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Property

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PROPERTY

by

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THIS Article will continue to follow format guidelines established in the Articles on Property for the previous two years.[1]

I. STATUS OF TITLE

Ownership and Boundary Disputes. As in previous years, of the generally recognized methods for proving title,[2] proof of title by adverse possession[3] received primary attention in litigation during the survey year. As is also common, a recurring issue in such litigation was whether the claimant's activities put the defending party on notice of an adverse claim. For example, in *Crisp v. Parker*[4] the court reiterated the 1963 Texas Supreme

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1. Wallenstein, *Property, Annual Survey of Texas Law*, 29 SW. L.J. 29 (1975) [hereinafter referred to in the text as the 1975 Property Article and in subsequent footnotes as Wallenstein (1975)] and Wallenstein, *Property, Annual Survey of Texas Law*, 28 SW. L.J. 27 (1974) [hereinafter referred to in the text as the 1974 Property Article and in subsequent footnotes as Wallenstein (1974)].

2. The four generally recognized proofs of title are as follows: (1) proof of a regular chain of conveyances from the sovereign of the land to one of the litigants; (2) proof of a superior title in one litigant traced from a common source acknowledged by both litigants; (3) proof of adverse possession by one litigant for the applicable limitations period prescribed by statute; and (4) if neither litigant can prove superior title by one of the first three methods, proof of one litigant's prior possession combined with proof that such possession has not been abandoned. Land v. Turner, 377 S.W.2d 181, 183 (Tex. 1964). *See also* Annot., 5 A.L.R.3d 364 (1966). For an analysis of the fourth proof, actually merely a presumption which may be rebutted, see Reiter v. Coastal States Gas Producing Co., 382 S.W.2d 243 (Tex. 1964); Whited v. Mullins, 515 S.W.2d 159 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

3. This category of proof is authorized in several articles of the Texas Revised Civil Statutes. TEX. REV. CIV. STAT. ANN. art. 5507 (1958), the three-year statute, requires that a claimant be in peaceable and adverse possession "under title or color of title." *Id.* art. 5509, the five-year statute, requires a claimant to prove peaceable and adverse possession (including cultivation, use or enjoyment) under "a deed or deeds duly registered," along with payment of property taxes. *Id.* art. 5510, the ten-year statute, requires cultivation, use or enjoyment by the adverse possessor plus "some written memorandum of title" if the adverse possessor wishes to claim more than 160 acres. *Id.* art. 5518, one of the three 25-year statutes, bars suit by a record owner despite any disabilities (such as age, mental incapacity or military service) if not commenced within 25 years after his cause of action has accrued. *Id.* art. 5519, a second 25-year statute, bestows good and marketable title on a good faith adverse possessor under a claim of right (including a recorded deed, deeds or similar "instruments") after such a period. *Id.* art. 5519a, the third 25-year statute, which unlike the prior articles gives the adverse claimant merely a prima facie case and is not totally irrebutable, requires the adverse claimant to show that he has exercised dominion over the land and paid all property taxes on the land for 25 years and that the record owner has failed either to exercise dominion or failed to pay at least one year's taxes on the land in the prior 25 years. For a recent discussion of these statutes see *Symposium, Texas Land Titles: Part II*, 7 ST. MARY'S L.J. 58, 78-111 (1975). *See also* Larson, *Limitations on Actions for Real Property: the Texas Five-Year Statute*, 18 SW. L.J. 385 (1964); Larson, *Texas Limitations: The Twenty-Five Year Statutes*, 15 SW. L.J. 177 (1961).

4. 516 S.W.2d 10 (Tex. Civ. App.—Austin 1974, no writ).

Court decision of *Todd v. Bruner*[5] that "[p]ossession, coupled with payment of taxes, is not notice to a cotenant of a repudiation of the common title."[6] In another case involving cotenants, *Hines v. Pointer*,[7] the court acknowledged the general rule that a deed purporting to convey the entire fee from one cotenant to a "stranger to title," followed by the entry upon and possession of the property for five years by the stranger under claim of the deed, would meet the requirements for proving title under the five-year statute.[8] In that case, however, the court refused to equate the continued possession of the grantor-cotenant's lessee with possession by the stranger in the absence of actual notice to the other cotenants that the stranger and lessee were asserting a different claim of right. The claim of title by adverse possession was, therefore, denied.

In *Sims v. Cage*[9] the court held that when a claimant or his predecessor in possession loses a trespass to try title action but continues to use the property for pasturing cattle, such use is to be characterized as being merely permissive and, thus, insufficient to constitute adverse possession. Two other "fencing and grazing" cases were also handed down during the survey year. As usual, the determinative inquiry in each case was whether the fencing in of the land had been purposeful or merely "casual" or "incidental."[10] Thus, in *Mixon v. Clark*[11] the court held that where a tract of land had been purposefully fenced in and used by the possessor for grazing purposes during the statutory period, such use was sufficient notice of a hostile claim to support a claim of adverse possession under the ten-year statute. A contrary result was reached in *Chapa v. Garcia*,[12] in which the court found the fencing to be incidental as a result of the fencing in of surrounding tracts and, therefore, not sufficient to trigger the running of the limitation period.

Three cases were decided during the survey year on issues of an estoppel nature. In two of those cases would-be adverse possessors who offered to purchase the land from their respective record holders prior to the running of the period of limitation found that such an offer precluded their further use of the property as being labelled "adverse."[13] In the third case,[14] although a grantor continued using his formerly owned property for more than forty years after he had delivered a deed to the record title holder, the court held that his continued use and possession, in the absence of a repudiation of the

5. 365 S.W.2d 155 (Tex. 1963).
6. *Id.* at 160, quoted in Crisp v. Parker, 516 S.W.2d 10, 13 (Tex. Civ. App.—Austin 1974, no writ).
7. 523 S.W.2d 733 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).
8. Jones v. Silver, 129 Tex. 18, 100 S.W.2d 352 (1937).
9. 523 S.W.2d 486 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).
10. *See* Comment, *Seasonal Use of Land for Business Purposes as Regards Quality of Adverse Possession*, 21 BAYLOR L. REV. 217 (1969).
11. 518 S.W.2d 402 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).
12. 513 S.W.2d 953 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).
13. Tex-Wis Co. v. Johnson, 525 S.W.2d 232 (Tex. Civ. App.—Waco 1975, writ granted); Wolgamot v. Corley, 523 S.W.2d 491 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).
14. Haynes v. Dunn, 518 S.W.2d 880 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

deed and actual notice to the record holder that the possession was adverse, did not constitute adverse possession.[15]

In *Morris v. Texas Elks Crippled Children's Hospital, Inc.*[16] the court, after noting that the disabilities statute[17] (which tolls the running of the limitations period in certain instances) does not include the mere lack of knowledge of adverse possession, reaffirmed earlier holdings[18] that the statutes of limitation run against those who inherit an interest in land regardless of whether or not they are aware of their inheritance. The court also held, in a rather unique divided opinion,[19] that although a party's silence could constitute a fraudulent concealment of possession—thereby tolling the running of the limitations period—when such party had a fiduciary obligation to the record title holder, no such fiduciary obligation should be asserted against the adverse possessors in this case.[20]

Finally, in *Kleckner v. McClure*[21] the court acknowledged that adverse possessors in privity with each other may tack their respective periods of adverse possession in order to establish adverse possession for one entire limitation period.[22] However, in what appears to be a case of first impression in the state, the court further concluded that when title by adverse possession does mature in a current adverse possessor, tacking is no longer available and title can be transferred thereafter only by a deed.

Effect of Conveyances. In cases analyzing the effect of ambiguities in instruments of conveyance, courts generally apply the rule of construction that "words of doubtful meaning must be construed against the grantor."[23] For example, in *Louisiana-Pacific Corp. v. Cain*,[24] regarding a timber deed which permitted the grantee to extend the term six months "because of uncertainty of weather," the court construed the phrase as merely stating the reason for which the extension option was included in the deed rather than creating a condition precedent to its exercise. Similarly, in *Dickerson v.*

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15. *Accord*, Toscano v. Delgado, 506 S.W.2d 317 (Tex. Civ. App.—San Antonio 1974, no writ).

16. 525 S.W.2d 874 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

17. TEX. REV. CIV. STAT. ANN. art. 5518 (Supp. 1975-76).

18. McCook v. Amarada Petroleum Corp., 93 S.W.2d 482 (Tex. Civ. App.—Texarkana 1936, writ dism'd); Krausse v. Hardin, 222 S.W. 310 (Tex. Civ. App.—San Antonio 1920, writ dism'd).

19. The published opinion includes an "opinion" by one justice, a "dissent" by the chief justice, an order signed by the third justice converting the original dissent into the opinion of the court, and a final dissent written by the original writing justice.

20. Actually the obligation was claimed against the predecessor-grantor of the adverse possessors, who as executor under a probated will failed to advise certain heirs (claimants in this case) of their possible rights to the property under another will which was not probated.

21. 524 S.W.2d 608 (Tex. Civ. App.—Fort Worth 1975, no writ).

22. Sterling v. Tarvin, 456 S.W.2d 529 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

23. Louisiana-Pacific Corp. v. Cain, 519 S.W.2d 528, 529 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.). *See also* TEX. REV. CIV. STAT. ANN. art. 1291 (1962); Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Welch v. Straach, 518 S.W.2d 862 (Tex. Civ. App.—Waco), *rev'd*, 531 S.W.2d 319 (1975); Rogers v. Nixon, 275 S.W.2d 197 (Tex. Civ. App.—San Antonio 1955, writ ref'd); *Symposium, Texas Land Titles*, 6 ST. MARY'S L.J. 802, 816-23 (1974).

24. 519 S.W.2d 528, 529 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

Keller[25] the court interpreted an agreement in a deed stating that the grantee would "care for me [the grantor] for the rest of my life" as a covenant rather than a condition subsequent giving rise to a forfeiture in the absence of express words of condition.[26] The court also held that where the life tenant has an unqualified power to dispose of the property during her lifetime, the remaindermen possess only a contingent remainder interest and have no justifiable interest in any of the property except that remaining undisposed of at the life tenant's death.

In two cases defective instruments were remedied by court interpretation. In *Lewisville State Bank v. Blanton*[27] the interest of a judgment lien creditor was held to be inferior to the equitable title of a grantee who had received a deed from the debtor prior to the filing of an abstract of judgment, even though the debtor still retained legal title because the deed contained an insufficient description of the property. The court in *Kunkel v. Kunkel*[28] held that, even though a wife had failed to sign a deed for which vendor's lien notes had been given, her signing and acknowledgment of a final vendor's lien release was equivalent to a signing and acknowledgment of the deed itself under the doctrine of ratification.[29]

An interesting distinction was drawn in *Coastal Industrial Water Authority v. York*[30] between submerged lands and lands which have been taken into a navigable stream by reason of erosion. The court, after acknowledging the settled rule of law that in the latter instance title to such land is entirely lost by the property owner (reverting to the state),[31] held that such rule did not apply in the former instance "as long as the boundaries [*i.e.*, the boundaries originally granted] can be reasonably identified."[32]

An analysis of Mexican law regarding abandonment, which was in effect in Texas 135 years ago, is found in *State v. Superior Oil Co.*,[33] holding that after an extensive lapse of time a presumption arises that every act which would tend to bar a claim has been done and that while such a presumption is ordinarily one of fact, after such a period of time it becomes, for all practical purposes, one of law.[34]

The case of *Hoover v. Materi*[35] concerned how the proceeds of a partition sale should be distributed between the two bidding cotenants, when, after

25. 521 S.W.2d 288 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.).
26. *Cf.* Wallenstein (1975) at 31.
27. 520 S.W.2d 607 (Tex. Civ. App.—Waco 1975), *rev'd on other grounds*, 525 S.W.2d 696 (Tex. 1975).
28. 515 S.W.2d 941 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).
29. *But see* Click v. Seale, 519 S.W.2d 913 (Tex. Civ. App.—Austin 1975, no writ), where a wife was permitted to enjoy the benefits of a lease while rejecting a purchase option contained in the lease.
30. 520 S.W.2d 494 (Tex. Civ. App.—Houston [1st Dist.] 1975), *aff'd*, 19 Tex. Sup. Ct. J. 146 (Jan. 31, 1976).
31. *See* Hancock v. Moore, 135 Tex. 619, 146 S.W.2d 369 (1941).
32. 520 S.W.2d at 502.
33. 526 S.W.2d 581 (Tex. Civ. App.—Corpus Christi 1975, no writ).
34. *Accord*, Clements v. Texas Co., 273 S.W. 993, 998 (Tex. Civ. App.—Galveston 1925, writ ref'd).
35. 515 S.W.2d 406 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.). The case had been before the El Paso court of appeals on two previous occasions. *See* Hoover v. El Paso Nat'l Bank, 498 S.W.2d 276 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.); Spires v. Hoover, 466 S.W.2d 344 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

commencement of partition proceedings, one cotenant encumbers his interest. In *Hoover* the nonencumbering cotenant claimed that he was at a disadvantage since both cotenants had been required to bid subject to an indebtedness for which only one was personally liable. Notwithstanding such claim, the court affirmed an equal division of the proceeds between the cotenants (without regard to the lien). It rejected the claim primarily on the nonencumbering cotenant's failure to preserve his rights during the proceedings.[36] One of the most interesting aspects of the case, however, is the possibility of a lienholder subsequent to the commencement of the partition action not receiving payment upon sale.[37] Since the judgment reflects the rights of the parties at the *commencement* of the partition action, the proceeds in most cases would be, except on motion by one of the parties (or perhaps the lienholder himself), distributed directly to the cotenants and would require the lienholder to take the necessary steps for the enforcement of a money judgment.[38]

Finally, the fiduciary nature of cotenancy was reflected in *Rudford v. Coker*[39] in which the court held that, in the absence of the consent of the other cotenants, a cotenant who purchases an adversary claim to the estate at a foreclosure sale or trustee's sale under deed of trust does so for the benefit of all the cotenants and does not thereby acquire title to the interests of his cotenants.[40]

Easements and Other Rights. In *Sun Pipe Line Co. v. Kirkpatrick* the court held that "every easement carries with it the right to do whatever is reasonably necessary for the full enjoyment of the easement itself"[41] and that in the absence of an inherently dangerous activity, physical invasion, or negligence, no recovery in tort was available to the owner of the servient estate.[42] Additionally, when the activity is not "intrinsically dangerous" the owner of the easement who employs an independent contractor to perform the work will not be liable for the negligence of the independent contractor. In *Hicks v. City of Houston*[43] the court held that while the mere non-use of an easement is not sufficient to constitute abandonment, if the non-use is continued for an extended period without explanation, an inference arises as

36. *Cf.* Pyland v. Sayers, 148 S.W.2d 450, 452 (Tex. Civ. App.—Austin 1940), *rev'd on other grounds*, 161 S.W.2d 769 (Tex. 1942), where the court stated: "[A]s between cotenants where a lien exists only against the moiety of one, and a partition is affected whereby the other *assumes* the outstanding debt, the conveyance to him thus creates a lien against the entire property so conveyed to him." (Emphasis added.)

37. *See* 515 S.W.2d at 408. *See also* Annot., *Partition as Affecting Pre-existing Mortgage or Other Lien or Undivided Interest*, 93 A.L.R. 1267 (1934). No Texas cases are listed in the opinion and none directly on point could be located.

38. *See* Arnold v. Butterbaugh, 92 Ind. 403 (1884); A. Kiefer Drug Co. v. De Lay, 63 Ind. App. 639, 115 N.E. 71 (1917).

39. 519 S.W.2d 934 (Tex. Civ. App.—Waco 1975, no writ).

40. For a discussion of the right of a cotenant to reimbursements for improvements, see Comment, *The Right of a Cotenant to Reimbursement for Improvements to the Common Property*, 18 BAYLOR L. REV. 111 (1966).

41. 514 S.W.2d 789 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

42. *Id.* at 792. The court noted that in all the earlier Texas crop dusting cases where there has been no physical invasion of the plaintiffs' premises by the crop duster, the courts have uniformly required a finding of negligence as a condition precedent to imposition of liability. *Id.* at 793.

43. 524 S.W.2d 539 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

to an intention to abandon. The case of *Parshall v. Crabtree*[44] revealed that an easement of necessity could be created, even where the effect of easement would still not give the dominant estate access to a public road, as long as permissive access was available from an adjacent landowner to the servient estate. And in *Williams v. Cassell*[45] the mere mentioning in a deed of a proposed road on a boundary of the property conveyed was held to be insufficient to establish an easement along that boundary. Finally, in *Harris v. Phillips Pipeline Co.*[46] the court also recognized that an expansible easement gives to the grantee a present interest in the entire land described in the easement.[47]

Fraud, Duress and Undue Influence. The case of *Rodriguez v. Garcia*[48] represents a classic case of undue influence. The alleged grantor, a seventy-three-year-old man of Mexican ancestry, was unable to read, speak, or understand English and suffered from several physical disabilities including poor hearing and memory. On the way to the hospital for surgery, his niece—who had not visited him for twenty years prior to accompanying him on that day—induced him to sign and deliver to her mineral deeds, which provided his sole source of income, on the pretext that he was signing a social security application. Not surprisingly, the court found ample evidence to support the trial court's findings of lack of mental capacity of the grantor and undue influence by his niece.

