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artificial to make a distinction for those who move cargo directly off and onto a ship.

Thus, while purportedly relying on the congressional intent in interpreting the amendments, the court actually frustrated that intent, since thousands of longshoremen, loading and unloading, subjected to the risks concurrent with maritime employment, will be denied federal compensation if injured by the "fortuitous circumstance" of being landward of the first and last points of rest.

*Ruth L. Russell*

**CIVIL PROCEDURE—Venue—A Defendant Has the Right to Be Sued in County of Domicile When Suit Arises Out of a Consumer Transaction**

*Amaya v. Texas Securities Corp.,*

527 S.W.2d 218 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

Ramiro and Delia Amaya executed a written mechanic's and materialmen's lien contract with a paving company for making street improvements on property adjoining their residence in Hidalgo County, Texas. Texas Securities Corporation, as the assignee of the lien contract, brought suit in Bexar County for non-payment of the debt, and to foreclose its lien on the property. The defendants filed a plea of privilege to be sued in their county of residence, and the plaintiff filed a controverting affidavit claiming that venue was proper under Section 5(a) of Article 1995 of the Texas venue statutes<sup>1</sup> because the lien contract stipulated that the obligation was payable in San Antonio, Bexar County, Texas.<sup>2</sup> In rejecting the defendants' plea of privilege, the trial court held that venue was proper in Bexar County pursuant to section 5(a) in that the defendants had contracted in writing to perform an obligation in Bexar County.<sup>3</sup> The trial court added that Section 5(b) of Article 1995 was not applicable since the contract in question did not constitute a consumer transaction.<sup>4</sup> The defendants appealed. Held—

1. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(a) (Supp. 1975) states:

Contract in writing—(a) Subject to the provisions of Subsection (b), if a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile.

2. Contract was payable at the office of Texas Securities Corporation in San Antonio, Bexar County, Texas, but the actual contract was signed in Hidalgo County, Texas.

3. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(a) (Supp. 1975).

4. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(b) (Supp. 1975) states:

*Reversed.* Where a suit arises out of a consumer transaction for goods and services intended primarily for personal, family, or household use, venue will lie either in the county where the contract was signed or in the county in which the consumer resided at the time of the transaction, regardless of where the contract is made payable.<sup>5</sup>

The general venue statute in Texas provides that no person who is an inhabitant of this state is to be sued outside the county in which he has his domicile.<sup>6</sup> The right to be sued in the county of one's own residence is a valuable privilege<sup>7</sup> and advantageous to a defendant, for whose benefit it was intended.<sup>8</sup> Though there are numerous exceptions to the general venue statute, Texas courts have been reluctant to deprive a defendant of that right unless there is some affirmative allegation that a specified exception exists.<sup>9</sup> To deprive a defendant of the right of trial in the county of his domicile, the case against him must be brought within one of the exceptions found in the statute.<sup>10</sup>

Prior to the adoption of section 5(b), it was rather easy for a creditor to deprive a debtor of his statutory right to be sued in the county of his domicile by simply inserting a provision in the form contract, making it payable in some distant county.<sup>11</sup> As a result, the creditor would enjoy an advantageous bargaining position and, unknown to the debtor (consumer), venue would unquestionably be established in the distant county by virtue of section 5.<sup>12</sup> This inequity was cured when the Texas Legislature revised section 5.<sup>13</sup> The revision now provides that the consumer be sued in a

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In an action founded upon a contractual obligation of the defendant to pay money arising out of or based upon a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household or agricultural use, suit by a creditor upon or by reason of such obligation may be brought against the defendant either in the county in which the defendant in fact signed the contract, or in the county in which the defendant resides at the time of the commencement of the action.

5. *Amaya v. Texas Sec. Corp.*, 527 S.W.2d 218 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

6. TEX. REV. CIV. STAT. ANN. art. 1995 (1964).

7. See *Pool v. Pickett*, 8 Tex. 122, 123 (1852); *Holly v. Craig*, 334 S.W.2d 586, 587 (Tex. Civ. App.—Fort Worth 1960, no writ); *Russell v. Green*, 214 S.W. 448, 449 (Tex. Civ. App.—Dallas 1919, no writ).

8. *Pool v. Pickett*, 8 Tex. 122, 123 (1852); accord, *Cowan v. State*, 356 S.W.2d 170, 172 (Tex. Civ. App.—Austin 1962, writ dis'm'd).

