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Real Property

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# REAL PROPERTY

*by*

Jesse B. Heath, Jr.* and Barton R. Bentley**

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The 1977 survey period included an enormous number of real property decisions, but the courts were even more prolific in the 1978 survey period. This Article discusses more than 150 of the real property cases reported during the 1978 survey period. Like the 1977 Property Article many of these cases provide little more than a review of basic real property law; significant new developments, however, did occur in such areas as title insurance, contracts, mortgages, usury, mechanic’s and materialmen’s liens, and landlord and tenant law. Additionally, a considerable amount of new legislation of interest to real estate lawyers is reviewed in this Article. The basic format used in the Survey articles of the previous four years has been followed. Topics such as homestead and community property, oil and
gas, and ad valorem taxation, which constitute major portions of other articles in this issue, are omitted from this Article. Further, due to the wealth of topics worthy of significant discussion, and in keeping with the previously established format, no discussion of cases concerning eminent domain is included.

I. TITLE PROBLEMS

A. Ownership and Boundary Disputes

Of the generally recognized methods of proving title, proof of title by adverse possession and proof of prior possession received the most attention in litigation during the survey period. The court in Bradley v. Bradley reaffirmed the general rule that possession by a life tenant is not adverse to the remainderman since the remainderman has no immediate right to possession of the property. Additionally, the possession by a tenant generally will not be adverse against his landlord; limitations, however, will begin to run in favor of a tenant when (1) the tenant repudiates the landlord-tenant relationship, and asserts a claim of right adverse to the owner, and (2) notice of the repudiation and adverse claim is given to the owner. In Cleveland v. Hens...
the court reversed the trial court's judgment that the tenant had perfected a limitation title under the ten-year statute, remanded the cause for a new trial, and held that there was no direct evidence of repudiation or notice of an adverse claim and that the jury's finding of repudiation and notice was contrary to the great weight and preponderance of the evidence.

In *Markgraf v. Salem Cemetery Association* suit was brought claiming title by adverse possession to a tract of land, the record title to which was held by a cemetery association. The court held that since the tract in dispute was part of a public cemetery and had not been abandoned, adjoining landowners could not perfect title by adverse possession.

Adverse possession need not be continuous in the same person, but may be held by different persons successively where there is a privity of estate between them. In *Doyle v. Ellis* the court held that the running of the ten-year statute of limitations was not interrupted by the claimant's sale of the tract to a third party and the subsequent foreclosure and repossession of the tract after the third party failed to pay the full purchase price. One of the issues in *McShan v. Pitts* concerned the tacking of the possessions of three of the defendant's predecessors in title. One of the defendant's predecessors never occupied the land, but had leased the land to another party who did occupy it. The court held that possession by a tenant is considered possession by his landlord for the purpose of maturing title by limitations.

A limitation claimant under article 5510, the ten-year statute, satisfies the requirement of cultivation, use, or enjoyment by putting the land to a use for which the land is adaptable and capable of being used. In a proper case use of the land as a pasture for grazing and raising horses and cattle is a sufficient use. When, as in *McShan v. Pitts*, however, an adverse claimant relies upon grazing as his only adverse use and possession, the claimant generally must show that the land in dispute was "designedly fenced." Although the defendant was permitted to tack the successive possessions of his predecessors in title, the defendant was unable to establish that during the ten-year period the strip of land in dispute was designedly fenced. The court, however, indicated that there may be an exception to the designedly

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11. The court found that a landlord and tenant relationship existed because the owner had consented to entry by the tenant, and the tenant entered the property in recognition of the owner's title. 548 S.W.2d at 475. See Emporia Lumber Co. v. Tucker, 103 Tex. 547, 131 S.W. 408 (1910).
13. Once land is dedicated as a cemetery and the existence of graves is indicated, as long as such land is recognized by the general public as a graveyard, it cannot be abandoned. Andrus v. Remmert, 136 Tex. 179, 146 S.W.2d 728 (1941).
16. The seller had retained a vendor's lien to secure payment of a promissory note given as part payment of the purchase price. When a default occurred, the seller obtained judicial foreclosure of the lien. The court held that this constituted a sufficient privity of estate between the seller and purchaser to continue possession in the seller for limitations purposes. Id. at 64.
fenced rule if there is sufficient evidence of "active and total use to the limits of a pasture's capacity and to the exclusion of all others, with a claimant's livestock continuously present and visible." The court found that the defendant established merely occasional grazing on the disputed strip. Accordingly, the defendant failed to establish adverse possession sufficient to overcome the plaintiff's proof of record title.

In Fant v. Howell the Texas Supreme Court held that when adverse possession ripened after the execution of a contract for deed, but before the execution and delivery of the deed, the purchaser was entitled to partial specific performance of the contract, with a reduction in the purchase price and a return of a pro rata portion of the interest paid by the purchaser.

Prior possession is sufficient proof of title when neither litigant is able to prove superior title under a regular chain of title or by adverse possession. Four cases decided during the survey period concerned the doctrine of prior possession. In Howland v. Hough the court held that in order to establish title by prior possession prior, exclusive, and peaceable actual possession must be shown. In Spinks v. Estes the holder of record title to a tract of land brought suit to recover possession, alleging that he had been wrongfully dispossessed. The court held that the plaintiff's prior possession of the property was sufficient since the defendants failed to prove title by limitations or otherwise. Phillips v. Wertz involved a dispute between neighboring landowners over a narrow strip of land between their properties, title to which stood in the name of the original developer of the subdivision. The jury found that the plaintiff was in possession of the land in question prior to the defendants, and additionally that the plaintiff had peaceable adverse possession of the strip continuously for ten years before the suit was filed. The case was remanded for a determination of the damages suffered by the plaintiff. Exemplifying the rule that continuous possession is essential to a claim of title by prior possession is the decision in F.L.R. Corp. v. Blodgett. The mortgagor F.L.R. brought suit in trespass to try title, claiming title to two tracts of land against its mortgagee who had purchased the tracts at a foreclosure sale. F.L.R. attempted to show title to a 167-acre tract under the doctrine of prior possession. The court, however, held that prior possession of the tract could not be established because, before the foreclo-
sure and dispossession of F.L.R. by the mortgagee, F.L.R. had conveyed the property to a third party and placed the third party in possession.

**F.L.R. Corp. v. Blodgett** also involved an attempt by F.L.R. to prove title to a 541-acre tract by tracing the title to a common source and showing that the mortgagee who purchased at the foreclosure sale held title under F.L.R. F.L.R. offered as proof the deed of trust given to the mortgagee covering the tract in question and the substitute trustee’s deed which stemmed out of the foreclosure under the deed of trust. These instruments, however, were offered for the limited purpose of proving a common source of title and “not for proof of title.” An instrument showing a common source of title generally will not be considered for the purpose of showing title, unless offered by the claimant as evidence of title. Accordingly, the court concluded that, although the evidence did prove F.L.R. parted with title to the tract, the trustee’s deed offered for a limited purpose failed to establish title in the mortgagee. The court further held that a mortgagee who has purchased the land at a foreclosure sale, whether or not such sale was irregular or void as to the mortgagor or one claiming under the mortgagor, and who has taken possession in reliance upon such foreclosure and purchase, is entitled to retain possession against the mortgagor, or one claiming under the mortgagor, until the mortgagor’s debt is paid. Since F.L.R. had not paid or offered to pay the indebtedness, the mortgagee was entitled to retain possession.

In **Allen v. Linam** the plaintiffs brought a trespass to try title action against the defendants who claimed under a sheriff’s deed stemming out of a 1928 judgment in a suit by the State of Texas for delinquent taxes. The plaintiffs challenged the regularity of the 1928 proceedings, alleging improper citation and failure to join necessary parties. The court held that, since the file in the 1928 case had been lost, it must be presumed that the proceedings were regular and that the statutory procedures for service were followed. The plaintiffs additionally claimed that, since the 1928 suit named as defendants the “heirs of the estate of Genie Allen” instead of the “heirs of Genie Allen,” the proceeding was void. The court rejected this

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29. See Jones v. Parker, 193 S.W.2d 863 (Tex. Civ. App.—Texarkana 1946, writ ref’d n.r.e.). When the claimant shows that the other party holds title under the claimant, the burden shifts to the other party to prove title superior to the claimant’s. Howard v. Masterson, 77 Tex. 41, 13 S.W. 635 (1890).

30. 541 S.W.2d at 213.

31. See Davis v. Gale, 160 Tex. 309, 330 S.W.2d 610 (1960); Tate v. Johnson, 140 S.W.2d 288 (Tex. Civ. App.—Fort Worth 1940, writ dism’d jdgmt cor.).

32. 514 S.W.2d at 214; see Willoughby v. Jones, 151 Tex. 435, 251 S.W.2d 508 (1952); Jasper State Bank v. Braswell, 130 Tex. 549, 111 S.W.2d 1079 (1938); Whalen v. Etheridge, 428 S.W.2d 824 (Tex. Civ. App.—San Antonio 1968, writ ref’d n.r.e.).

33. 551 S.W.2d 448 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.).

34. The defendants relied on two statutes in effect at the time of the proceeding, both of which have been repealed. Tex. Rev. Civ. Stat. Ann. art. 2040 (Vernon 1964) (repealed 1977), which has been replaced by Tex. R. Civ. P. 111, which provided that where property has passed to the heirs of any deceased person, and the names of such heirs are unknown to such claimant, anyone having a claim relating to the property may bring an action naming the heirs of the decedent as the defendants, and may effect service by publication. Additionally, Tex. Rev. Civ. Stat. Ann. art. 7342 (Vernon 1960) (repealed 1977), which has been replaced by Tex. R. Civ. P. 117a, provided for service on unknown heirs by publication in suits pertaining to foreclosure on land to collect taxes.

contention and held that the two phrases were equivalent for purposes of satisfying the requirements of article 2040 which has been repealed.\(^3\)

In *Root v. Mecom*\(^3\) the defendant attempted to establish title under the doctrine of parol gift of land.\(^3\) The purported donor, however, had executed a deed conveying the land in question to the plaintiff-trustee to be held in trust for the benefit of the defendant; the defendant knew of this conveyance and had accepted the benefits of the trust. The court held that in order to establish a parol gift of land the donee must show his possession was exclusive and adverse to the donor’s title, and there was a complete surrender of possession by the donor.\(^3\) Since the defendant knew of the deed to the trustee and accepted the benefits of the trust, the defendant’s possession was found insufficient to satisfy the requirements of a parol gift. Additionally, the court held that the defendant could not recover the value of improvements made on the land under the doctrine of mistaken improver, because the defendant, as beneficiary of the trust, was charged with constructive notice of the trustee’s record title,\(^4\) and because the defendant had actual notice of the trustee’s title.

*Slim v. Zobel*\(^4\) exemplifies some of the problems of proof which often face a plaintiff in a trespass to try title case. The trial court entered an instructed verdict that the plaintiffs had established title to the land in question. The court of civil appeals, however, held that the evidence had failed to prove the identities of the original patentees as a matter of law, and that the plaintiffs had failed to discharge their burden of properly identifying the land by establishing its location on the ground. The court held that as a matter of law expert testimony regarding the location of the disputed land was insufficient to establish its location. Additionally, the plaintiffs’ chain of title contained several deeds which recited that certain tracts of land were excepted. The court held that since in a trespass to try title case the plaintiff must recover on the strength of his own title,\(^4\) it was incumbent on the

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38. The doctrine of parol gift of land is based on estoppel and the prevention of fraud. The elements needed to establish a parol gift of land are: (1) a gift of land; (2) possession by the donee with the donor’s consent; and (3) permanent and valuable improvements made by the donee with the knowledge and consent of the donor. When no improvements are made, however, a parol gift may be established if the donee shows facts which would make the transaction a fraud on the donee were a gift not recognized. Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921). See also Clifton v. Ogle, 526 S.W.2d 596 (Tex. Civ. App.—Fort Worth 1975, writ ref’d n.r.e.).
39. 542 S.W.2d at 880. See generally Thurmon v. Atlantic Ref. Co., 336 S.W.2d 268 (Tex. Civ. App.—Dallas 1960), writ ref’d n.r.e.
42. 552 S.W.2d 899 (Tex. Civ. App.—Eastland 1977, no writ).
43. Hejv v. Wirth, 161 Tex. 609, 343 S.W.2d 226 (1961); Walters v. Pete, 546 S.W.2d 871 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.); Gilm v. Temple, 546 S.W.2d 361 (Tex. Civ. App.—Corpus Christi 1976, writ ref’d n.r.e.). This burden of proof often places the plaintiff in a trespass to try title action in the difficult position of losing title to the property for failing to come forth with adequate proof of title. For this reason plaintiffs often bring claims of title under such other procedures as a declaratory judgment action. Tex. Rev. Civ. Stat. Ann. art. 2524-1 (Vernon 1965); see Blackmon v. Parker, 544 S.W.2d 810 (Tex. Civ. App.—El Paso 1976), aff’d, 553 S.W.2d 623 (Tex. 1977). Plaintiffs often bring suit to remove a cloud from a
plaintiffs to prove that the land claimed did not fall within any of the exceptions. The court found that the plaintiffs had failed to establish that the disputed land was not included in any of the exceptions. Accordingly, since the plaintiffs had failed to carry their burden of proving title, the court reversed the judgment of the trial court and rendered judgment for the defendant.

Ownership and boundary disputes often arise in the context of suits for partition of real property. In Bunting v. McConnel the court affirmed the judgment of the trial court that five children had entered into an oral agreement for the partition of a fifty-acre tract of land devised to them by their mother. In Westhoff v. Reitz the controversy concerned certain partition deeds. The facts stated in the opinion are sketchy, but apparently the land in question was originally partitioned in 1921, and then repartitioned in 1948. A dispute arose between the heirs at law of one of the parties to both the 1921 and 1948 partitions, and the purchasers of a portion of the land. The court held that the partition deeds did not alter the character of the property as separate property of the decedent, and that the purchasers of the property were required to look beyond the 1948 partition deed to the decedent in order to ascertain the true status of title as it was affected by the 1921 partition. Finally, in Ventura v. Hunter Barrett & Co. the court held that the common elements in a condominium development are owned by the condominium owners as tenants in common.

B. Easements and Other Rights

1. Easements by Operation of Law.

Of the various methods of establishing an easement or right of way by operation of law, proof of an easement by prescription and proof of an


- See Mills v. Fits, 121 Tex. 196, 48 S.W.2d 941 (1932).

- 554 S.W.2d 30 (Tex. Civ. App.-Fort Worth 1977, writ ref'd n.r.e.).

- See generally Comment, Misconceptions of Parol Partitions in Texas in Light of Statute of Frauds Requirements, 23 Baylor L. Rev. 75 (1971). The agreement, however, must be a binding contract for the partition, not the sale, of the land. See Estate of Eberling v. Fair, 546 S.W.2d 329 (Tex. Civ. App.-Dallas 1976, writ ref'd n.r.e.).

- 554 S.W.2d 1 (Tex. Civ. App.-Fort Worth 1977, writ ref'd n.r.e.).

- The court stated that the peculiar terminology of the 1948 partition deed to the decedent was sufficient notice to cause a prudent person to look further down the chain of title for conveyances affecting title. The court noted that the purchasers were required to look not only in the chain of title, but also for conveyances so closely connected with the chain of title that the purchasers were charged with notice thereof.

- See generally Heath & Bentley (1977), supra note 2, at 31-32.

- The generally recognized methods for proving an easement by operation of law are by: (1) prescription; (2) implied easement or way of necessity; (3) estoppel; and (4) implied dedication to the public. See Davis v. Carriker, 536 S.W.2d 246 (Tex. Civ. App.-Amarillo 1976, writ ref'd n.r.e.).
implied dedication to the public\textsuperscript{53} received substantial attention during the survey period. \textit{Wiegand v. Riojas}\textsuperscript{54} and \textit{City of Houston v. Church}\textsuperscript{55} exemplify the general rule that establishment of a prescriptive easement requires a showing that the use of the easement was open, notorious, hostile, adverse, uninterrupted, and exclusive for a period of ten years or more.\textsuperscript{56} In \textit{Wiegand v. Riojas} the evidence established that the claimant had commenced his use of the easement with the permission of the servient owner, and not until 1973 or 1974 was this permission withdrawn. Permissive use cannot ripen into a prescriptive right unless there is "a distinct and positive assertion of a right which is brought home to the servient owner's attention and which is hostile to the owner's rights."\textsuperscript{57} The court found that the claimant had failed to establish all the elements necessary to show a prescriptive easement, and that under the facts, even if the permissive use was transformed into an adverse use, the ten-year period could not have run by the time of the trial in 1975. In \textit{City of Houston v. Church} a city water line broke under a building and caused flooding and property damage. The city had no express easement for the pipeline but sought to establish a prescriptive easement. The court held that the city had failed to establish the elements of a prescriptive easement, and that operation of the pipeline was a direct and continuous trespass.

\textit{Robinson Water Co. v. Seay}\textsuperscript{58} concerned the establishment of a road by prescription. A forty-five foot wide private roadway easement extended across two tracts owned by the defendants, who had placed a chain link fence across a portion of the easement, and had used that fenced portion as part of their front yard continuously since 1961. The court held that the defendants had occupied that portion of the easement inside the chain link fence openly, peaceably, and notoriously for more than ten years so that the private roadway easement inside the chain link fence was extinguished under the ten-year statute of limitations.\textsuperscript{59} The court, however, also found that the public had acquired a prescriptive right in the remainder of the roadway easement outside the chain link fence which was effective to

\textsuperscript{53} An implied dedication to the public is established by showing that the road in question was expressly or impliedly thrown open to the public, the public accepted the dedication by general and customary use, and the public will lose valuable rights if the road is closed. See O'Connor v. Gragg, 161 Tex. 273, 339 S.W.2d 878 (1960). See generally 2 G. THOMPSON, REAL PROPERTY §§ 369-374 (repl. ed. 1961).