In *Moore County v. Bergner*[49] a court, in failing to enforce an alleged oral easement, refused to extend the application of the doctrine of estoppel *in pais*[50] in the absence of a showing of detrimental reliance.[51] In *Maykus v. First City Realty & Financial Corp.*[52] the court held that a letter of intent to form a joint venture for the acquisition and development of two particular tracts of land was sufficient to create a partnership relationship even though details of the proposed venture were left for future agreement. Furthermore, since a partnership existed, each party owed a fiduciary duty to the other and could be pursued if such duty were violated, notwithstanding a provision in the letter limiting the liability of the defendant to $2,000 on failure of the parties to enter into a joint venture contract. The court also held that the remedy of imposing a constructive trust on the failure of the defendant to fulfill his fiduciary duty as "trustee" in acquiring property was

44. 516 S.W.2d 216 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).
45. 515 S.W.2d 403 (Tex. Civ. App.—Austin 1974, no writ).
46. 517 S.W.2d 361 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).
47. *Accord*, Strauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677 (Tex. Civ. App.—Corpus Christi 1968, writ dism'd); Williams v. Humble Pipe Line Co., 417 S.W.2d 453 (Tex. Civ. App.—Houston 1967, no writ).
48. 519 S.W.2d 908 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).
49. 526 S.W.2d 702 (Tex. Civ. App.—Amarillo 1975, no writ).
50. The doctrine provides a narrow exception to the requirement that an easement must be created in writing. In Texas the doctrine is only operative where there has been an easement granted orally and the recipient of the easement right has expended monies which will be lost and valueless if the right to enjoy the easement is revoked. *See* Harrison v. Boring & Kenealy, 44 Tex. 255 (1875).
51. The requirement of detrimental reliance as an element of estoppel in pais was expressed by the supreme court in Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1962).
52. 518 S.W.2d 887 (Tex. Civ. App.—Dallas 1974, no writ).

proper and not barred by the "clean hands" doctrine or the statute of frauds by reason of insufficient description of the property.

In *Stephens County Museum, Inc. v. Swenson*[53] the Texas Supreme Court, recognizing that a recorded deed does not always imply a valid conveyance, held that, while filing an instrument of record establishes both a prima facie case of delivery and the accompanying presumption that the grantor intended to convey according to the terms of the deed, the presumption of intent can be overcome by showing (i) that the deed was delivered or recorded for a different purpose, (ii) that fraud, accident, or mistake was involved in the delivery or recordation, or (iii) that the grantor had no intention to divest himself of the title.[54]

A plaintiff's attempts to use the doctrine of promissory estoppel to avoid the limitation pleas of the defendant and to defeat the defendant's plea of the statute of frauds were rejected in *Clifton v. Ogle*.[55] With regard to the statute of frauds, the court held that although the doctrine of promissory estoppel had been applied in a recent supreme court case,[56] the doctrine should be used only in the event that the statute of frauds itself would otherwise operate to defraud. With regard to the limitation plea the court found nothing in the limitation statute which would in itself operate to defraud if the doctrine of promissory estoppel were not honored.

The court in *Goldring v. Goldring*,[57] relying on *Rosenbaum v. Texas Building & Mortgage Co.*,[58] held that, if a person who is induced by fraud to enter into a contract continues to receive benefits under the contract subsequent to his discovery of the fraud or otherwise acts in such a manner as to recognize the contract as binding, such conduct acts as affirmation of the contract and a waiver of his right of recission regardless of the absence of express ratification. In *Nobles v. Marcus*[59] the court held that while a creditor may maintain an action in equity to vacate a fraudulent conveyance of his debtor's land, he may not maintain an action to set aside a deed on the ground of fraud upon the debtor (rather than fraud upon the creditor's legal rights). Finally, in *Seegers v. Spradley*[60] the court, relying on the 1974 supreme court decision of *Meadows v. Bierschwale*,[61] held that a relationship between the purchasers of property and the guarantor of their purchase-money indebtedness was one of mutual trust and confidence and, therefore, subject to a constructive trust with regard to oral promises by the purchaser to give the guarantor the right to purchase an interest in the property.

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53. 517 S.W.2d 257 (Tex. 1974).

54. For example, the recorded deed may be for the purposes of collateral in a security agreement. *Compare* Davis Bros. v. Misco Leasing, Inc., 508 S.W.2d 908 (Tex. Civ. App.—Amarillo 1974, no writ), *with* Moran v. Kenai Towing & Salvage, Inc., 523 P.2d 1237 (Alas. 1974).

55. 526 S.W.2d 596 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

56. "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934 (Tex. 1972).

57. 523 S.W.2d 749 (Tex. Civ. App.—Fort Worth 1975, writ dism'd).

58. 140 Tex. 325, 167 S.W.2d 506 (1943).

59. 524 S.W.2d 367 (Tex. Civ. App.—Waco 1975, writ granted).

60. 522 S.W.2d 951 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

61. 516 S.W.2d 125 (Tex. 1974). The court held that a fiduciary relationship was not always a condition precedent to the imposition of a constructive trust. *See* Wallenstein (1975) at 33.

Title Insurance. The concept of bar-related title insurance, discussed (somewhat disparagingly) in the 1974 Property Article[62] and the 1975 Property Article,[63] became law during the survey year. The new Texas Title Insurance Act[64] will be discussed more fully in another article in this *Survey* issue;[65] however, certain essential aspects of the act, such as bar-related title insurance, will be mentioned in this Article. Article 9.56 of the Act authorizes the incorporation and operation of an "attorney's title insurance company," to be governed by all provisions of the Act except as expressly modified in article 9.56. Perhaps the most significant modification is the reduction of the capital stock and surplus requirement (from $1,000,000.00 and $400,000.00, respectively, to $250,000.00 and $150,000.00) for any attorney's title insurance company created as an affiliate or subsidiary of the State Bar of Texas or a foundation created by the State Bar of Texas.[66] However, although the easing of the capital and surplus requirements may give bar-related title insurers an advantage over other companies, the article does place the same rigorous—and expensive—standards for abstracting (including access to an abstract plant) upon the attorney's title insurance company. Other provisions in the Act which are worthy of reference include those relating to the Real Estate Settlement Procedures Act of 1974[67] and the specific authorization for "insured closing letters."[68]

The legislature was not the only governmental body active in the field of title insurance during the survey year. The State Board of Insurance also participated in some important changes. In August, for example, the board authorized the first increase in premium rates since 1968,[69] and during the last few months of the year the board revised and added several title insurance forms, procedural rules and rate rules.[70] Finally, in December the board repealed most of its prior bulletins[71] and made public (to be included in title insurance manuals) those bulletins which were not repealed.[72]

In one case tangentially involving title insurance, *American Savings & Loan Ass'n v. Musick*,[73] the supreme court reviewed the scope of the

62. Wallenstein (1974) at 34-35.
63. Wallenstein (1975) at 35.
64. TEX. INS. CODE ANN. arts. 9.01-.56 (Pamphlet Supp. 1975-76).
65. Brin, *Insurance Law*, p. 195 *infra*.
66. TEX. INS. CODE ANN. art. 9.56 (Pamphlet Supp. 1975-76). Although a state bar subcommittee is now working towards the creation of such an attorney's title insurance company, none has been established as of this date.
67. *Id.* arts. 9.53, .54. For mention of the Real Estate Settlement Procedures Act of 1974 see footnote 133 *infra* and accompanying text.
68. TEX. INS. CODE ANN. art. 9.49 (Pamphlet Supp. 1975-76).
69. Order No. 29432 of the State Board of Insurance (Aug. 13, 1975).
70. A complete set of the existing forms and rules can be obtained from Hart Graphics in Austin, Texas.
71. Orders No. 30019 and 30020 of the State Board of Insurance (Dec. 1, 1975).
72. Since Jan. 1, 1946, the State Board of Insurance has issued bulletins in accordance with its regulatory responsibility. Prior to the recent board orders, these bulletins were generally sent only to title insurance companies; however, they often contained comments of significance to attorneys and realtors. For a discussion of a controversial bulletin issued in 1973 in connection with the "survey exception" in title policies (which bulletin has been repealed by the recent board orders), see Wallenstein (1974) at 34.
73. 19 Tex. Sup. Ct. J. 105 (Dec. 17, 1975), *rev'g* 517 S.W.2d 627 (Tex. Civ. App.—Houston [14th Dist.] 1974).

election of remedies doctrine and concluded that a suit for trespass to try title could be pursued by a holder of title insurance even after the insured had processed a claim against his title company alleging a failure of title.[74]

Miscellaneous Cases. In *W.H. Betts v. Texas Pacific Land Trust*[75] the court held that validity of a land patent was not subject to attack by one whose only claim to the land arose subsequent to the issuance of the patent. The court in *Rayson v. Johns*[76] held that a factual question exists where there is conflicting evidence as to whether property in a partition proceeding is susceptible to division in kind. In *Kropp v. Prather*[77] the court held that, since in Texas the filing of a *lis pendens* is a part of a judicial proceeding involving real estate without which the *lis pendens* would be non-existent, it would not be the basis for a cause of action in libel or slander. In *Miller v. Gasaway*[78] the court held that the owner of a fee interest who occupies the land by right of homestead or of life estate cannot charge the remaindermen with the value of any permanent improvements made upon the property during the time the property was occupied under the homestead right or life estate. Instead, the remaindermen in a partition action would be entitled to share in the value of the improvements in the same proportions as they then own the fee, subject to the "betterments" exception to this general rule.[79] Finally, in *Schwartz v. Jefferson*[80] the supreme court held that property adjudications in a divorce decree become final the same as in other judgments relating to title and possession of property.

II. PURCHASES AND OTHER TRANSACTIONS

Contract Validity and Interpretation. In addition to the traditional line of cases discussing whether the property description in a purported contract is sufficient to enforce the contract,[81] several noteworthy contract issues were

74. "The claim against the title insurance company is based on a contractual right that exists separate and distinct from any final determination of ownership of the property . . . . There is certainly no inconsistency between seeking a defense by the title insurance company and filing a trespass to try title action." 19 Tex. Sup. Ct. J. at 110.

75. 524 S.W.2d 564 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

76. 524 S.W.2d 380 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.).

77. 526 S.W.2d 283 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

78. 514 S.W.2d 90 (Tex. Civ. App.—Texarkana 1974, no writ).

79. The exception provides that when the life tenant and partial fee owner is under the mistaken belief that he is the owner of the entire fee, he is entitled to recover the improvements or alternatively the amount by which they have enhanced the land (in addition, of course, to his portion of the fee). However, in order to qualify as a good faith improver, he must show not only that he believed that he was the true owner, but also that he had reasonable grounds for that belief, and that he was ignorant that his title was contested by any person having a better right. *See also* 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 36 (1961); *Symposium, Texas Land Titles: Part II*, 7 ST. MARY'S L.J. 58, 112-17 (1975).

80. 520 S.W.2d 881 (Tex. 1975).

81. *See* Pockrus v. Connelly, 521 S.W.2d 115 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), in which the court held that a description by street, lot, and block number was sufficient, notwithstanding the absence of any reference to the official county records. The court in *Pockrus* followed the test set out by the Texas Supreme Court, that "to be sufficient, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty." Morrow v. Shotwell, 477 S.W.2d 538, 539 (Tex.

addressed by Texas courts during the survey year. For example, in *Pockrus v. Connelly*[82] the court held that the contractual requirement of a "cash" down payment permitted the purchaser to tender his personal check instead of paper money, coins, or a more reliable evidence of a legal tender such as a money order or cashier's check.[83] In *Hill v. Rich*[84] the court discussed the requirement that an offeree either accept a real estate offer in writing within a reasonable period of time after receipt of the offer, or, if earlier, within the time period specified in the offer.[85]

For real estate developers who execute contracts to purchase real property in the name of an individual as "trustee" for an undisclosed purchasing group the case of *Gorme v. Axelrad*[86] should provide some qualified comfort. In that case the individual who executed a contract of sale as "trustee" disclosed at the time of execution that he was acting as agent for an undisclosed principal who would, together with the "trustee," constitute the actual purchasing group. However, at the date set for consummation of the sale, the seller refused to accept a purchase-money promissory note from the "trustee" and the undisclosed additional purchaser, claiming that the contract was unenforceable because the real purchasers had not been named. The court rejected the seller's claim, reasoning (1) that the use of the word "trustee" on the face of the contract indicated the interest of others in the contract and (2) that the seller's rights were in no way prejudiced but instead were enhanced by the liability of the other purchaser for the balance due. The second rationale of the court should suggest to real estate brokers that the *Gorme* decision may not be helpful in cases where a broker wishes to substitute the actual purchaser instead of adding an additional party. In such cases the broker should include in the contract an express assignment authorization.[87] In *Taggert v. Crews*[88] the real estate broker used a form of brokerage listing agreement instead of a "trustee" contract, which weak-

1972). *See also* Wallenstein (1975) at 35-36; Wallenstein (1974) at 35-36; Note, *Statute of Frauds—Sufficiency of Description*, 24 BAYLOR L. REV. 413 (1972). *But cf.* U.S. Enterprises, Inc. v. Dauley, 524 S.W.2d 339 (Tex. Civ. App.—Fort Worth 1975, writ granted).

82. 521 S.W.2d 115 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

83. It should be noted that the court did not mention the possible alternatives of a money order or a cashier's check. Moreover, the facts of the *Pockrus* case indicate that the sellers had quite likely concocted the "cash" requirement argument as a mere rationale to disguise their unwillingness to consummate the transaction. Possibly the requirement of a "cash" down payment would be interpreted more strictly in a different factual situation.

84. 522 S.W.2d 597 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

85. By implication the court suggested that an offeror must hold open an offer for a reasonable time even if no consideration has been given by the offeree. Although statutory authority for such a concept is available in TEX. BUS. & COMM. CODE § 2.205 (1968) with regard to sales of personalty by merchants, no case authority could be found by the authors of this Article to support this implication as a general rule of law. *Cf.* Echols v. Bloom, 485 S.W.2d 798 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

86. 519 S.W.2d 139 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

87. Real estate brokers should also be aware of the conflict-of-interest challenge which may arise out of "trustee" contracts. *See* Anderson v. Griffith, 501 S.W.2d 695 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.), *discussed in* Wallenstein (1975) at 42. Moreover, inasmuch as § 2 of the Texas Trust Act, TEX. REV. CIV. STAT. ANN. art. 7425b-2 (1960), expressly excludes from the Act "so-called 'Massachusetts Trusts' or similar business trusts" and "instruments wherein one or more persons are mere nominees for one or more persons without any disclosed beneficiaries and without any active trust duties," all persons who utilize this form of party designation should realize

ened his principal's claim for enforcement even though the principal had been named in the listing agreement. However, in reversing a trial court's granting of the seller's motion for summary judgment, the court acknowledged that the broker's principal could enforce the contract if it were found as a matter of fact that the contracting parties intended to create contractual benefits for the principal.[89]

The question of whether "time was of the essence"[90] arose in at least four real estate contract cases during the survey year. In three of those cases the courts held that in the absence of a specific provision time was not of the essence and, therefore, failure to close on time did not necessarily constitute a breach of the contract.[91] In *White v. Miller*,[92] however, the court held that since the contract was properly characterized as an "option," time was of the essence. The authors of this Article have reviewed *White v. Miller* carefully, as well as certain aspects of the contract in question which were not mentioned in the court's opinion,[93] and believe that the result may have been correct, but not because of the "financing" contingency relied upon to some extent by the court.[94] In *Herzstein v. Echols & Lynn*[95] the court held

that liability under the contract may arise in either the "trustee" or the undisclosed beneficiary, or both, under the law of principal and agent (and the law of partnership, if the "trustee" is also included in the beneficiary group). For an extensive discussion of this problem and others see Comment, *A Device for Texas Land Development: The Illinois Land Trust*, 10 HOUS. L. REV. 692 (1973).

88. 521 S.W.2d 703 (Tex. Civ. App.—San Antonio 1975, no writ).

89. *See* Simmons & Simmons Constr. Co. v. Rea, 155 Tex. 353, 286 S.W.2d 415 (1955) (intention is usually inference to be drawn by fact finder from other facts and circumstance in evidence).

90. *See* Note, *Time is of the Essence: Condition or Covenant?*, 27 BAYLOR L. REV. 817 (1975).

91. Tabor v. Ragle, 526 S.W.2d 670 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.); Helsley v. Anderson, 519 S.W.2d 130 (Tex. Civ. App.—Dallas 1975, no writ); Herzstein v. Echols & Lynn, 517 S.W.2d 355 (Tex. Civ. App.—Dallas 1974, no writ). In the *Helsley* case the court's decision of enforcement was rendered even though almost two years had elapsed between the closing date set out in the contract of sale and the date of purchaser's demand for performance. In reversing the trial court's conclusion that the purchaser was estopped by laches, the court noted that this extraordinary equitable remedy is available only when two essential elements are present: (1) an unreasonable delay in the assertion of one's legal or equitable rights and (2) a good faith change of position by another to his detriment because of the delay. *See* City of Fort Worth v. Johnson, 388 S.W.2d 400 (Tex. 1964).

