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Recovery of Usurious Interest Paid Is Not Authorized As a Forfeiture under Article 5069-1.06(1).

Taylor S. Boone

In statutory construction problems the courts should "[rule] out literalism as an absolute and an end in and of itself . . . ."[70] Nevertheless, unless a literal reading of a statute would lead to absurd consequences,[71] a careful adherence to statutory language is preferable. It is incumbent upon the legislature to phrase statutes in a manner that clearly reflects the objective to be accomplished. When a statute is part of a code, an even greater obligation is imposed upon the legislature to insure that the code provisions will provide a workable, coherent scheme. If the legislature falls short of this duty, the courts are left with the difficult task of extracting reasonable interpretations. As evidenced by the *Ward* decision, this can result in further confusion and uncertainty.

Betty L. Newcomb Hollowell

USURY—Penalties—Recovery of Usurious Interest Paid Is Not Authorized As a Forfeiture Under Article 5069-1.06(1)

First State Bank v. Miller,
563 S.W.2d 572 (Tex. 1978).

O.W. Miller and his wife, Macile Miller, contracted with the First State Bank of Bedford (Bank) for a $70,000 note payable in three years with interest at the rate of ten percent per annum. Pursuant to this contract, the Millers had the use of only $56,000. The remaining $14,000 was frozen in a non-interest bearing account to guarantee two postdated checks for the first two years' interest. After the death of her husband, Mrs. Miller repaid the contracted principal of $70,000 and brought suit alleging usury and seeking double the usurious interest contracted for and charged. The trial court, after holding that the loan was not usurious, rendered judgment in favor of the Bank. The court of civil appeals reversed and rendered in part, holding *inter alia* that the $56,000 was the true principal, and that the $14,000 was, in fact, usurious interest and should be returned to Mrs. Miller to satisfy the purpose of the usury statute.[1] The Bank appealed to the Texas Supreme Court. Held—*Affirmed as modified.* The recovery of usurious interest paid is not authorized as a forfeiture penalty under article

70. Hattaway v. United States, 304 F.2d 5, 9 (5th Cir. 1962).

71. *Id.* at 9 (quoting United States v. Katz, 271 U.S. 354, 357 (1926)).

1. Miller v. First State Bank, 551 S.W.2d 89, 97, 102-03 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified,* 563 S.W.2d 572 (Tex. 1978). The court held that since the $21,000 in interest contracted for was usurious based on the true principal of $56,000, Mrs. Miller was entitled to recover double the interest contracted for or charged in the amount of $42,000, and that the two $7,000 amounts the bank failed to recover in its counterclaim should be awarded to the plaintiff. *Id.* at 103.

5069-1.06(1) of the Texas Civil Statutes.[2]

Although now defined by constitutional and statutory provisions and judicial precedents, the concept of usury dates back to the Old Testament.[3] Until the Reformation, the collection of any interest whatsoever for the lending of money was considered a sin, as well as a breach of the law.[4] During this period the charging of interest in a moderate amount was first allowed, and it was not until the Statute of Anne that interest rates were statutorily regulated.[5] In the United States two general approaches eventually developed with regard to the enforcement of usury statutes and the treatment of usurious contracts: the *pari delicto* approach and the victim approach.[6] In a number of jurisdictions both the lender and the borrower to a usurious contract were apparently regarded as in *pari delicto* based on the general rule that money voluntarily paid with knowledge of all facts cannot be recovered although the contract or claim was illegal.[7] Consequently, these courts left the parties to the usurious contract as they found them and disallowed any recovery of usurious interest paid by the borrower.[8] In those jurisdictions appearing to follow the victim approach, the lender was regarded as an oppressor and the borrower as a victim.[9] Since the lender was regarded to have taken advantage of the unwary and the

2. First State Bank v. Miller, 563 S.W.2d 572, 576 (Tex. 1978). Article 5069-1.06(1) provides that "[a]ny person who contracts for, charges or receives" usurious interest "shall forfeit to the obligor twice the amount of interest contracted for, charged or received . . . ." TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1971). The court also held that since Mrs. Miller had not pled for recovery of any interest either at trial court or in the court of civil appeals, she could not sustain a favorable judgment for the $14,000. First State Bank v. Miller, 563 S.W.2d 572, 576 (Tex. 1978); *accord,* Oil Field Haulers Ass'n, Inc. v. Railroad Comm'n, 381 S.W.2d 183, 191 (Tex. 1964); Carreon v. Texas State Dep't. of Pub. Welfare, 537 S.W.2d 345, 347 (Tex. Civ. App.—San Antonio 1976, no writ).

3. *See* Pearce and Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury,* 22 Sw. L.J. 233, 233 (1968). *See generally Leviticus* 25:36; *Deuteronomy* 23:19; *Psalms* 15.

4. *See* Pearce and Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury,* 22 Sw. L.J. 233, 233-34 (1968).

5. *See* Pearce and Williams, *Punitive Past to Current Conveniece—A Study of the Texas Law of Usury,* 22 Sw. L.J. 233, 234 (1968) (citing Statute of Anne, 1713, 12 Anne, c. 16).

6. *Compare* Alabama Cash Credit Corp. v. Bartlett, 144 So. 808, 808 (Ala. 1932) *and* Wright v. First Nat'l Bank, 297 N.W. 505, 511 (Mich. 1941) *(pari delicto* approach) *with* Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 167-68, 14 S.W. 227, 227-28 (1890) *and* Temple Trust Co. v. Haney, 103 S.W.2d 1035, 1041 (Tex. Civ. App.—Austin), *aff'd,* 133 Tex. 414, 107 S.W.2d 368 (1937) (victim approach).

