.' *Greever v. Persky*, 140 Tex. 64, 165 S.W.2d 709, 712.<sup>43</sup>

This dictum from *Greever v. Persky*<sup>44</sup> is misleading unless placed in its proper context. First, the quotation contains a qualification in that the lender "may," without violating the usury law, make an extra charge for any distinctly separate and additional consideration other than for the lending of money. But even this statement is not true if such extra charge is made with usurious intent.<sup>45</sup>

Second, the quotation begs an important question involved in Section 6 and the *Hatridge* case, namely, whether the credit insurance commissions arising from compulsory credit insurance were received by the lender as compensation for the use of money or were

<sup>40</sup> *Parks v. Lubbock*, 92 Tex. 635, 51 S.W. 322 (1899).

<sup>41</sup> *Watts v. Mann*, 187 S.W.2d 917 (Tex. Civ. App. 1945) *error ref.*

<sup>42</sup> See notes 14 and 39, *supra*. Also see *Donaldson, Small Loan Legislation in Texas*, 20 TEXAS L. REV. 186, 190 n.8 (1941).

<sup>43</sup> 246 S.W.2d at 669.

<sup>44</sup> 140 Tex. 64, 165 S.W.2d 709, 712 (1942).

<sup>45</sup> *Glover v. Buchanan*, 104 S.W.2d 66 (Tex. Civ. App. 1937) *error disp.*

an innocent extra charge for a distinct, separate and additional consideration to the borrower.

Applied as a test of Section 6, the inquiry is whether commissions received by the lender for the compulsory credit insurance are invariably "an extra charge for any distinctly separate and additional consideration other than the simple lending of money." Obviously the answer is no, because the very intent of the statute and the lender is that he receive such commission as additional consideration for the simple lending of money.<sup>46</sup> Even the stipulated facts in the *Hatridge* case do not show that Ware received the commissions for "any distinctly separate additional consideration" other than the loan. The Supreme Court in *Greever v. Persky* held as a matter of law that Greever, in procuring money from a bank on his own credit and security and then lending to Persky, did not render any service to Persky other than the lending of money for which he had no right to charge a commission or bonus. It is authority against the constitutionality of Section 6 and is authority against the decision in the *Hatridge* case.

*Nevels v. Harris*,<sup>47</sup> cited in the above quotation, is not authority for the constitutionality of Section 6, for it held that fees paid out of the loan to the inspector of the land and the attorney examining the title and drawing up the legal papers were not interest, where the ". . . lender does not participate in the fund so paid." The purpose of Section 6 is to permit the lender to participate in the fund so paid. The stipulated facts in the *Hatridge* case were that the lender Ware received the commissions and thereby was permitted to "participate in the funds so paid." The *Nevels* case, too, is authority against the constitutionality of Section 6 and the decision in the *Hatridge* case.

The opinion then states:

'A collateral transaction between the borrower and lender, whereby the lender may take profit, will not render the loan usurious when such transaction was entered into in good faith and without usurious intent.' *C. C. Slaughter Co. v. Eller*, Tex.Civ.App. 196 S.W. 704, syl. 14.<sup>48</sup>

This is not an accurate statement of the law. There are numerous cases holding that if the arrangements, although set up under ostensibly legal forms, including collateral transactions, result in the

---

<sup>46</sup> For detailed treatment of this point see Davis, *supra* note 3, at 152-54. The *Hatridge* opinion itself says that the purpose of the Act is to render bona fide any transaction made in accordance with its terms. See pp. 451, 52 *infra*.

<sup>47</sup> 129 Tex. 190, 102 S.W.2d 1046 (1937).

<sup>48</sup> 246 S.W.2d at 669.

lender collecting usurious interest, the element of the actual intent of the parties is not essential.<sup>49</sup> But even if this statement is taken at face value it is very unfavorable to the constitutionality of Section 6, for it requires an actual, bona fide collateral transaction made in good faith and without usurious intent; whereas Section 6 attempts to make the compulsory credit insurance a "collateral" transaction by legislative fiat, and then attempts to legalize the "collateral" transaction irrespective of good or bad faith or usurious intent. And the statement is also unfavorable to the *Hatridge* decision, because the stipulated facts in the *Hatridge* case were that "as a condition of loan" Hatridge had to purchase credit life, health and accident insurance. So it was not and could not be a "collateral" transaction, nor was it stipulated that this was a collateral transaction entered into in good faith and without usurious intent. And again, the decision of the case from which the above quotation was extracted is not authority favorable to the constitutionality of Section 6, nor to the decision in the *Hatridge* case. Usury was pleaded but the court held that usury was in no event decisive of the appeal, therefore the assignments of error on the question of usury were not considered in detail, but the court stated the law for the guidance of the lower court on another trial.

