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One Who Unconditionally and Absolutely Guarantees Payment of a Note Is Bound by Its Terms, Including Its Venue Provisions.

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the rights of mineral owners in the exploration and production of badly needed domestic energy resources. The decision, however, is questionable in the light of the safeguards provided by the new reclamation statute. Furthermore, title to minerals under a grant or reservation continues to remain uncertain in the absence of specific language in the instrument.[70] Rather than vesting title to near-surface substances in the surface owner, as advocated in *Reed,* the mineral owner should obtain title to all minerals and his right to remove them should be regulated to prevent surface destruction.[71] Furthermore, legislation should be enacted requiring that the mineral owner compensate the surface owner in damages for loss of surface use during the period of mining and reclamation. *Reed's* significance lies in its demonstration of the court's willingness to sacrifice stability and certainty in land titles in an effort to protect the surface estate from temporary impairment due to surface mining. This policy does not favor the production of energy resources, and whether it will endure subsequent decisions remains to be seen.

Peter H. Carroll, III

VENUE—Guaranty Contracts—One Who Unconditionally and Absolutely Guarantees Payment Of a Note Is Bound By Its Terms, Including Its Venue Provisions

Hopkins v. First National Bank,
551 S.W.2d 343 (Tex. 1977) (per curiam)*

Burtram C. Hopkins and others entered into a contract which absolutely and unconditionally guaranteed payment of a corporation's promissory note to a bank. Alleging that the note was past due, the bank sued the corporate maker and the guarantors.[1] The suit was brought in the county

70. *See* 6 WEST'S TEXAS FORMS § 1.2(5)(B), at 7 (1977) (grant or reservation of minerals should expressly provide for substances that would cause surface destruction upon extraction).

71. *See* Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals?",* 30 Sw. L.J. 481, 504 (1976).

* In a memorandum opinion the Texas Supreme Court found no reversible error and refused the writ from the court of civil appeals. The opinion of the court of civil appeals may be found at 546 S.W.2d 84 (Tex. Civ. App.—Corpus Christi 1976), *writ ref'd n.r.e. per curiam,* 551 S.W.2d 343 (Tex. 1977).

1. The note sued upon was a renewal of a prior note. The guaranty, executed at the time of the original note, provided that the bank may "extend or renew . . . any of the Liabilities." Hopkins v. First Nat'l Bank, 546 S.W.2d 84, 86 (Tex. Civ. App.—Corpus Christi 1976), *writ ref'd n.r.e. per curiam,* 551 S.W.2d 343 (Tex. 1977).

where the note was expressly made payable. Hopkins filed a plea of privilege to be sued in the county of his domicile. In its controverting affidavit the bank alleged article 1995 subdivision 5(a) as proper basis for venue.[2] The trial court overruled the plea of privilege. Hopkins appealed, contending that subdivision 5(a) was not applicable because his guaranty contract did not expressly name a place for performance. The court of civil appeals affirmed.[3] On Hopkins' application for writ of error, the Texas Supreme Court, in a per curiam opinion, refused the application by finding no reversible error.[4] Held—*Writ refused n.r.e.* If a promissory note expressly states that it is payable in a certain place, venue is sustainable in that place against one who has absolutely and unconditionally guaranteed its payment.[5]

The basic venue rule in Texas gives a defendant a privilege to be sued in the county of his domicile.[6] A statutory exception for contracting parties[7] has been present since the first venue statute was enacted in 1836.[8] Under subdivision 5(a) contracting parties have a limited right to agree upon venue.[9] When the defendant has contracted in writing to perform an obligation in a county other than his domicile naming that county expressly, or stating a definite place within that county, the plaintiff may bring suit there or in the county of the defendant's domicile.[10] Although subdivision

2. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(a) (Vernon Supp. 1976-1977) states:

> 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.

Subdivision 5(b) excepts consumer transactions from the 5(a) venue exception. *Id.* § 5(b).

3. Hopkins v. First Nat'l Bank, 546 S.W.2d 84 (Tex. Civ. App.—Corpus Christi 1976), *writ ref'd n.r.e. per curiam*, 551 S.W.2d 343 (Tex. 1977).

4. Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977) (refusing writ n.r.e. per curiam).

5. *Id.* at 345. The words "absolute," "unconditional" and "guaranty of payment" are often used interchangeably. *See, e.g.*, Estes v. Continental Bank & Trust Co., 421 S.W.2d 158, 161 (Tex. Civ. App.—Dallas 1967, no writ) (guaranty of payment absolute not conditional guaranty); Austin v. Guaranty State Bank, 300 S.W. 129, 132 (Tex. Civ. App.—Waco 1927, no writ) (guaranty of payment is "absolute, that is, an unconditional undertaking"); El Paso Bank & Trust Co. v. First State Bank, 202 S.W. 522, 524 (Tex. Civ. App.—El Paso 1918, no writ) (guaranty of payment without words of condition is absolute guaranty).

6. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964). The Texas statute was drawn from Spanish law which favored the convenience of the defendant. *See* McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEXAS L. REV. 24, 40 (1959) (discussing Richardson v. Wells, 3 Tex. 223 (1848)).

7. TEX. REV. CIV. STAT. ANN. art 1995, § 5(a) (Vernon Supp. 1976-1977) is the present form of the exception for written contracts.

8. Texas' first venue statute, with ten exceptions, was enacted in 1836 in the Congress of the Republic. *See* 1836 Tex. Gen. Laws, An Act Establishing the Jurisdiction and Powers of the District Courts § 5, at 200, 1 H. GAMMEL, LAWS OF TEXAS 1260 (1898).

9. Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535, 536 (Tex. 1972). The fixing of venue by contract, except as permitted by the statutory exception, is invalid. *Id.* at 537.

10. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(a) (Vernon Supp. 1976-1977). The original

5(a) has been the subject of much appellate litigation,[11] it is well settled that when a contracting party is sued for payment the designation of a specific place for payment in the contract is sufficient to sustain venue in the county of the place so named.[12] A central issue in a long line of civil appeals cases had been the applicability of subdivision 5(a) to written guaranty contracts.[13] If neither the principal contract nor the guaranty contract names a place for payment, subdivision 5(a) will not be applicable.[14] If the guaranty itself specifies a place for performance, suit may be brought against the guarantor in that county.[15] But where the principal

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exception did not require a contract in writing. *See* 1836 Tex. Gen. Laws, An Act Establishing the Jurisdiction and Powers of the District Courts § 5, at 200, 1 H. GAMMEL, LAWS OF TEXAS 1260 (1898). By 1935 a written contract was required and in that year the exception was altered to read that the contract must name "expressly" the county in which the obligation is to be performed or a "definite place therein . . . ." 1935 Tex. Gen. Laws ch. 213, § 1, at 503. The 1935 amendment is discussed in Saigh v. Monteith, 147 Tex. 341, 344-45, 215 S.W.2d 610, 611-12 (1948). In *Saigh* a written lease provided for payments to be made to a particular bank. The lessor sued in the county where the bank was located but venue was not sustainable there because the lessee had not expressly named that county or a definite place therein. *Id.* at 344-45, 215 S.W.2d at 611-12. For cases following the rule that venue may not be fixed by implication see Burtis v. Butler Bros., 148 Tex. 543, 549, 226 S.W.2d 825, 828 (1950); Martin v. Allen, 494 S.W.2d 585, 586 (Tex. Civ. App.—San Antonio 1973, no writ); Annot., 97 A.L.R.2d 934 (1964).

11. *See* Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution,* 51 TEXAS L. REV. 269, 270-72 (1973) (interesting discussion of venue litigation in Texas).

12. *See, e.g.,* Thompson v. Republic Acceptance Corp., 388 S.W.2d 404, 405 (Tex. 1965) (refusing writ n.r.e. per curiam) (note payable "in Austin" was contract in writing performable in Travis County for purpose of subdivision 5); Southwestern Inv. Co. v. Allen, 160 Tex. 258, 259, 328 S.W.2d 866, 867 (1959) (note payable at plaintiff's office "in Amarillo, Potter County, Texas" sufficient to fix venue in Potter County); Burtis v. Butler Bros., 148 Tex. 543, 548, 226 S.W.2d 825, 829 (1950) (words "all bills payable in Dallas" in financial statement sufficient to fix venue in Dallas County).

13. *See, e.g.,* Rost v. First Nat'l Bank, 472 S.W.2d 579 (Tex. Civ. App.—Corpus Christi 1971, no writ); Cullum v. Commercial Credit Co., 134 S.W.2d 822 (Tex. Civ. App.—Amarillo 1939, no writ); McCauley v. Cross, 111 S.W. 790 (Tex. Civ. App. 1908, no writ). When the principal debtor and the guarantor are joined, the plaintiff may also allege subdivision 4 (defendants in different counties) or 29a (two or more defendants) to sustain venue against the guarantor. *See* TEX. REV. CIV. STAT. ANN. art 1995, §§ 4, 29a (Vernon 1964). When the principal is a resident of the county of suit, his guarantor is a "proper party" and subdivision 4 applies. Storrs-Schaefer Co. v. Shelton, 82 S.W.2d 156, 158 (Tex. Civ. App.—Amarillo 1935, no writ). When venue is sustainable against the principal under another exception, however, his guarantor is not a "necessary party" for purposes of subdivision 29a. Kids Kounty Klothing, Inc. v. Lachman-Rose Co., 546 S.W.2d 381, 384 (Tex. Civ. App.—Eastland 1977, no writ).

