

12-1-1979

The Regulation of Interest; Practice and Procedure Early Regulation Student Symposium: A Study of Texas Usury Law.

Forrest M. Smith III

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>

 Part of the [Legal Remedies Commons](#), [Secured Transactions Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Forrest M. Smith III, *The Regulation of Interest; Practice and Procedure Early Regulation Student Symposium: A Study of Texas Usury Law.*, 10 ST. MARY'S L.J. (1979).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol10/iss4/6>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

STUDENT SYMPOSIUM

A STUDY OF TEXAS USURY LAW

I. THE REGULATION OF INTEREST; PRACTICE AND PROCEDURE

EARLY REGULATION

FORREST M. SMITH, III

The exaction of excessive interest,¹ more commonly referred to as usury,² has been described as "one of the oldest professions of man."³ The matter of regulating usurious transactions historically stemmed from important moral considerations, and was not simply a problem of economic fact finding and rate setting.⁴ Although the designation of permissible maximum rates of interest did not develop solely because of moralistic concerns,⁵ ecclesiastical condemnation for moral reasons played a dominant role.⁶

In the Old Testament of the Bible, not only was excess interest denounced, but the taking of any amount of interest was adjudged a breach of brotherly love.⁷ The leaders of the early church considered it abhorrent

1. "Interest' is the compensation allowed by law for the use or forbearance or detention of money . . ." TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1971). The *use* referred to is the one contracted for when the loan is made. The *forbearance* arises when a debt is due and the parties agree to extend the time for payment. *Detention* occurs when the debt has become due and the debtor withholds payment without the authority to do so. See *Parks v. Lubbock*, 92 Tex. 635, 637, 51 S.W. 322, 323 (1899); *Jones v. United States & Mexican Trust Co.*, 105 S.W.328, 330 (Tex. Civ. App. 1907, no writ).

2. "'Usury' is interest in excess of the amount allowed by law." TEX. REV. CIV. STAT. ANN. art. 5069-1.01(d) (Vernon 1971). The etymology of the word usury is the Latin *usa* and *area*, meaning "the use of money." Bernstein, *Background of a Gray Area in the Law: The Checkered Career of Usury*, 51 A.B.A.J. 846, 847 (1965).

3. See Bernstein, *Background of a Gray Area in the Law: The Checkered Career of Usury*, 51 A.B.A.J. 846, 846 (1965).

4. Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637, 637 (1958).

5. An additional concern was the welfare of the poor. So-called consumer loans, to profit from others' poverty, were never approved. See Bernstein, *Background of a Gray Area in the Law: The Checkered Career of Usury*, 51 A.B.A.J. 846, 849 (1965).

6. See J. NOONAN, *THE SCHOLASTIC ANALYSIS OF USURY* 3 (1957). The Bible, writings of the early church fathers against usury, and condemnations by early church councils all combined to form early opinions of usury. *Id.* at 11.

7. See Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637, 637 (1958). A passage extracted from Deuteronomy reads, "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury . . ." See *Deuteronomy* 23: 19-20. "And if thy brother be waxen poor . . . thou shalt relieve him . . . Take thou no usury of him, or increase; but fear God . . ." See *Ezekiel* 18: 5,13. "If a man hath given forth upon usury, and hath taken increase; shall he live? He shall not live . . . he shall surely die." See also *Leviticus* 25: 35-36, *Psalms* 15:5; *St. Matthew* 25:27; *Luke* 19:23.

that money should increase unnaturally while lying fallow.⁸ Laws, however, had not always been so strict. For instance, the Babylonian Code of Hammurabi, the laws of early Greece, and the ancient Twelve Tablets of Rome all allowed interest on credit, but put a ceiling upon legally chargeable rates.⁹ By the Middle Ages, when Christian doctrines dominated the thought patterns of Western European civilizations, habitual usury was cause for excommunication, a penalty amounting to a denial of the sacraments and outcasting by society.¹⁰

The distinction between interest and usury was slow to develop in the common law; the word interest originally had the same meaning as that now conveyed by the word usury.¹¹ During the reformation a twofold change occurred in the idea that the taking of any interest was usurious.¹² First, there was a slackening of restrictions pertaining to interest in that the receipt of interest, in itself, was no longer considered usurious.¹³ A

8. See Bernstein, *Background of a Gray Area in the Law: The Checkered Career of Usury*, 51 A.B.A.J. 846, 847 (1965). "That a lender should profit in his own idleness and that a borrower should be charged even though he may not have lost money in the transaction, both were intolerable." *Id.* at 847.

9. The Code of Hammurabi, formed by the king of ancient Babylon in about 1800 B.C., regulated the debtor-creditor relationship. The maximum rate allowable was set at thirty-three and one-third percent per annum for loans of grain repayable in kind, and twenty percent per annum on loans of silver by weight. If more than the legal rate was collected the principal was cancelled. See S. HOMER, *A HISTORY OF INTEREST RATES* 4 (1963). The early laws of China absolutely prohibited interest in any form. See *id.* The Mosaic Laws allowed Jews to exact interest only from Gentiles. See A. FOLSOM, *A SUMMARY OF USURY LAWS AND DECISIONS* 2 (1927). Around 600 B.C., the recorded legal history of Greece began with the laws of Solon, in which all limits on the rate of interest were abolished. See S. HOMER, *A HISTORY OF INTEREST RATES* 4 (1963). The Greeks held in contempt, however, anyone actually charging more than twelve percent per year interest. See 91 C.J.S. *Usury* § 2 (1955). The Romans' recorded legal history began with the Twelve Tablets, dating around 450 B.C. The laws regulating credit limited interest on loans to no more than eight and one-third percent per year. Higher charges were penalized by fourfold damages. See S. HOMER, *A HISTORY OF INTEREST RATES* 4 (1963).

10. See generally J. NOONAN, *A HISTORY OF INTEREST RATES* 16, 34-35 (1957); R. TYLER, *A TREATISE ON THE LAW OF USURY, PAWNS OR PLEDGES, AND MARITIME LOANS* 37 (1878).

11. This refusal of the common law courts to recognize the legitimacy of returns upon money capital has been cited as one of the historical reasons for the use of language of conveyance in a mortgage. See *Humble Refining Co. v. Atwood*, 244 S.W.2d 637, 639 (Tex. 1952).

During a long period any return upon a loan might be declared usury . . . and the unfortunate creditor subjected to fine, imprisonment, ransom at the king's pleasure, and exposure on the 'pillare, to their open rebuke and shame.' So the creditors sought refuge in their feudal tenures and secured a return upon their loans in the form of rents and profits, accompanying the right of possession.

Id. at 639. See generally A. FOLSOM, *A SUMMARY OF USURY LAWS AND DECISIONS* 1, 3 (1927); J. NOONAN, *THE SCHOLASTIC ANALYSIS OF USURY* 20 (1957); R. TYLER, *A TREATISE ON THE LAW OF USURY, PAWNS OR PLEDGES, AND MARITIME LOANS* 37 (1878); J. WEBB, *LAW OF USURY* 1 (1899).

12. See generally B. NELSON, *THE IDEA OF USURY* 29 (1969).

13. See Pearce & Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 234 (1968).

change in the focal point of the usury inquiry also took place as the inquisition shifted from the moral status of the lender to an examination of the social and economic effect of the act itself.¹⁴ In England, the eventual result of this transition was the codification of permissible interest rates in the Statute of Anne.¹⁵ The codification, however, failed the test of time, and the Statute of Anne was repealed in 1854.¹⁶ During the next forty-six years, until the Money-Lenders Act of 1900,¹⁷ England had no legal interest rate maximum. The Statute of Anne, although abolished by its founders, served as a blueprint for the drafters of usury laws in American colonial legislation.¹⁸

DEVELOPMENTS IN THE UNITED STATES

By 1844, every state in the United States had some form of usury legislation.¹⁹ In consonance with the then current laissez-faire doctrine,²⁰ most European nations were in the process of repealing their usury laws.²¹ During that period, individual wage earners in the United States were living at a bare subsistence level and could not afford a loan at any rate of

14. See *id.* at 234.

15. Statute of Anne, 1713, 12 Anne, c. 16; see Pearce & Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 234 (1968).

16. See Bernstein, *Background of a Gray Area in the Law: The Checkered Career of Usury*, 51 A.B.A.J. 846, 847 (1965)(citing 17 & 18 Vict., c. 90 (1854) which repealed the Statute of Anne). During the debates on the proposed repeal of the statute, members of Parliament in favor of such a move argued that there was nothing immoral about usury and also that "God did not so hate it, that he utterly forbade it." See *id.* at 848.

17. See Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637, 640 (1958) (citing 63 & 64 Vict., c. 51 (1900)). By the enactment of the Money Lender's Act the Chancery was given the power to reopen all transactions involving interest, relieve the borrower from excess rates, order repayment of any excess paid, and set aside harsh or unconscionable security arrangements. See *id.* at 640. For an analysis of the effectiveness of this approach, see Note, *An Ounce of Discretion for a Pound of Flesh: A Suggested Reform for Usury Laws*, 65 YALE L.J. 105, 109-10 (1955).

18. See A. FOLSOM, *A SUMMARY OF USURY LAWS AND DECISIONS* 5, 6 (1927).

19. See Comment, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CAL. L. REV. 123, 131 (1967).

20. According to laissez-faire doctrines, money should be left free in the markets and uncontrolled, like other goods. See Bernstein, *Background of a Gray Area in the Law: The Checkered Career of Usury*, 51 A.B.A.J. 846, 849 (1965). Economists had discovered that money does have an exchange value. This, coupled with the belief that anything leading to an expanding economy was morally just, produced fertile grounds for the flourishing of laissez-faire economic doctrines. See Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637, 637-38 (1958).

21. See A. NUSSBAUM, *MONEY IN THE LAW* 237-38 (1939). England led the way by repealing the Statute of Anne in 1854. Others followed suit: Denmark in 1855, Spain in 1856, Holland, Sardinia, Norway and Geneva in 1857, Saxony and Sweden in 1864, Belgium in 1865, Prussia and the North German Confederation in 1867. Relief from oppressive interest rates was left to the courts. *Id.*

interest; they therefore had no need for the fundamentally protective functions of usury laws.²² The rapidly growing commercial interests had no need of usury protection either, since they were experiencing tremendous profits.²³ Most states, following the European example, either repealed or made their usury laws much less restrictive.²⁴

After 1900, however, as the economy in America shifted from capital to consumer goods, the necessity for the protection of usury laws increased.²⁵ In order to purchase high cost products, consumers needed credit.²⁶ Since wages had increased from the level of the 1800's, consumers could afford to borrow at interest.²⁷ State legislatures, realizing the possibility for exploitation by creditors, began to set lower and more stringent interest maximums.²⁸ From the early 1900's until 1958, at least eighteen states reduced their allowable interest ceilings.²⁹

During the past several decades the United States has experienced a tremendous explosion in the growth of consumer credit.³⁰ The result of this growth has been legislative recognition of the importance of credit in today's economy, and of the possibilities for abuse that exist in both the consumer and commercial marketplaces.³¹ Thus, simple biblical directives against usury³² have been supplanted by an extremely complex set of rules, regulations, and statutes in an attempt to restrain credit abuses.

