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REAL PROPERTY: LANDLORD AND TENANT, MORTGAGES, AND MECHANICS’ AND MATERIALMEN’S LIENS

by

Richard M. Dooley*

I. LANDLORD AND TENANT

A. Assignment

In Lawther v. Super X Drugs of Texas, Inc.¹ the Houston court of appeals considered whether the tenant had the right to assign his interest in the lease without the consent of the landlord. The lease in Lawther required the tenant to notify the landlord of the name and business of a proposed subtenant or assignee. The lease entitled the landlord to reject the proposed sublease or assignment if the new business would conflict with exclusive rights granted in leases to other tenants. If the landlord failed to respond within ten days or if the landlord withheld approval on grounds other than business conflicts with existing tenants, the lease entitled the tenant to terminate the lease.²

The landlord in Lawther never consented to the tenant’s assignment. In challenging the assignment, however, the landlord did not contend that the business of the assignee conflicted with exclusive rights granted to other tenants. The court thus considered the right of a tenant to assign a leasehold interest without consent of the landlord absent express agreement between the parties. The tenant argued that the lease necessarily implied a right of assignment because the terms of the lease bound and inured to the benefit of the parties’ assigns. The tenant cited prior Texas cases in support of its argument.³ One of the cases cited by the tenant involved lease provisions iden-

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¹ 671 S.W.2d 591 (Tex. App.-Houston [1st Dist.] 1984, no writ).
² The lease also required that the landlord supply, at the tenant’s request, copies of clauses in leases to other tenants granting exclusive rights to conduct businesses in the shopping center. Id. at 592.
³ See Dillingham v. Williams, 165 S.W.2d 524, 526 (Tex. Civ. App.—El Paso 1942, writ ref’d w.o.m.) (lease to a named person, his heirs, and assigns expressly authorized assignment of lease by lessee); Harris v. Goodloe, 58 S.W.2d 156, 158 (Tex. Civ. App.—Eastland 1933) (lease that bound the parties, their successors, and assigns implied a right to assign the lease), aff’d, 94 S.W.2d 1141 (Tex. Comm’n App. 1936, opinion adopted); Penick v. Eddleman, 291 S.W. 194, 195 (Tex. Comm’n App. 1927, judgmt adopted) (lease that bound the parties, their
tical to the provisions involved in *Lawther*.4

The court found that article 5237 of the Texas Revised Civil Statutes clearly expressed the public policy of the state concerning lease assignments.5 Article 5237 provided that "[a] person renting said lands or tenements shall not rent or lease the same during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney."6 The court determined that all leases entered into in Texas incorporated article 5237 by operation of law.7 To change the prohibition against lease assignments contained in article 5237, the parties must, the court held, clearly express such an intent.8 The court found that the lease did not clearly express an intent to change the prohibition against lease assignments contained in article 5237.9 The court reasoned that paragraph 25 of the lease gave the landlord the right to refuse consent to an assignment if the assignment would violate the exclusive rights of another tenant or for any other reason.10 If the landlord exercised the right to refuse consent to an assignment for a reason other than conflict with the exclusive rights of other tenants, the tenant's sole remedy was termination.11 The lease did not grant the tenant an additional right to assign the lease without consent.12 Paragraph 28, when read together with paragraph 25, merely provided that if the landlord consents to an assignment, the terms of the original lease bind both parties.13

In finding for the landlord the court distinguished the prior cases cited by the tenant on the grounds that the cited cases, with the exception of *Houck v. Kroger Co.*,14 did not contain language similar to paragraph 25 of the lease or did not deal with a lease contract governed by article 5237.15 The court distinguished *Houck* on grounds that *Houck* involved an appeal from a temporary injunction that did not require the court to reach the assignment without consent issue.16 In affirming the trial court, the court of appeals in *Houck* did not affirm the tenant's right to assign, but merely concluded that such a determination by the trial court did not constitute an abuse of discre-

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5. 671 S.W.2d at 592. TEX. REV. CIV. STAT. ANN. art. 5237 (Vernon 1962) has been repealed effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. § 91.005 (Vernon Pam. 1983), which provides that during the lease term, the tenant may not rent the leasehold to any other person without the landlord's prior consent. *Id.*
7. 671 S.W.2d at 592 (citing *American Nat'l Bank & Trust Co. v. First Wisconsin Mortgage Trust*, 577 S.W.2d 312, 316 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.)).
8. 671 S.W.2d at 592 (citing *Young v. De la Garza*, 368 S.W.2d 667, 670 (Tex. Civ. App.—Dallas 1963, no writ)).
9. 671 S.W.2d at 593.
10. *Id.* at 593-94.
11. *Id.* at 594.
12. *Id.*
13. *Id.*
14. 555 S.W.2d 803 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).
15. 671 S.W.2d at 593.
16. *Id.*
In Heflin v. Stiles the Fort Worth court of appeals considered whether an assignment by one partner to another partner of the first partner's interest in the lease without the consent of the landlord violated the provisions of the lease and article 5237. The lease required the tenant to obtain the landlord's written consent prior to any assignment. The original parties to the lease included a prior owner, as the landlord, and a partnership, as the tenant. The partnership subsequently sublet the entire premises covered by the lease to a party who later purchased the premises from the prior owner. The purchaser thereby became the landlord under the base lease to the partnership and the subtenant under the sublease with the partnership. In a subsequent winding up of the partnership, one of the partners assigned his interest in the base lease to the other partner without obtaining the consent, written or oral, of the landlord. Upon learning of such assignment, the landlord/subtenant discontinued rental payments under the sublease and refused to accept rental payments under the base lease from the remaining partner. The landlord/subtenant also delivered to the remaining partner a notice cancelling the base lease and a notice to vacate on the ground that the tenant assigned the lease without the written consent of the landlord.

The remaining partner filed suit against the landlord/subtenant to recover past due rental under the sublease. The landlord/subtenant counterclaimed for termination of the base lease and the sublease on the ground that the tenant breached the base lease when one partner assigned to the other partner an interest therein without the consent of the landlord. The court held that article 5237 prohibited the assignment of an interest in the lease by one partner to the other without the consent of the landlord unless the lease clearly contained an expression of contrary intent. The court found that the lease not only lacked an expression of contrary intent, but restricted assignments beyond the terms of article 5237 by requiring consent in written form.

In making its finding, the court rejected the tenant's argument that the court should not construe the assignment by one partner to the other of an interest in the lease as an assignment for purposes of the prohibitions contained in the lease and in article 5237. The tenant argued that the court should construe such an assignment as an instrument dissolving the partnership between original co-tenants whereby one co-tenant succeeds to the other co-tenant's interest in the lease. In support of this argument the tenant cited Denning v. Republic National Bank Building Co., in which the court held that a tenant does not breach a covenant against subletting by taking a third person into partnership with him and, thus, letting such third person

17. Id.
18. 663 S.W.2d 131 (Tex. App.—Fort Worth 1983, no writ).
19. Id. at 134.
20. Id.
21. Id.
22. 294 S.W.2d 888 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.).
into joint possession of the premises.\textsuperscript{23}

The court distinguished Denning on the ground that Denning involved the addition of a third person rather than the removal of a partner-tenant.\textsuperscript{24} The court reasoned that article 5237 and similar lease provisions purport to secure to the landlord the right to have no one occupy the premises whose ability or willingness to pay the rents contracted for does not satisfy the landlord.\textsuperscript{25} The court drew an analogy to contract cases in which a party may not transfer an interest in a contract if the other party has relied on the first party’s skill, character, credit, or substance in entering into the contract.\textsuperscript{26}

\section*{B. Constructive Eviction}

In \textit{Harry Hines Medical Center, Ltd. v. Wilson}\textsuperscript{27} the Dallas court of appeals considered whether actions by the landlord after the tenant had vacated the premises constituted constructive eviction or acceptance of surrender. During the lease term the tenant notified the landlord that he was vacating the premises due to poor health and a desire to retire. Approximately three months after the delivery of such notice to the landlord, the tenant vacated the premises and ceased paying rent despite continued demands by the landlord for rental payments. After the tenant’s departure from the premises, the landlord permitted personnel of a nearby hospital partially to occupy the premises. The landlord apparently allowed such occupation in an attempt to expedite completion of construction on the hospital so that the landlord could find new tenants to relet the premises vacated by the tenant. After completion of the hospital, the landlord successfully relet the premises.

The landlord sued the tenant for unpaid rental less amounts received in reletting the premises. The district court held that the landlord accepted the tenant’s offer of surrender and constructively evicted the tenant by allowing occupation of the premises.\textsuperscript{28} The district court also found that the constructive eviction rendered inoperative the express provision in the lease requiring that any acceptance of surrender be in writing and signed by the landlord.\textsuperscript{29}

The court of appeals found that the trial court erred in holding that the landlord’s conduct in allowing partial occupation of the premises constituted an acceptance of surrender that cancelled the tenant’s remaining rental obligations.\textsuperscript{30} The court held that when a landlord re-enters and relets aban-

\begin{enumerate}
\item \textit{Id.} at 898.
\item 663 S.W.2d at 134.
\item \textit{Id.} (citing Guadalupe-Blanco River Auth. v. San Antonio, 145 Tex. 611, 625, 200 S.W.2d 989, 998 (1947); Forest v. Durnell, 86 Tex. 647, 649, 26 S.W. 481, 482 (1894)).
\item 663 S.W.2d at 134-35 (citing Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379, 387 (1888); Moore v. Mohan, 514 S.W.2d 508, 513 (Tex. Civ. App.–Waco 1974, no writ)).
\item 656 S.W.2d 598 (Tex. App.—Dallas 1983, no writ).
\item \textit{Id.} at 600-01.
\item \textit{Id.} at 601.
\item \textit{Id.}
doned premises for the landlord's own benefit, the tenant's obligation ceases;\(^1\) however, when the landlord evidences an intent to relet in an attempt to mitigate damages for nonpayment of rent, the landlord's attempt to relet does not constitute an acceptance of surrender.\(^2\) The landlord's continuing demands on the tenant for rental payments clearly indicated that the landlord did not accept any offer of surrender by the tenant.\(^3\) The court further found that the trial court erred in concluding that the landlord constructively evicted the tenant and thereby relieved the tenant of complying with the express lease provision requiring any acceptance of surrender to be in writing and signed by the landlord.\(^4\) To establish constructive eviction, the court held that the tenant must plead and prove four elements: (1) that the landlord intended that the tenant no longer enjoy the premises; (2) that some material act by the landlord substantially interfered with the tenant's use and enjoyment of the premises; (3) that the landlord permanently deprived the tenant of the use and enjoyment of the premises; and (4) that the tenant abandoned the premises after and as a direct consequence of such act by the landlord.\(^5\)

The court ruled that the district court's findings of fact failed to establish any of the elements of constructive eviction.\(^6\) The finding of fact by the trial court that the tenant left the premises due to ill health and a desire to retire directly conflicted with the trial court's holding of constructive eviction.\(^7\) The court further ruled that evidence that the tenant notified the landlord of difficulties with the heating and cooling system did not establish an act intended by the landlord to deprive the tenant permanently of the use of the premises.\(^8\)

C. Demised Premises

In *Tierney v. Lane, Gorman, Trubitt & Co.*,\(^9\) the Corpus Christi court of appeals considered whether provisions in a lease granted the tenant the right to use parking spaces without the payment of additional rent. The granting clause of the lease entitled the tenant to take the "demised premises," which were described elsewhere in the lease without reference to parking spaces.\(^10\)

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32. 656 S.W.2d at 601 (citing *Arrington v. Loveless*, 486 S.W.2d 604, 608 (Tex. Civ. App.—Fort Worth 1972, no writ)).
33. 656 S.W.2d at 601-02.
34. *Id.* at 602.
35. *Id.* (citing *Michaux v. Koebig*, 555 S.W.2d 171, 177 (Tex. Civ. App.—Austin 1977, no writ); *Richker v. Georgandis*, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref’d n.r.e.)).
36. 656 S.W.2d at 602.
37. *Id.*
38. *Id.* (citing *Metroplex Glass Center v. Vantage Properties*, 646 S.W.2d 263 (Tex. App.—Dallas 1983, writ ref’d n.r.e.)).
39. 664 S.W.2d 840 (Tex. App.—Corpus Christi 1984, no writ).
40. The granting clause of the lease provided:

In consideration of the obligation of the Tenant to pay rent as herein provided and in consideration of the other terms, covenants, and conditions hereof, Land-
A separate "Exhibit C" to the lease, however, entitled the tenant to thirty-two parking spaces. The landlord argued that the tenant had no right to use the thirty-two parking spaces without the payment of additional rent because the definition of "demised premises" contained in the lease did not include the parking spaces and because the granting clause contained in the lease gave the tenant the right to use only the defined demised premises for the rental specified in the lease.

