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Real Property: Purchase, Sale, Title, and Ownership

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Due to the sheer volume of decisions published during the Survey period, this Article attempts to limit discussion herein to those cases that represent a significant development in real property law or that involve novel theories or fact situations. This Article limits its scope to those cases involving real property purchase, sale, ownership, and title issues. Other real property topics appear elsewhere in this Survey. The legislature adopted no significant legislation during the Survey period.

I. Purchase and Sale

A. Contract Formation

In *Thurmond v. Wieser*¹ property owners presented a prospective buyer’s realtor with an offer good for one day only to sell a specific property for $260,000. The realtor relayed the offer to the prospective buyer, who called a business associate to discuss the offer since the business associate possessed knowledge of the property. The business associate called the realtor and instructed her to counteroffer $250,000 to the property owner, apparently without the direct knowledge or consent of the prospective buyer. Upon receipt of the $250,000 counteroffer, the property owner, prior to the expiration of the original acceptance period, dismissed the offer and removed the property from the market. After hearing that the property owner had rejected the $250,000 counteroffer and withdrawn the original offer, the prospective buyer caused the realtor to attempt to accept the $260,000 offer prior to the expiration of the original acceptance period. The property owner refused to sell, alleging that the counteroffer constituted a rejection that allowed him to withdraw the original offer. The prospective buyer later sued the property owners, alleging a contract to purchase the property in question. The trial court denied specific performance, and the prospective buyer appealed.

The appellate court affirmed.² The court found sufficient evidence to sup-

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¹ 699 S.W.2d 680 (Tex. App.—Waco 1985, no writ).
² Id. at 682.
port the trial court’s findings of fact and held as a matter of law that an offeree’s power of acceptance terminates when he makes a counteroffer. An exception exists where the offeror expresses a contrary intention or the counteroffer provides evidence of the offeree’s contrary purpose. Because the prospective buyer, acting through an agent who was determined to have apparent authority, made a counteroffer without informing the property owner that the original offer was still under advisement, the property owner was justified in terminating the original offer and taking the property off the market.

B. Contract Interpretation

In Carrington v. Hart the prospective buyer and seller heavily negotiated a land sale contract, resulting in a number of interlineated contract revisions that the parties initialed. The seller inserted in the last fully executed and initialed version of the contract a paragraph that conditioned the validity of the contract upon both parties signing and accepting it within a two-week feasibility study period. Immediately following the expiration of the feasibility period, the seller attempted to repudiate the contract, claiming that he had not received a final contract within the specified time period. The buyer successfully sued for specific performance. The appellate court, in affirming the lower court, held that the seller’s conditional paragraph provided that the parties could agree to change the contract during the allotted time period and did not require termination of the agreement if a final contract failed to be published during the period. The court of appeals held that a provision in a contract should be strictly construed against the party inserting the language.

C. Contract Enforcement

Medallion Homes, Inc. v. Therma Investments, Inc. involved a Houston bank’s acquisition of the Quail Forest residential subdivision. Wooten, a prospective developer, lacked sufficient financing to develop the subdivision. At Wooten’s behest Therma Investments contracted to purchase the lots from the bank. The contract prohibited assignment without the bank’s prior written consent. Therma and Wooten, in anticipation of the bank’s approval, on the same day contracted to assign an undivided one-half interest in the contract to Wooten. The bank, however, did not approve and, therefore, the assignment was invalid. Six months later, Medallion Homes, Inc.

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3. _Id._ 4. _Id._ RESTATEMENT (SECOND) OF CONTRACTS § 39 (1979) provides this rule for the court.
5. 699 S.W.2d at 682.
6. 703 S.W.2d 814 (Tex. App.—Austin 1986, no writ).
7. _Id._ at 817. The court noted that the seller’s conditional paragraph could “reasonably be read to provide for the modification of the contract by agreement of the parties within the 14-day feasibility study period rather than as a nullification of the entire contract.” _Id._
8. _Id._
9. 698 S.W.2d 400 (Tex. App.—Houston [14th Dist.] 1985, no writ).
contracted to buy twenty-one lots in the subdivision from Thermar at the rate of five lots every six months. Wooten then recorded his assignment, which prevented further conveyances from Thermar to Medallion because the title company considered the assignment as a cloud on the title. Thermar and the bank terminated their contract, and a third party purchased the property. The third party then sold additional lots to Medallion at an increased price. Medallion sued Thermar and others for the increase in the price it paid. The court awarded Medallion its basic loss of profit damages, but both the trial and appellate court refused to grant Medallion any additional damages, including treble damages sought for a violation of the Texas Deceptive Trade Practice Act (DTPA).

The court of appeals found that Thermar did not breach the implied warranty of title because the bank's ownership was of record. The constructive notice provided by recording constituted a defense to the cause of action brought by Medallion under the DTPA. Moreover, evidence tended to show that Medallion had actual notice of the bank's ownership. Further, since the assignment to Wooten was invalid, it did not constitute a proper cloud on the title. Additionally, evidence showed that at least one other title company would have issued a title policy without regard to the purported assignment.

In Hubler v. Oshman a buyer exercised an option to purchase three acres of land, and the parties agreed that the closing would take place within a reasonable time. In order to close the transaction and deliver good title, it was necessary to replat the three acres. Compliance with applicable municipal ordinances regarding the replatting created delays. Some two years after the signing of the original agreement, the seller wrote the buyer a letter that attempted to terminate unilaterally the option contract. The letter also suggested that the parties could negotiate a new contract should the buyer still desire to purchase the property. The parties remained in contact, and the buyer submitted a proposal to satisfy the municipal requirements to the seller, at which time the buyer was ready, willing, and able to close the sale. The seller failed to execute the proposal, and suit resulted. The trial court ordered specific performance of the option agreement.

The appellate court affirmed. The court held that when a buyer has made every effort to finish a deal, but the seller's unavailability causes the sale to fail, the buyer may sue and enforce the agreement through the doctrine of specific performance even though the buyer may not have tendered the purchase price. Provided the contract itself is not objectionable, the buyer must only allege that he is ready, willing, and able to pay the agreed

10. Id. at 404.
12. 698 S.W.2d at 402.
14. 698 S.W.2d at 403.
15. 700 S.W.2d 694 (Tex. App.—Corpus Christi 1985, no writ).
16. Id. at 699.
17. Id. at 698.
price.\textsuperscript{18}

In \textit{Stegman v. Chavers}\textsuperscript{19} a contract for sale of a residence was to terminate if the buyer could not obtain satisfactory financing within 180 days. The buyer did not apply for financing and claimed that the seller's refusal to allow an appraiser on the property in question justified his noncompliance. The seller subsequently repudiated the contract and claimed, among other things, that an oral modification rendered the contract unenforceable. Apparently there was a subsequent oral agreement to deposit earnest money with the title company, rather than with the seller, as provided by the contract. The buyer sued for specific performance and lost on that issue at trial.

In reversing, the court of appeals held that the parties' oral modification of the earnest money provision constituted a minor change with regards to the payment of the purchase price.\textsuperscript{20} Therefore, the court concluded that the small oral modification did not invalidate the written contract.\textsuperscript{21} The court found further that whether the seller's conduct excused the buyer from complying with the terms of the contract was a material question, and that the buyer's evidence raised a fact issue on that question, which precluded the trial court's grant of the seller's motion for judgment.\textsuperscript{22}

In \textit{Gordin v. Shuler}\textsuperscript{23} the contract of sale of an apartment complex required as a condition precedent the written approval of the first lienholder. Although this approval was eventually obtained, the property owner refused to close because the lienholder's approval was conditioned on the owner's agreement to an increased interest rate and continuing liability on the existing note. The prospective purchaser then sued, seeking specific performance of the contract of sale, which the trial court granted. In reversing, the court of appeals stated that the record clearly supported the owner's repeated refusal to agree to the modifications, which constituted conditions precedent.\textsuperscript{24} Because the conditions precedent were not performed, the trial court erred in granting specific performance.\textsuperscript{25}

\textbf{D. Breach of Contract of Sale}

\textit{Pace v. Garcia}\textsuperscript{26} involved the construction of an agreement for the purchase of five apartment complexes. The agreement provided that the parties use best efforts and due diligence to obtain consent from the existing
mortgagees for the transfer of the properties and assumption of mortgages. The court refused to recognize an implied duty of good faith where the agreement imposed no such requirement on the parties.\textsuperscript{27} The agreement also provided that the seller's sole remedy for failure to close was the retention of the earnest money as liquidated damages. The court cited prior Texas case law to establish that such a provision in a purchase agreement transforms the agreement into an option contract rather than a bilateral contract of sale.\textsuperscript{28}

E. Contracts: Post-Sale Disputes

In \textit{Andrews v. Koch}\textsuperscript{29} the co-administrators of an estate applied to the probate court for a private sale of a tract of land in order to pay debts and taxes of the estate. An addendum to the contract of sale provided that the purchaser would have unlimited access to a road at the boundary of the tract. The probate court incorporated the administrators' deed, without provision for the roadway easement, into its decree. Upon partition of the remainder of the estate, the recipient of the adjacent tract disputed the purchasers' rights to enjoy the easement. The probate court issued an order nunc pro tunc correcting the administrators' deed to convey the easement. The court of appeals held that any deed change constituted correction of a judicial error and that an order nunc pro tunc inappropriately corrected the deed.

The Supreme Court of Texas reversed\textsuperscript{30} and, citing its prior approval of \textit{Truelove v. Truelove},\textsuperscript{31} held that the probate court's correction of the administrators' deed to reflect accurately the true decision of the court did not involve additional judicial reasoning and, therefore, did not amount to impermissible nunc pro tunc correction of judicial error.\textsuperscript{32} The court found that title would not pass without both the judicial order and confirmation.\textsuperscript{33} The court concluded that the probate court's authority to correct the confirmation order established its power to order a correction deed.\textsuperscript{34}

F. Brokers: Commission Agreements and Licensing

In \textit{Carmack v. Beltway Development Co.}\textsuperscript{35} the court of appeals extended the part performance exception to the statute of frauds\textsuperscript{36} and held that a real estate broker was entitled to enforce a written real estate commission agreement that failed to describe precisely the subject property.\textsuperscript{37} A property

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 1420-21.
\item \textsuperscript{28} \textit{Id.} at 1421.
\item \textsuperscript{29} 702 S.W.2d 584 (Tex. 1986).
\item \textsuperscript{30} \textit{Id.} at 586.
\item \textsuperscript{31} 266 S.W.2d 491 (Tex. Civ. App.—Amarillo 1953, writ ref'd).
\item \textsuperscript{32} 702 S.W.2d at 586.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} 701 S.W.2d 37 (Tex. App.—Dallas 1985, no writ).
\item \textsuperscript{36} TEX. BUS. & COM. CODE ANN. § 26.01(a)-(b) (Vernon 1968 & Supp. 1987).
\item \textsuperscript{37} 701 S.W.2d at 41.
\end{itemize}
owner and a broker agreed in writing that the broker would find a tenant for a Dallas property in exchange for a six percent commission. The agreement required that one-half of the commission be paid upon execution of the agreement with the balance due one year later. The listing agreement described the property only by street address and recited, incorrectly, that a legal description was attached. When the owner terminated the lease and failed to pay the second half of the commission, the broker sued. The owner appealed a judgment in favor of the broker and argued that the agreement failed to describe the property sufficiently to comply with the statute of frauds applicable to real estate commission agreements. 38

The appellate court found that the insufficient description created no uncertainty about the owner’s acceptance of the broker’s services or about the amount of the commission due. 39 The lessee of the property at issue took possession of the property, paid the rentals, and made valuable improvements. Under these circumstances the use of the statute requiring a written commission agreement to deny liability for the commission tends to perpetuate fraud, not prevent it. 40 The court also held that although mere performance was insufficient to excuse noncompliance with the statute of frauds, under the doctrine of part performance a real estate broker could enforce a written real estate agreement that failed to describe the property notwithstanding the statute of frauds when four necessary events occur. 41

In Steinmetz & Associates, Inc. v. Crow 42 Crow, a real estate broker, entered into a written agreement to purchase property. Steinmetz was a real estate broker who apparently conducted subsequent negotiations with the owners for purchase of the same property. The trial court granted judgment for Crow in a suit for tortious interference with a real estate contract. The appellate court focused on the knowledge element of the cause of action for tortious interference, 43 finding that Steinmetz suspected that Crow had already conducted negotiations with the land owner and had signed a written contract to purchase the property. 44 Such suspicion fell short of the knowledge required to sustain a cause of action for tortious interference with business relationships. 45

Stiles v. DeAngelo 46 involved a realtor suing to recover his commission

38. TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1987). This section states that “[a]n action may not be brought . . . for the recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged . . .” Id. at 41.
39. 701 S.W.2d at 41.
40. Id.
41. Id. at 41-42. The events include: “(1) the broker . . . fully performed, (2) the other party . . . knowingly accepted the broker’s services by completing the transaction arranged by the broker and receiving benefits from that transaction, (3) the other party . . . acknowledged in writing his obligation for a commission, and (4) documentary evidence establishes the amount of the commission due.” Id.
42. 700 S.W.2d 276 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.).
43. Id. at 277-78.
44. Id. at 280.
45. Id.
46. 706 S.W.2d 175 (Tex. App.—Fort Worth 1986, no writ).
under an earnest money contract. The agreement provided that a six percent commission was due on consummation of the sale or upon the seller's default. The buyers appeared at the closing and performed their obligations, but the sellers failed to appear. The buyers then obtained an order of specific performance, but failed to consummate the sale. The sellers elected to accept the buyers' $500 deposit as liquidated damages and obtained a summary judgment in the lower court against the realtor on their claim that they only owned a commission of $250, pursuant to the contract's provision in the event of the buyers' default and the sellers' election to receive the earnest money deposit as liquidated damages therefor.