7. *See, e.g.,* Gladwin State Bank v. Dow, 180 N.W. 601, 605 (Mich. 1920); Ferguson v. Soden, 19 S.W. 727, 728 (Mo. 1892); Beach v. Guaranty Sav. & Loan Ass'n, 76 P. 16, 18 (Or. 1904). *See generally* Annot., 59 A.L.R.2d 522 (1958).

8. See cases and material cited note 7 *supra.*

9. *See* Wheaton v. Hibbard, 20 Johns. 289, 290 (N.Y. Sup. Ct. 1822); *cf.* Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 167-68, 14 S.W. 227, 228 (1890) (*pari delicto* approach rejected). *See generally* Annot., 59 A.L.R.2d 522 (1958).

less fortunate borrower, such borrower was allowed to recover interest paid on the usurious contract.[10] In enforcing usury laws Texas courts have declined to follow the *pari delicto* approach and have, instead, treated the parties to a usurious contract under the victim approach.[11]

Enforcement of usury laws in Texas dates back to the middle of the 19th century when the regulation of interest rates was first incorporated in Texas statutes.[12] Shortly after the Civil War, however, the Reconstruction government redrafted the Texas Constitution, repealing all usury laws.[13] Seven years later, in the wake of severe credit abuses,[14] the prohibition against excessive interest was incorporated in the 1876 Constitution.[15] Article XVI, section 11 of the Texas Constitution, as amended November 8, 1960, authorized the legislature to define interest and establish maximum rates of interest.[16] Subsequently, the legislature defined interest as "the compensation allowed by law for the use or forbearance or detention of money"[17] and established a ten percent per annum maximum limit on interest rates.[18] Usury was defined as interest exceeding the amount fixed by law,[19] and it was stipulated that all written contracts, except those otherwise authorized by law,[20] which directly or indirectly provided for a

10. See cases and material cited note 9 *supra*.

11. *See* Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 167-68, 14 S.W. 227, 228 (1890); Temple Trust Co. v. Haney, 103 S.W.2d 1035, 1041 (Tex. Civ. App.—Austin), *aff'd*, 133 Tex. 414, 107 S.W.2d 368 (1937); Thompson v. Kansas City Life Ins. Co., 102 S.W.2d 285, 286 (Tex. Civ. App.—Waco 1937, writ ref'd). *See generally* Annot., 59 A.L.R.2d 522 (1958).

12. *See* Pearce and Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 235 (1968). *See generally* TEX. CONST. art. XVI, § 11, comment (Vernon 1955).

13. *See* TEX. CONST. art. XII, § 44 (1869). *See generally* TEX. CONST. art. XVI, § 11, comment (Vernon 1955).

14. *See generally* TEX. CONST. art. XVI, § 11, comment (Vernon 1955).

15. *See* TEX. CONST. art. XVI, § 11 (1876).

16. *See* TEX. CONST. art. XVI, § 11.

17. TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1971).

18. *Id.* art. 5069-1.04.

19. *Id.* art. 5069-1.01(d). The essential elements of usury are: (1) a loan or forbearance of money, (2) an obligation of the borrower to repay the principal, and (3) an agreement to pay more than the legal rate of interest for its use. *See, e.g.*, Crow v. Home Sav. Ass'n, 522 S.W.2d 457, 459-60 (Tex. 1975); Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 168, 14 S.W. 227, 228 (1890); Maloney v. Andrews, 483 S.W.2d 703, 704 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.). *See generally* Loiseaux, *Some Usury Problems in Commercial Lending*, 49 TEXAS L. REV. 419 (1971); Pearce and Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233 (1968). The test for usury must be applied to the net amount of money of which the borrower actually has use, which is not necessarily the principal of the loan. Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 782 (Tex. 1977); Nevels v. Harris, 129 Tex. 190, 196, 102 S.W.2d 1046, 1049 (1937).

20. For example, certain regulated small loans may call for interest rates in excess of ten percent. *See* TEX. REV. CIV. STAT. ANN. arts. 5069-3.15, .16 (Vernon 1971).

greater interest rate would be subject to the appropriate penalties.[21] The penalties were established in article 5069-1.06 and classified by the amount of interest contracted for, charged, or received.[22]

In Texas, under the victim approach, actions similar to that for money had and received were at one time invoked to recover usurious interest paid.[23] Payments of usurious interest made by the borrower were deemed involuntary, and, therefore, the borrower and lender were not in *pari-delicto.*[24] With the enactment of statutes providing penalties for charging or receiving usurious interest,[25] the courts allowed the borrower to elect between application of the usurious interest paid to the discharge of the principal or recovery of twice the amount of the interest paid.[26] When it was proven, however, that the borrower had knowingly paid usurious interest which was subsequently applied to the discharge of the principal, the borrower was not permitted to recover either the usurious interest paid in excess of the principal or the double interest penalty.[27] With these precedents, the usury statutes were rewritten in 1967.[28]

The most significant change to the usury statutes in 1967 was the addition of the term "contracts for" to the former "charges or receives" in the

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21. *Id.* art. 5069-1.04.