The court applied a rule established by the Texas Supreme Court in R&P Enterprises v. LaGuarta, Gavrel & Kirk for interpreting contracts containing possibly ambiguous provisions. In R&P Enterprises the supreme court held that a court should give effect to the intentions of the parties by examining the entire instrument and interpreting them so that none of the instrument's provisions will be rendered meaningless. Applying this rule to Tierney, the court found that the only interpretation of the lease that would not render any of its provisions meaningless was that the tenant, in leasing the described demised premises, also obtained the right to use the thirty-two parking spaces without the payment of additional rent. Any other construction would effectively sever Exhibit C from the lease and treat Exhibit C as a separate agreement. The court held that the lease was unambiguous and did not, therefore, entitle the landlord to charge the tenant additional rent for the use of the thirty-two parking spaces.

D. Forcible Entry and Detainer

In Flowers v. Diamond Oaks Terrace Apartments the Fort Worth court of appeals considered whether the court had jurisdiction over a forcible entry and detainer suit from an order of the county court at law. In Flowers the landlord filed a forcible entry and detainer suit against the tenant in the county court at law. The county court at law granted the landlord's motion for a nonsuit. The tenant sought review by the court of appeals, contending that the county court at law had erred in granting the nonsuit and in denying the tenant attorney's fees. The court of appeals held that article 3992 governs the appeal of a forcible entry and detainer suit to the court of ap-
peals.\textsuperscript{49} Article 3992 provides that one may not appeal final judgments from county courts except when the judgment awards damages in excess of $100.\textsuperscript{50} Citing prior case law\textsuperscript{51} the court held that an appeal does not lie from a judgment of the county court disposing of a forcible entry and detainer action unless damages in the action exceed $100.\textsuperscript{52} The court, therefore, dismissed the appeal on jurisdictional grounds.\textsuperscript{53}

In \textit{RCJ Liquidating Co. v. Village, Ltd.}\textsuperscript{54} the Texas Supreme Court considered whether the Fort Worth court of appeals had jurisdiction to hear an appeal of a forcible detainer action in which the justice court awarded no actual monetary damages, but awarded attorney's fees to the landlord in the amount of $3,500. The landlord in \textit{RCJ Liquidating} sued the tenant and the tenant's assignee in forcible detainer. The justice court awarded the landlord restitution of the premises, attorney's fees of $3,500, and costs. Five days after the justice court signed the judgment, the tenant and the tenant's assignee filed an appeal bond. The county court at law dismissed the appeal for want of jurisdiction on the ground that the tenant had not timely perfected the appeal. The tenant and the tenant's assignee appealed to the Fort Worth court of appeals. The court of appeals dismissed the appeal for want of jurisdiction, holding that article 3992 prohibited review of the county court at law judgment since the county court did not award damages in excess of $100. The court of appeals did not consider the correctness of the county court at law's finding that the tenant had not timely perfected appeal from the judgment of the justice court.

The Texas Supreme Court held that the court of appeals erred in finding that it had no jurisdiction of the appeal from the county court at law.\textsuperscript{55} The supreme court held that reasonable attorney's fees in forcible detainer actions in the justice and county courts constitute damages under rule 752\textsuperscript{56} and satisfy the jurisdictional requirements of article 3992.\textsuperscript{57} The Texas Supreme Court further held that the county court at law correctly dismissed

\textsuperscript{49} 669 S.W.2d at 433.
\textsuperscript{50} TEX. REV. CIV. STAT. ANN. art. 3992 (Vernon 1966) (repealed 1984). Article 3992 has been repealed effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. § 24.0007 (Vernon Pam. 1983), which provides: "A final judgment of a county court in a forcible entry and detainer or a forcible detainer action may not be appealed unless the judgment awards damages greater than $100."
\textsuperscript{51} The court cited Woolley v. Burger, 602 S.W.2d 116, 117 (Tex. Civ. App.—Amarillo 1980, no writ); New Friendship Baptist Church v. Collins, 453 S.W.2d 529, 530 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); Keils v. Waldron, 240 S.W.2d 788, 789 (Tex. Civ. App.—Waco 1951, no writ) (all holding that an appeal does not lie from a judgment of the county court disposing of an action in forcible entry or detainer unless damages in excess of $100 are awarded).
\textsuperscript{52} 669 S.W.2d at 433.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} 670 S.W.2d 643 (Tex. 1984).
\textsuperscript{55} \textit{Id.} at 644.
\textsuperscript{56} TEX. R. CIV. P. 752.
\textsuperscript{57} 670 S.W.2d at 644.
the appeal because rule 749 requires that one file an appeal bond within five days from the date that the justice court signs the judgment without any provision for delay arising from a motion for new trial.

In *McGlothin v. Kliebert* the Texas Supreme Court considered whether a district court may temporarily enjoin proceedings in the justice court in a forcible entry and detainer suit. In *McGlothin* the landlord filed a forcible entry and detainer suit against the tenant. Before trial the tenant filed suit in the district court seeking a temporary restraining order, a temporary injunction, a permanent injunction, and damages against the landlord. After a hearing the district court granted a temporary injunction. Since the tenant sought damages and declaratory relief the court of appeals upheld the district court action on the ground that possession of the premises was not the sole issue in the suit.

The Texas Supreme Court held that for the district court to enjoin the exercise of the justice court’s exclusive jurisdiction in a forcible entry and detainer action, the district court must find either that the justice court lacks jurisdiction or that the tenant has no adequate remedy at law. Since the tenant had conceded that no dispute existed regarding title to the premises, the supreme court found that the justice court clearly had jurisdiction. The supreme court further found that the tenant had an adequate remedy at law because the tenant could raise any legal defenses to his possession of the premises in the justice court and could pursue other relief in the district court for damages not within the jurisdiction of the justice court. In making its finding that the tenant had an adequate remedy at law, the supreme court expressly disapproved the holdings in three previous court of appeals cases.

58. TEX. R. CIV. P. 749.
59. 670 S.W.2d at 644.
60. 672 S.W.2d 231 (Tex. 1984).
61. 663 S.W.2d 2, 3 (Tex. App.—Houston [14th Dist.] 1983), rev’d, 672 S.W.2d 231 (Tex. 1984).
62. 672 S.W.2d at 232.
63. *Id.*
64. *Id.* at 232-33 (citing Halcombe v. Lorino, 124 Tex. 464, 79 S.W.2d 307, 309 (1935) (when party claims right of possession as a tenant the party has an adequate remedy at law in a forcible entry and detainer action in which the party may prove facts to establish that the landlord has no right to terminate the lease); Smith v. Ryan, 20 Tex. 661, 664 (1858) (court dissolved injunction against justice court proceedings even though justice court may have lacked jurisdiction because the party could have fully contested jurisdiction in the justice court and, by certiorari, in the district court); Chadoin v. Magee, 20 Tex. 477, 481 (1857) (party may not obtain injunction against forcible entry and detainer proceedings, but must present defense to the action in the proceedings); Haith v. Drake, 596 S.W.2d 194, 197 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (court found that purchaser of property had adequate remedy at law to protect against loss of possession on ground that purchaser could prove any facts not inconsistent with title under which he entered possession of the premises and that showed that purchaser’s right to occupancy existed when suit was brought); Bexar County v. Stewart, 41 S.W.2d 85, 85 (Tex. Civ. App.—San Antonio 1931, writ ref’d) (forcible entry and detainer action, by providing for a full hearing before justice of the peace and appeals to higher courts, provides adequate remedy at law)).
65. 672 S.W.2d at 233. The cases that the court disapproved were O’Hara v. Dallas Scene, Inc., 470 S.W.2d 63 (Tex. Civ. App.—Waco 1971, no writ); Grady v. Fryar, 103
In Judson Building Co. v. First National Bank a federal district court in Texas considered whether a judgment in a forcible entry and detainer suit constituted a violation of the former owner's due process rights under the fourteenth amendment. In Judson Building the owner of the premises granted a deed of trust lien covering the premises to a lender to secure a loan. After the owner defaulted on the loan, the lender foreclosed under the deed of trust and acquired the premises at the trustee's sale. The lender then mailed letters to an officer of the former owner requesting the former owner to vacate the premises and to remove all of the former owner's property from the premises. The lender filed a forcible entry and detainer action in the justice court when the former owner did not respond to the lender's letters. When the former owner failed to appear at the hearing in the justice court, the judge entered a default judgment ordering that the lender recover possession of the premises. The court then issued a writ of possession. Following the justice court proceedings, an officer of the lender notified everyone on the premises that the lender would take possession of the premises. The lender then took possession and changed the locks. An officer of the lender then wrote a letter to an officer of an affiliate of the prior owner asking when the lender could expect such affiliate to remove remaining property from the premises. Neither the former owner of the premises nor the former owner's affiliate answered the letter. The former owner instead filed suit, challenging the validity of the justice court's order and alleging wrongful conversion of the personal property of the former owner's affiliate.

In support of the wrongful conversion claim the former owner of the premises argued that the justice court action violated the fourteenth amendment due process requirement of notice for two reasons. First, the justice court entered judgment at a hearing in the absence of the former owner's counsel. Second, an affiliate owned the property subject to the forcible entry and detainer action and was not a party before the justice court. Consequently, the former owner contended that the justice court deprived the affiliate of property without notice in violation of the due process clause of the fourteenth amendment. The lender argued that the justice court did not deprive the former owner of due process for three reasons. First, the justice court's order was valid and the lender only acted pursuant to the order. Second, after foreclosure of the premises, all parties occupying the premises become mere tenants at will of the lender from whom the lender may demand possession at any time. Third, the lender never refused any demand for the return of the personal property of the former owner's affiliate and thus did not convert the property.