9. See *A.H. Belo Corp. v. Blanton*, 133 Tex. 391, 395, 129 S.W.2d 619, 621 (1939); *Gilley v. Morse*, 375 S.W.2d 569, 570 (Tex. Civ. App.—Dallas 1964, no writ).

10. *City of Mineral Wells v. McDonald*, 141 Tex. 113, 116, 170 S.W.2d 466, 468 (1943); *Lindheim v. Muschamp*, 72 Tex. 33, 35, 12 S.W. 125, 126 (1888); *Stephens v. Rhea*, 342 S.W.2d 822, 824 (Tex. Civ. App.—Amarillo 1961, no writ).

11. Brief for appellants, *Amaya v. Texas Sec. Corp.*, 527 S.W.2d 218 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). Appellants were attempting to show the inequity inherent in section 5 of article 1995 before it was amended.

12. The venue exception previously contained in subdivision 5 survives as subdivision 5(a) of the new statute.

13. See Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEXAS L. REV. 269 (1973).

forum bearing a genuine relationship of the execution of the contract or to the consumer's domicile.<sup>14</sup>

Section 5(b) is closely patterned after California law.<sup>15</sup> Both statutes borrow from the Uniform Commercial Code and rely heavily upon section 9-109(1).<sup>16</sup> The underlying purpose of both state venue statutes is to protect the consumer from distant forum lawsuits that essentially deny the consumer his day in court.<sup>17</sup>

In *Amaya v. Texas Securities Corp.*,<sup>18</sup> a case of first impression, the San Antonio Court of Civil Appeals concluded that a paving lien was a consumer transaction because it involved goods and services intended primarily for personal, family, or household use.<sup>19</sup> Consequently, venue was transferred to Hidalgo County, the defendants' domicile, in accordance with section 5(b).

By placing venue in the defendants' county of domicile, the court's decision in *Amaya* is significant for two reasons. First, section 5(b) has unwittingly been transformed to an exception within an exception. What the court in *Amaya* has apparently done is to shift the burden of proof to the defendants. In utilizing an exception to article 1995, the burden of proof is upon the plaintiff to establish a cause of action in his controverting affidavit;<sup>20</sup> but here, the court has made it incumbent upon the defendants to show that a paving lien is within the scope of a consumer transaction.<sup>21</sup>

Second, although the Texas venue statute has been strictly construed in the past,<sup>22</sup> the court in *Amaya* has apparently supplanted the usual strict

14. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(b) (Supp. 1975).

15. CAL. CIV. PROC. CODE § 395(b) (Deering 1972) states in part:

[I]n an action founded upon an obligation of the defendant for goods, services, loans or extensions of credit intended primarily for personal, family or household use . . . the county in which the defendant in fact signed the contract, the county in which the defendant resided at the time the contract was signed, or the county in which the defendant resides at the commencement of the action is the proper county for the trial thereof.

16. TEX. BUS. & COMM. CODE ANN. § 9-109(1) (Tex. UCC 1968) states: "Goods are 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes."

17. Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEXAS L. REV. 269, 286 (1973). For instance, by designating the place of payment at a substantial distance from where the transaction occurred, the creditor could deprive the consumer of his right to subpoena witnesses.

18. 527 S.W.2d 218 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

19. *Amaya v. Texas Sec. Corp.*, 527 S.W.2d 218, 221 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

20. See *A.H. Belo Corp. v. Blanton*, 133 Tex. 391, 396, 129 S.W.2d 619, 622 (1939); *Furr's Super Mkt., Inc. v. Jernigan*, 380 S.W.2d 193, 194 (Tex. Civ. App.—Amarillo 1964, no writ).

21. *Amaya v. Texas Sec. Corp.*, 527 S.W.2d 218, 221 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

22. See *National Life Co. v. Rice*, 140 Tex. 315, 322, 167 S.W.2d 1021, 1025 (1943); *Brown v. Clary*, 315 S.W.2d 385, 386 (Tex. Civ. App.—Austin 1958, no writ); *Old Lincoln County Mut. Fire Ins. Co. v. Hall*, 214 S.W.2d 203, 204 (Tex. Civ. App.—Dallas 1948, no writ).