22. *Id.* art. 5069-1.06. Section (1) of article 5069-1.06 provides that a person contracting for, charging, or receiving interest in excess of ten percent shall forfeit to the obligor twice the amount contracted for, charged, or received. Section (2) mandates that a person charging twenty percent or more "shall forfeit as an additional penalty, all principal as well as interest and all other charges." Section (2) further stipulates that such person shall be guilty of a misdemeanor and establishes a fine not to exceed one thousand dollars. Section (3) provides a four year statute of limitation. *Id.* art. 5069-1.06(1)-(3).

23. *See* Smith v. Stevens, 81 Tex. 461, 465, 16 S.W. 986, 989 (1891) (on rehearing); Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 168-69, 14 S.W. 227, 228 (1890).

24. *See* Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 168, 14 S.W. 227, 228 (1890). It was held that even a borrower who had voluntarily paid interest at an usurious rate could recover the interest paid in excess of the rate permissible under the statute. *Id.* at 168, 14 S.W. at 228.

25. *See* 1907 Tex. Gen. Laws, ch. 143, § 1, at 277-78; 1963 Tex. Gen. Laws, ch. 205, § 28, at 550.

26. Adleson v. B.F. Dittmar Co., 124 Tex. 564, 568, 80 S.W.2d 939, 941 (1935); Cherry v. Berg, 508 S.W.2d 869, 876-77 (Tex. Civ. App.—Corpus Christi 1974, no writ); Ingram v. Temple Trust Co., 108 S.W.2d 306, 309 (Tex. Civ. App.—Austin 1937), *aff'd on other grounds sub nom.* Glenn v. Ingram, 133 Tex. 431, 126 S.W.2d 951 (1939). The courts recognized this election to be valid only when the principal had not been repaid and they also held that the remedies were mutually exclusive. Adleson v. B.F. Dittmar Co., 124 Tex 564, 568, 80 S.W.2d 939, 941 (1935); Cherry v. Berg, 508 S.W.2d 869, 876-77 (Tex. Civ. App.—Corpus Christi 1974, no writ); Ingram v. Temple Trust Co., 108 S.W.2d 306, 309 (Tex. Civ. App.—Austin 1937), *aff'd on other grounds sub nom.* Glenn v. Ingram, 133 Tex. 431, 126 S.W.2d 951 (1939).

27. Cherry v. Berg, 508 S.W.2d 869, 876-77 (Tex. Civ. App.—Corpus Christi 1974, no writ); Ingram v. Temple Trust Co., 108 S.W.2d 306, 309 (Tex. Civ. App.—Austin 1937), *aff'd on other grounds sub nom.* Glenn v. Ingram, 133 Tex. 431, 126 S.W.2d 951 (1939).

28. *See* 1967 Tex. Gen. Laws, ch. 274, § 2, at 609-10 (codified at TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 to 1.06 (Vernon 1971)).

section prescribing penalties.[29] In *Wall v. East Texas Teachers Credit Union*[30] the Texas Supreme Court construed article 5069-1.06 to mean that anyone who contracted for interest greater than ten percent would be required to forfeit twice the amount of interest whether or not interest was paid.[31] Furthermore, the court concluded that the penalty of twice the amount of interest contracted for would not be realized if the borrower were also required to pay the usurious interest.[32] A subsequent case held that to recover penalties for usurious interest any one of the three conditions precedent would suffice: a contract for usurious interest, the charging of usurious interest, or the receipt of usurious interest.[33]

As a consequence of the penalty provisions, usury statutes have been considered penal in nature.[34] As a general rule penal statutes have been construed strictly, and this rule has been applied numerous times to require a strict construction of the usury statutes.[35] The intention of the legislature, however, has governed in the construction of both penal and civil statutes, and penal statutes have not been construed so narrrowly as to circumvent the clear intent of the legislature.[36] Since the passage of the

29. Loiseaux, *Some Usury Problems in Commercial Lending*, 49 TEXAS L. REV. 419, 441 (1971); *see* TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1971).

30. 533 S.W.2d 918 (Tex. 1976).

31. *Id.* at 921; *see* TEX. REV. CIV. STAT. Ann. art. 5069-1.06 (Vernon 1971).

32. Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921 (Tex. 1976). In this case the lender was affirmatively seeking payment of usurious interest which had not been paid. The court of civil appeals had erroneously awarded the lender that payment as an offset against the borrower's recovery of twice the contracted for interest. *See id.* at 921.

33. *See* Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260, 261 (Tex. 1977).

34. *E.g.*, First State Bank v. Miller, 563 S.W.2d 572, 577 (Tex. 1978); Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Temple Trust Co. v. Haney, 103 S.W.2d 1035, 1039 (Tex. Civ. App.—Austin), *aff'd*, 133 Tex. 414, 107 S.W.2d 368 (1937). *See generally* Comment, *The Judicial Avoidance of Liberal Statutory Contruction: Is Article 10, Section 8 Lost and Forgotten?*, 10 ST. MARY'S L.J. 163 (1978).

35. *See, e.g.*, Commerce Trust Co. v. Best, 124 Tex. 583, 591, 80 S.W.2d 942, 946 (1935); Pinemont Bank v. DuCroz, 528 S.W. 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Temple Trust Co. v. Haney, 103 S.W.2d 1035, 1039 (Tex. Civ. App.—Austin), *aff'd*, 133 Tex. 414, 107 S.W.2d 368 (1937). *See generally* Pearce and Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 SW. L.J. 233 (1968).