92. 518 S.W.2d 383 (Tex. Civ. App.—Tyler 1974, writ dism'd).

93. In *White* the court held that the contract (allowing the purchaser thirty days to obtain financing and providing that, if financing was not arranged within the period, the contract was void at the *seller's* option) constituted an option contract. *Id.* at 385.

94. The court stated that the test for distinguishing a contract for sale from an option contract is whether (i) one party is obligated to sell and the other party is obligated to purchase or (ii) the document confers merely a right to purchase upon the party's election. The court construed the purchaser's deposit of the $5,000 earnest money as the consideration for his option, although apparently the deposit was returned to the purchaser upon the seller's election. Ironically, this might indicate that it was *not* an option contract after all but rather a contract with contingencies. *See* Willeford v. Walker, 499 S.W.2d 190 (Tex. Civ. App.—Corpus Christi 1973, no writ); Huckleberry v. Wilson, 284 S.W.2d 205 (Tex. Civ. App.—El Paso 1955, writ dism'd) (holding that by entering into a contract of sale where final consummation is contingent upon purchaser's obtaining specified financing, purchaser impliedly promises to pursue loan application with reasonable diligence); *cf.* U.S. Freight Co. v. United States, 422 F.2d 887 (Ct. Cl. 1970) (Distinction made between contract to purchase property at a future date and an option contract. Such distinction was determinative as to whether the loss was deductible as a capital loss or as an ordinary loss.).

95. 517 S.W.2d 355 (Tex. Civ. App.—Dallas 1974, no writ). *See also* Ayers v. Hodges, 517 S.W.2d 589 (Tex. Civ. App.—Tyler 1974, no writ).

that the seller had the burden of showing that a utility easement was permitted by a contract of sale which provided that "utility easements which do not adversely affect the value of the property . . . shall not be deemed to be title defects."[96] Additionally, the court held that the purchaser's statement to the seller's agent that he would not close the transaction on any condition did not constitute an actual breach when made before the time for performance. In light of the seller's treatment of the contract as continuing, the statement could not be deemed an anticipatory breach.

In a case involving a real estate installment sales contract,[97] the court held that article 1301b of the Texas Revised Civil Statutes[98] is expressly limited by its language to situations of forfeiture and acceleration due to a purchaser's default and has no application to actions for cancellation and rescission. The court distinguished rescission and forfeiture: forfeiture being the assertion of a right granted by contract and declared pursuant to contract; rescission being the abrogation of the contract and restoration of the parties to the positions they respectively occupied before the contract was made. In *Bouldin v. Woosely*[99] the court held that an agency relationship between two tenants-in-common, once established and in the absence of any action to revoke it, is presumed to continue through the execution and consummation of a purchase option by the cotenant's lessee.

Finally, two cases involved the severability of a lease and an option of the tenant to purchase the leased premises. In *Farrell v. Evans*[100] the court held that, although a purchase option is generally not assignable by the optionee unless permission for an assignment is evidenced by the terms of the option, such permission is evidenced in a lease which contains both a purchase option in favor of the tenant and a clause permitting the tenant to assign all of his rights under the lease. However, in *Click v. Seale*,[101] a case somewhat in conflict with *Farrell* as to the concept of severability in lease-purchase options, the court held that the lease and purchase option in question was severable; therefore, the statutory repudiation rights accorded to a wife at the time of the contract could be utilized by her to defeat the purchase option without disturbing the lease obligations of the parties.[102]

Remedies. In *National Resort Communities, Inc. v. Cain*[103] the supreme court set out two requirements for reformation of a contract of sale: first,

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96. This provision is found in the Contract of Sale form (Form 1971-S), published by the Greater Dallas Board of Realtors. In the residential contract form proposed by the Broker-Lawyer Joint Committee sponsored by the State Bar of Texas and the Texas Real Estate Commission (see note 111 *infra* and accompanying text) the following provision is used to describe permitted easements: "utility easements common to any regularly platted subdivision where Property is located."

97. Marshall v. Garcia, 514 S.W.2d 513 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

98. TEX. REV. CIV. STAT. ANN. art. 1301b (Supp. 1975-76).

99. 525 S.W.2d 276 (Tex. Civ. App.—Waco 1975, no writ).

100. 517 S.W.2d 585 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

101. 519 S.W.2d 913 (Tex. Civ. App.—Austin 1975, no writ).

102. *Accord*, Estapa v. Saldana, 200 S.W.2d 722 (Tex. Civ. App.—San Antonio 1947, no writ).

103. 526 S.W.2d 510 (Tex. 1975).

the party seeking reformation "must prove the true agreement of the parties"; second, "the provision erroneously written (or included or omitted) into the instrument was there by mutual mistake."[104] The court found the requirements had not been met, concluding that, since the seller had remained willing to rescind the contracts, each purchaser had an adequate remedy at law—either to rescind his contract or to stand upon the contract as written.

In *Dickey v. Johnson*[105] the court held that a seller could maintain an action to recover the purchaser's earnest money even though no actual tender of deed occurred, as long as the trial court had found that the seller was "ready and willing to execute a deed to the purchaser."[106] A dissent noted that at no time did the seller and his wife tender a deed properly executed and acknowledged, thereby failing to show ability to perform the contract.

A procedural matter which should pose a warning for those seeking summary judgment arose in *Kain v. Neuhaus*.[107] The court held attachment of unsworn and uncertified copies of earnest money contracts to an affidavit which the affiant refers to as true and correct is insufficient to make the contracts "sworn or certified copies" required by rule 166-A(e) of the Texas Rules of Civil Procedure.[108]

Home Warranty Insurance. The Sixty-fourth Legislature, evidently responding to requests from home-builder organizations,[109] enacted a new article 5.53-A of the Insurance Code[110] which authorizes fire insurance and marine insurance companies to issue a "home warranty insurance" policy. The term "home warranty insurance" is defined in article 5.53-A as "assuring either (1) performance by builders of residential property of their warranty obligations to purchasers of such property; or (2) against named defects arising from failure of the builder to construct residential property in accordance with specified construction standards."

Regulation of Brokers Drafting Contracts. The first standard form real estate contract, drafted by the Broker-Lawyer Joint Committee sponsored by

104. *Id.* at 513, 514. The court referred to its 1972 decision in Morrow v. Shotwell, 477 S.W.2d 538 (Tex. 1972), as the basis of its requirements for reformation.

105. 513 S.W.2d 876 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

106. *Id.* at 877. The court distinguished two earlier cases, Milliken v. Townsend, 16 S.W.2d 259 (Tex. Comm'n App. 1929, jdgmt adopted), and Gibson & Johnson v. Ward, 355 S.W.2d 824 (Tex. Civ. App.—Eastland 1931, no writ), involving actual tender by the seller, by stating that neither case "held that a finding by a trial court that a seller and his wife were ready and willing to sign a deed would be insufficient." 513 S.W.2d at 877.

107. 515 S.W.2d 45 (Tex. Civ. App.—Corpus Christi 1974, no writ).

108. TEX. R. CIV. P. 166-A(e) provides that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." *But cf.* Pinemont Bank v. Du Croz, 528 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

109. It should be noted, however, that some small home-builders, whose opinions were expressed in the legislature by Representative Al Korioth of Farmers Branch, argued against the proposal on the basis that it was an unnecessary expense to home builders and purchasers. *See Warranty Bill OK'd*, The Dallas Morning News, March 21, 1975, at 13A, col. 2.

110. TEX. INS. CODE ANN. art. 5.53-A (Pamphlet Supp. 1975-76). *See also id.* art. 6.01-A, 21.28-C (further provisions relating to home warranty insurance).

the State Bar of Texas and the Texas Real Estate Commission,[111] was delivered to real estate brokers in Texas during December 1975.[112] Although the form contract, which is limited to residential transactions involving the assumption of an existing loan, was characterized as a final draft of the committee's work, the authors of this Article have been advised that the committee will accept and review comments and critiques submitted during the first few months of calendar year 1976.

Brokerage. In two cases decided during the survey year, *Pockrus v. Connelly*[113] and *Cooper v. Wildman*,[114] Texas courts confirmed once again[115] that in litigation for brokerage commissions real estate brokers may recover attorneys' fees pursuant to article 2226 of the Texas Revised Civil Statutes, even when suit is premised on a written brokerage agreement containing no specific provision for attorneys' fees.[116]

In *Wagner v. Hall*[117] a prospective seller sued his real estate broker because of a fraudulent misappropriation by the broker's salesman. The court agreed that the seller was entitled to recover the additional payments he made on his mortgage during the period in which the house remained empty (after the salesman's fraud caused the pending sale to be cancelled and before the seller could obtain another purchaser), as well as the difference between the higher net cash payment he would have received pursuant to the original transaction and the net cash payment he ultimately received. However, the court refused the seller recovery of exemplary damages because there had been no showing of negligence on the part of the broker in retaining the salesman.

In at least two cases decided during the survey year characterization of the conveyed property as "a security" was in issue.[118] In *Thywissen v. FTI Corp.*[119] the court held (1) that the mere fact that the sale of an interest in a corporation was consummated through a stock transfer, as distinguished from a sale of assets, did not establish as a matter of law that the plaintiff was engaged in the transaction as a securities broker, but (2) where, as here, a sale of stock is the basis for a commission claim, it is the plaintiff's burden to show that the agreement between plaintiff and defendant did not contem-

111. For discussions of the "Statement of Principles by the State Bar of Texas and the Texas Real Estate Commission," which precipitated the formation of the Committee, see Wallenstein (1974) at 37-38; Wallenstein (1975) at 40-41.

112. Copies of the form can be obtained from William W. Gibson, Jr., Professor of Law, The University of Texas School of Law.

113. 521 S.W.2d 115 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); *see* note 81 *supra.*

114. 528 S.W.2d 80 (Tex. Civ. App.—Corpus Christi 1975, no writ).

115. *See* Flagg Realtors, Inc. v. Harvel, 509 S.W.2d 885 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.), *discussed in* Wallenstein (1975) at 43.

116. Although the *Cooper* decision lists a few cases in support of its conclusion, in each of those decisions, as well as in *Flagg Realtors*, the court failed to state with certainty that the brokerage agreement was in writing. *See also* Clark Advertising Agency, Inc. v. Tice, 490 F.2d 834, 838-39 (5th Cir. 1974), and cases cited therein (indicating that a written contract may be a "special contract" falling outside the coverage of TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1975-76)).

117. 519 S.W.2d 488 (Tex. Civ. App.—El Paso 1975, no writ).

118. *See* Wallenstein (1975) at 43-44; Wallenstein (1974) at 40-42.

119. 518 S.W.2d 947 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

plate the sale of real estate or securities.[120] In *D & S Investments, Inc. v. Mouer*[121] the court deferred to the "primary jurisdiction" of the Texas Securities Commission for a determination of whether sales of joint venture interests for purchasing real property constituted sales of "securities" within the meaning of the Texas Securities Act.[122] The court concluded, therefore, that the district court had no jurisdiction to hear the plaintiffs' declaratory judgment action. In legislative action during the survey year the Sixty-fourth Legislature enacted four amendments to the Texas Securities Act, at least two of which should have a significant impact upon real estate syndications.[123] And in administrative action concerning real estate securities the Texas Securities Commission amended its Guidelines for the Registration of Real Estate Programs[124] concerning the amount of real estate commissions on resale of the property.[125] And the Securities and Exchange Commission, apparently acknowledging that its rule 146 concerning "private offerings"[126] would not adequately ameliorate the dangers inherent in small

120. *See also* Remley v. Street, 523 S.W.2d 430 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); Maddox v. Flato, 423 S.W.2d 371 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.); McDonald & Co. v. Kemper, 386 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1965, no writ). The court in *Thywissen* also refused to recognize the distinction claimed by the plaintiff between "finders" and real estate brokers (with a "finder" being merely an intermediary who contracts to find and bring parties together but leaves the negotiation of the ultimate transaction to the principals). 518 S.W.2d at 951. In the court's opinion such a distinction might allow a party to circumvent the requirements of the Real Estate License Act and the Texas Securities Act merely by showing that his services were less valuable than those expected of a broker. *Id.; cf.* Avent v. Stinnett, 513 S.W.2d 89 (Tex. Civ. App.—Amarillo 1974, no writ), *discussed in* Wallenstein (1975) at 41; Sherman v. Bruton, 497 S.W.2d 316 (Tex. Civ. App.—Dallas 1973, no writ), *discussed in* Wallenstein (1974) at 40.

121. 521 S.W.2d 118 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

122. TEX. REV. CIV. STAT. ANN. arts. 581-1 to -39 (1964). For an analysis of Sunshine v. Mid-South Constr., Inc., 496 S.W.2d 708 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.), a 1973 Texas case which held that similar sales did not constitute sales of real estate, therefore implying that they did constitute sales of securities, see Wallenstein (1974) at 41. *See also* the cases and authorities cited in Wallenstein (1975) at 43; *cf.* United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), *noted in* 29 SW. L.J. 987 (1975), holding that sales of interests in a certain co-operative housing project did not constitute sales of "securities"; Grenader v. Spitz, 6 CCH FED. SEC. L. REP. ¶ 95,300, at 98,526 (S.D.N.Y. 1975), distinguishing the Supreme Court's *United Housing* decision and holding that some co-operative housing interests were securities; Huberman v. Denny's Restaurants, 337 F. Supp. 1249 (N.D. Cal. 1972), holding that the sale to a passive investor of fee simple title pursuant to a certain sale-lease "package", with the tenant's rentals subject to increase in the event of increases in the tenant's gross sales, constituted a sale of a security.

123. First, the Texas Securities Board was given express rule-making authority pursuant to a new § 28-1 of the Act. And acting upon that authority the Board has already adopted several rules, one set of which is a modified version of the "Guidelines for the Registration of Real Estate Programs" which was first introduced by the Board on May 24, 1974. *See* Wallenstein (1974) at 42; Wallenstein (1975) at 43. Second, § 34 of the Act, requiring a brokerage commission claimant to be a registered securities dealer (with certain exceptions), was amended to remedy the defect found to exist by the Waco court of civil appeals in the now infamous case of Rowland v. Integrated Systems Technology, Inc., 488 S.W.2d 133 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.), *noted in* Wallenstein (1974) at 41. For an excellent analysis of all changes to the Act, see Bateman & Dawson, *The 1975 Amendments to the Business Corporation Act and the Texas Securities Act*, 6 TEX. TECH L. REV. 951, 995-1019 (1975).

124. 3 BLUE SKY L. REP. ¶ 46,609, at 42,519-33 (1976).

125. *Id.* at 42,522. The amendment was announced in a letter dated June 19, 1975, from Roy W. Mouer, Securities Commissioner.

126. SEC Rule 146, 17 C.F.R. § 230.146 (1974), *adopted in* SEC Securities Act Release No. 5487 (April 23, 1974), *amended in id.* No. 33-5585 (May 7, 1975).

offerings,[127] adopted rule 240,[128] exempting from securities registration offerings by a syndicator[129] (1) who does not have more than 100 security holders in *all* of his syndications and (2) who has not during the sale in question and the immediately preceding twelve months sold more than $100,000.00 of securities in *all* of his syndications.[130]

Finally, the Sixty-fourth Legislature enacted a revised version of the Real Estate License Act,[131] which among other changes includes much more rigorous residential and educational requirements for real estate brokerage licenses.

RESPA. The 1975 Property Article[132] mentioned that June 20, 1975, was the effective date of the Real Estate Settlement Procedure Act of 1974 (RESPA).[133] Through this legislation the Ninety-third Congress moved to protect residential buyers and sellers from the alleged abuses of excess closing costs, kickbacks, and other unethical practices by lenders, brokers, title insurance companies, and, in certain instances, sellers. What was not predicted in that former article was the turbulence created in the real estate industry by RESPA and regulation X[134] promulgated by the Department of Housing and Urban Development (HUD) for implementation of RESPA. However, RESPA, regulation X, the recent amendments to regulation X,[135] the RESPA legal opinions issued by the HUD general counsel,[136] and the clouded future of RESPA in light of increasing industry and congressional concern,[137] have already been discussed thoroughly in numerous trade publications, including one excellent law journal commentary.[138]

Miscellaneous. The Deceptive Trade Practices—Consumer Protection Act,[139] which early in the survey year was interpreted in *Cape Conroe Ltd.*

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127. *See* Wallenstein (1975) at 44 n.107 (listing of law review articles related to SEC rule 146). *See also* Weinberg & McManus, *The Private Placement Exemption Under the Securities and Exchange Act of 1933 Revisited, and Rule 146*, 27 BAYLOR L. REV. 201 (1975).

128. SEC Rule 240, 17 C.F.R. § 230.240 (1974), *adopted in* SEC Securities Act Release No. 5560 (Jan. 24, 1975).

129. *See generally* 3 BLUE SKY L. REP. ¶ 46,609 (1976).