The court found that to establish a cause of action under section 1983, the former owner of the premises must satisfy two elements. The former owner must show both a deprivation of a right secured by the United States

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67. U.S. CONST. amend. XIV.
Constitution and that a party acting under color of state law caused the deprivation. The court concluded that the forcible entry and detainer hearing did constitute state action, but that the justice court did not deprive the former owner of any rights secured by the Constitution. The court rejected the former owner's two arguments regarding deprivation of due process. First, the court held that the failure of the former owner's counsel to appear at the forcible entry and detainer hearing resulted from the fault of the former owner and not from the fault of the lender. Second, the court held that no conversion of the affiliate's personal property occurred because: (1) any interest of the affiliate in the premises was subject to the lender's rights under the deed of trust; (2) after foreclosure the affiliate was a tenant at will of the lender; (3) the landlord has unlimited power to terminate a tenancy at will as long as the landlord acts reasonably under the circumstances; (4) the lender acted reasonably in terminating the affiliate's tenancy at will; (5) in the absence of a wrongful eviction, no action for conversion could lie as a matter of law unless the lender thereafter refused a demand for the return of the personal property; and (6) no evidence existed that the lender had refused any demand for the return of the affiliate's personal property.

In Ethan's Glen Community Association v. Kearney the Houston court of appeals considered whether a take-nothing judgment entered against the owner in a prior forcible detainer suit constituted either res judicata or judgment by estoppel in a subsequent suit to establish title, right of possession, and other relief. In Ethan's Glen the owners of two adjacent lots in the Ethan's Glen townhouse subdivision extended their fences and concrete patios beyond the boundaries of their lots and thereby enclosed a portion of the common area of the subdivision. The association that administered the deed restrictions of the subdivision, acting as trustee, brought an action for forcible detainer against the lot owners, seeking a writ of possession to the area in dispute. The county court entered a take-nothing judgment from which the association did not appeal. Following the county court ruling, the association filed suit in the district court against the lot owners to establish title and right of possession to the area in dispute. The association asked the district court for a permanent mandatory injunction prohibiting the lot owners from blocking access to the common area, for recovery of the costs of removing

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70. 587 F. Supp. at 855 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982)).
71. 587 F. Supp. at 855.
72. Id.
73. Id.
74. Id.
75. Id. (citing First Nat'l Bank v. Wallace, 13 S.W.2d 176, 183 (Tex. Civ. App.—Texarkana 1928), rev'd on other grounds, 120 Tex. 92, 35 S.W.2d 1036 (1931); 35 TEX. JUR. 2D Landlord and Tenant § 29 (1962)).
76. 587 F. Supp. at 855-56.
77. 587 F. Supp. at 856 (citing Norris v. Bovina Fedders, Inc., 492 F.2d 502 (5th Cir. 1974); 15 TEX. JUR. 3D Conversion § 12 (1981)).
78. 587 F. Supp. at 856.
79. 667 S.W.2d 287 (Tex. App.—Houston [1st Dist.] 1984, no writ).
the fences and concrete patios, and for attorney’s fees. The lot owners raised numerous defenses, including judgment by estoppel based on the take-nothing judgment entered against the association in the prior forcible detainer suit in the county court.  

After making extensive findings of fact the district court held that the take-nothing judgment entered against the association in the prior forcible detainer suit estopped the association from asserting its right to possession of the disputed area. The court further held that the association should recover title to the disputed land area subject to an irrevocable license of the lot owners to use the disputed land area. The court found that the association gave the lot owners written permission to extend their fences and that the association could not revoke the permission after the lot owners changed position in reliance upon it. The district court thus entered judgment awarding the association title to the land area in dispute, but denied all other relief, including the mandatory injunction requested by the association. The association appealed that part of the judgment denying the mandatory injunction and other relief.

The court of appeals held that the take-nothing judgment entered against the association in the county court in the prior forcible detainer suit did not constitute either res judicata or judgment by estoppel in the district court action. After analyzing two prior cases the court reasoned that the take-nothing judgment in the prior forcible detainer action did not preclude the association from seeking to establish its title and right to possession to the disputed area in a subsequent trespass to try title suit. Since the right to possession necessarily follows the adjudication of title, the court held that the title action may determine the right to possession even though the prior forcible detainer proceeding determined the right to temporary possession.

The court of appeals further found that the district court erred in holding that the lot owners acquired an irrevocable license to use the disputed land

80. In addition to judgment by estoppel, the lot owners alleged waiver, permission, consent, acceptance, and ratification. Id. at 288.

81. 667 S.W.2d at 290.

82. The court analyzed House v. Reavis, 89 Tex. 626, 35 S.W. 1063 (1896), and Johnson v. Highland Hills Drive Apartments, 552 S.W.2d 493 (Tex. Civ. App.—Dallas 1977), writ ref’d n.r.e. per curiam, 568 S.W.2d 661 (Tex. 1978). In Johnson the Dallas court of appeals entertained a suit for damages for wrongful termination of a lease. The court held that a judgment of possession entered against the tenant in a prior forcible detainer action did not estop the tenant from seeking damages for wrongful eviction in a subsequent action. 552 S.W.2d at 494. The court held that the forcible detainer action only determined the party entitled to immediate possession of the premises and did not dispose of the rights of the parties with respect to other issues, even though the ultimate determination of the other issues might result in a change of possession. Id. at 495-96. In House the Texas Supreme Court construed TEX. REV. CIV. STAT. ANN. art. 3994 (Vernon 1966) and held that a judgment of possession in a forcible detainer action did not bar a subsequent trespass to try title suit. 89 Tex. at 635, 35 S.W. at 1067. Article 3994 provides that “[t]he proceedings under a forcible entry, or forcible detainer, shall not bar an action for trespass, damages, waste, rent or mesne profits.” TEX. REV. CIV. STAT. ANN. art. 3994 (Vernon 1966) (repealed 1984).

83. 667 S.W.2d at 290.

84. Id.
The court distinguished prior cases that held that the doctrine of equitable estoppel may extend an initially revocable license and that equity may prevent the exercise of a right of revocation when consideration has moved from the licensee to the licensor. Since the improvements made by the lot owners were solely for their benefit, the court stated, the association received no consideration to support a finding of an irrevocable license. The court concluded that the lot owners held merely a permissive license for an undetermined period of time.

Notwithstanding that the lot owners did not possess an irrevocable license, the court held that the district court did not abuse its discretion by refusing to grant the mandatory injunction requested by the association. Since the association had made no offer in equity to reimburse the lot owners for the costs of relocating their fences, the court found that, in balancing the equities between the parties, the district court could refuse to grant the mandatory injunction. Consequently, the court of appeals affirmed the district court's judgment without prejudice to the association's right to reassert its title and right of possession to the disputed area and the association's right, upon an appropriate equitable showing, to have the lot owners' fences and patios relocated to their original location.

E. Lost Profits

In Village Square, Ltd. v. Barton the San Antonio court of appeals considered whether testimony of a tenant in a district court trial could sustain a judgment against the landlord for lost profits alleged by the tenant. In Village Square the tenant sued the landlord for damages arising from the landlord's failure to maintain the shopping center premises and the landlord's failure to comply with an alleged oral agreement not to lease space in the shopping center to a competing business. In a default judgment the district court awarded actual damages of $300,000 and damages under the Decep-

85. Id. at 291.
86. Id. at 290 (citing Risien v. Brown, 73 Tex. 135, 10 S.W. 661 (1889)).
87. 667 S.W.2d at 290-91 (citing Joseph v. Sheriffs' Ass'n, 430 S.W.2d 700, 704 (Tex. Civ. App.—Austin 1968, no writ) (although licensor may generally revoke license at will, when licensee makes expenditures in reliance on the license, revocation should be allowed only in a fair and equitable manner); Markley v. Christen, 226 S.W. 150, 153 (Tex. Civ. App.—San Antonio 1920, writ dism'd w.o.m.) (equity will not allow revocation of permission to use premises if one has made permanent improvements in reliance on such permission); Fort Worth & N.O. Ry. v. Sweatt, 50 S.W. 162, 163 (Tex. Civ. App. 1899, no writ) (landowner who permits a railroad to construct line on his land may not revoke the license after construction of the railway, so long as the railway uses the license as a right-of-way for operation of railroad); Evans v. Gulf Co. & S.F. Ry., 28 S.W. 903, 904 (Tex. Civ. App. 1894, no writ) (landowner who verbally agrees to convey a right-of-way to a railroad company without charge is estopped from claiming damages when the railroad company builds across his land in reliance on agreement)).
88. 667 S.W.2d at 291.
89. Id.
90. Id.
91. Id.
92. Id. at 291-92.
93. 660 S.W.2d 556 (Tex. App.—San Antonio 1983, no writ).
tive Trade Practices Act\textsuperscript{94} of $150,000. The court of appeals reversed the district court on both damage awards. With respect to the award of damages under the Deceptive Trade Practices Act, the court held that the tenant's pleadings did not give fair notice to the landlord of the claim.\textsuperscript{95} The court of appeals reversed and remanded for new trial the award of actual damages on the ground that the tenant's general testimony in the district court concerning lost profits did not include facts, figures, or data of any kind from which the court could determine lost profits with any degree of certainty and exactness.\textsuperscript{96}

\section*{F. Misrepresentation}

In \textit{Southwest Craft Center v. Heilner}\textsuperscript{97} the San Antonio court of appeals considered the liability of the landlord to the tenant for losses arising from the theft of gemstones on consignment with the tenant. In \textit{Southwest Craft} a third party delivered certain loose gemstones to the tenant on an oral agreement of consignment. The gemstones disappeared in a burglary of the premises. The third party sued the tenant on the oral bailment for the loss of the gemstones, and the tenant sued the landlord as a third-party defendant seeking indemnity from the landlord for any loss sustained by the tenant. In a nonjury trial the district court found that the landlord had represented to the tenant that a theft insurance policy covered and protected any theft, with the exception of shoplifting. The court also concluded that the tenant sustained damages in the amount of $5,000 in reliance on the landlord's misrepresentation regarding theft insurance and that the landlord must indemnify the tenant in that amount. The landlord appealed the judgment of indemnity on the ground that no statutory or contractual obligation existed upon which to base the judgment. The court rejected the landlord's argument and affirmed the district court.\textsuperscript{98} The court of appeals held that the detrimental reliance of the tenant upon the landlord's misrepresentation that theft insurance existed estopped the landlord from denying liability for losses suffered by the tenant resulting from the misrepresentation.\textsuperscript{99}

\textsuperscript{94} TEX. \textsc{Bus.} \& \textsc{Com.} \textsc{Code} \textsc{Ann.} §§ 17.41-.63 (Vernon Supp. 1984).
\textsuperscript{95} 660 S.W.2d at 559.
\textsuperscript{96} Id. at 560 (citing Pederson v. Dillon, 623 S.W.2d 696, 698 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (court denied claim for lost profits on grounds that uncertainty existed as to whether any profits would have been realized and proof of profits was limited to speculative testimony); Van Sickle v. Clark, 510 S.W.2d 664, 669 (Tex. Civ. App.—Fort Worth 1974, no writ) (court found claim for lost profits too speculative because the claimant presented no data from which the court could ascertain profits with a reasonable degree of certainty and exactness); Birge v. Toppers Mens Wear, Inc., 473 S.W.2d 79, 85 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (court denied claim for lost profits and stated general rule that, to warrant recovery of lost profits, the proof must not be conjecture, speculation, or opinion not founded on facts and that the profits must be capable of being measured or ascertained on a reasonable basis)).
\textsuperscript{97} 670 S.W.2d 651 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).
\textsuperscript{98} Id. at 656.
\textsuperscript{99} Id. (citing Wheeler v. White, 398 S.W.2d 93 (Tex. 1965)).
In Kaplan v. Floeter the Houston court of appeals considered the enforceability of a renewal option provision. The lease provided that the tenant had an absolute and irrevocable right to renew the lease for an additional five-year term at an increased rental amount mutually acceptable to both parties. If the parties failed to agree to a new monthly lease payment amount, the lease provided that the tenant had right of first refusal to relet the premises upon terms offered by a third party and acceptable to the landlord. The tenant argued that, based on the phrase “absolute and irrevocable right,” the court should construe the lease to allow the district court to determine a reasonable rental if the landlord and tenant could not agree. The court distinguished the renewal provision contained in the lease from renewal provisions found enforceable on the ground that the enforced provisions contained wording by which a court could determine a specific renewal rental. The renewal provision, therefore, was unenforceable and void because it was indefinite and uncertain with respect to the rental rate during the renewal term.

