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PROPERTY

by

Joe A. Stalcup and J. McDonald Williams***

I. LANDLORD AND TENANT

Tenant as Landlord's Agent. Perhaps no better illustration of the old adage "hard facts make bad law" can be found than the recent case of *Rosen v. Peck.*[1] In a revolutionary departure from established law and business custom, the court essentially held that a tenant under a "triple-net" lease[2] is the agent of the owner. The suit was brought by an air conditioning contractor to recover from the owners of a bowling alley the value of work ordered by the tenant and to foreclose a mechanic's lien against the property. Since a materialman ordinarily has no lien claim against the owner of the fee title to leased property because of a contract with the tenant,[3] the contractor had to establish that the tenant was the owners' agent in order to recover from the owners and foreclose the mechanic's lien. In establishing the agency relationship, the contractor showed the following: (1) the owners purchased the property from the tenant, a nominally capitalized corporation, which leased back the property for a twenty-five-year term (there being no common ownership or control between the two parties); (2) the lease contained typical "triple-net" lease provisions requiring the tenant to pay taxes, insurance and other expenses and to make repairs; (3) the lease was subordinate to existing mortgage liens; (4) the tenant was precluded from assigning the lease without the owners' consent; (5) the owners could assign their interest and be relieved of personal liability for covenants under the lease; (6) the existing subleases to the bowling alley operators were assigned to the owners as collateral security for the tenant's payment of rent and could not be amended or cancelled without the owners' consent; and (7) the tenant was required to deliver to the owners periodic statements showing the rents collected from subleases. The court noted that the tenant frequently was late in making its rental payments and occasionally its checks were dishonored. Also, the subtenants from time to time defaulted in their rental payments, and the owners wrote numerous letters demanding payment. Finally, after a period of such continuing defaults, the owners assumed a partnership name similar to the corporate name of the tenant and began collecting rents and otherwise dealing with the subtenants under express provisions in the lease and assignment of subleases permitting such action. In this connection, the owners evicted one of

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[1] 445 S.W.2d 241 (Tex. Civ. App.—Waco 1969).

[2] R. KRATOVIL, REAL ESTATE LAW 393 (4th ed. 1964) defines net lease as one in which the tenant agrees to pay, in addition to the fixed rent, all the expenses including taxes and insurance.

[3] *See, e.g.*, Schneider v. Delwood Center, Inc., 394 S.W.2d 671 (Tex. Civ. App.—Austin 1965), *error ref. n.r.e.*

the subtenants. The owners later brought suit against the tenant and a guarantor of the tenant's obligations. Because of its failure to pay state franchise taxes, however, the tenant's corporate charter was forfeited, and it ceased conducting any business.

At approximately the same time that the tenant defaulted in the rent and the owners began collecting rent directly from the subtenants, the tenant contracted with the plaintiff for the air conditioning repair work. There was no evidence that the owners were aware of this contract or of the work done thereunder, nor that the contractor thought the tenant was acting as the agent of the owners. However, the court found that the owners had placed the tenant in "apparent" control of the income-producing property with knowledge that the tenant was financially irresponsible. The court characterized the facts as follows:

> . . . Bol-Con's [the tenant] primary responsibility under its contract with appellants [the owners] was the maintenance of the properties; . . . Bol-Con was authorized and required by appellants to make all necessary repairs and improvements to the properties to keep them properly maintained; . . . appellants knew that debts for corrective repairs and permanent improvements to the properties would be incurred by Bol-Con and that Bol-Con would not be financially able to pay those debts; . . . appellants and Bol-Con did not consider their association to be a genuine relationship of lessor and independent lessee; . . . appellants exercised all significant control regarding the use of the properties; . . . Bol-Con was nothing more than a local management agent furnishing services to appellants for a compensation, under the domination of appellants without any real, substantial control over the use of the properties.[4]

The court also concluded that the owners' failure to testify or produce any evidence at the trial raised a strong presumption against their position which, in turn, strengthened the probative force of plaintiff's evidence.

The court's conclusions that the tenant was merely a caretaker under the domination of the owners and that they did not consider their association to be genuinely that of landlord-tenant seem eliptical and without justification. Also, to say on the one hand that the owners placed the tenant in apparent control (as is the substantive nature of a triple-net lease), but on the other hand that the owners exercised all significant control (because the owners sought to preserve the continuity of the income stream from the subtenants), appears to be inconsistent. The court has given the owner under a triple-net lease the Hobson's choice of refraining from any activity in connection with the property (to the likely detriment of his investment), or of actively enforcing his rights (to the potential expansion of his liability).