130. For a thorough analysis of rule 240 see Erwin, *A Useful Exemption from Securities Registration for Smaller Real Estate Syndications: SEC Rule 240*, 4 REAL ESTATE L.J. 263 (1975). However, in the opinion of the authors of this Article, the aggregation of all syndications for determining maximum security holders and dollars will render this rule ineffective for all but the occasional syndicator, and, therefore, it is not of assistance to those in the business of syndication.

131. TEX. REV. CIV. STAT. ANN. art. 6573a (Supp. 1975-76).

132. Wallenstein (1975) at 40.

133. Real Estate Settlement Procedure Act, 12 U.S.C. §§ 2601-16 (Supp. IV, 1970).

134. SEC Reg. X, 24 C.F.R. pt. 82 (1975), *added by* 40 Fed. Reg. 22448 (1975).

135. *See* 40 Fed. Reg. 26509 (1975); 40 Fed. Reg. 47792 (1975).

136. *See* RESPA Legal Opinion No. 1, 40 Fed. Reg. 30480, 40 Fed. Reg. 31211 (1975), and RESPA Legal Opinion No. 2, 40 Fed. Reg. 44129 (1975).

137. In fact, HUD itself acknowledged the possibility of adverse congressional activity in 40 Fed. Reg. 47792 (1975).

138. Whitman, *The Real Estate Settlement Procedures Act: How to Comply—Problems and Prospects*, 4 REAL ESTATE L.J. 223 (1976). [Editor's Note: RESPA was amended by Pub. L. No. 94-205, 89 Stat. 1157 (Jan. 2, 1976), and the amendments were incorporated into Regulation X by 41 Fed. Reg. 1672 (Jan. 9, 1976).]

139. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1975-76).

v. Specht[140] as being inapplicable to real estate transactions, was amended by the Sixty-fourth Legislature so that real estate transactions would clearly be within the Act's coverage.[141] However, the legislature also amended the "Home Solicitation Transactions" chapter[142] of subtitle 3, article 5069 of the Texas Revised Civil Statutes (often referred to as the Consumer Protection Act), to exclude from the statute's coverage any sale of realty occurring in a residence other than the *existing* residence of the consumer.[143] Prior to the amendment, the statute might have included a residential sales transaction where the consumer-purchaser and the seller negotiated the sale at the *seller's* residence. Finally, the Federal Fair Housing Act[144] was reviewed by the United States Court of Appeals for the Fifth Circuit in *United States v. Northside Realty Associates*,[145] the third appellate decision in the same litigation, with the court en banc vigorously confirming again to the defendant that the latter had violated the Act and, thus, had properly been enjoined from further violations.

III. FINANCING AND DEVELOPMENT

Article 5069-1.07. The 1974 Property Article contained an extensive analysis of 1973 legislation which, although vetoed by Governor Briscoe and, therefore, never enacted, represented a serious attempt by the Texas Legislature to adapt interest statutes to current necessities in real estate transactions.[146] In 1975 the Sixty-fourth Legislature passed, and Governor Briscoe signed into law, article 5069-1.07,[147] a statute drafted with essentially the same substantive terms as the ill-fated 1973 version. Divided into two separate and essentially unrelated sections, article 5069-1.07 attempts to ameliorate the impact of usury laws on real estate transactions (a) by solidifying by statutory recognition the concept of "spreading" front-end interest and interest in advance for "any loan or agreement to loan secured or to be secured, in whole or in part, by a lien, mortgage, security interest, or other interest in or with respect to any interest in real property,"[148] and (b) by increasing from ten percent per annum to the corporate rate[149] the

140. 525 S.W.2d 215 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).
141. *See* TEX. BUS. & COMM. CODE ANN. § 17.45(1) (Supp. 1975-76) which now defines "goods" as "tangible chattels or real property purchased or leased for use."
142. TEX. REV. CIV. STAT. ANN. arts. 5069-13.01 to -13.06 (Supp. 1975-76).
143. *Id.* art. 5069-13.01(5) (Supp. 1975-76).
144. Fair Housing Act (title VIII of the Civil Rights Act of 1968), 42 U.S.C. § 3601-31 (1970).
145. 518 F.2d 884 (5th Cir. 1975).
146. Wallenstein (1974) at 42-45.
147. TEX. REV. CIV. STAT. ANN. art. 5069-1.07 (Supp. 1975-76).
148. *Id.* art. 5069-1.07(a). As explained in an excellent recent student analysis, the term "interest in advance" generally denotes "interest actually paid before the borrower has had the use of the borrowed funds for the time period for which such interest is charged" and the term "front-end interest" generally denotes "a fee or charge, received by the lender, in consideration for the loan of money, at the inception of the loan." Comment, *Usury Implications of Front-End Interest and Interest in Advance*, 29 SW. L.J. 748, 750-51 (1975). *See also* Comment, *Usury in Texas: Spreading Interest over the Entire Period of the Loan*, 12 HOUS. L. REV. 159 (1974).
149. TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Supp. 1975-76) permits the rate of interest in certain loans to corporations (not including charitable and religious corporations) to reach "one and one-half percent (1½%) per month" without creating a

maximum contractual interest rate "on any loan in the principal amount of $500,000 or more, which is made for the purpose of interim financing for construction on real property or financing or refinancing of improved real property."[150] As may be indicated by the quoted excerpts in the immediately preceding sentence, the language of article 5069-1.07 will quite likely be the subject of frequent consternation—and possibly litigation—both with regard to solidifying the concept of "spreading"[151] and with regard to revising the maximum contractual rate for specified transactions.[152] More-

usurious transaction. Whether the rate of "one and one-half percent (1½%) per month" restricts lenders more than 18% per annum has been the subject of concern to those analyzing article 1302-2.09. *See* Wallenstein (1974) at 47 n.134.

150. TEX. REV. CIV. STAT. ANN. art. 5069-1.07(b) (Supp. 1975-76).

151. The problem areas of article 5069-1.07(a) which the authors of this Article have discerned as of this date include the following: (1) Does the language of the statute, as quoted in the text of this Article, permit the statute to be applied to loans secured by a partnership interest in a real estate syndication? (2) Does the savings clause in the statute itself require the refunding of unearned excess interest in the event of a voluntary prepayment, thus reversing established case law? *See* Gulf Coast Inv. Corp. v. Prichard, 348 S.W.2d 658 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.); A.Y. Creager Co. v. Horton, 96 S.W.2d 790 (Tex. Civ. App.—El Paso 1936, no writ). (3) Does the statute's restriction to real estate loan situations create a presumption that "spreading" is not authorized for loans not relating to real estate? (4) Because the statute requires spreading "during the period of the full stated term of the loan" is it applicable to loans due "on demand, or if no demand be made, then on [a stated date]"? (5) Does the statute permit "spreading" of interest on the full *stated* amount of the loan, even when the transaction involves front-end interest, thus reversing established case law that the interest rate for usury determinations must be computed on the net amount actually disbursed by the lender (*i.e.*, after deducting front-end interest)? *See* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1346 (5th Cir. 1972); Nevels v. Harris, 129 Tex. 190, 195, 102 S.W.2d 1046, 1049 (1937). (6) Because the statute requires the "amortizing, prorating, allocating, and spreading, *in equal parts* [emphasis added] during the period of the full stated term of the loan, all interest at any time contracted for, charged, or received," can the lender be placed in jeopardy in situations of installment loans with level payments amortizing the principal to a low amount towards the end of the loan? (7) And finally, will the statute fail a constitutional challenge since, as has been pointed out in recent analysis, it may have removed any effective ceiling on interest rates? *See* Comment, *supra* note 148, at 764-65.

With regard to the last four problem areas, article 5069-1.07(a) should not be construed in a manner which would make it vulnerable to such claims. Instead, it should be construed as permitting what the Amarillo court of civil appeals in 1924 correctly alluded to as being the proper approach in calculations involving "interest in advance." Instead of relying strictly on the stated terms of the loan documents, calculations should be made to determine whether the *effective yield* throughout the stated term of the loan is greater than the applicable maximum legal rate, such calculations to be as follows: (i) any excess interest (*i.e.*, over the maximum legal rate) charged in a particular year should be treated as if it were a payment on the principal of the loan; (ii) any excess *uncharged* interest (*i.e.*, the difference between the full amount of interest permitted under the maximum legal rate minus interest actually charged) in a particular year should be treated as an increase of the principal of the loan; and (iii) the court should then determine under this method whether in the last term of the loan the interest charged exceeds the maximum amount permitted (in which event the effective yield over the entire loan term would be greater than the applicable maximum legal rate). *See* Shropshire v. Commerce Farm Credit Co., 266 S.W. 612 (Tex. Civ. App.—Amarillo 1924), *rev'd*, 120 Tex. 400, 30 S.W.2d 282 (1930), *discussed in* Note, *Usury in Texas: Spreading Interest Over the Entire Period of the Loan*, 12 HOUS. L. REV. 158, 163-67 (1974). The basis for the supreme court's reversal in *Shropshire*, the absence of a savings clause protecting the borrower in the event of prepayment or acceleration, has been resolved in article 5069-1.07(a); therefore, the emphasis on *effective yield* can and should be adopted by Texas courts in order to bring usury law in line both with the inescapable logic of such approach (judging the legality of the stated loan terms by comparison to the maximum effective yield if the loan documents were restated) and with the realities of lending practices (where most lending institutions and developers compute effective yield regardless of how the loan is characterized in its stated terms).

152. The problem areas of article 5069-1.07(b) which the authors of this Article have

over, inasmuch as the bill enacting article 5069-1.07 provided that it "does not have any application to any right or duty, *contract*, obligation, cause of action, or claim of defense *arising* prior to its effective date,"[153] the new statutory provisions may not be effective as to loans after September 1, 1975, which were committed prior to September 1, 1975,[154] and as to renewals after September 1, 1975, of loans originally made prior to that date.[155]

Usury Cases; Miscellaneous Legislation and Rulings. In *Skeen v. Glenn Justice Mortgage Co.*[156] and *American Century Mortgage Investors v. Regional Center, Ltd.*[157] the Dallas court of civil appeals brought the current state of Texas usury law in line with the most sophisticated appellate decisions of any other state,[158] by validating loans made to corporations formed exclusively to qualify the prospective borrower for a higher rate of interest.[159] In *Skeen* the court held that a lender may require a prospective

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discerned as of this date, in addition to the one indicated in footnote 149 *supra*, are as follows: (1) Does the language of the statute, as quoted in the text of this Article, exclude a $550,000 construction loan commitment if the first advance is less than $500,000 (an especially complicated question if the loan documents contain contingencies for full funding, such as optional construction costs or rental requirements)? (2) Is a $1,000,000 business rehabilitation loan excluded when less than $500,000 of the loan is secured by the company's real estate holdings? (3) Does the requirement that the interim financing be "for construction on real property" exclude a $550,000 loan where more than $50,000 is allocated for the purchase of unimproved land upon which the borrower will expend less than $500,000 in the construction of improvements? (4) What improvements are necessary to qualify the loan as a "financing or refinancing of *improved real property*"? (Emphasis added.) With regard to the last problem area, an impressive outline presented to the University of Texas School of Law Mortgage Lending Institute, Sept. 25, 1975, by Frank F. Smith, Jr., attorney at law, Houston, Texas, draws analogies to the following sources: (a) Regulation 8.1(A) of the Texas Savings & Loan Comm'n; (b) Nat'l Banking Act Regulations, 12 C.F.R. § 220(e) (1975); (c) Texas case law: Reynolds v. State, 390 S.W.2d 493 (Tex. Civ. App.—Texarkana 1965, no writ); Texas Power & Light Co. v. Lovinggood, 389 S.W.2d 712 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); Mallet Land & Cattle Co. v. State, 84 S.W.2d 260 (Tex. Civ. App.—Amarillo 1935), *rev'd on other grounds*, 126 Tex. 392, 88 S.W.2d 471 (1935); and (d) judicial decisions from other states. *See, e.g.*, Builders Land Co. v. Martens, 255 Iowa 231, 122 N.W.2d 189 (1963).

153. Ch. 26, § 3, [1975] Tex. Laws 47 (emphasis added).

154. If a loan commitment is dated before Sept. 1, 1975, and if it merely gives an *option* to the prospective borrower to consummate a loan after such date (without any requirement that he consummate the loan), then no "contract" for payment of interest has "arisen" prior to the effective date of the statute. Unfortunately, lenders, in their zeal to bind prospective borrowers to a loan commitment, often document it in such a way that the option nature of the contract is overshadowed by language denoting a bilateral loan agreement. *See* Draper, *The Broken Commitment: A Modern View of the Mortgage Lender's Remedy*, 59 CORNELL L. REV. 418 (1974); *cf.* Draper, *Tight Money and Possible Substantive Defenses to Enforcement of Future Mortgage Commitments*, 50 NOTRE DAME LAW. 603 (1975); Wolf, *The Refundable Commitment Fee*, 23 BUS. LAW. 1065 (1968).

155. *See* Cherry v. Berg, 508 S.W.2d 869 (Tex. Civ. App.—Corpus Christi 1974, no writ) (renewal promissory notes tainted with usury of original note).

156. 526 S.W.2d 252 (Tex. Civ. App.—Dallas 1975, no writ), *noted in* 29 SW. L.J. 959 (1975).

157. 529 S.W.2d 578 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

158. The superior conceptual analysis of the instant problem is that generally referred to as "the New York rule." *See* Leader v. Dinkler Management Corp., 20 N.Y.2d 393, 230 N.E.2d 120, 283 N.Y.S.2d 281 (1967). But note that "the New York rule" is not without limitation even in the State of New York. Buoninfante v. Hoffman, 48 App. Div. 678, 367 N.Y.S.2d 984 (1975) (citing other recent cases).

159. *See* note 149 *supra*. *See also* Comment, *Incorporation to Avoid the Usury Laws*, 68 COLUM. L. REV. 1390 (1968); Comment, *Using a "Dummy" Corporate*

borrower to incorporate, even though the lender knows that usury considerations are the sole reason for incorporation. The court did not address itself directly to the effect of the "corporate" borrower's being a mere sham or "dummy" corporation representing the de facto non-corporate developer because no issue in connection with that question had been presented to the trial court.[160] However, in finding that the affidavit which was presented to the trial court "states *no* facts, or even conclusions, which *indicate* that the corporation was created as a cloak or cover for a fraudulent or illegal transaction,"[161] the court by necessity held that the lender's requirement of a corporate borrower did not of itself permit any presumption that the lender had participated in a sham transaction. This implied holding in *Skeen* was embellished in the *American Century* case, in which the de facto non-corporate borrower had set up a "dummy" corporate entity solely as a subterfuge for the purpose of evading the ten percent usury rate for non-corporate borrowers and with full intent that ownership and control of the property securing the loan would remain in the actual non-corporate borrower. Acknowledging that a subterfuge had been created by the borrower in order to obtain its loan, and further acknowledging by implication that the lender may have had reason to know of the subterfuge (or at least ample opportunity to discover it upon reasonable investigation), the court nevertheless validated the loan because of the absence of a finding that "the lender *participated in* or *had actual knowledge of* the subterfuge."[162] The enormous importance of the *Skeen* and *American Century* cases can perhaps be appreciated fully only by attorneys whose lending clients have elected to adopt a "hear no evil; see no evil; speak no evil" approach in dealing with purported corporate borrowers (and perhaps by attorneys whose developer clients hope, for purposes of preserving their individual tax deductions, that their lenders will adopt such an approach[163]); however, the court's obvious inclination in cases of this nature—to avoid penalizing a lender for entering into a complex financial transaction with an eager and astute borrower—should have a rather universal appeal.[164]

In another significant case pairing, *Wagner v. Austin Savings & Loan Ass'n*[165] and *Freeman v. Gonzales County Savings & Loan Ass'n*,[166] two

Borrower Creates Usury and Tax Difficulties, 28 Sw. L.J. 437 (1974). With regard to the tax aspects of such transactions see Collins v. United States, 514 F.2d 1282 (5th Cir. 1975), *aff'g* 386 F. Supp. 17 (D. Ga. 1974). *Cf.* Rev. Rul. 75-31, 1975 INT. REV. BULL. No. 4, at 6.

160. The appellate court was reviewing a summary judgment rendered in substantial reliance on affidavits submitted by each party.

161. Skeen v. Glenn Justice Mortgage Co., 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no writ) (emphasis added).

162. American Century Mortgage Investors v. Regional Center, Ltd., 529 S.W.2d 578, 583 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (emphasis added).

163. *See* note 159 *supra*.

164. In light of former Justice Douglas' recommendations that law review authors disclose business interests which may affect their conclusions, Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965), the authors of this Article wish to point out, with respect to their conclusions accompanying this and the immediately preceding footnotes, that their law practice includes representation of both real estate lenders and real estate developers.

165. 525 S.W.2d 724 (Tex. Civ. App.—Beaumont 1975, no writ).