And then the opinion states:

And Fourth, the power of the Legislature to broaden the common law definition of 'interest' was recognized by the Supreme Court in *Parks v. Lubbock*, 92 Tex. 635, 51 S.W. 322; and recent Legislatures have given further sanction to the rule stated in *Greever v. Persky*, supra, by declaring that certain things, including insurance premiums, should not be regarded as interest. See Art. 342-508, V.A.S., Texas Banking Code; Art. 4646b, V.A.S., the latter statute having been held constitutional: *Watts v. Mann*, supra; *Wooldridge v. State*, Tex.Civ. App., 183 S.W.2d 746; *Wilkenfeld v. State*, Tex.Civ.App., 189 S.W.2d 80.<sup>50</sup>

This statement seems to imply that the legislature has the constitutional power to declare what shall and what shall not be interest, irrespective of its own definition of interest, the common law definition of interest, and the constitutional meaning of interest.

<sup>49</sup> *Sledge v. Murphy*, 284 S.W.2d 938 (Tex. Civ. App. 1955); *Donoghue v. State*, 211 S.W.2d 623 (Tex. Civ. App. 1948) *error ref. n.r.e.*; *Federal Mortgage Co. v. State Nat'l Bank*, 254 S.W. 1002 (Tex. Civ. App. 1923) *error disp.*; *Joy v. Provident Loan Soc'y*, 37 S.W.2d 254 (Tex. Civ. App. 1931), *judgment reformed and aff'd*, 124 Tex. 583, 80 S.W.2d 942 (1935). And see *Graham & Lock Investments v. Madison*, 295 S.W.2d 234, 243 (Tex. Civ. App. 1956) *error ref. n.r.e.*

<sup>50</sup> 246 S.W.2d at 669.

That the legislature has no such power has already been dealt with.<sup>51</sup> That the authority cited in the opinion in no wise upholds such a proposition will next be discussed.

The Supreme Court held in *Parks v. Lubbock*<sup>52</sup> that the legislature had power to add to the common law definition of "interest" the charge made by a lender for the borrower's detention of money. At common law the lender would charge the borrower an exorbitant rate for the time the borrower detained the money after maturity, under the guise that the charge was a "penalty" and not "interest" and therefore not usurious. The legislature closed this obvious loophole, and in doing so it was carrying out the constitutional mandate to prevent usury. *Parks v. Lubbock* is not authority that the legislature has the power to narrow the common law definition of interest or change said definition in any way that would thwart the constitutional mandate to prevent usury. *Parks v. Lubbock* and *Watts v. Mann*<sup>53</sup> are analogous in that both cases recognize and approve legislation designed to prevent and penalize usury, as directed by the constitution.

The *Hatridge* opinion misinterprets the words used in article 342—508<sup>54</sup> and article 4646b.<sup>55</sup> A consideration of the constitutionality of these statutes is not within the scope of this article. However, neither of these statutes declares in substance or otherwise that insurance premiums "shall not be regarded as interest" as is indicated in the above quotation. In the writer's opinion there is no reasonable way to extract such an interpretation from the words of these statutes.

Article 342—508, the only one which uses the word "insurance," states in part:

. . . Provided, however, a bank may require an applicant for a loan or discount to pay the cost of any abstract, attorney's opinion or title insurance policy, or other form of insurance, and filing or recording fees or appraisal fees.

Nowhere is this sentence qualified. The borrower, in paying the costs for the items listed in the quoted sentence is not paying "interest" if said costs are not intended to be for the use of money; but the statute does not attempt, as does Section 6, to preclude a showing that said costs were extracted for the use of money and therefore interest.

---

<sup>51</sup> See pp. 436, 39, 40, *supra*.

<sup>52</sup> 92 Tex. 635, 51 S.W. 322 (1899).

<sup>53</sup> See note 18, *supra*.

<sup>54</sup> Texas Banking Code, TEX. REV. CIV. STAT. ANN. (Supp. 1956).