It is difficult to discern from the opinion what policy interest the court is seeking to protect. The usual triple-net lease transaction is not designed to defeat contractors performing work on the property or other creditors. The transaction is so framed to provide the owner with a passive investment and the residual value of the property upon the expiration of the lease

[4] 445 S.W.2d at 246.

term. Requiring a tenant to effect repairs and discharge all costs and expenses in connection with the property and regulating the assignment and subletting of the property typify such leases. Also, provisions permitting landlords to deal directly with subtenants following the tenant's default are quite common. The imposition of all liabilities on the tenant is intended to protect the owner from liability, and certainly not to expose the owner to enlarged risks of having the tenant as his agent and, therefore, in a position to bind the owner. The rationale of the court's holding is broad enough to ensnare the owner for the tenant's other acts as well, including tortious acts and contractual acts imposing liability on the owner. The policy of safeguarding mechanics' liens of contractors is, of course, salutary; however, in this case the contractor apparently did not rely on the owners' ability to pay or their property in agreeing to perform the work and presumably was in a position to check the tenant's credit. The contractor thus enjoyed an unanticipated windfall. The court has thus tampered with what has long been recognized in business custom as the independent nature of the landlord-tenant relationship under triple-net leases. Hopefully *Rosen* will not be followed in the continuing evolution of landlord-tenant case law.[5]

Landlord's Right To Approve Subtenants. Leases frequently provide that the tenant may not assign the lease or sublease the property without the approval of the landlord and that the landlord's approval will not be unreasonably withheld. The latest chapter in the courts' struggle to develop a standard of reasonableness in this situation is found in *Mitchell's, Inc. v. Nelms.*[6] In this case, the tenant had subleased the premises to a subtenant who defaulted under the sublease. The landlord and tenant then entered into an agreement permitting the tenant to secure a new subtenant, subject to the reasonable approval of the landlord, and a modification of the lease in several respects—including rent and terms. In the event an acceptable subtenant was not found by a specified date, the agreement provided that the modification extending the term of the lease would terminate. A subtenant was not found by such a date; but later the tenant found a newly chartered bank as a prospective subtenant and proposed a sublease providing for a fixed rent and contingent rent based upon the amount of the bank's deposits. The landlord rejected the proposed sublease. The court agreed that there was probative force to support the trial court's finding that the landlord's refusal was not unreasonable, stressing the fact that the tenant had failed to produce a subtenant by the specified date. The court reviewed a number of other cases and found varying approaches. Some courts require the tenant to show that the landlord's refusal is arbitrary, which is defined variously as "without fair,

[5] In considering the mechanic's lien claim the court had to deal with the question of TEX. REV. CIV. STAT. ANN. art. 2226 (1964), which requires demand on the owner. The court noted the language of art. 2226, providing that demand may be made on the owner's authorized agent, and concluded that notice to the tenant was notice to the owner since the tenant was the agent of the owner acting within the scope of the owner's authority.

[6] 454 S.W.2d 809 (Tex. Civ. App.—Dallas 1970), *error ref. n.r.e.*

solid and substantial cause or reason"[7] or "capricious, despotic, tyrannical, bound by no law and . . . performed without regard to principles."[8] Others require that the refusal be merely unreasonable, which is defined as "irrational, foolish, unwise, absurd, silly, preposterous, senseless and stupid"[9] or "where . . . there is no room for difference of opinion among reasonable minds."[10] The opinion does not adopt one of these standards nor does it shed much light on the application of these definitions, thus leaving landlords and tenants without guidelines for determining the reasonableness of a disapproval.