H. Remedies

In Bifano v. Young the Corpus Christi court of appeals considered whether deletion of language from the remedies provisions contained in the lease limited the landlord’s remedies upon the tenant’s default to termination of the lease and suit for damages. In Bifano the tenant did not make rental payments for the final four months of the lease term. The landlord successfully sued the tenant in district court for the unpaid contractual rent due under the lease. On appeal the tenant argued that, because the lease deleted all of the specified remedies other than the right to termination and damages, the lease limited the landlord’s remedies to termination and suit for damages.

The court of appeals found that, under Texas law, when a tenant defaults the landlord has the option of either suing immediately for anticipatory breach and damages or standing upon the lease contract and suing for the

100. 657 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1983, no writ).
101. Id. at 2-3 (citing Watley v. Vergott, 561 S.W.2d 925, 926 (Tex. Civ. App.—Fort Worth 1978, no writ) (court enforced renewal provision on same terms as in original lease although the renewal option did not specify terms); Aycock v. Vantage Management Co., 554 S.W.2d 235, 236 (Tex. Civ. App.—Dallas 1977, writ ref’d n.r.e.) (court enforced renewal provision that provided that renewal rental shall be “based on then prevailing rental rates for properties of equivalent quality, size, utility and location, with the length of the Lease term and credit standing of the Lessee to be taken in account”); Parham v. Glass Club Lake, Inc., 533 S.W.2d 96, 97 (Tex. Civ. App.—Texarkana 1976, writ ref’d n.r.e.) (court found that lessee’s covenant to pay rentals provided consideration for both the primary lease and the renewal option when the lease and option form an integrated agreement); Red Oak Fishing Club v. Harcrow, 460 S.W.2d 151, 152 (Tex. Civ. App.—Waco 1970, no writ) (court enforced renewal provision that stipulated that renewal rental would equal the agreed primary rental)).
102. 657 S.W.2d at 2 (citing Schlusseleberg v. Rubin, 465 S.W.2d 226 (Tex. Civ. App.—El Paso 1971, writ ref’d n.r.e.)).
103. 665 S.W.2d 536 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.).
rental as it becomes due. The court further found that a contract may provide for either permissive or exclusive remedies and that if the lease contract provides for only one remedy and states that the specified remedy constitutes the only remedy, the exclusive remedy provision will bind the landlord. The court indicated, however, that parties must clearly indicate their intent that a specified remedy operate to exclude other remedies for a court to find an exclusive remedy provision. Applying these principles to the case, the court held that the deletions contained in the remedies section of the lease did not limit the landlord's remedies to termination of the lease and a suit for damages. The court found that the language of the lease providing the landlord with the option to pursue any one or more of the specified remedies without notice or demand sufficiently preserved the landlord's common law remedies for breach of the lease by the tenant.

In Speedee Mart, Inc. v. Stovall the Amarillo court of appeals considered whether the landlord may recover both accrued rental under the lease and future damages for anticipatory breach after default by the tenant. In Speedee Mart the tenant discontinued its business and closed the premises approximately five months after the commencement of a ten-year lease. The landlord then took possession of the premises and secured a writ of restitution from a justice court. The landlord then successfully sued the tenant in the district court for accrued rental payments due under the lease through the time of trial and for future damages for anticipatory breach.

The court of appeals reversed the district court award of accrued rental payments. The court found that when a tenant breaches a lease by abandoning the property and terminating rental payments, the landlord has four options under Texas law. First, the landlord may maintain the lease in full force and effect by declining to repossess the premises and suing under the lease for contractual rental as it matures. Second, the landlord may

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105. 665 S.W.2d at 539 (citing Vandergriff Chevrolet Co. v. Forum Bank, 613 S.W.2d 68 (Tex. Civ. App.—Fort Worth 1981, no writ); Stergois v. Babcock, 568 S.W.2d 707 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.)).

106. 665 S.W.2d at 539.


108. 665 S.W.2d at 539.

109. Id.

110. 664 S.W.2d 174 (Tex. App.—Amarillo 1983, no writ).

111. Id. at 178.

112. Id. at 177.

113. Id. (citing Maida v. Main Bldg., 473 S.W.2d 648, 651 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ); Western Flavor-Seal Co. v. Kallison, 389 S.W.2d 521, 522 (Tex. Civ. App.—San Antonio 1965, no writ)).
treat the tenant’s conduct as an anticipatory breach of the lease, repossess
and retain the premises for his own purposes, and recover from the tenant
the present value of the rentals that accrue under the lease reduced by the
reasonable cash market value of the lease for the unexpired term.114 Third,
the landlord may treat the tenant’s conduct as an anticipatory breach of the
lease, repossess and relet the premises, and recover from the tenant the con-
tractual rental due under the lease reduced by the amount to be received
from the reletting.115 Fourth, the landlord may declare the lease forfeited
and thereby relieve the tenant of liability for future rental payments.116

The court found that the landlord in Speedee Mart had elected to repos-
sess and retain the premises.117 Consequently, the court ruled that the land-
lord should recover damages from the tenant for anticipatory breach equal
to the present value of the rentals that accrue under the lease reduced by the
reasonable cash market value of the lease.118 The court held that the district
court erred in awarding damages to the landlord for accrued rental pay-
ments due under the lease through the time of trial and remanded the case
for a new trial.119

I. Trade Fixtures

In Neely v. Jacobs120 the Fort Worth court of appeals considered whether
hydraulic lifts qualified as trade fixtures subject to removal by the tenant.
The tenant had installed six hydraulic lifts on the premises. The tenant in-
stalled each lift by placing its base in an excavation approximately nine feet
deep and pouring concrete around its base. Since the tenant did not pour
cement under the base of the lifts, the tenant could remove the lifts by
breaking the concrete collar around the base and pulling each lift out with a
tow truck. After the installation of the lifts, a third party purchased the
premises from the prior owner and landlord and ordered the tenant to vacate
the premises because of rental arrearages. A dispute arose concerning the
ownership of the lifts. The new landlord contended that he owned the lifts
because the lifts constituted part of the realty purchased from the prior
owner. The tenant claimed that the lifts qualified as removable trade fix-
tures. Consequently, when the tenant vacated the premises, he took with
him controls and above-ground pipes, rendering the lifts inoperable. The
landlord filed suit to enjoin the tenant from removing the lifts from the

114. 664 S.W.2d at 177 (citing Maida v. Main Bldg., 473 S.W.2d 648, 651 (Tex. Civ.
    App.—Houston [1st Dist.] 1971, no writ); Walter E. Heller & Co. v. Allen, 412 S.W.2d 712,
    719-20 (Tex. Civ. App.—Corpus Christi 1967, writ ref’d n.r.e.)).
115. 664 S.W.2d at 177 (citing Maida v. Main Bldg., 473 S.W.2d 648, 651 (Tex. Civ.
    App.—Houston [1st Dist.] 1971, no writ); White v. Watkins, 385 S.W.2d 267, 270 (Tex. Civ.
    App.—Waco 1964, no writ)).
116. 664 S.W.2d at 177 (citing Maida v. Main Bldg., 473 S.W.2d 648, 651 (Tex. Civ.
    App.—Houston [1st Dist.] 1971, no writ); Rohrt v. Kelley Mfg. Co., 162 Tex. 534, 537, 349
    S.W.2d 95, 98 (1961)).
117. 664 S.W.2d at 177.
118. Id. at 177-78.
119. Id. at 178.
120. 673 S.W.2d 705 (Tex. App.—Fort Worth 1984, no writ).
premises, and the tenant counterclaimed for conversion damages. After a nonjury trial, the district court found that the landlord had converted the lifts and awarded the tenant damages of $20,000 as the cash market value of the lifts on the date of conversion.

The court of appeals found that to qualify as a trade fixture, an article generally must satisfy two requirements: (1) the tenant must have annexed the article to the realty to enable him properly or efficiently to carry on his trade, profession, or enterprise as contemplated by the lease or in which he engages while he occupies the premises; and (2) the article must be removable without material injury to the freehold. Since the tenant installed the lifts to carry on his transmission business, the court of appeals found that the lifts met the first requirement of the trade fixture test. The court of appeals further found that the lifts satisfied the second requirement of the trade fixture test since the evidence showed that the tenant could remove the lifts from the premises by merely breaking the concrete collar around the base of each lift. The court of appeals, therefore, affirmed the district court's judgment, but ordered a remitter of $10,200 of the $20,000 damages awarded to the tenant, which the court found to represent the reasonable cost of removing the lifts.

J. Waiver and Ratification

In *The Atrium v. Kenwin Shops of Crockett, Inc.* the Houston court of appeals considered whether the landlord ratified a letter agreement that was void by its terms by accepting rental under and acquiescing to the tenant's occupancy of new premises pursuant to the letter agreement. The tenant in *The Atrium* had leased retail premises from the prior owner. After purchasing the premises from the prior owner, the landlord wished to renovate the premises extensively. The landlord requested the tenant to relocate to a newly renovated area of the building after completion of the renovations. The tenant agreed to relocate, and the landlord and the tenant entered into a letter agreement, which provided that the agreement would be null and void if the landlord did not fully complete the renovation so that the tenant could move in and commence business by a specified date. The landlord did not complete the renovation until approximately six months after the specified completion date, at which time the tenant moved into the new premises. Approximately six months after moving into the new premises, the tenant tendered and the landlord accepted the additional rental specified in the letter agreement. The landlord later expressed doubt concerning the validity of the letter agreement and filed a petition for declaratory judgment requesting the court to declare the letter agreement null and void as called for by its literal terms. The tenant responded to such action by contending that the

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121. Id. at 707 (citing Jim Walter Window v. Turnpike Distrib., 642 S.W.2d 3 (Tex. App.—Dallas 1982, no writ)).
122. 673 S.W.2d at 708.
123. Id.
124. Id. at 708-10.
125. 666 S.W.2d 315 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).
The landlord had ratified the letter agreement. The tenant argued that the landlord was estopped from challenging the validity of the letter agreement since the landlord had accepted the increased rentals and permitted the tenant to occupy the new premises. After both parties filed motions for summary judgment, the district court held that the landlord had waived any conditions in the letter agreement and that the parties had ratified the letter agreement by their continuing course of conduct.

The court of appeals held that the district court correctly denied the landlord's motion for summary judgment because the landlord, by accepting increased rental under the letter agreement and allowing the tenant to occupy the new premises, clearly raised questions of fact as to whether such actions constituted waiver and ratification by the landlord. The court of appeals further held that the district court erred in granting the tenant's motion for summary judgment since waiver and ratification involve questions of intent. The court found that the evidence did not conclusively establish whether the landlord intended by his actions to create a waiver and ratification of the letter agreement or a tenancy at will under the terms of the previously existing lease. The court of appeals, therefore, reversed the judgment of the district court and remanded the case for a new trial.