<sup>55</sup> TEX. REV. CIV. STAT. ANN. (Supp. 1956).

The impression given by this portion of the *Hatridge* opinion is that the Legislature declared in article 4646b that "certain things, including insurance premiums, shall not be regarded as interest;" that such a declaration is correct and legal because article 4646b has been held constitutional. But such is unquestionably wrong, for article 4646b in nowise deals with or mentions insurance. Also, it was only that part of article 4646b creating injunctive powers against habitual usurious lenders that was held constitutional, on the basis that its purpose was to help carry out the constitutional mandate to the legislature to prevent usury.<sup>56</sup>

Section 2a of article 4646b reads in part as follows:

Nothing in this Act shall in any way modify, alter or change any valid provision of Article 8 of Chapter 5 of House Bill Number 79, Acts of the Regular Session, 48th Legislature [Article 342-508, Texas Banking Code] nor shall anything in this Act prevent charging of any actual and necessary expense, now or hereafter permitted and authorized by law, and such shall not be considered interest.

In the trial of any application for injunction under this Act there shall exist a prima facie presumption that the actual and necessary expenses of making any such loan was One (\$1.00) Dollar for each Fifty (\$50.00) Dollars, or fractional part thereof loaned. . . .

*Watts v. Mann* did not pass on whether section 2a is valid or invalid as an attempt to change or narrow the definition of interest.

Section 2a of article 4646b was involved in *Wooldridge v. State*,<sup>57</sup> another stipulated case where the agreed statement of facts between the county attorney and the lender did not really raise the issue of the constitutionality of section 2a of article 4646b. The court did not actually pass on its constitutionality. There is dicta to the effect that it is constitutional because it did not permit any charges forbidden by the constitution and its only effect was to create a prima facie presumption that a charge made by the lender was to cover the actual expense of making the loan, if it was not more than \$1.00 for each \$50.00 loaned. The parties agreed that the lender collected ten per cent interest and that a "service charge" was made as permitted under section 2a of article 4646b. It was alleged that such charge was not "for the use and detention of money but to pay the reasonable costs of making the loan." The trial court found the statute unconstitutional and restrained the defendant from collecting the "service charge" upon any loan made by him. The exact decision of the Court of Civil Appeals was that it was incumbent upon

---

<sup>56</sup> See notes 19, 25 and 26, *supra*.

<sup>57</sup> 183 S.W.2d 746 (Tex. Civ. App. 1944) *error ref. w.o.m.*

the state to prove that the "service charges" made by the defendant were not for legitimate expenses of making the loans and since the stipulated facts did not reveal whether the "service charges" were legal or illegal, the State had not sustained its burden of proof, so the judgment of the trial court was reversed and the cause remanded.

It is very significant that the Court of Civil Appeals refused to hold that the "service charges" were legal even in the face of the agreed stipulation that they were made pursuant to section 2a of article 4646b and the allegations of defendant lender that they were not for the use and detention of money but to pay the reasonable costs of making the loans. As discussed later in this article in detail,<sup>58</sup> the *Hatridge* opinion erroneously uses the analogous situation in the stipulated facts and allegations in that case to uphold the constitutionality of Section 6. The *Wooldridge v. State* opinion recognized that irrespective of statutory authorization, the real test was whether the lender in making the "service charges" was adding legitimate expenses of making the loans or was charging for the use of money. Contrast this with the effect of Section 6 and the decision of the *Hatridge* case in nullifying any such test.

*Wilkenfeld v. State*,<sup>59</sup> also cited in the part of the *Hatridge* opinion quoted above, agreed with *Watts v. Mann* that article 4646b is constitutional in giving the state power to enjoin habitual money lenders from charging usurious interest.

Omitting the next portion of the opinion making general statements about the Credit Insurance Act, the opinion then states:

Even prior to effective date of the statute under consideration, this Court had held that a requirement of personal insurance as additional security to the lender was lawful, 'provided the plan is not a cover for usurious loans.' *Texas Finance & Thrift Assn. v. State*, Tex.Civ.App. 224 S.W.2d 522, 523.<sup>60</sup>

This sentence carries several possible implications which will now be considered. The use of the word "even" could mean that if requiring personal insurance as a condition of the loan was lawful without a statute, it doubtless would be lawful when authorized by a statute. The sentence cites *Texas Finance & Thrift Ass'n v. State* as holding that such requirement was lawful. This is incorrect. The holding in that case was that a temporary injunction mandatorily requiring a lender to cease writing credit insurance as a condition of loan changed the status quo and accomplished the sole objective

<sup>58</sup> See pp. 449-51 and nn. 73-77 *infra*.