22. See B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 2 (1965).

23. *Id.*

24. See J. WEBB, LAW OF USURY 621-71 (1899). By 1900, eleven states, mostly in the western United States, no longer imposed interest rate ceilings. Nine states, including Texas, allowed interest between ten and twelve percent. *Id.* It was argued by advocates of repeal that attempts to fix the price of money would drive capital into foreign markets, restricting its circulation, and would lead to evasion of usury laws by lenders, thus creating higher effective interest rates. See Comment, *Usury and the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CAL. L. REV. 123, 132 (1967). Assertive pressure by advocates, coupled with the explosion of industry in the Industrial Revolution, caused laissez-faire doctrines to prevail. See *id.* at 133.

25. See B. CURRAN, TRENDS IN CONSUMER LEGISLATION 1 (1965).

26. See *id.*

27. See *id.*

28. See Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637, 640 (1958).

29. See *id.* at 640.

30. See B. CURRAN, TRENDS IN CONSUMER LEGISLATION 1 (1965). There are two distinctions that must be made between consumer legislation and usury legislation. First, since credit extended by a seller to a buyer has not been considered a loan, interest payments for this credit have been held to fall outside the scope of usury laws. See Comment, *Usury in the Conflict of Laws: The Doctrine of Lex Debitoris*, 55 CAL. L. REV. 123, 135 (1967). Second, consumer credit legislation has traditionally been concerned more with disclosure of information to the buyer than with regulation of interest rates, usury laws' primary function. *Id.* at 135.

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

32. See *Deuteronomy* 23: 19-20; *Ezekiel* 18:5, 13; *Leviticus* 25: 35-36; *Psalms* 15:5; *St. Matthew* 25:27; *Luke* 19:23.

TEXAS CONSTITUTIONAL AND STATUTORY PROVISIONS

Today all but a few of the fifty states have some form of usury regulation.³³ Contemporary usury statutes perform the chief function of borrower protection.³⁴ Usury laws are based upon the premise that the bargaining power of the two parties in a loan transaction is not equal: greed, compelling necessity, shortsightedness, a gullibility deprives the debtor of the ability to freely enter a loan transaction and places him at the mercy of the lender.³⁵ The Declaration of Legislative Intent to the Texas Credit Code indicates that protection of the borrower from unscrupulous creditors is still the main function of the Texas usury statutes.³⁶

Texas was without the protective functions of usury laws after 1869, when the legislature abolished interest regulation and forbade any limitations to the exaction of interest on loans.³⁷ This situation, however, lasted only seven years. Because the 1869 repeal resulted in an immediate rash of credit abuses, necessity warranted the reenactment of usury provisions in the constitution of 1876.³⁸ The 1876 constitution prohibited interest rates above twelve percent per annum when the rate was agreed upon by the parties, but when no rate was contracted for, the maximum was set at eight percent.³⁹ In 1891, the limit was lowered to the present ceiling of ten percent per year for contracted for rates, and six percent per year for rates not set by agreement.⁴⁰

33. S. MORGANSTERN, *LEGAL REGULATION OF CONSUMER CREDIT* 61 (1972). See also THE NATIONAL ASSOCIATION OF HOME BUILDERS, *SURVEY OF STATE USURY LAWS* (1975) (compilation and summary of usury laws in United States, including District of Columbia).

34. See *Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933); *Carozza v. Federal Fin. & Credit Co.*, 131 A. 332, 342 (Md. 1925); *Ferdon v. Zariello Bros., Inc.*, 208 A.2d 186, 191 (N.J. Super. Ct. 1965); *Glenn v. McCarty*, 130 S.W.2d 295, 301 (Tex. Civ. App.—Amarillo 1939), *aff'd*, 138 Tex. 16, 155 S.W.2d 912 (1941).

35. See J. WEBB, *LAW OF USURY* 15 (1899). It has been said that the borrower and lender cannot be deemed in *pari delicto*, and that pressure under which the borrower contracts is great enough to eliminate the element of *particeps criminis*, meaning one who shares in the crime. See *Marshall v. Beeler*, 178 P. 245, 247 (Kan. 1919).

36. See *Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1-2 (Vernon 1971). "It is the intent of the Legislature in enacting this revision . . . to protect the citizens of Texas from abusive and deceptive practices now being perpetrated by unscrupulous operators, lenders and vendors in both cash and credit consumer transactions . . ." *Id.*

37. See TEX. CONST. art. XII, § 44 (1869). "All usury laws are abolished in this state, and the Legislature is forbidden from making laws limiting the parties to contracts in the amount of interest they may agree upon for loans of money or property . . ." *Id.* The abolition of state usury laws toward the mid-1800's was a result of the free enterprise doctrines that every man knew best how to defend his interest; therefore, governmental interference was unnecessary. See TEX. CONST. art. XVI, § 11, comment (Vernon 1955). Furthermore, it was believed that protection of the poor by the state from excess rates actually had the effect of excluding them from sources of credit, and that restricted interest rates would result in a shortage of capital, thus increasing the cost of credit. *Id.*

38. See TEX. CONST. art. XVI, § 11, comment (Vernon 1955).

39. See *id.*

40. See *id.*

The 1891 constitution directed the legislature to "provide appropriate pains and penalties" to prevent usury.⁴¹ Although the provision made allowance for the legislature to define the criteria involved in a usurious transaction and the penalties for usury, the legislature was nevertheless bound by the constitutionally mandated ceiling of ten percent.⁴² In 1960, the constitution was again amended⁴³ to allow the legislature greater flexibility in the regulation of interest-bearing transactions.⁴⁴ As amended, article XVI, section 11 recognizes the importance of the legislative regulation of credit in both consumer and commercial fields, and allows the legislature to formulate regulations and maximum interest rates for various types of credit transactions.⁴⁵

The legislature is thus authorized by the Constitution to regulate loans, define interest, and fix maximum rates of interest.⁴⁶ Pursuant to this authority, the legislature has enacted the Texas Credit Code which serves as a guideline for regulation of interest bearing transactions in Texas.⁴⁷ The Credit Code is supplemented by various statutory provisions regulating a variety of institutions, including, but not limited to, national banks, savings and loan associations, corporations, credit unions, mutual loan companies, real estate companies, agricultural credit corporations, and agricultural livestock pools.⁴⁸

41. TEX. CONST. art. XVI, § 11. It was subsequently held that this constitutional mandate only directed the legislature to do that which it already had the inherent power to do. See *Watts v. Mann*, 187 S.W.2d 917, 923 (Tex. Civ. App.—Austin 1945, writ ref'd).

42. See TEX. CONST. art. XVI, § 11 (1891). "All contracts for a greater rate of interest than ten per centum per annum, shall be deemed usurious . . ." *Id.*; cf. *Galveston & W. Ry. v. City of Galveston*, 96 Tex. 520, 526, 74 S.W. 537, 540 (Tex. 1903) (constitution refers only to contracts and does not limit legislature with regard to regulation of other rights).

43. See TEX. CONST. art. XVI, § 11.

44. See *Wagner v. Austin Sav. & Loan Ass'n*, 525 S.W.2d 724, 728 (Tex. Civ. App.—Beaumont 1975, no writ); Pearce & Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 235 (1968).

45. See TEX. CONST. art. XVI, § 11, comment (Vernon 1955).

The ethical nature of the concept of usury renders it impossible to formulate permanent and definite criteria of what constitutes a usurious transaction. As long as freedom of contract remains the cornerstone of economic organization it is up to the legislature to decide at what point a voluntary economic transaction constitutes an abuse of economic freedom and thus an act of usury.

Id. Article XVI, § 11, as amended, provides in pertinent part:

The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten per centum (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six per centum (6%) per annum.

46. TEX. CONST. art. XVI, § 11.

47. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01 to 50.01 (Vernon 1971).

48. The following chart lists the basic interest rates allowable under the credit code and related statutes:

1979]

STUDENT SYMPOSIUM

831

ARTICLE	RATE
5069-1.02, 1.04 (Vernon 1971)	Maximum rate of interest unless otherwise fixed by law limited to 10% per annum; effective August 27, 1979, the rate will convert to a floating rate tied to one percent above the discount rate on 90 day commercial paper in effect on the day the loan is made at the federal reserve bank in the federal reserve district where the lender is located; in no case will the rate be above twelve percent nor below ten percent.
5069-1.03 (Vernon 1971)	Legal rate applicable in absence of agreement between parties: 6% per annum from date due on all written contracts ascertaining a sum payable; 6% per annum on open accounts from 1st of January after same are made; effective August 27, 1979, accounts and contracts will bear six percent legal interest from and after the date when the sum is due and payable.
5069-1.05 (Vernon 1971)	Judgments bear interest at 9% from date of judgment unless otherwise specified in contract upon which suit is based.
5069-1.07(b) (Vernon Supp. 1978-1979)	Loans of \$500,000 or more made for interim financing for construction on real property or financing of improved real property may bear interest at the corporate rate: 1½% per month; effective August 27, 1979, the "large loan" rate will be applicable to all loans in the amount of \$250,000 or more without regard to security.
5069-1.07(c) (Vernon Supp. 1978-1979)	Loans of \$500,000 or more made for payment of direct or indirect cost exploration for oil and gas may bear interest at the corporate rate: 1½% per month.
5069-1.07 (d) 1979 Tex. Sess. Law Serv., ch. 715, § 1, at 1766-68 (Vernon)	Loans secured by an interest in one to four family dwellings may bear the lesser rate of: 1) twelve percent, or 2) the average per annum market yield adjusted to constant maturities on ten year U.S. Treasury Notes plus two percent per annum rounded off to the nearest quarter of one percent. (effective from August 27, 1979 through September 1, 1981)
5069-1.08 (Vernon Supp. 1978-1979)	Brokers & dealers registered under Federal Securities and Exchange Act may charge 1½% per month on monthly debit balance of customer's account if balance is payable at will by the customer and secured by stocks or other securities.
5069-1.09 (Vernon Supp. 1978-1979)	Loans insured by the FHA may bear interest permitted by the National Housing Act; Loans insured by the VA may bear rate permitted by the Veterans' Benefits Code.

