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REAL PROPERTY: PURCHASE, SALE, TITLE, AND OWNERSHIP

by
William R. Creasey*

DURING the survey period the decided cases in the area of real property law were numerous. Consequently, an extensive treatment of each case is beyond the scope of this Article. The discussion that follows is concerned primarily with cases that are noteworthy because of their subject matter, their results, or the principles of law that they enunciate.

I. PURCHASE AND SALE

Offer and Acceptance. *Dempsey v. King*¹ held that a seller could withdraw acceptance of an earnest money contract after she had signed the contract but before the contract was delivered to the buyers.² A portion of the sellers' divorce decree and property settlement agreement directed the husband to attempt to sell the family residence. The husband and the buyers executed a contract of sale, and the husband then delivered the contract to the wife for her signature. The wife signed the contract and returned it to the husband. The next day, the wife orally notified the husband that she did not intend to go through with the sale. Later that same day, the husband informed one of the buyers that the wife had signed the contract. Although the opinion does not indicate how the wife communicated her withdrawal of acceptance to the buyers, the court upheld the trial court's finding that all parties were aware of the wife's withdrawal prior to the buyers' receipt of the signed contract.³ At closing, the husband conveyed his interest in their house to the buyers. The wife neither attended the closing nor executed an instrument of conveyance.

In affirming the trial court's judgment denying specific performance to the

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1. 662 S.W.2d 725 (Tex. App.—Austin 1983, writ dismissed).

2. *Id.* at 726-27.

3. *Id.* at 726. The court stated: "Evidence in the record amply supports the findings by the jury and the trial court that all parties were aware of [the wife's] withdrawal of acceptance before actual manual or physical 'delivery' of the earnest money contracts back to the purchasers." *Id.* Later in the opinion the court found that the wife "communicated the fact of her withdrawal of such acceptance to the other parties to the agreement two days before delivery of the instrument to the purchaser by her former spouse." *Id.* at 727.

buyers, the court stressed that the offeree must communicate acceptance of an offer to buy real property to the offeror.⁴ The buyers conceded that the husband was not their agent; therefore, the court found that the wife's delivery of the contract to the husband did not constitute delivery to the buyers.⁵ The court held that the wife had effectively withdrawn her acceptance of the contract when she communicated such withdrawal to the buyers prior to their receipt of the contract.⁶ The buyers, however, argued that the mailbox rule applied.⁷ They contended that the act of the wife returning the signed contract to the husband was the equivalent of mailing it to the purchasers. The court dismissed that argument and explained that the mailbox rule applies only in situations in which the person who mails an acceptance, the offeree, desires that the contract be upheld.⁸ The court found no authority for applying the rule to bind the offeree.⁹

The Houston court of appeals in *Vallone v. Miller*¹⁰ outlined the necessary elements of a valid agreement to convey joint management community property. In *Vallone* the husband executed a contract of sale covering such property, but the wife did not sign the contract despite the fact that the contract provided for execution by both husband and wife. The buyer sought to compel either sale of the entire property or sale of the husband's one-half interest. The court confirmed that a husband has the right to convey his interest in nonhomestead joint management community property without the signature of his wife on the conveyance.¹¹ The court stated, however, that to compel the husband to convey his interest, a valid and complete contract to convey must exist.¹² The court found the contract incomplete on its face and incapable of specific enforcement.¹³ The court noted that the property was not described in terms of the husband's undivided one-half interest.¹⁴ Moreover, the terms of the document evidenced the parties' intent that the agreement would be effective only upon execution by both husband and wife as sellers, since the buyers intended to purchase the interests of both the

4. *Id.* at 726. The court cited *American Nat'l Ins. Co. v. Warnock*, 131 Tex. 457, 114 S.W.2d 1161 (1938), as representative of a line of authority that requires communicated acceptance.

5. 662 S.W.2d at 727.

6. *Id.* at 726-27.

7. *Id.* at 727. The term "mailbox rule" was apparently used by the court to refer to the principle of contract law whereby an offer is considered accepted when the acceptance is mailed if the offer was made by letter or the parties agreed that the offer could be accepted by letter. See 14 TEX. JUR. 3D *Contracts* § 77 (1981).

8. 662 S.W.2d at 727.

9. *Id.*

10. 663 S.W.2d 97 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

11. *Id.* at 98; see *Williams v. Portland State Bank*, 514 S.W.2d 124, 127 (Tex. Civ. App.—Beaumont 1974, writ dism'd).

12. 663 S.W.2d at 98. For example, in *Williams v. Portland State Bank*, 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ dism'd), new conveyance documents were prepared for the husband alone to execute after the wife refused to sign the original documents intended to be executed by both husband and wife. The court held that the new documents, executed by the husband, conveyed the husband's interest in the joint management community property. *Id.* at 127.

13. 663 S.W.2d at 98.

14. *Id.*

husband and the wife.¹⁵ The court, therefore, found no basis for compelling the husband to convey his undivided one-half interest.¹⁶ In addition, the court held that the agreement was insufficient to compel sale of the entire property.¹⁷ The court pointed out that absent a special agreement between the spouses, one spouse alone cannot convey joint management community property.¹⁸ Because no evidence of such an agreement was present in this case, the husband had no authority to contract to sell the entire property.¹⁹

Covenants and Conditions. In *Rhodessa Development Co. v. Simpson*²⁰ the El Paso court of appeals determined that an earnest money contract that conditioned the buyer's performance upon the buyer's obtaining a zoning change placed an implied obligation on the buyer to use due diligence to obtain such a change.²¹ Seller and buyer had entered into an earnest money contract pursuant to which the buyer deposited with a title company \$20,000 earnest money to be paid to the seller as liquidated damages if the buyer failed to perform. If the buyer failed to obtain a zoning change by a specified date, the buyer had the right to terminate the contract and receive a refund of the earnest money. The buyer hired engineers and land planners to develop a proposal for submission to the local zoning authority. The buyer then consulted local counsel, who advised that the zoning commission would probably reject the proposal. The buyer decided not to request a zoning change. After the deadline for obtaining the necessary zoning change had passed, the buyer filed suit to recover the earnest money. Although the buyer asserted that the zoning change was a condition precedent that had not been satisfied,²² the court of appeals upheld the trial court's award of the earnest money to the seller.²³ The court found no Texas case on point, but relied on cases from Maryland²⁴ and Connecticut²⁵ to conclude that the buyer had an

15. *Id.*

16. *Id.* at 98-99.

17. *Id.* at 99.

18. *Id.*; see TEX. FAM. CODE ANN. § 5.22 (Vernon 1975).

19. 663 S.W.2d at 99.

20. 658 S.W.2d 218 (Tex. App.—El Paso 1983, no writ).

21. *Id.* at 220-21.

22. The buyer relied on a line of cases holding that no breach of the duty to purchase occurs if the sales contract contains a condition precedent that has not been satisfied. *Id.* at 219; see *Berman v. Rife*, 644 S.W.2d 574, 576 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (condition must be fulfilled in exact manner expressed in contract before promisor can be required to perform); *Knox v. Townes*, 470 S.W.2d 290, 292 (Tex. Civ. App.—Waco 1971, no writ) (until condition occurs or is performed no liability on part of promisor arises).

23. 658 S.W.2d at 221. The trial court found that the buyer did not use due diligence in the performance of its obligation to seek a zoning change pursuant to the contract and that the seller, therefore, was entitled to recover the earnest money as liquidated damages for breach of the contract. *Id.* at 219.

24. *Giba v. Bastian*, 246 Md. 508, 229 A.2d 93 (1967). The contract in *Giba* provided that it would be null and void unless the buyer acquired and obtained rezoning of four separate parcels of land that were under contract to the buyer from four separate sellers. The contract also contained an express provision requiring the buyer to take all reasonable steps to obtain the zoning change. After several attorneys advised the buyer that a zoning change probably would be denied, the buyer decided not to file for a zoning change and obtained the agreement of all but one of the property owners with whom he had contracted to rescind their contracts. The remaining seller, *Bastian*, sued the buyer for failure to perform. The court stated that if

implied obligation to use due diligence to obtain the zoning change.²⁶ The court concluded that by failing to file for the change, the buyer did not exercise due diligence.²⁷

*Major Investments, Inc. v. De Castillo*²⁸ involved a contract of sale that conditioned the buyer's performance upon her ability to obtain suitable financing. The buyer applied to a single lending institution and was rejected because she had insufficient assets and income. The buyer made no further effort to obtain financing. The court indicated that for the buyer to avoid the contract on the basis of failure of the financing condition, the buyer must establish that she attempted in good faith to obtain such financing.²⁹ The court found the buyer's single attempt to obtain financing insufficient to satisfy the good faith requirement as a matter of law.³⁰ The court, therefore, reversed the trial court's grant of the buyer's motion for summary judgment and remanded the issue of good faith for determination by the factfinder.³¹

In *Horner v. Bourland*³² the seller and buyer entered into a contract for the sale of real estate. The contract provided that the seller would refinance a note secured by a deed of trust on the property. The buyer would then assume that note and, in addition, execute a promissory note in favor of the seller secured by a second deed of trust. When the seller was unable to refinance the first note, the buyer filed suit for specific performance and made an oral offer to pay the full purchase price in cash. Seller rejected the offer on the ground that a full cash payment would cause him to suffer adverse income tax consequences. The Court of Appeals for the Fifth Circuit recognized that both parties had mistakenly assumed that the first note could be refinanced.³³ The court, nevertheless, held that such a mutual mistake did not render the contract unenforceable because the mistake concerned a matter that was collateral to the contract.³⁴ In so ruling, the court cited a

the Bastian contract had been the only contract involved and the buyer had failed to apply for rezoning, a breach of contract entitling the seller to recover damages would have occurred. *Id.* at 96. The court found, however, that the buyer had obtained in good faith reliable evidence that a zoning change could not be obtained. *Id.* Reasoning that the other sellers had the right to rescind their contract based on the evidence obtained by the buyer, the court denied recovery because the Bastian contract was contingent upon both rezoning and acquisition of all of the tracts for which the buyer had contracted. *Id.* at 97.