36. *See* Huddleston v. United States, 415 U.S. 814, 831 (1974); United States v. Lacher, 134 U.S. 624, 629 (1890); *accord*, Thompson v. Missouri K. & T. Ry., 103 Tex. 372, 378-79, 126 S.W. 257, 259 (1910). The Texas Legislature has provided that in the construction of civil statutes, the legislative intent is of paramount importance. TEX. REV. CIV. STAT. ANN. art. 10(6) (Vernon 1969); *see* Minton v. Frank, 545 S.W.2d 442, 445 (Tex. 1976); State v. Shoppers World, Inc., 380 S.W.2d 107, 110 (Tex. 1964). Further evidence of legislative disfavor with the canon of strict construction can be found in section 1.05 of the Texas Penal Code which states: "The rule that a Penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code." TEX. PENAL CODE ANN. § 1.05(a) (Vernon 1974).

Texas Consumer Credit Code,[37] of which the usury statutes are a part, Texas courts have issued various constructions of the penal sections therein.[38]

In *First State Bank v. Miller*[39] the Texas Supreme Court considered whether recovery of usurious interest paid was authorized as a forfeiture penalty under article 5069-1.06(1).[40] Although the court noted a procedural error which alone precluded recovery of the usurious interest paid,[41] it held that such recovery was not authorized under the usury statute.[42] The court reasoned that it was not the intent of the legislature to provide for the recovery of usurious interest paid, that the interpretation of *Wall* by the court of civil appeals was erroneous, and that a strict construction of article 5069-1.06(1) limited recovery of usurious interest to a maximum of twice that contracted for, charged, or received.[43] Justice Daniel, writing for the majority, reasoned that if the legislature had intended the additional penalty of forfeiture of interest actually paid under section (1) of article 5069-1.06, it could have been just as easily stated there as it was in section (2) of the same article.[44] In concluding its reasoning, the majority held that article 5069-1.06(1), being penal in nature, should be strictly construed, limiting recovery to the amount of usurious interest contracted for, charged, or received.[45]

Justice Johnson, writing the dissenting opinion, interpreted the majority

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37. TEX. REV. CIV. STAT. ANN. art. 5069 (Vernon 1971).

38. *Compare* Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755, 769 (Tex. 1977) (on motion for rehearing) *and* Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260, 261 (Tex. 1977) (penal provision within consumer credit code appears liberally construed) *with* First State Bank v. Miller, 563 S.W.2d 572, 577 (Tex. 1978) *and* Crow v. Home Sav. Ass'n, 522 S.W.2d 457, 460 (Tex. 1975) (usury provision within consumer credit code appears strictly construed).

39. 563 S.W.2d 572 (Tex. 1978).

40. *Id.* at 576.

41. *Id.* at 576. Mrs. Miller did not plead for recovery of any interest paid, no such claim was tried by consent, and it was not presented on appeal. *See* Oil Field Haulers Ass'n, Inc. v. Railroad Comm'n, 381 S.W.2d 183, 191 (Tex. 1964); Cape Conroe Ltd. v. Specht, 525 S.W.2d 215, 218 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

42. First State Bank v. Miller, 563 S.W.2d 572, 576-77 (Tex. 1978).

43. *Id.* at 577.

44. *Id.* at 576-77. *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1971) (lender shall forfeit twice the amount of interest) *with id.* art. 5069-1.06(2) (lender "shall forfeit as an additional penalty, all principal as well as interest"). Justice Daniel also wrote that the correct determination of whether a borrower could recover interest paid on a usurious contract was made in *Ferguson v. Tanner Development Co.* First State Bank v. Miller, 563 S.W.2d 572, 577 (Tex. 1978). In *Ferguson*, a suit to recover statutory penalties, the court noted that article 5069-1.06(1) does not specifically require the return of usurious interest received by the lender as an additional penalty. Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977).

45. First State Bank v. Miller, 563 S.W.2d 572, 577 (Tex. 1978).

holding as authorizing a lender to retain usurious interest already collected even though the borrower's payments were made "through ignorance, mistake, or fear."[46] The dissent further found the court's holding to be contrary to the legislative intent, the law of usury, and the equitable enforcement of the statute as reflected in *Wall*.[47] Consequently, the dissenting justices would have ordered the refund of usurious interest paid in addition to the penalty of twice the contracted for interest.[48]

By not requiring the refund of usurious interest paid, the majority opinion may frustrate the legislature's intent in enacting the usury statutes.[49] Lenders and borrowers are treated differently under the majority's interpretation based solely on whether the lender has exacted usurious interest.[50] The lender who collects any or all usurious interest is penalized less than the lender who has not received any payment of usurious interest.[51] Although both lenders, as mandated by statute, are to "forfeit to the

46. *Id.* at 578 (Johnson, J., dissenting).

47. *Id.* at 581 (Johnson, J., dissenting). *See generally* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918 (Tex. 1976). The dissent reasoned that the effect of the majority holding was to adopt a *pari delicto* approach in construing usurious contracts by leaving the parties where they were found, although such a construction would be contrary to legislative intent and judicial precedent. First State Bank v. Miller, 563 S.W.2d 572, 578 (Tex. 1978) (Johnson, J., dissenting); *see* Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 168, 14 S.W. 227, 228 (1890); *Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1, 1-2 (Vernon 1971). In *First State Bank* the dissent further argued that the majority's interpretation would be inequitable, possibly even unconstitutional, because it would permit varying results from case to case. Accordingly, the dissent would have applied another rule of construction that would have avoided inequitable and unconstitutional results. First State Bank v. Miller, 563 S.W.2d 572, 578-79 (Tex. 1978) (Johnson, J., dissenting); *see* McKinney v. Blankenship, 154 Tex. 632, 640-41, 282 S.W.2d 691, 697 (1955); Anderson v. Penix, 138 Tex. 596, 602, 161 S.W.2d 455, 458-59 (1942).

