SMU | Dedman School of Law

SMU Law Review

Volume 45
Issue 1 *Annual Survey of Texas Law*

Article 23

January 1991

Real Property

Lawrence J. Fossi

Bryant W. Burke

Philip D. Weller

REAL PROPERTY

by

Lawrence J. Fossi, Bryant W. Burke,** and Philip D. Weller****

SEVERAL decisions from this Survey period indicate that the Texas Supreme Court has begun to honor and uphold the intent of consenting adults, as that intent is expressed in their contracts.[1] To those who have reviewed court decisions during the 1980's, this approach may seem novel. Indeed, a historian in some far removed future, chancing upon several volumes of the Southwestern Reporter from the past decade, might conclude that in those olden days Texas was overrun with heavily armed bankers who made a practice of breaking into the offices of real estate developers and forcing their hapless captives to borrow money.

The Texas Supreme Court's new approach, which began with the 1988 elections, has some rather stark consequences for mortgage lenders and borrowers. If a borrower says "I promise to pay," then he will likely be required to do just that. If a guarantor says "I unconditionally and primarily guarantee payment of," then a court may take him at his word.[2] And if a real estate developer claims that he and his lender had a special relationship giving rise to a fiduciary duty, then he will need more than a banker's Christmas card to prove his point.[3]

The high court's decisions are emblematic of a more pervasive mood during the Survey period that saw the Texas bench become less inclined to venture outside the settled pathways of the common law. Perhaps the courts were inspired by the more cautious approach of the high court, or perhaps they were weary from the past decade's frenzy of judicial legislation. Whatever the reason, judges seemed content to return to the ways of simpler days when doctrinal changes were gradual and incremental, and when the hallmark of judicial craftsmanship was a decision which flowed naturally

---

* B.A., Rice University, J.D., Yale Law School. Partner, Vinson & Elkins, Dallas.

** B.A., Colgate University, J.D., University of Texas School of Law. Associate, Vinson & Elkins, Dallas

*** B.A., Bowling Green State University, J.D., University of Houston. Partner, Vinson & Elkins, Dallas

1. *See, e.g., infra* text accompanying notes 80-93 (discussing FDIC v. Coleman, 795 S.W.2d 706 (Tex. 1990)); *infra* text accompanying notes 354-62 (discussing Rhodes v. Cahill, 34 Tex. Sup. Ct. J. 33 (Oct. 10, 1990)).

2. *See infra* text accompanying notes 80-93 (discussing FDIC v. Coleman, 795 S.W.2d 706 (Tex. 1990)); *infra* text accompanying 104-14 (discussing Preston Ridge Financial Services Corporation v. Tyler, 796 S.W.2d 772 (Tex. App.—Dallas 1990, n.w.h.)).

3. *See, e.g., infra* text accompanying note 94 (discussing FDIC v. Blanton, 918 F.2d 524 (5th Cir. 1990)); *infra* text accompanying notes 80-93 (discussing FDIC v. Coleman, 795 S.W.2d 706 (Tex. 1990)).

and inevitably from its antecedents rather than one which with blaring trumpets heralded the dawning of a more perfect age.[4] This is not to deny that new and sometimes dubious law was made during the Survey period,[5] or that some of the opinions reflect less careful preparation than others.[6] By and large, though, a review of the Survey cases suggests that judicial modesty is once again the spirit of the day, leaving one to hope that Texas jurisprudence can again become, if not wholly predictable, at least less capricious.

I. MORTGAGES

A. Foreclosures and Deficiency Judgments

In 1988, the Beaumont court of appeals suggested in *Halter v. Allied Merchants Bank*[7] that a regularly conducted mortgage foreclosure sale might be invalid if the lienholder or its surrogate was the purchaser and there existed a "significant disparity" between the purchase price and the property's value.[8] The language in *Halter*, even though only *dicta*, was nevertheless startling because it ran counter to a century of Texas case law holding that mere inadequacy of sales price, absent some irregularity in the foreclosure proceedings that contributed to the inadequacy, would not justify setting aside a foreclosure sale.[9] The *Halter* decision was quickly seized upon by lawyers seeking to challenge foreclosure proceedings, and courts throughout Texas were confronted with the decision of whether to follow *Halter*. At stake was nothing less than the continuing vitality of the private sale remedy, with all of the likely consequences to the mortgage credit market that would attend a curtailment of that remedy.

During 1989 only one court, the El Paso court of appeals in *Olney Savings & Loan Association v. Farmers Market of Odessa*,[10] seemed inclined to follow *Halter*. Meanwhile, the *Halter* decision was receiving a sound thrashing by other courts, most particularly by the U.S. Court of Appeals for the Fifth Circuit in *Savers Federal Savings & Loan Association v. Reetz*.[11] The Fifth Circuit, in a carefully researched opinion, concluded that *Halter* was unsupported by any pertinent authority, was at odds with well-established case law

4. A comparison of, for example, Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373 (Tex. 1988), with FDIC v. Coleman, 795 S.W.2d 706 (Tex. 1990), or Rhodes v. Cahill, 34 Tex. Sup. Ct. J. 33 (Oct. 10, 1990), reveals two entirely different judicial temperaments at work.

5. *See, e.g., infra* text accompanying notes 166-69 (discussing Prappas v. Meyerland Community Improvement Assoc., 788 S.W.2d 427 (Tex. App.—Dallas 1990, writ denied)).

6. *See, e.g., infra* text accompanying notes 227-42 (discussing Don Hill Constr. Co. v. Dealers Elec. Supply Co., 790 S.W.2d 805 (Tex. App.—Beaumont 1990, n.w.h.).

7. 751 S.W.2d 286 (Tex. App.—Beaumont 1988, writ denied).

8. *Id.* at 288 (quoting Lee v. Sabine Bank, 708 S.W.2d 582 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (deficiency resulting from marshall's sale of boat).

9. *See, e.g.*, American Sav. and Loan Ass'n v. Musick, 531 S.W.2d 581, 587 (Tex. 1975); Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473, 475 (Tex. 1965); Sparkman v. McWhirter, 263 S.W.2d 832, 837 (Tex. Civ. App.—Dallas 1953, writ ref'd).

10. 764 S.W.2d 869 (Tex. App.—El Paso 1989, writ denied).

11. 888 F.2d 1497 (5th Cir. 1989).

and statutory law, and was in all events the "purest dicta."[12]

The attack on *Halter* continued during this Survey period, and all three courts addressing the issue rolled out the Fifth Circuit's *Savers Federal* decision as artillery. In *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank National Association*[13] a lender purchased property at a non-judicial foreclosure sale for approximately $4.85 million, prompting the borrower's suit alleging that the fair market value at the time of the foreclosure was approximately $10.53 million, making the bank's bid "unconscionably low."[14] The Houston appeals court, noting that the borrower made no claim that the foreclosure sale was in any way irregular, cited *American Savings & Loan Association v. Musick*[15] for the proposition that inadequacy of consideration absent some procedural irregularity in the sale that caused or contributed to the inadequacy is not grounds for setting the sale aside. The *Greater Southwest* borrower attempted to distinguish the *Musick* rule by contending that it was inapplicable to actions for damages. The borrower relied upon the *Olney* and *Halter* holdings. The Houston court of appeals emphatically declined to follow those cases, and instead strongly seconded the views of the dissenting opinion in *Olney* and of the Fifth Circuit in *Savers Federal*.[16] The court of appeals also held that the lender's policy of bidding 70% of a property's value, but not more than the debt owing, was not actionable under either contract or tort, and it rejected the borrower's claim that the borrower's subjective trust in the lender was sufficient to give rise to a special trust or fiduciary relationship.[17]

The second case, *First Nationwide Bank v. Summer House Joint Venture*,[18] arose out of a summary judgment granted to a lender in its efforts to collect a $5.6 million deficiency following a mortgage foreclosure. Most of the decision focuses on questions of federal procedure; however, a portion of the decision, relying on *Savers Federal*, reiterates the Texas rule that mere inadequacy of sales price does not void an otherwise regularly conducted non-judicial foreclosure sale.[19]

The final Survey case in the area, *Pentad Joint Venture v. First National Bank of LaGrange*,[20] is the most curious of the three. The Austin court of appeals initially adhered closely to the *Musick*, *Savers Federal*, and *Greater Southwest* line of authority in affirming a summary judgment in favor of a lender despite the guarantors' claims that 1) the foreclosure sales price was grossly inadequate, 2) the lender's failure to disclose before the sale that it would bid only 70% of the property's fair market value was unfair and contributed to the inadequacy of the sales price, and 3) the relationship between

12. *Id.* at 1503-07.
13. 786 S.W.2d 386 (Tex. App.—Houston [1st Dist.] 1990, writ denied).
14. *Id.* at 388.
15. 531 S.W.2d at 581 (Tex. 1975).
16. *Greater Southwest*, 786 S.W.2d at 389-90.
17. *Id.* at 390-91.
18. 902 F.2d 1197 (5th Cir. 1990).
19. *Id.* at 1201.
20. 797 S.W.2d 92 (Tex. App.—Austin, 1990, no writ).

the mortgagee and mortgagor was one of trust, giving rise to a duty of good faith and an obligation on the part of the mortgagee to obtain the highest possible price at foreclosure.[21] In response, however, to the summary dismissal of the guarantors' counterclaims for breach of a duty of good faith and fair dealing, common law fraud, and DTPA unconscionability, the appeals court reversed and remanded, saying that the lender had offered no conclusive summary judgment evidence of the property's fair market value.[22] If, as the court had affirmed only two pages earlier, the adequacy of foreclosure sales proceeds counts for naught absent some evidence of a defect or irregularity in the sale procedure, and if it was clear that no such defect or irregularity had even been alleged, then one wonders why the court held the door open to the counterclaims. It seems that *Halter*, although roughed up a good bit, still has some life in it, and may continue to cause mischief or do good, depending on one's perspective, until a definitive pronouncement from the Texas Supreme Court.

Two other Survey cases in this area, *FDIC v. Blanton*[23] and *Georgetown Associates, Ltd. v. Home Federal Savings & Loan Association*,[24] are noteworthy because they suggest an answer to the question of how inadequate sales proceeds must be in order to be regarded as "grossly inadequate." In *Blanton* a federal court jury found defects in the foreclosure sales of five properties, and further found that the defects contributed to the sale of each property at a grossly inadequate price. The judge had instructed the jurors that a grossly inadequate price would have to be so low as "to shock a correct mind, and thereby raise a presumption that fraud attended the purchase." The judge let stand the jury finding as to four of the properties, but granted judgment notwithstanding the verdict as to the fifth, and credited the borrower only with the actual sales price for that property. The judge concluded that, as a matter of law, a sales price of 62.3% of the market price is not shocking.[25]

The Fifth Circuit approved the jury instruction on the definition of grossly inadequate, and also sustained his judgment n.o.v. as to the fifth property. It noted that Texas authority supports the view that a sales price of more than 60% of market value is not grossly inadequate[26] and, while cautioning against a mechanical application of the 60% test, found that the evidence supported the trial judge's ruling.

In *Georgetown Associates, Ltd.* the Houston court of appeals concluded that a foreclosure sales price equal to 74% of the appraised value and 84% of the resale price was not grossly inadequate and, even if it were, there was

21. *Id.* at 95-97.
22. *Id.* at 98.
23. 918 F.2d 524 (5th Cir. 1990).
24. 795 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1990, writ dism'd w.o.j.).
25. *Id.* at 531.
26. *Id.* at 531-32 (citing Charter Nat. Bank-Houston v. Stevens, 781 S.W.2d 368, 375 (Tex. App.—Houston [14th Dist.] 1989, writ denied)) (cases cited therein indicate findings of gross inadequacy typically fall far below 60% line); Citizens Nat. Bank of Lubbock v. Maxey, 461 S.W.2d 138, 143 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (sales price of stocks that exceeded 60% of market value is, as a matter of law, not grossly inadequate).

no evidence of any irregularity in the foreclosure sale that would justify examining the price's adequacy.[27] The Houston court attacked the approach of *Halter* and *Olney* for being contrary to the settled law of *Musick*.[28]

Ironically, the approach of *Halter* and *Olney* may carry the day after all if legislation that is pending at the time of this article's publication is ultimately enacted. The proposed legislation[29] would limit mortgage deficiency judgments to the difference between the outstanding indebtedness and the property's fair market value at the time of foreclosure, with such value to be judicially determined. The legislation, which would be added to the Texas Property Code as section 51.003, would also require that a debtor be credited with any proceeds received by the lender from private mortgage insurance. A similar proposal was approved by both houses of the legislature during the 1990 session, but was vetoed by Governor Clements.[30]

B. The D'oench, Duhme Doctrine

The growing reluctance of Texas courts to protect borrowers from their written undertakings has an interesting federal law parallel: the increasing prominence of the so-called *D'Oench, Duhme* doctrine.[31] During the Survey period the Dallas court of appeals decided two cases, *FSLIC v. Stone-Liberty Land Associates*[32] and *FDIC/Manager Fund v. Larsen*,[33] that extend the sweep of the *D'Oench, Duhme* doctrine. Both cases held the FDIC can, upon becoming the owner of a failing financial institution's assets, assert the *D'Oench, Duhme* defense on appeal, even though such defense was not available to or asserted by the financial institution itself at trial.

The facts in *Stone* and *Larsen* are similar. In response to legal proceedings or a foreclosure action to collect indebtedness, the borrower (in *Stone*)

---

27. *Georgetown Assoc., Ltd.*, 795 S.W.2d at 255.
28. *Id.* at 254-55.
29. Tex. H.B. 169, 72nd Leg. (1991).
30. Tex. S.B. 452, 71st Leg. (1990).
31. The doctrine takes its name from D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), which held that secret agreements, such as those designed to deceive creditors or the public authority or tending to have that effect, cannot be asserted as a defense in a suit by the FDIC because they would tend to deceive the banking authorities. *Id.* at 459-60. Congress codified D'Oench in the Federal Deposit Insurance Act of 1950, § 2(13)(e), 64 Stat. 889, as amended by, 12 U.S.C.A. § 1823(e) (West 1989), which provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement —
>
> (1) is in writing,
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

32. 787 S.W.2d 475 (Tex. App.—Dallas 1990, writ granted).
33. 793 S.W.2d 37 (Tex. App.—Dallas 1990, writ granted) (relying on *Stone* precedent).

or a subordinate lienholder (in *Larsen*) challenges the collection proceeding by claiming that the financial institution has violated various oral agreements and representations made by it or its agents after the loan agreements were signed. Following a trial court verdict against the financial institution, the FDIC succeeds to the assets and liabilities of the institution and raises on appeal the *D'Oench, Duhme* (or section 1823(e)) defense: that no agreement which tends to diminish or defeat the right, title, and interest of the FDIC in any asset acquired by the FDIC shall be valid against the FDIC unless the listed requirements of section 1823(e) are met.[34] The effect of the *D'Oench, Duhme* defense will be to eviscerate essentially the entire case of the borrower or lienholder, and the question becomes whether the FDIC may raise the defense for the first time on appeal.

In answering that question affirmatively, the *Stone* and *Larsen* courts relied heavily on sections 1821(d)(13)(A) and (B) of the recently enacted Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[35] Section 1821(d)(13)(A) provides that the FDIC shall abide by any final unappealable judgment of any court of competent jurisdiction that was rendered before the appointment of the FDIC as conservator or receiver. Section 1821(d)(13)(B) provides that in the event of any appealable judgment, the FDIC shall have the rights and remedies that were generally available to the insured depository institution before the conservator or receiver was appointed as well as the rights and remedies available to the FDIC in its corporate capacity, including all appellate rights.

Several courts which have examined the question, including the Fifth Circuit Court of Appeals in a case during this Survey period, have concluded that the *D'Oench, Duhme* defense is not available on appeal.[36] The *Stone* and *Larsen* decisions took issue with these holdings. First, the Dallas court of appeals case rejected a conclusion from the federal cases that a trial judgment voiding an asset leaves no asset for the receiver. Such a conclusion, said the Dallas court, ignores the fact that an appealable judgment might be reversed, and the possibility of reversal means that economic value remains in the asset.[37] The Dallas court also disapproved of reasoning in the federal cases that the outstanding trial court judgment itself provided a bank record that the promissory notes at issue were void. That reasoning, said the court, takes no account of the U.S. Supreme Court's holding that knowledge of the FDIC is no defense to the *D'Oench, Duhme* defense,[38] and also fails to comprehend that a trial court judgment that is entered years after the disputed loan transactions falls far short of the requirements of *D'Oench, Duhme* and section 1823(e) that the bank records be contemporaneous with the

34. *See supra* note 31.

35. Federal Deposit Insurance Act 12 U.S.C.A. §§ 1821(d)(13)(A) & (B) (1989).

36. Thurman v. FSLIC, 889 F.2d 1441, 1447 (5th Cir. 1990); *see* Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n, 885 F.2d 266, 275 (5th Cir. 1989); Grubb v. FDIC, 868 F.2d 1151, 1158-59 (10th Cir. 1989).

37. *Stone*, 787 S.W.2d at 483-84; *Larsen*, 793 S.W.2d at 41 (citing *Stone's* rationale).