<sup>59</sup> 189 S.W.2d 80 (Tex. Civ. App. 1945).

<sup>60</sup> 246 S.W.2d at 669.

sought by a final injunction. Therefore the trial court's order was modified to restrain defendant

. . . from demanding, receiving or by the use of any means attempting to collect from the borrower usurious interest on account of any loan, or from thereafter charging any borrower usurious interest, or contracting for any usurious interest. . . .<sup>61</sup>

The Court of Civil Appeals in the *Texas Finance & Thrift Ass'n* case did by way of dicta state:

First, it is to be observed that the notes in question are prima facie lawful, providing for no more than ten per cent interest. So also, we think is the requirement for insurance as an additional security to the small lender, provided the plan is not a cover for usurious loans. The latter statement is made in view of Section 2a, Art. 4646b, making Art. 342—508, State Banking Code, a part thereof. . . .<sup>62</sup>

The *Hatridge* opinion admits that the "holding" in *Texas Finance & Thrift v. State* that section 2a of article 4646b made article 342—508, Texas Banking Code, a part thereof was "not entirely accurate" in view of the holding in *Wooldridge v. State*.<sup>63</sup> One of the specific holdings in the latter case was that section 2a of article 4646b did not make article 342—508, Texas Banking Code, a part thereof.<sup>64</sup> So the above quoted dicta was based on the erroneous assumption that a statute regulating bank loans had been incorporated into a statute dealing with small-loan lenders.

However, even the above quoted sentence from the *Texas Finance & Thrift Ass'n* opinion, when taken at its face value, is good authority against the *Hatridge* decision and the constitutionality of Section 6. The opinion in the above quotation is saying that a requirement of personal insurance is lawful with the qualification "provided the plan is not a cover for usurious loans." The main issue that presumably was before the court in the *Hatridge* case was whether the credit insurance plan Ware operated under was a cover for usurious loans and did the plan result in Ware's receiving additional compensation beyond the constitutional ten per cent per annum for the use of money. The Original Petition filed in behalf of Hatridge made

<sup>61</sup> *Texas Finance & Thrift Ass'n v. State*, 224 S.W.2d 522, 525 (Tex. Civ. App. 1949).

<sup>62</sup> *Id.* at 523.

<sup>63</sup> 246 S.W.2d at 669 n.2.

<sup>64</sup> 183 S.W.2d 746 at 749: "In reaching the conclusions we have made, we are of the opinion that the provisions of Article 8 of 'The Banking Code' cannot be made to apply to the appellant or to any other person, firm, association or corporation by and through the 'negative' language that was employed in the Act under discussion and its Section 2a. We believe that to effect such a purpose it is necessary to amend 'The Banking Code' so as to affirmatively include appellant and others situated as he, or that such provisions of said 'Code' as the Legislature may desire to make applicable to appellant and others should have been or should be re-enacted in the Act here under review."



such allegations but they were not passed on in the opinion in the *Hatridge* case. There is no further discussion or consideration as to whether the plan was or was not a cover for a usurious loan. This for the reason that the opinion assumes the validity of Section 6, and Section 6 precludes any inquiry as to whether the plan of credit insurance is or is not a cover for usurious loans. Yet one of the reasons Section 6 is invalid is that in attempting to decree that credit insurance commissions received by the lender "shall not be taken to be an interest charge on the money borrowed" it forecloses consideration as to whether the credit insurance plan is a cover for usurious loans.<sup>65</sup>

The *Hatridge* opinion then states:

Other recent decisions involving personal insurance in connection with loans prior to Art. 4764c, are *Denton v. Ware*, Tex.Civ.App., 228 S.W.2d 867, *Ware v. Heath*, Tex.Civ.App., 241 S.W.2d 362, and *Rodriguez v. R. P. Youngberg Finance, Ltd.*, Tex.Civ.App., 241 S.W.2d 815; the case first cited holding that the charge for insurance evidenced a benefit conferred under the contract aside from the use of money—not interest; the second merely holding that the contract was one of insurance. In the *Rodriguez* appeal, the transaction involved more than \$1,000 and occurred just prior to enactment of Art. 4764c; yet many regulations of the State Insurance Board involving identical subject matter has been promulgated and were in force. In the course of its opinion, the El Paso Court was required to discuss sec. 6, here under attack; holding that insurance expense made part of the loan (same as in the instant case) was clearly an additional benefit to the borrower, inclusion thereof not rendering the contract usurious.<sup>66</sup>