5069-3.15 (Vernon 1971)	Regulated loans (loans under \$2,500) made by licensee under chapter 3 of the Texas Credit Code may bear interest at the following add on rates: (a) \$18 per \$100 per annum on portion of cash advance under \$300 (b) \$8 per \$100 per annum on portion of cash advance in excess of \$300 but not in excess of \$2,500
5069-3.16 (Vernon 1971)	Alternative charges authorized for regulated loans under \$100: (a) \$0-29.99: charge of \$1 for each \$5 advanced (b) \$29.99-35: charge of 1/10 of cash advance plus \$3 monthly installment account handling charge (c) \$35-70: charge of 1/10 of cash advance plus \$3.50 monthly installment account handling charge (d) \$70-100: charge of 1/10 of cash advance plus \$4 monthly installment account handling charge
5069-4.01(1) (Vernon 1971)	Installment loans authorized at add on rate of \$8 per \$100 per annum for the full term of the loan contract
5069-5.02 (Vernon 1971)	Secondary mortgage loans authorized at add on rate of \$8 per \$100 per annum for the full term of the loan contract
5069-6.02(9) (Vernon 1971)	Retail installment contract payable in substantially equal monthly installments may provide for a time price differential in the following amounts: (a) on principal balance under \$500: \$12 per \$100 per annum (b) on principal balance from \$500-1000: \$10 per \$100 per annum (c) on principal balance in excess of \$1000: \$8 per \$100 per annum
1302-2.09 (Vernon Supp. 1978)	Corporations (other than non-profit corporations) may borrow at rate not to exceed 1½% per month on debt over \$5000
1302-2.10 (Vernon Supp. 1978)	Agricultural credit corporation discounting loans with Federal Intermediate Credit Bank may charge 3% per annum plus the rate of discount promulgated by the Federal Intermediate Credit Banks
2461-7.01 (Vernon Supp. 1978-1979)	Credit unions may make loans to members at a rate not exceeding 1% per month on the unpaid monthly balance
2489a (Vernon Supp. 1978-1979)	Agricultural livestock pools may charge interest on loans of up to 1½% over the rate of interest that the pool is charged by the farm loan banks
2507 (Vernon 1965)	Mutual loan corporations organized to aid in the production of agricultural products or livestock may loan money and charge interest at a rate of up to 3% over the rate of discount established by the Farm Credit Administration for discounts made by Federal Intermediary Banks

The power of the legislature to control interest rates, although quite broad, is nevertheless subject to constitutional limitations. Thus, in the absence of legislation to the contrary, the constitutional limit of ten percent controls.⁴⁹ Furthermore, the legislature, in the exercise of its authority to "fix maximum rates of interest" may not authorize the collection of charges that result in the elimination of an effective interest ceiling.⁵⁰ In authorizing exceptions to the general usury provisions and the statutory definition of interest, the legislature is required to use language sufficient to set a maximum rate allowable for the particular transactions involved.⁵¹

ELEMENTS OF USURY

Although constitutional and statutory provisions provide the framework within which transactions bearing interest must fall, the provisions have been annotated and interpreted by a voluminous body of case law. These cases are the result of attempts to analyze the complex concept of interest, clarify the scope of permissible usury regulation, and define areas in which the statutes have been vague. From this case law has developed the general requirement that four elements must be present to constitute usury: a loan, forbearance or detention of money; an absolute obligation to repay the principal; the exaction of a greater rate of interest than allowed by law; and an intention to exact the usurious rate.⁵²

Loan, Forbearance or Detention

Usury is presently defined as "interest in excess of the amount allowed

49. *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 220 (Tex. 1979); *Community Fin. & Thrift Corp. v. State*, 343 S.W.2d 232, 234 (Tex. 1962).

50. See *Gonzales County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 907-08 (Tex. 1976). In *Freeman*, the supreme court found that a statute which purported to exclude "premiums," or unlimited front-end fees charged on a loan, from the definition of interest was ineffective to accomplish this result. "In the absence of language setting a maximum rate for such charges or an appropriate modification of the definition of 'interest,' such 'premium' charges will be deemed to constitute interest . . ." *Id.* at 908. The legislature is thus not empowered to "legalize a subterfuge which enables lenders to charge varying rates in excess of ten per cent per annum . . ." *Community Fin. & Thrift Corp. v. State*, 343 S.W.2d 232, 234 (Tex. 1961).

51. See *Gonzales County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 907-08 (Tex. 1976); *Community Fin. & Thrift Corp. v. State*, 343 S.W.2d 232, 234 (Tex. 1961); St. Claire, *The "Spreading of Interest" Under The Actuarial Method*, 10 ST. MARY'S L. J. 753, 782-84 (1979).

52. See, e.g., *Sachs v. Ginsberg*, 87 F.2d 28, 29 (5th Cir. 1936) (absolute obligation to repay); *Medical Arts Bldg. Co. v. Southern Fin. & Dev. Co.*, 29 F.2d 969, 971 (5th Cir. 1929) (intention discussed); *Crow v. Home Sav. Ass'n*, 522 S.W.2d 457, 459 (Tex. 1975) (loan or forbearance); *Christian v. Manning*, 59 S.W.2d 234, 236 (Tex. Civ. App.—Fort Worth 1933), *modified*, 124 Tex. 517, 81 S.W.2d 54 (1935) (exaction of usurious interest); *C.C. Slaughter Co. v. Eller*, 196 S.W.704, 708 (Tex. Civ. App.—Amarillo 1917, writ ref'd) (intentions of parties).

by law."⁵³ Interest, as defined by the same Texas statute, is the "compensation allowed by law for the use or forbearance or detention of money."⁵⁴ Consequently, for a transaction to be considered usurious, there must be a loan, forbearance or detention of money. Texas case law has consistently required at least one of the three as an essential element of usury.⁵⁵

Illustrative of this point is *Maloney v. Andrews*,⁵⁶ in which the plaintiff sought to recover unpaid rentals under a written lease agreement. The defendant filed a counterclaim, contending that the agreed late charge of one dollar per day was usurious.⁵⁷ The jury, however, failed to find usury and awarded the plaintiff rent and attorney's fees.⁵⁸ In affirming the lower court's decision, the Eastland Court of Civil Appeals pointed out that for usury statutes to apply a loan must be present.⁵⁹ Since there was no loan, the late fee was not interest charged on a loan, and the usury statutes were inapplicable.⁶⁰ In *Vela v. Shaklett*,⁶¹ the note sued upon was payable in five years, with interest at ten percent per annum. A stipulation gave the maker of the note the privilege of paying at the end of three years, if he first paid a sum equal to three years advanced interest.⁶² Rejecting the usury defense, the court rationalized that the provision for the prepayment privilege was not a contract for the loan of money or forbearance of an existing debt.⁶³

The court in *Fisher v. Hoover*⁶⁴ discussed the concept of a loan or forbearance in broad terms holding it to include "every written agreement" to pay interest on a debt, whether the debt is assumed in the loan of money, the sale of property, or in any other debtor-creditor transaction.⁶⁵ The Texas

53. TEX. REV. CIV. STAT. ANN. art. 5069-1.01(d) (Vernon 1971).

54. *Id.* art. 5069-1.01(a).

55. See *Crow v. Home Sav. Ass'n*, 522 S.W.2d 457, 459 (Tex. 1975); *Bexar Bldg. & Loan Ass'n v. Robinson*, 78 Tex. 163, 169, 12 S.W. 227, 228 (1890); *Federal Mortgage Co. v. Davis*, 100 S.W.2d 717, 721 (Tex. Civ. App.—Dallas 1936), *aff'd*, 131 Tex. 46, 111 S.W.2d 1066 (1938); *A.Y. Creager Co. v. Horton*, 96 S.W.2d 790, 792 (Tex. Civ. App.—El Paso 1936, no writ); *Pansy Oil Co. v. Federal Oil Co.*, 91 S.W.2d 453, 455-56 (Tex. Civ. App.—Texarkana 1936, writ ref'd); *Campbell v. Oskey*, 239 S.W. 332, 334 (Tex. Civ. App.—El Paso 1922, no writ).

56. 483 S.W.2d 703 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

57. *Id.* at 703-04.

58. *Id.* at 703-04.

59. *Id.* at 704.

60. *Id.* at 705.

61. 12 S.W.2d 1007 (Tex. Comm'n App. 1929, judgment adopted).

62. *Id.*

63. *Id.* at 1008. A stipulation giving privilege of prepayment is not enough to constitute usury unless the lender is entitled to demand prepayment. Here the provision merely gave the debtor a valuable privilege of prepayment at his own option, by its nature not compensation for the use of money. *Id.* at 1008.

64. 21 S.W. 930 (Tex. Civ. App. 1893, no writ).

65. *Id.* at 932.

Supreme Court recently reaffirmed the necessity for a finding of this element when it stated, "[i]t is a fundamental principle governing the law of usury that it must be founded on a loan or forbearance of money; if neither of these elements exist, there can be no usury."⁶⁶

Absolute Obligation to Repay Principal

The requirement that the borrower have an absolute obligation to repay the principal of the loan may be a product of the historical differentiation between ordinary risk taking in a business and the risk incident to a loan.⁶⁷ In the Middle Ages, one was adjudged guilty of usury if he loaned any money and required the borrower to repay principal and interest without assuming a portion of the risk in the business in which the funds were employed.⁶⁸ Risk in that sense did not refer to the risk incident to a loan, such as the possibility of the borrower's default.⁶⁹ Rather, the risk was the one that is usually associated with a capital investment, the return of which, including both principal and dividend, is contingent on the success or failure of the venture in question.⁷⁰ The modern day manifestation of such an interpretation of business risk is that usury may exist in a given transaction only if repayment of the principal of the loan is an absolute duty of the borrower, and not contingent upon the success or failure of the business venture in which the debtor has employed the borrowed funds.⁷¹ For example, in *Burton v. Stayner*,⁷² the loan was made under an agreement providing that before repayment of principal and profits, expenses incurred as a result of the investment would be deducted.⁷³ Applying the absolute repayment requirement, the court held that the transaction was not subject to the usury laws.⁷⁴ Since repayment of the principal was contingent upon profits exceeding expenses, the transaction was classified as an investment rather than a loan.⁷⁵

Failure of the contract terms to stipulate explicitly that the principal is

66. *Crow v. Home Sav. Ass'n*, 522 S.W.2d 457, 459 (Tex. 1975).

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

68. *Id.* at 233.

69. *Id.* at 233-34.

70. *Id.* at 233-34.

71. See, e.g., *Bexar Bldg. & Loan Ass'n v. Robinson*, 78 Tex. 163, 168, 14 S.W. 227, 228 (1890); *Pansy Oil Co. v. Federal Oil Co.*, 91 S.W.2d 453, 457 (Tex. Civ. App.—Texarkana 1936, writ ref'd); *Campbell v. Oskey*, 239 S.W. 332, 334 (Tex. Civ. App.—El Paso 1922, no writ).

72. 182 S.W. 394 (Tex. Civ. App.—San Antonio 1916, writ ref'd).

73. *Id.*

74. *Id.* at 395.

75. *Id.* at 395 (joint venture in which parties pooled resources with hope of profiting; not loan but merely advance of working capital).

absolutely repayable will not always defeat a finding of usury.⁷⁶ The defendant appealed an adverse judgement in *Sachs v. Ginsberg*,⁷⁷ claiming that the evidence did not support the finding that money advanced was absolutely and unconditionally repayable. Rejecting this contention, the court looked beyond the form of the transaction, determining that appellants actually contemplated the return of the money advanced.⁷⁸ The intentional effort by the appellants to omit the promise to repay was to no avail, since the actual substance of the transaction was an absolute obligation incurred by the borrower to repay the principal.⁷⁹ It is apparent that courts will apply the general rule and look through the form to the substance of the transaction to ascertain specifically whether the principal is absolutely repayable, and more generally, whether the transaction is usurious.⁸⁰

Exaction of Usurious Interest

The third requisite for a finding of usury is the exaction, or taking, of interest in excess of the maximum rate allowed for the use, forbearance, or detention of money.⁸¹ Exaction is defined as "the wrongful act . . . in compelling payment of a fee or reward . . . where no payment is due."⁸² Although the definition contemplates an "act," courts have generally held that there may be exaction of usurious interest even though the interest has not yet been paid.⁸³ This concept is actually codified in the Texas statutes under which a lender who "contracts for, charges or receives interest" greater than the amount allowed by law is subject to penalties for usury.⁸⁴ Thus a lender may "contract for" or "charge" usurious interest rates, and without the actual receipt of funds be subject to penalties for usury.⁸⁵

76. See *Sachs v. Ginsberg*, 87 F.2d 28, 29-30 (5th Cir. 1936).

77. 87 F.2d 28 (5th Cir. 1936).