38. *Stone*, 787 S.W.2d at 483-84 (citing Langley v. FDIC, 484 U.S. 86, 95 (1987)).

transaction.[39]

The Dallas court of appeals also rejected a conclusion from the federal cases that section 1821(d)(13)(B) gives conservators and receivers standing to pursue all appeals but does not grant any new substantive rights on appeal.[40] The Dallas court reasoned that one can reach such a conclusion only by construing just subpart (B) of section 1821(d)(13), and ignoring altogether subpart (A).[41] The FDIC surely must abide by final unappealable judgments, but it is expressly empowered to assert a vast panoply of rights and remedies so long as the judgment is still appealable.[42] The court also held that the FDIC has such rights and remedies even though the federal defenses were neither raised at trial nor preserved for review on appeal.[43] This is not shocking, the court said, because the federal defenses were unavailable to the financial institutions at trial.[44]

As a final point, the Dallas court of appeals noted that the phrase "no agreement" in section 1823(e) has been broadly construed to mean no part of the parties' bargain, as reflected in the express or implied conditions upon their performance.[45] "The essence of the *D'Oench* rule is that the FDIC is entitled to rely, to the exclusion of any extraneous matters, on the official bank records that set forth the rights and obligations of the bank and those to whom the bank lends money."[46] Hence, it matters not that the borrower or lienholder frames its claims as arising under agreements, or resulting from misrepresentations, or as constituting defenses or affirmative claims. To the extent such claims are based on matters extraneous to bank records, they may not be asserted.[47]

Whether the views of the Dallas court of appeals will carry the day remains to be seen. In light of the large dollar amounts at issue and the clear conflict among the courts, it may be that the Supreme Court of the United States will write the final chapter.

C. *Wraparound Mortgages*

Hampton v. Minton,[48] a wraparound note case relying on last year's Texas Supreme Court decisions in *Summers v. Consolidated Capital Special Trust*[49] and *Lee v. Key West Towers, Inc.*,[50] seems to confirm that the *Zeitgeist* of the 1990's is a world away from that of the 1980's. The *Hampton* decision reveals a court hard at work to apply precedent faithfully and

39. *Stone*, 787 S.W.2d at 483-84; *Larsen*, 793 S.W.2d at 41-42.
40. *See* Thurman v. FDIC, 889 F.2d 1441, 1447 (5th Cir. 1990).
41. *Stone*, 787 S.W.2d at 484; *Larsen*, 793 S.W.2d at 42.
42. *Id.*
43. *Stone*, 787 S.W.2d at 484.
44. *Larsen*, 793 S.W.2d at 43.
45. *Larsen*, 793 S.W.2d at 43 (citing Langley v. FDIC, 484 U.S. 86, 93-94 (1987)).
46. *Stone*, 787 S.W.2d at 490.
47. *Stone*, 787 S.W.2d at 490; *Larsen*, 793 S.W.2d at 44.
48. 785 S.W.2d 854 (Tex. App.—Austin 1990, writ denied).
49. 783 S.W.2d 580 (Tex. 1989).
50. 783 S.W.2d 586 (Tex. 1989).

disinclined to allow sophistical subtleties to undercut the contractual intent of the litigants.

Minton, the holder of the wraparound note, declared the wraparound note in default and posted for foreclosure after the makers of the note failed to pay insurance and taxes. The foreclosure sale was delayed by the makers' bankruptcy filing, and meanwhile Minton himself defaulted on the wrapped note, resulting in a foreclosure sale by the holder of that prior note. Minton sued the makers of the wraparound note for specific performance of their obligations under the wraparound note and for damages equal to the difference between the balance of the wraparound note and the amount bid by the first lienholder at foreclosure. On appeal from a judgment for Minton, the makers of the wraparound note contended that Minton could recover nothing because 1) their deed from Minton required him to make payments on the wrapped note even after their default on the wraparound note, and 2) Minton, by suing for specific enforcement of the wraparound note, did not treat the makers' breach as a repudiation of the contract, but rather kept the contract alive, thereby waiving Minton's excuse for failing to keep the wrapped note current.[51]

The Austin court of appeals acknowledged the general rule that a party seeking to recover damages for breach of an agreement must prove that he has performed all of his own obligations under the agreement. That rule is inapplicable, however, in instances when the other party has either repudiated its duty to perform or has made a breach of such materiality as to indicate an intention to repudiate.[52] Here, said the court, the defaults by the makers were so material as to evidence an intent to repudiate. Thus, Minton's breach was excused by the prior breach of the makers, and did not preclude Minton's collection of damages.[53]

The makers' second argument was more subtle. Texas courts have held that a party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part.[54] The makers of the wraparound note argued that Minton's suit for specific performance was tantamount to an election to treat the wraparound note as a continuing contract. The appeals court disagreed. It said that Minton's failure to seek rescission of the contract did not indicate an intent to keep the contractual obligations alive on both sides.[55] The court explained that the rule requiring a non-breaching party to "accept" a breaching party's repudiation has been narrowly applied, and generally only in the context of anticipatory repudiation.[56] In *Minton* the makers of the wraparound note had not anticipatorily repudiated; rather they had materially defaulted.[57] Moreover, the acceleration of the debt and the posting for foreclosure were reliable indicia of Min-

51. *Hampton*, 785 S.W.2d at 857.
52. *Id.* at 857-58 (citing Glass v. Anderson, 596 S.W.2d 507, 511 (Tex. 1980)).
53. *Hampton*, 785 S.W.2d at 858.
54. *See* Hanks v. GAB Business Serv., Inc., 644 S.W.2d 707, 708 (Tex. 1982).
55. *Hampton*, 785 S.W.2d at 858.
56. *Id.*
57. *Id.*

ton's intent to accept the makers' repudiation.[58] The makers further contended that Minton's failure specifically to plead excuse barred Minton from asserting that the makers' default excused Minton's failure to keep the first lien note current. The appeals court skirted the merits of the makers' claim by noting that Minton's failure had not been excepted to in writing before the judgment was entered, as required by Rule 90 of the Texas Rules of Civil Procedure.[59]

The makers then argued that Minton's failure to keep his promise to make timely payments on the first lien note breached a covenant of title and constituted a failure of consideration. The court saw the matter differently. It said that if Minton had defaulted in a circumstance where the makers continued to perform under the wraparound note, then there would have been a failure of consideration, not because of any breach of a covenant of title, but rather by reason of breach of contract.[60] The court's focus on the contract between the makers and Minton, and its view of the covenants in the deed as "memorials of the mutual promises between the vendor and vendee,"[61] is in line with the supreme court's approach in *Summers* and *Lee*. The makers also urged that Minton's promise to pay the wrapped note amounted to a covenant against encumbrances, and that Minton's default breached the covenant. The appeals court held, however, that such a covenant is breached, if at all, only on execution and delivery of a deed.[62] Finally, the makers claimed they were wrongfully deprived of notice of the foreclosure by the first lienholder. The appeals court disagreed, noting that the makers' right to cure defaults under the wrapped indebtedness was specifically limited, by the language of the deed, to circumstances in which the makers were not themselves in default.[63]

D. Mortgages Generally

Chicago Title Insurance Co. v. Lawrence Investments, Inc.[64] arose after two different parties purchased the identical property at two simultaneous foreclosure sales. The case affirms some hoary authority on the doctrine of equitable subrogation, and strengthens the position of lenders whose loan proceeds are used to satisfy debt secured by senior liens. Lawrence purchased property in exchange for a purchase money note and lien, and then sold the property to a company called Allibhai in exchange for a wraparound note secured by a wraparound lien. After a tax lien was filed against the property, Allibhai obtained a bank loan whose proceeds were used to satisfy the tax lien, repay the original purchase money note, and pay for new construction. Allibhai in turn sold the property, and the ultimate owner defaulted on the Lawrence wraparound note and the bank note. When Law-

58. *Id.*
59. *Hampton*, 785 S.W.2d at 858-59.
60. *Id.* at 859.
61. *Id.*
62. Id. at 859-60 (citing Beaumont v. Moore, 146 Tex. 46, 202 S.W.2d 448 (1947)).
63. *Hampton*, 785 S.W.2d at 860.
64. 782 S.W.2d 332 (Tex. App.—Fort Worth 1989, writ ref'd).

rence initiated foreclosure proceedings, Lawrence and the bank crossed swords about the seniority of their respective liens. The bank assigned its lien to Chicago Title, which had issued a mortgagee policy to the bank. Chicago Title and Lawrence conducted simultaneous foreclosure sales, and each then claimed to own the property. On cross-motions for summary judgment, the trial court ruled in favor of Lawrence.[65]

In reversing, the Fort Worth appeals court dusted off the venerable doctrine of equitable subrogation. Texas definitively adopted the doctrine in 1895, when the state's highest court announced that a person paying the debt of another person would succeed to all of that other person's rights, liens, and priorities, provided that the paying party was not a mere volunteer but rather was protecting an interest which would be jeopardized if the debt were not paid off.[66] The appeals court held the liens that were satisfied by the bank loan were both senior liens.[67] In conditioning its loan upon the satisfaction of those liens, the bank was no mere volunteer; rather, it was protecting the superiority of a legitimate business loan, and was therefore subrogated to the rights of the senior lienholders.[68] Chicago Title succeeded to those same rights, liens, and priorities by reason of its status as assignee of the bank note and lien, and thus acquired the property at the foreclosure sale free and clear of Lawrence's claims.[69] The issue of division of sales proceeds was not before the appeals court, but the court did note that the priority from subrogation existed only to the extent that the bank's funds were used to pay off the prior liens, and not to the additional extent of loan proceeds used for new construction.[70]

Scott v. Schneider Estate Trust.[71] also provided a lesson in common law precepts, this time involving the doctrine of equitable redemption. The estate trust sold two lots to an improvident purchaser in exchange for two notes and two liens. The improvident purchaser sold the property to a hard-luck buyer, who executed separate notes and liens. The hard-luck buyer made payments to the purchaser, who in turn was supposed to forward most of the payment on to the estate trust to satisfy the superior debt. The buyer dutifully made payments; unbeknownst to him, however, the improvident purchaser was pocketing the funds, causing a default under the first lien debts. When the buyer learned that the estate trust had posted for foreclosure, it sought to prevent the proceedings by filing suit for equitable redemption. In affirming a trial court judgment for the estate trust, the appeals court noted that the doctrine of equitable redemption requires a petitioner to submit three proofs.[72] First, he must demonstrate that he has a legal or equitable interest in the property subject to the mortgage. Second, he must

65. *Id.* at 333-34.
66. Faires v. Cockrill, 88 Tex. 428, 31 S.W. 190 (1895).
67. *Chicago Title*, 782 S.W.2d at 334.
68. *Id.*
69. *Id.* at 334-35.
70. *Id.*
71. 783 S.W.2d 26 (Tex. App.—Austin 1990, no writ).
72. *Id.* at 28.

prove that he is "ready, able or willing" to redeem the property by paying off the existing liens.[73] Third, he must assert his equity of redemption before a foreclosure sale occurs.[74] In this case, the hard-luck buyer met the first and third tests, but failed to prove that he was prepared to pay off the notes held by the estate trusts.[75]

Schultz v. Weaver[76] is a case whose holding, on first reading, appears so self-evident as hardly to merit another thought. A closer look, though, raises an intriguing question. In *Schultz* the original buyer of land gave the original seller, Weaver, a purchase money note and lien. The note provided that the maker had no personal liability for payment, and that Weaver's sole recourse upon default was to take back the property. The original buyer, in turn sold the land to Schultz; the warranty deed included an assumption by Schultz of payment under the original note "according to the terms thereof."[77] When Schultz defaulted, Weaver sued Schultz on the note, arguing that Schultz was now personally liable for payment, and the trial court awarded Weaver a judgment.

The Austin appeals court reversed. It noted that an assuming party is generally liable to the same extent as the party from whom it assumes.[78] It rested its holding, however, on the language in the warranty deed that qualified the assumption language: the assumption was to pay the note in accordance with its terms, and its terms were non-recourse.[79] The "according to the terms thereof" language surely helps rescue the otherwise shoddy assumption language in the deed. Even without that language, though, it seems that the result should be the same. Weaver was not a party to the transaction in which Schultz assumed payment, and gave no consideration for the promise, and should not become a third party beneficiary of any assumption.

II. GUARANTIES

In *FDIC v. Coleman*[80] the officers and owners of a corporation had guaranteed the corporation's mortgage loan. In the written guaranties, the guarantors waived diligence on the part of the lender in collecting the debt, and agreed that the lender could, in its sole discretion, exercise or refrain from exercising its rights under the mortgage without in any manner diminishing the guarantors' obligations. Six weeks before the note's maturity date, the corporation filed a bankruptcy petition under chapter 11 of the Bankruptcy Code. About six months later, the lender sued the guarantors and sought to

73. *Id.* (citing Houston v. Shear, 210 S.W. 976, 981 (Tex. Civ. App. 1919, writ dism'd)).
74. *Schreider Estate*, 783 S.W.2d at 28.
75. *Id.* The record was rather sketchy on why the hard-luck buyer's tender was insufficient. Because the appellant failed to submit a statement of facts as part of the appeal, the appeals court assumed that the evidence adduced at trial supported the trial court's conclusion that the tender was insufficient.
76. 780 S.W.2d 323 (Tex. App.—Austin 1989, no writ).
77. *Id.* at 324-25.
78. *Id.* at 325.
79. *Id.*
80. 795 S.W.2d 706 (Tex. 1990).

lift the bankruptcy stay in order to foreclose the mortgage lien. Shortly thereafter, the lender became insolvent and was taken over by the FDIC, which succeeded to the lender's rights. Soon after the FDIC's succession, and about a year after the bankruptcy filing, the guarantors' attorney wrote the FDIC. The attorney claimed that the mortgaged property was worth approximately the outstanding balance of the note, and requested a meeting to discuss a proposal whereby the guarantors would arrange for the bankrupt corporation to "abandon" the property to the FDIC. There was no evidence of whether the requested meeting occurred or whether the guarantors took any other steps to sell the property.

About twenty-one months after the maker's bankruptcy, the FDIC obtained bankruptcy court approval to proceed with its foreclosure. Ten months later, the FDIC sold the property at foreclosure for $357,000, leaving a mortgage note deficiency of $486,000. The FDIC then sought summary judgment for the deficiency against the guarantors. The guarantors defended by claiming that the FDIC had a duty to act in good faith and to pursue and protect the mortgage collateral, and that a fact question existed as to whether the FDIC breached those duties. In particular, the guarantors claimed that the FDIC delayed its foreclosure during a period when it knew that property values were declining, thus increasing the guarantors' liabilities. The trial court granted summary judgment in favor of the FDIC, and the Midland court of appeals reversed, holding that the FDIC owed a duty of good faith to the guarantors and therefore a fact questioned remained about whether the delay was a breach of the duty.[81]

The Texas Supreme Court doubted whether Texas Uniform Commercial Code section 1.203[82] imposed a duty of good faith on a mortgage lender in its dealings with a guarantor, and stated that even assuming section 1.203 applied to mortgage guaranties, it requires only honesty in fact, and not diligence.[83]

The guarantors cited several high court decisions in support of the proposition that a mortgage lender owes its guarantors a duty of good faith under state law.[84] The Texas Supreme Court distinguished those decisions as cases involving shared trust or imbalance of bargaining power.[85] By contrast, said the court, the relationship of mortgagor and mortgagee does not ordinarily involve a duty of good faith, nor does that of creditor and guarantor.[86] The court noted that in this case, the guarantors had not even asserted any special relationship with the lender or its successor.[87] The court distinguished a

81. *Id.* at 707. The appeals court opinion is reported at 762 S.W.2d 243, 245.

82. TEX. BUS. & COM. CODE ANN. § 1.203 (Vernon 1978).

83. *Id.* at 708 (citing Riley v. First State Bank, 469 S.W.2d 812, 816 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.)).

84. *Coleman*, 795 S.W.2d at 708 (citing Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210 (Tex. 1988); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987); Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984)).

85. *Coleman*, 795 S.W.2d at 708-09.

86. *Id.* at 709.

87. *Id.*

Fifth Circuit decision cited by the guarantors, *Frederick v. United States*,[88] as one requiring that a foreclosure sale be conducted fairly. Here, said the *Coleman* court, the claim is that the sale did not take place soon enough, not that it wasn't fair.[89]

Aside from the paucity of authority supporting the creation of a duty of good faith, the high court also found compelling policy reasons for not creating such a duty. For example, the guarantors, as controlling principals of the debtor corporation, could have caused the corporation to sell the property if, as their counsel claimed when he talked with the FDIC, the property's value approximated the amount of the debt. The guarantors instead chose to seek bankruptcy protection.[90] Moreover, imposing such a duty on a mortgage lender would impose the impossible task of foreseeing the future of real estate values.[91] The court noted that, according to appraisal evidence introduced by the guarantors, property values actually rose during a two month interval after the bankruptcy filing. If a lender were required to hasten its foreclosure sale during the falling market, said the court, then why not also require it to tarry during a rising market? In short, "it is difficult enough to determine when it is best to foreclose to protect one's own interests; it is virtually impossible to know when it is best to protect others' interests."[92]

Finally, the court held, even if a mortgage lender owed a duty of good faith to guarantors of the mortgage debt, in this case any such duty was waived by the provisions in the guaranties which afforded the lender complete discretion in deciding when and whether to enforce rights and which waived the lender's diligence.[93]

The supreme court's *Coleman* decision was dispositive in *FDIC v. Blanton*,[94] wherein the Fifth Circuit rejected a claim by a borrower that the FDIC's delay in foreclosing impaired the value of the collateral and thereby breached a duty of good faith. *Coleman* was also pivotal in *Georgetown Associates, Ltd. v. Home Federal Savings & Loan Association*,[95] wherein the Houston Court of Appeals declined to acknowledge the existence of a duty of good faith on the part of a mortgagee, stating instead that the mortgagee's only duty is to foreclose in accordance with the statutory procedures.[96]

Cocke v. Meridian Savings Association[97] involved a claim similar to that made in *Coleman* except that the syntax was different. In *Cocke* a lender

88. 386 F.2d 481 (5th Cir. 1967).