166. 526 S.W.2d 774 (Tex. Civ. App.—Corpus Christi 1975, writ granted).

courts of civil appeals reached different conclusions as to whether the special statutory provision for savings and loan association loans[167] exempts front-end interest from usury regulation. The court in *Wagner*, reviewing a front-end charge labeled as "points," reached an affirmative conclusion that the exemption was applicable.[168] However, in a situation involving a front-end charge labeled as a "loan fee," the *Freeman* decision implied a negative conclusion.[169] For reasons already amply discussed in a recent student article,[170] it is doubtful whether savings and loan associations should rely on the *Wagner* approach.[171]

The case of *Moore v. Sabine National Bank*[172] should serve as a warning to lenders that demand letters must not overstate the interest due as of the demand date. In the *Moore* case, which reviewed the penalty provisions of the Texas Consumer Credit Code,[173] the court refused to allow the lender to revoke its erroneous demand for unlawful interest, holding that by sending the demand itself—though not permitted by the terms of the loan instruments—the lender had violated the statutory proscription against "charging" excessive interest.

Several other cases of lesser significance were decided during the survey year,[174] and a new chapter was added to the Texas Consumer Credit

167. TEX. REV. CIV. STAT. ANN. art. 852a, § 5.07 (1964), which provides in relevant part that savings and loan associations "may charge premiums for making such [*i.e.*, real estate] loans" and that such premiums "shall not be deemed a part of the interest collected or agreed to be paid on such loans."

168. "[W]e hold that such 'points' are not interest within the usury statutes." Wagner v. Austin Sav. & Loan Ass'n, 525 S.W.2d 724, 728 (Tex. Civ. App.—Beaumont 1975, no writ).

169. For some reason the court did not face the issue squarely. Instead, it labeled the "loan fee" as interest, after discussing only whether it might be a "reasonable expense" of the type permitted by the statute (in addition to "premiums"). The court also failed in another definitional aspect of its opinion, confusing the "loan fee" in the case with a "commitment fee" which is not interest but, rather, a fee for the borrower's option to consummate a loan on or before a future date. *See* Wallenstein (1974) at 43 n.116. However, this aspect of the court's opinion has been accepted for review by the supreme court in its granting of writ of error. 19 Tex. Sup. Ct. J. 136 (Jan. 24, 1976).

170. Comment, *supra* note 148, at 758-59 n.80.

171. Even the *Wagner* court indicated its concern by noting in its opinion: "Plaintiffs make no constitutional challenge of this statute and the meaning thereof is clearly dispositive of the contention now advanced by plaintiffs." Wagner v. Austin Sav. & Loan Ass'n, 525 S.W.2d 724, 728 (Tex. Civ. App.—Beaumont 1975, no writ).

172. 527 S.W.2d 209 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

173. TEX. REV. CIV. STAT. ANN. arts. 5069-8.01-.02 (1971). As pointed out by the court in the *Moore* decision, however, the relevant provisions in the general usury penalty statute, *id.* art. 5069-1.06, are essentially the same.

174. Crow v. Home Sav. Ass'n, 522 S.W.2d 457 (Tex. 1975) (facts of case did not warrant jury's finding that transaction in question, triangular loan involving borrower and two lending institutions, was a "device" for accomplishing usurious loan); Hurley v. National Bank of Commerce, 529 S.W.2d 788 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (recovery in suit for usurious payments made more than two years prior to suit was barred by limitation provision of 12 U.S.C. § 85 (1970)); Pinemont Bank v. Du Croz, 528 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (maximum forfeiture which could be awarded on allegedly usurious note was twice the usurious interest, even though several parties signed note); Wall v. East Texas Teachers Credit Union, 526 S.W.2d 148 (Tex. Civ. App.—Texarkana 1975), *rev'd*, 19 Tex. Sup. Ct. J. 181 (Feb. 11, 1976) (party need not specifically plead usury where note is usurious on its face); Freeman v. Hernandez, 521 S.W.2d 108 (Tex. Civ. App.—Dallas 1975, no writ) (note usurious on its face was not subject to reformation in absence of any mistake or ignorance of usury laws); Johns v. Jaeb, 518 S.W.2d 857 (Tex. Civ. App.—Dallas 1974, no writ) (alleged partnership contribution was in fact a loan in violation of the usury laws).

Code[175] in an effort to coordinate state credit law with the Federal Consumer Credit Protection Act.[176] Finally, the Attorney General of Texas rendered an opinion[177] which expressly held the corporate usury rate inapplicable in the case of a loan to a partnership composed solely of two corporations, but which left unanswered the question of whether the corporate usury rate would be applicable in case of a loan to the two corporations severally.

Article 3810. In response to recent constitutional assaults upon non-judicial foreclosure sales[178] the Sixty-fourth Legislature amended article 3810 to require a foreclosing mortgagee to send written notice of the proposed foreclosure sale at least twenty-one days prior to sale to "each debtor obligated to pay such debt according to the records of such holder."[179] The amendment also dispenses with the previous requirement of two public postings in addition to the one at the county courthouse of the county in which the land is located. The new statute, while probably not subject to the due process clause of the fourteenth amendment,[180] does provide notice more in keeping with the United States Supreme Court decision of *Mullane v. Central Hanover Bank & Trust Co.*[181] than its predecessor. However, the new statute also raises certain additional dangers which may not be apparent from a cursory reading. First, as to deeds of trust executed before the effective date of the statute,[182] the deed of trust provision granting the power of sale may contain contractual requirements tracking the language of the old statute. It would, therefore, be prudent for anyone attempting to conduct a non-judicial foreclosure to comply with the notice requirements of *both* the old statute and the amended statute, especially in light of the strict scrutiny given to non-judicial foreclosures.[183] Second, the language "each

175. TEX. REV. CIV. STAT. ANN. arts. 5069-14.01 to -14.24 (Supp. 1975-76).

176. Federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-81 (Supp. IV, 1970).

177. TEX. ATT'Y GEN. OP. No. H-589 (1975).

178. *See, e.g.*, Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975); Hoffman v. HUD, 519 F.2d 1160 (5th Cir. 1975); Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974); Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975); Garner v. Tri-State Dev. Co., 382 F. Supp. 377 (E.D. Mich. 1974); Leisure Estates of America, Inc. v. Carmel Dev. Co., 371 F. Supp. 556 (S.D. Tex. 1974); Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). *See generally* Comment, *Procedural Due Process: For Sale in Texas to the Highest Bidder?*, 10 HOUS. L. REV. 880, 894-96 (1973); Comment, *Due Process Evolution—Fuentes and the Deed of Trust*, 26 SW. L.J. 876 (1972); Comment, *Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice*, 49 TEXAS L. REV. 1085 (1971).

179. TEX. REV. CIV. STAT. ANN. art. 3810 (Supp. 1975-76).

180. *See* cases discussed in text accompanying note 184 *infra*.

181. 339 U.S. 306 (1950). In *Mullane* notice by publication was held insufficient in the absence of a reasonable attempt of notification by mail. The Court held that to comply with the requirements of due process, notice must be given in the way most likely to give the other party actual notice. Assuming *arguendo* that the requisite state action *was* present, then the due process clause would require the trustee to mail notice to the debtor rather than merely posting in three public places.

182. Section 2 of the 1975 amendatory act revising art. 3810 provided: "This Act shall become effective on January 1, 1976, and it shall apply only to sales made after that date." Ch. 723, § 2, [1975] Tex. Laws 2354.

183. *See, e.g.*, Winters v. Slover, 151 Tex. 485, 251 S.W.2d 726 (1952); Faine v. Wilson, 192 S.W.2d 456, 459 (Tex. Civ. App.—Galveston 1946, no writ).

debtor obligated to pay such debt" leaves unclear whether or not guarantors are within the class who are entitled to notice. The authors of this Article feel that guarantors probably are so entitled and that to avoid the possible discharge of the guarantors or the setting aside of the sale, a prudent trustee should send notice to each guarantor. Third, the statute requires that if notice is to be deemed effected as of the date of posting, it must be sent to a "debtor" at his "most recent address as shown by the records of the holder of the debt"; therefore, attorneys who represent their lending clients in foreclosure proceedings must check carefully with their clients to determine the "most recent address."

Several recent cases[184] have apparently settled the question of whether article 3810 involves state action sufficient to subject it to the due process requirements of the fourteenth amendment. Probably the most extensively documented of these decisions is Judge Wisdom's analysis in the Fifth Circuit's case, *Barrera v. Security Building & Investment Corp.*[185] In that case the court first distinguished action under article 3810 from those with direct involvement of the state, as found in *Fuentes v. Shevin*,[186] *D.H. Overmeyer Co. v. Frick Co.*,[187] *Swarb v. Lennox*,[188] and *Sniadach v. Family Finance Corp.*,[189] since under article 3810 no agent of the state is vested with any power and none has any obligatory function.[190] The court did recognize that the power of sale ultimately relies on the state's acknowledgment of the transfer of title, but concluded that to equate such acknowledgment with state action would result in virtually all private arrangements being subject to the due process clause. The court quickly disposed of the debtor's argument that the statute constitutes "significant state involvement" by noting that the state neither authorizes the power of sale nor codifies the right to contract for and to exercise that power; rather the statute merely *restricts* the exercise of those powers.[191] Relying on its decision in *James v.*

184. Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975); Hoffman v. HUD, 371 F. Supp. 576 (N.D. Tex. 1974), *aff'd*, 519 F.2d 1160 (5th Cir. 1975); Leisure Estates of America v. Carmel Dev. Co., 371 F. Supp. 556 (S.D. Tex. 1974); Carmel v. Federal Nat'l Mortgage Ass'n, Civ. No. CA-3-7158-L (N.D. Tex. 1973); Criss v. Federal Nat'l Mortgage Ass'n, Civ. No. CA-3-7044-E (M.D. Tex. 1975); Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). *See also* cases cited in notes 190, 196 *infra*.

185. 519 F.2d 1166 (5th Cir. 1975).

186. 407 U.S. 67 (1972).

187. 405 U.S. 174 (1972).

188. 405 U.S. 191 (1972).

189. 395 U.S. 337 (1969).

190. *But cf.* Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975). The applicable foreclosure statute vested the clerk with administration of upset bid provisions, approval of the disposition of the proceeds of sale, as well as the explicit verification of the essentials of the sale. The court characterized the procedure as "a streamlined version of a judicial sale, with the clerk exercising by detailed *statutory* authority many of the supervisory powers inherent in a court of equity." *Id.* at 1258.

191. This distinction is the crux of the state action question in self-help remedy statutes—whether the statute is permissive (*i.e.*, authorizing certain conduct) or whether the statute is restrictive (*i.e.*, restricting the manner of conduct which would be permissible in the absence of the statute). However, those reviewing the wording of questionable statutes should review the statute as a whole, and in context with common law rules, instead of relying exclusively on whether the statute is couched in permissive or restrictive language.

Pinnix,[192] the court then noted that the mere fact that a state has sought to regulate an activity does not in itself constitute state action. Finally, the court rejected the debtor's argument that foreclosure by sale is a judicial function, noting that non-judicial foreclosure under a power of sale in a deed of trust has been used and recognized for more than one hundred years.[193] The court in dictum noted that it did not mean to imply approval of the omission from the statute of any requirement of personal notice to the debtor, but that in the absence of state action, this was a matter for the state courts and legislatures.[194]

Similarly, in *Armenta v. Nussbaum*[195] a state court held that article 3810 did not involve "significant state action"[196] but rather was enacted for the protection of the debtor to curb abuses in the use of the power of sale provisions. The court analogized the article to UCC section 9-503, citing the fact that six federal circuits have sustained the constitutionality of the section on a finding of insufficient state action to raise the due process question.[197] The court concluded that for it to strike down the statute would leave the debtor with less protection than he presently enjoys.

Mortgages. While it is a well-established principle that a foreclosure sale will not be voided merely because the property was sold for a price well below fair market value,[198] three cases decided during the survey demonstrated that grossly inadequate prices will not be tolerated if there is even a slight irregularity in the sale. For example, in *Crow v. Heath*[199] the court noted that a $5,000 bid on property later sold by the bidder for $28,675 was grossly inadequate. The court then held that the standard notice of a trustee's sale is not sufficient notice to the debtor to make operative an optional acceleration clause[200] and that such absence of proper notice, when coupled with the inadequacy of the consideration, would be sufficient to set

192. 495 F.2d 206 (5th Cir. 1974).

193. *See, e.g.*, Hipp v. Hutchett, 4 Tex. 20 (1849). The court in *Barrera* distinguished Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), which had held a landlord's lien statute unconstitutional on the grounds that prior to the enactment of the statute, Texas had not recognized such a self-help remedy.

194. For an analysis of action by the Texas Legislature, see footnotes 178-83 *supra* and accompanying text.

195. 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

196. *Accord*, Bryan v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974); Coffey Enterprises Realty & Dev. Co. v. Holmes, 213 S.E.2d 882 (Ga. 1975); Federal Nat'l Mortgage Ass'n v. Howlett, 521 S.W.2d 428 (Mo. 1975).

197. 519 S.W.2d at 678, citing *e.g.*, James v. Pinnix, 495 F.2d 206 (5th Cir. 1974).

198. A bid of only 7.4% of the property value was held to be sufficient in American Sav. & Loan Ass'n v. Musick, 19 Tex. Sup. Ct. J. 105 (Dec. 17, 1975), *rev'g* 517 S.W.2d 627 (Tex. Civ. App.—Houston [14th Dist.] 1974), where the court found no irregularity in the sale. *See* Jefferson Standard Life Ins. Co. v. Elledge, 463 F.2d 639 (5th Cir. 1972) (sales price was barely more than one-third the alleged fair market value); Mitchell v. Foster, 492 S.W.2d 632 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.) (sales price was barely more than one-half the alleged fair market value). *See also* Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473, 475 (Tex. 1965) (the Supreme Court of Texas repeated the general rule that "mere inadequacy of consideration alone [a $1,200 purchase price when the alleged value of the property was $4,000] does not render a foreclosure sale void if the sale was legally and fairly made.").

199. 516 S.W.2d 225 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

200. *See* Lockwood v. Lisby, 476 S.W.2d 871 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

the sale aside.[201] And, in *Phillips v. Latham*[202] a court held that a bid of $691.43 for property worth at least $12,500 was so grossly inadequate that the purchaser was estopped from asserting that he was a good faith purchaser for value;[203] therefore, payments by the debtor to the original creditor were effective as against an assignee if made in good faith and without notice of the assignment.[204] Similarly, in an execution sale where the bid was only two percent of the value of the property and the judgment lien debtor had no notice of either the levy or the sale, the sale was set aside.[205] On the other hand, as was shown in *American Savings & Loan Ass'n v. Musick*,[206] where the trustee is an officer of the beneficiary a strict adherence to the literal language of the deed of trust for appointment of a substitute trustee may not be required even in a low bid situation. The Texas Supreme Court held that even though the deed of trust did not mention resignation as a ground for appointment of a substitute trustee,[207] the trustee's resignation constituted a refusal to act even though no request to act had been made of the trustee. Finally, as demonstrated in *Ross v. Brown*,[208] only those who are injured can complain of the inadequacy of the consideration despite evidence that an irregularity at the sale was responsible for the low price.[209] Another aspect of the *Ross* case was the court's application of the equitable doctrine of subrogation. The court held that where the third party had paid off the recorded lien it succeeded to the rights of the lienholder and, therefore, had an equitable lien on the property for that amount.[210]

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201. *See* Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473 (Tex. 1965); Crow v. Davis, 435 S.W.2d 176 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.).

202. 523 S.W.2d 19 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

203. *Accord*, Nichols-Steuart v. Crosby, 87 Tex. 443, 453, 29 S.W. 380, 382 (1895); Hume v. Ware, 87 Tex. 380, 383, 28 S.W. 935, 936 (1894); *cf.* Hopper v. Tancil, 3 S.W.2d 67, 70 (Tex. Comm'n App.—1928, jdgmt adopted).

204. *Accord*, Olshan Lumber Co. v. Bullard, 395 S.W.2d 670, 672 (Tex. Civ. App.—Houston 1965, no writ).

205. Pantaze v. Slocum, 518 S.W.2d 407 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.).

206. 19 Tex. Sup. Ct. J. 105 (Dec. 19, 1975).

207. In the discussed case the deed of trust also failed to contain the common "for any other reason" language as grounds for the appointment of a substitute trustee.

208. 396 F. Supp. 192 (E.D. Tex. 1975).

209. In the reported case land worth $7,500 was sold at execution for $100 but neither the judgment debtor nor the creditor complained; rather, a third party who had paid off a prior lien subsequent to the judgment sought to have the sale set aside. However, the third party's own witness had testified that the land was worth less than the judgment so the possibility of the land's being worth more than the judgment was considered by the court as being too remote to set the sale aside. *Id.* at 195-96.