78. *Id.* at 30.

79. *Id.* at 30.

80. See, e.g., *Gonzales County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976); *Schmid v. City Nat'l Bank*, 132 Tex. 115, 117, 114 S.W.2d 854, 855 (1938); *Graham & Locke Inv., Inc. v. Madison*, 295 S.W.2d 234, 243 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.).

81. See, e.g., *Walker v. Temple Trust Co.*, 124 Tex. 575, 577, 80 S.W.2d 935, 936 (1935); *Denton v. Ware*, 228 S.W.2d 867, 870 (Tex. Civ. App.—Amarillo 1949, no writ); *Associates Inv. Co. v. Baker*, 221 S.W.2d 363, 364 (Tex. Civ. App.—Austin 1949, writ dismissed).

82. BLACK'S LAW DICTIONARY 664 (4th ed. 1951).

83. See *Glenn v. McCarty*, 130 S.W.2d 295, 304 (Tex. Civ. App.—Amarillo 1939), *aff'd*, 137 Tex. 608, 155 S.W.2d 912 (1941); *Dodson v. Peck*, 75 S.W.2d 461, 464 (Tex. Civ. App.—Amarillo 1934, writ dismissed).

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

85. See, e.g., *Windhorst v. Adcock Pipe & Supply*, 547 S.W.2d 260, 261 (Tex. 1974) (contract for); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 212 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (charge).

In a loan contract, although the duty to repay the principal amount must be absolute, a contingency creating uncertainty about payment of usurious interest may not defeat the applicability of usury regulations.⁸⁶ It has been said that usury "does not depend on the question whether the lender actually gets more than the legal rate of interest or not; but on . . . whether, by the terms of the transaction . . . he may . . . be enabled to get more than the legal rate."⁸⁷ In *Shropshire v. Commerce Farm Credit Co.*,⁸⁸ failure of the borrower to pay any installment of principal or interest gave the creditor the option to mature the entire debt. The usurious contingency was the right of the creditor to charge unearned interest upon default of the borrower.⁸⁹ Although the borrower had it within his power to prevent payment of excess interest by promptly meeting installment deadlines, the contingency remained as did the taint of usury.⁹⁰

On the other hand, the mere existence of a possibility that more than the legal interest might be paid under a given contract will not invariably invoke the usury laws. In *W.E. Grace Manufacturing Co. v. Levin*,⁹¹ the principal and interest charges were fixed, but the term of the loan was based on a contingency, and thus uncertain.⁹² Since the contingency was reasonable, the Texas Supreme Court found that under the circumstances, the legality of the contract should not depend on whether the loan might be repaid at an early date shortening the term and thus raising the interest rate above ten percent.⁹³ The court therefore held that there was no

86. See *Shropshire v. Commerce Farm Credit Co.*, 120 Tex. 400, 415-17, 30 S.W.2d 282, 285-86 (1930), *cert. denied*, 284 U.S. 675 (1931); *cf. Pansy Oil Co. v. Federal Oil Co.*, 91 S.W.2d 453, 457 (Tex. Civ. App.—Texarkana 1936, writ *ref'd*) (usury laws inapplicable if repayment of principal contingent).

87. *Dodson v. Peck*, 75 S.W.2d 461, 464 (Tex. Civ. App.—Amarillo 1934, writ *dism'd*) (extensions, renewals, and commissions involved enabled lender to collect sum in excess of legal rate of interest, although principal not due for years).

88. 120 Tex. 400, 30 S.W.2d 282 (1930), *cert. denied*, 284 U.S. 675 (1931).

89. *Id.* at 412-15, 30 S.W.2d at 285-86.

90. *Id.* at 412-15, 30 S.W.2d at 285-86.

91. 506 S.W.2d 580 (Tex. 1974).

92. *Id.* at 582. The loan was for \$18,000, and a \$500 handling charge agreed upon by the parties was deemed to constitute interest. The parties also agreed that the advance would be used by the debtor corporation to obtain certain goods that it had sold to a third party. The third party's check for \$25,000 in payment thereof was in turn to be indorsed to the lender to repay the \$18,000 advance and the \$500 charge with the excess to be applied to a pre-existing note between the parties. *Id.* at 584.

93. *Id.* at 584. Although the loan was actually paid in 22 days, resulting in an interest charge of forty-five percent per annum, at trial the jury refused to find that the parties agreed, either orally or in writing, that the loan would be repaid within 30 days. The supreme court noted the absence of jury issues on whether the contract was a cloak to evade the usury laws and whether the reasonable expectation of the parties was that the loan would be repaid within 56 days, which was the minimum term that the loan could have run in order to remain within the one and one-half percent per month limit on corporate loans. In the absence of these findings the court held that there was no contract for usurious interest. *Id.* at 583-84.

contract for usurious interest although the loan was in fact paid early.⁹⁴ *W.E. Grace*, in conjunction with *Shropshire*,⁹⁵ thus indicates that in an action for usurious interest "contracted for," the right to exact usury by contract must affirmatively appear.⁹⁶

A "charge" of excessive interest must also affirmatively appear in order to satisfy the requirement of an exaction.⁹⁷ It has been held that by adding usurious interest to the indebtedness,⁹⁸ or by demanding payment of usurious interest as in a court pleading or notice of intent to repossess under a security agreement, the lender has charged usurious interest.⁹⁹ The charge need not be made pursuant to an agreement,¹⁰⁰ but the lender must affirmatively represent that he considers the debtor to owe the usurious amount. Thus, merely because a seller's invoice contains the words "1½% Charged Each Month On Unpaid Balance," it will not constitute usury, if the excessive interest is not actually added to the customer's account nor demanded.¹⁰¹

94. *Id.* at 584. It should be noted, however, that although the court found, due to the ambiguous contingency, that no usurious interest had been contracted for, because the contingency occurred at such an early date the creditor was liable for penalties for usurious interest received. *Id.* at 585.

95. *Shropshire v. Commerce Farm Credit Co.*, 120 Tex. 400, 415-17, 30 S.W.2d 282, 285-86 (1930) (contingency in contract by which lender may exact excessive interest renders contract usurious), *cert. denied*, 284 U.S. 675 (1931). In *W.E. Grace* the court distinguished *Shropshire* on the ground that in that case the contract expressly provided for the collection of usurious unearned interest upon the debtor's default while in *W.E. Grace* the parties agreement and understanding regarding the contingent term of the note was uncertain. *W.E. Grace Mfg. Co. v. Levin*, 506 S.W.2d 580, 584 (Tex. 1974).

96. The court in *Shropshire* noted the "universally accepted rule" that the court must give to the terms of the contract, if susceptible thereto, a construction that would make it legal. *Shropshire v. Commercial Farm Credit Co.*, 39 S.W.2d 11, 12 (Tex.) (on motion for rehearing), *cert. denied*, 284 U.S. 675 (1931). The ambiguity concerning the specific agreement between the parties in *W.E. Grace* permitted the court to impliedly use that principle of validation and to give the contract a legal construction. *See W.E. Grace Mfg. Co. v. Levin*, 506 S.W.2d 580, 584 (Tex. 1974).

97. Compare *Windhorst v. Adcock Pipe & Supply*, 547 S.W.2d 260, 260-61 (Tex. 1977) (unilateral addition of one and one-half percent monthly finance charge to customer's account constitutes charging) with *Killebrew v. Bartlett*, 568 S.W.2d 915, 917 (Tex. Civ. App.—Amarillo 1978, no writ) (absent demand for payment or addition to customer's account, mere invoice terms providing for one and one-half percent monthly interest not charging).

98. *See Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 219-20 (Tex. 1979); *Windhorst v. Adcock Pipe & Supply*, 547 S.W.2d 260, 261 (Tex. 1977).

99. *See, e.g., Commercial Credit Corp. v. Chasteen*, 565 S.W.2d 342, 344-45 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); *General Motors Acceptance Corp. v. Uresti*, 553 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 211 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

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

101. *Thomas Conveyor Co. v. Portec, Inc.*, 572 S.W.2d 361, 363 (Tex. Civ. App.—Waco 1978, no writ); *Killebrew v. Bartlett*, 568 S.W.2d 915, 917 (Tex. Civ. App.—Amarillo 1978,

Texas law is well settled regarding three further points involving the exaction of usurious interest. First, it is not necessary to a finding of usury that the interest exacted be monetary.¹⁰² Courts may construe either property or services to be a type of interest, and the added value of the property or service may cause a scheme to be usurious.¹⁰³ Second, the inadvertent collection of interest beyond what is due according to the contract will not, by itself, cause illegality if an interpretation of the contract as a whole shows no wrong.¹⁰⁴ Finally, a finding that a usurious exaction is not the result of a written agreement will not invalidate application of usury remedies.¹⁰⁵ Laws prohibiting usury apply to both written and oral agreements with equal force, so long as the elements of usury appear.¹⁰⁶

Intention

The final element that must exist before usury can be found is an intention by the lender to exact more than the legal rate of interest on the

no writ). In *Killebrew* the plaintiff's original petition contained a demand for the one and one-half percent monthly interest that was allegedly charged, but the demand was omitted by amendment. The court noted that the superseded petition could have been offered into evidence as proof of a demand for usurious interest, but that in this case it had not been. The court went on to hold that the language on the invoice, standing alone, did not constitute "charging" excessive interest as a matter of law. *Id.* at 917.

102. *See, e.g.,* *Palmetto Lumber Co. v. Gibbs*, 124 Tex. 615, 621-22, 80 S.W.2d 742, 745 (1935); *Carder v. Knippa Mercantile Co.*, 1 S.W.2d 462, 463-64 (Tex. Civ. App.—San Antonio 1927, writ *dism'd*); *Sugg v. Smith*, 205 S.W. 363, 374 (Tex. Civ. App.—Austin 1918, writ *ref'd*); *cf. Cochran v. American Sav. & Loan Ass'n*, 568 S.W.2d 672, 675 (Tex. Civ. App.—Waco 1978, no writ). In *Cochran* the note provided for conventional interest at ten percent, and the court noted that any additional interest would render the note usurious. Although the lender had received options to purchase certain real estate as additional consideration for the loan, the court upheld the jury's findings that the options were of no monetary value and therefore not usurious. *Id.* at 675.

103. *See Palmetto Lumber Co. v. Gibbs*, 124 Tex. 615, 621-22, 80 S.W.2d 742, 745 (1935); *Sugg v. Smith*, 205 S.W. 363, 374 (Tex. Civ. App.—Austin 1918, writ *ref'd*). In *Carder v. Knippa Mfg. Co.*, 1 S.W.2d 462 (Tex. Civ. App.—San Antonio 1927, writ *dism'd*), it was held that the obligation of the borrower to plant a crop of oats for the lender, without charge for the service, would not constitute usury, but only because the agreement for service was not a part of the original loan contract. *Id.* at 463-64.