25. *Battistelli v. Corso*, 30 Conn. Supp. 135, 304 A.2d 676 (Super. Ct. 1973). In *Battistelli* the contract provided that the sale was contingent upon the buyer's obtaining zoning approval for construction. The court held that the contract also contained an implied promise that the buyer would apply for a zoning change within a reasonable time. 304 A.2d at 679.

26. 658 S.W.2d at 220-21.

27. *Id.* at 221. The result reached by the court in *Rhodessa* is questionable if it means that a buyer whose contractual performance is contingent upon rezoning must actively pursue a zoning change even if after execution of the contract the buyer realizes that such effort would be an exercise in futility. Requiring such an effort in these circumstances would force the buyer to waste considerable time and money.

28. 673 S.W.2d 276 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

29. *Id.* at 279.

30. *Id.*

31. *Id.* at 279, 282.

32. 724 F.2d 1142 (5th Cir. 1984).

33. *Id.* at 1145.

34. *Id.* The Fifth Circuit quoted *Turberville v. Upper Valley Farms, Inc.*, 616 S.W.2d 676 (Tex. Civ. App.—Corpus Christi 1981, no writ), in which the court stated that "[a] mutual

number of Texas cases holding that a cash offer in lieu of a contractually specified financing provision constitutes substantial compliance.³⁵ In response to the seller's complaint of adverse income tax consequences, the court explained that the decree of specific performance must be conditioned upon the buyer's compensating the seller for additional taxes incurred as a result of the cash payment.³⁶ Because the buyer's oral offer of cash did not constitute a material alteration of the original agreement, the court rejected the seller's argument that the offer failed to comply with the statute of frauds.³⁷

Options. In *Hott v. Percy/Christon, Inc.*³⁸ the buyer and seller entered into a purchase contract for real estate that conditioned the buyer's performance upon an ability to obtain suitable financing. The contract did not require the buyer to make an earnest money deposit upon execution of the contract; rather, it required the buyer to make a series of deposits to extend the financing condition. The contract also limited the seller's remedy for the buyer's default to retention of the buyer's earnest money deposits. Prior to the buyer's payment of the first installment of earnest money, the seller repudiated the contract. The buyer sued for specific performance. Deciding in favor of the seller, the court determined that the contract granted an option that was revoked prior to payment of the consideration necessary to make the option irrevocable.³⁹ The court's determination was based upon the con-

mistake of fact . . . occurs when both parties to a transaction have ' . . . a belief in the present existence of a thing, material to the transaction, that does not exist'" *Id.* at 678 (quoting 38 TEX. JUR. 2D *Mistake* § 1 (1962)). The *Horner* court thus decided that the relevant inquiry in a case involving mutual mistake is whether the mistake is material. 724 F.2d at 1145. The court cited *Advance Components, Inc. v. Goodstein*, 608 S.W.2d 737 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.), which quoted from the *Restatement of the Law of Contracts* a list of factors for determining materiality:

- (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
- (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance; [and]
- (c) The extent to which the party failing to perform has already partly performed or made preparations for performance

Id. at 740 (quoting RESTATEMENT OF CONTRACTS § 275 (1932)); see also *Durham v. Uvalde Rock Asphalt Co.*, 559 S.W.2d 866, 877 (Tex. Civ. App.—San Antonio 1980, no writ) (statement of materiality standard).

35. 724 F.2d at 1146; see *Advance Components, Inc. v. Goodstein*, 608 S.W.2d 737, 740 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); *Renouf v. Martini*, 577 S.W.2d 803 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); accord *Smith v. Nash*, 571 S.W.2d 372 (Tex. Civ. App.—Texarkana 1978, no writ). But see *Kitten v. Vaughn*, 397 S.W.2d 530 (Tex. Civ. App.—Austin 1965, no writ), in which the Austin court of civil appeals stated that "[o]ne first lien note and one lender for \$160,000.00 is not substantially the equivalent of one first lien note for \$100,000.00 payable to A and one second lien note for \$60,000.00 payable to B. It is to be noted that [the sellers] did not offer to finance the entire \$160,000.00." *Id.* at 533.

36. 724 F.2d at 1149; see *Advance Components, Inc. v. Goodstein*, 608 S.W.2d 737, 740 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

37. 724 F.2d at 1148-49.

38. 663 S.W.2d 851 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

39. *Id.* at 853. The buyer had prepared the contract and the seller had accepted it subject to certain counter-proposals inserted in the contract. The buyer approved the counter-proposals, but made additional changes to the contract before signing it. The seller alleged that these alterations were material and, consequently, the contract became a counter-offer that the seller

tractual limitation of the buyer's liability and upon the financing contingency.⁴⁰ The court noted that the buyer had neither tendered nor paid any consideration to the seller prior to the seller's written rejection of the contract.⁴¹ Generally, the court noted, mutual promises on the part of a buyer and seller are sufficient to create a binding contract to convey land.⁴² Nevertheless, such promises are insufficient when the contract limits the buyer's liability to forfeiture of the earnest money.⁴³ The court held that such a limitation results in an option to purchase that is revocable at the will of the seller until the buyer pays an independent consideration.⁴⁴

Breach and Remedies. *Atkin v. Cobb*⁴⁵ dealt with the issue of whether a buyer can enforce a real estate sales contract by specific performance and also recover damages. The sellers and the buyer entered into a purchase contract for real estate. Prior to the closing, the sellers refused to perform because they were able to convey only a three-fourths interest in the property.⁴⁶ The trial court ordered the sellers to convey their three-fourths interest to the buyer and ordered the buyer to pay the sellers the contract amount with an abatement proportionate to the deficiency in the sellers' conveyance. The trial court also awarded the buyer damages for breach of contract. The sellers contended that the trial court erred in awarding the buyer both damages and specific performance. The San Antonio court of appeals explained that if delay in performance causes injury to a buyer, damages are properly awarded as compensation for the injury resulting from the late performance.⁴⁷ The court, therefore, held that the trial court properly awarded damages for breach of contract in addition to partial specific performance, to the extent that the damages represented compensation for the loss suffered by the buyer due to delay in performance.⁴⁸ The court held, however, that the portion of the damage award that compensated the buyer for the loss of

never accepted. Because the court held that the contract granted an option that was validly revoked, the court found it unnecessary to reach the counter-offer issue. *Id.*

40. *Id.* The financing provision did not require earnest money to be paid up front. Instead, the contract required the buyer to pay \$5,000 within 16 days from the effective date of the contract. The seller sent a written rejection of the contract to the buyer prior to the buyer's tender of the \$5,000 consideration. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* The court cited *Echols v. Bloom*, 485 S.W.2d 798 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.), in which the Houston court of appeals held that an option contract within a sales contract is revocable until consideration passes under either the sales contract or the option contract itself. *Id.* at 800.

45. 663 S.W.2d 48 (Tex. App.—San Antonio 1983, no writ).

46. The remaining one-fourth interest was owned by the wife of one of the sellers. The wife was not a party to the contract and refused to convey her interest to the buyer. *Id.* at 50.

47. *Id.* at 51. The court of appeals stated that performance pursuant to a court order is not timely compliance with a contract. *Id.*; see *Foust v. Hanson*, 612 S.W.2d 251, 253 (Tex. Civ. App.—Beaumont 1981, no writ) (payment of expenses due to late performance appropriate in addition to specific performance); *Slaughter v. Roark*, 244 S.W.2d 698, 701-03 (Tex. Civ. App.—El Paso 1951, writ ref'd n.r.e.) (damages payable from time demand for performance is made if such time is later than time set for performance in contract).