The appellate court held that when a realtor finds a buyer and the resulting contract fails because of the seller's actions, the seller may not defeat the realtor's action for the commission on grounds that pursuant to the contract the realtor was not to be paid until the actual sale. This clause, which limits commission payment until time of the actual sale, fails to establish a condition precedent to liability. The seller's obligation to pay the realtor's commission arose on the day of the original closing when the buyer performed sufficiently to be able to compel specific performance.

In Cornerstore Group, Inc. v. Stone a property owner listed his property with a real estate broker, which listing contract included a provision that the seller would not prevent the sale by leasing the property during the term of the agreement. The broker introduced the property owner to a single prospective buyer. An immediate sale was not completed because of the prospective buyer's lack of resources, but the parties entered into a lease. The parties consummated a sale after the listing expired. The trial court denied damages to the broker, and the appellate court affirmed. Since the only potential buyer was financially unable to purchase the property during the listing period, the appellate court held that the owner's leasing of the property did not prevent the sale. The broker's testimony indicated that the broker had not produced, and could not have produced during the listing period, a ready, willing, and able buyer, a condition to its recovering a brokerage commission. The court further refused to find error with the trial court's holding that the proper measure of damages constituted the profit the broker would have made, and not liquidated damages in the amount of commission due under the listing agreement.

In Poppe v. Camelot Properties, Inc. the seller signed an exclusive listing

47. Id. at 177.
48. Id.
49. Id.
50. 710 S.W.2d 817 (Tex. App.—Fort Worth 1986, no writ).
51. The actual language of the listing agreement established that the owner would pay the realtor a commission "if during the term of this agreement Owner prevents the sale of said Property by attempting to cancel this agreement, by adversely renting the Property during the period of this agreement. . . ." Id. at 818 (court's emphasis removed).
52. Id. at 821.
53. Id. at 820.
54. Id. at 821.
55. 711 S.W.2d 101 (Tex. App.—Austin 1986, writ ref'd n.r.e.).
with a broker to market the seller's house for a specified period of time. The seller rejected bids from three prospective buyers produced by the broker, whose bids ranged from twenty to thirty thousand dollars below the listing price. Two days after the listing contract lapsed, the seller contracted to sell the house to one of the previous bidders for five thousand dollars less than the buyer's original bid price. The court, citing Goodwin v. Gunter, held that the real estate broker was entitled to a commission even though the listing had expired before the actual sale took place because the broker had fulfilled her contractual obligation by producing a ready, willing, and able buyer during the term of the listing agreement.

In Shehab v. Xanadu, Inc. a real estate agent licensed in Michigan moved to Texas to become sales manager of a condominium project, but did not secure a Texas real estate license. She received a rent-free apartment and was "on call" twenty-four hours a day in order to show apartments for sale. In her suit to recover unpaid commissions the trial court denied the agent the commissions because she had failed to follow provisions established in the Real Estate License Act. The agent claimed that she fell under the statutory exemption for on-site managers of apartment complexes. Noting that the statute attempted to avoid fraud on the public through licensing dealers in real estate, the court held that the list of exceptions to the licensing requirements must be strictly construed. Even conceding that the appellant acted as an on-site manager, the court contended that the legislature did not intend to broaden its definition of apartment complex to include a condominium operation. Further, the court held that neither the existence of a contract requiring the payment of commissions nor allegations of fraud would lift the statutory bar to recovery.

In Xarin Real Estate, Inc. v. Gamboa the owners of a San Antonio apartment complex contracted, with the aid of an independent, licensed broker, to sell the complex to Xarin or its nominee. The contract stated falsely that Xarin was a licensed Texas real estate broker. Xarin subsequently assigned the contract to Baker, a condominium converter. At closing Xarin received a fee for assigning the contract and received a payment from the seller's broker of one-half of the commission paid to such broker. After closing Baker sued Xarin under the Texas Real Estate License Act on the grounds that Xarin was not a licensed real estate broker.

The trial court found for Baker and the court of appeals reversed, hold-

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56. 109 Tex. 56, 185 S.W. 295 (1916), set aside on other grounds on motion for reh'g, 109 Tex. 56, 63-64, 195 S.W. 848 (1917).
57. 711 S.W.2d at 106.
58. 698 S.W.2d 491 (Tex. App.—Corpus Christi 1985, no writ).
60. Id. § 3(g).
61. 698 S.W.2d at 493.
62. Id. at 494.
63. Id.
64. 715 S.W.2d 80 (Tex. App.—Corpus Christi 1986, no writ).
66. 715 S.W.2d at 87.
ing that Xarin did not act as a broker under the Texas Real Estate License Act because it acted for its own account and not for the owner’s benefit.\(^{67}\) Citing various provisions of the Act, the court held that the Act necessarily required a broker to act for another.\(^{68}\) Under the facts presented, the court found no evidence that Xarin had acted on behalf of anyone other than itself.\(^{69}\)

**G. Deceptive Trade Practices**

In *Diamond v. Meacham*\(^ {70}\) a home warranty agreement between the buyer and the builder of a townhouse stated that the builder would provide proper grading for the property. Drainage problems developed in January 1980, and water first flooded the home in December 1982. The buyer filed suit in May 1983, alleging that the builder breached its warranty and that such breach was a violation of the DTPA.\(^ {71}\) Since the buyer had knowledge of the drainage problem as early as January 1980, the trial and appellate courts held that the two-year limitations period of the DTPA barred the resulting suit.\(^ {72}\)

In *Farrell v. Hunt*\(^ {73}\) the purchaser of fifteen acres sued the seller under the DTPA for wrongful foreclosure under a deed of trust. The purchaser executed a note in favor of the seller and assumed liability on a note to a previous owner. The purchaser sent combined monthly payments for both notes to the real estate agent, who then sent separate checks to each noteholder. The findings of fact at the trial court stated that the purchaser was not in default in his payments at the time that the seller foreclosed on the deed of trust held by the seller.

The Texas Supreme Court held that the purchaser failed to prove his common law damages, a prerequisite to recovery under the DTPA, because he failed to put on evidence as to the amount of the total indebtedness outstanding.\(^ {74}\) Specifically, the purchaser failed to prove the outstanding balance under the note to the previous owner, which the purchaser assumed and which was not secured by the deed of trust pursuant to which the seller foreclosed.\(^ {75}\) The court’s decision resulted in a situation where the purchaser lost the property and forfeited all his prior payments, notwithstanding that there was no evidence of a default in such payments.

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\(^{67}\) *Id.* at 84-85. The legislature defines a broker as one who acts “for another person,” *Tex. Rev. Civ. Stat. Ann.* art. 6573a, § 2(2) (Vernon Supp. 1987), as well as one who is “employed by or on behalf of the owner or owners,” *id.* § 2(3), in connection with the sale of real estate.

\(^{68}\) *Id.* at 84.

\(^{69}\) *Id.* at 85.

\(^{70}\) 699 S.W.2d 950 (Tex. App.—El Paso 1985, writ ref’d n.r.e.).


\(^{72}\) 699 S.W.2d at 953-54 (citing *Tex. Bus. & Com. Code Ann.* § 17.56A (Vernon Supp. 1987), which states that suit must be brought “within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.”).

\(^{73}\) 714 S.W.2d 298 (Tex. 1986).

\(^{74}\) *Id.* at 300.

\(^{75}\) *Id.*
The court not only failed to credit the purchaser with the sixty-five monthly payments he had made, but apparently also misapplied the law, a point raised by Justice Kilgarlin’s vigorous dissent. The seller’s right of foreclosure existed solely pursuant to the deed of trust, which secured only the note to the seller. The seller enjoyed no right of foreclosure if the buyer completely failed to pay the assumed note. Accordingly, Justice Kilgarlin’s analysis did not include proof of the outstanding balance of such note as a required element of the purchaser’s evidence.

Justice Kilgarlin concluded, as to the issues in this suit, the amount of indebtedness on the assumed note was irrelevant. The proper measure of damages in a wrongful foreclosure suit is the difference between the value of the property at issue and the remaining balance on the indebtedness. Not only were the purchaser’s payments current, but had the payments made by the purchaser on the seller’s note been correctly credited, the total remaining debt on the seller’s note would have only been $454, as contrasted with the $23,665 market value of the property on the date of foreclosure. Thus, merely because the purchaser failed to introduce evidence on the amount of indebtedness owing on an arguably irrelevant note, which amount was arguably established as a matter of law, the court precluded the purchaser from recovery, and the seller who wrongfully foreclosed profited by at least $23,000.

H. Mortgages, Deeds of Trust, and Other Liens

In *Sandel v. Burney* a purchaser at a foreclosure sale sued a substitute trustee and the foreclosing creditor for breach of the warranty of title in a trustee’s deed executed by the substitute trustee after foreclosure of the deed of trust. Although the trustee’s deed contained a general warranty clause, the United States held a tax lien on the property, which the purchaser necessarily cleared by payment of over $10,000. Since Texas is a lien state, the court held that the defendants were not liable as a matter of law because foreclosure of a deed of trust simply transfers title from the mortgagor directly to the purchaser, and neither the mortgagor nor the trustee ever possess title to the property.

In *Intertex, Inc. v. Walton* a debtor defaulted on a promissory note covering his residence, which property was then sold at a trustee’s sale. In 1980 the debtor was awarded a judgment setting aside the trustee’s sale on the condition that, within six months, the debtor pay the amount due on the note. The debtor failed to pay the amount due, and pursuant to the judg-

76. *Id.* at 300-02 (Kilgarlin, J., dissenting).
77. *Id.* at 301.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 299, 300.
82. 714 S.W.2d 40 (Tex. App.—San Antonio 1986, no writ).
83. *Id.* at 41.
84. 698 S.W.2d 707 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).
ment, a constable seized and sold the property. Written notice to the debtor of this sale was mailed with an incorrect zip code and by first class mail instead of certified mail, and the debtor did not receive the notice prior to the constable's sale. Suit followed to block the debtor's ouster and set aside the constable's sale. The trial court set aside the sale, and the court of appeals affirmed because the debtor did not receive proper notice of the sale.\(^{85}\) The trial court also found that the price paid by the purchaser at the constable's sale was grossly inadequate. Although the debtor failed to tender the amount paid by the purchaser at the constable's sale prior to filing suit, the appellate court held that the debtor's tender within forty-five days thereafter allowed the debtor to challenge the adequacy of the purchase price.\(^{86}\) The appellate court also accepted the findings of the trial court that there was sufficient evidence indicating that the constable acted in good faith and with the required diligence.\(^{87}\)

The purchaser in *Scalise v. McCallum*\(^{88}\) gave the seller a note for approximately $272,000 as part of a land purchase. The purchaser made payments of both interest and principal before the due date, but failed to pay the final interest installment and the majority of the principal. The seller gave the purchaser notice of a trustee's sale, but before the foreclosure, the parties reached a settlement agreement whereby the purchaser paid approximately $215,000 in cash to the seller, along with a new note for $10,000, and assumed the seller's debt for broker's commissions arising out of the sale of the property. After the seller gave the purchaser an immediate and complete release of the lien on the property, the purchaser sued for usury, contending that the original note and the settlement agreement constituted a single transaction.