104. *See, e.g.,* *Goode v. Davis*, 135 S.W.2d 285, 290 (Tex. Civ. App.—Fort Worth 1939, writ *dism'd* *judgmt cor.*); *Federal Mortgage Co. v. Davis*, 100 S.W.2d 717, 721 (Tex. Civ. App.—Dallas 1936), *aff'd*, 131 Tex. 46, 111 S.W.2d 1066 (1938); *Continental Sav. & Bldg. Ass'n v. Wood*, 33 S.W.2d 770, 774 (Tex. Civ. App.—Eastland 1930), *aff'd*, 56 S.W.2d 641 (Tex. Comm'n App. 1933, *judgmt adopted*).

105. *See People's Bldg., Loan & Sav. Ass'n v. Keller*, 50 S.W. 183, 186 (Tex. Civ. App. 1899, no writ) (holding that all contracts, oral or written, are usurious when greater than ten percent per year interest provided for).

106. *Id.* at 186; *see Autocredit of Fort Worth, Inc. v. Pritchett*, 223 S.W.2d 951, 953 (Tex. Civ. App.—Fort Worth 1949, writ *dism'd*); *Glen v. McCarty*, 130 S.W.2d 295, 301-02 (Tex. Civ. App.—Amarillo 1939), *aff'd*, 137 Tex. 608, 155 S.W.2d 912 (1941).

loan.¹⁰⁷ The intent required has been described as "the intent to take and reserve more than that permitted by statute for the loan."¹⁰⁸ Although decisions have discussed subjective intent,¹⁰⁹ Texas courts will usually look objectively at the lending agreement to determine intent of the parties.¹¹⁰ Generally, two rules of interpretation are followed. First, when a contract is fair and not illegal on its face, intent must clearly appear.¹¹¹ In other words, a corrupt agreement, devise, or scheme to cover usury must be shown, along with proof that it was in full contemplation of the parties at the time of contracting.¹¹² On the other hand, when the contract is usurious on its face, actual intent will not be required.¹¹³ In situations when usury is apparent, Texas courts have discussed intent as a requirement, but have rarely required it when actually ascertaining whether usury was present.¹¹⁴ For example, the plaintiff in *Campbell v. Oskey*¹¹⁵ borrowed money from the defendant to use in a certain business venture. Holding that an amount of money paid to the lender constituted interest within the usury statutes, the court rejected arguments that the amount paid was merely an advance share of profits.¹¹⁶ Upon rehearing the court discussed intent stating,

107. See, e.g., *Medical Arts Bldg. Co. v. Southern Fin. & Dev. Co.*, 29 F.2d 969, 971 (5th Cir. 1929); *Moser v. John F. Buckner & Sons*, 292 S.W.2d 668, 672 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.); *Wellfare v. Realty Trust Co.*, 85 S.W.2d 1067, 1069 (Tex. Civ. App.—Eastland 1935, writ ref'd).

108. *Joy v. Provident Loan Soc'y*, 37 S.W.2d 254, 257 (Tex. Civ. App.—Texarkana 1931, writ dismiss'd).

109. See, e.g., *Wellfare v. Realty Trust Co.*, 85 S.W.2d 1067, 1069 (Tex. Civ. App.—Eastland 1935, writ ref'd) (in usury questions matter of intentions control); *C.C. Slaughter Co. v. Eller*, 196 S.W.704, 708 (Tex. Civ. App.—Amarillo 1917, writ ref'd) (for usury there must be an intention knowingly to contract for or to take usurious interest); *Peightal v. Cotton States Bldg. Co.*, 61 S.W. 428, 431 (Tex. Civ. App. 1901, no writ) (usury matter of fact for jury to inquire and ascertain intent and motives).

110. See, e.g., *Ferguson v. Tanner Dev. Co.*, 541 S.W.2d 483, 492 (Tex. Civ. App.—Houston [1st Dist.] 1976), *aff'd*, 561 S.W.2d 777 (Tex. 1977); *Dorfman v. Smith*, 517 S.W.2d 562, 566 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); *Johns v. Jaeb*, 518 S.W.2d 857, 860 (Tex. Civ. App.—Dallas 1974, no writ).

111. See *Moser v. John F. Buckner & Sons*, 292 S.W.2d 668, 671-72 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.); *Federal Mortgage Co. v. Davis*, 100 S.W.2d 717, 721 (Tex. Civ. App.—Dallas 1936), *aff'd*, 131 Tex. 46, 111 S.W.2d 1066 (1938).

112. See *Moser v. John F. Buckner & Sons*, 292 S.W.2d 668, 672 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.); *C.C. Slaughter Co. v. Eller*, 196 S.W. 704, 708 (Tex. Civ. App.—Amarillo 1917, writ ref'd).

113. See, e.g., *Miller v. First State Bank*, 551 S.W.2d 89, 98 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 213 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Townsend v. Adler*, 510 S.W.2d 175, 176 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

114. See *Miller v. First State Bank*, 551 S.W.2d 89, 98 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 213 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

115. 239 S.W. 332 (Tex. Civ. App.—El Paso 1922, no writ).

116. *Id.*

"[w]here . . . the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent; *res ipsa loquitur*."¹¹⁷

As evidenced by recent case law, courts have eliminated the necessity of finding actual intent on the part of the parties in order to find usury.¹¹⁸ In *Miller v. First State Bank*¹¹⁹ intent was held to mean intent to make the bargain made, rather than intent to charge a usurious rate of interest.¹²⁰ The bank, therefore, was found to have had the intent necessary because it intended to make the loan agreement, notwithstanding testimony that it did not intend to exact usurious interest and that no devise or scheme was conceived for that purpose.¹²¹ The logical result of this ruling is that in all cases in which a contract is intended, although the parties are not aware of its usurious nature, intent will be imputed, and the lender will suffer the same penalties as if he had intentionally contrived the scheme of usury. It can therefore be generally said that subjective intent is immaterial and intent will be presumed by the courts if an objective examination of the documents and the actual transaction reflects usury.¹²²

There are, however, exceptions to this rule of presumed intent.¹²³ Although a contract is usurious on its face, it will not be held usurious if there is a showing of fraud, accident, or mistake as a defense.¹²⁴ While not sub-

117. *Id.* at 334. The evidence showed an absolute obligation on the part of the borrower to repay the \$750 advanced, plus an additional sum of \$300 interest as interpreted by the court. *Id.* at 334.

118. *See, e.g., Miller v. First State Bank*, 551 S.W.2d 89, 98 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 213 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Townsend v. Adler*, 510 S.W.2d 175, 176 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

119. 551 S.W.2d 89 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978).

120. *Id.* at 98.

121. *Id.* at 98; *see Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 213 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Townsend v. Adler*, 510 S.W.2d 175, 176 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Donoghue v. State*, 211 S.W.2d 623, 629 (Tex. Civ. App.—Austin 1948, writ ref'd n.r.e.). In *Townsend v. Adler*, 510 S.W.2d 175, 176 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ), the court ordered forfeiture of all that was due on the note since the lender clearly intended to make the bargain made, although he was ignorant of the usury laws.

122. *See, e.g., Ferguson v. Tanner Dev. Co.*, 541 S.W.2d 483, 492 (Tex. Civ. App.—Houston [1st Dist.] 1976), *aff'd*, 561 S.W.2d 777 (Tex. 1977); *Johns v. Jaeb*, 518 S.W.2d 857, 860 (Tex. Civ. App.—Dallas 1974, no writ).

123. For an in-depth discussion of the defenses of fraud, accident, or mistake, see text accompanying notes 303-321, *infra*.

124. *See, e.g., Shaw v. Lumpkin*, 241 S.W. 220, 221 (Tex. Civ. App.—Texarkana 1922, no writ) (accrued interest at rate greater than ten percent held not usurious due to fraud or mistake); *Western Bank & Trust Co. v. Ogden*, 93 S.W. 1102, 1104 (Tex. Civ. App.—1906, no writ) (when mistake made in calculation of interest party not liable for penalty); *Henry v. Sanson*, 21 S.W. 69, 70-71 (Tex. Civ. App.—1893, no writ) (because payee was seriously ill, mutual mistake existed, and note held not usurious but subject to reformation).

jecting the lender to statutory penalties, the contract will be reformed, or subjected to reformation by the courts.¹²⁵ Ignorance of the law, however, will not constitute a bona fide error, relieving the lender from the penalties for usury violations.¹²⁶

PRACTICE AND PROCEDURE

Pleadings

A plea of usury is available either as a defensive offset to an action on a note or an affirmative action against the creditor based on an exaction of excess interest.¹²⁷ If the borrower avails himself of the usury defense, it is imperative that he plead the facts that render the contract sued upon usurious.¹²⁸ Likewise, when the usury action is affirmative, whether the petition is to recover usurious interest paid or a claim demanding the statutory penalty, the allegation of usury must be pled in the petition.¹²⁹ In either case, the plea must set forth, with definiteness and specificity, the material facts showing usury.¹³⁰ The party alleging usury should, in the

125. See *Shaw v. Lumpkin*, 241 S.W. 220, 221 (Tex. Civ. App.—Texarkana 1922, no writ); *Western Bank & Trust Co. v. Ogden*, 93 S.W. 1102, 1104 (Tex. Civ. App.—1906, no writ); *Henry v. Sanson*, 21 S.W. 69, 70-71 (Tex. Civ. App. 1893, no writ).

126. See *Johns v. Jaeb*, 518 S.W.2d 857, 860-61 (Tex. Civ. App.—Dallas 1974, no writ).

127. See, e.g., *Wall v. East Tex. Teachers Credit Union*, 533 S.W.2d 918, 921-22 (Tex. 1976); *Employees Loan Co. v. Templeton*, 109 S.W.2d 774, 779 (Tex. Civ. App.—Fort Worth 1937, no writ); *Mercer v. Bonner Loan & Inv. Co.*, 73 S.W.2d 988, 989 (Tex. Civ. App.—Fort Worth 1934, no writ).

128. See *Tex. R. Civ. P. 93 (l)* (evidence of usury defense inadmissible in absence of verified plea). A pleading of usury is required in order to put an opponent on notice that it will be used at trial as a defense. See *Wall v. East Tex. Teachers Credit Union*, 533 S.W.2d 918, 922 (Tex. 1976). It should also be noted that the plaintiff's petition itself may be the charge of excessive interest that gives rise to the defendant's cause of action on which the counterclaim or defense is based. See *Killebrew v. Bartlett*, 568 S.W.2d 915, 917 (Tex. Civ. App.—Amarillo 1978, no writ); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 211 (Tex. Civ. App.—Austin 1975, no writ). The usury defense must be raised at trial on an action on a note, and once judgment on the note is rendered it cannot be collaterally attacked on the ground of usury. See *Mercer v. Bonner Loan & Inv. Co.*, 73 S.W.2d 988, 989 (Tex. Civ. App.—Fort Worth 1934, no writ). The debtor may, however, bring a subsequent affirmative action to recover statutory penalties. See *id.* at 989.