II. MORTGAGES

A. Assignment of Rents

In In re Village Properties, Ltd. the Fifth Circuit considered whether, under the Bankruptcy Code of 1978, a mortgagee of Texas property who holds a deed of trust containing a collateral assignment of rents provision has any secured interest in rents collected by the mortgagor between the date of default and the date of foreclosure. The mortgagee in Village Properties held a deed of trust covering the collateral that included a collateral assignment of rents provision. After default on the indebtedness secured by the deed of trust, the owner of the collateral filed chapter 11 bankruptcy. The mortgagee filed a complaint to modify the automatic stay to permit foreclosure under the deed of trust. The bankruptcy court modified the automatic stay and ordered foreclosure. Approximately four months after the original bankruptcy petition, the deed of trust was foreclosed, and the mortgagee obtained possession of the collateral. The complaint to modify the automatic stay constituted the only pleading by the mortgagee filed in the bankruptcy court. The mortgagee did not petition the bankruptcy court for the appointment of a receiver, for an order of sequestration, or for any other

126. Id. at 317-18 (citing Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848, 851 (Tex. 1980)).
127. 666 S.W.2d at 318 (citing Merbitz v. Great Nat'l Life Ins. Co., 599 S.W.2d 655, 658 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (waiver); Sawyer v. Pierce, 580 S.W.2d 117, 123 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (ratification)).
128. 666 S.W.2d at 318.
129. Id.
130. 723 F.2d 441 (5th Cir. 1984).
order to impound rents. After the foreclosure, the mortgagee filed a proof of
claim against the mortgagor asserting an interest in rents collected between
the date of default on the indebtedness secured by the deed of trust and the
date of foreclosure pursuant to the deed of trust. The mortgagor objected to
the claim on the ground that the mortgagee no longer was a creditor of the
mortgagor’s estate. After a hearing on stipulated facts the bankruptcy court
denied the mortgagee’s claim. The mortgagee appealed to the federal district
court, which affirmed the bankruptcy court, and the mortgagee thereafter
appealed to the Fifth Circuit.

The Fifth Circuit found that Texas adheres to the lien theory of mort-
gages, under which the mortgagee does not own the collateral and is not
entitled to possession, rentals, or profits of the collateral.132 Consequently,
the mortgagee usually requires an assignment of the mortgagor’s interest in
rents falling due after the date of the deed of trust as additional security for
the indebtedness.133 Texas also has followed the common law rule that an
assignment of rents does not become effective until the mortgagee obtains
possession of the collateral, impounds the rents, secures the appointment of
a receiver, or takes some other similar action.134 The court found that the
deed of trust in the instant case contained language similar to language con-
tained in deeds of trust previously held by Texas courts to create only a
pledge of rents.135 The Fifth Circuit, therefore, held that the mortgagee’s
assignment of rents created only a security interest and did not entitle the
mortgagee to the rents in dispute because the mortgagee had not taken the
requisite affirmative steps to activate the pledge.136 Since Texas law did not
entitle the mortgagee to the disputed rents, the Fifth Circuit next considered
whether Congress intended that the Bankruptcy Code preempt state law on
the assignment of rents and automatically activate the assignment on de-
fault. The Supreme Court had previously considered the issue in Butner v.
United States,137 holding that state law controls the assignment of rents issue
under the Bankruptcy Act of 1898.138

The mortgagee in Village Properties argued that Butner applied only to the
Bankruptcy Act of 1898 and that Butner specifically recognized that Con-
gress had the authority to enact federal legislation defining a mortgagee’s
interest in rents. Using the definition of cash collateral contained in section
363(a) of the Bankruptcy Code,139 the mortgagee further argued that the

132. 723 F.2d at 443.
133. Id.
134. Id. (citing Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981); Simon v. State Mut. Life
Assurance Co., 126 S.W.2d 682 (Tex. Civ. App.—Dallas 1939, writ ref’d); McGeorge v.
Henrie, 94 S.W.2d 761 (Tex. Civ. App.—Texarkana 1936, no writ)).
135. 723 F.2d at 443.
136. Id.
138. 440 U.S. at 54-56; see Bankruptcy Act of 1898, 30 Stat. 544 (1898) (current version at
11 U.S.C. §§ 101-151, 326 (1982)).
139. 11 U.S.C. § 363(a) (1978). Section 363(a) defines cash collateral as “cash . . . or
other cash equivalents in which the estate and an entity other than the estate have an interest,”
id., such as a lien or a co-ownership interest. The mortgagee argued that “lien” should include
inchoate liens created by agreement, such as assignment of rents. The mortgagee contended
The bankruptcy court should turn to state law to determine whether and at what time a mortgagee has an interest in the rents. The mortgagee contended that if section 363(a) applied to rents in which the mortgagee had an interest through assignment, then section 363(c)(1) prohibits the trustee from using, selling, or leasing the cash collateral unless each entity with an interest therein consents or the court, after notice and hearing, authorizes such use. The Fifth Circuit rejected the mortgagee’s arguments and held that the language contained in section 552(b) of the Code clearly showed Congress’s intent not to disturb Burner or to preempt state law. Section 552(b) provides that a security interest extends to rents acquired by the estate after the commencement of the case to the extent provided by the security agreement and by applicable law. Since the mortgagee had not demonstrated a right to the disputed rents under either the Bankruptcy Code or state law, the Fifth Circuit affirmed the holding of the federal district court.

B. Deed in Lieu of Foreclosure

In Karcher v. Bousquet the Tyler court of appeals considered whether a deed from the mortgagor to the mortgagee in satisfaction of the indebtedness constituted a deed in lieu of foreclosure and thus cancelled a prior deed of the mineral estate absent evidence of default on the indebtedness. In Karcher the mortgagor executed a promissory note payable to the mortgagee secured by a duly recorded deed of trust lien covering the collateral. After the recordation of the deed of trust, the mortgagor conveyed all of the oil, gas, and other minerals in and under the collateral to his son by gift deed. Subsequent to the recordation of the gift deed, the mortgagor conveyed the collateral to the mortgagee by a warranty deed. The warranty deed recited as consideration the cancellation of the promissory note secured by the deed of trust. The collateral subsequently passed by conveyance through several parties, and the son of the mortgagor executed an oil, gas, and mineral lease covering those properties. Parties claiming under the mortgagee filed an action to cancel the gift mineral deed to the mortgagor’s son and to remove the cloud on the title as to the oil, gas, and other minerals in, to, and under the collateral. The lessee of the mineral estate intervened in the suit. The district court granted a motion for summary judgment filed by the parties claiming under the mortgagee and rendered judgment cancelling the gift mineral deed and removing the cloud on title to the mineral estate. The mortgagor’s son and his lessee appealed.

On appeal the mortgagor’s son argued that the district court erred in ren-
dering judgment cancelling the gift mineral deed because the mineral deed preceded the deed of the collateral to the mortgagee. The mortgagor's son argued that the deed to the mortgagee did not constitute a deed in lieu of foreclosure since the mortgagor had not defaulted under the deed of trust at the time of the conveyance. The mortgagor's son and his lessee further contended that the mortgagor had the absolute right to convey the mineral estate subject to the deed of trust lien and that the deed of trust did not constitute a conveyance and did not prohibit the transfer of the title to the collateral.

The court of appeals found that under the Texas lien theory of mortgages a mortgagee does not own the collateral and the mortgagor has legal title to and the right to convey the collateral to another party subject to the deed of trust lien.\textsuperscript{145} The court further found that since no evidence was presented that the mortgagor had defaulted under the deed of trust at the time that the mortgagor conveyed the collateral to the mortgagee, the conveyance did not constitute a deed in lieu of foreclosure.\textsuperscript{146} The court, therefore, held that the conveyance from the mortgagor to the mortgagee did not include the mineral estate previously conveyed to the mortgagor's son and reversed the judgment of the district court.\textsuperscript{147}

C. Due-on-Sale

In \textit{Slusky v. Coley}\textsuperscript{148} the Houston court of appeals considered whether a wraparound deed of trust entitled the mortgagee to accelerate the indebtedness and foreclose under the wraparound deed of trust upon a conveyance of the collateral in violation of the due-on-sale clause contained in the underlying deed of trust. In \textit{Slusky} the mortgagee conveyed the collateral to the mortgagor and received a wraparound note as partial consideration for the conveyance. The wraparound note included the principal amount of a note secured by a first lien deed of trust covering the collateral. The first lien deed of trust contained a due-on-sale clause. The parties obtained the consent of the holder of the first lien deed of trust in connection with the transfer of the collateral. The wraparound deed of trust did not contain a due-on-sale clause, but did provide that the mortgagor would pay and perform the covenants and obligations imposed by the first lien deed of trust and that any default by the mortgagor under the first lien deed of trust would permit the

\textsuperscript{145} Id. at 291-92 (citing Taylor v. Brennan, 621 S.W.2d 592, 593 (Tex. 1981) (under Texas's lien theory of mortgages the mortgagee is not owner of the property and is not entitled to its possession, rentals, or profits); Bradford v. Knowles, 86 Tex. 505, 508, 25 S.W. 1117, 1118 (1894) (mortgagor in Texas has legal title and may convey it to grantee); Fleming v. Adams, 392 S.W.2d 491, 495 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (mortgage does not convey title to land); Ziegler v. Sawyer, 16 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1929, writ ref'd) (mortgage is a mere lien on the property and vests no estate in the mortgagee); Paddock v. Williamson, 9 S.W.2d 452, 454 (Tex. Civ. App.—Beaumont 1928, writ ref'd) (mortgagor in Texas retains legal title)).

\textsuperscript{146} 672 S.W.2d at 292 (citing Baur v. Voelker Realty Co., 589 S.W.2d 867, 869 (Tex. Civ. App.—Dallas 1979, no writ)).

\textsuperscript{147} 672 S.W.2d at 292.

\textsuperscript{148} 668 S.W.2d 930 (Tex. App.—Houston [14th Dist.] 1984, no writ).
mortgagee to accelerate the wraparound note and foreclose the lien of the wraparound deed of trust. Approximately five years after the conveyance of the collateral from the mortgagee to the mortgagor, the mortgagor conveyed the collateral to a third party without securing the approval of the holder of the first lien deed of trust. One week after the conveyance, the mortgagee’s attorneys wrote a letter to the mortgagor demanding two acts of the mortgagor by a specified date: first, that the mortgagor pay past due principal and interest on the wraparound note, ad valorem taxes on the collateral, and attorney’s fees due under the wraparound note; and second, that the mortgagor furnish to the mortgagee’s attorneys written confirmation from the holder of the first lien deed of trust of the approval of the collateral’s transfer to the third party. The letter further notified the mortgagor that failure to comply with both demands on or before the specified date would result in foreclosure of both the wraparound note and the wraparound deed of trust.

The third-party owner of the collateral tendered the sums demanded before the specified date. The mortgagee, however, refused the tender because neither the mortgagor nor the third-party owner obtained approval of the transfer of the collateral from the holder of the first lien deed of trust. On the specified date the mortgagee’s attorneys notified the mortgagor that the mortgagee had accelerated the wraparound note and would post the collateral for foreclosure. The third-party owner of the collateral applied to the district court for a temporary injunction to preserve the status quo and a declaratory judgment establishing his rights under the wraparound note, wraparound deed of trust, and other instruments. The district court denied the application, and the third-party owner of the collateral appealed. On appeal the third-party owner of the collateral argued that since the wraparound deed of trust did not contain a due-on-sale clause, absent the holder of the first lien deed of trust declaring default or accelerating the first lien debt because of the transfer, the mortgagee had no right to accelerate the wraparound note and proceed to foreclosure under the wraparound deed of trust.