48. First State Bank v. Miller, 563 S.W.2d 572, 581 (Tex. 1978) (Johnson, J., dissenting).

49. *See id.* at 578-79 (Johnson, J., dissenting); *cf.* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921 (Tex. 1976) (recovery against borrower of usurious interest before maturity contrary to legislative purpose of usury statute).

50. *See* First State Bank v. Miller, 563 S.W.2d 572, 578-79 (Tex. 1978) (Johnson, J., dissenting).

51. The example below compares Lender A with Lender B. A and B both loan $10,000 at 15% for 2 years. A has been able to collect one year's interest of $1,500, while B has not. Both A and B are sued for usury in a court that interprets article 5069.1.06(1) as requiring penalties of twice the interest for which has been contracted. Assuming that A and B were found guilty of usury, the enforcement of the penal provisions as interpreted by the majority would have the following result.

	Lender A	Lender B
Interest Collected	$ 1,500	$ —0—
Penalty: Twice the Interest Contracted for ($3,000 × 2)	< 6,000 >	< 6,000 >
NET PENALTY	<$4,500 >	<$ 6,000 >

obligor twice the amount of interest,"[52] the lender who has received payment of such interest is not specifically required to refund that amount.[53] As a result, the penalty of the lender who made collections is offset by the usurious interest payments.[54] Indeed, where a lender collects all of the usurious interest contracted for, his net penalty would be nothing more than the amount of such interest, thereby effectively eliminating the legislatively mandated penalty.[55] Consequently, the majority's interpretation in effect provides an incentive for lenders to apply whatever means possible to collect interest from borrowers.[56] Furthermore, it will be those individuals least likely to comprehend their rights under the usury statutes who succumb to such pressures.[57] Since the stated purpose of enacting the present usury statute was to protect "the uneducated, the unsophisticated, the poor, and the elderly," the majority's interpretation is difficult to reconcile with the intent of the legislature.[58]

The legislature's declaration of intent evidences a recognition that the penalties under the prior statute did not provide effective or workable safeguards.[59] It is contrary to this stated intent to attribute to the legislature a desire to impose a penalty under article 5069-1.06(1) that would

52. TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1971).

53. *See* Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977).

54. *See* First State Bank v. Miller, 563 S.W.2d 572, 579 (Tex. 1978) (Johnson, J., dissenting); *cf.* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921 (Tex. 1976) (obligor required to pay usurious interest does not receive forfeiture of twice the contracted for interest).

55. *Cf.* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921 (Tex. 1976) (obligor required to pay usurious interest does not receive forfeiture of twice the contracted for interest). For example, if a borrower under a usurious contract agreed to pay $100,000 in interest, the statutory penalty would be $200,000. If the lender had already collected the $100,000 in usurious interest, his net penalty would be only $100,000, an amount equal only to the contracted for interest. *See* First State Bank v. Miller 563 S.W.2d 572, 579 (Tex. 1978) (Johnson, J., dissenting).

56. *Cf.* Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976) (lender collecting should be in no better position than one merely contracting for or charging), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977).

57. *See* First State Bank v. Miller, 563 S.W.2d 572, 579 (Tex. 1978) (Johnson, J., dissenting).

58. *See Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1, 1-2 (Vernon 1971). The *Declaration of Legislative Intent* states:

> (1) Many citizens of our State are being victimized and abused in various types of credit and cash transactions . . . .
>
> . . . .
>
> (4) These unregulated practices bring great social and economic hardship to many citizens of our State. They impose intolerable burdens on those segments of our society which can least afford to bear them—the uneducated, the unsophisticated, the poor and the elderly.

Id. at 1-2.

59. *See id.* at 1-2.

yield nothing more than the penalty of the prior statute - twice the interest paid.[60] It would be more reasonable to construe section (1) as requiring the refund of the interest paid, thereby making the penalty more of a safeguard.

Furthermore, the majority opinion is difficult to reconcile with the holding in *Wall*.[61] The court in *Wall* concluded that a penalty of twice the amount of interest contracted for would not be realized if the borrower were also required to pay the usurious interest.[62] The most significant difference between *First State Bank* and *Wall* is that the lender in *First State Bank* had collected usurious interest while the lender in *Wall* had not.[63] It follows from this comparison that the majority has restricted the application of *Wall* to only those situations where the lender has yet to collect the usurious interest.[64] The significance of this limitation is to provide different penalties for the same usurious contract depending only upon whether the lender has exacted usurious interest.[65] The court, in essence, has created

60. *See id.* at 1-2. *See generally* Pearce and Williams, *Punitive Past to Current Convenience—A Study of Texas Law of Usury*, 22 Sw. L.J. 233, 249 (1968).

61. *Compare* First State Bank v. Miller, 563 S.W.2d 572, 575-76 (Tex. 1978) (lender allowed to retain usurious interest collected) *with* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 920-21 (Tex. 1976) (lender not allowed to collect usurious interest).

62. Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921 (Tex. 1976).

63. *Compare* First State Bank v. Miller, 563 S.W.2d 572, 575-76 (Tex. 1978) (usurious interest collected) *with* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 920-21 (Tex. 1976) (no interest collected).