The appellate court reversed the trial court's holding that the original note and the settlement agreement were a single transaction.\(^{89}\) Rather, the settlement constituted a substitution of a new agreement concerning the sale of the property for the old arrangement.\(^{90}\) The notes made as part of the settlement agreement bore interest within the legal limits applicable; thus, the seller was not liable for usury.\(^{91}\) The court further found that the purchaser was liable to the seller on the $10,000 settlement agreement note, plus attendant interest and attorney's fees.\(^{92}\)

In *Fillion v. David Silvers Co.*\(^{93}\) the failure of a debtor to pay insurance proceeds over to the noteholder after fire severely damaged the property encumbered by the note precipitated the acceleration of the note. After the noteholder foreclosed, the debtor challenged the foreclosure sale on the

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85. Id. at 712.
86. Id. at 710.
87. Id. at 712.
88. 700 S.W.2d 682 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
89. Id. at 684.
90. Id.
91. Id. at 685.
92. Id.
93. 709 S.W.2d 240 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).
grounds of insufficient notice of acceleration. The appellate court noted that notice of acceleration is unnecessary when the debtor waived such notices.94

The court further found that the debtor failed to make a valid tender of the balance owed on the note.95 A necessary prerequisite to the mortgagor’s recovery of title after a void foreclosure sale demands tender of the amount due on the note.96 The debtor offered a letter of credit as tender of payment. The court held that a debtor cannot validly make a legal tender through the offer of a letter of credit because a letter of credit does not represent an unconditional offer to pay in cash.97 In the absence of an agreement to the contrary tender of payment where money is called for becomes invalid when made other than by cash.98

Prewitt v. United States99 involved an action by the Internal Revenue Service to seize property under an IRS levy to collect civil penalties. A court had awarded the property at issue, owned by a husband and wife as community property under Texas law, to the wife as her separate property when the couple divorced. The county clerk’s office failed to file a copy of the divorce decree in the deed records of the county clerk until after the IRS had levied on the property. The husband never executed a deed conveying the property to the wife. The IRS assessed civil penalties against the husband and filed notice in the county clerk’s office of a federal tax lien against him for the amount of the penalties, which notice did not name the wife. Ten days after the notice was filed, the wife sold the property to a third party who possessed no knowledge of the tax lien against the ex-husband. The IRS then seized the property under an IRS levy in order to collect the penalties.

The court held that the federal tax lien enjoyed priority over the intervening purchaser from the former wife.100 The IRS filed the tax lien against the former husband after the divorce decree became final, but before recordation of the decree. Under Texas law,101 a former spouse must record in the county deed records his or her separate interests in real property created by a divorce decree in order to protect the interests against the other spouse’s creditors that have no notice of the decree.102

In Elmore v. McCammon103 an unsuccessful bidder at a mortgage sale sued, claiming improprieties in the foreclosure sale and irregularities in the

94. Id. at 245 (citing Cortez v. Brownsville Nat’l Bank, 664 S.W.2d 805, 810 (Tex. App.—Corpus Christi 1984, no writ)).
95. 709 S.W.2d at 246-47.
96. Id. at 246.
97. Id. at 247.
98. Id.
99. 792 F.2d 1353 (5th Cir. 1986).
100. Id. at 1355-56. The court based its decision on this point on United States v. Creamer Indus., Inc., 349 F.2d 625 (5th Cir.), cert. denied, 382 U.S. 957 (1965). The Fifth Circuit noted in that case that the IRS can advantageously use state recording statutes. 349 F.2d at 628.
101. The court, through analysis of prior statutory construction, determined that in cases concerning divorce the applicable statute is TEX. PROP. CODE ANN. § 12.005 (Vernon 1984).
102. 792 F.2d at 1356-58.
enforcement of tax liens on a tract of real property. The foreclosure sale occurred pursuant to a deed of trust signed by the record owner of the property at the time of the sale. The unsuccessful bidder bid twenty-three dollars in silver and claimed lawful ownership as a result.

The court determined that Texas case law restricts standing to attack the foreclosure sale pursuant to a deed of trust to the mortgagor or those whose property interests or rights are affected by the sale.104 In this case the court found no property interest in the bidder prior to the substitute trustee's sale.105 The bidder, therefore, failed to meet the standing requirement.

I. Deeds of Trust

In Casbeer v. State Federal Savings & Loan Association106 a real estate developer owned a number of Texas properties. In exchange for the note-holder's agreement not to foreclose on a certain property the developer agreed to bring the interest current on the note secured by such property within thirty days, to assign profits from six other properties to the note-holder, and to execute deeds of trust on two additional properties. The developer signed the documents regarding most of the assignments and the two deeds of trust, but only one of the profit assignments was notarized in his presence. The Fifth Circuit considered "whether a deed of trust has been perfected when, although it has been recorded and has a genuine signature, the signer did not properly acknowledge the deed of trust before the notary public."107 The court held that where the acknowledgment on a certificate is defective and not apparent from the certificate itself, the fact that the certificate is recorded serves as constructive notice.108

J. Statute of Frauds

Carley v. Carley109 addresses the enforceability of an oral interest in land, notwithstanding the statute of frauds.110 Throughout the parties' marriage, the parties lived on land owned by the appellant's parents. In 1982 the parties built a six-room house on the land, where they lived until separating before the divorce action. The appellant's parents told the parties that they could stay in the house on the land forever. They also told the parties that the appellant would receive title to the property after their death. No written document evidenced these statements.

The appellant contended that the lower court erred in finding that he had an interest in property owned by his parents and in awarding his former wife reimbursement in a divorce action for one-half of the couple's community funds used to increase the value of such property interest. The court of ap-

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104. Id. at 908.
105. Id.
106. 793 F.2d 1436 (5th Cir. 1986).
107. Id. at 1440 (footnote omitted).
108. Id.
peals affirmed the trial court's findings that the appellant enjoyed a separate real property interest in the land owned by his parents,\(^{111}\) that the parties had expended community funds to enhance the value of appellant's separate estate,\(^{112}\) and that the appellee was entitled to reimbursement of one-half of the community funds so expended.\(^{113}\)

The court based its decision on the Texas Supreme Court's holding in *Hooks v. Bridgewater*.\(^{114}\) In *Hooks* the court held that an oral interest in land is enforceable, notwithstanding the statute of frauds, where: (1) the transferee had paid consideration; (2) the transferee had taken possession; and (3) the transferee had permanently improved the value of the land with the consent of the transferor.\(^{115}\) In applying the *Hooks* test the court found that the record established that the consideration for the life estate constituted the appellant's promise to his parents that he would provide for their care.\(^{116}\) The court found that the record also established the second requirement of *Hooks*, possession by the transferee.\(^{117}\) Finally, the court found that evidence of the third requirement, that the transferee must have made permanent and valuable improvements upon the land with the consent of the transferor, naturally resulted from the six-room home built by the parties.\(^{118}\)

### II. Title and Ownership

#### A. Title Disputes and Trespass to Try Title

In *Fuentes v. Garcia*\(^{119}\) the type of use that a person must show in an adverse possession action was at issue. Fuentes acquired title to a series of properties by paying cash to the owners of record in a series of transactions over a period from 1979 to 1982. He then brought a forcible detainer and eviction action. The Garcia family possessed the land. Various members of the family had resided on the disputed lots for a number of years. The Garcias filed a trespass to try title action. At the trial of the latter action the evidence demonstrated that all of the Garcias possessed the land since at least 1963. Fuentes contested this action with the claim that the Garcias had not established one of the requisite elements of adverse possession, notably cultivation, use, or enjoyment of the land.\(^{120}\) The court held that sufficient evidence of this element existed in the case of each contested lot.\(^{121}\) The court noted that the standard of use in this type of case merely requires use

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111. 705 S.W.2d at 373.
112. *Id.* at 373-74.
113. *Id.* at 374.
114. 111 Tex. 122, 229 S.W. 1114 (1921).
115. *Id.* at 126-27, 229 S.W. at 1116.
116. 705 S.W.2d at 373.
117. *Id.*
118. *Id.*
119. 696 S.W.2d 482 (Tex. App.—San Antonio 1985, no writ).
120. The court recognized the necessary elements of establishing title by possession as "(1) possession of the land, (2) cultivation, use or enjoyment of the land, (3) an adverse or hostile claim, (4) an exclusive dominion over the property and appropriation of it for the possessor's own use and benefit, and (5) statutory period of ten years has run." *Id.* at 484.
121. *Id.* at 485.
that is possible on the land at issue. The use of one lot to dispose of garbage, another to park a car, while a third lot was improved with a hen house showed sufficient use under this standard.

In *Temple Eastex, Inc. v. Busby* Busby brought an action in trespass to try title to grazing land under the ten-year statute of limitation. The issue at trial revolved around whether the granting of a temporary restraining order in prior litigation between these parties had tolled the ten-year period. If the temporary restraining order had tolled the statute, the facts were undisputed that Busby could not establish possession for ten years.

The court held that the prior litigation did not toll the statute of limitations because the prior suit was not adverse to the claim of possession of Busby. In the prior suit Busby had sought to enjoin the defendant from entering his land and logging it. The court found that this action was consistent with his claims of title and, therefore, there was no tolling effect. Temple Eastex also claimed that Busby had not established exclusive use of this grazing land. The court held that Busby’s erection of fences with the ability to hold ordinary cattle proved adequate to demonstrate this requirement.

In *Wright v. Wallace* the trial court granted summary judgment to the record owner of the property in question, who had sued to evict possessors asserting title to the land under the ten-year adverse possession statute. The appellate court affirmed. The court found undisputed evidence that the appellants possessed the land and enjoyment thereof, but found that they had failed to establish domination of the land for the necessary period. The parties submitted affidavits establishing that the possessors had begun their entry upon the land with the permission of the record owner; thus the possessors, in order to satisfy the adverse possession elements, needed to have notified the owner of their hostile possession. The evidence submitted did not show when the possessors gave the owner this re-

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122. *Id.*
123. *Id.* at 485-86.
124. 696 S.W.2d 609 (Tex. App.—Beaumont 1985, writ ref’d n.r.e.).
125. TEX. REV. CIV. STAT. ANN. art. 5510 (Vernon 1958) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986)).
126. 696 S.W.2d at 610.
127. *Id.* at 611.
128. *Id.*
129. *Id.* at 611-12.
130. 700 S.W.2d 269 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.).
131. TEX. REV. CIV. STAT. ANN. art. 5510 (Vernon 1958) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986)).
132. 700 S.W.2d at 269. The court noted that under the ten-year adverse possession statute a claimant seeking to show title by adverse possession must “show affirmatively: 1) possession of the land; 2) cultivation, use, or enjoyment thereof; 3) an adverse or hostile claim; and 4) an exclusive domination over the property and an appropriation of it for his own use and benefit for the statutory period.” *Id.* at 270 (quoting Ramirez v. Wood, 577 S.W.2d 278, 287 (Tex. Civ. App.—Corpus Christi 1979, no writ)).
133. *Id.*
134. *Id.* at 271.
135. *Id.*
quired notice. Therefore, the court held, the possessors failed to show an appropriation for the required statutory period.\textsuperscript{136}

The parties in \textit{Brownlee v. Sexton}\textsuperscript{137} litigated a boundary dispute as a trespass to try title action. Sexton, the plaintiff, did not have to meet the more difficult proof requirements usually applicable to such an action.\textsuperscript{138} In this action, adjoining lots contained a common boundary, Shannon Creek. Sexton, the owner of one lot, sued Brownlee, the owner of the other lot, claiming that Brownlee wrongfully possessed a portion of her lot. He denied this averment, claiming that the creek had a shifted course and no longer constituted the true boundary. The jury rejected this contention and held for Sexton. On appeal Brownlee contended that Sexton had not adequately proved her title under the requirements of a trespass to try title. The appellate court reviewed the pleadings and proof and determined that the action had been tried as a boundary dispute.\textsuperscript{139} The court found the usual stringent proof requirements of a trespass to try title action were, therefore, not applicable.\textsuperscript{140}

In \textit{Auchterlonie v. McBride}\textsuperscript{141} one of the adverse claimants assisted in constructing a barbed wire fence around two five-acre lots and began leasing the pasture to third parties for cattle grazing after the death of the co-builder. The leasing continued until the adverse claimants brought a trespass to try title suit based upon the fencing and the cattle grazing. The surviving heirs of the record owners appealed the trial court's judgment awarding title to and possession of the tracts of land to the adverse claimants.