*Denton v. Ware*<sup>67</sup> is another "stipulated" case involving the same V. L. Ware, a defendant in the *Hatridge* case. The above quotation from the latter case does not accurately state the decision in *Denton v. Ware*, which was that a loan contract which cancelled the debt in event of death and cancelled the payments in event of disability was *not* insurance but was considered by the court "merely as containing a waiver of collection of the debt in the event of the happening of the named contingencies."<sup>68</sup> *Denton v. Ware* also held that the payment for the "waiver" was not interest and under the stipulated facts and the allegations there was no other way it could

---

<sup>65</sup> The legislature has no power to foreclose judicial inquiry either by its fiat or by an attempt to change the meaning of words used in the constitution. This is usurpation of the function of the judiciary. See *Powell v. State*, 17 Tex. Civ. App. 345 (1884); *Ex parte Anderson*, 81 S.W. 973 (Tex. Crim. App. 1904); *Keller v. State*, 87 S.W. 669 (Tex. Crim. App. 1905).

<sup>66</sup> 246 S.W.2d at 669-70.

<sup>67</sup> 228 S.W.2d 867 (Tex. Civ. App. 1949).

<sup>68</sup> *Id.* at 871.

hold. Thus the case is not authority in support of the *Hatridge* decision.

*Ware v. Heath*<sup>69</sup> involved the very same type of contract used by V. L. Ware, but it was there held that the contract was one of insurance and on that point the case is in conflict with *Denton v. Ware* though purporting to distinguish it. The facts and pleadings in *Ware v. Heath* did not raise any question of interest, usurious or otherwise.<sup>70</sup> So *Ware v. Heath* is not authority for the *Hatridge* decision or for the constitutionality of Section 6.

*Rodriguez v. Youngberg*<sup>71</sup> is not authority for the *Hatridge* decision or the validity of Section 6 because the trial court found and recited in its judgment that the charges for credit insurance were "not a subterfuge for the collection of additional interest." There were no findings of fact or conclusions of law requested, so the Court of Civil Appeals, seeing no facts in the record to refute such findings, upheld the trial court on that finding.

The opinion then states:

The agreed stipulations do not show the percentage of commission retained by Ware or that the premium charged was in excess of rates promulgated by the Board, and in consequence, we must assume a compliance with regulations in that respect.<sup>72</sup>

It is of interest to note the "agreed stipulations" and what they fail to show. They fail to show the amount of the commissions received by the lender, yet said commissions are the purported basis for the entire case.

Then comes an amazing bit of legal sleight-of-hand in the opinion. It states:

From the cases cited in 42 Tex.Jur. 932, it would appear that when not governed by statute, each case turns on its own facts as to whether the transaction involving an additional charge is one made in good faith, distinct from a charge for use of money; in other words, a mere device or cover for usury. But where the matter of the collateral transaction is regulated by a valid statute, which is complied with, there can be no issue of fact as to good faith concerning a benefit allowed thereunder in addition to interest.<sup>73</sup>

First is set up the erroneous premise that only *when not governed*

<sup>69</sup> 237 S.W.2d 362 (Tex. Civ. App. 1951).

<sup>70</sup> *Id.* at 363: "The only question necessary to be decided in that case [*Denton v. Ware*] was whether or not the loan transaction was usurious, a question which is not before us, since neither of the parties has raised it on appeal."

<sup>71</sup> 241 S.W.2d 815 (Tex. Civ. App. 1951).

<sup>72</sup> 246 S.W.2d at 670.

<sup>73</sup> *Ibid.*

by statute does each case "turn on its own facts." Neither 42 *Tex. Jur.* 932 nor the cases therein cited limit the test to cases *not governed by statute*.<sup>74</sup> Under the constitution every case, whether governed by statute or not, turns upon its own facts as to whether the transaction involving an additional charge is one made in good faith for an additional consideration distinct from a charge for use of money. If it is an additional charge for the use of money it is interest regardless of good or bad faith.<sup>75</sup>

The main reason why Section 6 is unconstitutional is because it attempts to foreclose inquiry on the issue of whether the lender in receiving compulsory credit insurance commissions receives them as additional compensation for the use of his money.