\textsuperscript{54} 547 S.W.2d 287 (Tex. Civ. App.-Austin 1977, writ ref'd n.r.e.).

\textsuperscript{55} 554 S.W.2d 242 (Tex. Civ. App.-Houston [1st Dist.] 1977, writ ref'd n.r.e.).


\textsuperscript{57} 547 S.W.2d at 290; see Cleveland v. Hensley, 548 S.W.2d 473 (Tex. Civ. App.—Texarkana 1977, no writ), discussed at notes 9-11 supra and accompanying text.

\textsuperscript{58} 545 S.W.2d 253 (Tex. Civ. App.—Waco 1976, no writ).

Extinguish that portion of the private easement and establish a public roadway. Additionally, the court held that the public roadway by prescription should not be limited to the beaten path, but should be extended to include sufficient land for drainage ditches, repairs, and the convenience of the traveling public.\(^6\)

The case of *Garza v. Garza*\(^6\) provides a virtual guidebook to the theories of implied dedication. In that case the landowner had previously requested the county to lane and fence part of a private road on his land, which the county agreed to do. Later, the landowner asked the county to close the road, but the county declined. The road was maintained with county funds continuously for twenty-five years, used by county school buses, and generally was openly, visibly, and continuously used and recognized by the public for over twenty-five years. The court held that the road was a public road by reason of an implied dedication,\(^6\) noting that the act of throwing open property to public use, without any particular formality, is sufficient to establish a dedication to the public; if individuals in consequence of such a dedication acquire an interest in having the property remain open to the public, the owner cannot resume his possession.\(^6\)

One common situation where an implied dedication could be established,\(^6\) which could also give rise to an easement by estoppel, was exemplified in *Barron v. Phillips*,\(^6\) which stated the general rule that when a purchaser buys a lot with reference to a map or plat showing an abutting street or roadway, the purchaser acquires a private easement in such street regardless of whether the street has ever been opened or dedicated to the public.\(^6\) By virtue of such private easement, the purchaser has the right to keep the street open and to make reasonable use of it.

In *MGJ Corp. v. City of Houston*\(^6\) the city attempted to establish an easement under several theories. A theatre owner held an easement over an adjacent parking lot under a deed from the grantor who had conveyed another lot adjacent to such parking lot to a third party, who in turn had conveyed the lot to the city. No easement in the parking lot, however, was granted in the chain of conveyances to the city. The court held that the city had acquired no easement for use of the parking lot under the deed to the theatre owner, and, because the city was a stranger to the transaction between the original grantor and the theatre owner, the city could not claim

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\(^{60}\) See Nonken v. Bexar County, 221 S.W.2d 370 (Tex. Civ. App.—Eastland 1949, writ ref’d n.r.e.).

\(^{61}\) 552 S.W.2d 947 (Tex. Civ. App.—Tyler 1977, no writ).

\(^{62}\) See O’Connor v. Gragg, 161 Tex. 273, 339 S.W.2d 878 (1960); Dunn v. Deussen, 268 S.W.2d 266 (Tex. Civ. App.—Fort Worth 1954, writ ref’d n.r.e.). The theory of implied dedication is based on the notion that the owner consented to the use of his land as a public road. See Mallett v. Houston Contracting Co., 388 S.W.2d 216 (Tex. Civ. App.—Beaumont 1965, writ ref’d n.r.e.).


\(^{65}\) 544 S.W.2d 752 (Tex. Civ. App.—Texarkana 1976, no writ).


\(^{67}\) 544 S.W.2d 171 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref’d n.r.e.).
an easement by estoppel. Finally, the city was unable to prove an implied easement appurtenant since the original grantor, who had conveyed the easement to the theatre owner, had retained title to the tract ultimately conveyed to the city. An implied easement appurtenant requires that there be a dominant and a servient estate in tracts of land owned separately by two or more individuals.

2. Express Easements.

A recurring theme in litigation involving express easements is the scope and extent of rights granted in an express easement. In Reeves v. Arkansas-Louisiana Gas Co. a pipeline easement granted the company a right of way "to lay, maintain, alter, repair, operate and remove pipe lines . . . ." The company was engaged in replacing the original pipeline and laying a new line approximately ten feet from the old line, when the landowners blocked the company's access to the easement. The company sued and successfully enjoined the landowners from interfering with the construction of the pipeline. On appeal, the court held that by using the word "lines," the easement contemplated more than one line, and thus the trial court had not abused its discretion by issuing a temporary injunction. In Phillips Pipe Line Co. v. Clear Creek Properties, Inc. the court held that a twenty-foot pipeline easement which gave the defendant the right to "lay, construct, reconstruct, replace, renew, maintain, repair, change the size of, and remove pipes and pipe lines . . . .," and also granted "rights of ingress and egress to and from" the pipelines, did not authorize the defendant to clear vegetation or otherwise use land outside the twenty-foot strip, except for ingress and egress.

Vrabel v. Donahoe Creek Watershed Authority reaffirms the rule that an express easement must contain a legally sufficient description of the easement. Here the description merely stated that the easement covered "111.0 acres, more or less, out of a 250.5 acre tract . . . .", and then went on to

68. The court cited Cone v. Cone, 266 S.W.2d 480 (Tex. Civ. App.—Amarillo 1953), writ dism'd per curiam, 153 Tex. 149, 266 S.W.2d 860 (1954).
69. See Fleming v. Adams, 392 S.W.2d 491 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).
70. 553 S.W.2d 19 (Tex. Civ. App.—Texarkana 1977, no writ).
71. Id. at 20 (emphasis in original).
72. Id. at 21.
73. 553 S.W.2d 389 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
74. Id. at 391.
75. Id. at 392. Additionally the pipeline company claimed that it had the power of eminent domain to condemn land for "temporary working space" under TEX. BUS. CORP. ACT ANN. art. 2.01(B)(3)(b) (Vernon Supp. 1978) and TEX. REV. Civ. STAT. ANN. art. 6022 (Vernon 1962). The court rejected this contention and held that neither statute authorized the condemnation of land for "temporary working space." 553 S.W.2d at 392-93.
76. 545 S.W.2d 53 (Tex. Civ. App.—Austin 1976, no writ).
77. There must be a description sufficient to enable a surveyor to locate the easement. Compton v. Texas S.E. Gas Co., 315 S.W.2d 345 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.). It has long been established, however, that certain unlocated easements are valid. See Armstrong v. Skelly Oil Co., 81 S.W.2d 735 (Tex. Civ. App.—Amarillo 1935, writ ref'd). The property, of course, must be sufficiently described; when the facility is installed, the easement is located and becomes limited in scope. Houston Pipe Line Co. v. Dwyer, 374 S.W.2d 662 (Tex. 1964). The rationale for permitting unlocated easements is that the right to select a location for the facility makes unnecessary the determination of location of the easement. See Armstrong v. Skelly Oil Co., 81 S.W.2d 735 (Tex. Civ. App.—Amarillo 1935, writ ref'd).
78. 545 S.W.2d at 54.
more fully describe the 250.5 acre tract by reference to other instruments. The court held that the easement was void for lack of a sufficient description.

_Saunders v. Alamo Soil Conservation District_79 involved a suit to set aside a contract for an easement over the plaintiffs' land because of fraud. The court held that fraud does not render an agreement void, but merely voidable at the instance of the defrauded party.80 Since the suit was not filed until more than eight years after the fraud should have been discovered, the suit was barred by the four-year statute of limitations.81 The plaintiffs also contended that the easement had terminated automatically because of the defendant's failure to commence construction of certain improvements within five years as required by the contract, and that, accordingly, the defendant was trespassing on the plaintiffs' land. The court stated that in order for the failure of the condition to bring about an automatic termination of the easement without any action by the plaintiffs, the clause must be construed to have created a special limitation on the interest created. The court, however, held that since the instrument imposed an obligation on the grantee to see that the stated condition did not occur, the clause was a condition subsequent and not a special limitation.82 In order to terminate the easement, the grantor must reenter or take some equivalent action.83 The plaintiffs failed to do this, and, thus, the easement continued and the defendant's actions could not be a trespass.84

The rededication of a street was the subject of _Waterbury v. City of Katy_.85 The original plat of the subdivision showed the street in question, but it had never been constructed or used by the public, and the plat had been cancelled by the Harris county commissioners in 1912. The plaintiff landowner brought suit seeking a temporary injunction enjoining the city from constructing or using the street across the plaintiff's property. The city argued that the 1969 deed to the plaintiff, describing the plaintiff's property by reference to the cancelled recorded plat, constituted a rededication of the street as shown on the plat.86 The court stated that a reference to a plat for the purpose of describing the property conveyed does not constitute a

79. 545 S.W.2d 249 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).
80. Id. at 251.
82. 545 S.W.2d at 252. For a general discussion of the distinction between conditional limitations and conditions subsequent, see Heath & Bentley (1977), supra note 2, at 34. In cases of doubt a construction giving rise to a condition subsequent will be favored as less burdensome on the grantee than a conditional limitation. Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887 (Tex. 1962).
84. 545 S.W.2d at 253.
86. 541 S.W.2d 654 (Tex. Civ. App.—Eastland 1976, no writ).
87. The city cited Adams v. Rowles, 149 Tex. 52, 228 S.W.2d 849 (1950); City of Corsicana v. Zorn, 97 Tex. 317, 78 S.W. 924 (1904). The plaintiff argued that these cases were not in point because there was no privity between the parties. The plaintiff also argued that the reference in the deed to the original plat was solely for descriptive purposes and not intended to rededicate the street. 541 S.W.2d at 655.
rededication unless it was so intended. The court held, however, that the reference in the deed to the original plat constituted some evidence of intent to rededicate the street, and thus the trial court's implied finding of rededication was supported by sufficient evidence so that the denial of a temporary injunction was held not to be an abuse of discretion.


In _Port Acres Sportsman's Club v. Mann_ a portion of the plaintiff's property, submerged with shallow waters from a navigable stream, had been used by the defendants for fishing. The plaintiff brought suit to enjoin the defendants from fishing those waters. The court held that, although the plaintiff retained title to the submerged lands, the plaintiff could not block the public's access to free use of the waters from a navigable stream.

_Langford v. Kraft_ concerned the measure of damages for the wrongful diversion of surface water onto the lands of another, temporarily damaging the land, and the liability of the engineer who drew the plans for the development. The court held that the proper measure of damages was the cost of restoration plus compensation for loss of use, and considered the circumstances under which liability for such damages would attach. The court stated that if there was an unintentional but substantial invasion of another's land because of interference with the flow of surface water, liability would depend on whether the conduct was negligent, reckless, or ultrahazardous. On the other hand, if the invasion was intentional, liability would turn on whether the invasion was unreasonable. The court decided that a professional engineer engaged in the planning of the venture for a fee could be held liable under these rules for diversion of water caused by the implementation of his plans.

The first case in Texas regarding liability of a landowner for damages for subsidence of another's lands caused by the withdrawal of underground waters was reported during the survey period. In _Smith-Southwest Industries v. Friendswood Development Co._ the controversy centered around the

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87. See McCarver v. City of Corpus Christi, 155 Tex. 153, 156, 284 S.W.2d 142, 142-43 (1955).
88. 541 S.W.2d 847 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).
89. The jury found that the bayou flowing through the property was a navigable stream within the meaning of _Tex. Rev. Civ. Stat. Ann._ art. 5302 (Vernon 1962).
91. The plaintiffs also contended that the Relinquishment Act, _Tex. Rev. Civ. Stat. Ann._ art. 5414a (Vernon 1962), confirmed in the plaintiffs not only title to the land, but also the exclusive right to fish the waters on the land: The court, however, held that even if art. 5414a had confirmed plaintiff's title, it had not granted the plaintiffs such fishing rights. 541 S.W.2d at 850.
95. _Id._
96. The court applied the doctrine of strict liability in tort to the engineer. 551 S.W.2d at 396-97.
rights of a landowner to extract and use percolating waters beneath his land.\textsuperscript{98} Under the so-called "American" rule a landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his property, with due regard for the rights of others.\textsuperscript{99} Under the "common law" or "English" rule, however, the landowner's rights are absolute and he may withdraw ground water to any extent.\textsuperscript{100} The court of civil appeals ruled that although Texas follows the English rule of absolute ownership,\textsuperscript{101} this rule does not sanction negligent conduct by a landowner or the maintenance of a nuisance in fact\textsuperscript{102} in the withdrawal and use of ground water.\textsuperscript{103} The court stated:

Because of a landowner's absolute right to take all of the water which he can produce from his land, the fact that this taking causes the land of others to subside will not, standing alone, give them a cause of action. But if the landowner is negligent in the manner by which he produces the water, and the negligence is a proximate cause of the subsidence of another's land, the fact that he owns the water produced will not insulate him from the consequences of his negligent conduct.\textsuperscript{104}

Accordingly, the court of civil appeals held that the plaintiffs had stated a cause of action under the theories of negligence and nuisance in fact, and remanded the case for trial on these issues. The Texas Supreme Court has granted writ of error in this case.\textsuperscript{105}

\textit{City of Corpus Christi v. Nueces County Water Control & Improvement District No. 3}\textsuperscript{106} involved a suit for declaratory judgment for construction of the various water rights of the parties. The facts are extremely complex and raise a multitude of issues regarding the extent of the appropriative rights\textsuperscript{107} of the various parties under certain permits and certified filings issued under the Burgess-Glasscock Act of 1913.\textsuperscript{108} In addition to rights under the various permits and filings the city of Corpus Christi claimed that certain water rights had been acquired by prescription. A prescriptive right to the use of water may be acquired only through continuous, adverse, and hostile use of the water, or use of an open and notorious character. Such use must continue without interruption for the entire prescriptive period,\textsuperscript{109} and the owner whose rights are involved\textsuperscript{110} must receive actual or constructive

\textsuperscript{98} As a general rule a landowner owns all ordinary springs and waters arising on his land as well as the water beneath the surface. \textit{Barley v. Sone}, 527 S.W.2d 754 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.). \textit{See generally Heath & Bentley (1977), supra note 2 at 31. This rule, however, does not apply to subterranean streams or the underflow of rivers. \textit{Tex. Water Code Ann.} § 52.001(3) (Vernon 1972).


\textsuperscript{101} \textit{City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292, 276 S.W.2d 798, 801 (1955).

\textsuperscript{102} \textit{See Storey v. Central Hide & Rendering Co.}, 148 Tex. 509, 226 S.W.2d 615 (1950).

\textsuperscript{103} 545 S.W.2d at 897.

\textsuperscript{104} Id.

\textsuperscript{105} 20 Tex. Sup. Ct. J. 413 (July 9, 1977).

\textsuperscript{106} 540 S.W.2d 357 (Tex. Civ. App.—Corpus Christi 1976, no writ).


\textsuperscript{108} 1913 Tex. Gen. Laws ch. 171, § 1, at 358.

\textsuperscript{109} A three-year limitation period is applicable to the acquisition of permanent water rights under \textit{Tex. Water Code Ann.} § 5.029 (Vernon 1972). The period for an adverse user is ten years after the cause of action accrues. \textit{Martin v. Burr}, 111 Tex. 57, 228 S.W. 543 (1921).

notice. Additionally, there must be such an invasion of another’s water rights as to give rise to a cause of action. This prescriptive right involves hostility to the rights of the lawful owner and results in injury and detriment to the owner whose right is prescribed. The court stated that there was no evidence of such hostility by the city resulting in injury to the other party. The court also held that prescription does not run upstream, and, since the city’s diversion point was downstream from that of the other party, a prescriptive right could not exist.

C. Effect of Conveyances

The meaning of the term “other minerals” which often appears in mineral reservations in deeds was the subject of judicial construction during the survey period. The Austin court of civil appeals in DuBois v. Jacobs followed the 1971 Texas Supreme Court decision of Acker v. Guinn and held that when a deed reserves “oil, gas and other minerals,” no interest will be reserved “in substances that must be produced in such manner as to destroy, deplete, consume, or substantially impair the surface.” In Reed v. Wylie the Texas Supreme Court clarified and expanded the rule of Acker v. Guinn, holding that the surface owner would be entitled to the coal and lignite on or under the land only if he could prove that, as of the date of the instrument in question, the only commercially feasible method of producing the substance at or near the surface depths would have consumed or depleted the surface estate. Chief Justice Greenhill concurred in the result in Reed v. Wylie, but stated that a better rule would have been that a substance is not a mineral if any reasonable method of production would destroy or deplete the surface estate. Justice Daniels dissented, stating that he would hold that substances such as sand, gravel, limestone, iron ore, and near-surface lignite are not minerals because they form so much a part of the soil that they are a part of the surface.

The effective date of a deed was the issue in Rogers v. Gunn. The deed was executed and dated when the grantee was single, but was not acknowledged by the grantor and her husband until after the marriage of the grantee. The court held that, when a deed has one date and the acknowledgment a who asserts a water right by virtue of adverse use must prove satisfactorily and unequivocally the elements that constitute adverse use. 60 TEX. JUR. 2d Waters § 123 (1964).


113. 540 S.W. 2d at 376. See Mud Creek Irrigation, Agriculture & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S.W. 1078 (1889). In a related issue the court held that the city had failed to show an abandonment of the water rights. The court noted that an essential element of abandonment is the intention to abandon. 540 S.W. 2d at 376. See Lower Nueces River Water Supply Dist. v. Cartwright, 274 S.W. 2d 199 (Tex. Civ. App.—San Antonio 1954, writ ref’d n.r.e.).

114. See generally Comment, Is Coal Included in a Grant or Reservation of “Oil, Gas or Other Minerals”? 30 Sw. L.J. 481 (1976).


116. 464 S.W. 2d 348 (Tex. 1971).

117. 551 S.W. 2d at 150.

118. 554 S.W. 2d 169 (Tex. 1977). See Maroney, Oil & Gas Interests, 30 Sw. Legal Foundation 77 (1977).