Citing two prior cases, the court of appeals found that a due-on-sale clause did not constitute an unreasonable restraint on alienation. The court further found that the provision contained in the wraparound deed of trust requiring the mortgagor to perform all covenants required under the first lien deed of trust gave the mortgagee the right to accelerate the wraparound note and to foreclose under the wraparound deed of trust upon the transfer of the collateral by the mortgagor without the approval of the holder of the first lien deed of trust. Consequently, the court of appeals affirmed the district court’s denial of the temporary injunction and dissolved the temporary injunction granted by the court of appeals to protect its

150. 668 S.W.2d at 934.
151. Id.
In North Point Patio Offices Venture v. United Benefit Life Insurance Co. the Houston court of appeals considered whether the mortgagee's requirement that the mortgagor pay a fee to the mortgagee for the mortgagee's consent to a transfer of the collateral rendered the due-on-sale clause contained in the deed of trust an unreasonable restraint on alienation of property. In North Point the deed of trust contained a due-on-sale clause requiring the written consent of the mortgagee prior to certain dispositions of the collateral within five years of the execution of the deed of trust. Approximately one year after documentation of the loan, the mortgagor wished to transfer the collateral to a third party. Although the proposed transfer allegedly did not satisfy the mortgagee, the mortgagee proposed that the mortgagor pay the mortgagee a fee equal to five percent of the then outstanding indebtedness rather than have the mortgagee accelerate the indebtedness. The mortgagor paid the fee under protest and filed suit against the mortgagee alleging, inter alia, that the due-on-sale clause constituted an unreasonable restraint on alienation of property. The district court granted the mortgagee's motion for summary judgment, and the mortgagor appealed.

The court of appeals found that Texas case law has established a two-step process for determining the validity of due-on-sale clauses. First, the court must decide whether the clause constitutes a restraint on alienation of property. Second, if the court finds that the clause constitutes a restraint, then the court must determine whether the restraint is unreasonable and thus void as against public policy. After analyzing the decision of the Texas Supreme Court in Sonny Arnold, Inc. v. Sentry Savings Association, the court of appeals decided that the due-on-sale clause constituted a restraint on alienation. The court also based this decision on the fact that the clause contained a direct, contractual promissory restraint on alienation prohibited by the Restatement of Property as construed by the Texas Supreme Court in Sonny Arnold. The court further held that the imposition of the transfer fee by the mortgagee coerced the mortgagor and constituted an inherent restraint on alienation of property. The court of appeals, therefore, reversed the judgment of the district court and remanded the case for trial.

In Longview Savings & Loan Association v. Nabours the Texarkana
court of appeals considered whether representations of the mortgagee's representative constituted a waiver of the mortgagee's right to enforce the due-on-sale clause contained in the deed of trust. In *Longview Savings* the deed of trust contained a due-on-sale clause requiring the mortgagor to obtain written consent of the mortgagee prior to any inter vivos transfer of the premises. A third party wished to purchase the home of the mortgagor, but did not want to assume the indebtedness at an increased interest rate. The mortgagor agreed to finance the purchase with a wraparound mortgage. The mortgagor's attorney requested the mortgagee to consent to the sale. The mortgagee responded that the third party must apply for an assumption of the loan and must execute an assumption agreement. The mortgagee further stated that if the transfer occurred without the consent of the mortgagee, the mortgagee would treat the transfer as a default under the terms of the deed of trust and would act accordingly. The mortgagor's attorney responded to the mortgagee's letter by explaining that the third party did not wish to assume the loan, but wished to obtain financing from the mortgagor. Prior to close of the sale, a vice-president of the mortgagee telephoned the third party and recommended that the third party not complete the purchase. The vice-president did not state that the mortgagee would enforce the due-on-sale clause. In a previous transaction with the third party the same vice-president of the mortgagee had waived the due-on-sale requirement contained in a similar deed of trust and assured the third party that the mortgagee did not escalate or foreclose when sales were made without its consent, even though the mortgagor might give formal notice to the contrary. Relying on waiver by the mortgagee, the third party purchased the home from the mortgagor. The mortgagor continued for several months to make monthly payments on the loan. The mortgagee received the payments without objection, but subsequently posted foreclosure notices. After obtaining a temporary injunction to restrain the mortgagee from proceeding with foreclosure, the third party sued in district court. The jury found that the mortgagee had waived its right to foreclose, and the mortgagee appealed.

The court of appeals affirmed the district court and held that a court may imply waiver from acts that raise an inference of an intention to relinquish a right or that mislead another person to his prejudice into the honest belief that waiver was intended. The court rejected the mortgagee's argument that the right to foreclose had not accrued at the time that the acts allegedly constituting waiver occurred. The court found evidence of a course of conduct before, during, and after the transfer of the house that sufficiently established facts to justify a finding of waiver. The court also rejected the mortgagee's argument that the mortgagee's letter and telephone call to the third party negated any waiver. The court found evidence that the mort-

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164. *Id.* at 361 (citing Lewis v. Smith, 198 S.W.2d 598 (Tex. Civ. App.—Fort Worth 1946, writ dism'd); Miller v. Deahl, 239 S.W. 679 (Tex. Civ. App.—Amarillo 1922, writ ref'd); 60 TEX. JUR. 2D Waiver § 9 (1964)).
165. 673 S.W.2d at 361.
166. *Id.*
167. *Id.*
gagee told the third party that any notice that the mortgagee would enforce its rights would only constitute a formality and that such notice should not concern the third party.168

D. Foreclosure

In Mussina v. Morton169 the Houston court of appeals considered whether a domestic relations court in a divorce proceeding had the authority to issue a temporary injunction to protect against foreclosure by the mortgagee under the deed of trust and to appoint a receiver. In Mussina the mortgagee sold the collateral to the mortgagors and received a third-lien note secured by a deed of trust on the collateral. When the mortgagors failed to pay an installment due on the note, the mortgagee accelerated the note and demanded full payment. The mortgagors failed to tender full payment, and the mortgagee and the trustee under the deed of trust gave notice of foreclosure. The mortgagors were a husband and wife engaged in a divorce proceeding. The wife responded to the foreclosure notice by petitioning the divorce court for a temporary restraining order or a temporary injunction to prohibit foreclosure. After the divorce court granted a temporary restraining order and appointed a receiver with directions to sell the collateral covered by the deed of trust, the mortgagee appealed.

The court of appeals reversed the divorce court’s order granting the temporary injunction and vacated the appointment of the receiver by the divorce court.170 The court of appeals found that the purpose of a temporary injunction is to preserve the status quo pending a trial on the merits.171 The court further found that the applicant for a temporary injunction has the burden of showing a probable right of success in a trial on the merits and probable injury if the court does not grant the injunction.172 Since the mortgagee’s deed of trust appeared valid on its face and the parties did not question the validity or justness of the indebtedness, the court of appeals held that the wife did not meet her burden of showing a probability of success in a trial on the merits and could not object to the enforcement of the mortgagee’s rights in accordance with the contract between the parties.173 Finally, the court held that section 3.58 of the Texas Family Code174 did not authorize a divorce court to appoint a receiver when the owner of the marital property seeks the appointment against a third-party creditor.175

168. Id.
170. Id. at 873.
171. Id. (citing Camp v. Shannon, 162 Tex. 515, 348 S.W.2d 517 (1961)).
172. 657 S.W.2d at 873 (citing Millwrights Union v. Rust Eng’g, 433 S.W.2d 683 (Tex. 1965)).
173. 657 S.W.2d at 873 (citing Bowers v. Cottonbelt Oil & Gas Co., 94 S.W.2d 214 (Tex. Civ. App.—Beaumont 1936, no writ)).
175. 657 S.W.2d at 873-74 (citing North Side Bank v. Wachendorfer, 585 S.W.2d 789 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); TEX. REV. CIV. STAT. ANN. art. 2318 (Vernon 1971)).
In *Cantu v. Harris* the Corpus Christi court of appeals considered whether a portable metal building constituted a fixture that became the property of the purchasers under a foreclosed deed of trust. In *Cantu* the purchasers sought an injunction to prevent the prior owners from removing a portable metal building that the purchasers contended passed to them pursuant to the foreclosure. The evidence showed that the prior owners had added a three- to four-inch concrete floor to the portable metal building. After a nonjury trial, the district court found that the prior owners had permanently attached the portable metal building to the land and that the building constituted part of the real estate purchased. The district court issued a permanent injunction to prevent the prior owners from removing the building, and the prior owners appealed.

The court of appeals found that Texas case law had established the following three-part test to determine whether a chattel has become an immovable fixture: (1) a party must actually or constructively annex the property in question to the realty; (2) the property must fit or adapt to the uses or purposes of the realty to which the party connects the property; and (3) the party must intend that the property become a permanent accession to the freehold. The court found that the intent of the annexing party is the most important factor. Applying this test to the present case, the court of appeals found no evidence that the building had become part of the realty and found uncontradicted and corroborated testimony that the prior owners intended to remove the building. The court thus dissolved the permanent injunction granted by the district court.

In *Corinth Joint Venture v. Lomas & Nettleton Financial Corp.* the Dallas court of appeals considered whether a settlement agreement between the mortgagee and two guarantors of the indebtedness, one of which was a joint venturer in the mortgagor, could extend the maturity date of the indebtedness otherwise subject to the statute of limitations. A joint venture executed and delivered a promissory note, secured by guaranties, to the mortgagee. The mortgagee held a deed of trust against specific property of the joint venture. After a default on the indebtedness the mortgagee filed suit on the guaranties, but did not join the joint venture in the suit. The mortgagee and two of the guarantors, one of whom was a partner in the joint venture, entered into a settlement agreement establishing a schedule of payments to retire the indebtedness. After a default on the indebtedness the mortgagee filed suit on the guaranties, but did not join the joint venture in the suit. The mortgagee and two of the guarantors, one of whom was a partner in the joint venture, entered into a settlement agreement establishing a schedule of payments to retire the indebtedness. After supplementation of the settlement agreement and severance of the action against the other guarantors, the court rendered an agreed judgment against the two guarantors. Subsequently, because the
two guarantors did not make payments in accordance with the settlement agreement, the mortgagee demanded immediate payment. The mortgagee stated that, if the two guarantors did not promptly pay, the mortgagee would post the property of the joint venture for foreclosure under the deed of trust.

The joint venture and the guarantor that was both a party to the settlement agreement and a partner in the joint venture filed suit seeking a temporary and permanent injunction to prevent foreclosure of the deed of trust on the ground that the statute of limitations barred the indebtedness because the debtors had defaulted more than four years prior to the suit. The mortgagee contended that the settlement agreement extended the maturity date of the indebtedness and that the indebtedness, as extended by the settlement, had remained in default less than four years. The district court denied the permanent injunction, but temporarily enjoined the foreclosure proceedings to protect the jurisdiction of the court of appeals. On appeal the joint venture and the guarantor argued that the settlement agreement could not bind the joint venture because the joint venture had joined neither the settlement agreement nor the litigation from which the settlement agreement developed. The joint venture further contended that the guarantor that was a party to the settlement agreement and a partner in the joint venture did not have the authority to bind the joint venture to the settlement agreement. The joint venture argued that to bind the joint venture to the settlement agreement would constitute confessing a judgment against the joint venture, an action which requires the joinder of all partners.  