The above quotation from the *Hatridge* opinion actually means that the good faith or usurious intent of the lender cannot be questioned regardless of the nature of the compensation he receives, as long as he complies with the regulations of a "valid" statute.<sup>76</sup> Here

<sup>74</sup> 42 *TEX. JUR.* 932 may have been an inadvertent mis-citation for its language has no relationship to the court's statement. The following cases cited in 42 *TEX. JUR.* 932 have been examined: *National Bond and Mortgage Corp. v. Mahanay*, 70 S.W.2d 236 (*Tex. Civ. App.* 1934), *modified*, 124 *Tex.* 544, 80 S.W.2d 947 (1935); *Forreston State Bank v. Brooks*, 51 S.W.2d 645 (*Tex. Civ. App.* 1932); *Joy v. Provident Loan Soc'y*, 37 S.W.2d 254 (*Tex. Civ. App.* 1931) *error dismissed*; *Independent Lumber Co. v. Gulf State Bank*, 299 S.W. 939 (*Tex. Civ. App.* 1927) *error ref.*; *Hudmon v. Foster*, 210 S.W. 262 (*Tex. Civ. App.* 1918); *Slaughter Co. v. Eller*, 196 S.W. 704 (*Tex. Civ. App.* 1917). None of them contains language supporting the court's qualification "when not governed by statute." In fact, in *Joy v. Provident Loan Society*, *supra*, the lender tried without avail to take refuge behind the "Pawnbrokers Act," Articles 6145-61 sub. 48, *TEX. REV. CIV. STAT. ANN.* (Supp. 1956), as exempting him from the general law of usury.

<sup>75</sup> The cases on this point are almost unlimited. Some of the Texas cases are: *Temple Trust Co. v. Swell*, 133 *Tex.* 417, 126 S.W.2d 943 (1939); *Schmid v. City Nat'l Bank*, 132 *Tex.* 115, 114 S.W.2d 854 (1938); *Walker v. Temple Trust co.*, 124 *Tex.* 575, 80 S.W.2d 935 (1935); *Graham & Locke Investment Co. v. Madison*, 295 S.W.2d 234, 243 (*Tex. Civ. App.* 1956) *error ref. n.r.e.*; *Sledge v. Murphy*, 284 S.W.2d 938 (*Tex. Civ. App.* 1955); *Autocredit of Ft. Worth, Inc. v. Pritchett*, 223 S.W.2d 951 (*Tex. Civ. App.* 1949) *error dismissed*; *Donoghue v. State*, 211 S.W.2d 623 (*Tex. Civ. App.* 1948) *error ref. n.r.e.*; *Standard Supply and Hardware Co. v. Christian-Carpenter Drilling Co.*, 183 S.W.2d 657 (*Tex. Civ. App.* 1944) *error ref.*; *Glenn v. McCarty*, 130 S.W.2d 295 (*Tex. Civ. App.* 1939), *aff'd*, 137 *Tex.* 608, 155 S.W.2d 912 (1941); *Glover v. Bushman*, 104 S.W.2d 66 (*Tex. Civ. App.* 1937) *error dismissed*; *Commerce Trust Co. v. Best*, 54 S.W.2d 1037 (*Tex. Civ. App.* 1932), *judgm. reformed and aff'd*, 124 *Tex.* 583, 80 S.W.2d 942 (1935); *Joy v. Provident Loan Soc.*, 37 S.W.2d 254 (*Tex. Civ. App.* 1931) *error dismissed*; *Federal Mortgage Co. v. State Nat'l Bank*, 254 S.W.1002 (*Tex. Civ. App.* 1923) *error dismissed*; *Henry v. Sanson*, 21 S.W. 69 (*Tex. Civ. App.* 1893). Some cases involving *TEX. REV. CIV. STAT. ANN.* art. 881 *et seq.* (1948) [the Building and Loan Statute] which has been held constitutional and where the court used the test of good faith, are *Mack v. North American Bldg. & Loan Ass'n*, 60 S.W.2d 1099 (*Tex. Civ. App.* 1933) and *Hampton v. Guaranty State Bldg. & Loan Ass'n*, 63 S.W.2d 873 (*Tex. Civ. App.* 1933).