89. *Coleman*, 787 S.W.2d at 709. Dissenting from the *Coleman* opinion were Justices Mauzy, Spears, and Ray, who felt that the FDIC owed "a duty of commercial reasonableness," and therefore the case should go to the jury to determine the FDIC had breached that duty. *Id.* at 710-11 (Mauzy, J., dissenting).

90. *Id.* at 709.

91. *Id.* at 710.

92. *Id.*

93. *Id.* at 710.

94. 918 F.2d 524, 530-31 (5th Cir. 1990).

95. 795 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1990, writ dism'd w.o.j.).

96. *Id.* at 255-56.

97. 778 S.W.2d 516 (Tex. App.—Corpus Christi 1989, no writ).

sued the debtor for a deficiency remaining after a real property foreclosure. The debtor defended by contending that the lender had a duty to mitigate its damages and, by selling the property 10 months after the earliest possibility, during which interval the property lost $300,000 in value, had failed to fulfill its duty. The Corpus Christi appeals court curtly declined to create a duty to mitigate in property law,[98] citing the rather inscrutable authority of *Brown v. RepublicBank First National*.[99]

In *Waite v. BancTexas-Houston, N.A.*[100] four mortgage note guarantors sought to overturn a summary judgment against them by claiming that a fact issue existed as to whether the bank had failed to use reasonable efforts in obtaining bids at a foreclosure sale. The court gave short shrift to the claim, calling it "without merit."[101] The *Waite* court cited *American Savings and Loan Association v. Musick*[102] for the proposition that disparity between purchase price and fair market value is actionable only if there existed an irregularity in the foreclosure sale that contributed to the disparity.[103]

Preston Ridge Financial Services Corp. v. Tyler[104] poses the following exercise in contract construction: If 1) a guarantor guarantees payment of a portion of a loan above a certain amount (for instance, all indebtedness in excess of $735,000), 2) the lender forecloses its lien on property securing the loan before pursuing the guarantor, and 3) the foreclosure proceeds are sufficient to reduce the loan below the threshold amount, is the guarantor still liable?

The guaranty at issue provided that the guarantor would pay "when due" the sum of all interest on the loan and the amount by which the outstanding principal balance of the loan exceeded $735,000.[105] When the borrower defaulted, the lender foreclosed its liens against the collateral and applied the foreclosure proceeds to the loan. After such application, the principal balance of the loan was less than $735,000. The lender demanded that the guarantor pay the remaining loan balance. The guarantor refused, claiming its liability was extinguished by the application of the foreclosure proceeds to the loan. The trial court agreed and granted the guarantor's motion for summary judgment.[106] On appeal, the lender urged that the guarantor's liability was established when the outstanding indebtedness was due, on the date of acceleration. The guarantor responded that the guaranty required payment of the guaranteed indebtedness "immediately upon demand"; therefore, his liability should be determined when the lender demanded payment.[107] The guarantor argued that the lender had extinguished his liability

98. *Id.* at 520.
99. 766 S.W.2d 203 (Tex. 1988). In dicta, a majority of the majority and dissenting judges actually voiced approval for a duty to mitigate damages.
100. 792 S.W.2d 538, (Tex. App.—Houston [1st Dist.] 1990, n.w.h.).
101. *Id.* at 541.
102. 531 S.W.2d 581 (Tex. 1975).
103. *Waite*, 792 S.W.2d at 541.
104. 796 S.W.2d 772 (Tex. App.—Dallas 1990, n.w.h.).
105. *Id.* at 774.
106. *Id.*
107. The guarantor relied on the following language to support its position: "Guarantor

by applying the foreclosure proceeds to the loan before demanding payment.

The Dallas appeals court noted that the guaranty's introductory paragraph clearly evidenced that the guaranty was executed to supplement the other collateral.[108] The court then construed the guaranty in light of what it regarded as the parties' intent to make the lender whole if the borrower defaulted.[109] Thereafter, it was downhill for the guarantor. The court found that the provision requiring payment "immediately upon demand" established when payment from the guarantor was due and not when the guarantor's liability accrued.[110] The court construed the guaranty in conjunction with the terms of the promissory note, and held that the guarantor's liability accrued when the maturity date of the loan was accelerated.[111]

The guarantor also argued that the guaranty provided that all payments made on the loan should reduce the guaranteed indebtedness. To support his argument, the guarantor cited the following provision: "If the guaranteed portion of the indebtedness is partially satisfied by reason of the election of Lender to pursue any of the remedies mentioned in this paragraph, Guarantor shall remain liable for the balance of the guaranteed portion of the indebtedness."[112] The court held that this provision merely assured the guarantor that, to the extent the lender's exercise of other remedies yielded proceeds in excess of $735,000, the guarantor would receive credit for those excess amounts.[113]

The court's unwillingness to sanction the "anomalous result" that would occur if the guarantor's arguments were adopted guided its decision. That is, if the lender elected first to proceed against the guarantor and then to foreclose its lien against the collateral, the guarantor would be fully liable; on the other hand, if the lender elected first to foreclose its lien against the collateral and then to proceed against the guarantor, the guarantor's liability would be extinguished.[114]

III. LANDLORD AND TENANT

A. Construction and Interpretation

In both last year's Survey and this one, we have heaped high praise on the Texas Supreme Court, rejoicing in its new-found inclination to honor rather than frustrate the intent of contracting parties. In *Bockelmann v. Marynick*,[115] however, the court has strayed somewhat from the straight and narrow. That there was a great temptation to stray is clear from the facts.

---

hereby agrees that if the Note is not paid by [the borrower] in accordance with its terms . . ., then immediately upon demand by [the lender], Guarantor will pay to [the lender] the guaranteed portion of the indebtedness . . . . " *Id.* at 778.

108. *Preston Ridge*, 796 S.W.2d at 777-78.
109. *Id.* at 778.
110. *Id.* at 778-79.
111. *Id.* at 779.
112. *Id.*
113. *Id.*
114. *Id.* at 781.
115. 788 S.W.2d 569 (Tex. 1990).

The Dallas court of appeals had ruled that a wife who separated from her husband and left their leased duplex before the end of the lease's original term was nevertheless liable for holdover rental that the husband failed to pay, even though the landlord had allowed the husband to defer some rental by signing a written loan agreement. The court of appeals based its holding on a lease provision stating that any holding over would create a new year-to-year tenancy between the landlord and tenant.[116] In order to escape holdover liability, said the court of appeals, the wife needed to notify the landlord that she no longer held any interest in the property.[117]

The Texas Supreme Court, in an opinion written by Chief Justice Phillips and issued without dissent, reversed. Noting that under common law a landlord may elect to treat a holdover tenant either as a trespasser or as a tenant holding under the terms of the original lease,[118] the court said that the lease in question incorporated this rule by providing that if the landlord consents, a new tenancy is created with a one-year term. Thus, said the court, the language of the lease indicated that the holdover tenancy was a new one rather than an extension of the old one. Under such circumstances, only the new tenant was liable.[119]

The court's examination of the language in the lease agreement is, perhaps, a bit too selective. The lease did indeed give the landlord the right to treat the holding over as a new tenancy, but the lease stated that the new tenancy would be between the landlord and the tenant, and it identified the "tenant" as both the husband and the wife.[120] It is one thing to formulate common law doctrines that govern the parties' rights in the absence of an agreement, but it is quite another matter to substitute those doctrines in place of written contractual undertakings. All things considered, it seems that the common law does not impose an undue burden on an abandoning joint tenant by requiring notice to the landlord.[121] The Texas Supreme Court's desire to do good rather than to do right is understandable, but one wonders what the result would have been had the wife shown up at the courthouse door demanding to share the leased premises during the holdover term.

The continuing vitality of the mail box rule was demonstrated in *Brown v. Swift-Eckrich, Inc.*[122] The tenant mailed a certified letter exercising a renewal option some three days before the required date, but the notice was not received until after the final date for exercise. The landlord alleged that the notice was not timely given, and that therefore the option had lapsed. The El Paso court of appeals held for the tenant, noting that where a lease

116. *Id.* at 570-71.
117. *Id.* at 571.
118. *Id.* (citing Howeth v. Anderson, 25 Tex. 557, 572 (1860)).
119. *Id.* at 571-72.
120. *Id.* at 570.
121. In light of the husband's dealings with the landlord during the holdover term, including a written loan agreement without the wife's signature, one wonders why no one contended that the landlord had notice of the cessation of the wife's actual possession.
122. 787 S.W.2d 599 (Tex. App.—El Paso 1990, writ denied).

specifically provides for giving notice by mail, timely deposit of notice in compliance with the lease will suffice.[123]

The difficulty of determining if a landlord has accepted a surrender of a lease was at issue in *Ingleside Properties v. Red Fish Bay Terminal*.[124] The tenant had ceased making rental payments and abandoned the premises after its subtenant chose not to renew its sublease and moved out. The landlord notified the tenant that it was not terminating the lease but would continue to sue for rentals. The landlord also sent a notice to the tenant's former subtenant trying to intercept payments required to be made for construction of a warehouse on the premises. The court noted that a surrender results as a matter of law when the landlord has exercised such dominion over premises as to reappropriate them with the intention of depriving the tenant of future rights.[125] In *Ingleside*, however, the court held that the landlord's occasional mooring of vessels at a dock that was part of the premises did not constitute a surrender because the longest term of the landlord's occupancy was between seven and fourteen days, and most of the occupancy periods ranged only between twelve and eighteen hours.[126]

B. Breaches and Remedies

Assume you are a retailer and you discover that your premises are so defective that you cannot properly operate your business. After repeated efforts to obtain repairs you finally withhold rent, though you offer to escrow it while matters are resolved. This action, coupled with the landlord's desire to lease your premises to another tenant, finally draws enough attention to start negotiations. While negotiating for substitute space, though, the landlord sends you a demand for delinquent rent and then tells you to ignore the notice. Finally, while you are on vacation, the landlord enters your premises, seizes your inventory, and evicts you. Would you be in a litigious mood? The tenant in *Gill Savings Association v. Chair King, Inc.*[127] certainly was, and it found a sympathetic ear in the trial court, which ruled that the facts supported the tenant's claims for actual and punitive damages resulting from the eviction.[128] On appeal, the landlord contended that the eviction was valid because the alleged defects did not justify withholding rent. The appeals court disagreed, pointing to an extensive list of defects, including roof leaks and problems with access to air conditioners.[129] The court also

123. *Id.* at 600 (citing Pruett Jewelers v. J. Weingarten, Inc., 426 S.W.2d 902, 905 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Kamenoff v. Meadows, 457 S.W.2d 574 (Tex. Civ. App.—Waco 1970, no writ)). The court also noted that, in general, strict compliance with provisions concerning exercise of options is required in the absence of equitable considerations. *Brown*, 787 S.W.2d at 601.

124. 791 S.W.2d 217 (Tex. App.—Corpus Christi 1990, no writ).

125. *Id.* at 218-19 (citing, *inter alia*, Harry Hines Medical Center, Ltd. v. Wilson, 656 S.W.2d 598, 601 (Tex. App.—Dallas 1983, no writ)).

126. *Id.* at 219-20.

127. 783 S.W.2d 674 (Tex. App.—Houston [14th Dist.] 1989) *aff'd in part & modified in part*, 797 S.W.2d 31 (Tex. 1990).

128. 783 S.W.2d at 675.

129. *Id.* at 677.

quoted an internal memorandum of the landlord stating "that the general atmosphere was one of disaster."[130] The landlord's demanding rent and evicting rather than repairing the defects, especially in light of the negotiations with the new tenant, supported a fraud claim and estopped the landlord from asserting that the eviction was proper.[131] The landlord's activity was also found sufficient to defeat its claim for the withheld rent; however, because it could not determine how the trial court had determined damages,[132] the appeals court affirmed liability, and reversed for trial on the damage issue.[133] The Texas Supreme Court affirmed as to liability, while reversing as to part of the attorney's fees issue.[134] A final point of interest is that one of the successful defenses to the landlord's rent counterclaim was breach of the implied warranty of habitability. The opinion, however, makes no reference to the seminal case in the area, *Davidow v. Inwood North Professional Group—Phase I*.[135]

Although not utilized in *Chair King*, *Davidow* implied warranty of suitability formed part of the basis for an interesting damage suit by a landlord-owner against its management company alleging negligence in the management of an office building. In *Henry S. Miller Management Corp. v. Houston State Associates*[136] a building owner recovered lost rentals after a major tenant moved out because of the manager's failure to provide maintenance and repairs, which was held at trial to constitute a breach of the implied warranty of suitability established in *Davidow*. On appeal the court noted that *Davidow* is not grounded in constructive eviction, and therefore in order to terminate the lease, the tenant was not required to prove constructive eviction, loss of use, or loss of economic benefit.[137] The management company argued that, assuming the landlord was entitled to damages, it was entitled only to lost profits, and not lost rentals. The Houston court of appeals said that the management company cited no authority for the argument that an agent whose poor management drove away a tenant should be liable only for lost profits, and found the landlord's argument in this regard to be persuasive.[138] That portion of the decision, however, is *dicta* because the management company failed to preserve error on the issue.[139]

C. *Mitigation*

Since the confused welter of opinions in *Brown v. RepublicBank First National*[140] in 1988, Texas lawyers have wondered to what extent, if any, a landlord has a duty to mitigate damages following a breach by its tenant. In

130. *Id.*
131. *Id.* at 677-78.
132. *Id.* at 679.
133. *Id.* at 682.
134. 797 S.W.2d 31, 32 (Tex. 1990).
135. 747 S.W.2d 373 (Tex. 1988).
136. 792 S.W.2d 128 (Tex. App.—Houston [1st Dist.] 1990, writ denied).
137. *Id.* at 131.
138. *Id.*
139. *Id.*
140. 766 S.W.2d 203 (Tex. 1988).

Cassidy v. Northwest Tech Center Associates, Ltd.[141] the Dallas court of appeals unequivocally affirmed its position that a landlord has no duty to mitigate under the common law, and held that nothing in *Brown* alters the common law rule.[142] Because writ has been granted in *Cassidy*, it appears likely that the Texas Supreme Court will soon have to either adopt or disown its duty to mitigate.[143]

Mitigation was also at issue in *Vasquez v. Carmel Shopping Center Co.*,[144] but because the landlord's duty to mitigate was expressly agreed to in the lease, the court made no reference to *Brown* in reaching its determination. The tenant sought permission to assign its lease, but the landlord would not consent unless the assignee agreed to a rent increase. The assignee refused, and ultimately the tenant was unable to meet its obligations and defaulted. The landlord took possession and re-let the premises at a lower rental, sued, and obtained summary judgment for the difference in rental value.[145] The tenant appealed, asserting a fact issue as to whether the landlord failed to mitigate damages by refusing to accept the proposed assignment. The court rejected this argument, noting that the lease obligated the landlord to make reasonable efforts to re-let the premises at the best rental available, but only after a breach of the lease by the tenant, a condition that had not yet occurred at the time the tenant requested consent to the assignment.[146] The court's conclusion, while certainly defensible, probably made the tenant wish it had withheld rent in the month it requested consent to the lease assignment.

D. Residential Tenancies

Two Survey cases in the residential area dealt with premises defects with differing results. In *Bryan v. Dockery*,[147] which might be called the case of the honest landlord, the deposition testimony of an elderly cripple stripped her of her common law defenses regarding duty to repair and resulted in a judgment for injury to a visiting postman.[148] The case arose when a mailman delivering a package was injured by the collapse of a stairway leading to a garage apartment. The apartment was leased under an oral tenancy, and the parties admitted that there was no clear agreement concerning who was responsible for repairs, though from time to time the tenant would notify the landlord about various conditions and then would repair them at the landlord's cost. The landlord cited *Yarbrough v. Booher*[149] for the proposition that, absent a statute, agreement, or concealed condition, the tenant takes

141. 785 S.W.2d 407 (Tex. App.—Dallas 1990, writ granted).
142. *Id.* at 412 (citing Metroplex Glass Center, Inc. v. Vantage Properties, Inc., 646 S.W.2d 263 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)).
143. Writ was granted, in part on the mitigation issue, at 33 Tex. Sup. Ct. J. 622, 623 (June 30, 1990).
144. 777 S.W.2d 532 (Tex. App.—Corpus Christi 1989, writ denied).
145. *Id.* at 533.
146. *Id.* at 535-36.
147. 788 S.W.2d 447 (Tex. App.—Houston [1st Dist.] 1990, n.w.h.).
148. *Id.* at 452.
149. 141 Tex. 420, 422, 174 S.W.2d 47, 48 (1943).

the risk of the premise's condition and the landlord is not liable for injuries caused by an unsafe condition. The injured mailman argued that the Texas Property Code supplants the holding of *Yarbrough* and imposes liability on the landlord.[150] Under the Texas Property Code, the landlord's duty to repair arises only if the tenant is current in its rental payments. In this case, however, no evidence was adduced at trial on that point. The mailman prevailed all the same, however, because in deposition testimony the landlord had stated unequivocally that she owned the apartment, that she had responsibility for it, and would "take all the blame." The court of appeals relied on these statements in upholding judgment for the mailman.[151]

The loquacious landlord in *Bryan* should be compared with the taciturn one in *Montelongo v. Goodall*,[152] whose tenant under an oral lease broke her ankle in a fall down stairs at the leased premises. The tenant sued the landlord alleging failure to exercise ordinary care. In upholding a summary judgment in favor of the landlord, the court noted that when a landlord gives up possession of property to a tenant, he owes no further duty to exercise ordinary care unless he has knowledge of hidden defects or unless there is an agreement to the contrary.[153] The evidence indicated that the landlord agreed to be responsible for major repairs only when the tenant notified him that such repairs were needed. The court could not determine if the condition of the stairs was such as to require a major repair, but did not need to reach that issue as it was clear that the tenant never notified the landlord about any problems with the stairs.[154]

An effort to engraft a common law duty to demand rent prior to initiating a forcible entry and detainer action was unsuccessful in *Caro v. Housing Authority of the City of Austin*.[155] The tenant was evicted for non-payment of rent and defended by alleging that the landlord had failed to demand payment of rent before bringing a forcible entry and detainer action. While the Austin court of appeals generally indicated that there is no common law duty of demand, it disposed of the case on other grounds because the residence in question was part of a subsidized housing project and was subject to specific grievance procedures imposed by the U.S. Department of Housing and Urban Development. The HUD procedures preempted any applicable state common law demand requirements.[156]

---

150. 788 S.W.2d at 449-50. The relevant statutory provision, TEX. PROP. CODE ANN. § 92.052 (Vernon 1984 & Supp. 1990), requires a landlord to repair or remedy a condition if the tenant notifies the landlord, the tenant is current in rent at the time, and the condition materially affects health or safety of an ordinary tenant. The court also noted that Kamarath v. Bennett, 568 S.W.2d 658, 660-61 (Tex. 1978), established an implied warranty of habitability in a dwelling unit rental. The court, however, did not rely on *Kamarath* in its holding. *Dockery*, 788 S.W.2d at 450.