119. 554 S.W. 2d at 174.

120. Id. at 182.

121. 545 S.W. 2d 861 (Tex. Civ. App.—Amarillo 1976, no writ).
different date, the deed is presumed to have been delivered on the date of its execution, in the absence of actual proof showing a different date of delivery. The plaintiffs also argued that under article 1299, now repealed but in effect at the time of the conveyance, the deed was not effective until acknowledged by the married grantor. The court rejected this argument, holding that when the privy acknowledgement was made the title related back to the date of execution and delivery of the deed.

In *Pebsworth v. Behringer* the court restated the rule that a deed to land abutting a railroad right-of-way is construed as intending to convey title to the center line of the right-of-way, unless a contrary intention is expressed in the instrument. Reformation of a deed will not be granted when the rights of a bona fide purchaser would be disturbed. Additionally, as exemplified by *Walters v. Pete*, the burden of proof is on the party attacking the legal title, and asserting a superior equity because of a mistake in a prior deed, to show that the holder of legal title is not a bona fide purchaser. The four-year statute of limitations is also applicable to actions for reformation of deeds. The statute does not run against a purchaser in actual possession; he may have a mistaken description reform- ed to conform to the original intent of the parties. Where a party is dispossessed of the property, however, the period of limitations commences to run, and the failure to file suit within four years bars a claim for reformation.

*Olivas v. Zambrano* concerned the termination of a fee simple estate on condition subsequent relating to the furnishing of water and the operation and maintenance of a water works system for a period of three years. The grantor had taken a deed to the property back from the grantee prior to the expiration of the three-year period of the grant because of a failure of the condition subsequent. The remaindermen later brought suit for title and possession, arguing that there had never been a reentry by the grantor. The court rejected this contention and held that when the grantor took the deed

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128. 546 S.W.2d 871 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.).


133. 546 S.W.2d at 875.


135. *See generally* *Heath & Bentley* (1977), *supra* note 2, at 34.
back from the grantee, there was a merger of two estates which destroyed the contingent remainder.\textsuperscript{136} 

The doctrine of resulting trust\textsuperscript{137} was again the subject of litigation during the survey period.\textsuperscript{138} In \textit{Hernandez v. Simbeck}\textsuperscript{139} a father brought an action against his daughter to impress a resulting trust on a certain lot which he had purchased in her name at a sheriff's sale, ostensibly for the purpose of keeping the property out of his community estate and to avoid estate and inheritance taxes upon his death. The court of civil appeals affirmed the trial court's finding that the father had made a gift of the lot of his daughter, and thus there could be no resulting trust.\textsuperscript{140}

A constructive trust usually arises out of fraud or overreaching. Such a trust may be impressed on property in order to hold the owner accountable as trustee, thus preventing him from personally retaining an advantage gained through a fiduciary relationship, and preventing unjust enrichment.\textsuperscript{141} \textit{Douglas v. Neill}\textsuperscript{142} involved two long-standing friends who had decided to purchase jointly a tract of land. At what Douglas believed to be the closing of this transaction, and without reading or otherwise examining the instrument, Douglas signed and acknowledged what he later discovered was a general warranty deed by which he had conveyed a tract of land he owned to Neill. When Douglas later discovered what had occurred, he brought suit seeking cancellation of the deed and the imposition of a constructive trust. The trial court directed a verdict for the defendant and entered a take nothing judgment. The court of civil appeals, however, reversed and remanded, holding that there were fact questions for the jury concerning whether the relationship between Douglas and Neill was that of joint venturers, thereby creating a confidential relationship.\textsuperscript{143} Additionally, the court held that since Douglas had alleged that he had received no consideration for the deed, an offer to restore the benefits received was not a prerequisite to a suit for cancellation of the deed.\textsuperscript{144} This result should be contrasted with the

\textsuperscript{136} 543 S.W.2d at 182. Although merger cannot destroy a vested remainder, the court found that, since the deed-back occurred before the three years had passed and before the obligation had been completed, no estate had vested in the remaindermen. \textit{Id}.

\textsuperscript{137} A resulting trust may arise when a party purchases land, but takes title in the name of another, and in other limited circumstances. See Sheldon Petroleum Co. v. Peirce, 546 S.W.2d 954 (Tex. Civ. App.—Dallas 1977, no writ). See generally Heath & Bentley (1977), \textit{supra} note 2, at 36.

\textsuperscript{138} During the previous survey period this doctrine was the focal point of \textit{Bell v. Smith}, 532 S.W.2d 680 (Tex. Civ. App.—Fort Worth 1976, no writ). See the discussion of \textit{Bell} in Heath & Bentley (1977), \textit{supra} note 2, at 36-37.

\textsuperscript{139} 553 S.W.2d 13 (Tex. Civ. App.—San Antonio 1977, no writ).

\textsuperscript{140} \textit{Id.} at 15.


\textsuperscript{142} 545 S.W.2d 903 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.).

\textsuperscript{143} See Gaines v. Hamman, 163 Tex. 618, 358 S.W.2d 557 (1962); Mills v. Gray, 147 Tex. 33, 210 S.W.2d 985 (1948).

\textsuperscript{144} 545 S.W.2d at 907. The court also held that there was a jury question as to whether Neill had abused the confidential relationship of a joint venturer with such artifice and concealment to toll the statute of limitations which would have otherwise run. The court noted, however, that the existence of a confidential relationship does not free a defrauded person from exercising diligence to discover fraud. Reasonable diligence is ordinarily a question of fact for a jury. \textit{See Brownson v. New}, 259 S.W.2d 277 (Tex. Civ. App.—San Antonio 1953, writ dism’d).
general rule, stated in *Finch v. McVea*,¹⁴⁵ that a party will not be permitted both to repudiate an instrument because of fraud and also to retain the benefits received under such instrument.¹⁴⁶ In *Glasscock v. Citizens National Bank*,¹⁴⁷ the court held that section 24.02(a) of the Texas Business and Commerce Code,¹⁴⁸ regarding fraudulent conveyances, clearly provided two distinct grounds of recovery. Consequently, a jury finding that a conveyance had been made with intent to hinder or delay the creditor was not in conflict with another finding that the conveyance had been made with intent to defraud the creditor.

**D. Title Insurance**

There were three important decisions in the area of title insurance during the survey period; each concerned the measure of liability of the title insurer. The disposition by the Texas Supreme Court in *Stone v. Lawyers Title Insurance Corp.*¹⁴⁹ left unanswered many of the questions raised in the court of civil appeals' decision¹⁵⁰ which was discussed in the 1977 Property Survey Article.¹⁵¹ In that case the purchaser of a tract of land sued the title insurer, the title insurance agency, its president, and the real estate broker, but not the grantor, to recover damages resulting from certain gas pipeline easements which, although listed as exceptions in the title report prepared for the title insurance agency, were not listed in the owner policy issued by Lawyer's Title. The supreme court agreed with the court of civil appeals that the insured was entitled to recover a portion of the whole liability based on the ratio of the value of the adverse claim to the value of the entire estate without regard to such title exceptions.¹⁵² The purchaser, however, also claimed that the title insurance agency and its president were negligent and had committed fraud in failing to inform the purchaser of the contents of the title report. The court of civil appeals had affirmed a take nothing judgment on these issues, holding that there was no duty on the part of the agency or its president to disclose title defects to the purchaser, that there was no evidence supported by the pleadings that the status of title of the property had been misrepresented, and that no cause of action had been stated. The Texas Supreme Court reversed and remanded on these points. The court stated that there was some evidence of misrepresentation, and that a cause of action had been alleged against the agency and its president for fraud in

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¹⁴⁵. 543 S.W.2d 449 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).
¹⁴⁶. The court stated that the primary purpose of a suit to cancel an instrument obtained by fraud is to “undo” the fraud and place the parties in their original positions. *Id.* at 452. The court cited *Howard v. Burkholder*, 281 S.W.2d 764 (Tex. Civ. App.—Amarillo 1955, writ dism'd). Therefore, if relief is to be granted, any benefits received must be restored in order to return the parties to their original positions. *See* *Freyer v. Michels*, 360 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1962, writ dism'd); *Arnold v. Wheeler*, 304 S.W.2d 368, 370 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).
¹⁴⁷. 553 S.W.2d 411 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).
¹⁴⁸. TEX. BUS. & COMM. CODE ANN. § 24.02(a) (Vernon 1968).
¹⁴⁹. 554 S.W.2d 183 (Tex. 1977).
¹⁵². For example, if the amount of the policy equals the value of the estate insured, the loss recoverable is simply the value of the outstanding interest. *See* *Southern Title Guar. Co. v. Prendergast*, 494 S.W.2d 154, 157 (Tex. 1973).
knowingly and recklessly misrepresenting that the property was free of pipeline easements. In so holding, the Texas Supreme Court did not comment on the statement of the court of civil appeals that the title insurance agency had no duty to disclose the known title defects.\textsuperscript{153}

A case which clarifies the method for determining the value of outstanding interests and the extent of the liability of the title insurer, in addition to presenting some other interesting issues, is \textit{Southwest Title Insurance Co. v. Plemons}.\textsuperscript{154} The insureds purchased certain property in Hunt County, Texas, and obtained an owner policy from Southwest Title. Shortly thereafter the insureds entered into a contract of sale with a third party; the sale, however, was never closed because of the disclosure of the existence of two drainage easements. These easements were not listed as exceptions in the owner policy. The insureds brought suit against the title insurance company and recovered a judgment for $77,440 based on the formula set forth in \textit{Southern Title Guaranty Co. v. Prendergast}\textsuperscript{155} and reiterated in \textit{Stone v. Lawyers Title Insurance Corp.}.\textsuperscript{156} The title insurance company, however, argued that, in applying the formula, the value of the outstanding easements should be determined apart from the rest of the property. The court disagreed and held that the value is the difference between the market value of the property without the easements and market value with the easements.\textsuperscript{157}

The standard owner policy used in Texas provides that title defects known to the insured at the date of the policy are exceptions to the coverage. The title insurance company argued that the insureds knew or should have known of the outstanding drainage easements. Both the deed to the insureds and the title report, however, failed to mention the easements, and there was testimony that the easements were not visibly apparent on the surface of the property.\textsuperscript{158} Accordingly, the court rejected this contention of the title insurer and held that there was no evidence of either actual or constructive notice. Another issue concerned the recovery of attorney’s fees. The standard owner policy literally permits recovery of attorney’s fees only in actions against third parties in which the insurer is obligated to defend. The Texas Supreme Court, however, has held that, despite the actual wording of the owner policy, an insured is entitled to attorneys’ fees in a suit against the insurer for failure to cure defects.\textsuperscript{159} Accordingly, the court affirmed the trial court’s award of $25,000.00 in attorney’s fees. Finally, the court modified the award of damages since one of the original insureds had conveyed one-half of his interest to another party. The standard owner policy provides

\begin{itemize}
  \item \textsuperscript{153} The Texas Supreme Court affirmed the decision of the court of civil appeals on all other points. This included the holding that, as to the real estate agent, the case should be remanded for a jury determination of whether he recklessly represented to the purchaser that no pipeline easements existed and whether any such representation was made with the intent that the purchaser rely thereon.
  \item \textsuperscript{154} 554 S.W.2d 734 (Tex. Civ. App.—Dallas 1977, no writ).
  \item \textsuperscript{155} 494 S.W.2d 154 (Tex. 1973).
  \item \textsuperscript{156} See notes 149-53 supra and accompanying text.
  \item \textsuperscript{157} The court stated that this measure prevailed over the mere valuation of the easements because channel or drainage easements are not susceptible to market valuation. 554 S.W.2d at 736.
  \item \textsuperscript{158} Easements must be open and visible to an observing purchaser in order to place him on notice. \textit{Shaver v. National Title & Abstract Co.}, 361 S.W.2d 867 (Tex. 1962).
  \item \textsuperscript{159} \textit{Id.} at 871.
\end{itemize}
that on the sale of the insured's interest the policy converts to a warrantor's policy. Since no claim was made on a warrantor's policy, the amount of the owner policy coverage was reduced by the value of the interest conveyed.

In *Southwest Title Insurance Co. v. Northland Building Corp.* the Texas Supreme Court considered the liability of a title insurer under a mortgagee policy because of additional indebtedness secured by a prior lien under a "dragnet" or "other indebtedness" clause in a prior deed of trust. The facts indicated that Northland had made a loan to a third party which was secured by a junior lien on certain real property. Among the conditions to the closing of the loan was the requirement that the borrower furnish "estoppel" letters from the holders of indebtedness secured by prior liens, specifying the current balances of such indebtedness. At the closing the borrower delivered two estoppel letters which later proved to be forgeries. When the borrower later defaulted, Northland learned that the estoppel letters had been forged, and that as a consequence of the dragnet clause the outstanding indebtedness secured by a prior deed of trust lien was considerably more than the amounts stated in the forged estoppel letters. Northland brought suit claiming that the title insurance company and the attorney who had closed the loan were liable for dispensing the loan funds in violation of the condition that valid estoppel letters be furnished. Northland also claimed that the title insurance company was liable for failure to disclose the existence of the dragnet clause in the prior deed of trust, and, additionally, under the mortgagee policy on the theory that the policy insured against the existence of any prior secured indebtedness other than the listed exceptions.

The court of civil appeals held that Southwest Title was liable to Northland for releasing the loan funds without obtaining valid estoppel letters. The Texas Supreme Court, however, disagreed and stated that, even if the loan conditions had required the closer or his principal to guarantee the estoppel letters, there was no evidence of actual or apparent authority on the part of the closer to "conduct and accept responsibility for" the satisfaction of the conditions of the closing. The court of civil appeals had stated that "the title policy should have revealed the existence of 'dragnet' clauses" in the prior liens. This statement raised considerable concern regarding the role of title insurance and title companies with respect to disclosure of the legal effect of all the detailed provisions of a prior deed of trust. The supreme court clarified this issue. Under the approach taken by the supreme court, the issue was not whether there was a duty to disclose, but rather what was excepted from coverage under the mortgagee policy. Southwest Title argued that all the provisions of prior deeds of trust, including any dragnet clauses, were excepted from coverage by the reference to them in the mortgagee policy. The supreme court stated that, although exceptions from coverage may be provided by reference to instruments without setting forth the contents of those instruments, such was not the case here. The

160. 552 S.W.2d 425 (Tex. 1977).
162. 552 S.W.2d at 428.
163. 542 S.W.2d at 455.
court examined the language of the exceptions in the policy and concluded that there was no statement that the coverage was subject to the deeds of trust, rather the exceptions only specified the indebtedness (i.e., certain notes) secured by liens. Since the exceptions were limited to liens securing the listed indebtedness, the court held that there was no exception with regard to additional unlisted indebtedness which may also have been secured by those liens. Accordingly, the court held that Northland had proved a defect in its lien against which Southwest Title had insured.

Finally, the Texas Supreme Court considered the damages recoverable under the mortgagee policy. Southwest Title was bound under the policy to reimburse Northland for any loss suffered due to an impairment of its security not listed as an exception in the policy. The court stated that Northland could have brought suit “for the difference in the market value of the insured equity less the market value of the actual equity,” but that Northland was not limited to that measure of damages. The insured may always recover the actual loss. In no event, however, is the insured entitled to recover in excess of its unpaid indebtedness, or the market value of the equity insured, or the policy amount; and, as the court noted, payment of the note was not insured. The supreme court then held that the damages awarded Northland were erroneous because the judgment exceeded the policy amount and because Northland had failed to prove a loss due to the undisclosed indebtedness. Accordingly, the claim by Northland on the mortgagee policy was severed and remanded for trial.

In the 1977 Property Article it was reported that the State Board of Insurance considered, but did not adopt, a rule change which would have prohibited the deletion of the standard printed exception for “discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or any overlapping of improvements” from all future owner and mortgagee title policies issued in Texas. During this survey period the board did adopt amendments to the rules which now provide that this exception may be deleted except with respect to “shortages in area.” Additionally, the board is considering proposed Rate Rule R-18 which would provide that when a mortgagee policy has been issued insuring the lien of a construction loan which is to be “taken up” by a new loan, the premium for issuance of a mortgagee policy on the new loan shall be at the basic rate, plus the minimum premium rate, less the premium paid for the policy on the construction loan; provided that the charge for the new policy shall in no event be less than the regular minimum premium rate.

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164. 552 S.W.2d at 430. The court stated that this measure determined the effect upon the market value of the security due to the undisclosed lien or indebtedness.

165. See Heath & Bentley (1977), supra note 2, at 39-40. This exception appeared as item 2 in schedule B of both policies. The mortgagee policy, however, added to the quoted language of the qualification “which a correct survey would show.” Until recently this exception could be deleted in its entirety upon a complete on-the-ground survey by a surveyor acceptable to the title company and, in the case of an owner policy only, the payment of an additional premium in an amount equivalent to fifteen percent of the basic rate, with a minimum premium of $20.00. See Procedural Rule P-2 and Rate Rule R-16, BASIC MANUAL OF RULES, RATES AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS. The Basic Manual is available from Hart Graphics, P.O. Box 768, Austin, Texas 78767.

E. Miscellaneous Title Cases

1. Covenants Running with the Land; Equitable Servitudes.

The Texas Supreme Court affirmed, as modified, the judgment of the court of civil appeals in *Clear Lake Apartments, Inc. v. Clear Lake Utilities Co.*, a case discussed in the 1977 Property Article. A contract between the utility company (Utilities) and the predecessor in title of Clear Lake Apartments (Apartments) granted Utilities "the exclusive right to furnish water and sewer service" to a certain tract of land and the apartment project thereon. When Apartments purchased the project, however, it informed Utilities that the contract was being terminated. Utilities then brought suit for declaratory judgment, contending that its contract rights constituted a covenant running with the land and thereby bound Apartments to perform pursuant to the contract. The court of civil appeals rejected this contention, finding the necessary privity of estate lacking, and the Texas Supreme Court agreed. Utilities also argued that the contract should be enforced in equity because the contract was on record at the time of the conveyance to Apartments, thereby providing at least constructive notice of the provisions of the contract. The supreme court noted that an equitable servitude may exist only with regard to promises which affect the use of the land. The court held that the exclusive service provision in the contract between Utilities and the predecessor in title of Apartments was not such a restriction on land use, but rather was a mere limitation on the right of Apartment's predecessor in title. Such a limitation only collaterally affected the use of land and would not give rise to an equitable servitude or be a covenant running with the land. Accordingly, the Texas Supreme Court affirmed the holding of the court of civil appeals that Apartments was not bound by the exclusive service provision in the contract.