14. Prewitt v. First Nat'l Bank, 491 S.W.2d 950, 954 (Tex. Civ. App.—Waco 1973, no writ) (note payable "at office of said Bank" insufficient to establish venue against maker or guarantor in county where bank located); Dina Pak Corp. v. May Aluminum, Inc., 417 S.W.2d 419, 422 (Tex. Civ. App.—Corpus Christi 1967, no writ) (neither purchaser nor guarantor contracted in writing to perform obligation in county of suit).

15. Mahler v. J.R. Watkins Co., 120 S.W.2d 459, 460 (Tex. Civ. App.—Dallas 1938, no writ); J.R. Watkins Co. v. Webb, 97 S.W.2d 284, 285 (Tex. Civ. App.—El Paso 1936, no writ).

contract names a place for payment and the guaranty contains no such provision, a question is raised whether venue is fixed against the guarantor in the county where the principal agreed to pay. The courts have been willing to answer this question affirmatively when the guaranty contains language which incorporates the terms of the principal contract.[16] When the guaranty lacks incorporation language, however, the courts have reached conflicting results[17] which reflect differing concepts about the nature and extent of a guarantor's liability.[18]

In recent years concepts about guarantors have been influenced by the Uniform Commercial Code (UCC). Article 3, which embodies the law of negotiable instruments, contains provisions dealing with "sureties" of negotiable instruments.[19] "Surety" is used in a broad generic sense; thus a guarantor specifically governed by section 3.416[20] is a type of surety.[21]

In both cases a written guaranty providing for performance at Winona, Minnesota or Dallas was held to meet the requirements of subdivision 5.

16. *See* Loveless v. Texas First Mortgage R.E.I.T., 531 S.W.2d 870, 872-73 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd) (guaranty payable "at the place specified in the note"); Marco Milling Co. v. Commercial Servs., Inc., 346 S.W.2d 495, 497 (Tex. Civ. App.—Texarkana 1961, no writ) (guaranty of contract in accordance with its terms); Cullum v. Commercial Credit Co., 134 S.W.2d 822, 824 (Tex. Civ. App.—Amarillo 1939, no writ) (guaranty provided for payment "as the same shall become due and payable"); Tayloe v. Federal Land Bank, 120 S.W.2d 825, 826 (Tex. Civ. App.—Beaumont 1938, no writ) (guaranty of note "according to the terms thereof").

17. For cases sustaining venue against the guarantor without express words of incorporation see Hinn v. Continental Nat'l Bank, 495 S.W.2d 286, 289 (Tex. Civ. App.—Fort Worth 1973, no writ); Rost v. First Nat'l Bank, 472 S.W.2d 579, 581-82 (Tex. Civ. App.—Corpus Christi 1971, no writ); Carter v. Texas State Bank, 189 S.W.2d 782, 784 (Tex. Civ. App.—Texarkana 1945, no writ); Citizens' State Bank v. Commonwealth Bank & Trust Co., 268 S.W. 1008, 1009 (Tex. Civ. App.—San Antonio 1925, no writ); McCauley v. Cross, 111 S.W. 790, 791 (Tex. Civ. App. 1908, no writ). *Contra*, Smith v. First Nat'l Bank, 146 S.W.2d 270, 273 (Tex. Civ. App.—Galveston 1940, no writ); Storrs-Schaefer Co. v. Shelton, 82 S.W.2d 156, 158 (Tex. Civ. App.—Amarillo 1935, no writ).

18. *Compare* Smith v. First Nat'l Bank, 146 S.W.2d 270, 273 (Tex. Civ. App.—Galveston 1940, no writ) (emphasized separate nature of guarantor's undertaking in holding that venue established by note not sustainable against guarantor) *with* Cullum v. Commercial Credit Co., 134 S.W.2d 822, 824 (Tex. Civ. App.—Amarillo 1939, no writ) (stressed fact that extent of guarantor's liability is measured by that of principal in holding that venue provisions in note fixed venue against guarantor).

19. TEX. BUS. & COMM. CODE ANN. § 3.416 (Tex. UCC) (Vernon 1968). Sureties under article 3 include indorsers, accommodation parties and guarantors. *See* Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833, 836-40 (1968). *See generally* Clark, *Suretyship in the Uniform Commercial Code*, 46 TEXAS L. REV. 453, 455-57 (1968).