II. Purchase and Sale

Most contracts for the purchase and sale of real property require the seller to convey the property free and clear of encumbrances. Questions arise frequently as to the types of title exceptions that constitute encumbrances. In *Bowen v. Briscoe*[11] the seller entered into a contract of sale with the purchaser, agreeing to convey the property free and clear of any encumbrances. At the time the contract was entered into, the property, having dimensions of 100 x 125 feet, was subject to a state highway easement having dimensions of 100 x 16 feet. Upon discovery of the easement, the purchaser refused to close the purchase, and the seller sued for specific performance. The Texas supreme court held for the purchaser, concluding that such an easement was an encumbrance in the nature of a possible public street. The court concluded that a variance of thirteen per cent of the total area of the property "as a matter of law . . . is substantial and precludes plaintiffs' request for the equitable relief of specific performance."[12] In the event of such a substantial variance, the court regarded as immaterial the fact that the easement did not interfere with the purchaser's intended use of the property as a service station.

III. Mechanics' and Materialmen's Liens

A recent case raises an interesting dilemma for the homeowner who is building a new home. In order to perfect a mechanic's and materialman's lien on a homestead, the contractor or subcontractor must enter into a written contract signed by both the husband and wife and file the contract of record.[13] In *Floyd v. Rice*[14] the owner owned one home and contracted for the construction of a new home. The owner apparently intended to make the new home his homestead. He sold his existing homestead during the course of construction of the new home and then rented a house

[7] *Id.* at 814, summarizing the definition stated in Webb v. Dameron, 219 S.W.2d 581, 584 (Tex. Civ. App.—Amarillo 1949), *error ref. n.r.e.*

[8] 454 S.W.2d at 814, citing Travis-Williamson County Water C. & I. Dist. v. Page, 358 S.W.2d 158, 162 (Tex. Civ. App.—Austin 1962), *aff'd in part, rev'd in part*, 367 S.W.2d 307 (Tex. 1963).

[9] 454 S.W.2d at 814.

[10] *Id.*, citing Thurman v. Meridian Mutual Ins. Co., 345 S.W.2d 635, 639 (Ky. 1961).

[11] 453 S.W.2d 287 (Tex. 1970).

[12] *Id.* at 289, 290.

[13] Tex. Rev. Civ. Stat. Ann. art. 5460 (Supp. 1970).

[14] 444 S.W.2d 834 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

for several months until the new home was completed. The owner paid the contractor in full, but failed to retain ten per cent of the contract price for thirty days as provided in article 5469.[15] The contractor failed to pay a subcontractor, who sued the contractor and owner and sought to foreclose his statutory materialman's lien. The owner argued that the new home was his homestead and that the requirements of perfecting a lien on a homestead were not met. The court of civil appeals, however, held for the subcontractor, concluding that since the owner was occupying a residence as a homestead at the time the construction contract was entered into, he could not then have a second homestead; nor could he abandon his existing homestead without moving therefrom with the intention to abandon the same as a home. Thus, since a mechanic's lien relates back to the time the construction contract is signed, apparently a homeowner building a new home will be unable to establish the new home as his homestead during the construction period unless he moves from his existing home prior to entering into the construction contract.

IV. MORTGAGES

In most construction projects the construction lender will require the owner to give an affidavit that no work has been done on the site and that no construction contract has been entered into prior to the recording of the deed of trust. If the construction contract has already been entered into, the contractor must subordinate his mechanic's lien to the deed of trust. In any event, the relative priority between a deed of trust lien and a mechanic's lien is frequently the subject of dispute and litigation. The root case on this subject is *Oriental Hotel Co. v. Griffiths*,[16] in which the owner contracted with a contractor to finish construction of a hotel whose foundation had already been constructed. After the execution of the contract, but before labor and materials were furnished, a deed of trust lien securing the construction loan was recorded. The Supreme Court of Texas held that the inception of all mechanics' and materialmen's liens related back to the formation of the construction contract and thus were superior to the deed of trust lien. Although the *Oriental Hotel* case has since been narrowly construed, a recent case, *Irving Lumber Co. v. Alltex Mortgage Co.*,[17] illustrates the continuing vitality of its doctrine. In *Irving Lumber* the owner apparently entered into an oral contract with a lumber company for labor and materials for the shells of four houses. Thereafter, a deed of trust lien was recorded securing the construction loan. After the deed of trust was recorded, the lumber company began furnishing labor and materials for the construction. The court of civil appeals at Dallas held that the deed of trust lien had priority over the mechanic's lien, distinguishing the *Oriental Hotel* case on the following grounds: First, there was no general construction contract to complete the improvements,

[15] TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1970).

[16] 88 Tex. 574, 33 S.W. 652 (1895).