2. Slander of Title.

To recover in an action for slander of title to real property, the plaintiff must allege and prove: (1) the plaintiff possessed an estate or interest in the

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168. 549 S.W.2d 385 (Tex. 1977).
170. 537 S.W.2d at 51.
171. 549 S.W.2d at 388.
172. Id. Utilities attempted to invoke the doctrine of equitable servitude under which a landowner's promise binds a subsequent purchaser or possessor who acquires the land with notice of the promise. See generally Williams, *Restrictions on the Use of Land: Equitable Servitudes*, 28 Texas L. Rev. 194 (1949).
173. 549 S.W.2d at 388. See Montgomery v. Creager, 22 S.W.2d 463 (Tex. Civ. App.—Eastland 1929, no writ).
174. With regard to the other issues in the case, the Texas Supreme Court held that, although under the Texas Uniform Declaratory Judgments Act, Tex. Rev. Civ. Stat. Ann. art. 2524-1, § 11 (Vernon 1971), joinder of persons "who have or claim any interest which would be affected by the declaration" is mandatory, noncompliance with § 11 is not a jurisdictional defect. 549 S.W.2d at 389. The court also considered a separate, exclusive service contract between Utilities and Clear Lake Water Authority, and held that since Authority was a conservation and reclamation district under Tex. Rev. Civ. Stat. Ann. art. 8280-280 (Vernon 1965), as authorized by Tex. Const. art. XVI, § 59, the Authority could not bind itself in such a way as to restrict the free exercise of its governmental powers. Since the contract stated no termination date, it was terminable at the will of either party. See Kennedy v. McMullen, 39 S.W.2d 168 (Tex. Civ. App.—Beaumont 1931, writ ref'd).
property; (2) the defendant uttered and published slanderous words about the plaintiff's title which were false and malicious; and (3) the plaintiff sustained special damages.175 In Louis v. Blalock176 the court held that since the plaintiff failed to prove that the defendant publicly uttered a claim of a prescriptive easement, except by pleading in a prior case, the plaintiff was not entitled to recover for slander of title.177 Additionally, the plaintiff alleged that the prior suit, which was terminated in the plaintiff's favor, was maliciously instituted without probable cause. The court held that an action for malicious prosecution will not lie unless the plaintiff can show that he suffered some interference with his property by reason of the prior suit.178 Since no interference was shown, the court affirmed the trial court's judgment n.o.v. on this point.

II. PURCHASES AND OTHER TRANSACTIONS

A. Contract Validity and Interpretation

1. Execution, Delivery, and Enforceability.

In Sabine Investment Co. v. Stratton179 the seller's main defense to a suit for specific performance of a contract of sale was that the salesman had no authority to sign the contract on its behalf. The seller was a corporation in the business of selling residential lots and had employed the salesman for that purpose. The seller relied upon article 5.08 of the Texas Business Corporation Act which provides in part that "any corporation may convey land by deed . . . signed by the president or a vice-president or attorney in fact of the corporation when authorized by appropriate resolution of the board of directors or shareholders."180 The court held that article 5.08 was inapplicable if the corporation was in the business of buying and selling land and the salesman was employed not only for that purpose but also had the implied authority to sign contracts of sale.181 The court also found support in Donnell v. Currie & Dohoney182 for the principle that authority to convey title is not essential for an agent to make an executory contract to convey land binding upon his principal. Nevertheless, the contract was not specifically enforced because the description of the land was insufficient and the contract was incomplete. Specific performance of a contract was also denied in Agnew v. Brawner183 on the basis that the purchaser failed to prove that the contract had been delivered. The court applied the same standard for delivery of a contract to convey real property that applies to other contracts and to deeds;184 that is, there must be a delivery with the intent and

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175. See Walker v. Ruggles, 540 S.W.2d 470 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ); Heath & Bentley (1977), supra note 2, at 41-42.
176. 543 S.W.2d 715 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.).
177. The court noted that a claim asserted in the course of a judicial proceeding could not be the basis of a civil action for slander of title. Id. at 718.
178. Id. at 719. The court noted that an unsuccessful attempt to have an injunction issued would not constitute an actionable interference with property. Id.
180. TEX. BUS. CORP. ACT ANN. art. 5.08 (Vernon 1956).
181. 549 S.W.2d at 248-49.
182. 131 S.W. 88 (Tex. Civ. App.—Texarkana 1910, writ re’f’d).
183. 553 S.W.2d 688 (Tex. Civ. App.—Eastland 1977, writ re’f’d n.r.e.).
purpose on the part of the seller to relinquish dominion and control over the contract.

In Bradley v. Bradley the court held that an oral agreement involving the acquisition of an interest in real property was not required to be in writing under the Statute of Frauds because (1) the statute does not apply to an agreement between two or more parties to acquire realty from a third party, and (2) the consideration had been paid, the vendee had taken possession, and valuable and permanent improvements had been made on the property. Other decisions involving the enforceability and interpretation of contracts to convey real property are discussed in this Article under the topic Seller's and Purchaser's Remedies.

2. Sufficiency of Description.

An insufficient legal description is probably the most common defense raised in a suit for specific performance of a contract to convey real property or for the collection of a real estate commission. The Statute of Frauds requires that all contracts for the sale of real property be in writing and signed by the party to be charged. The additional requirement that the writing furnish the means or data by which the property may be identified with reasonable certainty has been imposed by the courts. Extrinsic evidence cannot supply the location or description of the land; it can be used only for the purpose of identifying the land with reasonable certainty from the data contained in the writing.

An otherwise deficient description may be overcome, or at least supplemented, by a recitation in the contract that the land is owned by the seller, especially if that is the only land owned by the seller in that particular county, survey, or league. The rule, as stated in Kmiec v. Reagan, is that 

\[\text{"[w]hen the grantor is stated to be the owner of the property to be conveyed and it is proved that the grantor owns only a single tract answering the description, the land is identified with reasonable certainty."
}\]

The seller's land was described in the contract as a certain quantity located in the corners of a particular league grant in Robertson County, Texas. The court cited Pickett v. Bishop, which held that in the right circumstances the use of "my property" in a contract is in itself a matter of description which leads to the certain identification of the property and brings the description within the terms of the rule that 'the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty.'
said that the only deficiency in this description was the shape of each of the corner tracts, and held that extrinsic evidence was admissible to cure that defect and to satisfy the Statute of Frauds. Accordingly, the trial court's decree of specific performance in favor of the purchaser was affirmed, except with respect to a small and separate tract that the court held was not sufficiently described.

Several cases decided during the survey period\(^{194}\) illustrate that a sufficient legal description of the whole tract can be undone by an insufficient description of a portion that is reserved or excepted by the seller. The lack of a beginning point and calls for course and distance in the metes and bounds description, an inability to locate the four corners of the property, and an inadequate description of an excepted portion of the tract made the contract for the sale of realty void in *Barham v. Powell*.\(^{195}\) The testimony of a surveyor that he could locate the land from the description in the contract was considered extrinsic evidence and therefore could not supply the required description.\(^{196}\) In *Estate of Eberling v. Fair*\(^{197}\) the entire tract seemed to have been adequately described, but the contract left for future determination an “area sufficient to accommodate the house” which was to be extracted from the land conveyed. This exception, the court of civil appeals ruled, made the contract incomplete in its essential terms and could not be cured by allowing the jury to determine the area for the house. The court concluded that the contract did not have the required certainty, either as a matter of contract law\(^{198}\) or as a matter of sufficiency of the writing to satisfy the Statute of Frauds.\(^{199}\)

Similarly, in *Mooney v. Ingram*\(^{200}\) the court refused to enforce an agreement to share profits from a future sale of land because the portion of land the owner intended to except from the sale was not sufficiently described. The owner sold the property without reserving any part of the land. The court stated that the agreement was clear that the owner did not intend to share profits on the reserved portion and, therefore, rejected the plaintiff’s argument that he was entitled to share in the profits from the sale of the entire tract. Ingram attempted to escape the requirement that the land be sufficiently described by arguing that the contract, rather than requiring a conveyance of land, only promised him a share of the profits from a future sale. He relied upon cases holding that in a suit for damages only reasonable certainty is required. The court stated that this argument would merit serious consideration if the suit had been one to recover an estimate of damages based upon the measure of compensation provided in the contract.

\(^{194}\) See also U.S. Enterprises, Inc. v. Dauley, 535 S.W.2d 623 (Tex. 1976), which is discussed in Heath & Bentley (1977), supra note 2, at 47-48.

\(^{195}\) 554 S.W.2d 826 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).

\(^{196}\) Id. at 828-29; see Wilson v. Fisher, 144 Tex. 53, 57, 188 S.W.2d 150, 152 (1945).

\(^{197}\) 546 S.W.2d 329 (Tex. Civ. App.—Dallas 1976, writ ref’d n.r.e.).

\(^{198}\) The court said “[u]nder contract law, a contract, whether written or oral, must define its essential terms with sufficient precision to enable the court to determine the obligations of the parties.” Id. at 333.

\(^{199}\) Id. at 334. An agreement to enter into future negotiations cannot be enforced by the courts. Radford v. McNeely, 129 Tex. 568, 572, 104 S.W.2d 472, 474 (1937).

\(^{200}\) 547 S.W.2d 314 (Tex. Civ. App.—Dallas 1977, writ ref’d n.r.e.).
Stuart v. Coldwell Banker & Co. was a suit by a real estate broker to recover a commission arising from the exercise of an option to lease a tract of land. The commission agreement did not describe the land, but did make reference to the lease option agreement which, the court found, contained a legally sufficient description. The lease option agreement provided that the leased property, which consisted of eight acres out of a larger tract, would be located by survey. The contract contained a description sufficient for the surveyor to locate three of the four boundaries and, since the parties intended the tract to be exactly eight acres, the surveyor could locate the fourth boundary to enclose the eight acre tract. Although locating the fourth boundary in this manner required reversing the order of the calls made in the contract, a court, which is not required to give controlling effect to every call in the field notes or to follow strictly the ordinary priority of calls, can harmonize those calls. The legal description before the court in Chisholm v. Hipes, on the other hand, was not sufficient to permit the broker to recover a real estate commission. Unlike the contract in Stuart, the contract in Chisholm merely described the land as being twenty-four acres, more or less, out of a larger tract, a description which was insufficient. The contract indicated that the smaller tract was to be located by a future survey, but the court held that under the facts the survey would be inadmissible extrinsic evidence. The court distinguished LeBow v. Weiner, stating that in LeBow the legal description in the contract was sufficient for one familiar with the locality to identify the property with reasonable certainty, and the survey was resorted to only for the purpose of ascertaining the exact acreage. The court also rejected the broker's effort to reform the contract because that cause of action was barred by limitations.

The cases decided during the survey period illustrate the difficulty contracting parties have had with legal descriptions. In order to avoid the vague legal principles which lead to the results of the cases discussed, the property lawyer must exercise extreme care in preparing the legal description. Several means available to help shape a sufficient legal description were discussed in the 1977 Property Article.

B. First Refusal Rights and Options

A first refusal right to purchase land limits the owner's right to execute an oil and gas lease according to Sanchez v. Dickinson. A recorded contract, which had been assigned to Dickinson, gave Dickinson the first option to

201. 552 S.W.2d 904 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). Another issue in this case is discussed in notes 291-93 infra and accompanying text.
202. The court considered the description in the contract to be an "office" survey which was intended only as a guide to the surveyor. See generally Annot., 30 A.L.R.3d 935 (1970).
204. Id. at 521.
205. 454 S.W.2d 869 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.).
206. See Heath & Bentley (1977), supra note 2, at 48.
207. 551 S.W.2d 481 (Tex. Civ. App.—San Antonio 1977, no writ). In another case decided during the survey period, the oil and gas lease required the optionee to join in the execution of the lease and subordinate his option to the lease; the optionor was to receive all lease payments until the option was executed. Morales v. Martinez, 545 S.W.2d 568 (Tex. Civ. App.—El Paso 1976, no writ).
purchase the land when and if the owner decided to convey it. The court held that, although a first refusal right would not restrict the owner's right to enter into an ordinary lease of the surface, entering into an oil and gas lease or mineral deed was a sale of an interest in land and, thus, was in derogation of the first refusal right. The court distinguished the first refusal right from an option to purchase and held that the holder of a first refusal right has only a preferential right to purchase the land when the seller decides to sell and only on the same terms as offered by a bona fide purchaser. The first refusal right is a covenant that runs with the land, requires no definite price to be enforceable, and is an exception to the merger doctrine. Foster v. Bullard also involved a first refusal right. Foster had a first refusal right to buy 47.96 acres of a 2,460-acre ranch for a price consistent with other offers, but not less than $750 per acre. Bullard sold the entire ranch to Mutual Savings Institution for $650 per acre. The court held that Foster was entitled to buy the 47.96 acres of land from Mutual for $750 per acre.

Several interesting points of law were discussed in Smith v. Hues in which the trial court's decree of specific performance of the contract of sale was affirmed. The court agreed with the seller that a provision which limited the seller's remedies to retaining the escrow deposit as liquidated damages made the contract an option contract in which time was of the ess-

208. 551 S.W.2d at 487.
209. Id. at 484-86. See also Gochman v. Draper, 389 S.W.2d 571 (Tex. Civ. App.—Austin 1965), rev'd on other grounds, 400 S.W.2d 545 (Tex. 1966); Stone v. Tigner, 165 S.W.2d 124 (Tex. Civ. App.—Galveston 1942, writ ref'd). See generally Annot., 76 A.L.R.3d 1139 (1977) for a discussion of the condition that the owner first receive an offer from a third party. The first refusal right becomes an option when the seller decides to sell or receives the third party offer. The impact of giving a first refusal right was clearly illustrated in Sanchez, and Henderson v. Nitschke, 470 S.W.2d 410 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.). In Henderson the court held that once the owner decided to sell, the first refusal right became an enforceable option which could be exercised within the time allowed in the agreement, even though the third party cancelled its offer to purchase. The right of first refusal should not be applicable to an involuntary sale such as a condemnation or foreclosure. See Annot., 17 A.L.R.3d 962 (1968). A purchaser on actual or constructive notice of a first refusal right must make reasonable inquiry to determine whether the owner has complied with the terms of the contract. Foster v. Bullard, 496 S.W.2d 724 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). For example a purchaser who has knowledge of even an unrecorded grazing lease may be on notice of a first refusal right or option given to the tenant in the lease. See Miller v. Compton, 185 S.W.2d 754 (Tex. Civ. App.—Eastland 1945, no writ).
211. Sinclair Ref. Co. v. Allbritton, 147 Tex. 468, 475, 218 S.W.2d 185, 188 (1949).
212. 551 S.W.2d at 486. The court stated that, at least under the facts in this case, the sale of land under a contract was only partial performance, and the remaining, independent obligation under the first refusal right was not merged into the deed. The doctrine of merger is discussed in 8A G. Thompson, supra note 53, § 4460 (repl. ed. 1963). See Dallas Farm Mach. Co. v. Reaves, 158 Tex. 1, 307 S.W.2d 233 (1957); Burgess v. Putnam, 464 S.W.2d 698, 700-01 (Tex. Civ. App.—Fort Worth 1971, writ dism'd).
213. 554 S.W.2d 66 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
214. 540 S.W.2d 485 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).
215. Id. at 488. See also Tabor v. Ragle, 526 S.W.2d 670, 675 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.), in which the court held that the deletion of the contract provision for specific performance did not require the seller to accept liquidated damages as his exclusive remedy. The seller had all available remedies, including the remedy of specific performance. This factor distinguished Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 353 S.W.2d 841 (1962), and made the contract a contract of sale rather than an option. Consequently, to deny the remedy of specific performance, the contract must specifically state that specific performance is not available or that the remedy provided is exclusive.

The test to distinguish an option from a contract of sale is whether one party is obligated to sell and the other to purchase or whether there is conferred a right to purchase if there is an
sence, but found that the seller had waived the requirement of timely performance. The seller's limited remedy against the purchaser caused the contract to lack mutuality of obligations but, the court ruled, this did not make the option contract unenforceable. The court further rejected the seller's contention, that an agreement to change title companies as escrow agents was required by the Statute of Frauds to be in writing, and held that this change was an "incidental condition" and not a change in the character or value of the consideration or in a provision that was even required to be in writing in the original contract. Finally, the court held that the price, based upon acreage shown by survey, the amount of the note, the date and place of payment of the note, and the provisions for a deed of trust were expressed with sufficient certainty to permit specific performance.

The general rule is that the optionee must strictly comply with all of the terms of an option agreement. After discussing the equitable principles that excuse strict compliance, as well as waiver and equitable estoppel as defenses to strict compliance, the court in Cattle Feeders, Inc. v. Jorda found that none of these principles relieved the optionee from giving timely notice of the exercise of the option.

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216. White v. Miller, 518 S.W.2d 383, 385 (Tex. Civ. App.—Tyler 1974, writ dism’d). Thus in Miller the condition that the purchaser would have thirty days to obtain financing made the contract an option. The fact that performance by one party is conditioned upon the occurrence of certain events, however, does not necessarily make the contract an option. See Saunders v. Commercial Indus. Serv. Co., 541 S.W.2d 658, 660 (Tex. Civ. App.—Eastland 1976, writ ref’d n.r.e.); Ayers v. Hodges, 517 S.W.2d 589, 592-93 (Tex. Civ. App.—Tyler 1974, no writ) (upholding a "purchaser satisfaction" contract).