151. *Dockery*, 788 S.W.2d at 450.

152. 788 S.W.2d 717 (Tex. App.—Austin 1990, n.w.h.).

153. *Id.* at 718, 719 (citing Parker v. Highland Park, Inc., 565 S.W.2d 512, 515 (Tex. 1978); Morton v. Burton-Lingo Co., 136 Tex. 263, 150 S.W.2d 239, 240 (1941); Prestwood v. Taylor, 728 S.W.2d 455, 460 (Tex. App.—Austin 1987, writ ref'd n.r.e.)).

154. *Goodall*, 788 S.W.2d at 719-20.

155. 794 S.W.2d 901 (Tex. App.—Austin 1990, no writ).

156. *Id.* at 905-06.

E. Title

In *Rockport Shrimp Coop. v. Jackson*[157] a concerned tenant holding under a lease dating back to 1969 entered into a new lease with a navigation district that it believed might be the true owner of the subject property. Rental under the new lease was paid into a trust account, and would be returned if the district turned out not to have superior title. Some time after execution of the contingent lease, the old landlord brought suit to establish title and ultimately obtained clear title to the subject property.[158] The tenant then brought suit against the landlord and the district seeking to affirm the district lease (apparently because the rent under the district lease was preferable to that under the old lease). The appeals court had little trouble affirming judgment in favor of the landlord, relying on the long-standing rule that so long as a tenant is not disturbed in its possession, it is estopped to deny its landlord's title.[159] The tenant claimed its situation fell within the exception to the general rule that permits a tenant to acquire superior title in instances where the landlord has no title. The tenant, however, had not acquired superior title, but rather had only entered into a lease with a party who allegedly had superior title. The facts, therefore, were insufficient to bring the tenant within the exception.[160]

In *Fabrique, Inc. v. Corman*[161] the issue was whether a landlord must place an assignee into peaceful possession where the lease permits assignment. The assignee obtained its leasehold interest by assignment out of a bankruptcy proceeding with court approval, but the landlord warned the assignee not to take possession of the property. The assignee then brought suit to enforce the lease and the landlord moved for summary judgment alleging that as a matter of law it owed no duty to put the assignee in possession, having put the original tenant in possession. The landlord also sought recovery of unpaid rentals.[162] The court held that when the terms of a lease expressly or impliedly give the tenant the right to assign, then the landlord impliedly covenants that it will not hinder the assignee's possession following a valid assignment.[163] But because the trial court had not determined whether the assignment was valid, the appeals court reversed for further proceedings.[164] The appeals court also found that the assignee acted properly in declining to take possession in the face of the warnings from the landlord not to do so, and rejected the landlord's argument for unpaid rentals because he

157. 776 S.W.2d 758 (Tex. App.—Corpus Christi 1989, writ denied).

158. *Id.* at 760.

159. *Id.* (citing Lorino v. Crawford Packing Co., 142 Tex. 51, 175 S.W.2d 410, 417 (1943); Parker v. Standard Oil Co. 250 S.W.2d 671, 680 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.)).

160. *Rockport Shrimp*, 776 S.W.2d at 761.

161. 796 S.W.2d 790 (Tex. App.—Dallas 1990, n.w.h.).

162. *Id.* at 791.

163. *Id.* at 793. The court noted the general rule that once a landlord has placed a tenant in possession, if a stranger thereafter trespasses it is the tenant's responsibility to cure the problem. *Id.* at 792 (citing Hertzberg v. Beisenbach, 64 Tex. 262, 265 (1885)).

164. *Rockport Shrimp*, 796 S.W.2d at 791, 793.

was estopped by his own actions.[165]

IV. LIS PENDENS

A case of first impression in Texas, *Prappas v. Meyerland Community Improvement Association*,[166] will likely make the filing of a lis pendens notice a common practice in litigation involving anything that even remotely involves real estate. As *Prappas* makes clear, a litigant who records a notice of lis pendens is completely shielded from the consequences of his act, even where the filing is unauthorized and malicious.[167]

Prappas arose when several homeowners sought to sell their properties after a period of heavy flooding. Fearing that the proposed buyer would use the properties for commercial development, a number of other homeowners, in combination with a homeowners' association, sought a declaratory judgment to block the sale. The complaining homeowners lost at trial. After the trial court entered its judgment, and on the eve of the impending sale, the complaining homeowners filed a notice of lis pendens which caused the sellers' deal to unravel. The court of appeals subsequently affirmed the trial court's judgment against the complaining homeowners, and the Texas Supreme Court declined to review the case.[168] The jilted sellers next brought suit against the complaining homeowners for slander of title and tortious interference with contract.

The sellers' chief contention was that the recording of the lis pendens amounted to a tort. At the outset, however, this argument faced a major hurdle: since 1975, Texas courts have characterized a lis pendens notice as a part of a judicial proceeding, and therefore entitled to the same absolute privilege as all other communications that are uttered or published during judicial proceedings.[169] This notion that lis pendens is to be swaddled in a cloak of privilege was most recently affirmed in another case from this Survey period, *Sharif-Munir-Davidson Development Corp. v. Bell*.[170] The privileged nature of a lis pendens filing would defeat the sellers' cause of action because by definition, "[a]n absolutely privileged communication is one for which, by reason of the occasion upon which it was made, no remedy exists."[171]

The selling homeowners in *Prappas* attempted to distinguish the prior decisions as cases involving lis pendens notices that were authorized by stat-

165. 796 S.W.2d at 792.

166. 795 S.W.2d 794 (Tex. App.—Dallas 1990, no writ).

167. *Id.* at 795.

168. *Id.* For further factual background, see Meyerland Community Improvement Ass'n v. Temple, 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

169. *Prappas*, 795 S.W.2d at 795 (citing Kropp v. Prather, 526 S.W.2d 283 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); Griffin v. Rowden, 702 S.W.2d 692 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)). More recently, the basis for the privilege has been expanded to include the open courts policy recognized by the Texas Supreme Court in Sakowitz, Inc. v. Steck, 669 S.W.2d 105, 107 (Tex. 1984).

170. 788 S.W.2d 427 (Tex. App.—Dallas, 1990, writ denied).

171. *Id.* at 430 (citing Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 110, 166 S.W.2d 909, 912 (1942)).

ute;[172] that is, as instances where the underlying lawsuits actually involved either title to real property, establishment of an interest in real property, or enforcement of an encumbrance against real property. The selling homeowners argued that, the recorded notice in the present case was *unauthorized*. While authorized filings may be absolutely privileged, they said, unauthorized filings are not.

The two judge majority writing for the Houston court of appeals readily acknowledged that the filing at issue involved neither of the first two types of lawsuits authorized by statute.[173] Whether the lawsuit involved the enforcement of an encumbrance, said the judges, was open to dispute. The parties had briefed the question, but the majority did not decide it; rather, the majority assumed that the filing was unauthorized, and ruled that even an unauthorized filing is granted the absolute privilege accorded other publications during judicial proceedings.[174] The majority outlined several reasons for its ruling. First, the court stated that there are several ways to cause a lis pendens filing to be expunged.[175] An aggrieved party can seek cancellation of the filing under the statute itself.[176] Indeed, where the filing is unauthorized, courts have relieved the party seeking cancellation from the rather onerous requirements of the statute.[177] Also, the aggrieved party may seek an order from the district court, with mandamus available if no relief is forthcoming.[178] Second, if there were a distinction between authorized and unauthorized filings, courts frequently would become enmeshed in difficult and derivative determinations of whether a particular filing was authorized.[179] Finally, the majority imagined a parade of horribles that were supposedly analogous to a litigant who becomes subject to tort liability when his lis pendens filing is held to be unauthorized.[180] The example mustered by the court was a litigant who becomes subject to a defamation lawsuit simply because he makes his claim in a court lacking subject matter jurisdiction.[181]

Taken alone or together, the majority's reasons are not especially persuasive. The statutory procedure for cancelling a lis pendens is quite burdensome to the petitioner, and the extra-statutory relief is, at best, uncertain. In a case like *Prappas*, where the filing occurred on the eve of closing, it is unlikely that any judicial relief would have been in time to save the day. As for courts becoming enmeshed in determining whether filings are authorized

172. TEX. PROP. CODE ANN. § 12.007(a) (Vernon 1984).
173. *Prappas*, 795 S.W.2d at 796.
174. *Id.* at 796.
175. *Id.*
176. *Id.* Section 12.008 of the Texas Property Code provides for the cancellation of a notice of lis pendens if the petitioning party deposits money with the court or obtains a guaranty of payment that is backed up by two sureties. In either case, the amount of security must exceed the amount of the judgment sought. TEX. PROP. CODE ANN. § 12.008 (Vernon 1984).
177. *Prappas*, 795 S.W.2d at 798 (citing Hughes v. Houston Northwest Med. Center, 647 S.W.2d 5, 7 (Tex. App.—Houston [1st Dist.] 1982, writ dism'd)).
178. *Prappas*, 795 S.W.2d at 796 (citing Olbrich v. Touchy, 780 S.W.2d 6 (Tex. App.—Houston [14th Dist.] 1989, no writ)).
179. *Prappas*, 795 S.W.2d at 798.
180. *Id.*
181. *Id.*

under the lis pendens statute, such exercises in statutory interpretation are precisely the business of courts. Besides, seeking the judicial relief prescribed by the majority will in fact require courts to engage in the very same exercises. As for the parade of horribles envisioned by the majority, it inspires more of a smirk than a shiver. There is no reason why a holding on lis pendens cannot be limited to lis pendens. The real danger posed by *Prappas* and similar cases is not an erosion of the open courts principle, but rather an untrammelled abuse of the lis pendens process resulting in innocent parties suffering significant and unrecoverable damages.

A dissent by Chief Justice Brown characterized the majority decision as the creation of a privilege to commit a tort.[182] This, said the dissenter, was a case in which tortfeasors waited until the last possible minute to record the lis pendens, and did so with the explicit intention of thwarting the sale.[183] The dissenter pointed out that the law already allows such last minute machinations by means of a temporary injunction, with the significant difference being that the law of injunctions protects the party against whom the relief is sought by requiring the posting of a bond. The effect of the majority decision is to give a litigant all of the benefits of the temporary injunction with none of the burdens.[184] The dissenter, noting that the recording of a lis pendens was being accorded absolute privilege only because of its characterization as part of judicial proceedings, also doubted that the filing of a lis pendens notice, taking place as it does at such a remove from the courtroom, really amounts to a judicial proceeding in any meaningful sense of the word.[185]

V. TITLE AND CONVEYANCES

A. Generally

The question in *Culbertson v. Brodsky*[186] was whether a contract to acquire land was an enforceable earnest money contract or a mere option contract unsupported by consideration. The buyer under the contract had deposited a $5,000 check with the title company, but the contract provided for a sixty-day feasibility period during which the title company was not authorized to cash the check and the buyer could terminate for any reason. When the buyer sued for specific performance, the seller defended by claiming that the contract was an option contract that was unsupported by consideration. The buyer argued that the deposit of the check with the title company was sufficient consideration to support the contract because such deposit was a forbearance of the use of those funds. The court rejected this argument because the check could not be cashed until after the feasibility period expired; therefore, the buyer had free use of the amounts on deposit

182. *Id.* at 800 (Brown, J., dissenting).
183. *Id.*
184. *Id.*
185. *Id.*
186. 788 S.W.2d 156 (Tex. App.—Fort Worth 1990, writ denied).

in his account during that period.[187] Consequently, the court said there was no consideration for the option, and held for the seller.[188]

Krenek v. Texstar North America, Inc.[189] was a textbook illustration of the strip and gore doctrine. The owners of a 236-acre tract conveyed the surface estate to twenty-four acres down the tract's center for use as a highway right-of-way. Thereafter, the part of the tract on one side of the highway was devised to the owners' son and the part on the other side was devised to their daughter. The son conveyed his parcel under a deed that described the property as running up to, but not including, the right-of-way. When oil was later produced from the parcel, the son sued the oil company for drainage of the land under the right-of-way. The court set forth the fundamental precepts of the strip and gore doctrine: Absent an express reservation to the contrary, a conveyance of land bounded on an existing public road carries with it the fee to the center of the road.[190] The presumption applies even if the deed's metes and bounds description stops at the roadway's edge, and is overcome only if the grantor owns land abutting both sides of the roadway or if the roadway is larger and more valuable than the conveyed tract. In this case, said the court, the strip and gore doctrine was clearly applicable, and the son was entitled to no damages because he was presumed to have conveyed his interest in the mineral estate beneath the roadway.[191]

B. Reformation

A loosely drafted lease addendum was rescued by the doctrine of reformation in *Olson v. Bayland Publishing, Inc.*[192] The addendum granted the tenant an option to purchase up to a 50% ownership interest in property "better known as 2472 Bolsover Bldg."[193] The tenant exercised the option and a dispute arose as to whether the 2472 Bolsover building also included two additional lots which, though used by the tenant for parking, were neither adjacent to the building nor located on Bolsover Street.

The court agreed that the property description did not satisfy the statute of frauds as to the two lots, but considered whether the doctrine of reformation could all the same sustain a damage verdict for the tenant.[194] The court acknowledged that the property description in this case was more deficient than in any of the previously decided cases which upheld reformation arising out of mutual mistake.[195] The court noted, however, that reformation is an equitable remedy that seeks to place the parties in the position they intended,

187. *Id.* at 157. Presumably, if the contract had permitted the title company to cash the check, then there would have been sufficient consideration to support the contract.
188. *Id.* at 158.
189. 787 S.W.2d 566 (Tex. App.—Corpus Christi 1990, writ denied).
190. *Id.* at 568 (citing, *inter alia*, State v. Williams, 335 S.W.2d 834, 836 (Tex. 1960)).
191. *Krenek*, 787 S.W.2d at 568-69.
192. 781 S.W.2d 659 (Tex. App.—Houston [1st Dist.] 1989, writ denied).
193. *Id.* at 661.
194. *Id.* at 662-63. The relevant statute of fraud provision is found at TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987).
195. *Olson*, 781 S.W.2d at 662-63 (citing Morrow v. Shotwell, 477 S.W.2d 538, 539 (Tex. 1972)). In *Morrow*, the court remanded for a retrial on a theory of reformation based upon

and held that the appropriateness of reformation should be based, at least in part, on the strength of the evidence of mutual mistake.[196] In *Olson* the evidence included the following facts: 1) the landlord told the tenant that the addendum included the two lots, 2) the landlord offered the lots to the tenant in two prior sales attempts, 3) the lots were pledged with the building to secure a mortgage loan, 4) the lots provided essential parking to the building, and 5) the landlord earlier furnished the tenant with a written description of the building that included a legal description of the two lots. Taken together, these facts were sufficient to support the jury's reformation verdict.[197]

In contesting the damage award, the landlord argued that the tenant was not ready, willing, and able to consummate the transaction because the tenant was not in a position to execute a joint venture or management agreement covering its undivided interest in the property.[198] The appeals court dismissed the argument, holding that the damages verdict was adequately supported by the jury's finding that a joint venture agreement was also omitted from the addendum by mutual mistake.[199] The holding is quite expansive given the rather sketchy language of the addendum (which is set out in the case), and surely constitutes the high-water mark for the doctrine of reformation. It seems doubtful, though, that the result would have been the same had the tenant sought to enforce specific performance rather than to collect damages.

C. Title Insurance Companies

Title insurance companies fared poorly in suits involving the escrow function during the Survey period, suffering reversals of three verdicts in their favor. In *Zimmerman v. First American Title Insurance Co.*[200] a broker who had arranged for the sale of forty-eight lots was to receive one of them as his commission; his right to the lot was set forth in the contract of sale, which he signed and delivered to the title company. The closing instructions from the purchaser's lender required that the deed of trust securing the loan cover all of the lots. The transaction was closed by the title company, which also recorded the deed conveying the lot to the broker. The purchaser subsequently defaulted, and the bank foreclosed its lien and sold all forty-eight lots to another purchaser. The new purchaser obtained a new loan from a different bank, again secured by a deed of trust encumbering all of the lots. The broker learned of the situation only three years after the original closing when he received no tax statement for his lot. He then contacted the title company, which obtained a quitclaim deed from the purchaser at the foreclosure sale. Inexplicably, the title company did not also obtain a release

strong evidence in the record that the parties intended to describe a particular tract and that they were mutually mistaken in the belief that the description used was legally sufficient.