<sup>76</sup> Even though the validity of the statute be assumed, the court is incorrect in saying "there can be no issue of fact as to good faith concerning a benefit allowed thereunder." *Wooldridge v. State*, 183 S.W.2d 746 (*Tex. Civ. App.* 1944), discussed p. 446 *supra*, was reversed for a new trial to go into just such an issue of fact. Also see discussion of *Continental Savings & Building Ass'n v. Wood*, p. 451, *infra*.

is a classic example of one pulling oneself up by one's own bootstraps. The very question that is supposed to be at issue is the validity of the statute. The opinion assumes its validity and this enables the opinion to give the appearance of foreclosing the very consideration that reveals its invalidity. The statute is invalid because it precludes an inquiry into the issue of whether the lender receives the compensation in good faith for something other than the use of money or whether the lender receives the compensation for the use of money under a device or cover for usury. But by legal acrobatics the question to be decided is assumed and such assumption prevents inquiry into the factors that must be considered in deciding the question.

It is then stated:

The purpose of Art. 4764c is to render bona fide any transaction made in accordance with its terms, just as under Art. 881 et seq., V.A.S., a building and loan association cannot 'be adjudged to have devised a scheme to conceal usury if all its actions were authorized by a valid statute.' *Continental Savings & Building Ass'n v. Wood*, Tex.Civ.App., 33 S.W.2d 770, 772, affirmed, Tex. Com. App., 56 S.W.2d 641; 42 Tex.Jur., p. 888.<sup>77</sup>

Here is the stark admission that the purpose of the statute is to render bona fide *any* transaction made in accordance with its terms. Against the background heretofore developed, such purpose can only be unconstitutional. The constitution says and all the other cases have said that any transaction the purpose of which is to give the lender more than ten per cent per annum for the use of money is illegal and usurious. The *Hatridge* opinion here reveals itself as never really considering the basic constitutional issues.

Articles 852—881b<sup>78</sup> regulate building and loan associations. A consideration of their constitutionality is not within the scope of this paper. However, it has no provision comparable to Section 6 and none of its provisions attempt to foreclose inquiry as to what is or is not interest. *Continental Sav. & Bldg. Ass'n v. Wood*,<sup>79</sup> from which the *Hatridge* opinion extracts the above quote, does not hold that such inquiry is foreclosed. The Commission of Appeals in affirming the Court of Civil Appeals' opinion in the *Wood* case stated:

. . . In other words, there is no allegation in the plaintiffs' petition that the contract was executed through fraud, accident, or mistake. An inspection of the statement of facts shows that the contract was the usual one contemplated to be made by virtue of the provisions of title 24, articles 852-881, R. S. 1925, authorizing the organization and

<sup>77</sup> 246 S.W.2d at 670.

<sup>78</sup> TEX. REV. CIV. STAT. ANN. (Supp. 1956).

<sup>79</sup> 33 S.W.2d 770 (Tex. Civ. App. 1930), *aff'd*, 56 S.W.2d 641 (Tex. Comm. App.).

operation of building and loan associations. It may be that in fact this particular transaction was usurious, but the record in this case shows that it was not. It is true that the testimony of the plaintiffs in error, considered alone and assumed to be true, demonstrates beyond the peradventure of a doubt that they did not intend to purchase any stock in this association, and that they did not intend to pay any commission fees, and that they did not intend to become obligated to pay any membership fees in the association, and also that they did not agree to pay any broker's fee, *but, when we examine their pleadings, we find no basis upon which to rest this testimony.* They merely allege that the scheme by which the defendant in error was enabled to collect the amount of money it did collect from them was a device to charge usurious interest. But the testimony shows that this scheme was one expressly authorized by the statutes of the state, and therefore could not legally have been a usurious one, *in the absence of allegations and proof to the effect that by some fraudulent act on the part of defendant in error, or its authorized agent, or some accident or mistake on the part of the plaintiffs in error, who executed the instrument, the execution of the same was procured to the detriment of the person executing it, so as to render the act, apparently legal, an illegal one.*<sup>80</sup> (Emphasis added.)