218. 540 S.W.2d at 490. The court further stated that "mutuality of remedy at the inception of the contract is not an essential element in a suit for specific performance of any contract, because the required mutuality may be supplied by performance by the party seeking specific performance." Id. (emphasis added). See also Saunders v. Commercial Indus. Serv. Co., 541 S.W.2d 658, 659 (Tex. Civ. App.—Eastland 1976, writ ref’d n.r.e.). Mutual obligations can furnish the essential consideration for a contract. Texas Farm Bureau Cotton Ass’n v. Stovall, 113 Tex. 273, 284-85, 253 S.W. 1101, 1105 (1923).

219. 540 S.W.2d at 490-91. See also Toland v. Azton, 553 S.W.2d 433 (Tex. Civ. App.—San Antonio 1977, no writ) (change in interest rate for purchaser’s financing).

220. The court stated that the test for determining whether specific performance may be decreed is that the "essential terms of the contract are expressed with reasonable certainty." The court overruled the seller's argument that the purchaser had not properly tendered performance, because the note he delivered contained a provision that note payments would be applied first to interest and then to principal. The court held that this was not such a material breach as to preclude specific performance. Id. at 491-92. In fact, if parties fail to provide otherwise, note payments are usually applied first to accrued interest and then to principal. See Community Sav. & Loan Ass’n v. Fisher, 409 S.W.2d 546, 550 (Tex. 1966).


222. The court summarized the equitable principles:

An optionee will be excused from strict compliance where his conduct in failing to comply was not due to willful or gross negligence on the part of the optionee but was rather the result of an honest and justifiable mistake. In addition, equity will also excuse strict compliance where the strict compliance was prevented by some act of the optionor such as waiver or misleading representations or conduct.

549 S.W.2d at 33; see Jones v. Gibbs, 133 Tex. 627, 640-43, 130 S.W.2d 265, 272-73 (1939).

223. A purchase option must be strictly exercised and a tenant cannot deduct needed repairs from the option price. Harmann v. French, 74 Wis.2d 668, 247 N.W.2d 707 (1976). A willing and able tenant, however, was allowed to exercise an option after the landlord elected to terminate the lease due to waste committed by the tenant because the landlord was not damaged by the breach. Phillips v. Hill, 555 P.2d 1043 (Okla. 1976). See also Adams v. Waddell, 543 P.2d 215 (Alas. 1975).
C. Performance of the Contract

Contracts for the sale of real property typically contain various conditions that must be performed at or prior to the closing. If the time for performance of a condition in a contract is not of the essence and if no exact time for performance is specified, a reasonable time for performance is implied. What is a reasonable time depends upon "the circumstances of each particular case including the nature and character of the thing to be done and the difficulties surrounding and attending its accomplishment." A rather unusual contract provision was before the court in Joines v. Burke. It required the seller to close the sale upon the entry of a final judgment establishing limitation title in the seller. The seller was obligated by the contract to cooperate with the purchaser's effort to obtain the limitation title judgment so that "this contract may be consummated as rapidly as possible," but no time was fixed for filing the suit or obtaining the judgment. Ten months after the contract was executed the seller notified the purchaser that he had another buyer. Twenty-nine months later the seller requested a quit claim from the purchaser, and more than three years later the seller filed this suit to cancel the contract. Although the purchaser still had not filed the limitation title suit, the court found that the delay was not unreasonable considering the difficulties involved in bringing suit and the lack of cooperation by the seller.

A very common provision found in contracts of sale, especially those involving residential property, is one that conditions the purchaser's obligations upon his ability to obtain financing to purchase the property. The contract in Toland v. Azton was conditioned upon the purchaser securing a loan at a rate of interest not in excess of eight percent a year. The purchaser was unable to obtain such a loan, but orally agreed with the seller to accept a loan at nine and one-quarter percent a year and made written application for such a loan. The purchaser later sought to avoid the contract on the basis that the oral modification violated the Statute of Frauds. The court, however, held that the change in the interest rate merely changed the manner of payment of the consideration and, under Garcia v. Karam, was not required to be in writing. The court further held that the purchaser ratified the oral modification when he signed the application for the loan at the higher rate of interest.

The contract which the purchaser sought to enforce in B.B. Smith Co. v. Huddleston required the purchaser to submit building plans for the seller's approval prior to the closing; if the seller disapproved the plans, which it

229. 545 S.W.2d 559 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).
did, the contract was to be null and void. The court recited the established Texas rule that if the closing of a contract is conditioned upon the personal approval of one of the parties, that party must act in good faith.\textsuperscript{230} The court found that the seller had acted in good faith in disapproving the plans. The purchaser's building plans showed that he had intended to locate one of his buildings over a driveway leading to the seller's adjacent shopping center, but the seller was unwilling to relocate the driveway. In \textit{Sentry Development Corp. v. Norman}\textsuperscript{231} the purchaser of a residential lot was successful in his suit to recover his escrow deposit because a condition in the contract requiring approval of purchaser's application for membership in the country club, an inducement offered by the developer, was not satisfied.

If a contract requires the seller to furnish at the closing a current survey of the property showing the "net acreage" after deducting acreage located within encroachments, easements, roads, and rights-of-way, the seller is in breach of the contract if he furnishes a survey showing only the gross acreage. Thus, in \textit{Cramer v. White},\textsuperscript{232} the court held that the seller's failure to furnish the required survey entitled the optionee to recover the consideration paid for the option.

Most contracts for the sale of real property require that the seller convey good title to the property, usually subject to all recorded or specifically listed encumbrances. Judgment was rendered for the purchaser to recover his escrow deposit in \textit{Gaines v. Dillard}\textsuperscript{233} because the seller failed to satisfy the contractual requirement that he furnish abstracts of title showing a merchantable title of record. The contract merely required the seller to furnish an abstract to the purchaser; the purchaser then had sixty days to review it and to deliver title requirements to the seller. The court, however, construed this provision to require an abstract showing merchantable title of record.\textsuperscript{234} Once the purchaser made objections to title defects which were disclosed in the abstract,\textsuperscript{235} the burden was upon the seller either to cure the claimed defects or to show that they did not impair the merchantability of title. The court stated that title by limitations or by accretion was not merchantable title,\textsuperscript{236} and that as a matter of law the seller had failed to

\textsuperscript{230} Id. at 562 (citing Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80 (Tex. 1976); Atomic Fuel Extraction Corp. v. Estate of Slick, 386 S.W.2d 180 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.)).

\textsuperscript{231} 553 S.W.2d 664 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

\textsuperscript{232} 546 S.W.2d 918 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). The purchase price was to be computed on the basis of $3,000 for each net acre. The court held that the purchaser did not waive the breach when he later inquired about the survey: "It is not a waiver for a party not in default to make an honest effort to induce the party who has breached his contract to withdraw the repudiation and perform the contract." Id. at 922 (quoting Haddaway v. Smith, 277 S.W. 728, 731 (Tex. Civ. App.—Amarillo 1925, no writ)).

\textsuperscript{233} 545 S.W.2d 845, (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

\textsuperscript{234} Id. at 851.

\textsuperscript{235} If the objections were based upon title defects not disclosed in the abstract, however, the burden would be upon the purchaser to show that the claimed defects made title unmerchantable. Id. at 851. See Spencer v. Maverick, 146 S.W.2d 819 (Tex. Civ. App.—San Antonio 1941, no writ).

\textsuperscript{236} 545 S.W.2d at 852. The court gave the following definition of merchantable title:

\textquote{Marketable title is not dependent upon whether the purchaser, if sued, could successfully defend such title against those suing. If the record of his title as shown by the abstract discloses such outstanding interests in other parties than his vendor, as would reasonably subject him to litigation, or compel him to resort to
discharge his burden of proof. If title was unmerchantable, the court continued, it was immaterial that the purchaser's real reason for refusing to close was that the value of the property had declined.\textsuperscript{237} Furthermore, the purchaser's silence during a ten-day period in which he could have rejected title or waived the seller's inability to cure the title defects was not a waiver of the right to have the escrow deposit returned.\textsuperscript{238} In \textit{Henry v. Mr. M. Convenience Stores, Inc.} \textsuperscript{239} a purchaser under a contract of sale succeeded in enforcing specific performance against a second, later purchaser, and in removing use restrictions and a mortgage lien which had been placed upon the property by the second purchaser. After the contract was signed, the seller, due to neighborhood opposition to the construction of a convenience store, sold the property to a neighboring resident who then placed a lien against the property and recorded an instrument which restricted the use of the property to residential purposes. Both the vendee\textsuperscript{240} and the bank-mortgagee had knowledge of the contract of sale.\textsuperscript{241}

D. Seller's and Purchaser's Remedies

1. \textit{Damages for Fraud or Misrepresentation and for Breach.}

Suits brought to recover damages for fraud or misrepresentation arising out of the sale of real property dominate the remedies section in this year's survey. Purchasers of real property certainly have not ignored seeking the remedies available under the Texas Deceptive Trade Practices Act,\textsuperscript{243} and the recent decision in \textit{Woods v. Littleton}\textsuperscript{244} will result in even greater consumer awareness in purchasers as well as tenants\textsuperscript{245} of real property. In \textit{Woods} the purchasers of a new home sued the builder under the Act for treble the actual damages resulting from mental anguish and the diminished value of the home. The plaintiffs purchased the home before the Act became evidence in parol, not afforded by the record, to defend his title against such outstanding claims, it is not marketable.


237. 545 S.W.2d at 853.
238. \textit{Id.} at 854. The court stated that this provision merely gave the purchaser an option to accept even unmerchantable title; it did not require him to reject the title again in order to recover his escrow deposit.

239. 543 S.W.2d 393 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).
240. A vendee with knowledge of another's rights under a contract of sale stands in the position of the seller in a suit for specific performance. Langley v. Norris, 141 Tex. 405, 410-11, 173 S.W.2d 454, 457 (1943). If the property, however, had been sold to a second purchaser who was unaware of the first contract of sale, specific performance would not be available to the first purchaser. \textit{Compare} Kress v. Soules, 152 Tex. 595, 261 S.W.2d 703 (1953), \textit{with} Maurer v. Albany Sand & Supply Co., 40 App. Div. 2d 883, 337 N.Y.S.2d 44 (1972).

244. 554 S.W.2d 662 (Tex. 1977). The court of civil appeals decision is discussed in Heath & Bentley (1977), \textit{supra} note 2, at 51-52.
245. \textit{See note 492 infra}.
effective and received a warranty which provided that the builder would repair any defects arising within a year after the sale. Defects in the sewer system and septic tank occurred a few weeks after the sale. The builder made several attempts to correct the problem, and after the date the Act became effective, he represented that the sewer system was in good working order. The Texas Supreme Court held that the purchasers were "consumers" within the meaning of section 17.45(4) of the Act, 246 that the builder's warranty was made pursuant to a sale of "services" within the meaning of section 17.45(2), 247 and that the representation that the sewer system was in good working order was a deceptive trade practice. The court concluded that the date on which the deceptive trade practice occurred, which was after the Act became effective, rather than the date of the sale, which was before the Act became effective, determined the applicability of the Act. The court further held that section 17.50(b)(1), 248 which provides that the consumer "may" recover treble damages, is mandatory rather than discretionary. The court reserved for later determination whether a sale of real estate prior to May 21, 1973, alone can give rise to a cause of action under the Act. 249 It has been suggested that recovery for diminished market value under the Texas Deceptive Trade Practices Act should be based upon the diminution in market value resulting from the defect on the date the deceptive trade practice occurred. 250

In Robert v. Sumerour 251 a purchaser of residential property was awarded damages equal to the difference between the market value of the property as represented at the time of sale and its actual value as delivered. The representation concerned the quantity and quality of water from a well. The court stated that the defendant could not avoid the liability for damages which resulted from his fraud even though the purchaser could have discovered the truth by the exercise of proper care. 252

King v. Tubb 253 was a suit to recover money invested in a real estate development plan. The court found that King had promised to assist in the development of the property, which he denied, and that he had repudiated this promise. Generally, the court observed, in order for a statement to be fraudulent, it must be a statement as to a present existing fact. But the court stated that "the present intention of the speaker not to perform in the future . . . makes the representation a present false statement." 254 If, as in this case, the person denies having made the statement, "that alone is sufficient evidence to support a finding of lack of intent to perform at the time the statement was made." 255 Thus, there was sufficient evidence to support the trial court's finding of fraud in a real estate transaction within the purview of

247. Id. § 17.45(2).
248. Id. § 17.50(b)(1).
249. 554 S.W.2d at 668 n.10.
252. Id. at 892. See also Douglas v. Neill, 545 S.W.2d 903 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.), discussed at notes 142-44 supra and accompanying text.
254. Id. at 441. See Heath & Bentley (1977), supra note 2, at 46.
255. 551 S.W.2d at 441.
section 27.01 of the Texas Business and Commerce Code.\textsuperscript{256} The court also stated that recovery could be awarded under "assumpsit"\textsuperscript{257} or under a combination of fraud and assumpsit. Recovery under a different contract was upheld not only against King, but also against his alter ego, Monarch Real Estate Corporation.\textsuperscript{258} *Wise v. Pena*\textsuperscript{259} is another case in which the purchaser of real property successfully sued to recover actual and exemplary damages under section 27.01 of the Texas Business and Commerce Code. Here the purchaser sued the brokers for false representations regarding the purchase price and the income from a hotel. The broker who appealed argued that the purchaser ratified the fraudulent acts; the court, however, held that the factual\textsuperscript{260} issue had not been properly raised.

Unless the contract provides otherwise, the execution of a contract for the sale of realty passes the risk of loss to the purchaser, at least when the loss arises after the contract is executed and is not the fault of the seller.\textsuperscript{261} In *Fant v. Howell*\textsuperscript{262} the Howells contracted to deed a tract of land to Fant at a later date, but Fant was entitled to immediate possession and use of the land. Both the Howells and Fant were aware, when the contract was signed, that third parties were claiming a portion of the land by adverse possession. No action was taken to oust the adverse claimants, and three years after the contract was signed, title to that portion of the land was lost through adverse possession. Fant subsequently paid the amount on the contract that was required in order for him to receive the deed. Fant demanded a general warranty deed to the entire tract, but the Howells were only willing to warrant title as of the date of the contract. The court of civil appeals\textsuperscript{263} placed the risk of loss on the purchaser and held that Fant was not entitled to a general warranty deed covering the portion of the land which had been lost by adverse possession. The Texas Supreme Court reversed on the authority of *English v. Jones*\textsuperscript{264} and held that, since there was nothing in the record to

\textsuperscript{256} 552 S.W.2d 196 (Tex. Civ. App-Corpus Christi 1977, writ dism'd).

\textsuperscript{257} The court defined assumpsit as "a recovery for the unjust retention of a benefit to the loss of another, or the retention of money of another against the fundamental principals of justice and equity." Id. at 442.

\textsuperscript{258} Id. at 445. A corporate entity will not be disregarded unless compelling reasons exist.

\textsuperscript{259} The court stated that there was insufficient evidence to establish ratification as a matter of law. Id. at 200.


\textsuperscript{261} 547 S.W.2d 261 (Tex. 1977); see note 22 supra and accompanying text.

\textsuperscript{262} 537 S.W.2d 350 (Tex. Civ. App.—Austin 1976). See Heath & Bentley (1977), supra note 2, at 51. Another case decided during this survey period involving damages for trespass was Pentagon Enterprises v. Southwestern Bell Tel. Co., 540 S.W.2d 477 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). The court held that a purchaser under a contract of sale had no right to sue for a trespass that occurred before he was entitled to possession of the property. The effect of this case is to deny a cause of action for any trespass which occurs prior to closing since the purchaser generally is not entitled to possession until the closing. A cause of action for trespass is based upon an injury to possession. Id. at 478. The court rejected a contrary result reached in Texas & Pac. Ry. v. Bullard, 127 S.W. 1152 (Tex. Civ. App.—1909, no writ), and instead followed Boyd v. Schreiner, 116 S.W. 100 (Tex. Civ. App.—1909, writ ref'd).

\textsuperscript{263} 154 Tex. 132, 274 S.W.2d 666 (1955). The court in *English* held that the purchaser was
excuse the sellers from initiating a trespass to try title suit against the adverse claimants, Fant was entitled to a reduction in the purchase price equal to the value of the lost land on the date of the contract, the return of interest payments attributable to that portion of the land, and a general warranty deed to the remainder of the land. There was some evidence that the sellers had agreed to file the trespass to try title suit if it became necessary, and this evidence must have had some influence on the Texas Supreme Court's opinion. Undoubtedly the result would have been different had the contract specifically placed the risk of loss by adverse possession on the purchasers and reflected a price reduction based upon this risk, or if the adverse possession had begun after the date the contract was executed.

Sellers, too, were aggrieved during the survey period, though not due to the fraud of their purchasers. The court in Saikowski v. Gage permitted the seller to recover $10,000.00 actual damages for the loss of his bargain after the purchaser breached the contract of sale. The seller, however, was not allowed to recover damages for the decrease in market value due to the fact that after the breach he owned a used rather than a new house. This was because (1) the seller had consented to the occupancy of the house and could not recover rents or damages for the occupancy until the date the purchaser repudiated the contract, and (2) it would amount to a double recovery for the same loss. The court, citing Brown v. Randolph, said that such a recovery would depend upon a relationship of landlord and tenant, and this relationship could not arise until the purchaser breached the contract of sale.