196. *Olson*, 781 S.W.2d at 663.

197. *Id.*

198. *Id.* at 664.

199. *Id.*

200. 790 S.W.2d 690 (Tex. App.—Tyler 1990, writ denied).

from the bank then holding a lien on the lot. The new purchaser also defaulted and the new bank foreclosed its lien, leading to a suit by the broker against the title company for breach of contract, negligence, and violation of the Deceptive Trade Practices Act.[201]

The trial court directed a verdict in favor of the title company on the theories that it owed no duty to the broker, that the broker had elected to accept the lot encumbered by the liens, and that the cause of action was barred by limitations. Thus the court of appeals reviewed the case under the standards applicable to appeal from a directed verdict.[202] The court of appeals found the contention that no duty was owed insupportable because the broker was a signatory to the contract and possessed enforceable legal rights under it.[203] The court also noted that the broker had previously done business with the title company and had brought the contract to the title company not only to procure title insurance for the buyer, but also to handle the closing in conformity with instructions.[204] The court held that a title company can be liable for negligence in closing a real estate transaction and that when a title company acts as an escrow agent, it becomes a fiduciary.[205]

To support the ubiquitous DTPA claim, the broker testified that the title company advised him that he need not obtain an owner's policy because title to all the lots would be checked in connection with the sale to the original purchaser (a rather curious position for a title company to take). The court found this testimony sufficient to support a claim for a false or misleading act.[206]

The court gave little credence to the title company's argument that the broker's acquiescence amounted to an election to accept the lot encumbered by liens and a waiver of any rights to recovery. The court said that the broker asserted his rights as soon as he was aware of the situation, and that instituting suit against all possible parties at that time was not an election of remedies.[207] Finally, the court disposed of the limitations claim by noting that the existence of a fiduciary relationship may excuse a party from making a prompt and thorough investigation of records and may also estop a person from asserting limitations as a defense if his conduct kept another ignorant of the situation.[208] The court was clearly influenced by the title company's undertaking to cure the problem, albeit unsuccessfully, when the broker first brought the matter to the title company's attention.

---

201. *Id.* at 694.

202. *Id.* A directed verdict requires that evidence be viewed in the light most favorable to the appellant's position disregarding all contrary evidence and inferences. If there is evidence about which reasonable minds could differ, the trial court's judgment must be reversed. *See* Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 650 (Tex. 1976).

203. *Zimmerman*, 790 S.W.2d at 694.

204. *Id.* The court never mentioned that the closing instructions from the first lending bank required that its deed of trust cover all the lots.

205. *Id.* at 695.

206. *Id.*

207. *Id.* at 697.

208. *Id.* at 699 (citing Courseview, Inc. v. Phillips Petroleum Co., 158 Tex. 397, 312 S.W.2d 197 (1957)).

An egregious set of facts led to a rather obscurely written opinion in *Boatright v. Texas American Title Co.*[209] The Boatrights purchased a parcel of property, giving back a first mortgage to their seller, and then immediately sold the property to a new purchaser who gave back two mortgages to the Boatrights, one in the same amount as the one the Boatrights had given and another in the amount of $36,025. Both transactions were closed by the same title company on the same day, but, amazingly, the deed from the Boatrights made no reference to the prior mortgage given by the Boatrights. The deed of trust intended to secure the $36,025 note was never recorded, and possibly was never signed. The Boatrights' purchaser made only a few payments before defaulting, and the Boatrights referred the matter to an attorney. The attorney's notice of default stated that the note was secured by a recorded deed of trust, a statement that was untrue — the recording reference mentioned in the letter was that of the deed from the Boatrights to their purchaser. Ultimately, the attorney represented to the Boatrights that he had foreclosed the lien securing the $36,025 note, and he delivered a substitute trustee's deed to them. In its analysis, the court stated that foreclosure of a nonexistent or unrecorded deed was improper.[210] If the deed of trust was never executed, then this conclusion is correct, but the mere fact that a deed of trust is not recorded does not render foreclosure improper, although lien priority would certainly be an issue.[211]

The Boatrights' purchaser sued them, their attorney, and the title insurance underwriter, alleging wrongful foreclosure. The underwriter settled with the purchaser and took an assignment of the purchaser's claims alleging that the Boatrights had breached their warranty of title when they executed a warranty deed that made no mention of the prior existing mortgage (which by then had been foreclosed as well). The Boatrights brought cross-actions against the title company that closed the transaction, the title insurance underwriter, and their attorney, and received a favorable jury verdict.[212] The trial court ignored the verdict, granting the underwriter's and the attorney's motions for judgment notwithstanding the verdict.[213] Consequently, the procedural posture of the case limits its usefulness in other settings since if there is the slightest evidence supporting the verdict, the judgment n.o.v. must fail.[214]

The court of appeals found that the title insurance company, as the escrow agent for both transactions, owed a fiduciary duty to the Boatrights.[215] The court also held that due to the title company's additional role as agent of the underwriter, the underwriter was in no position to raise a claim of breach of warranty against the Boatrights.[216] In reaching this conclusion, however,

209. 790 S.W.2d 722 (Tex. App.—El Paso 1990, writ dism'd).
210. *Id.* at 724.
211. *Id.*; *see* Denson v. First Bank & Trust of Cleveland, 728 S.W.2d 876, 877 (Tex. App.—Beaumont 1987, no writ).
212. *Boatright*, 790 S.W.2d at 726.
213. *Id.* at 726, 729.
214. *Id.* at 726.
215. *Id.* at 727.
216. *Boatright*, 790 S.W.2d at 727-28.

the court noted that the Boatrights had paid for an owner's title insurance policy to protect them from title defects. While not entirely clear from the opinion, this statement also probably is incorrect because of the likelihood that the Boatrights paid for an owner's policy to protect their purchaser, as is customary in Texas real estate transactions.[217] The court also upheld the jury's verdict against the Boatright's attorney, noting that he had written two letters and foreclosed on property without ever verifying that the note in default was, in fact, secured by a recorded deed of trust.[218] Unfortunately, the opinion's language is rather murky, and the reader is never enlightened on the seemingly important question of whether the purchaser from the Boatrights knew about the prior deed of trust.

The lesson of *Lacy v. Ticor Title Insurance Co.*[219] is that a title company should be loathe to be named as beneficiary under a letter of credit in an escrow transaction. In *Lacy*, the landowner entered into a contract with Sullivan Investments, Inc. to sell a tract of undeveloped land. The contract granted Sullivan the right to terminate the contract at the end of the inspection period, November 30, 1984. Sullivan deposited $200,000 in the form of a check with the title company as earnest money; thereafter, Sullivan substituted an irrevocable standby letter of credit for the check. The letter of credit named the title company as the beneficiary for the benefit of the seller, and was payable upon presentment with a signed statement from the seller that Sullivan had defaulted under the contract.

Sullivan delivered the seller's broker a letter dated November 28, 1984, terminating the contract. The broker, however, discovered the letter only on December 5, 1984, and delivered it to the seller and the title company the next day. Several weeks later, the seller informed the title company that Sullivan had defaulted on the contract and instructed the title company to draw on the letter of credit. Sullivan, in response, instructed the title company not to present the letter of credit. Faced with conflicting instructions, the title company did nothing, the letter of credit expired, and the litigation began.

The seller sued Sullivan for breach of contract and the title company for breach of its fiduciary duty. Sullivan defended by claiming, first, that it had timely delivered the termination notice to the seller and, second, that the contract was formed under a mutual mistake regarding the extent to which the property was affected by a flood plain. The jury found that the termination notice was not delivered timely because the seller's broker was not authorized to receive the termination notice, but also found that the contract was based on a mutual mistake, so the trial court entered judgment in favor of Sullivan and the title company.[220]

The Dallas court of appeals reversed, holding that regardless of the par-

217. *Id.* at 727.

218. *Id.* at 729.

219. 794 S.W.2d 781 (Tex. App.—Dallas 1990), *aff'd in part & modified in part*, 34 Tex. Sup. Ct. J. 127, 127-28 (Nov. 28, 1990).

220. *Id.* at 784.

ties' understanding about the flood plain when the contract was executed, there was no evidence of a mistake that justified canceling the contract.[221] The court's holding emphasized 1) that the contract permitted Sullivan to terminate for matters reflected on the survey, 2) that the survey showed the extent of the flood plain and Sullivan failed to terminate the contract after its review of the survey, and 3) that Sullivan agreed to extend the contract for an additional three weeks after receiving the survey.[222] The appeals court then addressed Sullivan's and the title company's liability.

Sullivan argued that it should not be liable for the earnest money because its obligation was merely to deliver the letter of credit under the contract, and the delivery of the letter of credit fully satisfied its obligation to pay the earnest money.[223] The court distinguished the Florida case which Sullivan relied on as one in which the seller's only remedy was to retain the letter of credit. In this case, by contrast, the contract allowed the seller to retain the earnest money, as opposed only to the letter of credit.

The appeals court also found the title company liable for breaching its fiduciary duty to the seller.[224] Because no escrow agreement defined the title company's role, the court looked to the letter of credit to establish the rights of the parties.[225] As the beneficiary under the letter of credit, only the title company was entitled to draw on the letter of credit. The court held that the seller's complete dependence on the title company to make proper presentment created a fiduciary duty on the part of the title company to adhere strictly to the terms of the letter of credit, despite any conflicting instructions.[226]

VI. MECHANIC'S & MATERIALMAN'S LIENS

The Beaumont court of appeals, which in the recent past has undertaken an adventuresome rewriting of the law of real estate foreclosure,[227] has now decided to revise the mechanic's and materialman's lien statutes.[228] The court's muddleheaded opinion in *Don Hill Construction Co. v. Dealers Electrical Supply Co.*[229] holds that an owner of property is liable for material delivered to its property even if the supplier fails to give timely notice of its claim to the original contractor.[230]

The case arose when a supplier was not paid for electrical materials that it delivered to a subcontractor from August through November, 1985. The

221. *Id.* at 785.
222. *Id.* at 784-85.
223. *Lacy*, 794 S.W.2d at 792.
224. *Lacy*, 794 S.W.2d at 789.
225. *Id.* at 786.
226. *Id.* at 788.
227. *See* Halter v. Allied Merchants Bank, 751 S.W.2d 286 (Tex. App.—Beaumont 1988, no writ), in which the Beaumont court held that a guarantor may reduce the deficiency for which it is liable by the difference between the fair market value of the property and the amount bid by the lender at the property's foreclosure sale, and cases cited therein.
228. TEX. PROP. CODE ANN. §§ 53.001-.240 (Vernon 1984 & Supp. 1990).
229. *Don Hill*, 790 S.W.2d 805 (Tex. App.—Beaumont 1990, n.w.h.).
230. *Id.* at 809.

supplier delivered notices of non-payment to the original contractor and the owner of the project on November 11, 1985.[231] The form of the notice was sufficient to authorize the owner to withhold funds from the original contract price. The owner, however, neither withheld funds nor set aside the required statutory retainage,[232] prompting a suit by the supplier against the subcontractor, original contractor, and owner, which resulted in a judgment by the trial court against the three defendants for all four months of unpaid bills.[233]

On appeal, the owner argued that it should not be liable for materials delivered in August because the supplier had failed to deliver timely notice to the original contractor of its claim for these materials.[234] The appeals court held, however, that the untimely notice to the original contractor did not vitiate the claim against the owner because the notices to the original contractor and the owner are separate from each other.[235] The court said that owner who receives the 90-day notice on a timely basis does not escape responsibility because such notice was not timely under the 36-day notice rule applicable to the original contractor.[236]

This decision conflicts with the plain language of the statute. An owner of property is liable to a subcontractor performing work on or delivering materials to its property in the following two instances: 1) if the owner fails to retain undisbursed funds from the original contract price after it receives a fund-trapping notice from the subcontractor;[237] and 2) if the owner fails to withhold from the original contract price the statutory retainage until 30 days after the work is completed.[238] In either case, the notices required under section 53.056(b) of the Texas Property Code must be sent.[239] The Property Code provides that "[i]f the owner has received the notices required by [sections 53.051-.059], *if the lien has been secured*, and if the claim has been reduced to final judgment, the owner is liable for any money paid to the original contractor after the owner was authorized to withhold funds under [sections 53.051-.059]."[240] Before fund-trapping liability can be im-

231. *Id.* at 806. On November 19, 1985, the supplier delivered a second notice to the owner and the original contractor increasing the amount of the debt to $10,638.60. The supplier filed its lien affidavit on November 21, 1985. *Id.* at 806.

232. One alternative to avoid valid mechanic's and materialman's liens is an owner of property who retains 10% of the original contract price until 30 days after the work is completed. TEX. PROP. CODE ANN. § 53.101 (Vernon 1984 & Supp. 1991).

233. *Don Hill*, 790 S.W.2d at 806.

234. Under the applicable statute, the subcontractor was required to notify the original contractor of its claim for non-payment by the 36th day following the tenth day of the month after each month in which all or part of the claimant's material was delivered. TEX. PROP. CODE ANN. § 53.056(b) (Vernon 1984 & Supp. 1991). The statutory time periods have since been modified.

235. *Don Hill*, 790 S.W.2d at 809.

236. *Id.*

237. TEX. PROP. CODE ANN. §§ 53.051, 53.084(b). (Vernon 1984).

238. TEX. PROP. CODE ANN. § 53.105(a) (Vernon 1984 & Supp. 1991).

239. The Property Code provides that "to perfect a lien, a person must comply with [§§ 53.051-.059]." TEX. PROP. CODE ANN. § 53.051 (Vernon 1984). Further, "a claimant other than an original contractor *must* give the notice prescribed by this section for the lien to be valid." TEX. PROP. CODE ANN. § 53.056(a) (Vernon 1991) (emphasis added).

240. TEX. PROP. CODE ANN. § 53.084(b) (Vernon 1984) (emphasis added).

posed, there must be a valid lien which can be secured. Because the supplier in *Don Hill* failed to deliver timely notice to the general contractor, the supplier never obtained a valid lien. Without a valid lien, the supplier cannot secure its lien as required by the statute. Further, the statutory-retainage provisions of the mechanic's and materialman's statute require a subcontractor timely to deliver statutory notices to be entitled to a lien on retained funds.[241] The supplier did not timely deliver to the original contractor notice of its claim for the materials delivered in August, thereby failing to comply with the statutory-retainage provisions. A subcontractor must comply with statutory-retainage provisions to receive a lien on an owner's property for failure to retain funds.[242] Therefore, the appeals court should have held that the owner had fund-trapping and retainage liability only for the material delivered after August.

MBank El Paso National Association v. Featherlite Corp.[243] involved a priority dispute between a subcontractor's lender, which had a security interest in the subcontractor's accounts, and a subcontractor's brick supplier. The brick supplier gave timely notice of its claim to the general contractor and the owner, and timely filed its lien affidavit. Subsequently, the subcontractor assigned to the supplier the funds owed to it by the general contractor, and the general contractor signed a letter confirming that a joint check in the names of subcontractor and the supplier would be drawn from the retainage due under the original contract when received. Upon receipt of the letter, the supplier filed a release of its lien. When retainage funds became available, the general contractor, aware of the conflicting claims of the lender and the brick supplier, filed an interpleader action. The trial court found that the supplier did not have a valid lien because it had filed an instrument releasing its lien, and the lender also did not have a valid security interest because the funds were not an account receivable of the subcontractor.[244] The appeals court reversed the trial court and held that the amount owed by the contractor to the subcontractor was at all times an account receivable, which became subject to the supplier's lien when the supplier filed its lien affidavit.[245] Once the supplier filed its release, however, the bank's security interest was no longer subject to the supplier's claim; therefore, the bank was entitled to the funds owed to the subcontractor by the general contractor.[246]

VII. BROKERS

All of the brokerage cases from this Survey period featured the use of the

241. The Property Code provides that "[a] claimant has a lien on retained funds if the claimant: (1) sends the notices required by this chapter in the time and manner required . . . ." TEX. PROP. CODE ANN. § 53.103 (Vernon 1984); *see also*, TEX. PROP. CODE ANN. § 53.056 (Vernon 1984 & Supp. 1991) (outlining specific requirements for timely notice).

242. TEX. PROP. CODE ANN. § 53.105 (Vernon 1984 & Supp. 1991).

243. 792 S.W.2d 472 (Tex. App.—El Paso 1990, writ denied).

244. *Id.* at 474.

245. *Id.* at 475.

246. *Id.* at 476.

Texas Real Estate License Act[247] as either a sword or a shield in disputes over brokerage commissions. In *Hitchcock Properties, Inc. v. Levering*[248] the appeals court denied a broker's claim for a commission in connection with the sale of an option. The option was sold to a person procured by the broker, but the option holder sought to avoid payment of the commission by claiming that there was no written agreement for a commission, therefore precluding the broker's claim under the Real Estate License Act.[249] The broker argued that an option to buy real property is personal property and thus not subject to the act. The Houston appeals court disagreed, and held that an option to acquire real estate is an equitable interest in land and, as such, is real estate for purposes of the act.[250] Accordingly, the absence of a written agreement was fatal to the broker's claim.