210. Normally an equitable lien does not arise where the grantee pays off an underlying indebtedness encumbering the property. Rather the lien arises to prevent unfairness according to the general rules of equity. A common situation is an implied vendor's lien where none has been reserved and where there is no deed of trust in favor of the vendor. The *Ross* case presents a rather unique factual situation in which the court found the equitable lien doctrine applicable. *Cf.* Hurt v. Read, 108 F.2d 282 (5th Cir. 1939); Harrison v. First Nat'l Bank, 238 S.W. 209 (Tex. Comm'n App. 1922, jdgmt adopted); McDermott v. Steck Co., 138 S.W.2d 1106 (Tex. Civ. App.—Austin 1940, writ ref'd); Ricketts v. Alliance Life Ins. Co., 135 S.W.2d 725 (Tex. Civ. App.—Amarillo 1939, writ dism'd jdgmt cor.); Meador v. Wagner, 70 S.W.2d 794 (Tex. Civ. App.—El Paso 1934, writ dism'd); 53 TEX. JUR. 2d *Subrogation* § 41 (1964). *See also* Murphy v. Smith, 50 S.W. 1040 (Tex. Civ. App. 1899).

The case of *Vaughn v. Crown Plumbing & Sewer Service, Inc.*[211] involved an action by an owner to enjoin a foreclosure sale by its mortgagee. In that case the mortgagee had for several months accepted mortgage payments even though tendered a few days late; however, in one particular month the mortgagee without prior warning sent notice of acceleration on the fourth day of the month when the mortgage payment had not been received. The following day the owner tendered a cashier's check in the amount of the monthly installment, but the mortgagee refused to accept it. The court held that the mortgagee's past practice in accepting late payments created an issue as to whether he had waived his optional right of acceleration with respect to installments subsequently coming due, absent some notice that short delays were objectionable and that future installments should be timely paid.[212] An additional issue considered by the *Vaughn* court, and one apparently of first impression in this state, was the mortgagee's claim that the mortgage (which had been executed by the owner's predecessor and which contained a "future-advance" clause[213]) secured the payment of another note executed by the predecessor to the mortgagee *after* the date of the sale to the owner, and that the predecessor's default under this second note constituted a legal basis for foreclosure under the deed of trust. Without citing any authority, the court held that although the mortgage may have placed the owner on notice of debts incurred by its predecessor *prior* to the sale in which the owner obtained the property, it was certainly not notice of a note executed *after* the date of the sale; therefore, the "future advance" clause was ineffective as to such later debts.[214]

211. 523 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

212. *Accord,* Miller v. A-OK Motel Inc., 511 S.W.2d 620 (Tex. Civ. App.—Fort Worth 1974, no writ). *See also* Diamond v. Hodges, 58 S.W.2d 187, 188 (Tex. Civ. App.—Dallas 1933, no writ) quoting San Antonio Real Estate Bldg. & Loan Ass'n v. Stewart, 94 Tex. 441, 447, 61 S.W. 386, 389 (1901).

213. This clause, sometimes also referred to as a "dragnet" clause, recites that the deed of trust secures the payment of all other indebtedness (including future indebtedness) of the mortgagor/maker of the note or, sometimes less precisely, of any mortgagor of the property to the mortgagee.

214. Three general comments may be helpful to the understanding of "future-advance" or "dragnet" clauses. First, Texas, like most other states, recognizes that a mortgage can secure both contemporaneous advances and future advances, when the future advances are *clearly contemplated* by the original loan documents. *See generally* 3 G. GLENN, MORTGAGES §§ 392-400.1 (1943); 3 R. POWELL, REAL PROPERTY § 442 (1974).

Second, Texas, like most other states, will not recognize a blatant "dragnet clause" if the future advance was not "reasonably within the contemplation of the parties to the mortgage at the time it was made." Wood v. Parker Square State Bank, 400 S.W.2d 898 (Tex. 1966). *See also* Moss v. Hipp, 387 S.W.2d 656 (Tex. 1965). However, Texas does appear to have a rather lenient interpretation of "reasonably within the contemplation of the parties." *See* Estes v. Republic Nat'l Bank, 462 S.W.2d 273 (Tex. 1970). Unfortunately, the Court in the *Estes* decision did not discuss its prior *Wood* decision and thereby missed an opportunity to lay down guidelines; nevertheless, the peculiar facts in the *Wood* decision and the fact that it preceded the *Estes* decision strongly suggest that an attorney representing a borrower or a purchaser of land encumbered by a "dragnet" mortgage might well ignore the former case entirely.

Third, Texas appears to be in the minority of states which give priority to an original mortgage even when, after a junior mortgage attaches to the property, the original mortgagee makes an *optional* future advance (which, of course, must still have been "reasonably within contemplation" per the second consideration above). The most concise general statement of this consideration is found at 3 G. GLENN, *supra,* §§ 401-02. *But see* Annot., 138 A.L.R. 566 (1942), for a more thorough treatment. Note especially

In *Furman v. Sanchez*[215] the court, extending the holding of *Pearce v. Stokes*[216] to cover executory land sales contracts, held that upon death of the intestate vendee the vendee's equitable rights, title, and interests in the property could not be cancelled without an administration of the deceased's estate or the expiration of the statutory period in which an administration could be ordered. Thus, even though no administration was taken out for almost two years, during which period none of the delinquent installment payments were paid, and despite the ultimate administrator's knowledge of the delinquency, a subsequent sale to a new vendee was set aside. To one who is unfamiliar with the Texas Probate Code, the *Furman* case may appear to place vendors and mortgagees in a helpless situation. However, section 76 of the Probate Code allows any "interested person" to make an application for the appointment of an administrator, and under section 3(r) interested person includes "creditors, or any others having a property right in or claim against, the estate."[217] Therefore, a vendor or mortgagee can request that administration be taken out at an earlier date.

An example of debtor delay tactics in foreclosure contests is found in *Riverdrive Mall, Inc. v. Larwin Mortgage Investors*,[218] where the court, after assuming without deciding that article 1823[219] empowers the court to grant an injunction without requiring a bond, held that the equities of the case required the posting of a bond in the granting of an injunction to enjoin and to restrain the substitute trustee from conducting a foreclosure sale prior to the disposition of the appeal. And the case of *Pendleton Green Associates v. Anchor Savings Bank*[220] demonstrates the potential delay value of

pp. 576-77 of the annotation which discuss the "minority doctrine" of optional future advances. A recent analysis of Texas law in this area was undertaken by the court of civil appeals in the *Wood* case discussed above. *See* Wood v. Parker Square State Bank, 390 S.W.2d 835 (Tex. Civ. App.—Fort Worth 1956), *rev'd*, 400 S.W.2d 898 (Tex. 1966). It appears significant that although the supreme court reversed the court of civil appeals in that case, it did not challenge "the *Frieberg* rule" of optional future advances (*i.e.*, the Texas rule, based upon the holding in Frieberg v. Magale, 70 Tex. 116, 7 S.W. 684 (1888)) which the lower court had followed (with some reluctance, as shown in the last paragraph of the decision of the lower court). Instead, the supreme court reversed on the applicability of the "dragnet clause" and, in fact, seemed to add modern respectability to the nineteenth century *Frieberg* case by citing it favorably and then merely distinguishing it on the facts of the *Wood* case. *See also* Coke Lumber & Mfg. Co. v. First Nat'l Bank, 529 S.W.2d 612 (Tex. Civ. App.—Dallas 1975, writ ref'd) (citing *Frieberg* as authority for its holding that a deed of trust to secure future advances, if filed prior to a materialman's lien, has priority even with respect to advances made with actual notice of the materialman's lien); Crabb v. William Cameron & Co., 63 S.W.2d 367, 368 (Tex. Comm'n App. 1933, jdgmt adopted); Poole v. Cage, 214 S.W. 500, 502 (Tex. Civ. App.—Galveston 1919, writ ref'd).

215. 523 S.W.2d 253 (Tex. Civ. App.—San Antonio 1975, no writ).

216. 155 Tex. 564, 291 S.W.2d 309 (1956). The Texas Supreme Court held that a sale of realty made under a deed of trust after the death of a grantor does not pass title pending administration. *Accord*, Cole v. Franklin Life Ins. Co., 93 F.2d 620 (5th Cir. 1937); American Sav. & Loan Ass'n v. Jones, 482 S.W.2d 62 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

217. TEX. PROB. CODE ANN. §§ 3(r), 76 (1956).

218. 515 S.W.2d 2 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

219. TEX. REV. CIV. STAT. ANN. art. 1823 (1964). The statute gives the court the power to grant a temporary injunction to preserve the subject matter of the litigation pending appeal from an order by the trial court denying a temporary injunction. *See generally* Sales & Cliff, *Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals*, 26 BAYLOR L. REV. 501, 535 (1974).

220. 520 S.W.2d 579 (Tex. Civ. App.—Corpus Christi 1975, no writ).

an appeal from an order denying the debtor's request for a temporary injunction to restrain a foreclosure sale. Although the debtors in this case lost in both the trial and appellate courts, their procedural tactics caused at least a three-month delay of the foreclosure sale.

At least two aspects of *Pine v. Gibraltar Savings Ass'n*[221] are worthy of note. First, the case should provide to those developers seeking loan commitments the caveat as to the required specificity of the commitment in order for it to be enforceable as a binding contract. Second, the court held that water and sewer lines not included in the loan security were appurtenances to the property foreclosed upon and title to them passed to the mortgagee upon foreclosure.[222] Finally, the court in *Associates Financial Services of Texas, Inc. v. Solomon*[223] held that a landlord's lien perfected prior to the filing of a financing statement was superior to a purchase money security interest. Quoting from the "Secured Transactions" section of *Texas Jurisprudence 2d*, the court reiterated that "if the security interest is perfected with respect to the property *after it is on the premises* the landlord's lien should be superior."[224] The statement seems to stand for the proposition that a landlord's lien will be superior regardless of whether he perfects before the filing or perfection by the creditor as long as the creditor fails to perfect by the time the personal property is placed on the premises.

Mechanics' and Materialmen's Liens. The 1974 supreme court decision in *First National Bank v. Whirlpool Corp.*[225] was followed during the survey

221. 519 S.W.2d 238 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). The court held that a construction loan commitment providing that the lender would lend the developer at "prevailing market rates" and "industry standards" any moneys needed within a three-year period to construct houses on certain specified lots (with the lender reserving the right to reject any plans) constituted no more than an agreement to agree. The court cited the absence of any agreement as to the total amount to be loaned, when and how the principal was to be paid, when and how the interest was to be paid, the ratio of loan to appraisal value, or when the loans would mature. With regard to the alleged permanent loan commitment, the court found the lender's power to change the loan premium and to turn down loans to potential home buyers to be fatal to enforceability. In connection with the problems represented by this case, the authors of this Article have been particularly impressed with the following observations voiced at a 1967 Practicing Law Institute program in New York City:

> Chairman Glassner [Herman M. Glassner, a well-known New York City attorney and a co-chairman of the program]: I really felt after reading the average commitment, and I have read many of them just as other lawyers have drawn many, that there are many loopholes that would permit a lender to avoid the obligation. Perhaps in the final analysis the commitment itself is worth no more than the name of the lender at the top of the page. In other words, what one is doing in effect is relying on the good faith of the lender to go through with the loan.

REAL ESTATE FINANCING: BUSINESS AND LEGAL CONSIDERATIONS § 4.29 (1968).

222. The question of what constitutes an appurtenance to realty is not an entirely settled question. The court defined appurtenance to mean "all rights and interest in other property necessary for the full enjoyment of the property conveyed and which were used as necessary incidents thereto." 519 S.W.2d at 241. *See also* Hancox v. Peek, 355 S.W.2d 568, 569 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

223. 523 S.W.2d 722 (Tex. Civ. App.—Waco 1975, no writ).

224. *Id.* at 724, citing 51 TEX. JUR. 2d *Secured Transactions* § 265 (1970).

225. 517 S.W.2d 262 (Tex. 1974), *discussed in* Wallenstein (1975) at 48-49. The supreme court held that with respect to the dishwashers and disposals which the supplier had installed, but not with respect to the refrigerators and ranges, the supplier was entitled to a mechanics' lien in preference to a prior-recorded mortgage. Inasmuch as each disposal and dishwasher had been physically fastened to the adjacent wall, principally through the use of screws, the court found a sufficient incorporation in the realty to

year in *Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc.*,[226] where the court held that air conditioning and heating systems were incorporated into the realty within the meaning of the mechanics' and materialmen's lien statutes and the mechanics' and materialmen's liens perfected on such equipment were superior to a prior recorded vendor's deed of trust lien because the units could be removed from the structures without damage. A contrary result followed the court's finding that cabinets which had been installed could not be removed without damage to the real estate.

In *Corpus Christi Bank & Trust v. Smith*[227] the Texas Supreme Court failed to find sufficient evidence to sustain the contention of subcontractors and materialmen that they were entitled to contractual retainage funds as third party beneficiaries under the construction contract.

In *Red Henry Painting Co. v. Bank of North Texas*[228] the court held that article 5472e,[229] the trust fund provision, by its express terms applies only to the recovery of funds under a construction contract for the improvement of specific real property within the state and does not apply to general contracts or to claims based upon quantum meruit.

In *Da-Col Paint Manufacturing Co. v. American Indemnity Co.*,[230] involving an action against a surety on a prime contractor's bond by the supplier of a subcontractor, the Texas Supreme Court held that, where the sham contractor statute[231] is applicable, compliance with the notice requirements of article 5453[232] can be met simply by notifying the owner. Additionally, the court held that even though the subcontractor was elevated by operation of law to the status of an original contractor, the supplier of the subcontractor could still recover on the bond of the sham original contractor. To deny recovery, reasoned the court, would be to the advantage of the owner and sham contractor, thus defeating the purpose of the sham contractor statute.[233]

Miscellaneous. In *Plantation Foods, Inc. v. R.J. Regan Co.*[234] the court,

give rise to the statutory mechanics' lien. However, no mechanics' lien was deemed available with respect to the refrigerators and ranges since their only connection to the realty was the plug into the electrical wall outlet.

226. 517 S.W.2d 593 (Tex. Civ. Avp.—Waco 1974, no writ).

227. 525 S.W.2d 501 (Tex. 1975), *rev'g in part* 512 S.W.2d 761 (Tex. Civ. App.—Corpus Christi 1974). The appellate court decision along with several other cases dealing with the effect of Texas' mechanics' lien laws on *voluntary* protection contracted for the benefit of subcontractors is discussed in Wallenstein (1975) at 51-52. *See also* Citizens Nat'l Bank v. Texas & P. Ry., 136 Tex. 333, 150 S.W.2d 1003 (1941); Scarborough v. Victoria Bank & Trust Co., 250 S.W.2d 918 (Tex. Civ. App.—San Antonio 1952, writ ref'd).

228. 521 S.W.2d 339 (Tex. Civ. App.—Corpus Christi 1975, no writ).

229. TEX. REV. CIV. STAT. ANN. art. 5472e (Supp. 1975-76). The statute declares funds borrowed for the improvement of real property to be trust funds. *See* Youngblood *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665 (1972).

230. 517 S.W.2d 270 (Tex. 1974).

231. TEX. REV. CIV. STAT. ANN. art. 5452-1 (Supp. 1975-76).

232. *Id.* art. 5453. The statute sets forth the general requirements for securing a lien, including a requirement of notice to both the owner and the prime contractor.

233. Earlier cases denying recovery to materialmen of an original contractor based upon the bond of another original contractor were distinguished since in those cases the second original contractor became such by directly contracting with the owner and, therefore, was not vulnerable to deception. 517 S.W.2d at 273.

234. 520 S.W.2d 432 (Tex. Civ. App.—Waco 1975, no writ).

while reciting the well-established principle that when parties to a building contract agree to submit questions which may arise thereunder to the decision of an architect or engineer, his decision is binding upon such parties absent fraud, misconduct, or gross mistake implying bad faith or failure to exercise honest judgment, failed to note the distinction between arbitration and appraisement.[235] Whereas a provision for appraisement will be enforceable, a provision in an executory contract for arbitration will be unenforceable as against public policy.[236]

In a case of considerable tactical importance to real estate investment trusts, *Larwin Mortgage Investors v. Riverdrive Mall, Inc.*,[237] a federal district court held that a real estate investment trust may not be treated as a single entity for the purpose of determining the existence of federal diversity jurisdiction, and that the citizenship of all holders of beneficial interests, not that of the trustee, is determinative. The court noted that its order might create a barrier to federal diversity jurisdiction of actions in which real estate investment trust litigants are involved.

Lenders and developers are no doubt aware of the fact that since July 1, 1975, the Flood Disaster Protection Act of 1973[238] has precluded federally related financing assistance for acquisition of or construction on real estate subject to special flood hazards unless the "community" is participating in the national flood insurance program.[239] Guidelines for interpreting this Act are available in the Federal Register.[240] Finally the new Equal Credit Opportunity Act[241] now prohibits a lender from discriminating on the basis of the sex or marital status of a credit applicant. Recent regulations allowing the signature of a spouse only if "uniformly required," suggest that in light of the prohibition of discrimination on the basis of marital status, the term "uniformly required" may be interpreted to mean that if the lender requires two signatures for a married borrower the lender must also require two signatures if the person is single. A lender is permitted under an exception in the statute to inquire as to the marital status of the credit applicant if solely for purposes of "ascertaining the creditor's rights and remedies applicable to the particular extension of credit."[242] This should provide some relief to a lender who seeks to foreclose on a homestead or other property in a community property jurisdiction such as Texas, where the signatures of both spouses are necessary to convey the homestead.