[17] 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969), *error granted*, 14 Tex. Sup. Ct. J. 212 (1970).

but only to construct the shell; second, no labor or materials had been furnished and no improvements started when the deed of trust was recorded, whereas in *Oriental Hotel* the foundation had already been constructed (albeit by a different contractor).

In reversing the judgment of the court of civil appeals, the supreme court held that under the doctrine of *Oriental Hotel*, "When the building has been projected, and construction of it entered upon, that is contracted for—the circumstances exist out of which all future labor contracts for labor and material necessary to its completion may arise, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its 'inception.' "[18] Addressing itself to the distinction made by the court of appeals between a general contract and one for limited and specific improvements, the court stated, "We find no requirement that the labor and materialmen's contract must encompass performance of all the work and material necessary to construct an entire building as a basis for the relation-back doctrine."[19] The court's holding can be expected to trouble construction lenders who must ascertain that the construction contract has not been entered into prior to the recordation of the deed of trust.

V. Title Insurance

The Survey Exception. In *Dallas Title & Guaranty Co. v. Valdes*[20] the title company issued an owner's title insurance policy which contained the standard printed "survey exception" in connection with the conveyance of property by a lot and block description.[21] The owner, upon discovering that most of the lot was occupied by a highway, sued the former owner and the title company. The title company argued that since a correct survey would have shown the highway encroachment, the survey exception relieved the title company of any liability for the title defect. The court of civil appeals rejected the argument, however, and concluded that the title company intended to insure the entire lot, even though a thorough title search should have revealed the prior conveyance for highway purposes. The court indicated quite properly that the sanctuary of the survey exception ought to be narrowly limited, chiefly to certain cases involving boundary disputes. In view of the widespread reliance on title policies, particularly in urban real estate transactions, this case is important in making clear that the risk of correctly reflecting the state of title from the public records rests with the title company.

Recovery Under Policy Absent Adverse Claim. In a case of first impres-

[18] 14 Tex. Sup. Ct. J. at 213.
[19] *Id.* at 214.
[20] 445 S.W.2d 26 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*
[21] The "survey exception" is a standard printed exception appearing in Texas title policies and reads as follows: "Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachment, or any overlapping of improvements which a correct survey would show." The exception can be deleted by furnishing the title company a current survey and paying an additional 15% title premium.

sion,[22] the court of civil appeals reversed the trial court and held that an insured may recover from a title company on proof of a title defect, even though no suit has been filed by an adverse party and no adverse claimant is in possession of the property. The Texas standard title policy states that the title company "shall not be liable until such adverse interest, claim, or right shall have been held valid by a court of last resort to which either litigant may apply."[23] This language, the court held, is merely "a limitation on the guarantor's liability in those situations wherein an adverse claimant has filed suit against the insureds and the guarantor has undertaken its defense."[24] Thus, the insured need not await the assertion of an adverse claim to recover under his policy. The determination of damages, however, should prove to be an interesting question when the case is retried.

VI. Adequacy of Property Description

Year after year Texas courts are forced to decide cases in which one of the parties to a real estate transaction seeks to renege on his agreement on the basis that the property description is inadequate. The cases fall into one of several categories, including: a seller seeking to avoid paying a commission to a broker; a seller or buyer seeking to avoid closing a purchase and sale; or a landlord seeking to avoid an option he has granted to the tenant. The courts have enunciated the following test for the adequacy of the description: "[T]he writing must furnish within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty."[25]

Several recent cases illustrate the application of this test. In *Lebow v. Weiner*[26] the contract of sale described the property as one acre out of a larger tract which was described by lot, section and survey. The tract to be sold was that part of the seller's entire tract adjacent to and west of a tract of another person, with frontage along a road not to be less than 150 feet, and the west boundary to be parallel with the east boundary. The contract provided for the property to be specifically identified by a new survey to be furnished and further provided for a proration of the purchase price if the property contained more or less than one acre. A survey was made in accordance with the description, and the land was found to contain only nine-tenths of an acre. The seller refused to convey the property, and the purchaser sued for specific performance. The court concluded that it was obvious from a consideration of the contract that the parties knew exactly what was to be conveyed (which is nearly always the case in this type of litigation). The only question was the pre-

[22] Prendergast v. Southern Title Guar. Co., 454 S.W.2d 803 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*
[23] 454 S.W.2d at 806.
[24] *Id.* at 807.
[25] Wilson v. Fisher, 144 Tex. 53, 56, 188 S.W.2d 150, 152 (1945).
[26] 454 S.W.2d 869 (Tex. Civ. App.—Beaumont 1970), *error ref. n.r.e.*

cise acreage determinable by the survey, and this contingency was taken care of through the device of prorating the cost.