129. See, e.g., *Pansy Oil Co. v. Federal Oil Co.* 91 S.W.2d 453, 457 (Tex. Civ. App.—Texarkana 1936, writ ref'd); *Korth v. Tumlinson*, 73 S.W.2d 1048, 1049 (Tex. Civ. App.—San Antonio 1934, no writ); *Gibson v. Hicks*, 47 S.W.2d 691, 695 (Tex. Civ. App.—El Paso 1932, no writ). See also *Tex. R. Civ. P. 45*. Pleadings shall "consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense." *Id.*

130. See *Stanford v. United States Inv. Corp.*, 272 S.W. 568, 569-70 (Tex. Civ. App.—Waco 1925, writ disp'd) (appellant's petition held insufficient to charge usury since it failed to allege sufficiently definite facts to demonstrate usurious interest); *Interstate Bldg. & Loan Ass'n v. Bryan*, 54 S.W. 377, 378 (Tex. Civ. App. 1899, no writ) (general allegation that loan was set up to evade usury laws will not support judgment finding usury when

petition or answer, set forth all of the usurious terms of the transaction, show the loan or forbearance with an absolute obligation to repay the principal, and specify the method whereby interest in excess of the legal maximum is contracted for, charged or received.¹³¹

Rule 93 of the Texas Rules of Civil Procedure provides that a pleading of usury in defense to a suit on a contract must be verified by affidavit, unless the truth of usury appears on the record.¹³² One of the issues in *Wall v. East Texas Teachers Credit Union*¹³³ was whether the appellant's pleadings were sufficient to allow him to receive statutory penalties for the lender's usury. The appellant pled only that the plaintiff's suit, to collect on a promissory note, was based on an illegal loan and in violation of state statutes.¹³⁴ His plea, however, was not verified.¹³⁵ By simple mathematical

averments fail to disclose proper facts). In addition to his pleadings, the party alleging usury should request that the issue be submitted to the jury, and should tender such an issue to the court in writing. Unless the issue is requested and submitted, or the matter is conclusively established under the evidence, recovery for usury is waived on appeal under rule 279. See *Sudderth v. Howard*, 560 S.W.2d 511, 516 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); Tex. R. Civ. P. 279.

131. In *Aetna Life Ins. Co. v. Foster*, 66 S.W.2d 428 (Tex. Civ. App.—Texarkana 1933, writ dismiss'd), the court, after noting that usury must be specifically pled, refused to allow introduction into evidence, over objection, of a second agreement as part of the original usurious contract. Although the transaction taken as a whole could have constituted usury, plaintiff's pleadings, and thus his evidence, were limited to the original contract. *Id.* at 431; see *Pansy Oil Co. v. Federal Oil Co.*, 91 S.W.2d 453, 457 (Tex. Civ. App.—Texarkana 1936, writ ref'd) (in action to recover usurious interest paid, allegation of unconditional promise to repay alleged loan held insufficient); *Korth v. Tumlinson*, 73 S.W.2d 1048, 1049 (Tex. Civ. App.—San Antonio 1934, no writ) (petition failing to show borrower's absolute agreement to repay and not setting forth terms of usurious contract held not sufficient); cf. *United Fin. Corp. v. Smith*, 128 S.W.2d 419 (Tex. Civ. App.—Galveston 1939, writ dismiss'd). Under the old general demurrer practice, a petition was required to contain allegations "which in express terms or by reasonable inference are sufficient to admit evidence of every fact necessary to be proved." *Id.* at 420. Failure of the petition to set out the particulars of the usurious agreement was subject to special exception, but not to general demurrer. *Id.* at 420; *Cotton v. Thompson*, 159 S.W. 455, 458 (Tex. Civ. App.—Galveston 1913, no writ).

132. Tex. R. Civ. P. 93 (l). On appeal, unless the defendant has filed a verified plea of his usury defense, or unless the truth of his allegations appear of record, the reviewing court will consider the point waived. See *Scurlock v. Lovvorn*, 410 S.W.2d 525, 532 (Tex. Civ. App.—Dallas 1966, no writ); *Broadway Plan v. Ravenstein*, 364 S.W.2d 741, 744 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.).

133. 526 S.W.2d 148 (Tex. Civ. App.—Texarkana 1975), *rev'd on other grounds*, 533 S.W.2d 918 (Tex. 1976).

134. *Id.* at 151.

135. *Id.* at 151. A defensive plea of usury is required to be verified for two reasons. The plea itself serves to put the plaintiff on notice that the defense will be raised. The requirement of verification, however, is intended to have a deterrent effect. Dilatory pleas and defenses on the merits that are groundless are discouraged by the rule 93 requirement that they be made under oath. Tex. R. Civ. P. 93, comment (Vernon 1967). The courts have held, in accordance with this reasoning, that in an affirmative action to recover usury penalties the

calculations the court discerned that the note was usurious on its face; therefore, failure to specifically plead usury by verified affidavit did not affect a finding of usury.¹³⁶ On appeal, the supreme court noted that the plaintiff, who had written the note that was usurious on its face, should have been on notice that the defense of usury would be raised.¹³⁷

In addition to a plea of usury, the petition or answer should contain specific prayers for additional or inconsistent remedies.¹³⁸ In *First State Bank v. Miller*¹³⁹ the Texas Supreme Court held that the usury statutes do not provide for a refund of usurious interest paid in addition to the statutory penalty of twice the interest contracted for, charged, or received.¹⁴⁰ Since the debtor did not plead for recovery of interest paid, and the issue was not tried by consent, the court cited the general rule that a party must allege his cause of action to sustain a judgment thereon, and disallowed recovery of interest paid.¹⁴¹ Similarly, in *Burnett v. James*,¹⁴² the Dallas Court of Civil Appeals refused to grant the remedy of rescission of contract, upon a plea for damages and general relief under the Deceptive Trade Practices Act.¹⁴³

petition need not be verified. See *Texas Acceptance Corp. v. Simpson*, 154 S.W.2d 281, 282 (Tex. Civ. App.—Galveston 1941, no writ); *United Fin. Corp. v. Smith*, 128 S.W.2d 419, 420 (Tex. Civ. App.—Galveston 1939, writ dismissed).

136. *Wall v. East Tex. Teachers Credit Union*, 526 S.W.2d 148, 151-52 (Tex. Civ. App.—Texarkana 1975), *rev'd on other grounds*, 533 S.W.2d 918 (Tex. 1976). Compare *Thrift Fin. Co. v. State*, 351 S.W.2d 653, 655 (Tex. Civ. App.—Dallas 1961, writ refused n.r.e.) (unverified petition alleging usury sufficient if supported by detailed allegations and undisputed evidence) with *Reese v. Interstate Sec. Co.*, 301 S.W.2d 480, 482-83 (Tex. Civ. App.—Dallas 1957, writ dismissed) (unsworn pleadings and affidavits by interested witnesses based on legal conclusions and not evidentiary facts insufficient to defeat summary judgment).

137. *Wall v. East Tex. Teachers Credit Union*, 533 S.W.2d 918, 922 (Tex. 1976).

138. See, e.g., *First State Bank v. Miller*, 563 S.W.2d 572, 576-77 (Tex. 1978); *Burnett v. James*, 564 S.W.2d 407, 409 (Tex. Civ. App.—Dallas 1978, writ dismissed); *Miles v. W.C. Roberts Lumber Co.*, 561 S.W.2d 256, 259 (Tex. Civ. App.—Eastland 1978, writ refused n.r.e.). In *Miles*, the plaintiff brought suit on a sworn account. The defendant filed a sworn general denial and a plea of avoidance based on usury, but failed to deny the justness of the account as a whole, or the specifics of the unjustness as required by rule 185 of the rules of civil procedure. The court held that the usury plea did not meet the requirements of rule 185, and as a consequence the defendant had admitted that the account was correct. *Id.* at 259; see Tex. R. Civ. P. 185.

139. 563 S.W.2d 572 (Tex. 1978).

140. *Id.* at 576-77. The *Miller* case is discussed at footnotes 246-256 *infra* and accompanying text.

141. *Id.* at 576-77. The *Miller* court expressly reserved opinion, however, on whether a separate plea in the nature of a common law action was available for recovery of usury paid. *Id.* at 576-77; see *Ferguson v. Tanner Dev. Co.*, 541 S.W.2d 483, 495 (Tex. Civ. App.—Houston [1st Dist.] 1976) (recovery of usury paid granted under plea therefor), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977).

142. 564 S.W.2d 407 (Tex. Civ. App.—Dallas 1978, writ dismissed).

143. *Id.* at 409. The court noted that since rescission of a contract is inconsistent with a claim for damages under the same contract, rescission must be specifically prayed for. *Id.* at 409.

Venue

Venue for usury actions is controlled by provisions in the Texas Credit Code.¹⁴⁴ The code provides for five alternative venue facts: that the suit was brought in the county of the defendant's residence, in the county in which the excess interest was received or collected, in the county in which the transaction was entered into, in the county in which the party who paid usurious interest resided at the time of the transaction, or in the county in which the party who paid usurious interest resides at the time of the action.¹⁴⁵ These requirements for venue are stated in the disjunctive, and the plaintiff must allege and prove at least one to maintain venue in the forum he has selected.¹⁴⁶ There is conflict, however, among court of civil appeals decisions concerning whether the plaintiff must also prove, as an additional venue fact, that the transaction in question is actually usurious.¹⁴⁷ In *Donald v. Agriculture Livestock Finance Corp.*,¹⁴⁸ the Fort Worth Court of Civil Appeals held that once one or more of the necessary venue facts are established, there is no additional burden upon the plaintiff to prove the actual exaction of usurious interest.¹⁴⁹ The Beaumont Court of Civil Appeals, however, in *National Mortgage Corp. v. Maxwell*,¹⁵⁰ held that when the plaintiff seeks to establish venue in the county in which the transaction was entered into, but does not reside in that county, he must prove both that the transaction was entered into in that county and that it was usurious.¹⁵¹ Both cases relied upon the same 1937 supreme court case, *Universal Credit Co. v. Dunklin*,¹⁵² as authority for their conclusion.¹⁵³ Although it is well settled that a plaintiff must, in order to

144. TEX. REV. CIV. STAT. ANN. art. 5069-1.06(3) (Vernon 1971); see *id.* art. 1995 (30) (Vernon 1964); cf. *id.* art. 5069-8.04 (Vernon 1971) (venue provisions under consumer credit section of the code).

145. *Id.* art. 5069-1.06(3) (Vernon 1971).

146. See, e.g., *Universal Credit Co. v. Dunklin*, 129 Tex. 324, 327, 105 S.W.2d 867, 868 (1937) (plea of privilege prima facie evidence of defendant's right to change venue, and after its filing, burden on plaintiff to allege and prove venue facts); *Hamilton Inv. Trust v. Hi Fashion Wigs Profit Sharing Trust*, 559 S.W.2d 376, 378 (Tex. Civ. App.—Dallas 1977, no writ) (proper plea of privilege shifts burden to plaintiff to plead and prove proper venue); *Donald v. Agricultural Livestock Fin. Corp.*, 495 S.W.2d 592, 597 (Tex. Civ. App.—Fort Worth 1973, no writ) (plaintiff must prove one or more venue facts).

147. *Velasquez v. Schehle*, 562 S.W.2d 1, 3 (Tex. Civ. App.—San Antonio 1977, no writ). The *Velasquez* court noted the conflict of authority, but held that under either theory the plaintiff had successfully controverted the defendant's plea of privilege. *Id.* at 3.