The court of appeals held that "where land has been designedly enclosed and used continuously for grazing purposes for the statutory period, such use is sufficient notice of hostile claim to support a claim of adverse possession."\textsuperscript{142} The court found that the adverse claimants demonstrated that they purposefully enclosed the land claimed for grazing cattle, and, therefore, satisfied the element of open and adverse use.\textsuperscript{143}

The court further ruled that when the possessor recognizes someone else's title before the statute of limitations runs, the possessor loses the benefit of the statute.\textsuperscript{144} In applying this rule the court found that the fact that the adverse claimants offered to purchase the lots in 1978 or 1979 did not destroy the limitation title that had previously matured, since the record showed that the adverse claimant's possession began in 1956 with the fencing of the land for cattle grazing.\textsuperscript{145} Therefore, the limitation title matured

\begin{itemize}
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} 703 S.W.2d 797 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
  \item \textsuperscript{138} The court distinguished between the evidence necessary in a boundary action, normally only a recorded deed, and the evidence necessary in a trespass to try title case, normally the elements of adverse possession. \textit{Id.} at 799-800.
  \item \textsuperscript{139} \textit{Id.} at 799.
  \item \textsuperscript{140} \textit{Id.} at 799-800.
  \item \textsuperscript{141} 705 S.W.2d 183 (Tex. App.—Houston [14th Dist.] 1985, no writ).
  \item \textsuperscript{142} \textit{Id.} at 185.
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.} at 186.
  \item \textsuperscript{145} \textit{Id.}
\end{itemize}
under the ten-year statute prior to the adverse claimant's offer in 1978 or 1979.

In *McKee v. Bedell* 146 the court held that in order for a take-nothing judgment to be valid, the court must possess jurisdiction over the subject matter and the defendants.147 In *McKee* the appellants' claim to the property at issue rested upon a 1973 judgment decreeing that Browne, their predecessor in title, successfully gained title to the property through adverse possession. The court below had found that on the date that Browne filed suit the appellant's predecessor in title was the record owner of the tract at issue.

The court found that in this case the record reflected that the citation by publication related to the Browne lawsuit included neither the adverse claimant's predecessor, a corporation, nor its unknown stockholders.148 Therefore, the court ruled that they were not party defendants in the earlier suit and that the trial court enjoyed no jurisdiction over them.149 Consequently, the Browne judgment bound neither the adverse claimant's predecessor nor the unknown stockholders.150 Moreover, the court ruled that the information in the abstract of title on the date that Browne filed suit constituted constructive notice that the adverse claimant's predecessor was the record owner.151 The court concluded that this fact, coupled with its prior determination that a record owner cannot be called an unknown owner, supported a take-nothing judgment.152

In *De Alonzo v. Solis* 153 the possessors of three adjacent parcels of land filed a trespass to try title action in order to establish their title under the ten-year statute of limitations.154 The evidence showed that the adverse possessors continuously possessed the land beginning in 1961, and prior to that, Narisco Solis enjoyed possession from 1917 to his death in 1961. The possessors were Solis's heirs.

An adjoining land owner challenged the action by a cross claim. He also claimed title by adverse possession. His challenge alleged that the adverse possessors, the heirs of Solis, failed to make the requisite showing of continuous use for a ten-year period. The court held that a demonstration that the land had been cultivated by tenants of the possessor satisfied this requirement.155 The tenants held this land by a lease that acknowledged the adverse possessors as the landlord.

In *Holdsworth v. Guthrie Trust* 156 the court held that evidence of intermittent use of land by the true owner of land during the ten-year statute of

146. 705 S.W.2d 356 (Tex. App.—San Antonio 1986, no writ).
147. Id. at 358.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
153. 709 S.W.2d 690 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).
154. TEX. REV. CIV. STAT. ANN. art. 5510 (Vernon 1958) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986)).
155. 709 S.W.2d at 693.
156. 712 S.W.2d 177 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).
limitations defeats a claim of adverse possession.\textsuperscript{157} In \textit{Holdsworth} the true owner introduced evidence demonstrating that he had intermittently rented the property at issue and he and his family had used the property for recreation. The court held that the adverse possession claim failed because the true owner must be entirely excluded for the statutory period.\textsuperscript{158} Any type of combined possession by the adverse claimant and the true owner defeats the claim of adverse possession.\textsuperscript{159}

In \textit{Mallett v. Wheat}\textsuperscript{160} the court held that the sporadic use of property for grazing purposes coupled with its incidental enclosure by adjoining landowners' fences failed to establish adverse possession.\textsuperscript{161} Appellant showed that the property at issue had been used sporadically for grazing, and had been enclosed by neighbors' fences. This evidence proved insufficient as a matter of law to establish the requisite element of appropriation in an adverse possession action.\textsuperscript{162}

In \textit{Ybarra v. Newton}\textsuperscript{163} Ybarra brought a trespass to try a title action under the ten-year statute of limitations. Ybarra, the adverse possessor, purchased lots 7 and 8 of a Del Rio subdivision. She believed that she was actually purchasing lots 9 and 10. She took possession of lots 9 and 10 in 1964 at the time of her purchase. She remained in continuous possession by living in a house on these lots from 1964 up until the time of the action. The trial court held that Ybarra had failed to establish adequately the location of the lands she claimed. The court of appeals reversed,\textsuperscript{164} holding that Ybarra had been in peaceful and adverse possession of lots 9 and 10 for over ten years and that she had enjoyed the property during this time.\textsuperscript{165}

In \textit{Matcha v. Mattox}\textsuperscript{166} the court held that an easement established by custom may secure the public's right to use the section of a beach between the mean low tide and the natural line of vegetation.\textsuperscript{167} The state established the requisite elements of an easement by custom: "the public use must be ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law."\textsuperscript{168} Testimony of long-time residents that they had used the beach and had seen others use the beach without objection of the owners for time immemorial proved sufficient to establish this easement.\textsuperscript{169}

The \textit{Matcha} court also held that this easement did not remain static.\textsuperscript{170}

\textsuperscript{157} Id. at 179.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} 709 S.W.2d 768 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).
\textsuperscript{161} Id. at 771.
\textsuperscript{162} Id.
\textsuperscript{163} 714 S.W.2d 353 (Tex. App.—Corpus Christi 1986, no writ).
\textsuperscript{164} Id. at 356.
\textsuperscript{165} Id. at 355-56.
\textsuperscript{166} 711 S.W.2d 95 (Tex. App.—Austin 1986, writ ref'd n.r.e.).
\textsuperscript{167} Id. at 98-99.
\textsuperscript{168} Id. at 98 (quoting State \textit{ex rel.} Thornton \textit{v. Hay}, 254 Or. 584, 462 P.2d 671, 677 (1969), for the custom elements).
\textsuperscript{169} Id. at 99.
\textsuperscript{170} Id. at 100.
The line of vegetation on the beach in question moved inland as a result of Hurricane Alicia in 1983. The same hurricane destroyed Matcha’s house, which had been in the natural vegetation on the land side of the beach. The hurricane, however, tore away the vegetation abutting the beach, and the line of vegetation now ran inland from the ruins of Matcha’s house. The trial court enjoined Matcha’s efforts to rebuild his house, holding that the house now rested on the public’s easement. The easement was not static like most easements; instead, it moved and followed the vegetation line. The appellate court analogized this trait of the easement to easements on rivers that shift due to accretion and avulsion.171

In *Villa Nova Resort, Inc. v. State*172 the court held that an easement established by dedication or prescription may secure the public’s right to use a beach.173 In *Villa Nova Resort* the court found that both prescription and dedication had established an easement for the benefit of the public.174 The landowner brought a declaratory judgment action to obtain a determination of his rights to build on a portion of his beach. The state answered but did not plead an easement as an affirmative defense. The court recognized that the state’s position on the easement amounted to an affirmative defense, but excused the pleading requirement.175 It held that the complaint necessarily anticipated and raised the existence of the defense; this assumption alleviated the need for further pleading.176

The court next construed the appropriate section of the Natural Resources Code.177 This statute establishes a prima facie case that the landward boundary of the area subject to a public easement is a line 200 feet inland from the mean low tide, unless the vegetation line is consistently closer than 200 feet.178 The court upheld the use of expert testimony, which was based on a projection derived from a survey of adjoining property, to establish where the line of vegetation would have been.179

The court in *Payne v. Edmonson*180 held that representations to a prospective buyer by the adjacent landowner that a driveway between the two properties constituted a common driveway for use by both properties sufficiently created an easement by estoppel.181 The owner of the putatively dominant estate sued Edmonson, claiming that he enjoyed an implied easement by necessity and also by estoppel. A jury found for Payne on both theories, but the trial court granted Edmonson’s motion for judgment notwithstanding the verdict. The appellate court affirmed the trial court’s judgment relative to the easement by necessity, holding that Payne’s evi-

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171. *Id.* at 99-100.
172. 711 S.W.2d 120 (Tex. App.–Corpus Christi 1986, no writ).
173. *Id.* at 127-28.
174. *Id.*
175. *Id.* at 125.
176. *Id.*
178. *Id.*
179. 711 S.W.2d at 126-27.
180. 712 S.W.2d 793 (Tex. App.–Houston [1st Dist.] 1986, writ ref’d n.r.e.).
181. *Id.* at 796-97.
Payne introduced evidence going to the three elements of an easement by estoppel: "(1) a representation communicated to, (2) believed by, and (3) relied upon by the promisee." Payne testified that Edmonson, who happened to be both the broker for the property Payne purchased and the owner of the allegedly servient estate, told him that the common driveway served both properties and that the properties owned a mutual parking lot in the rear. Payne also testified that he relied on this representation when he decided to purchase the property. The court held that the trial court erred because Payne's evidence proved sufficient to reach the jury.

The court ordered a new trial because the trial court improperly excluded Edmonson's testimony that concerned Payne's discussion regarding leasing a part of the parking lot. This discussion took place prior to Payne's purchase and would have rebutted Payne's testimony about Edmonson's representation. The trial court erred in excluding this statement as evidence of a compromise.

*Gully v. Southwestern Bell Telephone Co.* involved an easement deed that permitted Southwestern Bell to place a communications cable at the edge of the property owned by Hazel Gully. The terms of the easement deed entitled Gully to ask Southwestern Bell to remove the line and relocate it upon ninety days' notice from the owner if four specified conditions were met. Since Gully intended to develop an office project on the land, she gave Southwestern Bell written notice on December 2, 1981, that she had met the easement deed's four conditions and that Southwestern Bell was required to move its lines within ninety days. In January 1982 Southwestern Bell informed Gully that the cable would stay in its location on Gully's property.

Gully sought declaratory relief, and Southwestern Bell cross-claimed for condemnation in the event that Gully's claim to title proved good. Upon a finding that the landowner's title was good, Southwestern Bell condemned the land. The district court awarded Gully the value of the land condemned plus damages sustained during the period before the phone company moved to condemn the property.