In *David Gavin Co. v. Gibson*[251] David Gavin Company, which was not a licensed real estate broker, entered into a consulting agreement with Gibson under which Gavin agreed to help Gibson acquire an automobile dealership. Gavin was also employed by the owners of a Toyota dealership to locate a buyer for their dealership. Gavin introduced Gibson to the Toyota dealership's owners and helped negotiate an agreement for Gibson's acquisition of the Toyota dealership; however, the transaction never closed. Gavin sued Gibson, the Toyota dealership, and the dealership's owners for a commission for the aborted sale. The trial court granted Gibson's motion for summary judgment, ruling that Gavin had failed to prove it was licensed to perform real estate brokerage as required by the Real Estate License Act.[252] On appeal, Gavin claimed that the act was not applicable because the disputed transaction involved the sale of an ongoing business that merely included realty. The appeals court noted, however, that under Texas law a fee for handling a sale consisting in part of real estate is considered a real estate commission payment governed by the act.[253] Whether an agreement contemplates the sale of real estate is a question of fact.[254] Unfortunately for Gavin, his pleadings stated that he assisted in arranging a transaction which contemplated that Gibson would purchase the assets of the dealership, including improved real estate used by the dealership in its business. This assertion of fact, which was not pled in the alternative, constituted a judicial

247. TEX. REV. CIV. STAT. ANN. art. 6573(a) (Vernon Supp. 1991).

248. 776 S.W.2d 236 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

249. TEX. REV. CIV. STAT. ANN. art. 6573(a), § 20(b) (Vernon Supp. 1991), provides that no action may be brought "for the recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged. . . ."

250. *Hitchcock*, 776 S.W.2d at 238. The Real Estate License Act defines real estate as "a leasehold, as well as any other interest or estate in land, whether corporeal, incorporeal, freehold, or non-freehold . . . ." TEX. REV. CIV. STAT. ANN. art. 6573(a), § 2(1) (Vernon Supp. 1991).

251. 780 S.W.2d 833 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

252. *Id.* at 834. Gavin's case against Gibson was severed from Gavin's claims against the dealership and its owners.

253. *Id.* (citing Hall v. Hard, 160 Tex. 565, 335 S.W.2d 584, 588 (Tex. 1960)).

254. *David Gavin*, 780 S.W.2d. at 834.

admission.[255] Therefore, Gavin was not entitled to a commission because it was not a licensed broker. What about the portion of the commission attributable to the non-real estate assets of the dealership? The court found the contract was not severable and applied the rule that if consideration, or any part thereof, is unlawful, the entire contract is void and unenforceable.[256]

In *Cissne v. Robertson*[257] Cupp, a licensed broker, and Cissne, a licensed salesman, sued a real estate partnership for a commission in connection with the transfer of several partners' interests in the partnership.[258] The contract of sale provided that the partnership would pay Cissne and another broker a four percent commission if the sale closed. The partnership, however, alleged that there was no obligation to pay Cissne a commission because he was a salesman rather than a licensed broker, and the Real Estate License Act prohibits a salesman from receiving a commission from any person other than a broker.[259] Cupp and Cissne argued that all parties to the transaction knew Cupp was Cissne's sponsoring broker and that a commission should be payable to Cupp for the efforts of Cissne. The court, however, observed that Cupp was not a party to the agreement (the only parties to the contract of sale were the buyer, the partnership, the other broker, and Cissne);[260] and because Cupp was neither a party to the contract nor mentioned as being Cissne's sponsor, the court held that Cupp was not entitled to a commission.[261] Additionally, because Cissne was merely a real estate salesman, the court held that no commission was payable to him.[262]

In *Callaway v. Overholt*[263] the seller entered into a contract of sale with two purchasers. The contract, which was not signed by the broker, provided that the seller would pay the broker a $40,000 commission upon the consummation of a sale. The sale did not close and the purchasers and seller entered into an agreement terminating the contract. Four months later, the seller entered into another contract with one of the purchasers and another party for the sale of the property. The subsequent contract did not refer to a

255. *Id.* at 835 (citing Houston First Am. Sav. v. Musick, 650 S.W.2d 764, 767 (Tex. 1983)).

256. *Id.* (citing McFarland v. Haby, 589 S.W.2d 521 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.)).

257. 782 S.W.2d 912 (Tex. App.—Dallas 1989, writ denied).

258. Cupp's and Cissne's claims were based on a contract to sell the partnership's real property, however, the sale never closed. The partnership interests were subsequently transferred to the buyers under the contract of sale. Presumably, Cupp and Cissne claimed that the sale of the partnership interests was tantamount to a sale of the property. Although the issue was not presented, the court assumed, expressly stating it was not deciding the issue, that brokering the sale of interests in a partnership that owns real estate would support a claim for a commission under the Real Estate License Act. *Id.* at 914.

259. TEX. REV. CIV. STAT. ANN. art. 6573(a), § 1(d) (Vernon Supp. 1991) (providing that "[n]o real estate salesman shall accept compensation for real estate sales and transactions from any person other than the broker under whom he is at the time licensed . . . .").

260. *Cissne*, 782 S.W.2d at 922. The contract of sale also contained a joinder of the brokers pursuant to which each of the brokers represented that he knew "of no other brokers, salespersons, or other parties entitled to any compensation for brokerage services arising out of this transaction other than those whose names appear in this Agreement." *Id.*

261. *Id.* at 923.

262. *Id.*

263. 796 S.W.2d 828 (Tex. App.—Austin 1990, n.w.h.).

broker's commission, and the purchase price was reduced by $140,000, which equaled the sum of the broker's commission for the prior transaction and the cost of repairs to the property. The second contract subsequently closed, and the seller refused to pay the broker for either transaction. The broker sued the seller for its commission and the trial court sustained the broker's motion for a directed verdict.[264]

The seller argued that the phrase "upon the consummation of [the] sale" imposed a condition on the broker's right to a commission, namely that the sale must actually close.[265] The Austin appeals court rejected the seller's argument and held that the provision in the first sales contract merely stated the time when the commission would be payable to the broker.[266] The Court did not abrogate the rule that a broker is entitled to a commission at the time he procures a buyer who is ready, willing, and able to purchase the seller's property on terms acceptable to the seller.[267]

VIII. RESTRICTIVE COVENANTS

Six Survey cases supply a practitioner's primer in restrictive covenants, and illustrate both the utility and the limitations of covenants as governors of land use in Texas. The first, *City of Houston v. Muse*,[268] is certain to strengthen the hand of municipalities that seek to enforce restrictive covenants under chapter 203 of the Texas Property Code.[269] The case arose when the city attempted to enjoin an appliance repair business from operating in a subdivision that was subject to covenants allowing only residential use. The trial court agreed that a breach of the covenants had occurred, but ruled that the city was barred by laches from enforcing the covenants, and also that enforcing the covenants would be inequitable.[270] Although it declined to enjoin the business activities, the trial court did attempt something like a Solomonic slicing of the baby by enjoining the business owners from displaying signs, allowing more than two vehicles near the premises, keeping garbage in plain view, and loading goods onto vehicles with more than two axles.[271]

The court of appeals roundly trounced the trial court's laches analysis. The elements of laches, it said, are 1) a good faith change of position by the

264. *Id.* at 830.
265. *Id.* at 831.
266. *Callaway*, 796 S.W.2d at 834. Although the agreement between the seller and the broker was not in writing, the provision in the first contract of sale referring to the seller's obligation to pay the broker satisfied the requirement of a writing under the Real Estate License Act. *Id.* at 831 n.1. The court pointed out that the provision in the first contract was merely a memorandum of the seller's and broker's agreement, and as such, did not preclude the seller from submitting evidence that the commission was contingent upon consummation of the sale. *Id.* at 832; *see* Parker v. Outhier, 209 S.W.2d 759 (Tex. 1948). The seller, however, did not attempt to introduce any such evidence, and relied solely on the first contract's provision.
267. 796 S.W.2d at 832.
268. 788 S.W.2d 419 (Tex. App.—Houston [1st Dist.] 1990, n.w.h.).
269. TEX. PROP. CODE ANN. §§ 201.001-.013 (Vernon Supp. 1991).
270. *Muse*, 788 S.W.2d at 421, 424.
271. *Id.* at 421.

party against whom a legal or equitable right is asserted, where the change is made in reliance on the delay and is detrimental to such party, and 2) an unreasonable delay in asserting the right.[272] Examining the first element, the court remarked that before purchasing the property, the business owners had both actual and constructive notice of the covenants, which were recorded and mentioned in their deed and title policy, and about which they were told by a neighbor. Thus, there was neither reliance nor a delay leading to a change in position.[273]

As to the second element of laches, the appeals court noted that the city brought suit ten months after it received word of the violations. That interval, said the court, as a matter of law is not unreasonable.[274] The appeals court recognized that the trial court had held that the knowledge of the subdivision residents must be imputed to the city, thereby extending the delay period to more than four years.[275] The appellate judges doubted that the imputation was proper, but said that in all events the business owners, by reason of their actual notice of the restrictions when they purchased the property, failed to show a good faith detrimental change in their position in reliance on the city's delay.[276]

In dicta, the appeals court questioned whether laches could ever be asserted against a city. The question turns on whether enforcing restrictive covenants is a governmental or proprietary function, but the court concluded that it need not reach the issue in light of its holding that the elements of laches did not exist.[277]

The appeals court made short shrift of the trial court's holding that the harm of an injunction to the business owners would outweigh the resulting benefit to the community. There must be a great disproportion between the harm and benefit, said the appeals court, to justify such a holding.[278] In this case, there was precious little evidence either of harm to the business owners or of lack of benefit to the community.[279] The appeals court concluded that laches being no bar, and the equities not militating against injunctive relief, the city must prevail, and therefore an award of attorneys' fees to the city (which the trial court had denied) was mandatory under section 5.006(a) of the Texas Property Code.[280]

The efficacy of restrictive covenants also received a boost in *Lee v. Braeburn Valley West Civic Association*,[281] which arose out of an attempt by

272. *Id.* at 422.
273. *Id.* (citing City of Fort Worth v. Johnson, 388 S.W.2d 400, 403 (Tex. 1964)).
274. *Id.*
275. *Id.* at 422.
276. *Id.*
277. *Id.*
278. *Id.* at 424 (citing Garden Oaks Bd. of Trustees v. Gibbs, 489 S.W.2d 133, 134-35 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.)).
279. *Muse*, 788 S.W.2d at 424.
280. *Id.* at 423-24 (citing TEX. PROP. CODE ANN. § 5.006(a) (Vernon 1984); Inwood N. Homeowners' Ass'n, Inc. v. Meier, 625 S.W.2d 742, 743-44 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ)).
281. 794 S.W.2d 44 (Tex. App.—Eastland 1990, writ denied).

a homeowners' association to collect past due assessments, together with interest and late fees, from a delinquent homeowner. The homeowner challenged as usurious the 10% per annum interest charge and $5 late fee provided for in the recorded restrictions. Moreover, because the assessments were used to maintain an esplanade area not owned by him, and to provide services that the City of Houston also provided, the homeowner claimed that the assessments violated his constitutional right to equal protection.

In affirming a trial court decision, the appellate court pointed out that the constitutional 6% per annum usury limit applies only in instances where there is no agreed rate of interest.[282] The court noted that the restrictions were of record before the homeowner made his purchase, and that the homeowner's deed recited that the conveyance was "made and accepted subject to any and all restrictions."[283] The Eastland court of appeals held that this language is tantamount to an agreement, and therefore removes the case from the constitutional limitation.[284] As for the late charge, the court held that it was a penalty rather than compensation for the use or forbearance or detention of money, and thus could not be properly characterized as interest under the usury laws.[285] The equal protection argument received similarly short shrift; it was dismissed as unsupported by the record and undercut by the homeowner's voluntary acceptance of property subject to the restrictions.[286]

Freedman v. Briarcroft Property Owners, Inc.[287] illustrates the use of the common law doctrine of nuisance to go where restrictive covenants cannot in order to preclude a landowner from changing the use of property. In *Freedman* a landowner's shopping center, which he had operated for thirty years, was part of a platted subdivision that also encompassed house lots standing behind the shopping strip and facing onto a quieter street. Upon expiration of the covenants restricting the house lots to residential use, the shopping center owner acquired one of the lots, tore down the existing dwelling, and announced an intention to build a parking lot for shopping center patrons. Two days after the demolition began, homeowners in the subdivision filed new deed restrictions which restricted the lots to residential use; the homeowners' association subsequently filed suit to enjoin the shopping center owner from using the lot for parking. The trial court disallowed enforcement of the homeowner's amended deed restrictions.[288] The jury, in a

282. *Id.* at 45.

283. *Id.*

284. *Id.* at 45-46. The court cited no authority, but such authority exists. *See* Scoville v. Springpark Homeowner's Ass'n, Inc., 784 S.W.2d at 498, 502 (Tex. App.—Dallas 1990, n.w.h.); Loving v. Clem, 30 S.W.2d 590 (Tex. Civ. App.—Dallas 1930, writ ref'd); Meyerland Community Improvement Ass'n v. Temple, 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

285. *Lee*, 794 S.W.2d at 46.

286. *Id.*

287. 776 S.W.2d 212 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

288. *Id.* at 215. Another example from the Survey period of an unsuccessful attempt to impose restrictions retroactively is Property Owners of Leisure Land, Inc. v. Woolf & Magee, Inc., 786 S.W.2d 757 (Tex. App.—Tyler 1990, n.w.h.) (restrictive covenants imposed after the severance of the mineral estate could not be used to block the mineral owner's construction of

split verdict, found that although use of the lot for parking did not violate the original deed restrictions, the use did constitute a nuisance.[289] Based on that verdict, the trial court entered a permanent injunction against use of the lot for parking.[290]

On appeal, the shopping center owner made numerous contentions, most of which were quickly dispatched. First, he claimed that the homeowners' association had no standing to bring suit because it owned no land. The Houston appeals court responded that the covenants and governing documents of the association expressly charging it with a duty to enforce the covenants gave the association more than mere naked possession of land, and hence gave it standing to sue.[291] The appellant next contended that the nuisance issue was not ripe for trial because no parking lot yet existed. The appeals court stated that although a court may generally grant injunctive relief only to restrain an existing nuisance,[292] an exception exists for an imminent nuisance.[293] The court of appeals held that the declared intention to create a parking lot was "ripe enough" for injunctive suit.[294]

Addressing the merits of the nuisance claim, the shopping center owner pointed out that the homeowners' association was required to demonstrate a reasonable certainty that the parking lot would be a nuisance,[295] and argued that the association had not adduced sufficient evidence to support the jury's finding of nuisance. The appeals court, however, found ample record testimony about the dangers to the residential neighborhood from increased traffic.[296]

Jim Walter Homes, Inc. v. Youngtown, Inc.[297] arose when a lot owner hired a contractor to construct a home that violated the subdivision's covenants governing construction materials and minimum area. Upon suit by the subdivision's developer, a jury returned a verdict against both the contractor and the lot owner.[298] The appeals court reversed the judgment against the contractor, holding that the contractor had no ownership interest in the lot and therefore no legal duty to comply with the covenants.[299] Moreover, said the court, the covenants by their terms were binding only on purchasers of the lots and their heirs, successors, and assigns, which neces-

---

an emergency evacuation road where such construction was reasonably necessary to the exploration, development, and production of minerals).

289. 776 S.W.2d 212 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

290. *Id.*

291. *Id.* at 215-16 (citing 66 C.J.S. *Nuisances* § 82 (1950)).

292. *Id.*

293. *Id.* (citing O'Daniel v. Libal, 196 S.W.2d 211, 213 (Tex. Civ. App.—Waco 1946, no writ); 66 C.J.S. *Nuisances* § 113 (1950)).

294. *Id.*

295. *Freedman*, 776 S.W.2d at 216-17 (citing Waggoner v. Floral Heights Baptist Church, 116 Tex. 187, 193, 288 S.W. 129, 131 (Tex. Comm'n App. 1926, opinion adopted); McAshan v. River Oaks Country Club, 646 S.W.2d 516, 518 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.); O'Daniel v. Libal, 196 S.W.2d 211, 213 (Tex. Civ. App.—Waco 1946, no writ)).

296. *Freedman*, 776 S.W.2d at 217.

297. 786 S.W.2d 10 (Tex. App.—Beaumont 1990, n.w.h.).

298. *Id.* at 11.

299. *Id.*

sarily excluded third parties such as the contractor.[300] The developer urged the court to impose liability on the contractor all the same for tortious interference,[301] but the court declined to do so, noting that tortious interference had not been pled.[302]

Scoville v. Springpark Homeowner's Association, Inc.[303] involved an attempt by homeowners in the original portions of a subdivision to prevent the secession by homeowners in a later addition to that subdivision. The entire subdivision was governed by a Master Declaration that set forth certain restrictions for the original tracts and provided for the annexation of future tracts by the filing of supplementary declarations which could contain provisions that both complemented and modified those set forth in the Master Declaration. The supplementary declaration at issue in *Scoville* contained, in its article II, certain restrictions governing setbacks, building materials, and the like, as well as provisions for assessments. Then, in its article III, the supplementary declaration allowed the owners of 90% of the covered lots to vacate or modify the restrictions. It was those article III provisions that the homeowners in the addition relied upon in seceding.

The homeowners in the original subdivision fought the secession by pointing to a provision in the Master Declaration allowing vacation or amendment only by consent of 75% of all homeowners, including those in the original tracts and in the subsequently annexed tracts.