20. TEX. BUS. & COMM. CODE ANN. § 3.416 (Tex. UCC) (Vernon 1968) states:

(a) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.

(b) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor

Section 3.416 provides for two kinds of guarantors who are distinguished by the form of their signing. A guarantor of payment may be required to pay when the instrument matures, but a guarantor of collection is generally not liable until the claim against the maker or acceptor has been reduced to judgment and returned unsatisfied.[22] The effect of section 3.416 is becoming apparent in Texas cases. In these cases, section 3.416 has influenced procedural rights of guarantors as well as substantive guaranty principles.[23] Citing section 3.416, the Texas Supreme Court recently held in *Universal Metals & Machinery, Inc. v. Bohart*[24] that a guarantor of payment is primarily liable and can be sued without joining the maker of the note.[25]

The UCC concept of a guarantor's liability was again discussed by the Texas Supreme Court in *Hopkins v. First National Bank.*[26] The court made it clear that despite his primary liability, a guarantor can be bound by venue provisions set out by the maker of a promissory note.[27] The court stated that in one sense a guaranty of payment and a note are separate undertakings—due to the primary nature of the guarantor's liability he can be sued apart from the maker.[28] Nevertheless, the court reasoned that in another sense they are not separate—when considering the *extent* of liability, the terms of the note must be examined to ascertain the guarantor's

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to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

21. "'Surety' includes guarantor." TEX. BUS. & COMM. CODE ANN. § 1.201(40) (Tex. UCC) (Vernon 1968). "Surety" in the UCC sense should be distinguished from "surety" as used in a narrow pre-code sense. *See* Wood v. Canfield Paper Co., 117 Tex. 399, 406, 5 S.W.2d 748, 750 (1928) ("substantial differences" between a guaranty and surety).

22. Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833, 840 (1968). This terminology is not new. Long before the code was enacted it was held that the distinction between a guaranty of payment and a guaranty of collection is that in the former the creditor may on default proceed directly against the guarantor without taking steps to collect from the principal. Ganado Land Co. v. Smith, 290 S.W. 920, 923 (Tex. Civ. App.—Galveston 1927, writ ref'd).

23. *See* Universal Metals & Mach., Inc. v. Bohart, 539 S.W.2d 874, 877, 879 (Tex. 1976) (guarantor of payment liable even though maker's signature is forged; usury no defense); Knick v. Green, 545 S.W.2d 269, 272 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (guarantor of payment liable as original obligor and notice of default not required). *Bohart* and *Hopkins* have influenced procedural rights of guarantors. *See* Cohen, *Jurisdictional and Procedural Aspects of Securing Judgments Against Parties Secondarily Liable—A Proposal for Reform*, 9 ST. MARY'S L.J. 245, 253 n.46 (1977).

24. 539 S.W.2d 874 (Tex. 1976).

25. *Id.* at 877. By executing a guaranty of payment a guarantor waives any requirement that the holder of the note take action against the maker as a condition precedent to his liability. *Id.* at 877.

26. 551 S.W.2d 343 (Tex. 1977) (refusing writ n.r.e. per curiam).

27. *Id.* at 345.

28. *Id.* at 345.

obligations.[29] Citing section 3.416, the court held that one who absolutely and unconditionally guarantees payment of a note thereby agrees to pay the note according to its terms if the maker defaults.[30] Consequently, if a note expressly designates a place for payment, the contract of guaranty must also be said to expressly provide for performance at a definite place.[31]

The Texas Supreme Court took jurisdiction in *Hopkins* because of a conflict with *Smith v. First National Bank*,[32] a decision which was expressly disapproved in the per curiam opinion. *Smith* was a suit against the maker and guarantor of promissory notes. Although the guaranty contract did not name a place for performance, the notes were payable in Trinity County, Texas. The guarantor's plea of privilege to be sued in the county of his domicile was sustained with the court reasoning that the notes and the guaranty were "separate and distinct."[33] The *Smith* court cited a number of decisions to support this holding.[34] Several of these decisions, however, are distinguishable, involving suits against sureties or indemnifiers rather than guarantors.[35] "Surety" in this context is used in a narrow pre-code sense.[36] The courts have consistently held that when a surety contract does not name a place for performance, venue cannot be sustained against the surety on the basis of a place named in the principal contract.[37] A corresponding rule applies to indemnifiers.[38]

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29. *Id.* at 345.

30. *Id.* at 345.