48. 663 S.W.2d at 51.

his bargain on the outstanding one-fourth interest in the property was erroneous.⁴⁹ The court noted that the buyer already had obtained an abatement in the purchase price that he was required to pay in connection with the award of partial specific performance.⁵⁰ The court could find no authority for also awarding the buyer loss-of-bargain damages for the partial breach that resulted in the abatement.⁵¹ The court, nevertheless, left open the possibility that loss-of-bargain damages might be available in the case of bad faith, an element lacking in the present case.⁵²

In *NRC, Inc. v. Pickhardt*⁵³ the buyer sought special damages and rescission of the purchase of two lots made more than ten years before he filed suit. The buyer based his suit on the seller's fraud in failing to advise the buyer of the existence of a flooding easement that rendered the lots unsuitable for use as homesites. The seller asserted that the four-year statute of limitations barred the buyer's claim. The court first observed that a purchaser of land is charged with constructive notice of all information contained in the grantor's chain of title.⁵⁴ Since the chain of title disclosed the flooding easement, the court concluded that the buyer was charged with notice thereof at the time of purchase.⁵⁵ The buyer's cause of action for the seller's failure to disclose the existence of the easement was, therefore, barred as a matter of law.⁵⁶

The court ruled differently, however, with regard to the buyer's cause of action for the seller's failure to disclose that the lots were unsuitable for use as homesites. The court held that the seller had a duty to disclose material facts affecting the suitability of the lots for the buyer's intended use if such facts were not discoverable through the exercise of ordinary diligence by the buyer.⁵⁷ The statute of limitations did not begin to run until the buyer either

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The sellers argued that loss-of-bargain damages are never proper unless the defaulting party was guilty of bad faith. The court of appeals disagreed and cited an early case holding that if the inability of the seller to convey full title resulted from the homestead character of the property, the buyer was entitled to loss-of-bargain damages without reference to the question of good or bad faith on the part of the husband. *Id.*; see *Goff v. Jones*, 70 Tex. 572, 577, 8 S.W. 525, 527 (1888) (expectation damages proper for breach of contract to sell homestead). *But cf.* *Long v. Brown*, 593 S.W.2d 371, 372 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (when seller of land is unable to convey title as agreed, absent fraud the buyer is limited to recovery of amount paid under contract plus interest). The *Atkin* court expressly declined to resolve this inconsistency and instead disallowed loss-of-bargain damages on the alternative ground that such damages are improper when the buyer is awarded partial specific performance and a corresponding price abatement. 663 S.W.2d at 51.

53. 667 S.W.2d 292 (Tex. App.—Texarkana 1984, writ dismissed).

54. *Id.* at 294; see *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 908 (Tex. 1982) (purchaser bound by all information fairly disclosed by any instrument that is an essential link in chain of title under which he claims); *Sutton v. Grogan Supply Co., Lumber Div.*, 477 S.W.2d 930, 935-36 (Tex. Civ. App.—Texarkana 1972, no writ) (purchaser charged as a matter of law with constructive notice of contents of all instruments in chain of title).

55. 667 S.W.2d at 294.

56. *Id.*

57. *Id.* Specifically, the buyer alleged that the seller had failed to disclose that the lots were below the 715-foot mean sea level. The 715-foot measurement was critical because the lots were subject to an easement in favor of the Lower Colorado River Authority that author-

discovered the fraud or should have discovered it.⁵⁸ Because the seller failed to establish that the buyer should have discovered the fraud more than four years prior to filing the suit, the court of appeals affirmed the trial court's judgment in favor of the buyer.⁵⁹

In *Fillion v. Troy*⁶⁰ the appellee was a young woman who had engaged the appellant, a middle-aged male attorney, to represent her in the administration of her father's estate. During the course of his work, the appellant influenced the appellee to convey significant amounts of real estate and other property to him. The appellee accused the appellant of breach of the fiduciary relationship, fraud, undue influence, violation of the attorney-client relationship, and violation of various attorney disciplinary rules. The trial court submitted a series of special issues to the jury and upon the verdict granted the appellee both rescission of the conveyances and punitive damages.⁶¹

The appellant contended that the award of punitive damages in a rescission case was improper, but the court of appeals held that the weight of Texas authority permitted such an award.⁶² The appellant also contended that the Texas statute governing fraud in real estate transactions⁶³ limited the award to twice the amount of actual damages. The court found the statute inapplicable because it relates to a sale of land or a contract for the sale of land and this case did not involve either.⁶⁴ The court held that the appellant obtained the deeds by overreaching and by appellee's lack of attentiveness, rather than through a contract.⁶⁵

In *Grohn v. Marquardt*⁶⁶ the San Antonio court of appeals upheld the cancellation of a deed on grounds of fraud and undue influence.⁶⁷ The evidence in the case established that the grantor, a single man, engaged in sexual relations with one of the grantees over a period of several years, a relationship which the grantee allegedly initiated. The relationship culminated in the grantor's conveyance of his ranch to the grantee and her husband, who had also befriended the grantor. The grantor testified that he

ized flooding the land below the 715-foot mean sea level contour level. None of the seller's sales information supplied to the buyer indicated that the lots were below the 715-foot line. *Id.* See *Smith v. National Resort Communities, Inc.*, 585 S.W.2d 655, 657-58 (Tex. 1979), for the Texas Supreme Court's disposition of a case with similar facts.

58. 667 S.W.2d at 294; see *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981).

59. 667 S.W.2d at 294.

60. 656 S.W.2d 912 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

61. The jury found that the appellant did not make reasonable use of the confidence placed in him by the appellee, that the transactions were not fair and equitable to the appellee, that the appellant did not act in good faith in informing the appellee of the nature and effect of the transactions, that appellee acted upon appellant's fraudulent representations that certain transactions were for their mutual benefit, and that appellant obtained the property through the use of undue influence. *Id.* at 914.

62. *Id.* at 915; *Russell v. Truitt*, 554 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.); see *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 583-84 (Tex. 1963) (court of equity can grant punitive damages incidental to equitable relief).

63. TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1968 & Supp. 1985).

64. 656 S.W.2d at 915.

65. *Id.*

66. 657 S.W.2d 851 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

67. *Id.* at 855-56.

had conveyed his ranch to the grantee and her husband out of feelings of love for both of them. The grantees presented evidence that the grantor was motivated by his belief in the grantees' representations that they would pay the outstanding indebtedness and taxes on the ranch, convey a life estate to the grantor, and permit him to retain seventy-five percent of the ranching profits. Shortly after the conveyance, the grantees became less friendly with the grantor, and approximately three years later the grantor filed suit seeking to set aside the conveyance to the grantees.

The grantees argued that the grantor's immoral conduct was contrary to public policy and, therefore, barred the grantor from obtaining the equitable relief he sought under the unclean hands doctrine. The San Antonio court of appeals disagreed and affirmed the trial court's decision in favor of the grantor.⁶⁸ The court confirmed that the unclean hands doctrine required that one who comes into a court of equity must come with clean hands.⁶⁹ The court found, however, that the doctrine does not apply when the cause of action is based on fraud and undue influence.⁷⁰ The court explained that to cancel a deed on the grounds of fraud, false representations of a material fact must have been made and the party being deceived must have believed and relied upon those representations.⁷¹ Undue influence, the court pointed out, may also serve as a basis for cancellation of a deed.⁷² The court held that the totality of the circumstances surrounding the grantor's relationship with the grantees was sufficient to support the grantor's claims of fraud and undue influence.⁷³ The doctrine of unclean hands, therefore, had no application.⁷⁴

Rescission. In *Givens v. Dougherty*⁷⁵ the Texas Supreme Court held that the mutual oral rescission of a contract for a commission for the sale of real estate is unenforceable.⁷⁶ The court first pointed out that under Texas law contracts for real estate commissions are themselves within the statute of frauds.⁷⁷ The court then acknowledged that the issue of rescission of such

68. *Id.*

69. *Id.* at 855; see *Munzenrieder & Assocs. v. Daigle*, 525 S.W.2d 288, 291 (Tex. Civ. App.—Beaumont 1975, no writ).

70. 657 S.W.2d at 855.

71. *Id.*; see *Booth v. Chadwick*, 154 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.).

72. 657 S.W.2d at 855.

73. *Id.*

74. *Id.* at 855-56.

75. 671 S.W.2d 877 (Tex. 1984).

76. *Id.* at 878.

77. *Id.* at 877-78. TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1985) provides:

An action may not be brought in a court in this state for the recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged or signed by a person lawfully authorized by him to sign it.

Id. In *Denman v. Hall*, 144 Tex. 633, 638, 193 S.W.2d 515, 516 (1946), the Texas Supreme Court interpreted this statutory provision as falling within the ambit of the statute of frauds.

contracts was one of first impression.⁷⁸ The court, nevertheless, observed that several Texas cases have dealt with oral rescission of other types of contracts required to be in writing.⁷⁹ The court stated that with the exception of *Nutt v. Berry*,⁸⁰ in which the El Paso court of civil appeals upheld the oral rescission of a written lease agreement,⁸¹ the majority of Texas cases hold that a contract required to be in writing may not be orally rescinded.⁸² Even though it conceded that virtually all of the commentators favor a contrary result,⁸³ the court adopted what it perceived to be the majority view, concluding that the purpose of the statute of frauds would be frustrated if a contract required to be in writing could be orally rescinded.⁸⁴ The court expressed its concern that to hold otherwise would encourage claims of oral rescission whenever the terms of a contract become burdensome to one of the parties.⁸⁵

Justice Spears dissented in an opinion joined by Justice Wallace. The dissent stated that no Texas authority governed the present case.⁸⁶ Justice Spears claimed that the cases cited by the majority did not support the majority opinion, but were consistent with the prevailing view to the contrary.⁸⁷ Justice Spears noted that the prevailing view is already subject to the qualification that if the rescission, because of its subject matter, is itself within the ambit of the statute of frauds, then the rescission must be in writing.⁸⁸ For example, rescission of a contract to sell real estate must be in writing since termination of the contract effectively constitutes a reconveyance.⁸⁹ Explaining that the purpose of the statute of frauds is to establish the precise terms of the agreement between the parties, Justice Spears emphasized that in the present case no dispute as to the terms of the contract was present.⁹⁰ The question presented was whether the contract had been terminated, a question of fact that could be decided by a jury in the same manner that the

78. 671 S.W.2d at 878.