On appeal Southwestern Bell objected to the amount awarded as the value of the land at the time of taking. The court stated that Texas law is well

182. *Id.* at 796.
183. *Id.*
184. *Id.* at 797.
185. *Id.* at 797-98.
186. *Id.*
187. 774 F.2d 1287 (5th Cir. 1985).
188. The four conditions stated that: (1) the street on which the property was situated needed to be cut through and extended west; (2) the property needed to be zoned commercial; (3) Southwestern Bell's easement needed to interfere with the construction of a commercial building; and (4) Southwestern Bell needed to be able to get permission to move its lines from the proper authorities. *Id.* at 1289 n.1.
settled that “compensation due a landowner for property taken by eminent
domain is measured by the fair market value of the land at the time of the
taking.” Also, the date of taking occurs when the condemnor lawfully
receives actual possession or when given constructive possession through a
special commissioner’s award. In this case the court held that the date of
taking occurred on the date on which the court effectively granted the tele-
phone company’s petition for condemnation, not the date on which the tele-
phone company technically breached the easement agreement for its
communications cable. In addition, the court affirmed the award of con-
tract damages that entitled Gully to recover for her reliance upon the tele-
phone company to fulfill its contractual obligations under the easement deed
and remove the cable.

B. Equitable Claims

In Tuttlebee v. Tuttlebee the court cancelled two warranty deeds that
had transferred ownership of the homestead of the eighty-two-year-old
owner to her brother-in-law. The court found that the brother-in-law
acted as a fiduciary and that he had breached his duty as a fiduciary by
misrepresenting the nature of the transfer. The owner relied on her
brother-in-law for a variety of services after the death of her husband three
years before the transfer. The brother-in-law had performed housework and
chauffeured the owner during this period. He possessed a real estate license,
as did his wife. Her company prepared the market analysis of the property
at issue.

The court held that the brother-in-law breached his fiduciary duty by mis-
representing the nature of the transfer. The owner informed him that she
wished to will her house to him. He recommended that she deed the house
to him reserving a life estate for herself. The brother-in-law suggested that
the deeding of the property to him constituted only a back-up to the will.
He also suggested that a niece of the owner might contest the will, and that
the deed would insure that he would get the house. The court found that the
owner relied on this misrepresentation and that until the time of trial she did
not recognize that she had relinquished ownership by signing the deeds.

In Balaban v. Balaban judicial estoppel did not preclude a party from
testifying that he owned the property where he resided, even though he had
at one point executed an affidavit of tenancy. The occupant of land
brought a trespass to try title against his siblings. The occupant, Myrko

189. Id. at 1291.
190. Id.
191. Id. at 1291-92.
192. Id. at 1292-95.
193. 702 S.W.2d 253 (Tex. App.—Corpus Christi 1985, no writ).
194. Id. at 257.
195. Id. at 256-57.
196. Id. at 257.
197. Id.
198. 712 S.W.2d 775 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.).
199. Id. at 777-78.
Balaban, claimed the land was his under a deed showing the owner as M. Balaban. The siblings claimed the deed referred to their father, Mychajlo Balaban.

The siblings introduced an affidavit of tenancy executed by Myrko in favor of the father. They claimed that this affidavit barred Myrko from asserting ownership under the doctrine of judicial estoppel. In its opinion the court recited the elements of judicial estoppel and held that the doctrine did not operate in this case because the siblings failed to show that the affidavit was executed in connection with a prior judicial proceeding.

In *The Schismatic & Purported Casa Linda Presbyterian Church in America v. Grace Union Presbytery, Inc.* the court held that the United States Constitution did not prohibit a court from using the deference rule when adjudicating a property dispute between two factions of a congregation. A portion of a Presbyterian Church congregation chose to sever its ties with the Presbyterian Church of the United States (PCUS), under whose auspices it had been constituted. The PCUS filed a declaratory judgment action, seeking a declaration that the portion of the local congregation remaining affiliated with it owned the church property. The trial court held for PCUS and the appellate court affirmed.

The court held that under Texas law the true question concerned which local congregation owned the property. Texas law requires the trial court to defer to the decision of the hierarchical church that constituted the congregation. Deference to the decision of PCUS does not amount to a certification by the court of which congregation is the true congregation in violation of the establishment clause of the first amendment of the Constitution. Instead, the court merely defers to the ruling of the organization that had originally constituted the congregation.

The court in *Ford v. Long* held that the imposition of a constructive trust on the portion of a husband's estate that vested in him upon the murder of his wife was constitutional. The trial court imposed a constructive trust on certain of Ford's assets for the benefit of the sole legatee of Ford's

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200. *Id.* The court noted elements of judicial estoppel as:

1. that the declaration relied on was made during the course of a judicial proceeding;
2. that the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony;
3. that the statement was deliberate, clear, and unequivocal;
4. that giving conclusive effect to the declaration will be consistent with public policy; and
5. that the testimony must be such as relates to a fact upon which a judgment for the opposing party may be based.

201. 710 S.W.2d 700 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
203. 710 S.W.2d at 708.
204. *Id.* at 706-07.
205. *Id.* at 705.
206. *Id.*
207. *Id.*
208. 713 S.W.2d 798 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).
209. *Id.* at 799.
deceased wife. The trial court also imposed a constructive trust on the assets that had been his wife's and had vested in him upon her death. The appellate court found that the imposition of a constructive trust did not result in an unconstitutional forfeiture of property upon conviction.\textsuperscript{210} The court reasoned that the constructive trust acted as an equitable tool to deny Ford the fruits of a wrongful act.\textsuperscript{211} As husband and wife the Fords each possessed a survivorship interest in certain mutual assets. By murdering his wife, Ford assured himself of the property; but for his act, the wife might have taken the property. The constructive trust pervasively reinstates the situation that would have existed but for the killing.

In \textit{Clark v. Amoco Production Co.},\textsuperscript{212} the administrators of the estate of James R. Meadors sued Amoco Production Company and several other oil companies, claiming a one-eighth interest in minerals taken from certain property. The administrators' complaint claimed that James Meadors had received a deed granting him a one-eighth interest in mineral rights in one hundred sixty acres of Jefferson County in 1911. The deed was recorded in Jefferson County in 1931. In 1983 the appointed administrators of Meador's estate brought suit on behalf of the estate. The magistrate who heard the case made a recommendation for dismissal on the grounds of presumed lost deed and laches. The district court adopted the magistrate's report in its entirety and dismissed the administrators' claim.

The court of appeals determined that the presumed lost deed doctrine requires proof of three elements.\textsuperscript{213} The court noted that where all of these elements are present, a presumption results, and the courts presume the possessor of the property gained title through a grant of deed.\textsuperscript{214} The court then determined that the district court should not have dismissed the complaint since the administrator had not conceded all elements of presumed lost deed in the pleadings.\textsuperscript{215} The court also considered that under Texas law the doctrine of laches rests on two elements,\textsuperscript{216} but becomes inapplicable to an action that comes within the provisions of a particular statute of limitations.\textsuperscript{217} The court of appeals ruled that the district court should not have applied the doctrine of laches before it made a specific determination of whether a statute of limitations applied to this case.\textsuperscript{218}

\textit{Texas American Bank/Levelland v. Resendez}\textsuperscript{219} involved a suit by a judgment creditor alleging that its lien on specified property had superiority to

\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} 794 F.2d 967 (5th Cir. 1986).
\textsuperscript{213} \textit{Id.} at 970. The elements include: "(1) a long asserted and open claim, adverse to that of the apparent owner; (2) a nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim." \textit{Id.}
\textsuperscript{214} \textit{Id.} at 970-71.
\textsuperscript{215} \textit{Id.} at 971.
\textsuperscript{216} \textit{Id.} The elements consist of: "(1) an unreasonable delay in bringing a claim although otherwise one has the legal or equitable right to do so, and (2) a good faith change of position by another, to his detriment, because of this delay." \textit{Id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.} at 972.
\textsuperscript{219} 706 S.W.2d 343 (Tex. App.—Amarillo 1986, no writ).
any interest of the purchasers. Jesse and Anita Resendez contracted with Loveta Alford to purchase a lot in the city of Levelland with improvements, but without the oil, gas, and other minerals under the property. Upon completion of the payments, the parties agreed that Alford would give the Resendezes a clear deed. They failed to record the contract. The purchasers moved into the home on the premises and resided there continuously. They paid the final installment under the purchase contract to Alford on November 10, 1983. Texas American Bank obtained a judgment against Alford and her husband in February 1984. The bank filed an abstract of the judgment in the appropriate county record during that same month. Warranty deeds from the Alfords to the purchasers were not filed until May 1984. At the trial court level the judgment creditors argued that upon proper recordation of an abstract of judgment it becomes a lien upon real property of the defendant located in the county in which the abstract of judgment is filed and indexed. The creditors claimed that since the Alfords and the Resendezes had recorded neither the conveyance to the Alfords nor the sale contract to the purchasers at the time the bank filed its abstract of judgment, its lien became superior to any claim of the purchasers.

In holding for the purchasers the court of appeals determined that until the purchasers paid the purchase price, they owned only an equitable right. The court recognized the principle that an equitable title acquired independent of a legal title is not subject to or governed by the registration statute, and the superiority of such a title may be asserted against a judgment lien creditor even though such creditor possessed no notice of the equitable title at the time of fixing his lien. The court cited as a rationale for this principle that the preference for the equitable rights of third persons against the legal lien is based on the fact that a judgment lienholder is certainly not an innocent buyer. In addition, the court noted that the purchasers' possession and use of the premises constituted sufficient notice to the judgment lienholder to prevent it from claiming the benefit of the statute.

C. Conveyances

In Haskins v. First City National Bank the vendor and her husband conveyed a one-hundred-acre tract of land to her son, and the deed was duly recorded. The deed reserved a life estate in favor of the vendor and her

220. The judgment creditors based this argument upon Tex. Prop. Code Ann. § 52.001 (Vernon 1984), which is titled “Establishment of Lien.” 706 S.W.2d at 345.
221. 706 S.W.2d at 345.
222. The registration statute noted here by the court is Tex. Prop. Code Ann. § 13.001 (Vernon 1984). Subsection (a) of that statute states that “[a] conveyance of real property or an interest in real property . . . is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged or proved and filed for record as required by law.” Id. § 13.001(a).
223. 706 S.W.2d at 346.
224. Id. at 345.
225. Id. at 347.
226. 698 S.W.2d 754 (Tex. App.—Beaumont 1985, no writ).
husband measured by the life of the survivor. During this life estate the survivor was to enjoy full possession and use of the land. A provision of the deed reserved to the vendor and her husband the right to disapprove any sale of the land that the son might make during the lifetime of the vendor and her husband. The son subsequently borrowed money from the bank, with the loans secured by deeds of trust on the one-hundred-acre parcel. When the son defaulted, the bank foreclosed on the tract, but did not interfere with the life estate or homestead rights of the vendor.

The vendor filed suit against the bank, asking that the conveyance to her son be set aside. The bank contended that the deed’s provision regarding approval of any sale constituted an unreasonable restraint on alienation, but wished the court to give effect to the rest of the deed. The trial court granted the bank’s motion for summary judgment.

The appellate court affirmed.227 Noting that courts do not favor conditions subsequent and that the deed provision in question did not arrange for a reverter or a reversion upon its violation, the court held that the provision was a covenant between the vendor and her son, not a condition subsequent.228 The vendor’s remedy would be damages for breach of the covenant.229 Any violation of the deed agreement did not diminish the bank’s security interest in the son’s fee simple remainder interest.230

In Schwarz v. State231 a landowner brought a declaratory judgment action against the State of Texas to have letters of patent construed. The patents conveyed the land at issue from the state to his predecessor in interest. The property owner claimed title to coal and lignite fifty feet under his property. The state claimed title based on a reservation of mineral estate in the patents. The Texas Supreme Court held the conveyance of property from the state to a private individual reserving mineral rights must be strictly construed in favor of the state.232 Public policy required the court to interpret the phrase that reserved mineral rights to the state to include all minerals regardless of whether recovery of the minerals would result in the destruction of the surface estate.233

In Chambers v. Huggins234 Chambers, a grantor, sought to prove that a deed by which he conveyed surface rights also reserved reversionary interests to one-half of the mineral estate. In 1955 Chambers acquired title to the disputed property through a conveyance that expressly reserved a one-half mineral estate in the property to the original owner. Upon expiration of the retained mineral interest the mineral interest vested in Chambers pursuant to the conveyance. When Chambers subsequently conveyed the surface rights to Huggins in 1973, he did so by a deed that granted Huggins an

227. Id. at 757.
228. Id. at 756.
229. Id.
230. Id.
231. 703 S.W.2d 187 (Tex. 1986).
232. Id. at 189.
233. Id. at 191.
234. 709 S.W.2d 219 (Tex. App.—Houston [14th Dist.] 1986, no writ).
interest in the land, and a portion of the mineral rights that Chambers received in the 1955 conveyance.