On the other hand, in *Dunlap-Swain Tire Co. v. Simons*[27] the owner of a shopping center, in his lease to a service station operator, granted a right of first refusal to lease other property in the shopping center described as "the North West Corner of New Webbs Chapel Road and Royal Lane," in the event the corner should be rezoned to permit its use as a service station. The property was so rezoned, but the owner sold the property to another without offering it first to the tenant. The new owner leased the corner to another service station operator. The tenant sued for damages, but the court of appeals sustained the trial court's summary judgment for the owner, characterizing the description as insufficient.

Frequently a complete metes and bounds description is unavailable at the time the agreement is entered into, and the description is added following the completion of a new survey. Hopefully, cases such as the *Lebow* case will discourage those tempted to renege on their bargains. Cases in line with the *Simons* case, however, can only be lamented and serve to remind parties to real estate transactions of the necessity of a complete property description.

VII. CONDEMNATION

Condemnation of a Determinable Estate. By its judgment in *City of San Antonio v. Ruble*[28] and its refusal to grant a writ of error in *Bolton v. City of Waco*,[29] the Supreme Court of Texas appears to have ruled that a possibility of reverter is not "property" within the meaning of article I, section 17 of the Texas Constitution which provides that, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ."[30] Such a ruling appears inconsistent with the holdings of earlier cases to the effect that a possibility of reverter may be assigned and may be devised.[31] It should be noted that neither the supreme court in *Ruble* nor the court of civil appeals in *Bolton* expressly states that a possibility of reverter is not property, but in the light of the decisions reached, the cases cited, and the reasoning relied upon, such a conclusion seems inescapable.

In *Ruble* the landowners (Harrison and Ruble) had granted an easement to construct and maintain earthen dams to retard flood waters and reduce sedimentation. The grant was made in the early 1950's to the Alamo Soil Conservation District (Alamo District) "for so long as the Grantees, their successors and assigns, shall continue to use said easement or right-

[27] 450 S.W.2d 378 (Tex. Civ. App.—Dallas 1970), *error ref. n.r.e.*

[28] 453 S.W.2d 280 (Tex. 1970), *reversing in part* 443 S.W.2d 894 (Tex. Civ. App.—San Antonio 1969).

[29] 447 S.W.2d 718 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*

[30] TEX. CONST. art. I, § 17.

[31] *See, e.g.*, Caruthers v. Leonard, 254 S.W. 779 (Tex. Comm'n App. 1923), *judgment adopted*; Perry v. Smith, 231 S.W. 340 (Tex. Comm'n App. 1921), *holding approved.*

of-way for said purposes."[32] In 1963, Alamo District conveyed an undivided one-half interest in the easement to the San Antonio River Authority (SARA). In 1966, it became apparent to the City Public Service Board (CPSB) of San Antonio that the land would have to be acquired as a part of the Calaveras Lake Project. CPSB initiated negotiations with Alamo District and SARA which led to the "friendly" condemnation of the easement. CPSB took the easement rights on July 13, 1967, and the landowners' fee title on August 10, 1967, as to Harrison and on November 8, 1967, as to Ruble. The two landowners sued for a declaratory judgment that at the time of taking their fee interests were no longer burdened with easements. The trial court rendered summary judgments for the landowners. The court of civil appeals affirmed as to this point, holding that the conveyance to CPSB had the effect of terminating the easement because it extinguished the purposes and uses for which it was granted. The supreme court reversed the court of civil appeals and held that the fee interests of Ruble and Harrison were still burdened with the easement rights on the date of taking of the fee.

The majority opinion cites *Hamman v. City of Houston*[33] as holding that even though the condemnation of the land defeats the original purpose of a deed, as expressed in a condition subsequent, there is no reversion to the grantor. However, the opinion fails to point out that the court in *Hamman* applied a constructive trust theory by requiring that the proceeds from a condemnation of a part of Milby Park for highway purposes be used to improve and maintain the remaining portion of Milby Park, for which purposes the determinable fee in the land had been granted. Had the supreme court used the same approach in *Ruble*, it probably would have found that the purposes of the trust were rendered impossible of fulfillment and hence, that the trust corpus should revert to the grantor.