79. *Id.*

80. 323 S.W.2d 500 (Tex. Civ. App.—El Paso 1959, no writ).

81. *Id.* at 502-03.

82. 671 S.W.2d at 878. The court cited *Dial v. Crane*, 10 Tex. 444, 454 (1853); *Gardner v. Sittig*, 222 S.W. 1090, 1090 (Tex. Comm'n App. 1920, judgment adopted); *Reyes v. Smith*, 288 S.W.2d 822, 825 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.).

83. 671 S.W.2d at 878. The court noted that according to 72 AM. JUR. 2D *Statute of Frauds* § 282 (1974), "the trend of modern authority seems to be toward the view that an oral rescission of an executory contract is valid notwithstanding that the contract rescinded was one required by the statute of frauds to be in writing." *Id.*; see, e.g., J. CALAMARI & J. PERILLO, *CONTRACTS*, §§ 19-37 (2d ed. 1977); 2 A. CORBIN, *CORBIN ON CONTRACTS* § 302 (1950); 4 S. WILLISTON, *WILLISTON ON CONTRACTS* § 592 (W. Jaeger 3d ed. 1961); J. MURRAY, *MURRAY ON CONTRACTS* § 332 (1974); *RESTATEMENT (SECOND) OF CONTRACTS* § 148 (1981); Williston, *Rescission by Parol Agreement*, 4 COLUM. L. REV. 455, 461-62 (1904).

84. 671 S.W.2d at 878.

85. *Id.*

86. *Id.* at 879 (Spears, J., dissenting).

87. *Id.*

88. *Id.*; see J. MURRAY, *supra* note 83, § 332.

89. *RESTATEMENT (SECOND) OF CONTRACTS* § 148 (1981); Williston, *supra* note 83, 461-62. Justice Spears distinguished the cases cited by the majority in support of its decision on the ground that they fell within the real property exception to oral rescission. 671 S.W.2d at 879.

90. 671 S.W.2d at 879.

jury decides other factual determinations regarding performance or breach.⁹¹

II. TITLE AND OWNERSHIP

Legal Description. In *Pick v. Bartel*⁹² the grantor owned two adjacent tracts of land, one containing 165 acres and the other containing twenty-five acres. He sold the 165-acre tract to Pick by a deed that contained the following language: "Grantors also guarantee grantees, their heirs and assigns, a right-of-way across the 25-acre tract sold to Walter Bartel."⁹³ The twenty-five-acre tract was sold to Bartel by a deed that was dated five days later than the deed to Pick. The Bartel deed stated: "There is also a further stipulation this conveyance directs that the grantors are designating that a right-of-way for a road shall be allowed to be had through and over the said 25 acres at a location which will least interfere with the use of the 25 acres . . ." ⁹⁴ Pick brought suit to enforce his rights under the easement purportedly granted in his deed.

The Texas Supreme Court noted that an easement is an interest in real property, the conveyance of which must meet the requirements of the statute of frauds.⁹⁵ One of those requirements is that the property description must furnish the means or data by which the particular land to be conveyed can be identified with certainty.⁹⁶ The court stated that the identification of the servient estate is the most essential element of a conveyance of an easement.⁹⁷ The identification may not be supplied by parol evidence; the property must be identified in the conveyance itself with sufficient certainty to satisfy the statute of frauds.⁹⁸

The supreme court discussed a line of cases holding that a description in a conveyance that identifies the property as "my property," "my land," or "owned by me" is a sufficient description.⁹⁹ In those cases, however, the conveyance expressly stated that the grantor was the owner of the property

91. *Id.*

92. 659 S.W.2d 636 (Tex. 1983).

93. *Id.*

94. *Id.* at 636-37.

95. *Id.* at 637 (citing *Anderson v. Tall Timbers Corp.*, 378 S.W.2d 16, 23 (Tex. 1964)). The Texas statute of frauds is found in TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1968 & Supp. 1985).

96. 659 S.W.2d at 637; *see, e.g., Jones v. Kelley*, 614 S.W.2d 95, 99 (Tex. 1981); *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972); *Wilson v. Fisher*, 144 Tex. 53, 56, 188 S.W.2d 150, 152 (1945).

97. 659 S.W.2d at 637.

98. *Id.*

99. *Id.*; *see Kmiec v. Reagan*, 556 S.W.2d 567, 569 (Tex. 1977); *Pickett v. Bishop*, 148 Tex. 207, 209, 223 S.W.2d 222, 223 (1949); *see also Patterson v. Twaddell*, 301 S.W.2d 680, 682, 684 (Tex. Civ. App.—Amarillo 1957, writ *ref'd n.r.e.*) (deed conveying "all that certain property of record in my name in Potter County, Texas" held to be sufficient legal description); *Texas Consol. Oils v. Bartels*, 270 S.W.2d 708, 710, 711-12 (Tex. Civ. App.—Eastland 1954, writ *ref'd*) (conveyance of "[a]ll the oil, gas and mining leases, royalties and overriding royalties located anywhere within the United States . . . owned by [said grantor]" held to be sufficient legal description).

to be conveyed.¹⁰⁰ Extrinsic evidence was then used to prove that the grantor owned only one tract of land that satisfied the other elements of the description.¹⁰¹ The court then pointed to another Texas Supreme Court case that emphasized the importance of an explicit statement of ownership in the conveyance.¹⁰² In *Wilson v. Fisher*¹⁰³ the court stated that the mere signature of the seller on the deed is not sufficient to prove ownership.¹⁰⁴ The supreme court concluded that it could not infer that the language in the Pick deed, "the 25-acre tract sold to Walter Bartel," referred to the alleged servient estate because the owner of the property referred to in the deed was not stated therein.¹⁰⁵ Furthermore, since the Pick deed was executed before the Bartel deed, at the time the Pick deed was executed the twenty-five-acre tract had not been sold to Bartel.¹⁰⁶ Because the deed also failed to include a city, county, state, lot, or block number designation, the supreme court found the description deficient in every respect.¹⁰⁷ The court found it unnecessary to reach the issue of whether the words "we guarantee" in the Pick deed were sufficient words of grant to convey an easement.¹⁰⁸

Deed Construction. In *Alford v. Krum*¹⁰⁹ the Texas Supreme Court construed a mineral deed and found that two of the deed's several paragraphs were in irreconcilable conflict.¹¹⁰ The first paragraph of the deed conveyed to the grantee one-half of a one-eighth interest in the mineral estate of a certain tract of land. Another paragraph stated that the land was subject to an oil and gas lease and provided that the mineral interest conveyed included one-sixteenth of certain rents and royalties due to be paid under the terms of the lease. A third paragraph provided that in the event the oil and gas lease was cancelled or forfeited, the grantor and grantee would each own a one-half interest in all of the oil, gas, and other minerals. Because the lease in effect at the time of the conveyance had expired, the issue presented to the court was the quantum of the permanent mineral interest conveyed by the deed.¹¹¹

The court noted that in construing conveyances, the primary duty of courts is to ascertain the intent of the parties as that intent is expressed by the instrument of conveyance.¹¹² All parts of the instrument must be harmonized, but when the instrument contains irreconcilable conflicts the court

100. 659 S.W.2d at 637.

101. *Id.*

102. *Id.*

103. 144 Tex. 53, 188 S.W.2d 150 (1945).

104. *Id.* at 60, 188 S.W.2d at 154.

105. 659 S.W.2d at 638.

106. *Id.*

107. *Id.*

108. *Id.*

109. 671 S.W.2d 870 (Tex. 1984).

110. *Id.* at 873.

111. *Id.* at 872.