On appeal Chambers argued that the reference to the 1955 conveyance, which reserved a one-half mineral interest, as well as the language in the deed stating that only half the mineral interests were being conveyed, demonstrated the intent to convey only half of the mineral estate. The court of appeals disagreed; it held that a reservation of minerals must be made by clear language and rejected Chambers's argument that since the grantor did not expressly convey the reversionary interest to the grantees, the grantor reserved it by implication. The court applied the following rules of construction:

(1) where there is no ambiguity, a deed will be enforced as written even if it does not express the original intention of the parties; (2) the intention of the parties must be ascertained from the entire instrument, and not isolated portions thereof; (3) deeds are construed to confer the greatest estate that their terms will permit; (4) grants are liberally, exceptions strictly, construed against the grantor; (5) deeds capable of two constructions are construed to convey to the grantee the largest estate possible; (6) it is presumed that all promises and agreements were merged into and fully expressed by the written instrument; and (7) an unambiguous written document will be enforced as written and cannot be varied or contradicted by parol testimony unless it is clearly alleged and proved that its execution was procured by fraud, accident, or mistake.

In summary, the court of appeals held that the grantor's reversionary interest in mineral rights passed along with the surface rights when Chambers deeded the land without expressly reserving his mineral rights.

In *Thursland v. Hoster* one of the parties brought an action to determine superior title to a townhouse. Both claimants to a property traced their title back to a common source. Satterwhite, Inc. had previously owned the property in dispute. The IRS filed a lien on this property, and the appellee acquired title to the property by quitclaim from the IRS following an auction. The appellant traced his title through an assignee of Satterwhite. He alleged that Satterwhite had assigned the property by a warranty deed before the IRS levied its liens. The appellee did not establish as a matter of law its underlying argument on summary judgment that Satterwhite's assignment constituted a sham sale taken to avoid the IRS's action. A conclusive presumption arises that a warranty deed conveys all of the assignor's interest in the absence of fraud, accident, or mistake. The argument that Satterwhite retained beneficial title presented a jury question.

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235. *Id.* at 222.
236. *Id.* (emphasis in original).
237. *Id.*
238. 713 S.W.2d 757 (Tex. App.—Houston [1st Dist.] 1986, no writ).
239. *Id.* at 759.
240. *Id.*
241. *Id.* at 760.
D. Construction of Deeds

In *Veltman v. Damon* 242 a testator’s son brought suit to set aside a deed from the testator’s widow to the couple’s daughter. The deed transferred an entire interest in property to the daughter and would have divested the son of his conditional remainder interest. When the testator died, his will gave a life estate to his widow of his half of the couple’s property with the power to sell or dispose of that interest. Subsequently, the widow executed a warranty deed transferring the entire property to the daughter. The deed’s granting clause referred only to the widow’s own undivided one-half interest, but the habendum clause referred to her own interest and the interest owned by the estate of the testator. In his action the son contended that the two clauses contradicted each other and that the granting clause should prevail, allowing the widow to grant only her own one-half interest to the daughter. The trial court entered judgment in favor of the daughter.

The appellate court affirmed.243 After finding that the applicable four-year statute of limitations barred the son’s cause of action,244 the court looked to the deed granted by the widow to her daughter to see if the deed effectively conveyed the property in question.245 The court found, looking at the language of the deed in its entirety, that the widow intended to convey all of the property to her daughter, subject to her own life estate.246 By exercising her power of disposition, the widow defeated the son’s conditional remainder interests. The Texas Supreme Court, however, modified the lower court’s decision on grounds that the appellate court had interpreted the deed incorrectly.247 The court agreed with the son in holding that the granting clause prevails where an irreconcilable difference exists between it and the habendum clause.248 As a result of its holding, the court reversed and remanded this particular portion of the lower court’s decision.249

In *Altman v. Blake* 250 the inheritors of a grantee brought an action to determine their interests in oil, gas, and other minerals on and under certain property. In 1938 the property owner executed a deed that conveyed an undivided one-sixteenth interest in the natural resources of the property provided that the grantee did not lease the interest rights.251 In 1939 this same

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242. 696 S.W.2d 241 (Tex. App.—San Antonio), *modified*, 701 S.W.2d 247 (Tex. 1985) (higher court held appellate court interpreted deed incorrectly).
243. 696 S.W.2d at 247.
245. 696 S.W.2d at 244-46.
246. *Id.* at 245-46.
247. 701 S.W.2d 247, 247-48 (Tex. 1985).
248. *Id.*
249. *Id.* at 248.
250. 703 S.W.2d 420 (Tex. App.—Amarillo), *rev’d*, 712 S.W.2d 117 (Tex. 1986). For a discussion of the supreme court’s reversal and its effect on mineral rights see *infra* notes 374-76 and accompanying text.
251. 703 S.W.2d at 420. The deed’s exact language conveyed the 1/16 interest “in and to all of the oil, gas and other minerals in and under” the property, provided that the grantee “does not participate in any rentals or leases.” *Id.*
grantor conveyed the entire parcel, except for the one-sixteenth interest conveyed earlier. The inheritors of the second grantee brought suit, seeking a determination of their rights and interests in the property. The trial court held that the grantor had effectively conveyed an undivided one-sixteenth nonparticipating royalty interest, and the inheritors of the second grantee appealed.

The appellate court affirmed, noting the rule that the court must ascertain and give effect to the intent of the parties as expressed in the language used in the deeds. The rule further presumes that the parties intend every clause to have effect in evidencing their agreement, and that the intent of the parties may be ascertained from the four corners of the document. The rule also requires that "all parts of the deed are to be harmonized and given effect, if possible, and no part is to be rendered meaningless unless there is an irreconcilable conflict wherein one part of the deed effectively destroys another part . . . ." In light of these principles, the appellate court determined that the first deed limited the conveyance by retaining in the grantor the right to make leases, thereby stripping the estate of its characteristics as a mineral estate and making it only a royalty interest. The court found that the second deed required that the rights of its grantees thereunder yield and be subordinate to the prior sale of royalty interests. The Texas Supreme Court later reversed the court's decision based on precedent in mineral cases. The court, however, approved of the deed construction rules applied by the appellate court.

Smith v. Graham addressed whether the language in four deeds conveyed working interests in certain oil and gas leases rather than fee mineral interests. The court of appeals held that the grantor conveyed fee mineral interests to the grantees. The court based its decision on the key language in the granting clause. The court ruled that under Texas law the specific language used in the grant from the grantor to the grantee conveys a mineral interest. The court concluded, therefore, that since all of the deeds at issue used the term "in, on and under," they constituted grants of mineral interests.

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252. Id. at 422.
253. Id. at 421.
254. Id.
255. Id.
256. Id. at 422.
257. Id.
258. 712 S.W.2d 117, 118-20 (Tex. 1986). For a discussion of this case see infra notes 374-76 and accompanying text.
259. 712 S.W.2d at 118.
260. 705 S.W.2d 705 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.).
261. Id. at 707.
262. Id. The key language stated "do hereby bargain, sell, assign and deliver unto [grantee] an interest in the oil, gas and other minerals in, on and under the above described tract equal to [fraction] of 7/8 working interest . . . ." Id.
263. Id.
264. Id.
E. Eminent Domain

In Ratcliff v. City of Keller a property owner sought to enjoin a city from proceeding with an eminent domain action to acquire a portion of the property owner's land in order to construct a storm sewer. The trial court denied the requested injunctive relief. The appellate court affirmed. The property owner contended that the city's condemnation was void because the proposed use was not a public use since the storm sewer would not serve all city residents. The appellate court held that the fact that all citizens do not directly enjoy a public improvement does not prevent the improvement from being a public use.

In Flores v. Military Highway Water Supply Corp. a water supply and sewer service company brought an eminent domain action to condemn property for the purpose of constructing a new sewage disposal plant. The property owners filed a petition for a temporary injunction blocking the condemnation. The trial court denied their petition.

The court of appeals reversed. Noting that the water supply company claimed authority for condemnation under either of two statutory provisions, the court held that neither article applied to the instant case. Article 1434(a) concerns the construction of rights-of-way for the laying of pipelines and cannot authorize construction of a buffer zone around the proposed disposal plant. The company sought to acquire the property at issue in order to create such a buffer zone. Article 1439 pertains to the condemnation of property for sewage disposal in any city or town, and the court held the statute inapplicable because the property in question was located in an unincorporated area.

In Tejas Gas Corp. v. Herrin Tejas Gas commenced condemnation proceedings against land owned by the Herrins in order to acquire a right of way and an easement for the construction and operation of a pipeline. The special commission that had been appointed determined the value of the land taken and damage to the property owners to be $7,536.32. Subsequently, Tejas Gas deposited the amount of the commissioner's award into the registry of the court, along with other statutorily required sums and bonds, and obtained an order for possession of the property. Later, the trial court allowed the landowners to withdraw the money. Before the trial, however, the landowners redeposited with the court the amount of the commissioner's award with interest and amended their pleadings to challenge

265. 698 S.W.2d 262 (Tex. App.—Fort Worth 1985, no writ).
266. Id. at 263.
267. Id.
268. 714 S.W.2d 382 (Tex. App.—Corpus Christi 1986, no writ).
269. Id. at 384.
270. Id. at 383-84. The water supply company relied on TEX. REV. CIV. STAT. ANN. art. 1434a, § 4 & art. 1439 (Vernon 1980), both of which concern eminent domain authority.
271. 714 S.W.2d at 384.
272. Id.
273. Id.
274. 716 S.W.2d 45 (Tex. 1986).
Tejas's right to condemn the property. The trial court entered adverse judgment against the condemnor.

The court of appeals held that the landowners' withdrawal of money deposited in the registry of the court did not waive their right to contest the actual taking of the land, unless they retained the money.\textsuperscript{275} The Texas Supreme Court reversed even though the landowners redeposited the funds with interest before the trial.\textsuperscript{276} The court stated that the absolute rule of law requires that after an award has been made and deposited in the registry of the court, and the landowner has withdrawn the award, the landowner cannot then assert an unlawful taking.\textsuperscript{277}

In \textit{Houston Lighting & Power Co. v. Landry}\textsuperscript{278} the court granted supersedeas of an injunction entered against a power company in a condemnation proceeding brought by the power company against a school district.\textsuperscript{279} The power company had filed condemnation proceedings for property owned by the school district to be used for construction of a transmission line. The trial court found the condemnation void and granted the school district a writ of possession and mandatory injunction. The trial court partially superseded its order of possession, but allowed the company to operate its transmission line only in emergencies.