Since it had become absolutely certain by the date of taking that the purposes for which the easement was granted had been rendered impossible by the easement holder's conduct, the court should have found that the owner of any determinable estate should not be permitted to thwart the grantor's purposes by condemning the fee simple title, appropriating the property for uses other than those specified in the grant and reducing (or eliminating entirely, as is the effect in *Bolton*) the value of the grantor's remaining interest in the property, by asserting that on the date of taking the fee was still burdened by the determinable estate.

The rather severe consequences which are apt to follow a logical extension of the court's reasoning in *Ruble* are illustrated in a small measure by the holding in *Bolton*. In that case the Cameron family deeded 350 acres in trust to the city of Waco to be used at all times solely and exclusively as a public park. The city of Waco condemned a 2.86-acre strip for a public street; the court of civil appeals held that "[t]he public property here involved belongs to the City. Thus under the authorities

[32] 453 S.W.2d at 282.

[33] 362 S.W.2d 402 (Tex. Civ. App.—Fort Worth 1962), *error ref. n.r.e.*

cited, the City had the legal right to construct the extension without resort to condemnation."[34] The court completely ignored the limitations in the original deed to the city. The court held, in effect, that a public authority has the right to appropriate property granted to it for a specific purpose and use it for *any* public purpose, and that the grantor is without right or remedy. If the reasoning of the court of civil appeals in *Bolton* is accepted, one interested in ecology who grants a determinable fee of 10,000 acres of valuable land to a city for so long as the same is maintained as a wild-life preserve, is without remedy if, subsequently, the city commences construction of a municipal airport, a sewage treatment facility, or a garbage dump on the property. Should such a grantor be without remedy merely because up to the "date of taking" the land is still being used as a wild-life preserve, ignoring what will inevitably occur as the result of the taking? A possibility of reverter should be deemed "property" within the purview of the constitutional provisions relating to the power of eminent domain, and any authority exercising such power should be required to pay adequate compensation for such property if its actions result in the taking, damage, or destruction of the property.

Material and Substantial Impairment of Access. In a very important development of the law, the supreme court modified the rules for determining when a loss of access caused by the activities of a governmental authority constitutes a loss which must be compensated under article I, section 17 of the Constitution of Texas. In *DuPuy v. City of Waco*[35] the supreme court had held that the property owner had no right to compensation for diminution of access if he still had reasonable access to his property. In *City of Waco v. Texland Corp.*[36] Mr. Justice Steakley, speaking for the majority, announced a more liberal rule, holding that "property has been damaged for a public use within the meaning of the Constitution when access is materially and substantially impaired even though there has not been a deprivation of all reasonable access; as before, this is a question of law for the Court."[37] In a concurring opinion Mr. Justice McGee suggested a further extension:

> I believe the proper interpretation of Article 1, Sec. 17 to be that the jury or court may award compensation for damages whenever there is evidence of probative force that there has been a diminution in value in abutting property because of an impairment of an adjacent easement of access caused by the construction of a public improvement.[38]

The difficulty in applying the new rule is evidenced by the court's action in two cases on the same point. In *City of Houston v. Fox*,[39] decided on the same day as *Texland*, the damage to the landowner's access was held not to be material and substantial and, therefore, noncompensable. There,

[34] 447 S.W.2d at 720.
[35] 396 S.W.2d 103 (Tex. 1965).
[36] 446 S.W.2d 1 (Tex. 1969).
[37] *Id.* at 2.
[38] *Id.* at 5.
[39] 444 S.W.2d 591 (Tex. 1969).

the city had narrowed the street which the landowner's property abutted and had changed it into a one-way street. In *Collins v. City of San Antonio*,[40] where the supreme court refused to grant writ of error, the landowner had access by means of three streets. When construction had ended, one street, though still open where it abutted landowner's property, became a dead end shortly thereafter. Another had become clogged with structures supporting an overpass, and traffic on it had been greatly reduced. The third had been closed to traffic where it abutted the landowner's property. The court of civil appeals held that the trial court properly granted summary judgment against the landowner.