64. *See* First State Bank v. Miller, 563 S.W.2d 572, 580 (Tex. 1978) (Johnson, J., dissenting).

65. *See id.* at 578-79 (Johnson, J., dissenting); *cf.* Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976) (lender collecting should be in no better position than one merely contracting for or charging), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977). The following example compares Lender A and Borrower X with Lender B and Borrower Y. Both groups contracted for a $10,000 note at 15% per annum for 2 years. Lender A never collected any interest. Under the authority of *Wall* his penalty is not reduced by the amount of usurious interest. Lender B has collected all $3,000 of interest, and under the authority of *First State Bank* B is not required to refund that amount.

	Lender A	Lender B
Interest Collected	$ —0—	$ 3,000
Penalty: Twice the Interest Contracted for	< 6,000>	< 6,000>
NET PENALTY	<$ 6,000>	<$ 3,000>

	Borrower X	Borrower Y
Interest Paid	$ —0—	<$ 3,000>
Relief: Twice the Interest Contracted for	6,000	6,000
NET RELIEF	$ 6,000	$ 3,000

classifications in addition to those specified in the usury statute. The legislature did not create classifications of lenders and borrowers according to whether they had received or paid interest,[66] and the propriety of creating such classifications by judicial fiat is questionable.[67] It would have been more consistent if *Wall* was applied by *First State Bank* so that article 5069-1.06(1) could be uniformly enforced within the legislatively created classifications.[68]

As a result of the holdings by the Texas Supreme Court in *First State Bank* and *Wall*,[69] when lower courts encounter a transaction where interest has been contracted for, charged, and collected in various amounts, they will find no guidance from the *First State Bank* opinion.[70] Following the opinion literally, a court could properly award twice the amount of interest contracted for or twice the amount of interest paid.[71] Consequently, the enforcement of the statute may become even more incongruous and inequitable as the courts draw their own conclusions.[72] It is an established principle of statutory construction that a statute "not be construed so as

66. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1971).

67. *Cf.* Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313, 319 (Tex.) (court not empowered to enlarge powers granted to Commission), *cert. denied*, 385 U.S. 991 (1966); Brazos River Auth. v. City of Graham, 163 Tex. 167, 182, 354 S.W.2d 99, 109 (1961) (court may not invade legislative field); Railroad Comm'n v. Houston Natural Gas Corp., 155 Tex. 502, 528, 289 S.W.2d 559, 575 (1956) (duty of legislature to declare law and of courts to apply it).

68. *Cf.* Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976) (lender collecting should be in no better position than one merely contracting for or charging), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977). For example, if the same facts as in note 65 *supra* are assumed, except that the logic of *Wall* has been applied by the court in which Lender B and Borrower Y appear, the net penalty and net relief for both groups would equal $6,000. Consequently, article 5069-1.06(1) would be uniformly enforced within the same classifications.

69. *Compare* First State Bank v. Miller, 563 S.W.2d 572, 575-76 (Tex. 1978) (usurious interest collected) *with* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 920-21 (Tex. 1976) (no interest collected).

70. *See* First State Bank v. Miller, 563 S.W.2d 572, 579 (Tex. 1978) (Johnson, J., dissenting).

71. *Id.* at 579 (Johnson, J., dissenting).

72. In the following example, X and Y are in different courts, both have borrowed $10,000 at 15% for 2 years, X has paid $1,500 interest, and Y has paid none. Further the court in which X appeared only recognized interest paid, while Y's court recognized interest contracted for.

	Borrower X	Borrower Y
Interest Paid	<$ 1,500>	$ —0—
Penalties Provided:		
a. Twice the Interest Paid	3,000	
b. Twice the Interest Contracted for		6,000
NET PENALTIES RECOVERED	$ 1,500	$ 6,000

to ascribe to the legislature an intention to do an unjust or unreasonable thing," if such statute is "reasonably susceptible" of a construction that will avoid such a result.[73] Accordingly, it would be more appropriate to construe article 5069-1.06(1) as requiring the recovery of twice the amount of interest contracted for in addition to a refund of interest paid.[74] Such a construction would provide for the uniform application of penalties regardless of whether and to what extent usurious interest had actually been paid.[75]

If penalties, however, are not applied consistently, the result could be the unconstitutional denial of equal protection.[76] The equal protection clauses of both the Texas and the United States Constitutions provide that two persons under similar circumstances are to be treated alike both in privileges conferred and liabilities imposed.[77] To determine the constitutionality of article 5069-1.06(1) under the equal protection provisions, the proper test is whether a reasonable basis exists for statutory classifications and whether the law operates equally towards all people within each class.[78] Four classifications are established in the usury provisions; two

73. Anderson v. Penix, 138 Tex. 596, 602, 161 S.W.2d 455, 458-59 (1942); *see* Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755, 769 (Tex. 1977) (on motion for rehearing); McKinney v. Blankenship, 154 Tex. 632, 640-41, 282 S.W.2d 691, 697 (1955).

74. *See* First State Bank v. Miller, 563 S.W.2d 572, 580 (Tex. 1978) (Johnson, J., dissenting); *cf.* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921 (Tex. 1976) (obligor required to pay usurious interest does not receive forfeiture of twice the contracted for interest).

75. *See* First State Bank v. Miller, 563 S.W.2d 572, 578-79 (Tex. 1978) (Johnson, J., dissenting).