The court of appeals affirmed the district court ruling and dissolved the temporary injunction. The court of appeals found that the mortgagee and the guarantor that was a party to the settlement agreement and a partner in the joint venture intended to bind the joint venture as well as the express parties to the settlement agreement. The court further found that the guarantor had the authority to bind the joint venture on the settlement agreement. The court held that the settlement agreement constituted a contract rather than a judgment and rejected the joint venture’s argument that the settlement agreement constituted a confession of judgment requiring joinder of all partners.

In Hury v. Preas the Tyler court of appeals considered whether the prior death of the mortgagor and a pending temporary administration voided a trustee’s sale pursuant to the mortgagee’s deed of trust and subsequent trustee’s deed. In Hury the mortgagor executed a deed of trust covering certain collateral as security for a promissory note payable to the mortgagee. Less than two months after executing the promissory note and deed of trust, the mortgagor died intestate, and the court appointed the

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183. 667 S.W.2d at 596-97.
184. Id. at 596.
185. Id. at 597.
186. Id. at 594-97.
187. 673 S.W.2d 949 (Tex. App.—Tyler 1984, writ ref’d n.r.e.).
mortgagor's surviving wife to serve as temporary administratrix of his estate. The court never made the appointment of the mortgagor's wife as administratrix of the deceased mortgagor's estate permanent. Approximately ten months after the death of the mortgagor, the trustee under the deed of trust sold the collateral covered by the deed of trust to the mortgagee at a trustee's sale conducted pursuant to the deed of trust and issued a trustee's deed to the mortgagee. The heirs of the deceased mortgagor brought suit to cancel the trustee's sale and deed. The district court rendered judgment that the heirs of the deceased mortgagor take nothing and that the successor to the interest of the mortgagee recover title and possession to the land in question. The heirs of the deceased mortgagor appealed.

On appeal the successors to the interest of the mortgagee contended that no administration remained pending at the time of the trustee's sale because the court never granted a permanent administration and the temporary administration terminated at some point in time. The court held as a matter of law that the opening of the administration suspended the power of sale contained in the deed of trust. The court further held that the power of sale remained suspended on the dates of the trustee's sale and deed to the mortgagee and that the sale and conveyance were void. Consequently, the court reversed the judgment of the district court and rendered judgment canceling and setting aside the trustee's deed to the mortgagee.

In *Gonzales v. Lockwood Lumber Co.* the Houston court of appeals considered whether the two-year or the four-year statute of limitations applied to a cause of action for wrongful foreclosure. In *Gonzales* the mortgagors filed suit for recovery of monetary damages for wrongful foreclosure of the deed of trust. The mortgagors filed suit within two years after the date of foreclosure, but failed, until two years after the foreclosure date, to add as a defendant the party who apparently caused the foreclosure. The responsible defendant raised the two-year statute of limitations as a defense. The jury found that the mortgagors had not defaulted at the time of foreclosure. The district court, however, ruled that the two-year statute of limitations barred the action and entered a take-nothing judgment non obstante veredicto. The mortgagors appealed.

The court of appeals held that the four-year statute of limitations governs a cause of action for wrongful foreclosure. The court found that the two-year statute of limitations basically applies to tort actions, whereas the four-year statute of limitations applies to actions founded in contract. The court reasoned that a suit for wrongful foreclosure obviously arises from

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188. *Id.* at 951 (citing *Pearce v. Stokes*, 155 Tex. 564, 566, 291 S.W.2d 309, 310-11 (1956); *Robertson v. Paul*, 16 Tex. 472, 474 (1856)).
189. 673 S.W.2d at 951-52.
190. *Id.* at 950, 952.
191. 668 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1984, no writ).
193. *Id.* art. 5527.
194. 668 S.W.2d at 815.
195. *Id.*
the contractual provisions of the deed of trust, and the court reversed and rendered the judgment of the district court.196

E. Homestead

In Dodd v. Harper197 the Houston court of appeals considered whether the constitutional prohibition against liens covering homesteads applied to a deed of trust covering the homestead of the mortgagor if the mortgagor held title to the homestead in the name of a sole proprietorship that had never requested a homestead exemption for ad valorem tax purposes. The mortgagee in Dodd presented a claim to the administrator of the deceased mortgagor's estate. The claim involved a promissory note that a sole proprietorship owned by the mortgagor had executed in favor of the mortgagee. Security for the note consisted of a deed of trust covering a townhome held in the name of the sole proprietorship and a guaranty of the mortgagor. The administrator denied the mortgagee's claim on several grounds. As one defense the administrator argued that the townhome covered by the deed of trust constituted the homestead of the deceased mortgagor and that the deed of trust thus violated the constitutional prohibition against liens covering homesteads for purposes other than purchase money, improvements, or taxes.198 The probate court found that the mortgagor had openly and obviously used the townhome covered by the deed of trust as a homestead. The probate court thus denied the mortgagee's claim, and the mortgagee appealed.

On appeal the mortgagee argued that since the mortgagor had held title to the townhome in the name of the sole proprietorship and since the mortgagor had never requested a homestead exemption on the townhome for ad valorem tax purposes, the evidence showed that the mortgagor had never claimed the townhome as his homestead.199 The court of appeals, however, rejected the mortgagee's argument. To establish homestead rights under Texas law, the court held, one must prove concurrent usage and intent to claim the property as a homestead.200 The court held that one need not base a homestead claim on a specific writing,201 but one may qualify for the constitutional homestead protections by merely using and enjoying property as a home.202 Finally, the court held that mere failure to designate property as a homestead cannot void the constitutional homestead protections.203 Applying these principles to the facts of the case, the court found that the townhome constituted the only residence of the deceased mortgagor at the time of his death and that the deceased mortgagor kept all of his personal

196. Id.
197. 670 S.W.2d 646 (Tex. App.—Houston [1st Dist.] 1983, no writ).
198. Id. at 647; see TEX. CONST. art. XVI, § 50.
199. 670 S.W.2d at 649.
200. Id. (citing Prince v. North State Bank, 484 S.W.2d 405, 409 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.)).
201. 670 S.W.2d at 649.
202. Id. (citing Hoffman v. Love, 494 S.W.2d 591, 594 (Tex. Civ. App.—Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973)).
203. 670 S.W.2d at 649.
effects in the townhome. The court further found that the deceased mortgagor used the townhome as a person normally would use a home and that the deceased mortgagor never made any attempt to conceal from anyone the fact that the townhome constituted his home. The court of appeals, therefore, affirmed all of the probate court's findings, including the finding that the townhome covered by the deed of trust constituted the homestead of the deceased mortgagor.

In Fuller v. Preston State Bank the Dallas court of appeals considered whether evidence concerning a simulated sale of a homestead required a trial on the merits in a suit by the vendor to cancel a deed of trust on the homestead arising from the sale. In Fuller a husband and wife owed money to a mortgagee, which unsuccessfully sued to collect the debt and establish a receivership. After threatening to file a bankruptcy proceeding, the mortgagee financed a sale of the mortgagors' homestead to the mortgagors' son and daughter-in-law and thereby acquired a deed of trust lien on the homestead. The mortgagee financed the sale of the homestead under unusual circumstances. The mortgagee initially rejected a loan application apparently submitted by the husband/vendor on behalf of his son and daughter-in-law. The mortgagee then approved a second loan application by the son and daughter-in-law following negotiations with the husband/vendor. The mortgagee approved the loan despite the fact that the son and daughter-in-law had only $200 at the time, the mortgagee had not yet received verification of the information contained in the loan application, and the parties had not executed the contract of sale covering the home. At the closing of the sale the son and daughter-in-law executed a new promissory note payable to the mortgagee and a deed of trust on the home to secure the note. The mortgagee applied the loan proceeds to retire the existing indebtedness of the husband/vendor, to retire another debt secured by a lien on the home, and to pay a portion to the husband/vendor. The record left unclear whether the mortgagee actually advanced the remainder of the face amount of the loan.

Several aspects of the closing of the sale raise questions regarding the integrity of the conveyance. First, although the closing papers recited a cash payment of $15,000, the son and daughter-in-law of the mortgagors paid nothing in cash. The settlement statement showed a $15,000 deposit on earnest money, but another part of the statement reduced the amount due to the seller by $15,000. Second, the closing instructions required the vendors' son and daughter-in-law to pay certain closing costs normally paid by a purchaser, and affidavits executed by both the vendors and the son and daughter-in-law of the vendors stated that the son and daughter-in-law paid such costs. The settlement statement, however, showed that the husband/vendor paid the closing costs. Third, when a question arose concerning prepayment penalties on the loan after the first year, the husband/vendor, rather than the

204. Id.
205. Id.
206. Id. at 651.
207. 667 S.W.2d 214 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).
son and daughter-in-law, initialled changes to the documents. Fourth, when
the wife/vendor inquired of the title company attorney whether the sale
would require the vendors to move out of their home, the attorney told her
not to worry. Finally, at the closing the son and daughter-in-law executed
an affidavit stating that they intended to occupy the home as their principal
residence. The vendors, however, continued to occupy the home. Subse-
quently, the husband/vendor died and the wife continued to occupy the
home, did not pay any rental to her son and daughter-in-law, paid all prop-
erty taxes, made all payments on the note to the mortgagee, and took the
interest on the note as a deduction on her federal income tax. Apprxi-
mately fourteen months after the sale of the home, the son and daughter-in-
law quitclaimed the home to the wife/vendor.

The wife/vendor sued the mortgagee for cancellation of the mortgagee's
deed of trust lien, alleging that the conveyance by her and her deceased hus-
band to their son and daughter-in-law constituted a simulated transaction
made for the purpose of obtaining a loan from the mortgagee and placing a
lien on the homestead contrary to the prohibition contained in the Texas
Constitution. After a jury trial the district court instructed a verdict for the
mortgagee, and the wife/vendor appealed. The court of appeals held that if
the purported sale constituted a subterfuge for the purpose of obtaining a
lien on the property, the lien was void unless the mortgagee advanced the
loan proceeds in reliance on the apparent genuineness of the sale, without
knowledge of the subterfuge and without knowledge of facts that would put
a reasonable mortgagee on notice of the circumstances. The court found
that the evidence, though circumstantial, indicated that the mortgagee either
knew of the subterfuge or had knowledge of facts that would have put a
reasonable mortgagee on notice of the subterfuge. The court of appeals,
therefore, reversed the district court's instructed verdict for the mortgagee
on the issue of cancellation of the deed of trust and remanded to the distric
court for retrial on the merits.