In *City of Beaumont v. Marks*[41] the supreme court held that while there was diminution in value resulting from a loss of reasonable access, the admission of evidence as to diversion of traffic and circuity of travel was reversible error.

Admissibility of Evidence. As usual, a number of decisions turned on the question of the admissibility of evidence, and whether, if erroneously admitted or excluded, such error was reversible. In two cases the supreme court emphasized that when the amounts received in sales of comparable property are introduced in proceedings where the value of the land is in issue, these amounts are admissible only if circumstances warrant, and then only for a limited purpose. In *City of Austin v. Flink*[42] the court stressed that the comparable sales are not introduced as evidence, but rather to show the basis for the conclusions of an expert witness—his conclusions being the evidence. In *State v. Chavers*[43] the court held that even where the sale is introduced to show the basis of the expert's testimony, it must be a sale of comparable property. The expert is not allowed to testify to sales of non-comparable property, even if his calculations take into account the distinguishing characteristics of the properties.

In another case[44] the supreme court affirmed a civil appeals reversal of the trial court which had erroneously admitted a transcript of testimony given at a hearing before the special commissioners. It was held that testimony as to the rights of the condemnor under the easement it sought was a statement of a conclusion of law—and an erroneous one at that. On the other hand, in *Lakeside Park, Ltd. v. State*[45] the court of civil appeals held that testimony as to the contents of a zoning ordinance violated the "best evidence" rule, but that the error was harmless. The Eastland court of civil appeals also held that it was harmless error to admit evidence of the price paid by the same condemning authority for another tract in the vicinity of the condemned tract.[46] In another case[47] the Tyler

[40] 443 S.W.2d 563 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*
[41] 443 S.W.2d 253 (Tex. 1969).
[42] 454 S.W.2d 389 (Tex. 1970).
[43] 454 S.W.2d 395 (Tex. 1970).
[44] White v. Natural Gas Pipeline Co. of America, 444 S.W.2d 298 (Tex. 1969).
[45] 452 S.W.2d 747 (Tex. Civ. App.—Beaumont 1970), *error ref. n.r.e.*
[46] City of Abilene v. Blackburn, 447 S.W.2d 474 (Tex. Civ. App.—Eastland 1969), *error ref. n.r.e.*
[47] State v. Stiefer, 443 S.W.2d 275 (Tex. Civ. App.—Tyler 1969), *error ref. n.r.e.*

court of civil appeals affirmed the trial court's judgment admitting a letter to the condemnee which stated the value put on the property as determined by the city.

Less than Fee Simple Condemned. Two decisions by the supreme court illustrate the difficulties that sometimes arise when the condemnor takes less than the fee simple title to property. In *White v. Natural Gas Pipeline Co. of America*[48] the condemnor had attempted to reduce the award by including in its petition for condemnation statements to the effect that the landowner could continue to farm upon and irrigate across the strip taken and that the condemnor would remain liable for crop damage. The Amarillo court of civil appeals reversed the lower court judgment which struck the statements from the pleadings.[49] The supreme court affirmed the judgment of the court of civil appeals,[50] but on other grounds. The supreme court expressly disagreed with the court of civil appeals that the petition provisions were limitations on the easement sought by condemnor. Instead, the provisions were held to be mere promises or declarations of future intentions and hence, invalid and subject to special exception. In *Chambers-Liberty Counties Navigation District v. Banta*[51] the supreme court reversed the judgment of the Beaumont court of civil appeals which had held that the jury's finding of no damage to the severed mineral estate by condemnation of the surface estate was contrary to the great weight and preponderance of the evidence.[52] The supreme court held that as a matter of law there can be no damages to the mineral estate, since it is the dominant estate and the owner of the mineral estate retains his common-law right to the reasonable use of the surface estate.

Date of Taking. In a case in which three justices dissented,[53] the supreme court provided a stark reminder to counsel that great importance is attached to the "date of taking" (the date the condemnor deposits the award with the court) and that neither the date of the petition nor the date of the award has legal significance.