112. *Id.*; accord *Canter v. Lindsey*, 575 S.W.2d 331, 334 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); see *Terrell v. Graham*, 576 S.W.2d 610, 612 (Tex. 1979).

must give effect to the controlling language of the instrument.¹¹³ The court then stated that in mineral deeds the controlling language is found in the granting clause, and if the granting clause and the other parts of the deed conflict, the granting clause must prevail.¹¹⁴

The court concluded that the granting clause of the deed in question clearly conveyed to the grantee an undivided one-sixteenth mineral interest.¹¹⁵ The court characterized the paragraph of the deed that provided a one-half mineral interest to the grantee as a future lease clause.¹¹⁶ Such a clause, the court stated, is subordinate to the granting clause and is useful only when the granting clause is unclear.¹¹⁷ The court found the two clauses to be in irreconcilable conflict and held that the unambiguous language of the granting clause prevailed.¹¹⁸

Chief Justice Pope, joined by Justices Campbell and Spears, dissented.¹¹⁹ The dissent focused on the paragraph of the deed providing that if the then-existing oil and gas lease were to terminate, the grantor and grantee would each own one-half of the mineral estate. The dissent emphasized that this clause is not inconsistent with the granting clause because the granting clause speaks to the quantum of the grant prior to expiration of the lease, whereas this clause speaks to the quantum of the grant after expiration of the lease.¹²⁰ The dissent concluded that the parties had thus validly expressed their intent to convey different estates before and after termination of the lease and that the court should have effectuated that intent.¹²¹

In a significant departure from previous holdings, the Texas Supreme Court in *Moser v. United States Steel Corp.*¹²² held that a grant or reservation of "oil, gas and other minerals"¹²³ includes all substances within the ordinary and natural meaning of the term "minerals," whether their presence or value is known at the time of severance.¹²⁴ In particular the court held as a matter of law that uranium is a mineral within the ordinary and natural meaning of the word.¹²⁵ The court thereby abandoned, in the case of uranium, the approach it had previously taken in determining the meaning of the phrase "other minerals."¹²⁶

Prior to *Moser*, the court had attempted to create a rule designed both to give effect to the intent of the parties to convey valuable minerals and to

113. 671 S.W.2d at 872; see *Texas Pac. Coal & Oil Co. v. Masterson*, 160 Tex. 548, 552, 334 S.W.2d 436, 439 (1960).

114. 671 S.W.2d at 872.

115. *Id.* at 874.

116. *Id.* at 873; see R. HEMINGWAY, *THE LAW OF OIL AND GAS* § 9.1 (2d ed. 1983) (discussion of use and effect of future lease clauses).

117. 671 S.W.2d at 873.

118. *Id.* at 873-74.

119. *Id.* at 874-77 (Pope, C.J., dissenting).

120. *Id.* at 875.

121. *Id.* at 875-77.

122. 676 S.W.2d 99 (Tex. 1984).

123. *Id.* at 100.

124. *Id.* at 102.

125. *Id.*

126. *Id.* at 101.

protect the surface estate from destruction caused by extraction of those minerals.¹²⁷ In *Reed v. Wylie*¹²⁸ the court held that a substance near the surface is part of the surface estate if any reasonable method of removal would consume, deplete, or destroy the surface.¹²⁹ In *Moser* the court noted that the *Reed* approach required factual determinations with regard to the method used to remove the mineral and the effect of that method on the surface estate.¹³⁰ The court acknowledged that application of the *Reed* approach had thus created considerable title uncertainty since a review of the conveyance instrument would not, by itself, reveal who owned title to an unnamed mineral substance.¹³¹

The implication of the holding in *Moser* is that the court will avoid future uncertainty by deciding categorically whether, as a matter of law, specified substances are minerals.¹³² In previous decisions the court has held that certain substances belong to the surface estate as a matter of law, including, for example, limestone,¹³³ caliche,¹³⁴ surface shale,¹³⁵ water,¹³⁶ sand,¹³⁷ gravel,¹³⁸ and near-surface lignite, iron, and coal.¹³⁹ The court emphasized in *Moser* that it would continue to adhere to those earlier categorical decisions.¹⁴⁰

Having established that the mineral owner had title to the uranium, the court next determined the extent to which the surface estate could be used by the mineral owner. The court noted that the mineral owner has the right to make any use of the surface that is necessarily and reasonably incident to the removal of the minerals.¹⁴¹ The court also pointed out that, as a general rule, the mineral owner's liability for such use is restricted solely to damages

127. See *Reed v. Wylie*, 597 S.W.2d 743, 747 (Tex. 1980); *Reed v. Wylie*, 554 S.W.2d 169, 172 (Tex. 1977); *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971).

128. 597 S.W.2d 743 (Tex. 1980). This case is a second appeal, after remand, of *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977).

129. 597 S.W.2d at 747. In the first appeal of *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977), the supreme court held that the surface owner has title to a mineral if substantial quantities of the mineral lie so near the surface that extraction as of the date on which the mineral was reserved or conveyed would necessarily have destroyed the surface. *Id.* at 172.

130. 676 S.W.2d at 101.

131. *Id.*

132. Because of the extent to which it felt parties had relied on its previous holdings, the court held that the rule announced in *Moser* would apply prospectively from June 8, 1983. *Id.* at 103.

133. *Heinatz v. Allen*, 147 Tex. 512, 518, 217 S.W.2d 994, 997 (1949).

134. *Atwood v. Rodman*, 355 S.W.2d 206, 211 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

135. *Id.*

136. *Fleming Found. v. Texaco*, 337 S.W.2d 846, 851-52 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

137. *Psencik v. Wessels*, 205 S.W.2d 658, 661-62 (Tex. Civ. App.—Austin 1947, writ ref'd).

138. *Id.*

139. *Reed v. Wylie*, 597 S.W.2d 743, 747-48 (Tex. 1980).

140. 676 S.W.2d at 102.

141. *Id.* at 103; see *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972); *Getty Oil v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971); *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967).

negligently inflicted to the surface estate.¹⁴² The court then held that the general rule restricting liability is inapplicable to a case such as *Moser* in which the mineral conveyed or reserved is unspecified.¹⁴³ Accordingly, the court held that the owner of an unnamed substance conveyed pursuant to a grant or reservation of "other minerals" is liable to the surface owner for surface destruction whether or not the destruction was negligently caused.¹⁴⁴

Co-tenants. In *Manges v. Guerra*¹⁴⁵ the Texas Supreme Court was concerned with the proper exercise of the executive right of a mineral estate by a co-tenant holding such right.¹⁴⁶ In *Manges* the executive had been sued by mineral co-tenants for failing to exercise diligence in leasing the minerals to third parties and for leasing a portion of the minerals to himself on unfair terms. The trial court cancelled the lease from the executive to himself, awarded actual and punitive damages to the co-tenants, and removed the executive from his position. The Texas Supreme Court recognized that the relationship between the holder of the executive rights and his co-tenants imposes upon the executive a fiduciary duty of utmost good faith.¹⁴⁷ That duty, the court said, requires the executive to obtain for the nonexecutives every benefit that he exacts for himself.¹⁴⁸ Finding that the executive breached his duty in this case, the court upheld the cancellation of the lease.¹⁴⁹ The court also upheld the damage award after finding that recovery for breach of a fiduciary duty is not limited to an accounting of profits received by the fiduciary.¹⁵⁰ The court refused, however, to uphold cancellation of the executive rights since the co-tenants had elected to waive rescission of the transfer of executive rights to recover damages.¹⁵¹

142. 676 S.W.2d at 103; see *General Crude Oil v. Aiken Co.*, 162 Tex. 104, 106-07, 344 S.W.2d 668, 669 (1961); *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 646, 651 (Tex. Civ. App.—Amarillo 1941, writ ref'd).

143. 676 S.W.2d at 103.

144. *Id.* The court emphasized that its holding does not affect the statutory duty of the mineral owner, or his lessee, to reclaim the surface after surface mining. *Id.* n.4. The Texas Uranium Surface Mining and Reclamation Act requires an operator who is surface mining uranium to submit and implement a plan of reclamation or forfeit his performance bond and be subjected to civil and criminal sanctions. TEX. NAT. RES. CODE ANN. §§ 131.101-.270 (Vernon 1978 & Supp. 1985).

145. 673 S.W.2d 180 (Tex. 1984).

146. The executive right is the exclusive right or power to execute all leases, permits, and unitization and pooling agreements. The executive right, therefore, is the exclusive right to develop the mineral estate. See R. HEMINGWAY, *supra* note 116, § 2.2.

147. 673 S.W.2d at 183; see *Schlittler v. Smith*, 128 Tex. 628, 631, 101 S.W.2d 543, 545 (1937); *Kimsey v. Fore*, 593 S.W.2d 107, 111 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

148. 673 S.W.2d at 183.

149. *Id.* at 184.

150. *Id.*; see *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 510 (Tex. 1980); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963). *But cf.* *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981) (suit for breach of contract will not support a judgment of exemplary damages even if contract is maliciously breached).

151. 673 S.W.2d at 184. The court noted that the jury found that the other co-owners had been fraudulently induced to sell their lands and, therefore, had the right to rescind the initial transfer of the executive rights. *Id.* The thrust of the supreme court's holding, apparently, was that executive rights are not subject to judicial cancellation even if the executive has breached his fiduciary duties. In its opinion the Waco court of appeals stated that the act of removing

In *McCarver v. Trumble*¹⁵² a husband and wife, who were residents of Colorado, each purchased an undivided one-fourth interest in a tract of land in Texas. The deed conveying the interests to them recited that the husband and wife were taking their respective shares of the land as joint tenants with the right of survivorship and that they were residents of Colorado. The husband died testate, and, by the terms of his will, his entire estate passed in equal shares to his sons by a prior marriage. The sons sold the husband's one-fourth interest in the land, and title was ultimately obtained by the appellants. The appellants contended that the attempt of the husband and wife to create a joint tenancy with right of survivorship was ineffectual because the property was community property and a joint tenancy with right of survivorship could not be created with community property under Texas community property law without first partitioning the community property. The appellants contended alternatively that they were bona fide purchasers without notice of the right of survivorship.