The parties to a contract can, and often do, stipulate the amount of damages that can be recovered in the event of a breach of the contract. If the stipulated amount was a reasonable estimate of actual damages which were difficult to determine, the provision will be enforced; on the other hand, if the stipulated amount was unreasonable it is an unenforceable penalty and only actual damages can be recovered. If the seller has agreed to accept liquidated damages for the purchaser's breach, actual damages cannot be recovered and the right to specific performance is waived, unless liquidated damages is merely an optional or alternative remedy. In Brewer v.
The contract provided that "in the event Purchaser is the defaulting party, Seller shall have the right to retain said cash deposit as liquidated damages for the breach of this contract." The court concluded that the provision was the seller's exclusive remedy for breach; accordingly, the seller could not sue the purchaser for actual damages. The court stated that had the intent been otherwise, it should have been expressed in the contract.

2. Rescission and Cancellation.

An option given either party to cancel or rescind a contract for the sale of realty must be exercised in strict compliance with its terms. Accordingly, in Stretcher v. Gregg the court held that oral notice of cancellation was ineffective because the contract required written notice.


In Chilton v. Pioneer National Title Insurance Co. the title company, acting as escrow agent under a contract of sale, and a stakeholder of the escrow deposit made by the purchaser, breached its duty to the purchaser by failing to cash the escrow checks. The purchasers delivered their escrow checks, payable to the seller, which in turn was then supposed to deliver the checks to the title company. Instead, the seller cashed the checks and later delivered its own check to the title company with instructions not to cash it. The check was subsequently processed and dishonored. The trial court's directed verdict in favor of the title company was reversed.

E. Brokerage

Unless the contract requires a closing of a sale as a condition precedent to the right of a broker to collect the commission, the broker need only procure a ready, able, and willing purchaser on the terms specified in the contract or on other terms acceptable to the seller. The broker, therefore, was entitled to recover the commission in Davidson v. Suber even though the pur-
chaser refused to complete the sale. The court concluded that the purchaser was ready, able, and willing at the time the contract was signed. Although the court found no authority on point, it further held that, if a broker makes the necessary proof to recover attorneys’ fees under article 2226, the court is required to award attorney’s fees.

A person who sells real property must be a licensed real estate broker in order to maintain an action to recover a real estate commission. Similarly, a person must be licensed under the Texas Securities Act in order to recover a commission for the sale of securities. If, however, a person merely acts as a “finder” in the sale of real property or securities, a license is not required for the recovery of a finder’s fee. A real estate broker sometimes finds himself in the peculiar position of representing a corporate owner of real property that decides to sell its stock rather than the real property. In this situation the broker can recover a commission if he can show that he acted only as a finder. The court in Stahl v. Preston held that a licensed real estate broker, who did not have a license under the Texas Securities Act, went beyond merely acting as a finder and played an active and significant role in the sale of bank stock and, therefore, could not recover a commission for the sale of the stock. The opposite situation, that of a person licensed to sell securities seeking to recover a commission on the sale of real property, was discussed in the 1977 Property Article.

The broker recovered his real estate commission in Stuart v. Coldwell Banker & Co. by overcoming the arguments of the owner that the commission agreement was unenforceable because it was executed subsequent to the lease option agreement and because it inadequately described the tenant and the land. The court held that the broker was not required to prove that the commission agreement was in existence at the time the services were rendered or that the commission agreement predated the lease option agreement. The commission agreement contained no description of

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284. 553 S.W.2d at 432. Actually there is by analogy sufficient authority in Woods v. Littleton, 554 S.W.2d 662, 668-70 (Tex. 1977) to support a holding that the award of attorneys’ fees under article 2226 is not discretionary.
286. TEX. REV. CIV. STAT. ANN. art. 581-34 (Vernon 1964); see Hall v. Hard, 160 Tex. 565, 335 S.W.2d 584 (1960).
289. A finder is “an intermediary who contracts to find and bring the parties together, but he leaves the ultimate transaction to the principals, he is the procuring cause, and his function ceases when negotiations between the principals begin.” Id. at 278-79. The court stated that the distinction between brokers and finders had been suggested in only one Texas case, Rogers v. Ellsworth, 501 S.W.2d 756, 757 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref’d n.r.e.). See also Annot., 24 A.L.R.3d 1160 (1969). The broker in Stahl had been engaged to sell both real property and bank stock, but was able to sell only the bank stock.
290. Lehman Brothers, Inc. v. Sugarland Indus., Inc., 537 S.W.2d 121 (Tex Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.); see Heath & Bentley (1977), supra note 2, at 56.
291. 552 S.W.2d 904 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.).
the land, but made reference to the lease option agreement which, the court found, contained a legally sufficient description.293

In Taggart v. Crews294 the court held that parol evidence was admissible to show that a listing agreement was delivered to the broker on the condition that a sale under the listing agreement would have to be approved by the seller’s banker and tax attorney.295 The required approvals were not given and, accordingly, the purchaser could not enforce specific performance of a contract founded upon the listing agreement and the broker was not entitled to a commission. In Stitt v. Royal Park Fashions, Inc.296 the court held that a sublease which provided for payment of a real estate commission “as collected from tenant” merely established a time for payment and did not require collection of the rentals as a condition precedent to receiving the monthly commission.297 The broker, the court stated, earned his full commission for negotiating the lease, and merely agreed to prorate the commission over the expected term of the lease. The court distinguished those cases which involved leases that provided for payment of a commission “for negotiating and collecting the rent.”298 Thus, when the landlord and tenant agreed to terminate the lease, the broker was entitled to receive the present value of the commissions he would have collected over the term of the lease.299

In Castrejana v. Davidson300 the court held that a promissory note given to the broker by the purchaser in payment of a portion of his real estate commission, which was supposed to be paid by the seller, was not subject to the defense that there was no written agreement between the purchaser and broker to pay a real estate commission.301 The court held that the note represented the balance of the purchase price rather than an agreement by the purchaser to pay a real estate commission.302 Other brokerage cases decided during the survey period, which are discussed elsewhere in this

293. This issue is discussed in the text accompanying notes 201-02 supra.
294. 543 S.W.2d 422 (Tex. Civ. App.—Waco 1976, writ ref’d n.r.e.).
296. 546 S.W.2d 924 (Tex. Civ. App.—Dallas 1977, writ ref’d n.r.e.).
297. The lease was terminated in conjunction with the purchase of the property by the tenant. Even if the collection of monthly rentals had been a condition precedent, the court would not have barred recovery since “a broker is entitled to his commissions notwithstanding failure of the condition precedent if the lessor gets the benefit of the obligation to pay the rent or if the lessor himself is responsible for failure of the condition.” Id. at 927. See also West Realty & Inv. Co. v. Hite, 283 S.W. 481 (Tex. Comm’n App. 1926, jdgmt adopted); Heath & Bentley (1977), supra note 2, at 52-53. The court in Stitt added that this was not a case in which the lessee had defaulted in the payment of rent. 546 S.W.2d at 927.
299. The court relied upon Adams v. Johnson, 298 S.W. 265 (Tex. Comm’n App. 1927, jdgmt adopted), in which the broker, who had agreed to be paid his commission out of deferred note payments from the sale of land, was found to be entitled to the balance of his commission despite the cancellation of the note and reconveyance of the land. See also Don Drum Real Estate Co. v. Hudson, 465 S.W.2d 409, 411 (Tex. Civ. App.—Dallas 1971, no writ). See generally Annot., 54 A.L.R.3d 1171 (1974).
300. 549 S.W.2d 466 (Tex. Civ. App.—Austin 1977, no writ).
301. TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1978). This statute requires that an action for the recovery of a real estate commission be based upon a promise in writing signed by the party to be charged. The court stated that the broker had fully performed his verbal agreement; his agreement to defer a portion of his commission in return for the purchaser’s note was, in effect, a portion of the down payment.
302. The court held that § 20(b), merely a rule of evidence, was not designed to impair contractual obligations. 549 S.W.2d at 468.
Article, involved the sufficiency of the legal description of the property as a requirement for the broker to enforce the contract to pay the commission,\textsuperscript{303} the sale of a joint venture interest as a sale of securities,\textsuperscript{304} and fraud in the sale of real property.\textsuperscript{305} Finally, in \textit{Texas Real Estate Commissioner v. Turner}\textsuperscript{306} the court upheld a Texas Real Estate Commission order requiring the revocation of a real estate license for violations of the Act\textsuperscript{307} based upon splitting commissions with an unlicensed person.

III. REAL ESTATE FINANCING

A. Mortgages

1. Enforceability of Loan Commitments.

In \textit{American National Insurance Co. v. Tri-Cities Construction, Inc.}\textsuperscript{308} the court of civil appeals held that the lender could retain an $11,000.00 loan commitment fee as liquidated damages after the borrower breached one of the terms of the loan commitment.\textsuperscript{309} In reversing the trial court, the court of civil appeals held that the $11,000.00 stipulated damages was not a penalty. The court stated that the correct test for distinguishing between enforceable liquidated damages and an unenforceable penalty is the one established by the Texas Supreme Court in \textit{Stewart v. Basey}.\textsuperscript{310} Further, the court indicated that the mere fact that a jury finds the stipulated damages to exceed the actual damages does not make the stipulated damage provision unenforceable.\textsuperscript{311} The court, however, repeated the warning in \textit{Stewart v. Basey} that if the same amount of stipulated damages applies to more than one breach of the contract the provision may be deemed a penalty if "the amount stipulated is also found to be unreasonable as it relates to any one of the possible breaches."\textsuperscript{312}

Two other decisions involving loan commitments merit brief attention. In

\begin{itemize}
\item \textsuperscript{303}\textit{Stuart v. Coldwell Banker & Co.}, 552 S.W.2d 904 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.); see notes 201-05 \textit{supra} and accompanying text.
\item \textsuperscript{304} \textit{McConathy v. Dal Mac Commercial Real Estate Co.}, 545 S.W.2d 871 (Tex. Civ. App.—Texarkana 1976, no writ); see note 556 \textit{infra} and accompanying text.
\item \textsuperscript{305} \textit{King v. Tubb}, 551 S.W.2d 436 (Tex. Civ. App.—Corpus Christi 1977, no writ); see note 253 \textit{supra} and accompanying text.
\item \textsuperscript{306} 547 S.W.2d 70 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
\item \textsuperscript{308} 551 S.W.2d 106 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). This was the second appeal of this case. On the previous appeal summary judgment in favor of the lender was reversed. \textit{Tri-Cities Constr., Inc. v. American Nat'l Ins. Co.}, 523 S.W.2d 426 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).
\item \textsuperscript{309} The loan was to be for the permanent financing of a car dealership to be built by Markland and leased by Chrysler Realty Corp. The mortgage was to give the lender a first right of refusal in the event the borrower decided to sell the improved property, subject to the prior right of Chrysler Realty to purchase under its lease agreement. Before the loan was closed, Markland sold the property and prevented the loan from being made on these terms.\textsuperscript{310} 150 Tex. 666, 245 S.W.2d 484 (1952). The test is stated as follows: "An agreement, made in advance of breach fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation." \textit{Id.} at 670, 245 S.W.2d at 486; see \textit{Brewer v. Myers}, 545 S.W.2d 235 (Tex. Civ. App.—Tyler 1976, no writ).
\item \textsuperscript{311} 551 S.W.2d at 109. \textit{See also Comment, A Functional Approach in Determining the Validity of a Liquidated-Damages Clause}, 30 \textit{Texas L. Rev.} 752 (1952).
\item \textsuperscript{312} 551 S.W.2d at 110.
\end{itemize}
REAL PROPERTY

Exchange Bank & Trust Co. v. Lone Star Life Insurance Co.\(^{313}\) the interim lender was held not to be a third-party beneficiary of a loan commitment between the permanent lender and their common borrower and could not require the permanent lender to take it out of the interim loan. The court further held that a letter agreement between the two lenders stating that the permanent lender agreed "to comply with the terms and conditions as set out in the commitment letter" did not obligate the permanent lender to purchase the loan.\(^{314}\) In DLJ Properties/73 v. Eastern Savings Bank,\(^{315}\) a suit by the borrower against the permanent lender for specific performance and damages for their failure to complete the loan under a tri-party agreement, the court held that the out-of-state permanent lender was amenable to service of process under the Texas long-arm statute.\(^{316}\)

2. Duty to Insure; Right to Insurance Proceeds.

Most deeds of trust require that the mortgagor insure the property against fire and other hazards for the benefit of the mortgagee. If the mortgagor fails to name the mortgagee as an insured in the policy, does the mortgagee have any claim to the insurance proceeds after fire destroys the improvements on the property? In Westchester Fire Insurance Co. v. English\(^{317}\) the trial court believed not, but the appellate court reversed, saying:

Under the principals of equity, the mortgagor's breach of his agreement to insure the mortgaged property for the benefit of the mortgagee charges the benefits of any insurance . . . with a lien in favor of the mortgagee; and the mortgagee may proceed directly against the insurer . . . to recover his pro rata share of any funds payable under the policy at the time the insurer learned of his interest.\(^{318}\)

As previously mentioned, deeds of trust generally require a mortgagor to insure the property in the full amount of the loan, usually through a policy naming the mortgagee as a co-insured. A mortgagee under an insurance policy with a loss-payable clause, however, can only recover the amount of the indebtedness owed to it. Furthermore, if the loss occurs before foreclosure, the mortgagee can recover only an amount equal to the balance owing on the indebtedness less the bid price.\(^{319}\) This was so held in Campagna v. Underwriters at Lloyd's London.\(^{320}\) The mortgagee argued that, since she was the purchaser at the foreclosure sale, she was entitled to recover the

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\(^{313}\) 546 S.W.2d 948 (Tex. Civ. App.—Dallas 1977, no writ). See also Republic Nat'l Bank v. National Bankers Life Ins. Co., 427 S.W.2d 76 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.); Briercroft Sav. & Loan Ass'n v. Foster Financial Corp., 533 S.W.2d 898 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.). There are no reported Texas decisions in which the interim lender has succeeded on this theory. Often the borrower, the interim lender, and the permanent lender will enter into an agreement under which the permanent lender agrees to purchase or take the loan if all the requirements of the agreement are met.

\(^{314}\) The court held that neither the commitment letter nor the letter agreement obligated the permanent lender to purchase the note, and further held that the letter agreement lacked the essential elements of a new contract. 546 S.W.2d at 953-54.

\(^{315}\) 549 S.W.2d 754 (Tex. Civ. App.—Eastland 1977, no writ).

\(^{316}\) TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

\(^{317}\) 543 S.W.2d 407 (Tex. Civ. App.—Waco 1976, no writ).


\(^{319}\) Under most deeds of trust the full bid price may be reduced by expenses of sale before being applied to the indebtedness.

\(^{320}\) 549 S.W.2d 17 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). See also G. OSBORNE, MORTGAGES § 137 (1970); Note, Insurance of Mortgaged Property, 88 U. PA. L. REV. 347 (1940).
market value of the property after the fire, rather than on the basis of the bid price, because no actual consideration was paid at the foreclosure sale.\textsuperscript{321} The court disagreed, holding that the mortgagee was bound by the consideration recited in the trustee’s deed.\textsuperscript{322} A mortgagee has no interest in the proceeds of the mortgagor’s policy in the absence of an agreement to insure for its benefit.\textsuperscript{323} Therefore, it is extremely important not only to include such a provision in the deed of trust, but also to make sure that the policy is obtained and maintained in the required amount. The mortgagee’s recovery in \textit{Campagna} would have been different had she maintained her own insurance or had she sought recovery under the policy prior to foreclosure.

The liability of a mortgagee for failing to insure improvements with funds which under the deed of trust were paid into escrow for that purpose was discussed in the 1977 Property Article\textsuperscript{324} in connection with \textit{Colonial Savings Association v. Taylor}.\textsuperscript{325} This year a case raised the issue of the failure by the mortgagee to insure personalty when similarly required. In \textit{Huckabee v. Lomas & Nettleton Co.}\textsuperscript{326} the deed of trust required the lienholder to accept and hold funds in escrow, for the payment of insurance premiums on the mortgagor’s or borrower’s residence.\textsuperscript{327} When the mortgagor’s insurance company cancelled the coverage, the mortgagor obtained identical coverage on both the improvements and personalty from a different company; however, the lienholder would not accept the new insurance policy and obtained insurance from another company which covered only the improvements. After a fire which damaged the improvements and personalty, the mortgagor sued the lienholder for wrongfully and negligently not having the personalty insured. The court of civil appeals reversed a summary judgment in favor of the lienholder and held that the alleged facts, if true, would make the lienholder liable for wrongful failure to insure the personalty. The Texas Supreme Court, however, reversed the appellate court on another point.\textsuperscript{328}

\textsuperscript{321} Typically, as here, the mortgagee merely off-sets the bid against the indebtedness. The mortgagee conceded that the bid price would be determinative if a third party purchased the property. \textit{See} Rosenbaum v. Funcannon, 308 F.2d 680, 684 (9th Cir. 1962).

\textsuperscript{322} The court reasoned that in a suit for a deficiency after a foreclosure the mortgagee would be bound by the consideration recited in the trustee’s deed, and that parol evidence could not be admitted to show any other consideration unless fraud, accident, or mistake was alleged. 549 S.W.2d at 18-19.

\textsuperscript{323} G. OSBORNE, supra note 318, § 137.

\textsuperscript{324} Heath & Bentley (1977), supra note 2, at 59-60.

\textsuperscript{325} 544 S.W.2d 116 (Tex. 1976).

\textsuperscript{326} 550 S.W.2d 371 (Tex. Civ. App.—Waco), rev’d, 21 TEX. SUP. CT. J. 67 (Nov. 19, 1977).

\textsuperscript{327} The exact requirement of this clause was not made clear in the civil appeals court’s opinion; a typical provision, however, requires the borrower, if requested by the mortgagee, to pay monthly an amount equal to one-twelfth of the estimated insurance premiums on the secured property. Although the typical clause does not expressly require the lienholder to pay the insurance premiums, the obligation is implied. \textit{See} Heath & Bentley (1977), supra note 2, at 60 n.215. On the other hand, since the typical deed of trust on a residence only requires the borrower to insure the secured property, which usually does not include personalty, there is no obligation to insure the personalty.