235. *But see* Huntington Corp. v. Inwood Constr. Co., 348 S.W.2d 442 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.).

236. For an excellent and comprehensive analysis of the Texas case law concerning arbitration see Tejas Dev. Co. v. McGough, Bros., 165 F.2d 276, 280 (5th Cir. 1947). *See also* Carrington, *The 1965 General Arbitration Statute of Texas*, 20 Sw. L.J. 21 (1966).

237. Civ. No. 74-L-23 (S.D. Tex., April 21, 1975).

238. Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, *amending* 42 U.S.C. ch. 50 (codified in scattered sections of 42 U.S.C.A. (Supp. 1976)).

239. *Id.*, 42 U.S.C. § 4106(a) (Supp. IV, 1970).

240. 39 Fed. Reg. 26186 (1974). For further information contact either the National Flood Insurers Ass'n, 160 Water Street, New York City, N.Y., 10038, telephone (212) 487-5661, the nearest HUD Regional Office, or the Federal Insurance Administration, HUD, Washington, D.C., (202) 755-8872 or (800) 424-8873.

241. 15 U.S.C. § 1691 (Supp. IV, 1970).

242. *Id.*

IV. LANDLORD-TENANT

During the survey year the Texas Supreme Court handed down two decisions in the landlord-tenant area. In *Oram v. General American Oil Co.*[243] the court held that a landlord's acceptance of rental payments after being restored to sound mind constituted ratification of the lease and had the effect of waiving or abandoning any right of rescission or attack upon any alleged initial invalidity. In *Big Country Homes, Inc. v. Christianson*[244] the denial of a temporary injunction requiring the landlord to make available possession of four mobile homes which the landlord had summarily seized for non-payment of rent and for damages was held not to be an abuse of discretion where a temporary order restraining the landlord from disposing of or encumbering the four houses had been granted.

The constitutionality of two prejudgment landlord remedies came under attack this past year, with neither of them passing muster in the courts' eyes because of the due process clause of the fourteenth amendment. In *Stevenson v. Cullen Center, Inc.*[245] the court held the Texas Rules of Civil Procedure relating to distress warrants[246] constitutionally deficient. The court examined the United States Supreme Court decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[247] noting three variables which had been given emphasis by the Supreme Court in that case: (1) a judge's participation in the process, (2) the specificity of the allegations contained in the affidavits which the judge relied upon in deciding whether to issue the writ, and (3) the availablity of an immediate hearing after seizure to determine the validity of the creditor's claims in an adversary setting. The court found the Texas rules to be inadequate with regard to the last two requirements. First, rule 610 makes no provision "for an affidavit which goes beyond mere conclusory allegations or which clearly sets out the facts entitling the creditor to his relief."[248] Second, no immediate post-seizure hearing is

243. 513 S.W.2d 533 (Tex. 1974).

244. 519 S.W.2d 845 (Tex. 1975), *aff'g* 513 S.W.2d 600 (Tex. Civ. App.—Eastland 1974). For a lengthier discussion of this case and other related cases see Wallenstein (1975) at 65-66.

245. 525 S.W.2d 731 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

246. TEX. R. CIV. P. 610-20. The distress warrant statute can be found at TEX. REV. CIV. STAT. ANN. art. 5239 (1962).

247. 419 U.S. 601 (1975). *North Georgia Finishing* represents the fourth case in the United States Supreme Court's tetralogy on procedural due process, along with Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972), and Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Many commentaries have been written analyzing these decisions and their impact on Texas statutes and no doubt many more will continue to be written. *See, e.g.*, Anderson & L'Enfant, *Fuentes v. Shevin: Procedural Due Process and Louisiana Creditor's Remedies*, 33 LA. L. REV. 62 (1972); Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Hughes, *Creditors' Self-Help Remedies Under UCC Section 9-503: Violative of Due Process in Texas?*, 5 ST. MARY'S L.J. 701 (1973); Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEX. TECH L. REV. 23 (1972); Schmitt & Peck, *Self-Help Repossession—The Recurring Problems of Section 9-503 of the Uniform Commercial Code*, 80 COM. L.J. 223 (1975); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975); 7 ST. MARY'S L.J. 613 (1975); 7 ST. MARY'S L.J. 423 (1975); 29 SW. L.J. 884 (1975); 29 SW. L.J. 660 (1975); 9 SUFFOLK U.L. REV. 756 (1975).

248. Stevenson v. Cullen Center, 525 S.W.2d 731, 734 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). In this particular case the affidavit did set out specific

prescribed in the rules; in fact, no adversary proceeding is available until the case is tried on its merits after progressing through the normal docketing procedures. The due process clause also proved fatal to the new residential landlord's lien statute[249] in *Fancher v. Cronan*,[250] an unreported federal district court case (which, however, the authors of this Article understand to be in the process of being withdrawn). In *Fancher* the court held that regardless of the provisions of a written lease agreement, seizure by a landlord of a tenant's property without providing the tenant with prior notice and an opportunity for a hearing is violative of the fourteenth amendment. The court apparently ignored the language of article 5236d, section 5, which *limits* self-help seizure to that done pursuant to a written contractual agreement, and held that the new article, like its predecessor[251] (struck down in *Hall v. Garson*[252]), authorizes state-like action by allowing the landlord to remove the tenant's property without prior notice or hearing. The court seized upon the somewhat dubious distinction which formed the basis of two recent Fifth Circuit cases[253] upholding section 9-503 of the Uniform Commercial Code—that section 9-503 is concerned with repossession of goods the purchase of which created the debt, while the landlord's lien statute deals with the seizure of property which has nothing to do with the creation of the debt.[254] Once the court had answered in the affirmative that the requisite state action was present, it went on to find that the *Mitchell v. W.T. Grant Co.*[255] decision had no application to a landlord's lien situation on the ground that here the landlord had no legally recognized interest in the property, as opposed to the interest of the seller in a seller-purchaser relationship.[256] Finally, because of the absence of proof, the court rejected the argument by the State of Texas as intervenor that the agreement constituted a valid contractual waiver of a known right.[257]

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facts entitling the creditor to relief; however, the court implied that this was insufficient where the rule itself makes no such requirement.

249. TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1975-76).

250. Civ. No. 75-H-179 (S.D. Tex., July 3, 1975). *See generally* 7 ST. MARY'S L.J. 613 (1975).

251. Ch. 686, [1969] Tex. Laws 2008 (repealed 1973).

252. 468 F.2d 845 (5th Cir. 1972).

253. Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974).

254. This purchase-money distinction would appear to be vulnerable for at least two reasons. First if a Uniform Commercial Code security interest can be created in situations other than a purchase-money financing transaction, the courts may have painted themselves into a corner by having adopted a rationale which would require invalidation of those section 9-503 security interests which are not purchase-money security interests. Second, the Uniform Commercial Code itself, in refusing to recognize so-called "conditional sales" as being other than security interests, seems to reject the foundation for the distinction (the purchase-money security interests should be elevated to a special class for purposes of validating self-help remedies). *See* UNIFORM COMMERCIAL CODE § 9-105, Comment 1.

255. 416 U.S. 600 (1974).

256. Again, this argument is weak. A lien *is* a legally recognized interest in property.

257. The court applied the *Fuentes* test that for a waiver to constitute an "intentional relinquishment or abandonment of a known right or privilege," the waiver must appear in type commensurate with the rest of the contract, must be bargained for on a status of full and equal understanding of its meaning, and must be accompanied either by an explanation of its impact or a specific description of what is in fact being waived. The *Fancher* court noted that the waiver was part of a printed standard form and was a

As a final installment in the landlord-tenant "due process trilogy," three assaults were mounted against the forcible entry and detainer statute.[258] In *McCray v. Good*,[259] the only *unsuccessful* constitutional attack of the three, the court held that where the tenant was given written notice and opportunity to be heard with counsel before a judicial tribunal prior to eviction, he was not denied due process. In response to the other two cases (both unreported)[260] the only two apparent constitutional infirmities of the statute and associated rules[261] were "cured" during the survey year by amendment of the "immediate possession" rule[262] and the "appeal bond" rule.[263] In *Carroll v. Knickerbocker*[264] the court held rule 740 unconstitutional as violative of due process. Rule 740 required the defendant, upon the execution of a bond by the plaintiff, to execute a counterbond in double the amount of the plaintiff's bond within six days of service to remain in possession. The amended rule, apparently modeled to conform with the United States Supreme Court decision in *Lindsey v. Normet*,[265] which upheld an Oregon forcible entry and wrongful detainer statute,[266] now allows the defendant either to post a counterbond in an amount fixed by the justice of the peace within six days of service or to demand trial be held prior to the expiration of the six-day period.[267] In *Compton v. Naylor*[268] the court held rule 750 unconstitutional in that it constituted an open-ended bond by the sureties. The new rule allows the inclusion of a fixed ceiling as to the liabilities of the sureties.

Although not imbued with novel legal implications, two cases should prove worthy reading for any attorney representing shopping center developers. In *Avnsoe v. Square 67 Development Corp.*[269] a shopping center tenant sought damages against a landlord, alleging that cancellation of the lease was authorized because of the landlord's failure substantially to complete a building on the date specified in the lease contract. The court, in reversing

necessary condition for rental. *See generally* Anderson, *A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver*, 79 CASE & COMMENT 24 (1974).

258. TEX. REV. CIV. STAT. ANN. art. 3973 (1966).

259. 384 F. Supp. 604 (S.D. Tex. 1974).

260. Carroll v. Knickerbocker, Civ. No. 3-74-241-B (N.D. Tex., Aug. 28, 1975), *dismissed as moot*; Compton v. Naylor, Civ. No. 3-74-1013-B (N.D. Tex., Aug. 28, 1975), *dismissed as moot.* Both cases were dismissed following the amendment of rule 740.

261. TEX. R. CIV. P. 738-55.

262. TEX. R. CIV. P. 740.

263. TEX. R. CIV. P. 750.

264. Civ. No. 3-74-241-B (N.D. Tex., Aug. 28, 1975), *dismissed as moot, consolidated with* Salazar v. Amco Management Co., Civ. No. 3-74-415-B (N.D. Tex., Aug. 28, 1975), *dismissed as moot. See also* Wesley v. Colonial Tepeyac Apts., Civ. No. 3-74-687-B (N.D. Tex., Aug. 28, 1975), *dismissed as moot.*

265. 405 U.S. 56 (1972).

266. ORE. REV. STAT. §§ 105.105-.160 (1974). The only provisions that the Court refused to uphold was the requirement that to appeal the tenant was required to post a double bond which was automatically forfeited to the landlord if the landlord prevailed on appeal.

267. TEX. R. CIV. P. 740(b), (c).

268. Civ. No. 3-74-1013-B (N.D. Tex., Aug. 28, 1975), *dismissed as moot, consolidated with* Lary v. Richburg, Civ. No. 3-74-909-B (N.D. Tex., Aug. 28, 1975), *dismissed as moot.*

269. 521 S.W.2d 874 (Tex. Civ. App.—Eastland 1975, no writ).

the trial court, held that as a matter of law, the failure of the landlord to pave a small triangular area contemplated as a parking area adjacent to the proposed building constituted a deliberate departure from a material stipulation in the contract and remanded the case for the determination of the tenant's damages. The danger of failing to act timely on a lease provision was illustrated in *Cox's Bakeries of North Dakota, Inc. v. Homart Development Corp.*,[270] in which a tenant sought damages for wrongful eviction and conversion of personal property by the landlord, who counterclaimed for the balance due on a promissory note and for accrued rent. The court held that because the landlord had waived its right to terminate the tenant's possession in October, the right to terminate in November would not be enforceable without notice to the tenant that the landlord did intend to evict.[271] The court also concluded that if the landlord's padlocking of the premises constituted wrongful eviction, then the tenant would have a cause of action for conversion and could receive damages for the value of the property so taken.

While continuing to scrutinize the claims of landlords, the courts in actions for rents by landlords demonstrated a willingness to find for the landlord in appropriate cases.[272] The trend mentioned in the 1974 Property Article[273] of courts' looking at the intent of the *landlord* in determining what constitutes the landlord's acceptance of the tenant's surrender of the lease[274] appears to be continuing, as demonstrated in *Evans Young Wyatt, Inc. v. Hood & Hull Co.*,[275] where the court held that for a lease to terminate as a matter of law upon surrender and acceptance of the premises there must have been an agreement to such effect by the parties, and such a determination is for the trier of fact.[276] One federal court also dealt with the question of surrender

270. 515 S.W.2d 326 (Tex. Civ. App.—Dallas 1974, no writ).

271. This case illustrates the importance of having a nonwaiver clause in the lease, which would have prevented the problem in the first place.

272. Williams v. Kaiser Aluminum & Chem. Sales, Inc., 396 F. Supp. 288 (N.D. Tex. 1975); Evans Young Wyatt, Inc. v. Hood & Hall Co., 517 S.W.2d 313 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.); Bevill v. Brakatselos, 516 S.W.2d 209 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); Hansen v. Ken Stoepel Ford, Inc., 515 S.W.2d 1 (Tex. Civ. App.—San Antonio 1974, no writ).

273. Wallenstein (1974) at 61-62.

274. Various jurisdictions have held at least three different standards. One group of courts has held that surrender by operation of law is purely a matter of mutual intent and thus a factual determination in each case. A second group has held that no surrender by operation of law occurs if the landlord merely notifies the tenant that he is attempting to relet on the tenant's behalf. A third group has held that upon the landlord's reletting, regardless of intent, surrender occurs by operation of law. Texas has always been considered as being in the first group, although some cases have suggested that the courts might be moving to embrace the second standard. Recent cases as noted in the text, however, indicate that Texas is still in the first group. For commentary on when a landlord's reletting or efforts to relet after the tenant's abandonment or refusal to enter will be deemed acceptance of the surrender see Annot., 3 A.L.R. 1080 (1919); Annot., 52 A.L.R. 154 (1928); Annot., 61 A.L.R. 773 (1929); Annot., 110 A.L.R. 368 (1937).

275. 517 S.W.2d 313 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

276. *Id.* at 315, citing, *e.g.*, Arrington v. Loveless, 486 S.W.2d 604 (Tex. Civ. App.—Fort Worth 1972, no writ). *See also* Updegraff, *The Element of Intent in Surrender by Operation of Law*, 38 HARV. L. REV. 64 (1924); Comment, *The Landlord's Duty To Mitigate by Accepting a Proffered Acceptable Sub-Tenant—Illinois and Missouri*, 10 ST. LOUIS U.L.J. 532 (1966); Comment, *Lease Drafting and Surrender by Operation of Law*, 41 TEXAS L. REV. 428 (1963).

and mitigation of damages. In *Williams v. Kaiser Aluminum & Chemical Sales, Inc.*[277] the court noted that under Texas law there is no general obligation on the part of the landlord to mitigate damages by procuring a new or substitute tenant when confronted with an abandonment by a tenant,[278] but that a duty to mitigate is imposed once the landlord has re-entered the premises[279] (with the burden to show that losses could have been avoided by reasonable effort falling on the one who caused the breach[280]). The court found that the action of the landlord in making extensive renovations and attempting to re-lease the space at a rent higher than the lease rent constituted a re-entry as a matter of law.[281] In *Hansen v. Ken Stoepel Ford, Inc.*[282] the court held that the period of limitations under article 5527 in a suit for rent under a lease providing that the rent was payable in advance on the first of each month began to run on the day that the rent was due.

A reminder to attorneys to make clear for whose benefit a specific provision is written is contained in *Taco Boy, Inc. v. Redelco Co.*,[283] in which the court, rejecting a unique argument by the tenant suggesting that he was relieved of his lease obligations because the lease contract provided for termination of the lease on non-payment of rent, held that because the provision was obviously for the benefit of the lessor, he alone had the right of terminating the lease on such breach.[284] Another caveat is found in *Ferrari v. Bauerle*,[285] a case whose appeal may not be limited to its legal significance. In *Ferrari* the court held that a permitted use clause in a lease, allowing the tenant to engage only in "traffic in foods and beverages," did not permit live entertainment, which in the particular case consisted of topless female dancers.[286] While not particularly sympathetic to the lessee's particular selection of live entertainment, the dissent argued that the trial court's injunction should be modified so as not to prevent the "usual and customary entertainment" found in supper clubs.[287]

277. 396 F. Supp. 288 (N.D. Tex. 1975).

278. *Id.* at 292, citing, *e.g.*, Marathon Oil Co. v. Edwards, 96 S.W.2d 551 (Tex. Civ. App.—Amarillo 1936, writ dism'd). *See generally* Annot., 21 A.L.R.3d 534 (1968).