The Corpus Christi court of appeals observed that in Texas a joint tenancy with right of survivorship cannot be created with community property.¹⁵³ Rather, if community property is involved, the spouses must partition the property and execute a separate instrument to establish a joint tenancy.¹⁵⁴ The court concluded that the property interest in question was, therefore, presumed to be community property¹⁵⁵ and that the burden of proof was on the wife to show otherwise.¹⁵⁶ The court further stated that although Texas law applies in determining the rights of nonresidents in Texas realty,¹⁵⁷ the law of the domicile of the purchasers applies in determining the characterization of the consideration paid for such land.¹⁵⁸ The court then found that the evidence clearly established that the property interests had been purchased with funds characterized as separate under Colorado law.¹⁵⁹ The court, therefore, concluded that the property interests were separate property and the deed created a valid joint tenancy with the right of survivorship.¹⁶⁰

The court noted that the appellants' bona fide purchaser argument was predicated on the proposition that the presumption of community property may not be rebutted as to bona fide purchasers.¹⁶¹ The court pointed out

an executive is analogous to the removal of a trustee for breach of fiduciary duties. *Manges v. Guerra*, 621 S.W.2d 652, 658 (Tex. App.—Waco 1981), *rev'd in part and aff'd in part*, 673 S.W.2d 180 (Tex. 1984). The holding of the supreme court apparently contradicts that statement.

152. 660 S.W.2d 595 (Tex. App.—Corpus Christi 1983, no writ).

153. *Id.* at 597; see *Hilley v. Hilley*, 161 Tex. 569, 579, 342 S.W.2d 565, 568 (1961).

154. 660 S.W.2d at 597; *accord* *Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981).

155. 660 S.W.2d at 597-98; see TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

156. 660 S.W.2d at 598; see *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975).

157. 660 S.W.2d at 597; see *Roswurm v. Sinclair Prairie Oil Co.*, 181 S.W.2d 736, 741 (Tex. Civ. App.—Fort Worth 1944, writ *ref'd* w.o.m.).

158. 660 S.W.2d at 598; see *Grange v. Kayser*, 80 S.W.2d 1007, 1008 (Tex. Civ. App.—El Paso 1935, no writ).

159. 660 S.W.2d at 598.

160. *Id.*

161. *Id.*; see *Boyd v. Orr*, 170 S.W.2d 829, 833 (Tex. Civ. App.—Texarkana 1943, writ *ref'd* w.o.m.).

that to meet the requirements of a bona fide purchaser the appellants must have been without notice of any third-party claims.¹⁶² The court concluded that the recitation in the deed as to the place of residence of the husband and wife, coupled with the finding that the appellants had actual knowledge thereof, was sufficient to put the appellants on actual and constructive notice of the wife's claim.¹⁶³

Life Estates and Remainders. In *Hudspeth v. Hudspeth*¹⁶⁴ the remaindermen brought an action against the life tenant that sought to quiet title to minerals and to recover bonuses, royalties, and delay rentals received by the life tenant as a result of oil and gas leasing and production. The court held that a prior judgment awarding the life tenant all rents, revenues, and income from the property could not be construed as including royalties and bonuses.¹⁶⁵ In support of its holding, the court cited the Texas Supreme Court decision in *Clyde v. Hamilton*.¹⁶⁶ That decision reaffirmed the well-established rule that the corpus of an estate must be preserved for the remaindermen and, therefore, cannot be disposed of by a life tenant. The court in *Clyde* determined that minerals are part of the land and that royalties and bonuses are part of the consideration for the sale of the land.¹⁶⁷ Royalties and bonuses are, thus, part of the corpus preserved for the remaindermen.¹⁶⁸ According to the decision in *Clyde*, however, a life tenant is entitled to delay rental payments and the interest or income derived from the investment of the bonuses and royalties.¹⁶⁹

The court in *Hudspeth* recognized the open mine doctrine as an exception to the foregoing rule. The open mine doctrine permits a life tenant to continue mineral development undertaken by the grantor of the life estate.¹⁷⁰ The court ruled, however, that absent a specific grant to the life tenant of the authority to continue mineral development, new leases granted after the expiration of leases in force at the creation of the life estate are not entitled to the benefits of the open mine rule.¹⁷¹ The court found no such authority in the instrument before it and granted judgment for the remaindermen.¹⁷²

Constructive Trusts. *Ginther v. Taub*¹⁷³ involved a suit seeking damages and imposition of a constructive trust on an oil and gas lease. Two owners of an oil and gas lease transferred their interests to a third owner, relying on the false assurances of the latter's attorney that the transferors would be permit-

162. 660 S.W.2d at 598-99.

163. *Id.* at 599.

164. 673 S.W.2d 248 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

165. *Id.* at 252.

166. 414 S.W.2d 434 (Tex. 1967).

167. *Id.* at 439.

168. *Id.*

169. *Id.*

170. 673 S.W.2d at 252 (citing *Moore v. Vines*, 474 S.W.2d 437 (Tex. 1971) (new leases do not operate as open mines until the vesting of the life estate)).

171. 673 S.W.2d at 252.

172. *Id.* at 252-53.

173. 675 S.W.2d 724 (Tex. 1984).

ted to reacquire the interest at a later date. No evidence indicated that the third owner participated in or had knowledge of his attorney's misrepresentations. The issue before the court was whether a constructive trust could be imposed against the third owner by virtue of the fraudulent action of his attorney. The court resolved the issue in favor of the transferors, holding that the policy against unjust enrichment mandated that the third owner not be allowed to retain the property received as a result of his attorney's fraud.¹⁷⁴ The court noted that a constructive trust based on a prior confidential relationship, unfair conduct, or unjust enrichment provides an exception to the statute of frauds rule that prohibits title to real property from resting in parol.¹⁷⁵

In *Stout v. Clayton*¹⁷⁶ the grantor conveyed real property to the grantees to qualify the grantor for Medicaid. The grantor believed she could not receive Medicaid if she owned the property. After her death, the grantor's successors sought to set aside the deed and to have a constructive trust imposed on the property.¹⁷⁷ The court stated that a constructive trust should not be imposed to aid a grantor in regaining property deeded to a grantee for the purpose of defrauding the grantor's creditors.¹⁷⁸ The court, however, found no evidence in the record that the grantor attempted to defraud her creditors by means of the conveyance.¹⁷⁹ Absent evidence that the conveyance aided the grantor in obtaining Medicaid, and since the federal government was not a creditor of the grantor, the court found no fraudulent conveyance that barred the imposition of a constructive trust.¹⁸⁰ The court imposed a constructive trust on the property since the evidence indisputably established a confidential relationship between the grantor and grantees.¹⁸¹

*Eminent Domain. City of Austin v. Casiraghi*¹⁸² involved an eminent domain proceeding in which the principal issue concerned the legality of money damages awarded for condemned property. The property owners received an award that included both the value of a restaurant operated on the property and the market value of the property itself. The court observed that in eminent domain proceedings the property owner has an opportunity to recover damages for the taking of his property for public use, since the proce-

174. *Id.* at 726-27 (citing *Morris v. Morris*, 642 S.W.2d 488 (Tex. 1982); *Pope v. Garrett*, 147 Tex. 18, 211 S.W.2d 559 (1948)).

175. 675 S.W.2d at 728 (citing *Pope v. Garrett*, 147 Tex. 18, 20, 211 S.W.2d 559, 561 (1948)).

176. 674 S.W.2d 821 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

177. *Id.* at 823-24; see *Mills v. Gray*, 147 Tex. 33, 38-40, 210 S.W.2d 985, 988 (1948).

178. 674 S.W.2d at 826 (citing *Dellerman v. Mangold*, 271 S.W.2d 720, 721 (Tex. Civ. App.—San Antonio 1954, writ ref'd)). The *Stout* court stated that when parties transfer land in constructive fraud of creditors, the policy of the law is to "leave the parties in the position in which they placed themselves, and any agreement on the part of the fraudulent grantees to hold the property in trust and to reconvey it will, therefore, not be entered." 674 S.W.2d at 827 (citing *Leal v. Cortez*, 603 S.W.2d 262, 263 (Tex. Civ. App.—Corpus Christi 1980, no writ)).

179. 674 S.W.2d at 827.

180. *Id.* at 828.