\textsuperscript{328} 21 TEX. SUP. CT. J. 67 (Nov. 19, 1977). The central question before the supreme court was whether the borrowers had elected their remedies by settling with another defendant insurer, thus barring them from suing the lienholder. The court of civil appeals held that the claim for wrongfully failing to insure the personalty was an independent transaction which was not barred. The Texas Supreme Court found this holding to be in conflict with \textit{Seamans Oil Co. v. Guy}, 115 Tex. 93, 276 S.W. 424 (1925), and held that suit against Lomas & Nettleton Co. was precluded by the election.
3. **“Other Indebtedness” Clauses.**

In *Magnum Machine & Tool Corp. v. First National Bank* the plaintiff, who has purchased real property subject to an existing deed of trust lien, joined many others who have been punished by the harsh realities of the “dragnet clause.” The plaintiff failed in its effort to obtain a temporary injunction against the foreclosure of the property precipitated by a default by the former owner under a second loan, which was made after the deed of trust was executed. The plaintiff argued that the foreclosure should not occur because the second loan was not reasonably contemplated at the time the deed of trust was executed. The court of civil appeals, while recognizing the existence of some evidence to support the plaintiff’s contention, upheld the trial court’s refusal to halt the foreclosure proceedings.

4. **Subrogation by a New Lender.**

Subrogation in this context is the right of a new lender to be substituted to the position of a prior lienholder whose debt has been satisfied by the proceeds of the new loan. The result of subrogation is that the new lender may become entitled to the liens and rights of the prior lienholder, even against an intervening lienholder. Subrogation can occur either under an equitable principal or, as in two cases decided this year, through an express provision in the new lender’s deed of trust. In *Texas Commerce Bank National Association v. Liberty Bank* Texas Commerce Bank made a $140,000.00 loan to Kalil secured by a deed of trust lien which was third in priority to two existing deed of trust liens. Kalil later sold the property to Day-Landon Interest which financed the purchase with a $187,000.00 loan from Liberty Bank. The Liberty Bank loan was used to pay the first and second lien notes and was supposed to pay in full the Texas Commerce Bank note. Due to a clerical error, however, Texas Commerce Bank advised the title company it was owed only $1,319.80 and the balance of the proceeds were thereupon delivered to Kalil, after which both Texas Commerce Bank and Liberty Bank foreclosed their liens. In the ensuing lawsuit Liberty Bank

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329. 545 S.W.2d 549 (Tex. Civ. App.—Eastland 1976, no writ).
331. The dragnet clause stated that the parties contemplated that the borrower would become further indebted to the bank in the future and that the same deed of trust would also secure the future indebtedness.
332. The court distinguished Wood v. Parker Square State Bank, 400 S.W.2d 898 (Tex. 1966), and Moss v. Hipp, 387 S.W.2d 656 (Tex. 1965), on the basis that those cases dealt with claims acquired from third parties, not subsequent loan transactions between the same parties. This is not a complete distinction. There was evidence that the bank made frequent loans to the former owner, although at the time the deed of trust was executed this particular loan had not been discussed. The loan described in the deed of trust was for $10,000; the second loan was made four months later for $350,000. It has a familiar ring; see, e.g., Estes v. Republic Nat’l Bank, 462 S.W.2d 273 (Tex. 1970).
333. One who is not a volunteer and not guilty of fraud, who advances money to pay a debt secured by a deed of trust lien and expects to receive a first lien on the property, is entitled to subrogation to the prior lien. A different result may occur, however, if there are intervening, though junior, lienholders known to the new lender. In that case the new lender should obtain an assignment of the lien. See G. Osborne, supra note 318, § 282. See also Lewis v. Investors Sav. Ass’n, 411 S.W.2d 794 (Tex. Civ. App.—Fort Worth 1967, no writ).
took the position that it had been subrogated to the rights of the first and second lienholder and, therefore, had purchased the property at the foreclosure sale free of the lien held by Texas Commerce Bank. The court agreed with Liberty Bank, relying upon Providence Institution for Savings v. Sims. The court held that "neither actual nor constructive knowledge of an intervening lien would defeat the right of subrogation where a senior lien had been discharged pursuant to an express agreement by the debtor that the lender would be entitled to subrogation." The third lienholder, however, only escalated ahead of the second lienholder to the extent of the amount of the first lien which he had paid—just as though he had taken an assignment of the note and lien. If in Liberty Bank the proceeds from foreclosure sale had exceeded the amount of the two superior liens, Texas Commerce Bank would have been entitled to the excess ahead of the balance due on Liberty Bank's fourth lien. The question of whether an assignment is essential also arose in Means v. United Fidelity Life Insurance Co., in which the court held that "where subrogation arises, it makes no difference whether the party, on the payment of the money, took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt canceled." Thus, the foreclosure of the lender's lien was effective despite the existence of a homestead claim which arose after the creation of the prior lien.


A requirement in the loan documents that the mortgagor give the mortgagee notice of any default and an opportunity to cure the default before accelerating the maturity of the promissory note or instituting foreclosure proceedings is a valuable right to the borrower. Two decisions during the survey period illustrate why the mortgagee is often unwilling to agree to give such a notice, especially for a default based upon a failure to make a note payment. The loan document before the court in Investors Realty Trust v. Carlton Corp. provided that the maturity of the note could not be accelerated unless the mortgagor failed to cure the default within ten days after written notice was received. The first notice of default contained a declaration that the note was immediately accelerated. After the mortgagor

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335. The Liberty Bank deed of trust provided that "in the event the . . . indebtedness secured hereby . . . are used to pay off and satisfy any liens . . . then Beneficiary is, and shall be subrogated to all of the rights, liens and remedies of the holders of the indebtedness so paid." Id. at 556.
336. 441 S.W.2d 516 (Tex. 1969).
337. 540 S.W.2d at 557. Texas Commerce Bank argued that subrogation should be denied because Liberty Bank had been negligent in ascertaining the correct amount of the balance due on Texas Commerce's note. The court observed that while this argument might have some appeal in a case where subrogation is based upon equitable principles, it has none in a case where subrogation is based upon a provision in the deed of trust. See also Providence Inst. for Sav. v. Sims, 441 S.W.2d 516, 519-20 (Tex. 1969). For a good general discussion of the question of negligence in an equitable subrogation situation, see G. Osborne, supra note 318, § 282.
338. Pugh v. Clark, 238 S.W.2d 980, 984 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.).
339. 540 S.W.2d at 557.
filed suit to enjoin the foreclosure sale, a second notice of default was given which allowed ten days to cure the default. The court of civil appeals held that the second notice complied with the requirements in the loan document and dissolved the temporary injunction granted by the trial court, holding that the mortgagor could have cured the default within the allowed ten day grace period. The court further held that a modification of the loan agreement following one default, and negotiations for an adjustment of the indebtedness following another default, did not constitute a waiver or estoppel of the right to accelerate and foreclose.

The effectiveness of a notice of default in a promissory note and deed of trust was also in issue in Joy Corp. v. Nob Hill North Properties, Ltd. Written notice was given to the mortgagor that note payments had not been received and that foreclosure proceedings would begin immediately. The mortgagor later refused to advise the mortgagor of the amount required to cure the default. After the mortgagee posted notice of a foreclosure sale, the mortgagor sought and obtained a temporary restraining order and a temporary injunction. The notes and deeds, construed together, expressly required written notice of any default before the maturity of the notes could be accelerated. The court of civil appeals found that the written notice did not declare the entire debt to be due or "constitute unequivocal action indicating that the entire debt was due." If the loan documents require notice of default before acceleration, the court said that "it is incumbent upon the mortgagee, in order to avail himself of this right of acceleration, to make a clear, positive, and unequivocal declaration in some manner of the exercise thereof, followed by an affirmative action toward enforcing the declared intention." If notice of acceleration is not provided for in the loan documents, however, and if in fact the borrower waives such a notice, then notice need not be given and demand for payment need not be made.

Bankruptcy court historically has been a popular forum for mortgagors in default to avoid foreclosure under a deed of trust. Bankruptcy rules under various chapters automatically impose a stay against the enforcement of

343. The second notice stated if the default were not cured within ten days, the noteholder "intends to accelerate," which seems to contemplate that a further notice of acceleration would be given. Would the first notice have been effective if it had stated that "unless the default is cured within ten days, you are hereby notified that the entire balance of the note will be due on the eleventh day hereafter?"


346. Id. at 695.

347. 543 S.W.2d at 695 (quoting Crow v. Heath, 516 S.W.2d 225, 228 (Tex. Civ. App.—Corpus Christi 1974, writ ref’d n.r.e.) (emphasis in original)).

348. See Sylvester v. Watkins, 538 S.W.2d 827 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.). See also Pruske v. National Bank of Commerce, 533 S.W.2d 931 (Tex. Civ. App.—San Antonio 1976, no writ). In Purnell v. Follett, 555 S.W.2d 761 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ), the court held that the note must contain an express waiver of notice of intent to accelerate; a provision waiving notice of demand and presentment is insufficient. If the noteholder merely has the option to accelerate on default and there is no waiver of notice, then demand for payment must first be made. Allen Sales & Servicenter, Inc. v. Ryan, 525 S.W.2d 863 (Tex. 1975).

liens during bankruptcy proceedings. Despite the stay, can a mortgagee accelerate the maturity of the promissory note? Some of the bankruptcy courts have taken the position that it cannot when the bankrupt is in fact the maker of the note.\textsuperscript{350} In \textit{Melcer v. Warren}\textsuperscript{351} the purchaser of property who had assumed the payment of the note filed a bankruptcy petition. The mortgagee notified the maker of the note of his election to accelerate. The bankruptcy court subsequently ordered the property abandoned. The mortgagee took the position that the bankruptcy stay order did not preclude him from accelerating the maturity of the note against the maker. The court of civil appeals agreed with the mortgagee, holding that: "We do not find that the Federal courts have construed Rule 601 with respect to facts under which collection of a secured debt is sought by a creditor against a debtor who is \textit{not} the bankrupt but who himself is a creditor of the bankrupt."\textsuperscript{352} The court concluded that "the Rule would not operate to stay appellant from taking such steps as were necessary to accelerate the note and bring suit against Warren [the maker] on the Note to recover personal judgment,"\textsuperscript{353} since the note and deed of trust specified that in the event of default the noteholder could accelerate the note and then could sue for personal judgment without resort to the lien.

Article 3810,\textsuperscript{354} as amended effective January 1, 1976, requires that a twenty-one day notice of foreclosure sale be given to each debtor obligated to pay the debt, addressed to the most recent address shown on the noteholder’s records. In the first reported decision under this amendment, the court in \textit{Burnett v. Anderson}\textsuperscript{355} held that the mortgagee was entitled to rely upon the address of the divorced husband according to its records, in the absence of evidence that it had a more current address.\textsuperscript{356}


A very complex factual setting produced somewhat clouded legal reasoning in \textit{Carruth v. First National Bank}.\textsuperscript{357} Carruth owned a tract of land that was security for a $70,000.00 promissory note under a deed of trust. The note was guaranteed by Adams who had arranged for the financing from First National Bank of Fort Worth. Carruth later sold a part of the land to a company owned by Adams, which assumed the $70,000.00 note. When the Adams company later sold the land to a limited partnership, the bank released part of the land from its liens in return for payment of $30,000.00 on the $70,000.00 note, and made a new construction loan to the limited part-

\textsuperscript{350} Compare \textit{In re Atlanta Int'l Raceway, Inc.}, 513 F.2d 546 (5th Cir. 1975) \textit{with In re Fontainbleau Hotel Corp.}, 508 F.2d 1056 (5th Cir. 1975). \textit{In re Utilities Power & Light Corp.}, 91 F.2d 598 (7th Cir. 1937), \textit{and Guaranty Trust Co. v. Henwood}, 86 F.2d 347 (8th Cir. 1936).

\textsuperscript{351} 550 S.W.2d 760 (Tex. Civ. App.—Austin 1977, no writ).

\textsuperscript{352} Id. at 762.

\textsuperscript{353} Id. at 763.


\textsuperscript{355} 543 S.W.2d 15 (Tex. Civ. App.—Dallas 1976, no writ).

\textsuperscript{356} Since the issue was not properly raised, the court did not decide whether the foreclosure sale was defective because it was conducted before the substitute trustee received his appointment. \textit{Id.} at 17-18. Most deeds of trust, however, require that the appointment of a substitute trustee be made in writing; any action by the substitute trustee prior to the appointment probably is ineffective.

\textsuperscript{357} 544 S.W.2d 678 (Tex. Civ. App.—Eastland 1976, writ dism’d w.o.j.).
nership. When the Adams company failed to pay the balance of the $70,000.00 note, the liens against the remainder of the Carruth tract were foreclosed and the land was sold to the bank at a foreclosure sale. The bank then sold the foreclosed tract to Adams and financed his purchase with a new loan. The court of civil appeals found that there was evidence to support the jury’s finding (which was disregarded by the trial court) that the bank and Adams conspired in the foreclosure of the property.\textsuperscript{358} The court stated that although “the purpose to be accomplished is lawful and no unlawful means are used, there can be no conspiracy,”\textsuperscript{359} and though the bank argued that it had only exercised its legal right to foreclose, the foreclosure was nevertheless “unlawful.” The court’s reasoning is difficult to follow, and its conclusion, although probably correct, seems to be based upon a false premise. The interpretation that the foreclosure was unlawful was based upon the court’s interpretation of the law of principal and surety,\textsuperscript{360} from which the court concluded that “the mortgagee bank could not lawfully release the middle tract from the lien without the knowledge or consent of Carruth.”\textsuperscript{361} This interpretation is incorrect because principal-surety law provides only that such a release might release Carruth from any further liability on the note,\textsuperscript{362} not that it would therefore be unlawful.

The proper rationale for holding the foreclosure to be unlawful is that the true value\textsuperscript{363} of the released tract should have been paid to the bank which would have then discharged the debt and the liens on the remainder of the property. The court also more properly could have said that had it not been for the conspiracy, Adams would have paid the balance of the $70,000.00 note and Carruth would have received title to the balance of the property free of the bank’s liens. If a finding of a civil conspiracy was necessary, and if an unlawful act was an integral part of that finding, the court could have reached the same holding without having to stretch the principal-surety law.

The bank’s penalty for the conspiracy was an award to Carruth of $200,000.00 damages.\textsuperscript{364} The result in this case probably would have been

\textsuperscript{358} Adams and the bank had many previous dealings. The bank had an understanding with Adams that it would foreclose, and that Adams’ lawyer would be appointed substitute trustee under the deed of trust. The amount of the bid, the resale to Adams, and the financing of the purchase by the bank were all discussed in advance and Adams was aware that the only way he could get the remainder of the land was through a foreclosure sale. \textit{Id.} at 680-81.

\textsuperscript{359} \textit{Id.} at 682.

\textsuperscript{360} The court reasoned as follows: (1) when Adam’s company assumed the $70,000 note, it became the principal and Carruth became the surety; (2) Carruth had the right to have the security applied to the debt to the extent necessary to protect him against personal liability; (3) if the bank released a part of the debt, Carruth was relieved of liability to the extent of the value of that security; (4) and the bank could not release the security or otherwise deal with Adams so as to destroy the security and enlarge the personal liability on the debt. 544 S.W.2d at 682. This much of the court’s reasoning was based upon sound principal-surety concepts. \textit{See, e.g., G. Osborne, supra note 318, §§ 262, 269-270.} The court, however, then jumped to the conclusion that the release was “unlawful.” 544 S.W.2d at 683. The court stressed the fact that Adam’s company had assumed the note. This raises the question of whether the result would be different if the sale had been subject to “the note and liens.” \textit{See G. Osborne, supra note 318, § 515.}

\textsuperscript{361} 544 S.W.2d at 683.

\textsuperscript{362} Carruth had no further liability on the note because the property was sold at foreclosure sale for the full balance due on the $70,000.00 note. \textit{Id.} at 680.

\textsuperscript{363} The jury found that the value of the released tract exceeded the balance due on the note. \textit{Id.} at 682.

\textsuperscript{364} The court’s holding that the partial release caused the release of the remainder of the
different if Carruth had joined in or consented to the bank’s partial release, since the court based its holding that the foreclosure sale was unlawful upon the unauthorized release. Furthermore, most deed of trust forms contain provisions that the mortgagee can deal with a successor or release any part of the security without releasing the mortgagor.365 This case should serve as a reminder to mortgagees that care must be exercised in the handling of foreclosure sales, including the making of advance arrangements with third parties who will bid at the sale.366

Persons named as trustees in deeds of trust must, as a matter of contract and practicality, act at the direction of the mortgagee. The mortgagee generally selects the trustee, most often the mortgagee’s attorney or employee. Texas courts have sanctioned this procedure by holding that a foreclosure sale cannot be set aside merely because the trustee is the mortgagee’s employee.367 This does not mean, however, that the trustee has no obligation or responsibility to the mortgagor. In *Hammonds v. Holmes*368 a suit for wrongful foreclosure was filed against the bank president and the bank vice-president, who was the trustee under the deed of trust. The Texas Supreme Court held the trustee’s responsibility to the mortgagor to be as follows: “The trustee has a separate capacity [than that as officer of the bank] and is imposed with a particular legal responsibility. He must act with absolute impartiality and fairness to the grantor in performing the powers vested in him by the deed of trust.”369 Similarly, in *FLR Corp. v. Blodgett*,370 the court refused to set aside a foreclosure sale merely because the trustee who had conducted the sale was the mortgagee’s agent and attorney. The court also stated the familiar rule that a mortgagee which purchases property at a void or irregular foreclosure sale may nevertheless retain possession of the property until the mortgagor pays the debt.

Attempts by mortgagees to foreclose for technical, non-payment defaults under deeds of trust are not generally favored by Texas courts.371 In *Saranv. Slape*372 the court of civil appeals upheld a temporary injunction

tract is important only with respect to the damage issue. Carruth did not sue to set aside the foreclosure sale. *Id.* at 679.