The appellate court granted the company's request for a writ of mandamus to supersede the injunction pending its appeal, holding that the power company had the right, as a matter of law, to use the land while its appeal was pending.\textsuperscript{280} The court noted that the Texas Property Code provides that pending litigation does not keep the condemning party from using the property at issue.\textsuperscript{281} The court held that the legislature enacted the statute "to permit entities having the right of eminent domain to possess condemned property and subject it to public use."\textsuperscript{282} The court held that pending litigation meant until a court of last resort rendered a determination.\textsuperscript{283}

\textit{Southwestern Bell Telephone Co. v. Gordon}\textsuperscript{284} involved an eminent domain proceeding that permitted Southwestern Bell to take possession of two tracts of land owned by Gordon. Gordon then sought damages for Southwestern Bell's temporary possession of the tracts, and the trial court

\begin{footnotes}
\footnotetext{275}{Tejas Gas Corp. v. Herrin, 705 S.W.2d 177, 179 (Tex. App.—Texarkana 1985), rev'd, 716 S.W.2d 45 (Tex. 1986).}
\footnotetext{276}{716 S.W.2d at 46.}
\footnotetext{277}{\textit{Id.} at 45-46 (citing State v. Jackson, 388 S.W.2d 924, 925 (Tex. 1965)).}
\footnotetext{278}{709 S.W.2d 693 (Tex. App.—Houston [14th Dist.] 1986, no writ) \textit{[Editor's Note: After this Article went to print, the Texas Supreme Court conditionally granted mandamus in this case sub nom. Klein Indep. School Dist. v. Fourteenth Court of Appeals, 720 S.W.2d 87 (Tex. 1987). The supreme court held that the trial court did not abuse its discretion in refusing to allow the power company to supersede the injunctive portion of the judgment. \textit{Id.}].}}
\footnotetext{279}{709 S.W.2d at 695.}
\footnotetext{280}{\textit{Id.}}
\footnotetext{281}{TEX. PROP. CODE ANN. § 21.021 (Vernon 1984) states that "[a]fter . . . an award in a condemnation proceeding . . . the condemnor may take possession of the condemned property pending the results of further litigation . . . ."}
\footnotetext{282}{709 S.W.2d at 695 (emphasis in original).}
\footnotetext{283}{\textit{Id.}}
\footnotetext{284}{705 S.W.2d 767 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).}
\end{footnotes}
awarded him $8,750 for the impaired marketability of options on the easement. With regard to the award for impaired marketability of options, the court determined that the evidence presented in the eminent domain proceeding did not justify the award.\textsuperscript{285} The record showed that Gordon's witness testified that while he knew that a market for the options existed, his estimate of Gordon's loss for the impaired marketability of options resulted from experience. In addition, the witness stated that he knew of no options offered to the owner during Southwestern Bell's occupancy, nor was he aware of any purchase offers during that period. Based on this evidence, the court determined that the evidence did not support the trial court's damage award for impaired marketability of options.\textsuperscript{286} With regard to Gordon's request for attorney's fees and costs, the court stated that the express terms of the statute\textsuperscript{287} bound it, and the statute clearly covers only voluntary dismissals of condemnation proceedings and does not allow attorney's fees following the judicial dismissal of a condemnation proceeding.\textsuperscript{288}

\textit{Devco, Ltd. v. Murray}\textsuperscript{289} was an eminent domain case. The landowners owned two tracts of land, and the condemnor owned an oil and gas lease that covered both tracts. The lease provided for gas gathering production lines from the gas unit that the two tracts formed. The decision by Devco's predecessor to transport gas from other production in the field caused these condemnation proceedings. After the first two condemnation proceedings were filed, it was discovered that the surveyor's metes and bounds description was incorrect. The condemnor filed the second pair of proceedings nine months later.

The trial court consolidated all four proceedings. A jury rendered judgment awarding the landowners a recovery on all four of the proceedings. The court of appeals reversed the trial court's judgment as to the first two proceedings based on the erroneous metes and bounds description.\textsuperscript{290} The court also remanded the first proceedings for dismissal after a hearing to permit the landowners an opportunity to prove their fees incurred in connection with the earlier condemnation proceedings.\textsuperscript{291} In addition, the court of appeals ordered the trial court to credit the condemnor for funds deposited in the court's registry and to disallow recovery for any expenses related to the second condemnation proceedings.\textsuperscript{292}

\textsuperscript{285} Id. at 768.
\textsuperscript{286} Id.
\textsuperscript{287} TEX. PROP. CODE ANN. § 21.019(b) (Vernon 1984). The statute states that "[a] court that hears a motion to dismiss a condemnation proceeding shall make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner to the date of the hearing." Id.
\textsuperscript{288} 705 S.W.2d at 768-69.
\textsuperscript{289} 705 S.W.2d 836 (Tex. App.—Eastland 1986, writ granted). [Editor's Note: This decision was affirmed by the Texas Supreme Court. 30 Tex. Sup. Ct. J. 394 (May 2, 1987).]
\textsuperscript{290} Id. at 839.
\textsuperscript{291} Id.
\textsuperscript{292} Id.
F. Disposal of Public Land

In *Mansfield v. City of Port Lavaca* 293 a city owned a seventy-five-acre tract of land that the State of Texas had granted to it for public purposes only. The city wished to sell this tract and sought legislation removing the public trust encumbrance; the state legislature passed a measure removing the encumbrance in 1983. The city advertised the land for sale, and several private dock companies combined to submit the single bid received. The city council accepted the bid, subject to voter approval. The voters approved a proposition that authorized the sale.

Several individuals brought a declaratory judgment action seeking to set aside the sale. They alleged various statutory and city charter violations, as well as the unconstitutionality of the state legislature's action in removing the public trust encumbrance. The trial court granted summary judgment in favor of the city and the buyers. The appellate court affirmed. 294 The court held inapplicable a state statute 295 prohibiting the sale of state lands to corporations, because the state did not own the land when it was sold to the dock companies. 296 The court further found the evidence insufficient to show that the tract in question was a public park 297 and found no evidence of a conflict of interest or alleged misconduct on the part of a buyer and the city attorney. 298 Finally, the court held that the challenged provisions of the state legislature's measure withstood constitutional analysis. 299 Even if a question remained as to the constitutionality of certain provisions, the legislation's severability clause 300 allowed the crucial provisions to stand and the public trust encumbrance to be removed. 301

G. Dedication to Public Use

In *Zak v. Sanchez* 302 a landowner brought suit to enjoin a neighbor's alleged interference in the use of a road over the neighbor's land. The trial court determined that the strip of land in question constituted a public roadway and permanently enjoined interference or hindrance to the public's use. The appellate court affirmed. 303 The court held that the evidence supported the trial court's finding of the implied dedication of the strip of land in question to public use as a roadway. 304 The court noted that the necessary ele-

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293. 698 S.W.2d 429 (Tex. App.—Corpus Christi 1985, no writ).
294. *Id.* at 435.
295. TEX. NAT. RES. CODE ANN. § 51.052(c) (Vernon Supp. 1987).
296. 698 S.W.2d at 431.
297. *Id.* at 432. The importance of this finding becomes evident when one reads TEX. PARKS & WILD. CODE ANN. § 26.001 (Vernon Supp. 1987). This statute severely restricts the taking of park and recreational areas. *Id.*
298. 698 S.W.2d at 432.
299. *Id.* at 433-34.
300. This clause effectively declared the 1983 legislation superior to the city's charter where the two conflicted. *Id.* at 434.
301. *Id.*
302. 700 S.W.2d 259 (Tex. App.—San Antonio 1985, no writ).
303. *Id.* at 263.
304. *Id.* at 261-62.
ments for a finding of implied dedication include: "(1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) he was competent to do so; (3) the public relied on these acts and will be served by the dedication, and (4) there was an offer and acceptance of the dedication."\textsuperscript{305} Texas case law holds that when the parties can show no proof to indicate the owner’s intent at the time a public use began on his property, a presumption arises that the owner possessed the necessary intent.\textsuperscript{306}

H. Zoning

In \textit{City of San Marcos v. R.W. McDonald Development Corp.}\textsuperscript{307} a developer owned a fifty-acre tract located outside the city boundary, but within its extraterritorial jurisdiction. The developer wanted to subdivide and develop the property for residential use. He sought and received approval from the city planning commission to do so. The city then brought suit, seeking a declaration that because the developer had not complied with its subdivision statutes, the court should not allow him to proceed with the subdivision. The city also claimed that the developer obtained approval from the planning commission by misrepresenting the source of the water supply serving the property at issue. The trial court denied the city’s request for declaratory and injunctive relief.

The appellate court reversed.\textsuperscript{308} The court found that the trial court erred in holding that the conduct of city officials estopped the city from insisting upon compliance with the subdivision ordinances.\textsuperscript{309} Unauthorized acts of its officials that conflict with a city ordinance may not estop a municipality.\textsuperscript{310} An exception to this rule exists only for circumstances that clearly require the exception in order to prevent manifest injustice.\textsuperscript{311} The court further found that the developer’s misrepresentations regarding the water supply constituted fraud because those misrepresentations deceived the city and its officials and caused injury to the public interest since adequate, unpolluted water was not available to the subdivision.\textsuperscript{312}

I. Damages

In \textit{Uvalde County v. Barrier}\textsuperscript{313} the testimony of the owner of real property concerning the dollar amount of temporary damage to his property proved insufficient, standing alone, to award damages. The appellate court revised a trial court judgment for the property owner that would have compensated

\begin{itemize}
\item \textsuperscript{305} Id. at 261 (quoting Lindner v. Hill, 691 S.W.2d 590, 592 (Tex. 1985)).
\item \textsuperscript{306} Id. (citing a proposition approved in O’Connor v. Gragg, 161 Tex. 273, 279, 339 S.W.2d 878, 882 (1960)).
\item \textsuperscript{307} 700 S.W.2d 674 (Tex. App.—Austin 1985, no writ).
\item \textsuperscript{308} Id. at 678.
\item \textsuperscript{309} Id. at 676-77.
\item \textsuperscript{310} Id.
\item \textsuperscript{311} Id.
\item \textsuperscript{312} Id. at 678.
\item \textsuperscript{313} 710 S.W.2d 740 (Tex. App.—San Antonio 1986, no writ).
\end{itemize}
him for damage to his property by the county. The court found that the award was based on insufficient evidence. The property owner's testimony that he had been told that the cost of restoring his property would be over $19,000 provided an inadequate basis to award damages. The court ruled that what another told him concerning restoration cost constituted inadmissible hearsay. The court then ruled that the testimony of a property owner, relative to the cost of making repairs, cannot be a basis for damages unless the owner is otherwise qualified.

J. Covenants and Restrictions

Hanchett v. East Sunnyside Civil League involved the validity and effect of certain deed restrictions relating to the minimum cost of housing in a subdivision. East Sunnyside Court was a residential subdivision subject to a set of restrictive covenants its developer entered into and recorded in 1955. The covenants contained two relevant provisions, a requirement that an architectural control committee approve all plans for a proposed home before construction, and second, another requirement that the minimum cost of a residence be $8,500 with the cost amount depending upon the date the covenants were recorded. The deed possessed no provision for amendments. In 1970 plaintiff Hanchett purchased his lot following the adoption of an amendment in 1964, recorded in 1977, and prior to a subsequent 1977 amendment. The 1964 amendment prohibited moving houses onto a lot, and the 1977 amendment authorized renewal or extension of the restrictions by a majority of the lot owners. In 1984 Hanchett purchased a house in a different area for $2,200 and moved it on to his lot in East Sunnyside Court.

The court of appeals held that the two amendments were invalid since no provision in the original restrictions authorized amendments. Even if the deed had authorized the amendments, since no one recorded either the 1964 amendment or the 1977 amendment until 1977, and the plaintiff received no actual notice of the proposed amendment in 1977, to which he was entitled as a property owner, neither amendment would apply to his property. Additionally, the restriction relating to the architectural control committee was invalid as to Hanchett since it was known that one member was dead, another was presumed dead, and the third could not be located, and no mechanism existed to provide for the appointment of successor members. The defendant, however, prevailed since the plaintiff admitted that the residence did not meet the estimated cost requirement in the current market of approximately $40,000.

314. Id. at 744.
315. Id.
316. Id.
317. Id.
318. 696 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
319. Id. at 615.
320. Id.
321. Id. at 615-16.
322. Id. at 616.
Giles v. Cardenas involved the enforceability of certain restrictive covenants that prohibited the construction of fencing forward of the street building setback line. The covenants and restrictions were properly recorded prior to the conveyance to the defendants of their building lot. The defendants then constructed a fence twenty feet in front of the side street building line.

The court of appeals found that the recording of the covenants, conditions, and restrictions gave the defendants proper notice and that the defendants failed to show that enforcement of the covenants would be inequitable since they presented no evidence that the developer or any other lot owner intended to waive the rights of enforcing the restrictions. The fence, which obstructed vision around the corner of intersecting streets, decreased visibility in an area where children lived and played. The fence, therefore, presented a material violation, posing a safety hazard to those living and driving in the area.

In Meyerland Community Improvement Association v. Temple a property owners' association brought an action for declaratory judgment against sixty-two lot owners in a subdivision, seeking to prohibit the lot owners from selling their property for nonresidential use. The suit required the trial court to interpret deed restrictions covering the subdivision. Each of the twenty-one separate sections was plotted and developed and possessed its own set of deed restrictions. No one recorded a general plan for the entire subdivision. The trial court entered judgment for the individual lot owners.