148. 495 S.W.2d 592 (Tex. Civ. App.—Fort Worth 1973, no writ).

149. *Id.* at 597; accord, *Allied Fin. Co. v. Miro*, 568 S.W.2d 910, 911 (Tex. Civ. App.—Waco 1978, no writ).

150. 541 S.W.2d 626 (Tex. Civ. App.—Beaumont 1976, no writ).

151. *Id.* at 626-27.

152. 129 Tex. 324, 105 S.W.2d 867 (1937).

153. See *National Mortgage Corp. of America v. Maxwell*, 541 S.W.2d 626, 626 (Tex. Civ. App.—Beaumont 1976, no writ); *Donald v. Agricultural Livestock Fin. Corp.*, 495 S.W.2d 592, 596 (Tex. Civ. App.—Fort Worth 1973, no writ). The *Donald* court cited *Dunklin* and

controvert a plea of privilege,¹⁵⁴ plead and prove the essential venue facts,¹⁵⁵ the identification of the essential venue facts is not so easily accomplished. As the law now stands, the plaintiff need only show that residence actually exists in order to sue in the county of the defendant's residence or that of his own.¹⁵⁶ On the other hand, when suit is filed in the county in which the transaction was entered into, the plaintiff must plead and prove that venue fact as well as prove the transaction was usurious.¹⁵⁷

EVIDENCE, BURDEN OF PROOF, PRESUMPTIONS, AND ADMISSIBILITY

As a general rule courts will presume that in a given transaction the law has been upheld; therefore, a judicial presumption exists in usury cases that the interest charged or to be collected is within legal limits, and that the transaction is untainted with usury.¹⁵⁸ The maxim that he who alleges

Ballard v. Shock for the proposition that the court need only refer to the allegations regarding usury, and that the plaintiff has no burden of proving the merits of his claim in order to controvert a plea of privilege. *Id.* at 596. The *Ballard* court did so hold, but then withdrew its opinion and on rehearing held that proof that the contract is actually usurious is an essential venue fact under the statute providing for venue in the county in which the usurious contract was entered into. See *Ballard v. Shock*, 91 S.W.2d 385, 388 (Tex. Civ. App.—Eastland 1934, no writ). Thus the Fort Worth court's reliance upon *Ballard* is misplaced. The reliance upon *Dunklin* is similarly erroneous since the supreme court in *Dunklin* cited *Ballard* only for the proposition that venue facts must be proven, and did not consider the question of proof of actual usury. See *Universal Credit Co. v. Dunklin*, 129 Tex. 324, 327, 105 S.W.2d 867, 868 (1937); cf. *Compton v. Elliott*, 126 Tex. 232, 237, 88 S.W.2d 91, 93 (1935) (proof that offense was actually committed is essential venue fact to establish venue in county of offense).

154. See TEX. R. CIV. P. 86.

155. See, e.g., *Universal Credit Co. v. Dunklin*, 129 Tex. 324, 327, 105 S.W.2d 867, 868 (1937); *Compton v. Elliott*, 126 Tex. 232, 237, 88 S.W. 91, 93 (1935); *Hamilton Inv. Trust v. Hi Fashion Wigs Profit Sharing Trust*, 559 S.W.2d 376, 377-78 (Tex. Civ. App.—Dallas 1977, no writ).

156. See *Allied Fin. Co. v. Miro*, 568 S.W.2d 910, 911 (Tex. Civ. App.—Waco 1978, no writ); *Donald v. Agricultural Livestock Fin. Corp.*, 495 S.W.2d 592, 596 (Tex. Civ. App.—1973 Fort Worth, no writ).

157. *National Mortgage Corp. of America v. Maxwell*, 541 S.W.2d 626, 626 (Tex. Civ. App.—Beaumont 1976, no writ). The two other venue provisions of article 5069-1.06(3) have not yet been the subject of appellate decisions. However, repealed article 5073, 1963 Tex. Gen. Laws, ch. 205, § 26, at 550, which was replaced by section 1.06(3) contained similar provisions for venue in the county in which the usurious interest was received or collected, and the county in which the party paying usurious interest resided when the transaction occurred. In *Pacific Fin. Corp. v. Mitchell*, 313 S.W.2d 357, 358 (Tex. Civ. App.—Texarkana 1958, no writ), the court held that the plaintiff was required to show both that the contract was usurious, and that he was a resident of the county in which the suit was brought at the time the transaction was entered into in order to maintain venue in that county. See *Woodman v. Bishop*, 203 S.W.2d 977, 977-78 (Tex. Civ. App.—San Antonio 1947, no writ).

158. See *Walker v. Temple Trust Co.*, 124 Tex. 575, 579, 80 S.W.2d 935, 936 (1935); *Miner v. Paris Exchange Bank*, 53 Tex. 559, 561 (1880); *Amaya v. First State Bank*, 570

must prove is applicable to cases in which usury is alleged, whether asserted as a defense or as an affirmative action for recovery of interest or penalties.¹⁵⁹ Apart from the presumption that the parties intended to observe and obey the law, Texas courts adhere to other general presumptions. Lenders of money are, as a rule, presumed to be able to recognize a usurious transaction when they see it, and are held to be on notice of its illegality.¹⁶⁰ Also, when facts and circumstances surrounding a contract clearly denote the existence of usury, a court will conclusively presume that the transaction was intended to be usurious.¹⁶¹

When usury is at issue, rules of admissibility of evidence are liberally applied by the courts, allowing inquiry into the actual truth behind the transaction.¹⁶² All evidence surrounding the transaction that will shed light upon the issue or tend to show the true character of the transaction is admissible, regardless of whether the agreement appears fair.¹⁶³ If courts

S.W.2d 95, 96 (Tex. Civ. App.—San Antonio 1978, no writ); *Miller v. First State Bank*, 551 S.W.2d 89, 95 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978); *Hernandez v. United States Fin. Co.*, 441 S.W.2d 859, 862 (Tex. Civ. App.—Waco 1969, writ *dism'd*); *Emerson v. Franklin Life Ins. Co.*, 107 S.W.2d 1029, 1031 (Tex. Civ. App.—Dallas 1937, writ *dism'd*).

159. *See, e.g.*, *Mays v. Pierce*, 154 Tex. 486, 489, 281 S.W.2d 79, 82 (1955); *Miller v. First State Bank*, 551 S.W.2d 89, 99 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978); *American Century Mortgage Inv. v. Regional Center, Ltd.*, 529 S.W.2d 578, 583 (Tex. Civ. App.—Dallas 1975, writ *ref'd n.r.e.*). When a contract shows no usury on its face, the burden of proof is on the party pleading it to show some agreement, devise, or subterfuge to exact usury. *See, e.g.*, *Griffin v. Stewart*, 348 S.W.2d 800, 803 (Tex. Civ. App.—Amarillo 1961, no writ); *Mathes v. Walker*, 66 S.W.2d 1093, 1094 (Tex. Civ. App.—San Antonio 1933, writ *dism'd*); *American Mortgage Corp. v. Dunnam*, 59 S.W.2d 1095, 1096 (Tex. Civ. App.—Amarillo 1933, writ *dism'd*).

160. *See Miller v. First State Bank*, 551 S.W.2d 89, 98 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978). In *Townsend v. Adler*, 510 S.W.2d 175, 176 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ), the lender was unaware of the state's usury laws. The court nevertheless found the transaction to be usurious, and charged the lender with the penalties therefor. *Id.* at 176.; *cf. North Am. Acceptance Corp. v. Warren*, 451 S.W.2d 921, 926 (Tex. Civ. App.—Dallas 1970, writ *ref'd n.r.e.*) (lender's assignee presumed to know public policy of state regarding interest contracts).

161. *See Graham & Locke Inv., Inc. v. Madison*, 295 S.W.2d 234, 243 (Tex. Civ. App.—Dallas 1956, writ *ref'd n.r.e.*); *cf. Maxwell v. Estate of Bankston*, 433 S.W.2d 229, 233 (Tex. Civ. App.—Texarkana 1968, no writ) (unnecessary to presume when intent is apparent).

162. *See General Southwestern Corp. v. State*, 333 S.W.2d 164, 168 (Tex. Civ. App.—Houston 1960, writ *ref'd n.r.e.*); *State v. Abbot Loan Serv.*, 195 S.W.2d 416, 419 (Tex. Civ. App.—Galveston 1946, writ *ref'd n.r.e.*). A liberal construction is applied by the court since generally the best evidence is in the possession of the creditor, and not readily available to the plaintiff. *See Consumers Discount Corp. v. State*, 352 S.W.2d 466, 468 (Tex. Civ. App.—Amarillo 1961, writ *ref'd n.r.e.*).

163. *See Peightal v. Cotton States Bldg. Co.*, 61 S.W. 428, 431 (Tex. Civ. App. 1901, no writ). This rule stems from the requirement that the debtor, in order to establish usury in a transaction valid on its face, must establish a corrupt scheme or agreement between the

strictly construed admissibility rules, schemes and devices of the usurer might remain unexposed, and regulatory statutes might become ineffective.¹⁶⁴ A liberal approach is therefore taken. Thus, parol or extrinsic evidence is admissible for the purpose of proving usury,¹⁶⁵ even though the parol evidence contradicts a portion of the party's writings.¹⁶⁶ Likewise, expert testimony is admissible to determine the true charge of interest and whether the exaction exceeded the rate allowed by law.¹⁶⁷ Evidence of usage or custom relating to interest charges in similar transactions may be admitted to show the actual understanding of the parties, but usage or custom possesses only evidentiary value when a fixed habit or custom is established by that evidence.¹⁶⁸ Unlike other rules of admissibility, however, the hearsay rule is strictly construed; thus, hearsay as to similar contracts of third parties is inadmissible on the issue of usury.¹⁶⁹

In accordance with the rule applicable to other civil actions, the party alleging usury must establish its existence by a preponderance of the evi-

parties to conceal usury. See *Moss v. Metropolitan Nat'l Bank*, 533 S.W.2d 397, 399 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *General Southwestern Corp. v. State*, 333 S.W.2d 164, 168 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

164. See, e.g., *F.B. & D. Inc. v. Nathan Alterman Elec. Co.*, 394 S.W.2d 821, 823 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.); *Farris v. Maisen*, 371 S.W.2d 86, 87 (Tex. Civ. App.—Amarillo 1963, no writ); *Southern Home Bldg. & Loan Ass'n v. Winans*, 60 S.W. 825, 827 (Tex. Civ. App. 1900, no writ); cf. *General Southwestern Corp. v. State*, 333 S.W.2d 164, 168 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (best evidence of usury generally in possession of accused).

165. See, e.g., *Day v. Garland Chrysler-Plymouth, Inc.*, 460 S.W.2d 272, 275 (Tex. Civ. App.—Dallas 170, no writ); *F.B. & D. Inc. v. Nathan Alterman Elec. Co.*, 394 S.W.2d 821, 823 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.); *National Bond & Inv. Co. v. Atkinson*, 254 S.W.2d 885, 888 (Tex. Civ. App.—Amarillo 1952, writ dism'd).