construction of the venue statute, as a whole, with a liberal interpretation of the phrase "consumer transaction" as found in section 5(b). In construing the term "consumer transaction," the court found it necessary to rely upon other codes and statutes, specifically the Uniform Commercial Code,<sup>23</sup> the Federal Truth in Lending Act,<sup>24</sup> and the California Civil Code.<sup>25</sup> Despite the varied sources, a common denominator is apparent: The *intended use* of the goods or services is the determinative factor. As noted in *Amaya*, the factor which distinguishes a "consumer transaction" from other transactions is the intended use of the goods, services, or loans.<sup>26</sup> By making "intended use" the determinative factor, the court in *Amaya* has properly construed the intent of the Texas Legislature for, when it enacted section 5(b), the legislature was utilizing Article 9 of the Uniform Commercial Code in the proper manner.<sup>27</sup>

If the court in *Amaya* had so desired, both the Texas Consumer Credit Code<sup>28</sup> and the Texas Deceptive Trade Practices-Consumer Protection Act<sup>29</sup> could have provided it with an even broader background of what might constitute a consumer transaction since both statutes have expanded the meaning of consumer goods to include the improvement or repair of real property. Without the aid of these statutes, the court concluded that even though pavement does become a part of the realty, it is insufficient grounds for

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23. TEX. BUS. & COMM. CODE ANN. § 9-109(1) (Tex. UCC 1968).

24. 15 U.S.C. § 1602(h) (1970) states:

The adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

25. CAL. CIV. CODE § 1802.1 (Deering 1972) states:

'Goods' means tangible chattels bought for use primarily for personal, family, or household purposes, including goods which, at the time of the sale or subsequently are to be affixed to real property as to become a part of such real property whether or not severable therefrom. . . .

*Id.* § 1802.2 states:

'Services' means work, labor, and services for other than commercial or business use, including services furnished in connection with the sale or repair of goods as defined in Section 1802.1 or furnished in connection with the repair of motor vehicles or in connection with the improvements of real property.

26. *Amaya v. Texas Sec. Corp.*, 527 S.W.2d 218, 221 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

27. TEX. BUS. & COMM. CODE ANN. § 9-109(1) (Tex. UCC 1968). When the Texas Legislature enacted section 5(b), it incorporated section 9-109(1) of the Uniform Commercial Code practically verbatim.

28. TEX. REV. CIV. STAT. ANN. art. 5069-6.01(a) (1971) states in part:

'Goods' means all tangible personal property when purchased primarily for personal, family or household use and not for commercial or business use, including such property which is furnished or used at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement or construction of real property so as to become a part thereof whether or not severable therefrom.

Section 6.01(b) states in part: "'Services' means work, labor, or services of any kind when purchased primarily for personal, family or household use and not for commercial or business use . . . ."

29. TEX. BUS. & COMM. CODE ANN. § 17.45 (Supp. 1975) states:

detracting from its character as "goods." This conclusion was evidently propounded in light of the Uniform Commercial Code's non-applicability to realty. But, there is nothing in that Act which specifically precludes a court from applying its rules to realty. Thus, the court has apparently transcended the Uniform Commercial Code's restriction to personalty. A literal reading of the sections cited to the Texas Consumer Credit Code and the Texas Deceptive Trade Practices-Consumer Protection Act provides support for this contention.

In construing a paving lien to be a "consumer transaction," the court apparently interpreted section 5(b) of the Texas venue statute to be remedial in nature.<sup>30</sup> Consequently, under Texas law, a statute remedial in nature is entitled to the most comprehensive and liberal construction possible.<sup>31</sup> Furthermore, since the San Antonio court did rely upon the Uniform Commercial Code in determining that a paving lien is a consumer transaction, the basis for that determination is entitled to as liberal a construction as possible.<sup>32</sup> In an official comment to the applicable section, the Code's draftsmen add that the Act should be developed by the courts in the light of unforeseen and new circumstances and practices.<sup>33</sup>

California, in construing the Uniform Commercial Code, particularly section 9-109(1), has interpreted it liberally.<sup>34</sup> It applies the simple test used in *Amaya*: The principal use to which the property is put is considered as determinative.<sup>35</sup> Other jurisdictions have consistently held that anything which is used primarily for personal, family, or household purposes constitutes a consumer good.<sup>36</sup>

In *Castleberry v. Acco Feeds*,<sup>37</sup> decided prior to *Amaya*, the Eastland

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- (1) 'Goods' means tangible chattels or real property purchased or leased for use.  
 (2) 'Services' means work, labor, or service purchased or leased for use, for other than commercial or business use, including services furnished in connection with the sale or repair of goods.