76. *See id.* at 578-79 (Johnson, J., dissenting); *cf.* Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972) (dissimilar treatment of persons classified as married or unmarried); Reed v. Reed, 404 U.S. 71, 75-77 (1971) (dissimilar treatment according to sex); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (arbitrary classification of corporations for purposes of taxation).

77. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972); Reed v. Reed, 404 U.S. 71, 75-77 (1971); Barbier v. Connolly, 113 U.S. 27, 31 (1885); *see* Rucker v. State, 170 Tex. Crim. 487, 488-89, 342 S.W.2d 325, 326-27 (1961); U.S. CONST. amend. XIV; TEX. CONST. art I, § 3. *See generally* TEX. CONST. art I, § 3, comment (Vernon 1955).

78. *E.g.*, Fuller v. Oregon, 417 U.S. 40, 49 (1974); James v. Strange, 407 U.S. 128, 140-41 (1972); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); *see* Railroad Comm'n v. Miller, 434 S.W.2d 670, 673 (Tex. 1968). At least three tests are applied at various times to determine the constitutionality of laws under the equal protection provision. The rational basis test is applied when administrative and statutory classifications are questioned as not being in harmony with the purpose of the relevant administrative rule or statute. *See* Fuller v. Oregon, 417 U.S. 40, 49 (1974); James v. Strange, 407 U.S. 128, 140-41 (1972); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991, 991-96 (1978). The "strict scrutiny" test is applied usually where classifications involve discrimination concerning race or national origin. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hall v. Pennsylvania State Police, 570 F.2d 86, 90 (3d Cir. 1978). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 522, 524-25 (1978). A third test similar to that of "strict scrutiny" has developed

classifications are for those persons who loan money in excess of ten percent and twenty percent, and the other two classifications are for those persons borrowing money in excess of ten pecent and twenty percent.[79] The classification of a person as a lender or as a borrower is reasonable as is the further classification according to the magnitude of the violation.[80] The imposition of penalties, however, as interpreted by the majority opinion, does not operate equally on all persons within each of the four classes; rather, it depends solely on how much interest has actually been paid.[81] Since there appears to be no rationale for varying the penalties within each classification in such a manner, the statute as construed by the court in *First State Bank* may be in conflict with both the United States and Texas Constitutions.[82] If the statute is susceptible to another construction that would render the imposition of penalties constitutional, such a construction would be more appropriate.[83] As evidenced by the dissent in *First*

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in the past ten years and is most often applied to classifications based on gender and illegitimacy. *See* Mathews v. Lucas, 427 U.S. 495, 505 (1976). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 522, 525 (1978).

79. *See* TEX. REV. CIV. STAT. ANN. art 5069-1.06(1) & (2) (Vernon 1971).

80. *See* Watts v. Mann, 187 S.W.2d 917, 924 (Tex. Civ. App.—Austin 1945, writ ref'd). *See generally* Fuller v. Oregon, 417 U.S. 40, 49 (1974); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); Ground Water Conservation Dist. v. Hawley, 304 S.W.2d 764, 767-68 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 306 S.W.2d 352 (Tex. 1957).

81. *See* First State Bank v. Miller, 563 S.W.2d 572, 578-79 (Tex. 1978) (Johnson, J., dissenting); *cf.* Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976) (lender collecting should be in no better position than one merely contracting for or charging), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977). The example below compares Lender A and Borrower X with Lender B and Borrower Y. Assume both groups entered into a $10,000 loan at 15% for 2 years. Lender A has collected the first year's interest of $1,500 from Borrower X; Lender B has collected no interest from Borrower Y. The following would result under the majority's opinion.

	Lender A	Lender B
Interest Collected	$ 1,500	$ —0—
Penalty Imposed and Amount Paid	< 6,000>	< 6,000>
NET PENALTY IMPOSED	<$ 4,500>	<$ 6,000>
	Borrower X	**Borrower Y**
Interest Paid	< $ 1,500>	$ —0—
Penalty Imposed and Amount Received	6,000	6,000
NET PENALTY REALIZED	$ 4,500	$ 6,000

82. *See, e.g.*, Fuller v Oregon, 417 U.S. 40, 49 (1974); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); Railroad Comm'n v. Miller, 434 S.W.2d 670, 673 (Tex. 1968).

83. *See* McKinney v. Blankenship, 154 Tex. 632, 640-41, 282 S.W.2d 691, 697 (1955); Greene v. Robison, 117 Tex. 516, 524, 8 S.W.2d 655, 656 (1928).

State Bank, article 5069-1.06(1) can be constitutionally construed to require the refund of usurious interest paid to the borrower.[84] Such an interpretation would guarantee uniformity of both penalties for the lender and relief for the borrower.[85]

Despite the common law rule that penal statutes are to be strictly construed against the state or prosecution and in favor of the accused,[86] the majority's application of this canon appears inappropriate.[87] The recovery of usurious interest paid is more similar to the civil remedy of conversion than it is to a penalty.[88] Therefore, since article 5069-1.06 is a civil statute,[89] and recovery of usurious interest is essentially a remedy rather than a penalty,[90] a strict construction is in conflict with the general provisions for the construction of civil statutes.[91] Furthermore, the majority's interpretation is inconsistent with the court's holding in *Southwestern Investment Co. v. Mannix*,[92] which preceded *First State Bank* by only four months. In *Mannix* the Texas Supreme Court did not adopt the narrow rule of strict construction but decided that it must follow a construction which was reasonable and in agreement with the legislative intent.[93] Additionally, the majority in *First State Bank* overlooks another well-established canon of construction that a penal statute should be construed to harmonize with and not frustrate the policy and objectives of the legislature.[94] The effect

84. First State Bank v. Miller, 563 S.W.2d 572, 579-81 (Tex. 1978) (Johnson, J., dissenting).

85. *See id.* at 578-81 (Johnson, J., dissenting).