The appeals court, noting that rules of contract construction are applicable to restrictive covenants,[304] held that the language in the supplementary declaration enabling the addition's homeowners to vacate the supplementary restrictions meant exactly what it appeared to mean.[305] The court found that the supplementary declaration's vacation language was not inconsistent with the Master Declaration's 75% amendment or abandonment provision because the homeowners in the addition did not purport to amend or abandon the Master Declaration provisions which apply to the original subdivision homeowners.[306] In support of its holding, the majority cited *Loving v. Clem*[307] and *Meyerland Community Improvement Association v. Temple*,[308] which dealt with independent actions by homeowners in subsequently annexed additions. A rather windy dissent, which cited most of the cases relied on by the majority, argued that allowing an addition to secede of its own initiative was inconsistent with the overall scheme of covenants, and was therefore insupportable.[309]

---

300. *Id.* at 12.

301. *Id.* In support, the developer cited Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988).

302. *Jim Walter Homes*, 786 S.W.2d at 12.

303. 784 S.W.2d 498 (Tex. App.—Dallas 1990, writ denied).

304. *Id.* at 502 (citing Parker v. Delcoure, 455 S.W.2d 339, 343 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.)).

305. *Scoville*, 784 S.W.2d at 503-04.

306. *Id.* at 504.

307. 30 S.W.2d 590 (Tex. Civ. App.—Dallas 1930, writ ref'd)).

308. 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

309. *Scoville*, 784 S.W.2d at 506-10 (Ovard, J., dissenting).

A final case, *Evans v. Pollock*,[310] contains a thorough exploration of the doctrine of implied reciprocal negative easements, a branch line running off the restrictive covenants trunk. *Evans* involved a peninsular tract extending into Lake Travis that was originally owned by two married couples. The couples subdivided their tract into seven blocks; one was landlocked on a hill, and the other six had lake frontage. Before the couples made the subdivision, however, they conveyed two lakefront lots to a third party. After the subdivision, they apportioned the blocks among themselves, with one couple taking three blocks and the other four, and with no agreement concerning land use restrictions. Each of the couples then sold numerous lakefront lots, all pursuant to deeds that prohibited business uses and contained other restrictions. The deeds were silent as to whether similar restrictions governed other parts of the subdivision or whether similar covenants would be included in other deeds of subdivision property. One of the two married couples retained use of four lakefront lots and the entire landlocked block. The controversy arose when that couple's devisees conveyed two of the lakefront lots and the landlocked block to a third party, who proposed to build a marina, club, and condominium development. A number of other lakefront lot owners challenged the development plans, urging that all of the property was subject to the residential-only restriction by reason of the doctrine of implied reciprocal negative easements. The trial court attempted a compromise, holding that all lakefront lots were subject to the restriction but that the landlocked parcel was not.[311]

In reversing the trial court, the appeals court recounted some root and branch principles of restrictive covenants. Within the bounds of law and public policy, it noted, parties are free to restrict property by covenants in conveyance deeds.[312] Such covenants are generally considered personal to the parties concerned, relate only to the conveyed property, and may be enforced only by the grantor and grantee.[313] Exceptions to these general limitations are instances where restrictions are imposed on separate grantees pursuant to a general plan of development; there, one grantee may enforce the restrictions against another on the theory of mutual covenant and consideration.[314] In such instances, a grantee sometimes may compel his grantor to adhere to the original development scheme by imposing like restrictions on property thereafter conveyed by the grantor; such an imposition is referred to as a reciprocal negative easement.[315] The imposition of

310. 793 S.W.2d 14 (Tex. App.—Austin 1989, writ granted).

311. *Id.* at 18.

312. *Id.* at 19 (citing Curlee v. Walker, 112 Tex. 40, 43, 244 S.W. 497, 498 (1922)).

313. *Id.* at 19 (citing Green v. Gerner, 289 S.W. 99 (Tex. 1927)).

314. *Id.* (citing Painter v. MacDonald, 427 S.W.2d 127, 134 (Tex. Civ. App. 1968), *rev'd on other grounds*, 441 S.W.2d 179 (Tex. 1969)).

315. *Evans*, 793 S.W.2d at 19. The doctrine of reciprocal negative easements has been described as follows:

> [W]here a common grantor develops a tract of land for sale in lots and pursues a course of conduct which indicates that he intends to inaugurate a general scheme or plan of development for the benefit of himself and the purchasers of the various lots, and by numerous conveyances inserts in the deeds substantially uniform restrictions, conditions and covenants against the use of the property,

such easements is never retroactive; rather, the development plan must originate with the common owner while the property is in his hands. Moreover, the plan must apply to the entire tract on which the restrictions are sought to be enforced.[316]

The indispensable requirement of a common owner was lacking in this case, said the court, because the married couples had apportioned the land before making the conveyances.[317] Also absent was the requirement that the entire tract be covered by the restrictions; two lakefront lots had been conveyed to third parties without any restrictions before the land was subdivided into blocks, and the lakefront lot owners conceded that the residential use limitation was intended to apply only to the lakefront lots, and not to the landlocked block. In light of the rule that extreme caution is to be used in imposing reciprocal negative easements,[318] and the rule that evidence of the general development plan applicable to the entire tract must be clear and unmistakable,[319] the appeals court found that no such easements could properly be imposed in this case. The appellate judges said that the trial court's attempt to fashion an equitable solution was understandable, but also held it to be improper.[320] Implied reciprocal negative easements do not exist at all absent an origin from a common owner's plan that applies to the entire tract; those circumstances are the only justification for impressing retained land with use restrictions, and absent those circumstances, no such impress is allowable.[321]

IX. EMINENT DOMAIN

A. Inverse Condemnation Caused by Flooding

Three Survey cases involving actions for damages from flooding reveal courts struggling to construe some rather muddled precedent. Although the issues in the cases are somewhat similar, the temperaments displayed by the different appeals courts are quite different.

In the *City of Odessa v. Bell*[322] the El Paso court of appeals considered a jury award of punitive and actual damages for flooding caused by sewer ef-

---

> the grantees acquire by implication an equitable right, variously referred to as an implied reciprocal negative easement or an equitable servitude, to enforce similar restrictions against that part of the tract retained by the grantor or subsequently sold without the restrictions to a purchaser with actual or constructive notice of the restrictions and covenants.

Minner v. City of Lynchburg, 204 Va. 180, 129 S.E.2d 673, 679 (1963) (citations omitted). Texas has long recognized the concept of the doctrine of implied reciprocal easements. *See* Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App. 1973, writ ref'd n.r.e.) (citing various cases).

316. *Evans*, 793 S.W.2d at 19.

317. *Id.* at 25.

318. *Id.* at 20 (citing Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App. 1973, writ ref'd n.r.e.)).

319. *Id.* (citing Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App. 1973, writ ref'd n.r.e.)).

320. *Evans*, 793 S.W.2d at 26.

321. *Id.* at 25-26.

322. 787 S.W.2d 525 (Tex. App.—El Paso 1990, n.w.h.).

fluent overflow during heavy rain. The court, in a carefully reasoned opinion, took note of the now codified rule that the maintenance of a sanitary sewer system by a city is a governmental function, not a proprietary one.[323] The court also noted that a city was not liable even for its negligence in performing governmental functions until the passage of the Texas Tort Claims Act in 1969.[324] In response to the aggrieved landowners' contention that their case arose not under the Tort Claims Act, but rather under article I, section 17 of the Texas Constitution, and was therefore different, the court pointed to the express language of the constitutional provision, which provides only for "adequate compensation" in the event of a taking.[325] By definition, said the court, that formulation excludes exemplary damages, and makes adequate actual damages the exclusive remedy.[326] The court disagreed with the landowners' view that the Texas Supreme Court opinion in *City of Gladewater v. Pike*[327] allowed the recovery of exemplary damages from a municipality for claims not brought under the Tort Claims Act.[328] The court explained that *Pike* stands for the much narrower proposition that in the case of the negligent performance of a proprietary function, which at the time of the *Pike* decision was not covered by the Tort Claims Act, exemplary damages could be recovered in egregious circumstances.[329] The court acknowledged that two cases cited by the landowner held out the possibility of exemplary damages in exceptional cases of malicious conduct or evil intent.[330] The court said such circumstances were not present in this case, and it doubted such circumstances would be present in any case.[331] The court further suggested that the cited cases were of dubious authority because an award of exemplary damages under article I section 17 would be justified only if the constitution were amended to allow recovery of such damages.[332]

The city also argued that, notwithstanding the jury's findings that the flooding damage was temporary, the facts and law established that the damage was permanent, and therefore the statute of limitations barred any recovery because the landowners had notice of the flooding more than two years before they filed suit. The case law defines permanent damage as "constant and continuous" damage, noted the court, and defines temporary damage as occasional, intermittent, recurrent, sporadic, and "contingent upon

323. *Id.* at 527 (citing Callaway v. City of Odessa, 602 S.W.2d 330, 333 (Tex. Civ. App.—El Paso 1980, no writ); codified as TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a) (Vernon Supp. 1991)).

324. *Bell*, 787 S.W.2d at 527.

325. *Id.* at 528.

326. *Id.* (citing Holt v. City of San Marcos, 288 S.W.2d 802, 809 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.)).

327. 727 S.W.2d 514 (Tex. 1987).

328. *Bell*, 787 S.W.2d at 528.

329. *Id.*

330. *Id.* (citing San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); Ostrom v. City of San Antonio, 77 S.W. 829 (Tex. Civ. App.—San Antonio 1903, writ ref'd)).

331. *Bell*, 787 S.W.2d at 528.

332. *Id.* at 529.

some irregular force such as rain."[333] The city argued that the injury in this case could not be enjoined, and was therefore permanent in nature. The court agreed that *Neely v. Community Properties, Inc.*,[334] decided by the Texas Supreme Court, suggests that if the activity causing the injury cannot be successfully enjoined, then the damage is permanent.[335] The court reasoned that the suggestion in *Neely* that the inability to enjoin an activity is a characteristic only of a permanent injury was the mistaken progeny of a misreading of an earlier case.[336] The better rule is that, while the ability to enjoin is an indicium of a temporary injury, the unavailability of injunction does not necessarily change a temporary injury into a permanent one. The court concluded that there was ample evidence that the flooding was sporadic and contingent, and therefore temporary.[337]

In contrast to the measured approach of Bell is the rather untidy opinion in *City of Princeton v. Abbott*,[338] which arose out of a suit against the city by the owner of a roller skating rink. The landowner's skating rink periodically flooded because of the overflow of water which collected behind an embankment on the city's land during rain storms. All agreed that the flooding began only after another landowner, whose tract adjoined the city's, levelled the agricultural terraces on the land. Appealing from a jury verdict awarding damages to the owner of the roller skating rink,[339] the city contended that 1) the city had not diverted or impounded the natural flow of surface waters in such a manner as to damage the claimant's property, and 2) even if the city had done so, such a diversion or impoundment does not constitute an actionable nuisance.

In support of its first contention, the city argued that the water collecting at its embankment had not arrived there in a natural state because of the adjoining landowner's levelling of the terraces. The court answered by noting that the agricultural terraces were themselves man-made, and that the levelling returned the adjoining land to its natural state. Therefore, the water collected at the city's embankment as a result of a natural flow.[340] The court's response, like a landscape painted on a wall, is pleasing to glance at but not altogether satisfactory for any sustained exploration. The levees along the Mississippi River are man-made, but it hardly follows that, were someone to remove them, each person whose land is crossed by the resulting flood should be exposed to liability for water that flows onto his neighbor's land.

Regarding the city's contention that the impoundment did not constitute a nuisance, the city argued that the claimant had proven neither of the requi-

333. *Id.* at 530 (quoting Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984) (citing Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978))).
334. 639 S.W.2d 452 (Tex. 1982).
335. *Id.* at 454.
336. *Bell*, 787 S.W.2d at 530.
337. *Id.*
338. 792 S.W.2d 161 (Tex. App.—Dallas 1990, writ denied).
339. *Id.* at 162.
340. *Abbott*, 792 S.W.2d at 164.

site elements of intention and unreasonableness.[341] The court, in an analysis that will not bear too much scrutiny, said that the intentional nature of the city's actions was proven by the fact that it had notice of a problem and still allowed it to continue. The unreasonableness of the city's actions was, continued the court, established by the fact that the city attempted to correct the problem but only ended up exacerbating it.

Finally, the city attacked the jury's $30,000 award for future water damage. The appeals court agreed that the injury to the claimant's property was of a temporary nature, which meant that the measure of recovery was "the cost of restoring the property to its condition immediately before the injury, plus the reasonable value of the loss of its use."[342] Accordingly, said the city, the jury award was improper because it amounted to a recovery for future damages. The court declined to "ensnare" itself "in the finer distinctions between permanent and temporary injuries and the particular type of damages recoverable under each."[343] It conceded that one of the cases relied on by the city[344] was instructive on the distinction between damages recoverable for permanent versus temporary injuries, but said, in a rather astonishing passage, that the cited case "concerns the diversion of the natural flow of stream water rather than the impoundment of surface water, and is factually distinguishable to that extent."[345] The phenomenon of a court declining to "ensnare" itself in legal distinctions which, though subtle, have for at least a century been regarded as significant, while at the same time disposing of hoary precedent by making factual distinctions of ethereal wispiness, is at least curious.

In *Allen v. City of Texas City*[346] the landowners asserted that a levy constructed by the city reduced the value of their property (located between the levy and Galveston Bay), and made the property more susceptible to flooding, thereby constituting a taking which entitled the landowners to compensation. The court of appeals, however, reiterated the long-standing Texas rule that the doctrine of inverse condemnation requires a taking, damage, or destruction amounting to an actual physical appropriation or invasion of property or an unreasonable interference with its use.[347] The landowners' pleadings on their face did not allege any invasion of property nor any interference with use to support their inverse condemnation claim.[348] The court also rejected the landowners' claims that failure to recognize their rights now would make them susceptible to a limitations defense if their property

341. *Id.* at 166 (citing RESTATEMENT (SECOND) OF TORTS § 833 comment b (1979)).

342. *Id.* at 164 (citing Kraft v. Langford 565 S.W.2d 223, 227 (Tex. 1978); Lone Star Gas Co. v. Hutton, 58 S.W.2d 19, 21 (Tex. Comm'n App. 1933, holding approved); Willacy County Water Control & Imp. Dist. v. Cantrell, 169 S.W.2d 203, 204 (Tex. Civ. App.—San Antonio), *writ dism'd* 141 Tex. 335, 172 S.W.2d 294, 295 (1943)).

343. *Abbott*, 792 S.W.2d at 164.

344. *Id.* at 165 (citing Lone Star Gas Co. v. Hutton, 58 S.W.2d 19, 21 (Tex. Comm'n App. 1933, holding approved)).

345. *Abbott*, 792 S.W.2d at 165.

346. 775 S.W.2d 863 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

347. *Id.* at 864-65 (citations omitted).

348. *Id.* at 865, 866.

sustained actual flood damage in the future.[349] The court noted that a cause of action for damage to land does not lie for future anticipated damages, and that the applicable two-year statute of limitations would commence to run only when the damage occurs.[350]

B. *Other Inverse Condemnation*

An additional Survey case, *Estate of Scott v. Victoria County*,[351] arose when developers who were exasperated by a moratorium on issuance of sewage treatment permits instituted a claim for inverse condemnation damages. The developers had restricted the property to residential use and subdivided it into single-family lots, but were stalled in their sales efforts because the county refused to issue further permits for sewage treatment in an admittedly overextended treatment plant. After reviewing the facts, the court found that the county's denial of sewage treatment was a reasonable exercise of its police powers, that there was no agreement requiring the county to provide sewage treatment capacity, and that the developers had brought some of their problems upon themselves by restricting the use of the property to residential purposes.[352] The court also held that in the absence of a binding agreement, a mere expectancy of sewer service is not a vested property right, and a temporary loss of use does not constitute an interference amounting to a taking for which compensation is required.[353]

X. ADVERSE POSSESSION

Rhodes v. Cahill,[354] a decision by the Texas Supreme Court, is another instance of judicial modesty from a court that until only two years ago was almost shameless in its pretensions of omnicompetence. *Rhodes* involved an adverse possession claim by the owner of a 177-acre tract which, at the time of its purchase, was enclosed by a fence that also enclosed an adjoining fifteen-acre tract known as the cedar tract. For thirty-seven years the owner of the larger tract grazed cattle on the smaller parcel, cleared cedar trees and brush from it, and paid taxes on it. When the owner learned of plans to construct a church on the cedar tract, she brought suit to establish title to that tract under the 10-year statute. The trial court awarded her title to only a small portion of the cedar tract, but the court of appeals reversed and awarded her title to the entire tract.[355]

The Texas Supreme Court, speaking through its chief justice, reversed.[356] It noted that under venerable Texas authority,[357] one seeking to disentitle another of property through adverse possession bears the burden of proving

349. *Id.* at 866.
350. *Id.*
351. 778 S.W.2d 585 (Tex. App.—Corpus Christi 1989, writ denied).
352. *Id.* at 590-91.
353. *Id.* at 592.
354. 34 Tex. Sup. Ct. J. 33 (Oct. 10, 1990).
355. *Id.*
356. *Id.* at 35.
357. *Id.* at 34 (citing Satterwhite v. Rosser, 61 Tex. 166 (1884)).

not only that he has been in actual possession of the property for the requisite period, but also that his possession has been so visible, notorious, distinct, and hostile as to "indicate unmistakably" a claim of exclusive ownership.[358] This requirement is reflected in the ten-year statute's requirement that the claimant's possession must constitute an actual and visible appropriation of the land.[359] The high court held that an isolated sale of cedar, the selective clearing to permit grazing, and the payment of taxes were, whether considered alone or together, insufficient to establish adverse possession.