30. Remedial in the sense that the Texas Legislature attempted to correct the problem of distant forum abuse and, in so doing, promote justice.

31. See *Mason v. West Texas Util. Co.*, 150 Tex. 18, 29, 237 S.W.2d 273, 280 (1951); *Cruzan v. Walker*, 119 Tex. 189, 191, 26 S.W.2d 908, 909 (1930); *Sheppard's Home v. Wood*, 140 S.W. 394, 395 (Tex. Civ. App. 1911, no writ).

32. TEX. BUS. & COMM. CODE ANN. § 1-102(a) (Tex. UCC 1968).

33. *Id.* § 1-102, comment 1.

34. E.g., *Vasquez v. Superior Court of San Joaquin County*, 94 Cal. Rptr. 796, 811 (1971) (purpose of Act is to protect consumers, and should be liberally construed to that end); *Morgan v. Reasor Corp.*, 73 Cal. Rptr. 398, 403 (1968).

35. *James Talcott, Inc. v. Gee*, 72 Cal. Rptr. 168, 171 (Ct. App. 1968).

36. *Bennett v. W.T. Grant Co.*, 481 F.2d 664, 665 (4th Cir. 1973) (household laundry dryer); *In re Williams*, 10 UCC Rep. Serv. 277, 281 (D. Me. 1971) (mobile home); *In re Ten Brock*, 4 UCC Rep. Serv. 712, 714-15 (W.D. Mich. 1966) (camper-trailer); *In re Nicolosi*, 4 UCC Rep. Serv. 111, 112 (S.D. Ohio 1966) (ring); *Atlas Credit Corp. v. Dolbow*, 165 A.2d 704, 708 (Pa. Super. Ct. 1960) (motor boat); *Mallicoat v. Volunteer Fin. & Loan Corp.*, 415 S.W.2d 347, 349-50 (Tenn. App. 1966) (automobile); *Commercial Credit Equip. Corp. v. Carter*, 516 P.2d 767, 770 (Wash. 1973) (airplane).

37. 525 S.W.2d 282 (Tex. Civ. App.—Eastland 1975, no writ).

Court of Civil Appeals was confronted with whether a transaction was a "consumer transaction" within the meaning of section 5(b). The plaintiff claimed that a rancher, who had purchased feed for his cattle, had an extensive operation, worth over \$350,000 and spread over 3,000 acres of land. The plaintiff maintained that this was not the type of transaction the legislature contemplated when it enacted section 5(b). The court rejected the plaintiff's argument, holding that the plaintiff's cause of action was "founded on a contractual obligation of the defendant rancher to pay money arising out of a consumer transaction for goods intended primarily for agricultural use,"<sup>38</sup> and was thus within the scope of section 5(b).<sup>39</sup> The court reasoned that section 5(b) was applicable because it found that the intent of the legislature, evidenced by the language used in the statute, was controlling.<sup>40</sup>

Though the facts are dissimilar, the case illustrates the proper method for determining whether a transaction is a "consumer transaction" by looking to the intended *use* of the goods or services. In *Castleberry*, the goods were intended for agricultural purposes; therefore, the transaction was a "consumer transaction" within the meaning and intent of section 5(b). In *Amaya*, the goods, services, and extensions of credit were for personal, family, and household purposes; paving the street which abutted the defendants' residence made it easier for them to come and go. This, the court concluded, was also a "consumer transaction."

With the passage of numerous consumer protection laws throughout the country, it is obvious that the plight of the consumer is in the minds of legislators and judges alike. In regard to consumer goods, Texas apparently will follow the "intended use test" wherein the intended *use* to which the goods are put will be considered as determinative. It is likely that any goods used or bought for use primarily for personal, family, household, or agricultural purposes, will be considered consumer transactions. Undoubtedly, the court's decision in *Amaya* will be criticized as too broad and liberal in its interpretation of section 5(b). As one judge has stated, however, "even the recently retired 'Queen Mary' could qualify as a consumer goods [*sic*] if purchased by a billionaire for his own personal use . . . ."<sup>41</sup>

*Sylvester Anthony Mauro*

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38. *Id.* at 285.

39. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(b) (Supp. 1975) provides in part: "intended primarily for personal, family, household or agricultural use."

40. *Castleberry v. Acco Feeds*, 525 S.W.2d 282, 285 (Tex. Civ. App.—Eastland 1975, no writ).

41. *In re Trumble*, 5 UCC Rep. Serv. 543, 544 (W.D. Mich. 1968).