On September 27, 1962, the city of Austin filed its petition to take a strip of land "out of" a larger tract. On October 29, 1962, the commissioners made an award of $38,500, and the award recited that it included severance damages. On November 1, 1962, the condemnee entered into a contract of sale agreeing to convey the remainder for $150,000, which was closed (although the property was not deeded) on December 11, 1962. The next day, December 12, 1962, was the official date of "taking" because on that day the city deposited with the court the amount of the commissioners' award. The trial court rendered judgment that the value of the remainder before taking was $258,322, and the value after

[48] 444 S.W.2d 298 (Tex. 1969).
[49] 436 S.W.2d 944 (Tex. Civ. App.—Amarillo 1968).
[50] 444 S.W.2d at 300.
[51] 453 S.W.2d 134 (Tex. 1970).
[52] 445 S.W.2d 61 (Tex. Civ. App.—Beaumont 1969).
[53] City of Austin v. Capitol Livestock Auction Co., 453 S.W.2d 461 (Tex. 1970).

taking was $150,000—therefore, finding damages of $108,322 to the remainder. The court of civil appeals affirmed.[54] The supreme court modified the judgment by deleting, as a matter of law, the damages to the remainder. The court reasoned that since the condemnee had entered into a contract of sale prior to the date of taking and had surrendered possession to the vendee in possession, equitable title to the remainder was in the vendee in possession and condemnee did not own any remainder on date of taking and so could not be entitled to recover for damages to the remainder.

Technically the court's decision may be sound, but in the light of the facts of the case, it is clear that if the condemnee had included the strip taken in his contract of sale, then the vendee would have been entitled to the $108,322 damages to the remainder. Further, a reading of the case leads one to assume that the result would have been different if the vendee had not taken possession before the technical date of taking or if the sale had been closed the day after, instead of the day before taking. From the jury findings the remainder was damaged substantially, and such damage certainly resulted from the city's action. The result appears to be a rather harsh application of form over substance. Since legal title to the part taken and the remainder were united on "the date of taking," perhaps the rationale for a more equitable result might have been an award (including the value of land taken and the damages to the remainder) to the single legal owner, but held in trust for the equitable owners to divide among themselves.

Other Cases of Interest. In *City of Tyler v. Arp Nursery Co.*[55] the Tyler court of civil appeals held that the condemnor's attempt to relinquish nursery stock which was a part of the land taken, by filing an amended petition two years after the taking was properly denied by the trial court.

In companion cases, the Eastland court of civil appeals affirmed trial court judgments awarding damages based upon a diversion of waters over the lands of the plaintiff which was found to be an intentional, unreasonable invasion causing injury.[56] The city had constructed a drainage project which emptied into a lake on plaintiff's land. Before the project the lake overflowed infrequently; afterward, it overflowed more often and left large pools of standing water that impeded plaintiff's use of the land. The court found the evidence sufficient both on the point of unreasonableness of the invasion and the intent of the city.

Hidalgo County v. Pate,[57] while not really a condemnation case, is worth noting. The court of civil appeals affirmed the trial court's judgment in a trespass-to-try-title action in which a 400-foot strip of land was con-

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[54] 434 S.W.2d 423 (Tex. Civ. App.—Austin 1968).

[55] 451 S.W.2d 809 (Tex. Civ. App.—Tyler 1970), *error ref. n.r.e.*

[56] City of Perryton v. Steed, 454 S.W.2d 440 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.*; City of Perryton v. Huston, 454 S.W.2d 435 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.*

[57] 443 S.W.2d 80 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

veyed to the county for the purpose of erecting a trestle bridge, consideration was not paid, the bridge was not built, and the road was not opened. The court found that the county held legal title to the strip as trustee under a resulting trust for the benefit of the grantor.

Those concerned with the expanding role of government bureaucracy will be especially interested in *United States v. 2,606.84 Acres of Land.*[58] Judge Brewster relates in fascinating detail the history of the Corps of Engineers' efforts to acquire land for a purpose not then authorized by statute by taking more land than was needed for an authorized purpose. The Government contended that since Congress authorized the Benbrook Dam and Reservoir project and the Secretary of the Army certified that the taking was for such purpose, such certification was beyond judicial review. The court held that the "due process guaranty would be a hollow one, indeed, if it could be defeated by the impenetrability of a paper shield."[59] The court goes on to hold that, "The certification of the purpose of a taking is subject to judicial review to ascertain whether it correctly states the true purpose, when there is a reasonable basis for a claim that the property involved is being taken in violation of the Constitution."[60]

[58] 309 F. Supp. 887 (N.D. Tex. 1969).
[59] *Id.* at 902.
[60] *Id.* at 903.