This language is in great contrast to the *Hatridge* opinion, which states categorically: "The purpose of Art. 4764c is to render *bona fide* any transaction made in accordance with its terms. . . ." (Emphasis added.) It seems too obvious for further comment that there can be no such legislative fiat that would foreclose judicial inquiry into the bona fides of a compulsory credit insurance loan transaction.<sup>81</sup>

The opinion then concludes its treatment of the constitutionality of the Credit Insurance Act with the paragraph previously quoted on page 436 *supra*. For convenience the pertinent part of this paragraph is again quoted:

As to the validity of this legislation, even if doubtful, we would be required to sustain it. 9 Tex. Jur., p. 478. Neither are we at liberty to invalidate it, though in our opinion same may be inexpedient or unwise. 9 Tex. Jur., p. 490.<sup>82</sup>

The first sentence above quoted implies that the validity of the Credit Insurance Act is not doubtful. But the opinion states that even if it is doubtful they would be required to sustain it, citing as

<sup>80</sup> Wood v. Continental Sav. & Bldg. Ass'n, 56 S.W.2d 641, 643 (Tex. Comm. App. 1933).

<sup>81</sup> See note 58, *supra*. The Dallas Court of Civil Appeals did not disapprove jury findings that the lender charged the borrower credit insurance premiums with a purpose of obtaining usury in *Industrial Finance Service Co. v. Riley*, 295 S.W.2d 498, 506 (Tex. Civ. App. 1956), *reversed on other grounds*, — Tex. —, 302 S.W.2d 652 (1957).

<sup>82</sup> 246 S.W.2d at 670.

authority 9 *Texas Jurisprudence* 478. That reference reads as follows:

It is but a decent respect to the wisdom, integrity and patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.<sup>83</sup>

This general statement of course is true. But the violation of the constitution by Section 6 is beyond reasonable doubt in view of its clear violation of the constitutional prohibition of usury.<sup>84</sup> Also the general presumption of validity does not apply in considering the constitutional mandate to the Legislature to prevent usury by pains and penalties.<sup>85</sup> Therefore, 9 *Texas Jurisprudence* 478 is not valid authority in this case for the court to say, "As to the validity of this legislation, even if doubtful, we would be required to sustain it."

The other citation from *Texas Jurisprudence* given in support of the opinion, quoted in full, states that:

An act of the legislature is said to be reviewable by the courts only with respect to the issue as to whether it is in conflict with the provisions of the constitution; and there is an abundance of authority in support of the proposition that a statute may not be nullified on grounds that it is in conflict with principles of natural justice, nor that it will be productive of hardship. Nor may an act of the legislature be set aside because it may appear to be unwise, inexpedient or impolitic.<sup>86</sup>

The first part of the first sentence quoted above states the basic constitutional principle that the constitutionality of acts of the legislature are reviewable by the courts. The basic issue in the *Hatridge* case was supposed to be whether the Credit Insurance Act was in conflict with any provision of the constitution. But a careful reading of the opinion discloses that it never came to grips with this issue. However, only the last sentence of the above citation was used to support the statement in the opinion, "Neither are we at liberty to invalidate it, though in our opinion same may be inexpedient or unwise." But the issue that the court was treating was whether the statute was unconstitutional and the court not only is at liberty to invalidate a statute that is unconstitutional; it also has the duty to do so.

Does the *Hatridge* case "legalize" usury? The answer is *yes* as long

---

<sup>83</sup> 9 TEX. JUR. 478.

<sup>84</sup> See pp. 437, 441, *supra*, and Davis, *supra* note 3, at 149-52.

<sup>85</sup> See pp. 437, 438, *supra*, and Davis, *supra* note 3, at 146-47.

<sup>86</sup> 9 TEX. JUR. 490.

as it is considered valid authority upholding the constitutionality of Section 6 of the Texas Credit Insurance Act. This article is a frank effort to convince the reader that the *Hatridge* case should not be regarded as valid authority for its decision that Section 6 is constitutional.

Should the question of the constitutionality of Section 6 come before a Texas appellate court again it is the writer's hope that what has been written will help persuade the court that it has the duty to invalidate Section 6 of the Texas Credit Insurance Act. It is the writer's opinion that Texas is in dire need of a comprehensive and effective small-loan law. But such law can never be achieved by permitting the legislature to exercise unconstitutional powers or upholding its exercise of unconstitutional powers. Section 11 of article XVI of the constitution should be amended so as to enable the legislature to enact a valid small-loan law designed to permit legitimate lenders to operate at a reasonable profit and designed to permit the valid use of credit insurance.