31. *Id.* at 345. The *Hopkins* rule should be applicable to guarantors of collection as well as guarantors of payment. A guarantor of collection is a "conditional" guarantor. *See* Estes v. Continental Bank & Trust Co., 421 S.W.2d 158, 161 (Tex. Civ. App.—Dallas 1967, no writ) (conditional guaranty merely guarantees collection). The circumstances leading up to his actual liability differ, yet, once liable, he too is bound by the note "according to its tenor." TEX. BUS. & COMM. CODE ANN. § 3.416(b) (Tex. UCC) (Vernon 1968). Thus, he should be bound by venue provisions in the note.

32. 146 S.W.2d 270 (Tex. Civ. App.—Galveston 1940, no writ).

33. *Id.* at 273.

34. *Id.* at 273.

35. Eleven cases were cited but only one dealt directly with the applicability of the contract exception to a guaranty. Five dealt with the applicability of the contract exception to surety or indemnity contracts. The *Smith* court did not distinguish these cases. *See* Smith v. First Nat'l Bank, 146 S.W.2d 270, 273 (Tex. Civ. App.—Galveston 1940, no writ).

36. The word surety is often used in a narrow sense to indicate a primary obligation to pay another's debt to distinguish it from the secondary obligation of a guarantor. L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP § 5 (1950). Surety is also used in the broad sense to include both technical surety and guarantor. *Id.* § 4.

37. *See, e.g.*, Lindheim v. Muschamp, 72 Tex. 33, 35, 12 S.W. 125, 126 (1888); Panhandle Steel Erectors, Inc. v. Whitlow, 359 S.W.2d 146, 151 (Tex. Civ. App.—Amarillo 1962, no writ); Employers' Cas. Co. v. Wm. Cameron & Co., 288 S.W. 584, 585 (Tex. Civ. App.—Austin 1926, no writ). These were all suits against sureties on contract bonds. Like the cases discussing the applicability of subdivision 5(a) to a guaranty, the nature of a surety's obligation has been a decisive factor. In a frequently cited case the court reasoned that "[t]he engagement . . . to construct the building was one contract, and the bond was

In light of *Bohart*, which held that guarantors of payment may be sued apart from the maker of a note, it might have been reasonable to infer that when the venue issue arises, these guarantors should be treated as sureties.[39] The *Hopkins* court apparently anticipated the potential incongruity between its decision and *Bohart* by stating that due to the primary nature of the guarantor's liability his contract is separate from the note in one sense, but that because the extent of his liability is determined by the terms of the note, his contract is not separate in another sense.[40] Consequently, when venue is established by the terms of the note, it is sustainable against one who has guaranteed its payment.[41]

The *Smith* court had also reasoned that the guaranty contract and the notes were "without any intrinsically-stated mutuality of obligation."[42] Hopkins pointed out that his guaranty made no express reference to the terms of the note and, relying on *Smith* and other cases, contended that in order for a guarantor to be bound by venue provisions in a note, express "incorporation language" was necessary.[43] Indeed, in many of the cases which held venue to be fixed against a guarantor by a place for payment named in the principal contract, the guaranty had contained words of incorporation.[44] The holding in *Hopkins*, however, suggests that the absence of such words is immaterial because under section 3.416 an unconditional guaranty includes the terms of the note.[45] A guaranty of payment,

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another, each separate and distinct. . . ." Lindheim v. Muschamp, 72 Tex. 33, 35, 12 S.W. 125, 126 (1888).

38. *See* Stribling v. American Sur. Co., 41 S.W.2d 300, 301 (Tex. Civ. App.—Austin 1941, no writ). For a case distinguishing guarantors and indemnifiers see Olson v. Smith, 72 S.W.2d 650, 652 (Tex. Civ. App.—El Paso 1934, writ dism'd).

39. When a guarantor's liability is treated as primary, the pre-code distinction between a surety and guarantor is blurred. Cook v. Citizens Nat'l Bank, 538 S.W.2d 460, 462-63 (Tex. Civ. App.—Beaumont 1976, no writ); *see* National City Bank v. Taylor, 293 S.W. 613, 618 (Tex. Civ. App.—Texarkana 1927, no writ) (surety contract is primary and direct while guaranty is collateral and secondary); Ganado Land Co. v. Smith, 290 S.W. 920, 923 (Tex. Civ. App.—Galveston 1927, writ ref'd) (guarantor who was primarily liable was "not less than a surety").

40. Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977) (refusing writ n.r.e. per curiam).

41. *Id.* at 345.