F. Insurance Proceeds

In English v. Fisher the Texas Supreme Court considered whether the
mortgagee had to forward insurance proceeds to the mortgagors to rebuild
improvements damaged by fire. In English the mortgagee held a deed of
trust lien on the mortgagors' house securing purchase money indebtedness.
The deed of trust required the mortgagors to keep the property fully insured
and entitled the mortgagee to receive the insurance payments in the event of
a loss. When fire partially destroyed the house, the mortgagors requested
that the mortgagee endorse the insurance check to the mortgagors for pur-
pose of rebuilding. The mortgagee verbally agreed to endorse the check, but

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208. Id. at 217-18 (citing Anglin v. Circo Mortgage Loan Co., 135 Tex. 188, 193, 141
S.W.2d 935, 940 (1940); Carter v. Converse, 550 S.W.2d 322, 329 (Tex. Civ. App.—Tyler
1977, writ ref'd n.r.e.)).
209. 667 S.W.2d at 217.
210. Id. at 216, 221.
211. 660 S.W.2d 521 (Tex. 1983).
after discussions with her ex-husband declined to endorse the check. The repairs to the house were delayed for over a year. The mortgagors contended that the delay resulted from their inability to obtain a loan to pay for the repairs without the insurance proceeds. Since the mortgagors and the mortgagee could not agree on the disposition of the insurance proceeds, the insurance company interpleaded the funds into the registry of the court. Approximately eight months after deposit of the funds in the registry of the court, the mortgagors posted a bond and withdrew the insurance proceeds.

The jury found that during the delay the costs of repair had increased $127,616, and the district court rendered judgment for the mortgagors in that amount. The court of appeals affirmed the district court's judgment, and the mortgagee appealed. On appeal the mortgagors contended that the supreme court should affirm the judgments below on three grounds: (1) an implied covenant of good faith and fair dealing; (2) an enforceable verbal contract supported by consideration; and (3) promissory estoppel.

The supreme court refused to adopt the theory that every contract contains an implied covenant that neither party will do anything that injures the right of the other party to receive the benefits of the agreement. The court found that the theory contradicted the well-established adversary system that has served Texas well for almost 150 years. The court further found that the theory would place a party under the onerous threat of treble damages should the party seek to compel his adversary to perform in accordance with the terms of the contract agreed upon and would abolish settled rules of law and result in each case being decided on what might seem fair and in good faith to each fact finder. The supreme court also rejected the mortgagors' contention that the original verbal agreement by the mortgagee to endorse the insurance check created a verbal contract supported by the consideration that the mortgagee's collateral would be enhanced by the increase in value resulting from rebuilding. The court held as a matter of law that the mortgagee received no consideration for the verbal agreement to endorse the check. The court found that the increase in value of the rebuilt home probably did not benefit the mortgagee more than receipt of cash to reduce the indebtedness and thus could not constitute consideration for the mortgagee's promise.

The supreme court finally rejected the mortgagors' argument based on promissory estoppel. The court ruled that the only acts taken by the mortgagors in reliance upon the mortgagee's verbal agreement to endorse the check involved cleaning up some of the burned house in preparation for

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213. 660 S.W.2d at 522.
214. Id.
215. Id.
216. Id. at 523.
217. Id.
218. Id.
219. Id. at 524.
rebuilding and that such acts did not constitute detrimental reliance. The supreme court reversed the judgments of the courts below and rendered judgment that the mortgagors take nothing.

G. Reformation

In Alkas v. United Savings Association the Corpus Christi court of appeals considered whether the property description contained in the deed of trust and subsequent trustee's deed could be reformed to include two excluded tracts. In Alkas the mortgagor purchased several tracts of land, consolidated the tracts, and developed the land as an inn and country club. The mortgagee provided financing for the land acquisition and development. When the mortgagor began having financial difficulty, the parties negotiated a loan consolidation involving a new deed of trust. The new deed of trust did not include two small tracts of land previously covered by the mortgagee's liens. These tracts contained the tennis courts, community postal boxes, and a part of the clubhouse parking lot. The mortgagee later took possession of the collateral as a mortgagee-in-possession. The mortgagor subsequently filed bankruptcy proceedings. For approximately eight months a receiver appointed by the federal bankruptcy court held the collateral. The mortgagee foreclosed upon the collateral, and a third party purchased the collateral with financing provided by the mortgagee. The mortgagee subsequently discovered the omission of the two small tracts from the deed of trust and the trustee's deed and filed suit to quiet title to the two small tracts or, in the alternative, to reform the deed of trust and trustee's deed. Holders of abstract of judgment liens against the mortgagor became defendants in the suit. The district court rendered judgment for the mortgagee, and the holders of the abstract of judgment liens appealed.

The court of appeals ruled that a court may construe an instrument to include a small parcel of land adjacent to a larger tract in a conveyance of the larger tract if: (1) the parcel is small in comparison to the larger tract; (2) the parcel is adjacent to or surrounded by the larger tract; and (3) the parcel is of no importance or benefit to the grantor of the larger tract. The court of appeals also found that a party may obtain the equitable relief of reformation upon proving that the parties reached an agreement, but that the instrument in question did not reflect such agreement. After considering the findings of fact by the district court, the court of appeals found that the two small tracts were small in comparison to the larger tract covered by the deed of trust, were adjacent to such larger tract, and were of no benefit or importance to the mortgagor except in connection with the use of the larger tract.
tract. The court of appeals further found that the two small tracts were excluded from the deed of trust by mistake through scrivener's error. Consequently, the court of appeals affirmed the district court's judgment of reformation of the deed of trust and trustee's deed.

III. MECHANICS' AND MATERIALMEN'S LIENS

A. Description

In Haden Co. v. Mixers, Inc. the Dallas court of appeals considered whether a lien affidavit filed by a materialman contained a sufficient description of the materials furnished. In Haden Co. a materialman sued the owner to recover the invoice price of overhead doors supplied to the general contractor and to foreclose a materialmen's lien filed against the property. The materialman sought to hold the owner liable because of the owner's failure to comply with the statutory retainage requirements. In the lien affidavit filed by the materialman, the materials furnished were described as "5'-12'2" x 14'-1" O.H.Std.M.G. $3,328.00." The district court entered a take-nothing judgment against the materialman, holding as a matter of law that the lien affidavit filed by the materialman was not sufficient to fix a lien on the property of the owner.

The court of appeals affirmed the judgment of the district court. The court held that the abbreviations and symbols used in the lien affidavit were not so generally known in the construction trade to constitute the subject of judicial notice and that if only a specially informed class knows the usage of abbreviations and symbols, that class must be established by pleadings and proof. The court found no evidence in the district court's record of any explanations of the abbreviations and symbols. Finally, the court held that one must record a lien affidavit to give third parties notice of the item for which one claims a lien and that because the contents of the lien affidavit filed by the materialman failed to comply substantially with the statutory notice requirements, no lien was perfected.

225. 672 S.W.2d at 857.
226. Id. at 858.
227. Id. at 860.
228. 667 S.W.2d 316 (Tex. App.—Dallas 1984, no writ).
230. 667 S.W.2d at 317.
231. Id.
232. Id.
234. 667 S.W.2d at 317-18.
235. Id. at 318 (citing Wiseman Hardware Co. v. R.L. King Constr. Co., 387 S.W.2d 79 (Tex. Civ. App.—Dallas 1965, no writ); 57 C.J.S. Mechanics' Liens § 131(4)(b) (1948)).
B. Limitations

In Buck v. Acme Brick Co., the Beaumont court of appeals considered whether the two-year or four-year statute of limitations applies to a suit to foreclose a materialmen's lien. In Buck the materialman delivered bricks, under an oral agreement, to the general contractor for the construction of a house. When the general contractor did not pay the materialman for the bricks, the materialman gave timely notice and filed a lien affidavit. The materialman filed suit against the owners and the general contractor for collection of the debt and foreclosure of the materialmen's lien more than two years after delivery of the bricks. The owners and the general contractor plead the two-year statute of limitations as a defense. The district court granted summary judgment for the materialman for the amount of the debt, foreclosure of the lien, and order of sale. The owners and the general contractor appealed. The court of appeals affirmed the judgment of the district court, finding that Texas courts have consistently held that the four-year statute of limitations governs any action for the breach of a contract for the sale of goods, including suits on sworn accounts.238

C. Priority of Contract

In Joseph v. PPG Industries, Inc., the Austin court of appeals considered whether a subcontractor that failed to perfect a mechanics' lien could counterclaim against the owner for the amount unpaid on the subcontract in a suit by the owner against the subcontractor for damages for breach of warranty. In Joseph the general contractor entered into a subcontract with the subcontractor for the sale and installation of double-paned windows. The subcontract contained a warranty providing that if the materials furnished by the subcontractor had not been manufactured in a workmanlike manner, the subcontractor would furnish replacement units. The owner withheld $9,000 of the contract price under the general contract. The general contractor thereafter failed to pay the subcontractor, abandoned the job, and disappeared. The glass windows subsequently failed to conform to specifications.

The owner sued the subcontractor for damages for express breach of warranty and for violations of the Deceptive Trade Practices Act. The district court rendered judgment that the owner take nothing and cancelled the mechanics' and materialmen's lien filed by the subcontractor on the ground that the subcontractor did not timely file the lien. The court of appeals reversed and remanded for trial the owner's claim under the Deceptive Trade Practices Act, but affirmed the district court's judgment of cancellation of the mechanics' and materialmen's lien. Since the subcontractor had not

237. 666 S.W.2d 276 (Tex. App.—Beaumont 1984, no writ).
238. Id. at 277 (citing Big D Serv. Co. v. Climatrol Indus., 523 S.W.2d 236 (Tex. 1975); Smith v. Post-Tensioned Sys., 537 S.W.2d 144 (Tex. Civ. App.—Fort Worth 1976, no writ)).
239. 674 S.W.2d 862 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
241. 674 S.W.2d at 868.
timely perfected a mechanics' and materialmen's lien and since privity of contract did not exist between the owner and the subcontractor, the court of appeals also held that the subcontractor could not counterclaim for the amount unpaid on the subcontract to offset any damages due to the owner by the subcontractor.

D. Retainage

In *Zack Burkett Co. v. Industrial Indemnity Co.* the Fort Worth court of appeals considered whether a subcontractor's claim against the bonding company that had issued a payment bond was limited to ten percent of the amount of the subcontract. In *Zack Burkett* the owner and the general contractor executed a general construction contract. The general contractor obtained a payment bond as required by the general contract. The general contractor executed a subcontract with the subcontractor for parking lot paving. The subcontractor submitted three invoices to the general contractor, but the general contractor only paid the first two. The subcontractor wrote a demand letter to the general contractor demanding payment and giving notice of an intent to file a lien if the general contractor did not pay in ten days. The subcontractor mailed a copy of the letter to the owner. When the subcontractor did not receive payment, it filed suit against the general contractor and the bonding company. The general contractor subsequently entered bankruptcy. The subcontractor nonsuited the general contractor and received a partial payment in the bankruptcy proceedings. The district court held that the subcontractor had perfected a claim only in an amount equal to the ten percent retainage provided for in the subcontract between the general contractor and the subcontractor. The district court concluded that the subcontractor had failed to perfect the remainder of its claim because the subcontractor had failed to give the statutory warnings required by article 5453.

The court of appeals ruled on appeal that one need not give the statutory warnings required under article 5453 to perfect a lien under article 5469 because article 5469 requires the owner to retain ten percent of the amount of the general contract irrespective of the nature of the claim. The court further ruled that the letter mailed to the general contractor and the owner satisfied the notice requirements of article 5469. Consequently, the court of appeals held that the subcontractor's claim was not limited to ten percent of the amount of the subcontract and that the subcontractor could claim

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243. 662 S.W.2d 161 (Tex. App.—Fort Worth 1983, writ ref’d n.r.e.).


245. *Id.* art. 5469.

246. 662 S.W.2d at 163 (citing *First Nat'l Bank v. Sledge*, 653 S.W.2d 283 (Tex. 1983)).

247. 662 S.W.2d at 163.
against the ten percent of the general contract retained by the owner.248

248. Id. at 162-64.