166. *F.B. & D. Inc. v. Nathan Alterman Elec. Co.*, 394 S.W.2d 821, 823 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.). "The parol evidence rule is no obstacle to showing that a writing which appears valid on its face is, in fact, a mask for usury." *Id.* at 823. Thus, contemporaneous parol agreements may be shown although the written contract is not usurious on its face. See *Smith v. Stevens*, 81 Tex. 461, 463, 16 S.W. 986, 987 (1891); *Roberts v. Coffin*, 53 S.W. 597, 599 (Tex. Civ. App. 1899, no writ); cf. *Graham & Locke Inv., Inc. v. Madison*, 295 S.W.2d 234, 243 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.) (contemporaneous instruments executed as part of same transaction are considered together as single instrument).

167. See *Acme Letter Shop v. State*, 342 S.W.2d 770, 772 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

168. See *Nocona Nat'l Bank v. Bolton*, 143 S.W. 242, 244 (Tex. Civ. App.—Fort Worth 1912, no writ). In a civil case, however, oral evidence given in denial of usurious intent is without force when contrasted with proven contractual provisions providing for usurious charges. Evidence of custom or usage is also inadmissible for the purpose of contravening a statute. See *Kollman v. Hunnicutt*, 385 S.W.2d 600, 602 (Tex. Civ. App.—Fort Worth 1964, no writ).

169. See *Western Bank & Trust Co. v. Ogden*, 93 S.W. 1102, 1104 (Tex. Civ. App. 1906, no writ) (trial court erred by permitting plaintiff to testify about certain hearsay statements made by third party in contract similar to one made with defendant).

dence.¹⁷⁰ At trial the question of usury is generally one of fact, although sometimes it may be one of law. When the contract does not appear to be usurious on its face, the issue is one of fact for the jury.¹⁷¹ Alternatively, when the agreement indicates usury on its face or when the evidence is insufficient to raise a jury issue, the inquiry becomes one of law for the court.¹⁷²

CONFLICT OF LAWS

Rules governing questions about conflict of laws have received great attention in recent years, and three general theories have appeared. According to the traditional view, the law of the forum in which the contract was made determines the validity and legality of the contract, unless the place of performance is different, and then the laws of the state of performance govern.¹⁷³ The second theory holds that when the parties have not stipulated which laws are to apply, the laws of the jurisdiction with the most significant relationship with the transaction will be applied.¹⁷⁴ The third theory, the governmental interest approach, is based on a determination of whether the forum state has a legitimate interest in the application of its laws.¹⁷⁵ When the law of another state might also be applied the court first looks at local policy, then ascertains whether the local contacts are

170. See *Griffin v. Steward*, 348 S.W.2d 800, 803 (Tex. Civ. App.—Amarillo 1961, no writ) (clear and convincing evidence requires at least a preponderance); cf. *Great S. Life Ins. Co. v. Williams*, 105 S.W.2d 277, 280 (Tex. Civ. App.—Amarillo 1937, no writ) (fact of usury must be established by at least clear and convincing evidence). For cases holding evidence to be sufficient to show usury, or to submit issue to jury see: *Brem v. Cook*, 147 Tex. 374, 376-77, 216 S.W.2d 179, 180 (1949); *Autocredit of Fort Worth, Inc. v. Pritchett*, 223 S.W.2d 951, 954 (Tex. Civ. App.—Fort Worth 1949, writ dismissed); *Marsh v. Tiller*, 293 S.W. 223, 224 (Tex. Civ. App.—Texarkana 1927, no writ).

171. See, e.g., *National Bond & Mortgage Corp. v. Mahaney*, 124 Tex. 544, 555, 80 S.W.2d 947, 953 (1935); *Mitchell v. Napier*, 22 Tex. 120, 129 (1858); *Cotton v. Cooper*, 160 S.W. 597, 601 (Tex. Civ. App.—San Antonio 1913), *aff'd*, 209 S.W. 135 (Tex. Comm'n App. 1919, judgment adopted).

172. See, e.g., *Chandler v. Guaranty Mortgage Co.*, 89 S.W.2d 250, 255 (Tex. Civ. App.—San Antonio 1935, no writ) (directed verdict for plaintiff held proper when evidence did not raise jury issue); *Mitchell v. Schimming & Eddins*, 52 S.W.2d 1080, 1081-82 (Tex. Civ. App.—Waco 1932, no writ) (evidence insufficient to raise jury issue); *Peightal v. Cotton States Bldg. Co.*, 61 S.W. 428, 431 (Tex. Civ. App. 1901, no writ) (when evidence shows transaction to be per se usurious court may charge jury to that effect).

173. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332, 358 (1934).

174. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 186-89 (1971).

The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law

Id. § 203.

175. See Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 667-68 (1959).

sufficient to support that policy.¹⁷⁶ Balancing local interest with the policy, contacts, and interest of the other state, the court retains jurisdiction unless insufficient local policies or contacts exist to warrant retention.¹⁷⁷

When usury laws conflict there exists a well-established rule, called the "rule of validation."¹⁷⁸ According to this rule, a contract for the payment of interest will be validated, whenever possible, by applying the more lenient usury statute of any state sufficiently connected with the contract.¹⁷⁹ It has been contended, however, that this special conflicts rule is neither well-established nor undisputed and that its "deceptive simplicity" stands "as a barrier to intelligent appraisals of conflicting state policies."¹⁸⁰

In the United States, there exists the long standing principle that interest rates are governed by the forum in which the contract is made, the debt is incurred, or the debt is to be paid.¹⁸¹ The Supreme Court in *Seeman v. Philadelphia Warehouse Co.*¹⁸² held that the general principle applicable to agreements in which the place of performance and of contracting differed would be that the parties could contract for rates valid in either forum.¹⁸³ If the parties have acted in good faith, and the legal interest permitted in the place set for performance is greater than the legal rate in the contracting location, parties may properly stipulate the higher rate of interest, without incurring usury penalties.¹⁸⁴

A state may not abrogate the rights of parties beyond its borders when no part of the transaction occurred within its borders.¹⁸⁵ Following this Supreme Court mandate, it was held in *Apodaca v. Banco Longoria, S.A.*¹⁸⁶ that although the note sued upon bore eighteen percent maturity interest, Texas law was not applicable since the note was both executed and made

176. *Id.* at 667-68.

177. *Id.* at 667-68.

178. See Note, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CAL. L. REV. 123, 125 (1967).

179. See *Fahs v. Martin*, 224 F.2d 387, 397-98 (5th Cir. 1955).

180. See Note, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CAL. L. REV. 123, 125 (1967).

181. See, e.g., *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407-08 (1927); *Bedford v. Eastern Bldg. & Loan Ass'n*, 181 U.S. 227, 242-43 (1901); *Miller v. Tiffany*, 68 U.S. (1 Wall.) 298, 310 (1863). See also *Apodaca v. Banco Longoria, S.A.*, 451 S.W.2d 945, 947 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.).

182. 274 U.S. 403 (1927).

183. *Id.* at 407-08.

184. *Id.* at 407-08. Conversely, if the legal rate of interest is higher in the place of contracting than at the place for performance, the parties may, in good faith, establish the higher rate. *Id.* at 408; see *Bedford v. Eastern Bldg. & Loan Ass'n*, 181 U.S. 227, 242-43 (1901); *Miller v. Tiffany*, 68 U.S. (1 Wall.) 298, 310 (1863).

185. *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930) (laws of state will apply only if contract made out of state is to be performed in the state).

186. 451 S.W.2d 945 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.).

payable in Mexico.¹⁸⁷ Likewise, in *Braniff Investment Co. v. Norton*¹⁸⁸ the court found Texas usury laws inapplicable. Because the note executed in Texas was made payable in Oklahoma, the court held Oklahoma usury laws applicable, notwithstanding the existence of an option making the note payable elsewhere, since that option had never been exercised.¹⁸⁹

Texas courts have generally accepted the holding that interest rates under agreements are to be governed by the laws of the state where the contract is made or performed.¹⁹⁰ In *Securities Investment Co. v. Finance Acceptance Corp.*¹⁹¹ the creditor was a Missouri corporation, the loan agreement with the borrower was made in Missouri, and the lender had no office in Texas. The court ruled the provision in the contract that laws of Missouri were to govern the agreement, was not invalid as a subterfuge to evade Texas usury laws.¹⁹² Furthermore, Texas follows the accepted rule that when citizens of different states contract a debt, they may contract with reference to the laws of either state.¹⁹³ Finally, Texas follows the general principle concerning a contract made in one place and to be performed wholly in another state.¹⁹⁴ The validity of these contracts is ordinarily to be governed by the law of the place of performance.¹⁹⁵ In *Andrews v. Hoxie*¹⁹⁶ a bona fide loan contract was made in Texas to be executed in Louisiana. Although the interest rate stipulated was greater than the legal maximum rate for Texas, the transaction was not held usurious since

187. *Id.* at 946. See also *McCans v. Brandtjen & Kluge, Inc.*, 179 S.W.2d 352, 353 (Tex. Civ. App.—Fort Worth 1944, no writ) (Texas law not applicable since contract made and performed in Minnesota).

188. 80 F.2d 598, 598-99 (5th Cir. 1935).

189. *Id.* at 598-99. *Contra*, *Braniff Inv. Co. v. Robertson*, 74 S.W.2d 425, 427 (Tex. Civ. App.—Eastland 1934), *rev'd*, 81 S.W.2d 45 (1935) (held place of payment clause not effective in making note payable there; therefore, forum's laws did not apply).

190. See *Building & Loan Ass'n v. Griffin*, 90 Tex. 480, 490, 39 S.W. 656, 660 (1897) (rule based on comity existing between states); *Apodaca v. Banco Longoria, S.A.*, 451 S.W.2d 945, 947 (Tex. Civ. App.—El Paso 1970, writ *ref'd n.r.e.*) (note executed and to be paid in another country).

191. 474 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ *ref'd n.r.e.*).

192. *Id.* at 272.

193. *Dugan v. Lewis*, 79 Tex. 246, 253, 14 S.W. 1024, 1026 (1891) (usury laws cannot be evaded under cover of naming a state whose laws are to control); *Securities Inv. Co. v. Financial Acceptance Corp.*, 474 S.W.2d 261, 271 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ *ref'd n.r.e.*) (law designated by parties to govern the contract will apply if it has a reasonable relationship to the contract). See generally *Building & Loan Ass'n v. Griffin*, 90 Tex. 480, 488-89, 39 S.W. 656, 659 (1897) (example of pretense or devise tacked onto Texas contract to avoid Texas usury law).

194. See *Dugan v. Lewis*, 79 Tex. 246, 250-52, 14 S.W. 1024, 1025 (1891); *Andrews v. Hoxie*, 5 Tex. 171, 186-87 (1849); *Grace v. Orkin Exterminating Co.*, 255 S.W.2d 279, 293 (Tex. Civ. App.—Beaumont 1953, writ *ref'd n.r.e.*).

195. See *Andrews v. Hoxie*, 5 Tex. 171, 186-87 (1849); *Grace v. Orkin Exterminating Co.*, 255 S.W.2d 279, 293 (Tex. Civ. App.—Beaumont 1953, writ *ref'd n.r.e.*).

196. 5 Tex. 171 (1849).