42. Smith v. First Nat'l Bank, 146 S.W.2d 270, 273 (Tex. Civ. App.—Galveston 1940, no writ).

43. Brief for Appellant at 9, Hopkins v. First Nat'l Bank, 546 S.W.2d 84 (Tex. Civ. App.—Corpus Christi 1976).

44. *See* cases cited note 16 *supra*. *But see* Carter v. Texas State Bank, 189 S.W.2d 782, 784 (Tex. Civ. App.—Texarkana 1945, no writ) (guaranty did not refer to notes, but import of its terms was to name county of performance); Citizens' State Bank v. Commonwealth Bank & Trust Co., 268 S.W. 1008, 1009 (Tex. Civ. App.—San Antonio 1925, no writ) (guaranty lacking words of incorporation was promise to pay "according to the tenor and terms of the note itself").

45. Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977) (refusing writ n.r.e. per curiam); *see* TEX. BUS. & COMM. CODE ANN. art. 3.416 (Tex. UCC) (Vernon 1968).

even one lacking such words as "according to its terms," is sufficient to bind the guarantor to venue provisions in the note.[46]

The Texas Supreme Court's use of the code in *Hopkins* is a departure from prior cases dealing with the guarantor-venue issue.[47] Both *Hopkins* and *Bohart* indicate that section 3.416 will have a pervasive effect on laws governing guarantors, yet it is unclear from these decisions what types of guaranties will fall within its scope. Guaranty agreements may take various forms and guaranties are not limited to promissory notes.[48] Section 3.416, however, speaks only of negotiable instruments.[49] In fact, section 3.416 seems to contemplate that all guaranties will be in the form of an additional signature on the instrument itself with words that indicate a special status.[50] Thus, in a technical sense, the applicability of section 3.416 to Hopkins' separate guaranty contract is questionable. At least two courts have refused to apply the code in similar situations,[51] and the dis-

46. Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977) (refusing writ n.r.e. per curiam).

47. Prior courts reaching the same result as *Hopkins* had based their reasoning upon the presence of words of incorporation or the coextensiveness of a guarantor's liability. *See* Cullum v. Commerical Credit Co., 134 S.W.2d 822, 824 (Tex. Civ. App.—Amarillo 1939, no writ) (words of incorporation); Citizens' State Bank v. Commonwealth Bank & Trust Co., 268 S.W. 1008, 1009 (Tex. Civ. App.—San Antonio 1925, no writ) (coextensive liability). The court of civil appeals in *Hopkins* did not use section 3.416 but did cite Laukhuf v. Associates Discount Corp., 443 S.W.2d 725 (Tex. Civ. App.—Dallas 1969, no writ) which was the first Texas case to apply the code for purposes of subdivision 5(a). Hopkins v. First Nat'l Bank, 546 S.W.2d 84, 87 (Tex. Civ. App.—Corpus Christi 1976), *writ ref'd n.r.e. per curiam*, 551 S.W.2d 343 (Tex. 1977). *Laukhuf* was a suit against persons who had indorsed notes "with recourse." The court cited section 3.414, which deals with indorsements, and held that the indorsements constituted an express agreement to pay in accordance with the terms of the note. Laukhof v. Associates Discount Corp., 443 S.W.2d 725, 727 (Tex. Civ. App.—Dallas 1969, no writ).

48. A guarantor is "answerable for the payment of some debt or the performance of some contract or duty" of another. Wood v. Canfield Paper Co., 117 Tex. 399, 404, 5 S.W.2d 748, 749 (1928).

49. Section 3.416 refers to "instruments." "'Instrument' means a negotiable instrument." TEX. BUS. & COMM. CODE ANN. § 3.102 (a)(5) (Tex. UCC) (Vernon 1968). Section 3.104(a) sets out the requirements of a negotiable instrument and in section 3.104(b) writings which meet these requirements are classified into drafts, checks, certificates of deposit and notes. *Id.* §§ 3.104(a), .104(b).

50. The comment under section 3.416 explains the liability of a guarantor of payment, referring to him as an "indorser who guarantees payment. . . ." TEX. BUS. & COMM. CODE ANN. § 3.416, comment (Tex. UCC) (Vernon 1968). An indorsement must be written on the instrument or on a paper firmly affixed thereto. *Id.* § 3.202(b).