181. *Id.*

182. 656 S.W.2d 576 (Tex. App.—Austin 1983, no writ).

ture is governed by statutory requirements¹⁸³ that must be strictly observed.¹⁸⁴ To recover the value of a business operated on real property involved in an eminent domain proceeding, a property owner must either plead an independent cause of action for inverse condemnation or establish in the eminent domain proceeding that the market value of his real property is greater because it is uniquely suited to the business conducted thereon.¹⁸⁵ The court in *Casiraghi* found that the property owner failed to bring an independent cause of action to recover for the loss of his business.¹⁸⁶ The court also found that the evidence established that the value of the business represented only goodwill or the value of the business as a going concern.¹⁸⁷ The property owner did not establish that the market value of the condemned realty was enhanced because it was uniquely suited to the business conducted thereon.¹⁸⁸

Real Estate Brokers. *Riley v. Powell*¹⁸⁹ involved a suit for specific performance of a written contract for the sale of an apartment complex. In consummating the transaction the buyer acted as the real estate broker for the seller. The court determined that a fiduciary relationship existed between the buyer and seller, imposing on the buyer the duty to protect and preserve the best interests of the seller, including the procurement of the best price possible for the property.¹⁹⁰ The buyer breached his fiduciary obligation to the seller since he knew, or had reason to believe, that the property was worth considerably more than the purchase price.¹⁹¹ The court determined that the contract of sale was voidable by the seller.¹⁹²

In *Heald v. Texas Real Estate Recovery Fund*¹⁹³ the court considered whether the provisions of the Real Estate License Act¹⁹⁴ applied to a licensed real estate agent who, acting as a principal in a real estate transaction, engaged in conduct prohibited under the Act. The Act entitles

183. *Id.* at 578; see TEX. REV. CIV. STAT. ANN. art. 3265 (Vernon 1968).

184. 656 S.W.2d at 579 (citing *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597 (Tex. 1979); *City of Bryan v. Moehlman*, 155 Tex. 45, 282 S.W.2d 687 (1955)).

185. 656 S.W.2d at 579-80; see TEX. CONST. art. I, § 17.

186. 656 S.W.2d at 580.

187. *Id.* at 581.

188. *Id.* In a dissenting opinion, Chief Justice Phillips argued that, contrary to the conclusion of the majority, the property owner properly sought damages for the destruction of its restaurant business and was entitled to recover therefor. *Id.* at 584 (Phillips, C.J., dissenting).

189. 665 S.W.2d 578 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

190. *Id.* at 580 (citing *Ramsey v. Gordon*, 567 S.W.2d 868 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.)).

191. 665 S.W.2d at 581. The evidence indicated that the property was possibly worth \$700,000 instead of the \$420,000 purchase price. The buyer, as real estate agent, had one offer for the property in the amount of \$700,000, which the buyer did not disclose to the seller. *Id.* at 580-81.

192. *Id.* at 581. In *Ramsey v. Gordon*, 567 S.W.2d 868 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.), the Waco court of appeals held that when an agent breaches his duty to his principal by becoming personally interested in an agency agreement, the contract is voidable at the election of the principal who was without full knowledge of the facts surrounding the agent's interest. *Id.* at 871.

193. 669 S.W.2d 179 (Tex. App.—Fort Worth 1983, no writ).

194. TEX. REV. CIV. STAT. ANN. art. 6573a, § 8 (Vernon Supp. 1985).

aggrieved persons suffering monetary damages due to unlawful acts committed by licensed real estate brokers or salesmen to receive reimbursement from the Real Estate Recovery Fund.¹⁹⁵ The defendant was a licensed real estate broker who had entered into a partnership for the purpose of buying and selling real property. The plaintiff brought this action against the partner, claiming that she had been defrauded with respect to certain partnership real estate proceeds. After obtaining a judgment against defendant, the defrauded partner filed a claim with the Texas Real Estate Commission for payment from the Real Estate Recovery Fund for the actual loss suffered. The court held that reimbursement from the Real Estate Recovery Fund was available only in situations in which the conduct complained of was committed in the scope of activity as broker or salesman under the Real Estate License Act.¹⁹⁶ The court then found that the defendant, in breaching the partnership agreement to share the proceeds of the sale of partnership property, had acted as a principal and not as a real estate agent or broker.¹⁹⁷ The court, therefore, held that the Real Estate License Act did not cover the defendant's actions.¹⁹⁸

In *Burnett v. Foley*¹⁹⁹ the court considered whether licensed real estate agents are entitled to recover from the Real Estate Recovery Fund. In *Burnett* real estate agents sued the real estate broker with whom they had associated to recover their commission from the sale of certain property. The parties reached a compromise settlement agreement, which the broker subsequently breached. The agents then filed a claim for reimbursement from the Real Estate Recovery Fund. The court held that real estate sales agents are not aggrieved persons within the meaning of the Real Estate License Act and, therefore, have no right of recovery thereunder.²⁰⁰ In light of the public policy the Act was designed to serve, the provisions of the Act regarding reimbursement from the recovery fund clearly established that the general public, rather than licensed real estate salespersons, are the persons for whom the protection was designed.²⁰¹ The court emphasized that a person licensed under the Real Estate License Act is not automatically precluded

195. *Id.* pt. 1(a).

196. 669 S.W.2d at 181.

197. *Id.*

198. *Id.* As a result of a 1983 amendment to the Real Estate License Act, the phrase "in the scope of activity which constitutes a broker or salesman" was deleted and the use of the fund was limited to a violation of § 15(3), which covers a licensee who "when selling, buying, trading, or renting real property in his own name, engaged in misrepresentation or dishonest or fraudulent action," or § 15(4), which is applicable when a "licensee has failed within a reasonable time to make good a check issued to the commission after the commission has mailed a request for payment by certified mail to the licensee's last known business address as reflected by the commission's records." TEX. REV. CIV. STAT. ANN. art. 6573a, §§ 15(3), (4) (Vernon Supp. 1985). Damages resulting to a person from conduct that constitutes fraud, misrepresentation, deceit, false pretenses, or trickery by a real estate licensee acting in the capacity of broker or salesman are not longer reimbursable from the Real Estate Recovery Fund. In light of the 1983 amendment, however, the conduct complained of in the *Heald* case apparently would give rise to a right to reimbursement from the fund.

199. 660 S.W.2d 884 (Tex. App.—Fort Worth 1983, no writ).

200. *Id.* at 886-87.

201. *Id.* at 887.

from recovery from the Real Estate Recovery Fund by virtue of his status as a licensee.²⁰² To recover from the fund a licensee must have been a principal in the transaction for which reimbursement is sought.²⁰³

Damage to Real Property. *Porras v. Craig*²⁰⁴ involved the measure of damages for permanent damage to land resulting from the cutting down of shade trees. The Texas Supreme Court applied the general damages rule that the measure of permanent damage to real property is the difference in the market value of the land immediately before and immediately after the injury.²⁰⁵ The court held that opinion testimony of the owner of the land as to its market value was admissible,²⁰⁶ even if the owner failed to qualify as an expert witness.²⁰⁷ The court found, however, that the opinion testimony given by the owner concerned the personal value and not the diminished market value of the land and, therefore, reversed the decision of the court of appeals.²⁰⁸ The court, nevertheless, decided that a conditional measure of damages, based upon the intrinsic value of the trees removed, should be applied.²⁰⁹ The intrinsic value rule is applied in situations in which the reduction in market value test will not adequately compensate the injured party.²¹⁰ In these cases the court will award damages for the loss of intrinsic value caused by the removal of trees or other vegetation.²¹¹ The court found evidence in the record to support recovery under this theory and remanded the case for a new trial.²¹²

Slander of Title. In *Ellis v. Waldrop*²¹³ appellee Waldrop sold two and one-half acres of a seven and one-half acre tract to Ellis and granted Ellis a right of first refusal to the remaining five acres. Waldrop then entered into an agreement for the sale of the remaining five acres to a third party. Waldrop's attorney notified Ellis by letter of the agreement. Waldrop sued to remove the cloud on title caused by Ellis's right of first refusal, which Ellis refused to release of record. The trial court found that Ellis had failed to exercise his right of first refusal in accordance with the terms of the agreement and awarded Waldrop damages for slander of title.²¹⁴ The court found

202. *Id.*

203. *Id.*

204. 675 S.W.2d 503 (Tex. 1984).

205. *Id.* at 504 (citing *Cummer-Graham Co. v. Maddox*, 155 Tex. 284, 285 S.W.2d 932 (1956)).

206. 675 S.W.2d at 504 (citing *State v. Carpenter*, 26 Tex. 604, 89 S.W.2d 194 (1936); 2 R. RAY, TEXAS LAW OF EVIDENCE: CIVIL & CRIMINAL § 1422 (3d ed. 1983)).

207. 675 S.W.2d at 504 (citing *State v. Berzer*, 480 S.W.2d 557 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.)).

208. 675 S.W.2d at 505.

209. *Id.* at 506 (citing *Miloscar v. Gonzales*, 619 S.W.2d 283 (Tex. Civ. App.—Corpus Christi 1981, no writ); *Hamilton v. Fant*, 422 S.W.2d 495 (Tex. Civ. App.—Austin 1967, no writ); *Moran Corp. v. Murray*, 381 S.W.2d 324 (Tex. Civ. App.—Texarkana 1964, no writ); *Lucas v. Morrison*, 286 S.W.2d 190 (Tex. Civ. App.—San Antonio 1957, no writ)).

210. 675 S.W.2d at 506.

211. *Id.*

212. *Id.* at 507.

213. 656 S.W.2d 902 (Tex. 1983).