The appellate court affirmed. The court held that the separate deed restrictions for each section within the subdivision, allowing each section to change its restrictions after twenty-five years, indicated no intent to create a continuing common plan or scheme. The court also held that the evidence was sufficient to find that certain amendments to the covenants allowed a two-thirds vote of lot owners within a section to change the use of the property from residential single-family at any time. Further, the court found sufficient evidence to support the finding of a change in conditions that made it no longer possible to gain the benefits for which the restrictions originally were intended.

In Selected Lands Corp. v. Speich a developer brought a declaratory judgment action against the owners of lots within a residential subdivision, seeking a determination that restrictive covenants required the lot owners to pay fees for the maintenance of the subdivision's common areas. These common areas included roads, a swimming pool, tennis courts, and a golf course.

323. 697 S.W.2d 422 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).
324. Id. at 427-29.
325. Id. at 428-29.
326. 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).
327. Id. at 268.
328. Id. at 266.
329. Id. at 267.
330. Id. at 268.
331. 702 S.W.2d 197 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).
The trial court ruled that the developer could not enforce the restrictive covenants against the lot owners. The appellate court reversed.\(^3\) The court found that the restrictive covenants placed on the lots constituted covenants running with the land.\(^3\) It further found that the restrictive covenants were properly recorded in several deeds, giving the lot owners constructive notice of them.\(^3\) The court held that a general plan or scheme to the subdivision existed, noting that a general plan may exist even though not every lot in a subdivision has a restriction.\(^3\) Rather, such a general plan may be established in other ways, including through an express covenant, by implication from a filed map or other document, or by parol evidence.\(^3\)

The court also held that the restrictive covenants and the assignment to the successor developer of the right to collect the maintenance fees did not violate the statute of frauds\(^3\) on the grounds of inadequate property descriptions.\(^3\) The parties satisfy the statute of frauds when a property "furnishes within itself, or by reference to other identified writings then in existence, the means or data by which the particular interest in land to be conveyed can be identified with specific and reasonable certainty."\(^3\) In this case, the naming of designated subdivisions, together with references to recorded plats, provided the means or data by which the particular property could be identified with reasonable certainty.\(^3\)

*Hidden Valley Civic Club v. Brown*\(^3\) involved the denial of a temporary injunction to enjoin property owners from parking their recreational vehicle at their home in alleged violation of deed restrictions and covenants. In this case the property owners testified that they bought the vehicle, a camper, in April 1979 and had parked the camper on their property since that time. They further testified that a letter dated September 20, 1984, constituted the first notice of any alleged deed restriction violation. The appellate court noted that the status quo preserved by a temporary injunction reflects the status before the argument began.\(^3\) The court ruled that if the trial court had granted the injunction and ordered the removal of the vehicle from the appellee's residence, then in essence it would have accomplished what should be reserved for a trial on the merits.\(^3\) Therefore, the trial court did not abuse its discretion by denying the temporary injunction.\(^3\)

\(^3\) Id. at 201.
\(^3\) Id. at 199.
\(^3\) Id.
\(^3\) Id.
\(^3\) Id. (citing Lehmann v. Wallace, 510 S.W.2d 675, 680 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.)).
\(^3\) TEX. BUS. & COM. CODE ANN. § 26.01(a)-(b) (Vernon 1968 & Supp. 1987).
\(^3\) 702 S.W.2d at 200.
\(^3\) Id.
\(^3\) Id. at 200-01.
\(^3\) 702 S.W.2d 665 (Tex. App.—Houston [14th Dist.] 1985, no writ).
\(^3\) Id. at 667. The court quoted the Texas Supreme Court in *Transport Co. v. Robertson Transp.*, 152 Tex. 551, 558, 261 S.W.2d 549, 553-54 (Tex. 1953), in which it defined the status resulting from a temporary injunction as "the last, actual, peaceable, noncontested status which preceded the pending controversy." Id.
\(^3\) 702 S.W.2d at 667.
\(^3\) Id. at 668.
In *DeNina v. Bammel Forest Civil Club, Inc.* 345 a homeowner’s group sought to enjoin DeNina from placing a satellite dish in his yard. A restrictive covenant’s provision barring certain types of antenna installation allowed the trial court to prohibit installation of a thirteen-foot diameter satellite dish. 346 The appellate court held that the lower court properly issued a temporary injunction to enforce this provision since the dish had to move forward of the front building line at certain times. 347 DeNina, a resident of the Bammel Forest Subdivision, signed the Agreement for Modification of Restrictions. Unrebutted evidence established that he violated the provision of the agreement dealing with antennas. The court also found that the antenna violated another provision of the agreement that required architectural approval of plans for any improvement that departed from the community standards of appearance. 348 The lower court properly granted the temporary injunction since the brilliant white, thirteen-foot diameter dish created a substantial departure from the serene and wooded subdivision. 349

In *Hicks v. Loveless* 350 the court enforced deed restrictions upon a showing that the buyer possessed actual notice of the restrictions. 351 One of the deed restrictions prohibited commercial use of property in a residential subdivision. The appellee alleged the restrictions did not bind him because at the time his predecessor in interest purchased the property from the developer, the developer had not yet recorded the deed restrictions. The failure to record the restrictions before the initial sale between the developer and the appellee’s predecessor in interest meant that the buyer failed to receive constructive notice of their existence. 352 The buyer, however, possessed actual notice because the developer had discussed the details of the restrictions with the buyer, prior to the sale. The court enforced the restrictions. 353

K. Condominiums

In *Pooser v. Lovett Square Townhomes Owners’ Association* 354 the owners of two condominium homes sued the association to enjoin the collection of past-due maintenance assessments. The two owners claimed certain offsets against the assessments. Specifically, the condominium owners claimed that the association had failed to maintain their roofs in good condition and repair. The trial court denied the claim and granted the association’s counterclaim for past-due assessments, interest, and attorney’s fees.

345. 712 S.W.2d 195 (Tex. App.—Houston [14th Dist.] 1986, no writ).
346. The provision’s key language stated that “[n]o television or radio aerial wires shall be maintained on any portion of any lot forward of the front building line of any lot in the subdivisions.” *Id.* at 198.
347. *Id.* at 198-99.
348. *Id.* at 199.
349. *Id.*
350. 714 S.W.2d 30 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).
351. *Id.* at 33-34.
352. *Id.* at 33.
353. *Id.* at 34.
354. 702 S.W.2d 226 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.).
The appellate court affirmed. The court found that the evidence supported the trial court's finding that the roof leakage present in the two owners' condominiums resulted from defective design and construction, and not from inadequate maintenance. It further held that neither the applicable condominium declaration nor the Texas Condominium Act made the duty to pay assessments contingent upon an obligation to repair. The court found reasonable efforts on the part of the association to solve the leakage problem. The court found that the Condominium Act, by providing that a condominium association may govern the administration of buildings within a project, does not establish that an association will be responsible for the reconstruction of common elements such as defective roofs, absent contrary agreements.

In Covered Bridge Condominium Association v. Chambliss the court of appeals held that a covenant restricting unit occupancy to those sixteen years or older was constitutional under both the state and federal constitutions. In Covered Bridge the condominium association brought an action for injunctive relief against condominium owners for violation of the aforementioned covenant. The unit owners counterclaimed and sought judgment declaring the restriction invalid. The unit owners also asked for the removal of a notice of lien filed against their property.

First, the court found that under Texas law age restriction covenants remain constitutional unless they are unreasonable or arbitrarily applied. The court concluded that age restrictions represent a reasonable means of providing housing that meets the different needs of various age groups. Second, the court held that the condominium association need not demonstrate a compelling state interest in this case because a private contract created the covenant, and not a governmental ordinance or statute.

The court next turned to the question of whether the language of the restriction met constitutional standards as applied. The court concluded that the record possessed no evidence that the covenant was applied in a discriminatory or arbitrary manner. Specifically, the condominium

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355. Id. at 232.
356. Id. at 229.
357. TEX. PROP. CODE ANN. §§ 81.001-.210 (Vernon 1984).
358. 702 S.W.2d at 230.
359. Id. at 231-32.
360. Id. at 232.
361. 705 S.W.2d 211 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).
362. Id. at 214.
363. Id. at 213 (citing Preston Tower Condominium Ass'n v. S.B. Realty, Inc., 685 S.W.2d 98, 101 (Tex. App.—Dallas 1985, no writ)).
364. Id.
365. Id.
366. The proper test in determining whether the language of a private age restriction covenant is constitutional is "(1) whether the restriction under the particular circumstances of the case is reasonable, and (2) whether it is discriminatory, arbitrary, or oppressive in its application." Preston Tower Condominium Ass'n v. S.B. Realty, Inc., 685 S.W.2d 98, 101 (Tex. App.—Dallas 1985, no writ) (quoting White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346, 351 (Fla. 1979)).
367. 705 S.W.2d at 214.
owner purchased the property as a single adult and at that time agreed to the deed restrictions. The owner’s problems with the covenant arose later after she married and had a child.

L. Mineral Rights

Holland v. Kiper\textsuperscript{368} involved a conflict regarding the ownership of certain coal and lignite deposits. Plaintiff Holland granted the defendant title to property subject to a reservation of mineral rights. She asserted that she had retained such rights and that they included ownership of the coal and lignite. The court of appeals affirmed a jury verdict for the defendants.\textsuperscript{369} The court followed the case of Reed v. Wylie,\textsuperscript{370} which held that rights to near surface lignite are not retained by the grantor pursuant to a reservation of mineral rights if any reasonable method of production would destroy or deplete the surface.\textsuperscript{371} Further, if the surface owner establishes ownership of the mineral at or near the surface, he owns such minerals beneath the land at whatever depth it may be found.\textsuperscript{372} In the instant case strip mining operations had, in fact, destroyed surface land. The court took judicial notice of the fact that such open or strip mining provides, as a matter of law, a reasonable system for recovering coal and lignite located within 200 feet of the surface.\textsuperscript{373}

In Altman v. Blake\textsuperscript{374} an interest in a mineral fee stripped of some of its attributes did not render it a nonparticipating royalty interest. The Texas Supreme Court found that a mineral interest conveyed by deed was a mineral fee.\textsuperscript{375} The court held that the deed created a mineral fee even though it expressly stripped the interest of two of the five attributes of a severed mineral estate.\textsuperscript{376}

M. Slander of Title

In Ostarly v. Johnson\textsuperscript{377} landowners appealed a denial of damages to them in their successful slander of title action. The trial court granted the landowners a partial summary judgment after holding that the defendant had slandered title to the property in question, and the court quieted title in the landowners. The trial court refused to award actual or punitive damages.

\textsuperscript{368} 696 S.W.2d 588 (Tex. App.—Tyler 1984, writ ref’d n.r.e.).
\textsuperscript{369} Id. at 592.
\textsuperscript{370} 597 S.W.2d 743 (Tex. 1980).
\textsuperscript{371} Id. at 747 (a deposit that is within 200 feet of the surface is deemed near surface as a matter of law).
\textsuperscript{372} 696 S.W.2d at 591.
\textsuperscript{373} Id.
\textsuperscript{374} 712 S.W.2d 117 (Tex. 1986). For a discussion of the appellate court’s decision and its effect on deed construction see supra notes 250-57 and accompanying text.
\textsuperscript{375} Id. at 118-20. The court noted that there are five attributes of a severed mineral estate: “(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, (5) the right to receive royalty payments.” Id. at 118.
\textsuperscript{376} Id. at 118-19. The deed stripped the right to lease and the right to receive delay rentals. Id. at 118.
\textsuperscript{377} 700 S.W.2d 643 (Tex. App.—Corpus Christi 1985, no writ).
The appellate court affirmed. The court agreed with the trial court's finding that the judgment removing the cloud on title rendered the land marketable. It noted that the evidence offered by the landowners established only that one out of seven title companies in the city would not issue a title policy on the property. The court further stated that unavailability of a title policy fails to prove that the property is wholly unmarketable and, therefore, worthless. The court also held that the landowners had failed to show that they had suffered actual damages, which are calculated by deducting the market value of the land at the time of trial with the cloud on the title removed from the price that would have been realized had an actual sale not been thwarted.

378. Id. at 645.
379. Id. at 644.
380. Id.
381. Id.
382. Id. at 644-45.