51. *See* Fewox v. Tallahassee Bank & Trust Co., 249 So. 2d 55, 57 (Fla. 1971); Eikel v. Bristow Corp., 529 S.W.2d 795, 799-800 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). In *Eikel* a bank sued on three notes executed in 1967 and on two separate guaranty contracts executed in 1965 and 1967. In refusing to apply section 3.416 to the guaranty contracts, the court noted that "[s]ection 3.416 deals with guarantee agreements which are added to a signature on the instrument." Eikel v. Bristow Corp., 529 S.W.2d 795, 800 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). In *Fewox* the defendants had written a letter which guaranteed payment of outstanding or future loans to a corporation. The Florida court

senting justice in *Bohart* felt that even that form of guaranty, which was a clause executed below the maker's signature on the note, was outside the scope of section 3.416.[52] *Hopkins,* however, indicates that a guaranty of a note in the form of a separate writing may fall within section 3.416.[53]

Regardless of its form, a guaranty clearly is beyond the scope of section 3.416 when the principal contract is not "commercial paper."[54] At least two cases decided before *Hopkins* which dealt with the guarantor-venue issue, involved guarantors for contracts other than promissory notes.[55] Logically, the *Hopkins* rule should extend to any guaranty without regard to the limited scope of section 3.416.[56] Moreover, long before the UCC, a guarantor's liability was said to be measured by that of his principal, even for venue purposes, unless the guaranty specified otherwise.[57] As a result, if the underlying contract expressly names a place for performance, venue should be sustainable in that place against a guarantor whose own contract does not name a place for performance.

There is another possible limitation not presented to the court in *Hopkins.* When the contract underlying the guaranty, whether it be a note or any other type of contract, is a consumer transaction, the effect of subdivision 5(b) of article 1995 must be considered. Subdivision 5(b), added in 1973, excludes consumer transactions from 5(a); a consumer may

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refused to apply the code to the letter, stating that section 3.416(a) requires a signature on a negotiable instrument. Fewox v. Tallahassee Bank & Trust Co., 249 So. 2d 55, 57 (Fla. 1971).

52. Universal Metals & Mach., Inc. v. Bohart, 539 S.W.2d 874, 880-81 (Tex. 1976) (Steakley, J., dissenting).

53. Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977) (refusing writ n.r.e. per curiam). It should be noted that Hopkins' guaranty was executed "at or about" the time of the original note. Furthermore, the note stated that it was "secured by Guaranty of Burtram C. Hopkins II." Hopkins v. First Nat'l Bank, 546 S.W.2d 84, 85 (Tex. Civ. App.—Corpus Christi 1976), *writ ref'd n.r.e. per curiam,* 551 S.W.2d 343 (Tex. 1977).

54. Article 3 deals exclusively with the regulation of negotiable instruments as defined in section 3.104 and instruments "otherwise negotiable" as defined in section 3.805. TEX. BUS. & COMM. CODE ANN. § 3.103, comment 1 (Tex. UCC) (Vernon 1968).

55. *See* Marco Milling Co. v. Commercial Servs., Inc., 346 S.W.2d 495, 497 (Tex. Civ. App.—Texarkana 1961, no writ) (guarantors of accounts receivable agreement); Farmers' & Merchants' Nat'l Bank v. Lillard Milling Co., 210 S.W. 260, 261 (Tex. Civ. App.—Fort Worth 1919, no writ) (alleged guarantors of purchase contract).

56. The use of section 3.416 could be viewed as a buttress for the *Hopkins* rule. A recent case citing *Hopkins* involved guarantors of a promissory note. In holding that the guarantors were subject to venue at a place named in the note, no mention was made of section 3.416 or whether the form of the guaranties complied with that section. Bridewell Dev. Corp. v. American Gen. Inv. Corp., 554 S.W.2d 824, 825-26 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

57. Cullum v. Commerical Credit Co., 134 S.W.2d 822, 824 (Tex. Civ. App.—Amarillo 1939, no writ); McCauley v. Cross, 111 S.W. 790, 791-92 (Tex. Civ. App. 1908, no writ). In both cases the court relied on the rule of coextensive liability in holding a guarantor subject to suit in a place where the note was payable. *See* Citizens' State Bank v. Commonwealth Bank & Trust Co., 268 S.W. 1008, 1009 (Tex. Civ. App.—San Antonio 1925, no writ).

be sued only in the county where he signed his contract or where he lives.[58] While many guaranty agreements are clearly for commercial purposes, a guarantor's undertaking may encompass a personal loan or retail purchase.[59] *Hopkins* leaves open the applicability of subdivision 5(b) when a guarantor for a consumer is sued.[60]

Although a guarantor is sometimes described as a "favorite of the law,"[61] a guaranty can be a trap for the unwary. Every guarantor assents to a guaranty relationship fully expecting that the principal debtor will meet his own obligations. Compounding the guarantor's surprise when his principal defaults is the surprise he may encounter if he is sued before any litigation is brought against the principal in a place where he may never have expected to be sued. Obviously a potential guarantor needs a way to assess the risks involved. Since the UCC professes to modernize and clarify commercial law[62] and article 3 contains a provision governing guarantors, the inclination may be to look to article 3 for guidance. Yet the proper relationship between negotiable instruments law and general guaranty principles is not well defined.[63] Furthermore, not all guaranty agreements

58. In 1973 subdivision 5 became subdivision 5(a); subdivision 5(b) was added. TEX. REV. CIV. STAT. ANN. art. 1995, § 5(b) (Vernon Supp. 1976-1977) states:

> 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. No term or statement contained in an obligation described in this subsection shall constitute a waiver of this provision.