214. *Id.* at 903-04.

that Ellis's failure to release his purported interest in the tract was a breach of the right of first refusal agreement because it hindered the plaintiff's efforts to develop the land.²¹⁵

Appellees Wilemon and Mahoney, who had purchased the five-acre tract from Waldrop, alleged that they had been hindered in their efforts to develop the tract and sought damages resulting therefrom. They admitted, however, that they had not desired or attempted to sell the land. The damages sought included property taxes and mortgage interest incurred during the period of impairment. The Texas Supreme Court, relying upon its decision in *A.H. Belo Corp. v. Sanders*,²¹⁶ held that to recover damage for disparagement of title a plaintiff must allege the loss of a specific sale.²¹⁷ The court noted that, although the failure to release a purported property interest can be the basis for a cause of action in slander of title, no Texas court had ever awarded damages "under the rubric 'cloud on title.'"²¹⁸ The court, therefore, reversed the judgment of the lower court and denied damages.²¹⁹

Justice Spears concurred in the result, but disagreed with the majority's view that *A.H. Belo Corp.* controlled the disposition of the case.²²⁰ Justice Spears pointed out that the specific sale rule in disparagement of title cases allowed damages only for special damages in the form of pecuniary losses.²²¹ Those losses must be proven with sufficient certainty to avoid speculation by the factfinder.²²² Justice Spears reasoned that Wilemon and Mahoney had not pleaded the loss of a particular sale; rather, they pleaded that Ellis's actions prevented them from obtaining a loan on the property because they could not obtain title insurance without a waiver and release from Ellis.²²³ Justice Spears agreed, however, that Wilemon and Mahoney were properly denied recovery because they failed to show any particulars of such a loan.²²⁴ In concluding, Justice Spears observed that although no Texas case appeared to have either allowed or denied recovery in a slander of title case after proving delays in financing resulting from malicious assertion of title by third persons, his decision did not narrow *A.H. Belo Corp.* to foreclose such a possibility.²²⁵

Municipal Annexation. In *City of Longview v. State ex rel. Spring Hill Utility District*²²⁶ the Texas Supreme Court reviewed a quo warranto action contesting the validity of ordinances by the city of Longview that annexed the Spring Hill Utility District. The Spring Hill Utility District was a water

215. *Id.* at 904.

216. 632 S.W.2d 145 (Tex. 1982).

217. 656 S.W.2d at 905.

218. *Id.*

219. *Id.*

220. *Id.* (Spears, J., concurring).

221. *Id.*

222. *Id.* at 906.

223. *Id.*

224. *Id.*

225. *Id.*

226. 657 S.W.2d 430 (Tex. 1983).

control and improvement district, consisting of one large tract of land and two smaller tracts located approximately six miles from the main tract. The main tract of land was adjacent to the Longview city limits and was within Longview's three and one-half mile extraterritorial jurisdiction. Two smaller annexed tracts were not adjacent to Longview and were not within its extraterritorial jurisdiction. The court noted that article 1175²²⁷ limited annexation to territory adjacent to a city, while article 970a²²⁸ limited annexation to territory within the extraterritorial jurisdiction of a city.²²⁹ Article 970a also requires that a city annex the entire portion of a water or sewer district and not merely one part.²³⁰ The court found that Longview had sequentially adopted four annexation ordinances with each ordinance annexing land adjacent to land annexed in the preceding ordinance.²³¹ Longview, therefore, annexed land that was entirely within its extraterritorial jurisdiction, as extended by each ordinance, and annexed the entire water district in compliance with the adjacency limitation of article 1175 and the extraterritorial jurisdiction limitation of article 970a.²³² The court observed that the moment the Longview city council annexed the main tract of the utility district, the city's extraterritorial jurisdiction immediately expanded three and one-half miles beyond the main tract.²³³ The court concluded that article 970a requires a city to annex a water district in its entirety, but does not require a city to annex the entire district in one ordinance; the use of four ordinances to achieve the annexation did not, therefore, make the annexation invalid.²³⁴

Nuisance. The issue confronting the San Antonio court of appeals in *Otten v. Town of China Grove*²³⁵ was the validity of a municipal ordinance prohibiting horse racing within the town limits. The court observed that sections 11 and 28 of article 1015 empowered a municipality to abate and remove nuisances and prohibit horse racing in the streets.²³⁶ The court emphasized, however, that a municipality may not arbitrarily categorize a particular ac-

227. TEX. REV. CIV. STAT. ANN. art 1175 (Vernon 1983).

228. *Id.* art. 970a.

229. 657 S.W.2d at 430.

230. *Id.* Section 11(B) of article 970a specifically provides that "[a] city may not annex territory within the boundaries of a water or sewer district unless it annexes the entire portion of the district that is outside the city's boundaries." TEX. REV. CIV. STAT. ANN. art. 970a, § 11(B) (Vernon 1983).

231. 657 S.W.2d at 430-31.

232. *Id.* at 431. The Texas Supreme Court pointed out that a city can easily extend its extraterritorial jurisdiction by passing successive ordinances. The Municipal Annexation Act provides that "[w]hen a city annexes additional territory, the extraterritorial jurisdiction of such city shall expand in conformity with such annexation." TEX. REV. CIV. STAT. ANN. art. 970a, § 3(C) (Vernon 1968).

233. 657 S.W.2d at 431 n.2.

234. *Id.* at 431. The supreme court noted that the legislative purpose in enacting § 11(B) was to prevent double taxation and the confusion of services; the section was not to be used as a tool for impeding municipal annexation. *Id.* The legislative purpose is satisfied whether the entire district is annexed in one or more ordinances. *Id.*

235. 660 S.W.2d 565 (Tex. App.—San Antonio 1983, writ *dism'd*).

236. *Id.* at 567; TEX. REV. CIV. STAT. ANN. art. 1015, §§ 11, 28 (Vernon 1963).

tivity as a nuisance unless it is a nuisance per se at common law.²³⁷ Stating that horse racing has not been declared a nuisance by the legislature nor is it otherwise illegal, the court held that the ordinance was not a valid abatement of a nuisance.²³⁸ Moreover, since the effect of the ordinance was to prohibit horse racing on private property, it did not represent a valid exercise of the municipality's power to prevent horse racing in the streets.²³⁹

*Condominiums. Major Investments, Inc. v. De Castillo*²⁴⁰ involved the question of whether under the Texas Condominium Act²⁴¹ the existence of a condominium regime is a prerequisite to the independent sale of condominium units. In this case the buyer contracted to buy a unit in an unestablished condominium regime. The court noted that the Texas Condominium Act appeared to require the submission of a condominium regime as a prerequisite to the conveyance of individual units.²⁴² The court, nevertheless, concluded that failure to comply with the Act does not render a contract for sale of a condominium unit void as a matter of law.²⁴³ Contrary to the contention of the buyer, the court held that the contract was not vague, indefinite, and wholly insufficient under the statute of frauds²⁴⁴ solely because it referred to a condominium unit not yet constructed.²⁴⁵ The court found that the land conveyed could be identified with reasonable certainty from the description attached to the contract and that such description was

237. *Id.*

238. *Id.*

239. *Id.*; see *All Tex. Racing Ass'n v. State*, 82 S.W.2d 151, 152 (Tex. Civ. App.—San Antonio 1935), *aff'd*, 128 Tex. 384, 97 S.W.2d 669 (1936).

240. 673 S.W.2d 276 (Tex. App.—Corpus Christi 1984, writ *ref'd n.r.e.*).

241. TEX. REV. CIV. STAT. ANN. art. 1301a (Vernon 1980).

242. 673 S.W.2d at 281. Sections 3 and 4 of the Texas Condominium Act provide as follows:

Sec. 3. When a developer, the sole owner, or the co-owners of a building or buildings or proposed building or buildings expressly declares, through the recordation of a master deed, lease, or declaration . . . their desire to submit their property to the regime established by this Act, there shall be thereby established a condominium regime.

Sec. 4. Once the property is submitted to the condominium regime, an apartment in the project may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of judicial acts, as if it were entirely independent of the other apartments in the project of which they form a part, and the corresponding individual titles and interests shall be recordable.

TEX. REV. CIV. STAT. ANN. art. 1301a, §§ 3, 4 (Vernon 1980).

243. 673 S.W.2d at 281. The buyer also contended that the contract was void because it failed to comply with TEX. REV. CIV. STAT. ANN. art. 6626(c) (Vernon Supp. 1985), which prohibits the use of a subdivision description in a contract of sale unless an approved subdivision plat has been filed of record. The court dismissed this contention on the ground that the contract contained a metes and bounds description of the real property in addition to references to a unit number and building designation. 673 S.W.2d at 281. In dismissing the buyer's further contention that the contract was void because it failed to comply with the requirements of the Texas Condominium Act, the court explained that, unlike article 6626(c), the Texas Condominium Act is not penal in nature and, therefore, lack of compliance therewith does not render a contract void as a matter of law. *Id.* at 280.

244. TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon Supp. 1985).

245. 673 S.W.2d at 281.

sufficient to satisfy the requirements of the statute of frauds.²⁴⁶

246. *Id.*