The court also considered evidence that the claimant had continuously grazed cattle and goats on the cedar tract. Such evidence, it said, does not establish title by adverse possession unless the disputed tract is "designedly enclosed" for such grazing.[360] The court distinguished between designed enclosures and "casual fences." If the fence existed before the claimant's possession, and if the claimant fails to demonstrate its purpose, then the fence is a "casual fence," and the grazing of livestock within it does not constitute adverse possession. The court took note of the claimant's occasional fence repairs, and agreed that, as a hypothetical matter, one cannot rule out the possibility that activities by the claimant may transform a casual fence into a designed enclosure.[361] However, the court said it knew of no case in which such a modification was found to have occurred, and said the mere repairing or maintaining of a casual fence, albeit for the purpose of keeping the claimant's animals within the fence's bounds, is not sufficient to perform the alchemy.[362]

Woodrow v. Henderson,[363] arising out of a trespass to try title case, provided a road map to a rather out-of-the-way rule and its even more remote exception. In *Woodrow*, the claimant contended that he was the owner of a seventy-one acre parcel of land by reason of the ten and twenty-five year statutes of limitation. The record title holders resisted these claims by pointing out that the claimant was in possession of a house on the land at the time of a 1947 judicial foreclosure which conveyed all of the claimant's interest. The record title holders obtained summary judgment based on the precept that someone holding over after the execution of a deed is regarded as a tenant at sufferance, and that before the limitation will run against the true owner, the tenant at sufferance must repudiate his tenancy and notify the true owner of the repudiation.[364] The court of appeals reversed the summary judgment and remanded for further proceedings.[365] Among other reasons for its reversal, the court said that a further corollary to the precept was

358. *Rhodes*, 34 Tex. Sup. Ct. J. 34 (Oct. 10, 1990).
359. *Id.* at 34 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.021 (Vernon 1986), § 16.026 (Vernon 1986 & Supp. 1991)).
360. *Id.* at 34-35 (citing McDonnold v. Weinacht, 465 S.W.2d 136, 142 (Tex. 1971); Orsborn v. Deep Rock Oil Corp., 153 Tex. 281, 287, 267 S.W.2d 781, 785 (1954)).
361. *Id.* at 35.
362. *Id.* at 35 (citing McDonnold v. Weinacht, 465 S.W.2d 136, 142-43 (Tex. 1971)).
363. 783 S.W.2d 281 (Tex. App.—Texarkana 1989, n.w.h.).
364. *Id.* at 285.
365. *Id.* at 286.

that the tenant at sufferance need not give actual notice; rather, the factfinder can infer constructive notice,[366] and in this case there were disputed issues of fact about whether the true owners had such constructive notice.[367]

XI. EASEMENTS AND ROADS

Texas landowners seemed intent on denying access to their neighbors by blocking roads during the Survey period, generally without success. In *Horne v. Ross*[368] Horne saw fit to block a roadway which provided access to two lots owned by the Rosses. The court had little difficulty in finding against Horne, noting that the roadway was reflected on a recorded plat and that the lots were conveyed by reference to that plat.[369] Horne objected that the absence of language of dedication in the plat meant that the road was not dedicated. The court responded that the roadway was an appurtenant easement, a type of easement that may be created without a written dedication.[370] Although other courts have relied upon estoppel or implication to uphold road easements created by platting, the court indicated it did not matter whether the rationale was stated in terms of estoppel or implication because easements of this type have been recognized by Texas case law for more than a century.[371]

The landowner seeking to block access was given even shorter shrift in *Rushin v. Humphrey*.[372] The blocking landowner erected a gate across a 30-foot strip of land which had been conveyed to him by the same party who conveyed title to the landowner seeking access. The original grant of the thirty foot strip provided that it was to be used as a roadway and that if such use ceased, then the property would revert to the original grantor. Although the blocking landowner argued that an easement of necessity could not be shown from the evidence, the court found that the express language of the conveyance itself implied the necessity of access, and held for the landowner enforcing the roadway easement.[373]

The landowner was also granted relief as to access, but denied damages, in *Hall v. Robbins*.[374] Hall, the owner of eighty-eight acres, had already obtained a permanent injunction blocking the Robbins from further denying access to the eighty-eight acre parcel, and sought damages for denial of access from 1982 through 1987. Hall's evidence, however, related only to real estate taxes and interest on a purchase money mortgage and on loans obtained to pay taxes during the period of denied access. After discussing the variety of remedies potentially available for a temporary injury to real prop-

366. *Id.* at 285.
367. *Woodrow*, 783 S.W.2d at 285.
368. 777 S.W.2d 755 (Tex. App.—San Antonio 1989, n.w.h.).
369. *Id.* at 756.
370. *Id.* at 757 (citing Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 203 (Tex. 1962)).
371. *Horne*, 777 S.W.2d at 757 (citing Wolf v. Brass, 72 Tex. 133, 12 S.W. 159, 160 (1888)).
372. 778 S.W.2d 95 (Tex. App.—Houston [1st Dist.] 1989, writ denied).
373. *Id.* at 97.
374. 790 S.W.2d 417 (Tex. App.—Houston [14th Dist.] 1990, n.w.h.).

erty, the appeals court upheld the trial judge's verdict denying damages because no evidence was presented on the proper measure of damages which, in this case, would be for the loss of use of vacant land during the time access was denied.[375]

Motel Enterprises, Inc. v. Nobani[376] provides a warning to foreclosing lienholders that they must take quick action to avoid ratification of easements granted after their liens. In 1983, the owner of a motel executed a deed of trust covering the project. The project was subsequently divided into two parcels with a cross-easement agreement allowing access between the parcels for operation of the motel and an adjoining drive-in restaurant. The cross easement was granted some two years after the original deed of trust was recorded, and the deed of trust lien was not subordinated to the easement agreement. Following a foreclosure of the deed of trust, the motel parcel was sold. The buyer testified that when he discovered that the drive-in window for the restaurant was on his property, he promptly sought to block access across his property. While the court correctly noted that foreclosure of a valid deed of trust lien extinguished the subsequent easement agreement, it also held that subsequent acts or conduct could ratify the easement.[377] Accordingly, the court reversed summary judgment in favor of the buyer because there was some evidence, "albeit circumstantial," to support ratification.[378]

The supporting evidence is, however, somewhat startling. The court concluded that there was sufficient evidence because the owners of the restaurant and the motel and their customers had enjoyed free access across both parcels since the grant of the easement. But this access is hardly surprising since such access was the purpose of the cross easement, and until the foreclosure of the prior deed of trust lien there was no argument between the landowners as to whether the easement was in existence. Nonetheless, the court held that this evidence tended to show use in accordance with the easement, and that a purchaser is deemed to have knowledge of an easement affecting property if it would be disclosed by an inspection of the premises.[379] While this may be a generally correct statement of the law, its applicability to a situation where an easement is extinguished by foreclosure of a prior lien is, at best, doubtful. Thus, we must await the ensuing jury trial to determine whether the buyer at foreclosure may block access to the drive-in window.

The owner of the servient estate of an easement was more successful in a summary judgment proceeding in *Reyna v. Ayco Development Corp.*[380] A child occupant of an apartment project was severely injured when she opened an electrical switching cabinet located within an easement granted to the City of Austin. Following settlement with the city, the landowner was

375. *Id.* at 418-19.
376. 784 S.W.2d 545 (Tex. App.—Houston [1st Dist.] 1990, n.w.h.).
377. *Id.* at 547.
378. *Id.*
379. *Id.* at 548.
380. 788 S.W.2d 722 (Tex. App.—Austin 1990, writ denied).

sued on several negligence theories, all alleging a duty on the part of the landowner to warn of and protect from the potentially dangerous condition created by the switching cabinet. The court reviewed the express language of the easement, which gave full control over the easement tract to the City of Austin, and upheld summary judgment in favor of the landowner.[381] The court held that while a landowner generally owes a duty of ordinary care, that duty ceases when an owner has transferred possession or control to another person.[382] Here, the easement itself expressly surrendered exclusive use and control of the property to the City of Austin, supplementing the doctrine of general easement law that the owner of the dominant estate has a duty to maintain and the owner of the servient estate has no right to interfere.[383]

XII. HOMESTEAD

During this Survey period various courts articulated several important holdings: 1) that a homeowner's conveyance of his residence to a wholly-owned corporation will not estop a subsequent homestead claim if the lender had reason to suspect that the conveyance was less than absolute;[384] 2) that a spouse's right to reinvest homestead proceeds is protected from the other spouse's creditors, even if the other spouse abandons the homestead;[385] 3) that when a lender knows its loan will be used by the borrower to acquire a business homestead, then the acquired property will be impressed with homestead characteristics;[386] 4) that to be entitled to claim a rural homestead exemption when property is located near an urban area, the landowner must use the property as his residence and as a means of support;[387] and 5) that a divorce court's award to one spouse of an interest in a residence is not sufficient to defeat the rights of a prior lienholder.[388]

Matter of Rubarts[389] arose when a bankrupt debtor asserted a homestead claim to property that he had years earlier conveyed to his wholly-owned corporation in order to collateralize a bank's loan to that corporation. In an elegant and witty opinion, the Fifth Circuit reconciled some hoary Texas authority[390] in holding that a lender without actual knowledge that a conveyance was less than absolute is nevertheless barred from asserting estoppel

381. *Id.* at 724.
382. *Id.* (citing Prestonwood v. Taylor 728 S.W.2d 455, 460 (Tex. App.—Austin 1987, writ ref'd n.r.e.)).
383. *Reyna*, 788 S.W.2d at 724. The court cited two out-of-state decisions in support of its position, but both of these decisions were cases where utility owners sought contribution from a landowner for damage claims against the utility. Gnau v. Union Elec. Co., 672 S.W.2d 142 (Mo. Ct. App. 1984); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982).
384. *Matter of Rubarts*, 896 F.2d 107 (5th Cir. 1990).
385. Taylor v. Mosty Bros. Nursery, Inc., 777 S.W.2d 568 (Tex. App.—San Antonio 1989, n.w.h.).
386. *In re* Moore, 110 B.R. 255 (Bankr. N.D. Tex. 1990).
387. *In re* Spencer, 109 B.R. 715 (Bankr. W.D. Tex. 1989).
388. Boyd v. United Bank, N.A., 794 S.W.2d 839 (Tex. App.—El Paso 1990, n.w.h.).
389. 896 F.2d 107 (5th Cir. 1990).
390. Eylar v. Eylar, 60 Tex. 315 (1883); Moore v. Chamberlain, 109 Tex. 64, 195 S.W. 1135 (1917).

against a homestead claimant where the facts and circumstances are sufficient to create suspicions in the mind of a reasonably prudent person. The suspicious circumstances in *Rubarts* included the bank's knowledge that the debtor and his family continued to occupy the house after the conveyance, and the fact that the insurance policy covering the house (which named the bank as a mortgagee and loss payee) continued to name the debtor as the owner.[391]

In *Taylor v. Mosty Bros. Nursery, Inc.*[392] the wife, whose husband abandoned his homestead (and, apparently, her), sought a declaratory judgment that a judgment lien of her husband's creditor was ineffective against her homestead. To her surprise, the trial court impressed a constructive trust in the amount of the husband's debt against the proceeds from any future voluntary sale of the homestead attributable to the husband's abandoned homestead interest; the trial court, however, declined to order a forced sale of the homestead.[393] The appeals court reversed the trial court and held that the statutory six-month investment period[394] applies to each homestead claimant for the entire proceeds from the sale of a homestead, even if one of the claimants abandons the homestead.[395]

The bank was taken to the cleaners in *In re Moore.*[396] The borrower was leasing space for his laundromat when he discovered a parcel of land on which to construct a new laundromat. The bank made a loan for the project, and the borrower executed a promissory note that was secured by a vendor's lien and deed of trust lien against the land. The note evidenced indebtedness that included the purchase price for the land, preexisting debt of the borrower to the bank, and funds to construct the laundromat. The borrower operated his laundromat in the leased space until the new laundromat was completed. Thereafter, the borrower's business failed and he filed for bankruptcy. The bank sought to have the stay lifted to permit foreclosure of its liens against the laundromat, arguing the entire indebtedness was secured by the bank's lien. The borrower, however, asserted that the new laundromat was his business homestead when the bank's lien was placed on the property and, therefore, only the indebtedness used to construct the new laundromat was secured by the bank's lien.

Agreeing with the borrower, the bankruptcy court found that the borrower acquired the new land intending to move permanently from the original laundromat to the new laundromat and, therefore, the borrower had abandoned his original business homestead as a matter of law when he purchased the new land.[397] Further, because the bank had notice of the

391. *Rubarts*, 896 F.2d at 113.

392. 777 S.W.2d 568 (Tex. App.—San Antonio 1989, n.w.h.).

393. *Id.* at 569.

394. TEX. PROP. CODE ANN. § 41.001(c) (Vernon Supp. 1991). This subsection allows the homestead claimant to reinvest, free of any creditor's claims, the proceeds from the sale of a homestead into another homestead within six months after the sale.

395. *Taylor*, 777 S.W.2d at 570.

396. 110 B.R. 255 (Bankr. N.D. Tex. 1990).

397. *Id.* at 257, 258 (citing Norman v. First Bank & Trust, Bryan, 557 S.W.2d 797 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.)). This holding by the bankruptcy court

borrower's intention to make the new land his business homestead, the property was impressed with homestead characteristics when the bank's lien was created.[398] Accordingly, the bank's lien could not secure the indebtedness attributable to preexisting debt.[399] Finally, because the borrower's spouse did not sign the loan documents, the debt attributable to the construction costs of the new laundromat also was unsecured.[400] Thus, only the indebtedness used to acquire the land was secured by the bank's liens.[401]

In *In re Spencer*[402] the debtors owned a tract of land located in and receiving some services from an incorporated city. In bankruptcy, the debtors claimed a rural homestead exemption for the entire tract. The creditors responded by claiming that the property was urban and therefore entitled only to the one-acre urban homestead exemption.[403] The court held that a homestead is rural in two instances: first, if it cannot be classified as urban (for instance, if it is not located near a developed city and does not receive services from a city); and second, if notwithstanding the existence of some urban characteristics, the property is used as a residence *and* as a means to support the owner.[404] In this case, the property came within neither category, so the debtors were entitled to claim only an urban homestead.[405]

Boyd v. United Bank, N.A.[406] required the court to determine whether a mortgagee's interest should be inferior to that of a party in possession of the mortgaged property. After a divorce decree awarded husband and wife joint ownership in residential real estate, the husband sought to consolidate his debts by obtaining a bank loan secured by that real estate. The bank required either that the husband be sole owner of the property or that the wife also join in the loan documents. Consequently, the husband and wife signed an agreement in which the wife sold the husband all her interest in the property, released all liens she had therein, and agreed to vacate before the scheduled closing date of the bank loan. In fact, the wife and her children were still on the property when the loan closed. Several months later, by bill of review, a divorce court awarded the wife a judgment against her husband, secured by an equitable interest in the mortgaged property. Thereafter, the

---

reversed *In re* Moore, 93 B.R. 480 (Bankr. N.D. Tex. 1988), which found that the bank's lien was perfected before the borrower abandoned the prior homestead (the leased laundromat). The court held the bank's lien, therefore, superior to the borrower's homestead claim. *Id.* at 483-84.

398. *Moore*, 110 B.R. at 258 (citing Hufstedler v. Glenn, 82 S.W.2d 733, 735 (Tex. Civ. App.—Austin 1935, no writ)).

399. *Moore*, 110 B.R. at 258. The court noted that the homestead statute permits liens on the homestead only for 1) purchase money, 2) taxes, and 3) work and material used in constructing improvements on the homestead if the work and material were contracted for in writing by the homestead claimant (and, if married, the spouse) before the material is furnished or the labor is performed. TEX. PROP. CODE ANN. § 41.001(b) (Vernon Supp. 1991).

400. *Moore*, 110 B.R. at 258.

401. *Id.*

402. *In re* Spencer, 109 B.R. 715 (Bankr. W.D. Tex. 1989).

403. A rural family homestead may consist of up to 200 acres; an urban homestead may consist of up to one acre. TEX. PROP. CODE ANN. § § 41.002(a), (b)(1) (Vernon Supp. 1991).

404. *In re* Spencer, 109 B.R. at 717-18.

405. *Id.* at 718.

406. 794 S.W.2d 839 (Tex. App.—El Paso 1990, n.w.h.).

husband defaulted on his loan, and the wife sought to forestall a foreclosure by arguing that the bank's lien amounted to an unlawful attempt to fix a lien against a homestead. The trial court ruled in favor of the bank, and the appeals court affirmed.[407] The court acknowledged that a mortgagee may acquire a lien inferior to possessor's interest.[408] However, said the court, such possession must be of such a character as to make it the mortgagee's duty to inquire about the possessor's claim.[409] Here, the wife knew her husband intended to present the conveyance papers to the bank, and she took no action to advise the bank of any inconsistent claim by her. To the contrary, by deeding the property to her husband, she took steps to allay the bank's curiosity about her claim. Under such circumstances, the bank had no duty to inquire about the nature of her claim.[410]

407. *Id.* at 840.

408. *Id.* at 841 (citing Texas Life Ins. Co. v. Texas Bldg. Co., 307 S.W.2d 149 (Tex. Civ. App.—Fort Worth 1957, no writ)).

409. *Boyd*, 794 S.W.2d at 841 (citing Sandoval v. Rattikin, 395 S.W.2d 889 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.)).

410. *Boyd*, 794 S.W.2d at 841.