The reason for this amendment was to prevent "distant forum abuse" when consumers are sued by their creditors. Amaya v. Texas Sec. Corp., 527 S.W.2d 218, 221 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.), *noted in* 8 ST. MARY'S L.J. 219, 221 (1976); *see* Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEXAS L. REV. 269 (1973). Subdivision 5(b) is said to be a result of this article. Amaya v. Texas Sec. Corp., 527 S.W.2d 218, 220 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

59. Recent decisions indicate that subdivision 5(b) will be liberally construed. *Cf.* Amaya v. Texas Sec. Corp., 527 S.W.2d 218, 221 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (street improvements on property adjoining a residence were consumer transaction); Beef Cattle Co. v. N.K. Parrish, Inc., 553 S.W.2d 220, 222 (Tex. Civ. App.—Amarillo 1977, no writ) (purchase of over a million pounds of milo by cattle corporation was consumer transaction).

60. Presumably Hopkins' guaranty was for loans of a commercial nature. The applicability of subdivision 5(b) was not discussed. *See* Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977) (refusing writ n.r.e. per curiam).

61. McKnight v. Virginia Mirror Co., 463 S.W.2d 428, 430 (Tex. 1971); Southwest Sav. Ass'n v. Dunagan, 392 S.W.2d 761, 766 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

62. *See* TEX. BUS. & COMM. CODE ANN. § 1.102(2)(a) (Tex. UCC) (Vernon 1968).

63. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-12, at 427 n.98 (1972); Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833, 836, 876-79 (1968).

fall within the scope of section 3.416.[64]

Nevertheless, *Hopkins* appears to settle the guarantor-venue issue. The limited scope of section 3.416 does not necessarily confine the *Hopkins* decision because *Hopkins* is consistent with principles apart from the code. Subdivision 5(a) gives contracting parties a right to agree upon venue by bargaining over a place for performance. A 1935 amendment which prevents venue from being sustained by implication and the 1973 revision which excludes consumer transactions were intended to ensure that no contract will contain a venue provision when surprise and hardship to the defendant will result.[65] The idea that a guarantor's liability is measured by that of his principal, unless the guaranty specifies otherwise, was established long before section 3.416.[66] Arguably, being subject to venue in a county other than one's domicile is not a "liability" in the same sense as an amount due or a time or place for performance. Even so, the courts have managed to reach a logically satisfying result by first referring to the principal contract to find the guarantor liable to pay at a given place. Then, according to subdivision 5(a) he is subject to venue there.[67] Perhaps the simplest, most direct approach would be to consider first whether there is a venue provision sufficient against the principal and if there is, to regard the guarantor as subject to that provision. Of course, if a guarantor has the foresight to name a place for performance in his own contract a venue provision in the principal contract should be immaterial.

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64. Section 3.416 seems to contemplate a guaranty written on a negotiable instrument. TEX. BUS. & COMM. CODE ANN. § 3.416 (Tex. UCC) (Vernon 1968); *see* notes 49 and 50 *supra*.

65. Saigh v. Monteigh, 147 Tex. 341, 344, 215 S.W.2d 610, 611 (1948) (1935 amendment); Amaya v. Texas Sec. Corp., 527 S.W.2d 218, 220 (Tex. Civ. App.— San Antonio 1975, writ ref'd n.r.e.) (1973 revision). A number of other states have a contract exception to their venue statutes which allows suit to be brought in the county of performance. *See* Annot., 97 A.L.R.2d 934, 937 (1964). In some states venue *can* be fixed by implication. *Id.* at 942; *see* Skaggs-Stone, Inc. v. Batt, 5 Cal. Rptr. 882, 883 (Dist. Ct. App. 1960) (guarantor's motion for change of venue unsuccessful for several reasons including fact that guaranty contract could be interpreted to provide for performance in county of suit).

66. *See* note 57 *supra* and accompanying text.

67. Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977) (refusing writ n.r.e. per curiam); Citizens' State Bank v. Commonwealth Bank & Trust Co., 268 S.W. 1008, 1009 (Tex. Civ. App.—San Antonio 1925, no writ).