279. 396 F. Supp. at 292-93, citing, *e.g.*, Evons v. Winkler, 388 S.W.2d 265, 269-70 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.). *But see* Employment Advisors, Inc. v. Sparks, 364 S.W.2d 478 (Tex. Civ. App.—Waco), *writ ref'd n.r.e.*, 368 S.W.2d 199 (1963) (per curiam). *See also* Early v. Isaacson, 31 S.W.2d 515 (Tex. Civ. App.—Amarillo 1930, writ ref'd).

280. 396 F. Supp. at 293, citing Polis v. Alford, 273 S.W.2d 79, 80 (Tex. Civ. App.—San Antonio 1954, writ ref'd). For a discussion of what constitutes re-entry see Annot., 21 A.L.R.3d 534 (1968).

281. 396 F. Supp. at 293-94. The court noted that an effort at seeking market rental value is not in itself fatal to a contention of no re-entry. *Id.* at 294, citing *In re* Garment Center Capitol, 93 F.2d 667 (2d Cir. 1938).

282. 515 S.W.2d 1 (Tex. Civ. App.—San Antonio 1974, no writ).

283. 515 S.W.2d 319 (Tex. Civ. App.—Corpus Christi 1974, no writ); *cf.* Pendleton Green Associates v. Anchor Sav. Bank, 520 S.W.2d 579 (Tex. Civ. App.—Corpus Christi 1975, no writ).

284. The case provides a lesson for those drafting leases to be sure to specify for whose benefit a certain provision is to be operative.

285. 519 S.W.2d 144 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

286. "We conclude that the common and ordinarily accepted meanings of the rather prosaic terms, 'bakery and associated purposes' and 'traffic in food and beverages' do not encompass, and may not be so stretched to encompass the trooping of partially clad females." *Id.* at 147.

287. *See also* Butts v. Somers, 441 S.W.2d 288 (Tex. Civ. App.—El Paso 1969, no

In *State National Bank v. United States*[288] the Fifth Circuit, defining a lease as a transfer of an interest in and possession of property for a prescribed period of time in exchange for an agreed consideration called "rent," held that where an agreement possessed sufficient characteristics of both a lease and a management agreement, whether payments under the agreement were tax exempt rent or unrelated business rent was a question of fact. In *Teague v. Roper*[289] the court held that the same elements necessary to remove a parol sale from the operation of the statute of frauds[290] were necessary to remove a parol lease from its operation, namely (1) payment of consideration whether money or services, (2) possession, and (3) valuable improvements made with consent of or in the presence of facts which make the transaction a fraud on the one seeking to enforce the lease or sale.[291]

As usual, the survey year provided a substantial number of tort cases between landlord and tenant.[292] For example, in *Stacks v. Rushing*[293] the court held that where the landlord's promise to repair is an inducement for the tenant to pay more rent than is currently due under a short term lease, the promise to repair is supported by consideration and becomes one of the terms of the tenancy. And in *Vanderburg v. Drake*[294] the court reaffirmed the principle that in the absence of an agreement requiring the landlord to repair the premises and in the absence of the landlord's fraud or concealment in failing to disclose any unknown or hidden defects known to him, the tenant alone is liable for injury to his invitees by virtue of the premises' unsafe condition.[295] *Barragan v. Munoz*,[296] involving suit to recover for water damage, was interesting for its application of the "holdover doctrine."[297] The court found that an exculpatory clause of the lease (which the court found not to be against public policy) became a covenant during the holding over period.[298]

V. PRIVATE RESTRICTIONS ON LAND USE

As in past years, the majority of cases involving private restrictions on

writ) (court construed provision prohibiting construction of "drive-in cafe" to encompass a restaurant similar to a "Toddle House" with all services inside and no take-out window).

288. 509 F.2d 832 (5th Cir. 1975).

289. 526 S.W.2d 291 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

290. TEX. BUS. & COMM. CODE ANN. § 26.01 (1967); TEX. REV. CIV. STAT. ANN. art. 1288 (1962).

291. *See* Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921).

292. Barragan v. Munoz, 525 S.W.2d 559 (Tex. Civ. App.—El Paso 1975, no writ); Stacks v. Rushing, 518 S.W.2d 611 (Tex. Civ. App.—Dallas 1974, no writ); Vanderburg v. Drake, 518 S.W.2d 285 (Tex. Civ. App.—Eastland 1974, writ dism'd).

293. 518 S.W.2d 611 (Tex. Civ. App.—Dallas 1974, no writ).

294. 518 S.W.2d 285 (Tex. Civ. App.—Eastland 1974, writ dism'd).

295. *See, e.g.*, Wallace v. Horn, 506 S.W.2d 325 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

296. 525 S.W.2d 559 (Tex. Civ. App.—El Paso 1975, no writ).

297. The doctrine provides that proof of a tenant's holding over after the expiration of a term fixed in the lease gives rise to a presumption that in the absence of evidence to the contrary, he continues to be bound by the same covenants which were binding upon him during the lease term. *See* Annot., 49 A.L.R.2d 480, 483 (1956).

298. *See generally* Wallenstein (1974) at 61-62.

land use have involved restrictive covenants in residential areas. In *Tejas Trail Property Owners Ass'n v. Holt*[299] the court, relying upon the principle of laches, affirmed the denial of both temporary and permanent injunctions to enforce a restrictive convenant limiting the use of permissible roofing structural materials. In that case the plaintiff had waited until the roof had been completed, although several officers of the plaintiff knew of the proposed construction (including the use of material in violation of the restrictive covenant) the previous month. In *Stephenson v. Perlitz*[300] the court, apparently following the rule of strict construction against the grantor in favor of the grantee, held that a restrictive covenant permitting "only one residence [to be] erected upon the premises" did not prohibit the construction of a duplex or two-unit dwelling on the property.[301] The court relied heavily on *McDonald v. Painter*,[302] which as the dissent noted held merely that the term "residences" included duplexes. The *Perlitz* court went on to conclude, based upon out-of-state decisions, that "one residence" could include one duplex.[303] The dissent noted a 1926 decision[304] involving a restriction prohibiting more than one residence which the court had construed as preventing the construction of an apartment house with eight living units. The dissent's argument that the *McDonald* case is not controlling is persuasive, especially since the deed restriction mentions both "residential purposes" *and* "one residence." Unless the latter phrase is to be construed as mere surplusage it would indicate that the intention of the grantor was not merely to restrict the property to residential use, but to restrict it to *one* residence (*i.e.*, a single family dwelling).[305] Similarly, in a suit for temporary injunction against construction the court in *Sleepy Hollow Development Co. v. South Park Civic Club*[306] construed the designation of 100-foot wide lots in a recorded plat with restrictions against the construction of any residence on a lot less than sixty feet wide to indicate the intention of the dedicators to create a subdivision of residential lots each 100 feet wide for single family dwellings, but not to restrict the property against the placing of a residential structure on any building lot which was sixty feet or more in width.

In a not surprising decision the court in *York v. Howard*[307] recognized the validity of mutual negative equitable easements, holding that where the owner of a tract of land subdivides it and sells distinct parcels thereof to

299. 516 S.W.2d 441 (Tex. Civ. App.—Fort Worth 1974, no writ).
300. 524 S.W.2d 786 (Tex. Civ. App.—Beaumont 1975), *rev'd*, 19 Tex. Sup. Ct. J. 161 (Feb. 7, 1976).
301. *But see* Lehmann v. Wallace, 510 S.W.2d 675 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.), *discussed in* Wallenstein (1975) at 59 (court held restrictions upon construction of more than one residence per lot could not be defeated by dividing a lot into two smaller lots).
302. 441 S.W.2d 179 (Tex. 1969).
303. 524 S.W.2d at 787-88.
304. Green v. Gerner, 283 S.W. 615 (Tex. Civ. App.—Galveston 1926), *aff'd*, 289 S.W. 999 (Tex. Comm'n App. 1927, jdgmt adopted).
305. *See generally* Annot., 14 A.L.R.2d 1376 (1950). [Editor's Note: In reversing the court of civil appeals' decision the supreme court relied essentially on the dissent. 19 Tex. Sup. Ct. J. 161 (Feb. 7, 1976).]
306. 524 S.W.2d 604 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).
307. 521 S.W.2d 344 (Tex. Civ. App.—Waco 1975, no writ).

separate grantees, imposing deed restrictions upon its use pursuant to a general scheme or plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee.[308] The court also found no ambiguity in the prohibition of moving an "old house" onto the property, holding that the restriction prohibited the moving of an old house which was to be largely rebuilt and expanded. In *Phillips v. Zmotony*[309] the court held that a mobile home was a "trailer" within the scope of a restrictive covenant prohibiting the placement as a residence of any trailer on the tract in question.[310] The court was not persuaded by the defendants' argument that the trailer had not been purchased for use as a trailer, but had been purchased solely for placement on the property in question.[311]

Finally, in a different area of private restrictions on land use, that of nuisance, the court in *Lacy Feed Co. v. Parrish*[312] held that a finding of negligence was unnecessary to recover for the consequences of a voluntary and intentional nuisance, such as the operation of turkey pens next to the plaintiff's property. The court also held that damages were recoverable both as to damage to the property (*i.e.*, loss in market value and loss of the use and enjoyment of the property) and as to damage to the person of the plaintiff, (*i.e.*, personal discomfort, annoyance, and inconvenience), but that exemplary damages were inappropriate since there was no evidence of any wrongful intent on the defendant's part to injure the plaintiff or of any willful disregard of the plaintiff's rights. Finally, in another nuisance case, *Adler v. City of Farmers Branch*,[313] the court held that where an action for nuisance was based upon invasion and trespass of material being used for a landfill on adjacent property and the land owners had actual knowledge of it, the period of limitation would begin to run even though the damage was at that time very slight.[314]

VI. MISCELLANEOUS

Personal Property. The following cases present a short summary of personal property cases. The court in *Loomis v. Sharp*[315] held that the conversion of property is a "trespass" within the meaning of the ninth exception to the general venue statute.[316] Two cases[317] held that a non-tenured teacher did not have a constitutionally protectible property interest in his re-employ-

308. *See* Hooper v. Lottman, 171 S.W. 270 (Tex. Civ. App.—El Paso 1914, no writ).
309. 525 S.W.2d 736 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd on other grounds*, 529 S.W.2d 760 (Tex. 1975).
310. *Accord*, Bullock v. Kattner, 502 S.W.2d 828 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.), *discussed in* Wallenstein (1975) at 57. *But see* Hussey v. Ray, 462 S.W.2d 45 (Tex. Civ. App.—Tyler 1970, no writ); Crawford v. Boyd, 453 S.W.2d 232 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).
311. *But see* Atkins v. Fine, 508 S.W.2d 131 (Tex. Civ. App.—Austin 1974, no writ), *discussed in* Wallenstein (1975) at 58.
312. 517 S.W.2d 845 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).
313. 526 S.W.2d 238 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).
314. *See* Linkenhoger v. American Fid. & Cas. Co., 152 Tex. 534, 260 S.W.2d 884 (1953); Houston Water-Works Co. v. Kennedy, 70 Tex. 233, 8 S.W. 36 (1888).
315. 519 S.W.2d 955 (Tex. Civ. App.—Texarkana 1975, writ dism'd).
316. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 9 (1964).
317. Siler v. Brady Ind. School Dist., 393 F. Supp. 1143 (W.D. Tex. 1975); Johnson v. Harvey, 382 F. Supp. 1043 (E.D. Tex. 1974).

ment.[318] In the area of bailments, the Texas Supreme Court held that section 7.204(a) of the Business and Commerce Code is not applicable to an unauthorized delivery of goods to a person not producing a warehouse receipt.[319] One supreme court case held that a prima facie presumption of negligence on the part of the bailee arises when the bailor proves the existence of a bailment for mutual benefit, a delivery of the chattel to the bailee, and a failure of the bailee to redeliver.[320] And in *Allright, Inc. v. Elledge*[321] the Texas Supreme Court held that a parking lot owner's limitation of liability to a maximum of $100 for theft of the vehicle by a written agreement with a month-to-month customer was not void as against public policy.[322] The court noted that its holding was based upon the absence of any fact in the court of civil appeals opinion or in the certified question indicating an absence of bargaining power of a parking lot customer. With regard to common carriers one court[323] held that a shipper establishes a prima facie case of carrier liability when he shows that the shipment was in good condition upon delivery to the carrier and in damaged condition or destroyed in transit, rebuttable by the carrier upon a showing that the damage or loss was caused solely by one of the common law excepted perils.[324] Jurisdictional and limitations questions arose in two other cases.[325]

Water Rights. Water rights cases this past year included a statutory cause of action for pollution,[326] a suit by the owner of riparian rights to set aside an order of the Water Rights Commission granting others a permit to appropriate state water by construction of a dam and a reservoir,[327] a suit by several members of a municipal water district against the water authority and other

318. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974); Robinson v. Jefferson County Bd. of Educ., 485 F.2d 1381 (5th Cir. 1973).

319. Turner v. Scobey Moving & Storage Co., 515 S.W.2d 253 (Tex. 1974).

320. Buchanan v. Byrd, 519 S.W.2d 841 (Tex. 1975), *rev'g* 515 S.W.2d 378 (Tex. Civ. App.—Eastland 1974); *accord*, Trammell v. Whitlock, 150 Tex. 500, 242 S.W.2d 157 (1951); Zable v. Huff, 432 S.W.2d 717 (Tex. Civ. App.—Amarillo 1968, no writ); Big "D" Auto Auction, Inc. v. Harley Hightower, 368 S.W.2d 881 (Tex. Civ. App.—Eastland 1963, no writ); Rhodes v. Turner, 171 S.W.2d 208 (Tex. Civ. App.—Fort Worth), *mandamus to certify questions ref'd sub nom.* Rhodes v. McDonald, 141 Tex. 478, 172 S.W.2d 972 (1943); Callihan v. Montrief, 71 S.W.2d 564 (Tex. Civ. App.—Fort Worth 1934, writ ref'd).

321. 515 S.W.2d 266 (Tex. 1974).

322. *Cf.* McAshan v. Cavitt, 149 Tex. 148, 229 S.W.2d 1016 (1950); Ford v. McWilliams, 278 S.W.2d 338 (Tex. Civ. App.—Amarillo 1955, no writ); Vollmer v. Stoneleigh-Maple Terrace, Inc., 226 S.W.2d 926 (Tex. Civ. App.—Dallas 1950, writ ref'd); Munger Automobile Co. v. American Lloyds, 267 S.W. 304 (Tex. Civ. App.—Waco 1924, no writ).

323. Boyd v. McCleskey, 515 S.W.2d 25 (Tex. Civ. App.—El Paso 1974, no writ).

324. *Id.* at 27 (listing excepted perils as fault of the shipper or inherent nature of goods).

325. Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975) (absence of in rem jurisdiction in admiralty because of the absence of the res in the district both when suit filed and during the pendency of the action); Luther Moving & Storage v. Roberts, 526 S.W.2d 557 (Tex. Civ. App.—El Paso 1975, no writ) (over two years passed before filing of suit of wrongful conversion).

326. City of Galveston v. State, 518 S.W.2d 413 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

327. Webster v. Texas Water Rights Comm'n, 518 S.W.2d 607 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

members of the district, challenging the method by which operational and maintenance costs were being charged against the member cities,[328] and a recognition of a duty to warn on the part of the person who creates a dangerous situation, regardless of any negligence being shown.[329]

Other Cases. In one case the proper measure of damages for the removal of a fence was held to be the reasonable value of the fence as an enclosure at the time of its removal with proper consideration of the cost of replacing the fence with a new fence of substantially the same construction.[330] A court of civil appeals case[331] held the expansion of a hospital district constitutional because of the absence in the state constitution of any specific provision or implication of a prohibition of such an expansion or boundary change. In *Cobra Oil & Gas Corp. v. Armstrong*[332] it was held that under former article 5397 the declaration of a forfeiture by the commissioner was a discretionary act which could be effective without the ministerial act of recording, and which could be accomplished orally followed by the prompt recordation of the oral declaration. Provisions of the Legislative Validating Act[333] and the Municipal Annexation Act[334] were applied in *City of Grand Prairie v. Turner*.[335] Other miscellaneous cases included an action by a member of a non-profit corporation for injunctive relief in connection with the corporation's sale of its grazing land,[336] and a suit by a city to recover personal property taxes.[337]

328. Canadian River Municipal Water Authority v. City of Amarillo, 517 S.W.2d 572 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).
329. Chrysler Corp. v. Dallas Power & Light Co., 522 S.W.2d 742 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).
330. Jackson v. Wallis, 514 S.W.2d 335 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).
331. Stamford Hosp. Dist. v. Vinson, 517 S.W.2d 358 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).
332. 520 S.W.2d 830 (Tex. Civ. App.—Austin 1975, no writ).
333. TEX. REV. CIV. STAT. ANN. art. 974d-13 (Supp. 1975-76).
334. *Id.* art. 970a (1973).
335. 515 S.W.2d 19 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).
336. Fulbright Grazing Ass'n, Inc. v. Randolph, 524 S.W.2d 798 (Tex. Civ. App.—Texarkana 1975, no writ).
337. Ana-Log, Inc. v. City of Tyler, 520 S.W.2d 819 (Tex. Civ. App.—Tyler 1975, no writ).