86. *Id.* at 577; *see* United States v. Resnick, 299 U.S. 207, 209-10 (1936); United States v. Wells, 176 F. Supp. 630, 632 (S.D. Tex. 1959); Mann v. Texas State Bd. of Medical Examiners, 403 S.W.2d 218, 221 (Tex. Civ. App.—Austin 1966), *aff'd*, 413 S.W.2d 382 (Tex. 1967).

87. *See* First State Bank v. Miller, 563 S.W.2d 572, 579-80 (Tex. 1978) (Johnson, J., dissenting).

88. *See generally* Pearce and Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 249 (1968).

89. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1971).

90. *See* Pearce and Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 249 (1968).

91. *See* TEX. REV. CIV. STAT. ANN. art. 10, §§ 6, 8 (Vernon 1971). Section 6 requires courts to follow legislative intent in the construction of civil statutes, and section 8, in part, requires a liberal construction of statutes to attain the statutes' objectives and to promote justice. *Id.* art. 10, §§ 6, 8. *See generally* Comment, *The Judicial Avoidance of Liberal Statutory Construction: Is Article 10, Section 8 Lost and Forgotten?*, 10 ST. MARY'S L.J. 163 (1978).

92. 557 S.W.2d 755, 769 (Tex. 1977) (on motion for rehearing) (court construing another article within Consumer Credit Code); *accord*, Ford Motor Credit Co. v. Blocker, 558 S.W.2d 493, 498 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.); O.R. Mitchell Motors, Inc. v. Bell, 528 S.W.2d 856, 859-60 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

93. Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755, 769 (Tex. 1977); *accord*, Ford Motor Credit Co. v. Blocker, 558 S.W.2d 493, 498 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.); O.R. Mitchell Motors, Inc. v. Bell, 528 S.W.2d 856, 859-60 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

94. *Se* Huddleston v. United States, 415 U.S. 814, 831 (1974); United States v. Lacher,

of the majority's strict construction of article 5069-1.06(1) is to allow the lender to offset any usurious interest collected against any penalty levied.[95] It is a questionable construction that allows the lender to retain the fruits of his wrongdoings.[96] Finally, it is ironic that this rule, which is most often applied in criminal proceedings,[97] has been abrogated in the Penal Code[98] and yet is applied without question by the majority to this civil statute.[99]

While usury has long been subject to regulation, the common law remedy for the recovery of payments of usurious interest has not been abrogated by statutes providing penalties.[100] Although the court held that interest paid was not recoverable under the statute, it did not preclude recovery under a common law action.[101] In fact, the court implied that it might have reached a different conclusion if the common law actions had been pled.[102] In such event the court would likely have followed the precedent, established in *Bexar Building & Loan Association v. Robinson*,[103] that a borrower not in *pari delicto* could recover the interest paid in excess of the highest legal rate.[104]

As a result of the decision in *First State Bank*, the imposition of penalties under article 5069-1.06(1) as construed could be questioned as producing inequitable and unconstitutional results. Although the statute is susceptible of a reasonable construction, it has been construed so narrowly and so strictly that it frustrates the legislative intent of the usury statute.[105] As a practical matter, the borrower when seeking to recover usurious interest payments, and to avoid the need of testing the constitutionality of the

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134 U.S. 624, 629 (1890); Thompson v. Missouri K. & T. Ry., 103 Tex. 372, 378-79, 126 S.W.257, 259 (1910).

95. *See* First State Bank v. Miller, 563 S.W.2d 572, 579 (Tex. 1978) (Johnson, J., dissenting); *cf.* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921 (Tex. 1976) (obligor required to pay usurious interest does not receive forfeiture of twice the contracted for interest).

96. *See* Young v. Barker, 342 P.2d 150, 159 (Kan. 1959).

97. *See, e.g.*, United States v. Giles, 300 U.S. 41, 48-49 (1937); Prussian v. United States, 282 U.S. 675, 677 (1931); United States v. Harris, 177 U.S. 305, 310 (1900).

98. *See* TEX. PENAL CODE ANN. § 1.05(a) (Vernon 1974).

99. *See* First State Bank v. Miller, 563 S.W.2d 572, 577 (Tex. 1978).

100. *See id.* at 576; Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977); *accord*, Flannery v. Bishop, 504 P.2d 778, 780 (Wash. 1972).

101. *See* First State Bank v. Miller, 563 S.W.2d 572, 576-77 (Tex. 1978).

102. *See id.* at 577. The court referred to Ferguson v. Tanner Development Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977), in which a common law recovery of usurious interest was allowed.

103. 78 Tex. 163, 14 S.W. 227 (1890).

104. *See id.* at 168-69, 14 S.W. at 227-28.

105. *Compare* First State Bank v. Miller, 563 S.W.2d 572, 576-77 (Tex. 1978) *with Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1, 1-2 (Vernon 1971).

majority's opinion, should always plead the common law action of conversion.[106]

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106. *See* Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 168-69, 14 S.W. 227, 227-28 (1890); Ferguson v. Tanner Dev. Co., 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977).