366. In at least some situations advance arrangements have been held not to make the foreclosure sale invalid. See French v. May, 484 S.W.2d 420 (Tex. Civ. App.—Corpus Christi 1972, writ ref’d n.r.e.).


369. 21 Tex. Sup. Ct. J. at 52 (citing First Fed. Sav. & Loan Ass’n v. Sharp, 359 S.W.2d 902 (Tex. 1962) (holding that the trustee abused his discretion in not allowing a bidder at foreclosure sale to have until 4:00 p.m. of the day of the sale to tender his cash bid), and Fuller v. O’Neal, 69 Tex. 349, 6 S.W. 181 (1887)). The main issue before the court in *Hammonds* was whether a previous suit for wrongful foreclosure against the bank was res judicata. The court held that it was res judicata as to the bank president, who had acted only in his capacity as an employee, but not against the vice president, who had acted in his separate capacity as trustee.

370. 541 S.W.2d 209, 214-15 (Tex. Civ. App.—El Paso 1976, writ ref’d n.r.e.). For a further discussion of this case see notes 28-32 supra and accompanying text.

371. See, e.g., Redman v. Whitney, 541 S.W.2d 889 (Tex. Civ. App.—Austin 1976, writ ref’d n.r.e.).

against foreclosure for defaults based upon the following: (1) failure to furnish a life insurance policy (which was obtained after the closing, and no time for furnishing it was required); (2) failure to furnish a separate assumption agreement (not required, and deed specified an assumption); (3) failure to furnish a prepaid hazard insurance policy (furnished, although not fully prepaid); (4) late payments of tax and insurance escrow (deed of trust only required payments "each month"); and (5) failure to maintain and repair to the "personal satisfaction" of the mortgagee (which had to be exercised in good faith, and here it was not).373

Pachter v. Woodman,374 discussed in the 1977 Property Article, held that an attorney’s affidavit stating that the mortgagee’s attorney had promised to give him notice of any foreclosure sale and that he had found no notice of sale posted at the designated place raised material issues of fact which made the trial court’s summary judgment in favor of the mortgagee improper. In Irving Bank & Trust Co. v. Second Land Corp.,375 the court upheld a temporary injunction restraining a trustee’s sale under a deed of trust, reasoning that, where a substantial claim of usury is asserted by the mortgagor, the trial judge has discretion to preserve the status quo until the net amount of the indebtedness can be determined at a trial on the merits. The court rejected the mortgagee’s assertion that the right to sue for damages and usury penalties is an adequate remedy at law, saying: "[w]hen ownership of real estate is at stake, [the] existence of a right of action for damages is not [a] ground for denying equitable relief."376 The court chastised the mortgagee for wasting its time with an appeal, saying that a trial on the merits with a preferred setting would have been the more appropriate way to resolve the issue.377

7. Use of Proceeds from Foreclosure Sale.

The general rule seems to be that the sale proceeds cannot be used to discharge a prior lien unless the deed of trust so provides or the mortgagor so agrees.378 The trustee, in Canfield v. Foxworth-Galbraith Lumber Co.,379 used proceeds from a foreclosure sale of property under a second lien deed of trust to pay off the first lien, and then paid the balance to the mortgagees. Canfield, who after the foreclosure sale took an assignment from the mortgagees of any of their rights to any additional sale proceeds, sued the second lienholder on the basis that the trustee had no authority to pay off the first

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374. The court is discussing in Heath & Bentley (1977), supra note 2, at 64.
376. 544 S.W.2d at 688.
377. Id. at 689.
378. See 59 C.J.S. Mortgages § 596 (1949). Query whether the following clause in a deed of trust would change the result: "the excess [of sales proceeds], if any, to Grantor or such other person or persons entitled thereto by law"? Unless the prior note had been called, the result would not likely change.
379. 545 S.W.2d 583 (Tex. Civ. App.—Tyler 1976, writ ref’d n.r.e.).
lien and that he, as assignee, was entitled to those funds. The court agreed in principle that the sale powers granted to the trustee under a deed of trust must be strictly followed, but held that, although there was no provision in the deed of trust that expressly permitted the trustee to pay off the first lien, the evidence nevertheless showed that the mortgagors waived any right to the proceeds paid to the first lienholder and ratified the payment. Canfield, the court believed, stood in the mortgagors' shoes and was likewise estopped from claiming those funds.

8. Attorneys' Fees.

Article 2226 has been amended, effective August 29, 1977, to permit a claimant to recover attorneys' fees in a suit on an oral or written contract. Prior to the effective date of the amendment the court of civil appeals ruled in Hodges v. Star Lumber & Hardware Co., a suit to recover the deficiency on a promissory note after a foreclosure sale, that ten percent attorney's fees could be recovered only on the amount of the deficiency. The note contained the standard provision that, in the event of a default and placement of the note in the hands of an attorney for collection or if suit were filed, the makers would pay ten percent "on the amount of principal and interest then owing, as attorney's fees." The trial court agreed with the plaintiff that the words "then owing" meant owing at the time the note was placed in the attorney's hands for collection. The appellate court, however, apparently concluded that the words meant the amount owing at the time suit was filed. Would the result of this decision be different if suit were filed on the full note balance before the foreclosure sale? Would the amendment to article 2226 change the result of this decision? What if the note had permitted the recovery of "reasonable attorney's fees" rather than ten percent attorney's fees? The court noted that the deed of trust was not placed in evidence at the trial, and it did not know whether that instrument contained a separate provision for the recovery of attorney's fees. The deed of trust contained, however, a provision that five percent "trustee's

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380. Id. at 586.
381. Id. at 586-87. The defendant's bid at the foreclosure sale was conditioned upon the trustee delivering a general warranty deed free of any encumbrances which, of course, the trustee did not have the power to give. An alternative procedure would have been to buy the property at the foreclosure sale subject to the first lien and then arrange to pay off the first lien. In either case the purchaser should make certain that the first lien can be discharged, i.e., the indebtedness can be repaid, if he wants his title to be free of that lien.
384. Id. at 187. It is not clear in the opinion whether the court made this determination, or whether it was simply limiting the attorney's fees on equitable principles.
385. The answer would be different only if the amount of reasonable attorneys' fees would exceed ten percent of the deficiency. Under either provision, however, only reasonable attorneys' fees can be recovered. See Kuper v. Schmidt, 161 Tex. 189, 338 S.W.2d 948 (1960); International Shelters, Inc. v. Corpus Christi State Nat'l Bank, 475 S.W.2d 334 (Tex. Civ. App.—Corpus Christi 1971, no writ).
386. 544 S.W.2d at 186. Deeds of trust sometimes contain provisions for attorneys' fees, but recovery under such provisions is limited to attorneys' fees incurred by the mortgagee in enforcing the deed of trust. There was no indication in the opinion in Hodges that any fees had been incurred for this purpose; such a finding was fatal to the recovery of attorney's fees under a deed of trust in American Nat'l Ins. Co. v. Schenck, 85 S.W.2d 833 (Tex. Civ. App.—Amarillo 1935, no writ).
fee” would be deducted from the proceeds of the foreclosure sale before determining the amount of the deficiency, which probably more than compensated the noteholder for any attorney’s fees or expenses in excess of the ten percent figure.

9. **Substitution of Collateral.**

Tax law developments are beyond the scope of this Article, but one recent revenue ruling deserves special mention. In Revenue Ruling 77-294\(^\text{387}\) the Internal Revenue Service ruled that an irrevocable escrow arrangement entered into six months after an installment sale\(^\text{388}\) will cause the seller’s gain to be accelerated. The escrow was arranged to allow the purchaser to substitute cash in escrow as security for his promissory note in order that the land could be released from the deed of trust lien. Under the terms of the escrow the seller could not accelerate the payment of the future note installments. This ruling means that the seller owes income tax on the money paid into escrow even though he does not actually receive the money until the next installment payment becomes due. Revenue Ruling 77-294, however, further provides that if the escrow arrangement incident to a sale imposes a “substantial restriction, in addition to the payment schedule, upon the Seller’s right to receipt of the sale proceeds,” the sale may still qualify for the installment sale election.

10. **Mortgage or Deed.**

In *Carter v. Converse*\(^\text{389}\) the court held that under the facts of the case a deed was a mortgage, and that a subsequent purchaser had a duty to inquire into the nature of the seller-mortgagor’s title. The duty to inquire was based upon the unusual facts of the case. The court cautioned:

> [w]e are not prepared to say that in each real estate transaction, the purchaser or his agent [attorney] should inquire directly to the seller, or the seller’s predecessor in title. There is no uniform standard of diligence in checking title beyond the usual record title search. Beyond the usual record title search, purchasers must use that diligence which fits the situation.\(^\text{390}\)

If the deed is intended as a mortgage, the mortgagor-grantor has an equity of redemption after paying the debt, at least in the absence of intervening rights of innocent third parties.\(^\text{391}\)

### B. Usury

The most significant usury decision during the survey period was the supreme court’s opinion in *Tanner Development Co. v. Ferguson*.\(^\text{392}\) The

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\(^{388}\) See I.R.C. § 453(b) for the tax treatment of installment sales.


\(^{390}\) 550 S.W.2d at 330; *see note 48 supra* and accompanying text.

\(^{391}\) *See* Humble Oil & Ref. Co. v. Atwood, 150 Tex. 617, 244 S.W.2d 637 (1951). *See also* Bradshaw v. McDonald, 147 Tex. 455, 216 S.W.2d 972 (1949).

opinion of the court of civil appeals\textsuperscript{393} was discussed and criticized in the 1977 Property Article,\textsuperscript{394} thus only the essential facts will be repeated. Tanner Development Co. sold land to Ferguson in 1973, at which time the purchaser paid in advance one year's interest on the purchase money promissory note at the rate of nine and one-half percent a year as stipulated in the note. In addition the note required quarterly interest payments in advance, beginning with the first quarter following the sale. The one year's prepaid interest was to be credited to the note beginning in July of 1977. When the purchaser defaulted in the note payments, Tanner Development Co. moved to foreclose the lien against the property, and the purchaser filed suit to restrain the sale and to recover usurious interest and penalties. The trial court found the note not to be usurious, but the court of civil appeals disagreed. Five months after it was filed by Tanner Development Co. the Texas Supreme Court granted a writ of error, and six months later the supreme court reversed and rendered for Tanner Development Co.

The court in \textit{Tanner Development Co.} was faced with the issue of whether the one year's prepaid interest should be deducted from the face amount of the note to arrive at the "true" principal amount of the note on which the interest was charged.\textsuperscript{395} The trial court had treated the stated face amount of the note as the true principal amount, while the court of civil appeals had deducted the amount of the one year's prepaid interest from the stated face amount to arrive at the true principal amount of the note. The trial court, in accordance with the savings clause\textsuperscript{396} in the note, credited the unaccrued portion of the one year's prepaid interest to the principal balance of the note. The court of civil appeals, however, included the one year's prepaid interest in its calculation to determine if excessive interest had been charged on the reduced true principal amount. The Texas Supreme Court agreed with the trial court, holding that the stated face amount of the note was the true principal amount; the one year's prepaid interest was not principal and should have been applied to the note as provided in the savings clause.\textsuperscript{397}

The decision in \textit{Tanner Development Co.} with respect to the proper determination of the true principal balance of the note is important in another respect. The note signed by Ferguson was a wrap-around note: it included the principal balance of a note secured by a prior lien in addition to the deferred portion of the purchase price payable to Tanner Development Co. \textit{Tanner Development Co.} is the first Texas decision to construe a wrap-around note in a usury context. Prior to this decision there was a question

\begin{itemize}
  \item \textsuperscript{394} Heath & Bentley (1977), supra note 2, at 71-73.
  \item \textsuperscript{395} At issue before the court was whether the insistence of the appellee to make a one year prepayment of interest for tax reasons would excuse the usurious interest. The court held that it would not.
  \item \textsuperscript{396} The savings clause provided that "[i]n the event of the prepayment of principal . . . or accelerated maturity . . . any interest paid on this note which is in excess of the maximum lawful rate permitted by the usury laws . . . shall be considered for all purposes as payment on principal, and so credited to the note." 21 TEX. SUP. CT. J. at 25.
  \item \textsuperscript{397} The court stated that the court of civil appeals compounded its error not only by deducting the prepaid interest from principal but also by including it in computing the amount of interest charged. \textit{Id.} at 27.
\end{itemize}
whether a Texas court would consider the full amount of the note or only the portion attributable to the deferred purchase price, in determining the true principal amount of the note for purposes of a possible usury violation. *Tanner Development Co.* seems to have settled this question, at least when there are similar facts, by treating the entire amount as the true principal balance of the note.

In addition to resolving this question the Texas Supreme Court also dealt with the appellee’s argument that under the holding of *Commerce Trust Co.* v. *Ramp* the note was usurious. In order to resolve this issue, the court had to decide whether it would adhere to the adopted opinion in *Commerce Trust Co.* or would follow its earlier decision in *Nevels v. Harris*. In *Commerce Trust Co.* the court held that if the payment of interest during any one year of the loan exceeded ten percent the loan was usurious, even though the total interest payable over the full term of the loan was less than ten percent. *Nevels*, however, stands for the proposition that the loan will not be usurious if the interest charged, when spread over the full term of the loan, is less than ten percent. The Texas Supreme Court resolved the conflict in favor of the position in *Nevels*, at least in fact situations that fall within the limited scope of *Tanner Development Co.*, and stated:

Since the contract in question provided Ferguson, the payor, with the full use of the consideration represented by the actual face amount of the note (the ten acres of land) for the entire term of the contract, and since usury penalties are now applied to the entire contract, we are compelled to hold that the advance interest payable under the present note should be spread over the entire term of the contract. To do otherwise would be manifestly unfair and unjust under the law as it existed when the Ferguson-Tanner contract was executed. In our opinion, it would be beyond the obvious intent of the Legislature in the enactment of Article 5069-1.06 to impose its severe penalties solely upon proof that one year’s interest payments exceeded the statutory limit, where over the effective period of the contract, interest payments were not, in the aggregate, in excess of the amount authorized by law. We hold, therefore, that the note in question was not usurious.

On motion for rehearing the court further reiterated that its decision does not authorize the allowance of deductions on money loans, saying: “In cash loan transactions from which the lender deducts interest, fees, commissions or other front-end charges, the amount of dollars actually received or retained by the borrower is held to be the ‘true’ principal. In such cases the amount of the stated principal is reduced accordingly in testing for us-

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398. 135 Tex. 84, 138 S.W.2d 531 (1940). *Ramp* was followed in Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc., 511 S.W.2d 724 (Tex. Civ. App.—Amarillo), writ ref’d n.r.e., per curiam, 516 S.W.2d 136 (1974).

399. 129 Tex. 190, 102 S.W.2d 1046 (1937). *Nevels* was followed in Imperial Corp. of America v. Frenchman’s Creek Corp., 453 F.2d 1338 (5th Cir. 1972).

400. The court candidly observed: “It must be conceded that during the decade of 1930 to 1940 this Court was not entirely consistent in its writings on this phase of the usury law.” 21 TEX. SUP. CT. J. at 28.

401. Id. at 31. The court was persuaded that the spreading provision enacted in 1975 in TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon 1975) adopted the *Nevels* doctrine of spreading interest over the whole term of the loan, whether it is judicially determined to be interest or so stipulated by the parties and regardless of the form it takes. Id. at 30-31.
The supreme court further limited its holding to contracts covered by article 5069-1.06(1) of the Texas Revised Civil Statutes, where the stated rate of interest in the contract does not exceed ten percent a year and where the stated interest and judicially determined interest is no greater than the principal debt would produce at ten percent a year during the full time the debtor has use of the principal debt or land. This case raises a question of whether a lender can escape this result by funding the full loan amount and shortly afterward collecting fees or other “front-end” charges. Evidence of the probable answer may be found in the following statement made by the supreme court on the rehearing of Tanner Development Co.: “Clearly this transaction is distinguishable from a loan of money, and there was no reason to judicially reduce the principal of the note so long as Ferguson had use of the land and forbearance on the stated principal during the entire term of the note.”

Tanner Development Co. does not answer all questions on the points discussed in its opinion. It is not authority that, for purposes of testing for usury, the face amount of the note is the true principal amount, if subsequent to the date the face amount is delivered to the debtor, he is required to pay the lender “front-end charges” (interest). Nor is it authority for spreading interest under a note with a stated rate of interest that exceeds the maximum lawful rate in one year (e.g., twelve percent), although the stated rate for that year when spread over the full term would be less than the maximum lawful rate. Nor can it be said with certainty that the court would treat the face amount of a wrap-around note as the true principal amount in a transaction not involving the sale of real property. Further questions raised which are not answered by the court’s language are whether the Nevels doctrine can be applied to a loan which is not secured by real property, and whether a “savings” clause is essential to bridge the gap, if one exists.

Miller v. First State Bank considered some of the same issues as were considered in Tanner Development Co. and may answer some of these questions. In Tanner Development Co. the borrower received the full use and benefit of the “loan” in the form of the land he purchased and the court held that the transaction was not a loan of money from which any fee, commission, or interest was withheld from the borrower. Miller, on the other hand, involved a loan of $70,000, of which $14,000 was “frozen” to pay the first two year’s interest on the note; thus, Miller only received the use and benefit of $56,000. Miller may depart from Tanner Development Co. in another respect. Tanner Development Co. permits the spreading of interest over the entire term of the loan, something which the court of civil appeals seemingly refused to do in Miller, although it is not entirely clear how the court reached the result it did without spreading. The facts in Tanner Development Co., however, involved three important factors not

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403. Id. at 104 (emphasis added).
405. The court stated that “the Bank comingled the $14,000.00 in the frozen account with its own funds and has loaned all or portions of it to other customers at interest as if it were its own funds.” Id. at 94.
present in Miller: (1) the maker of the note received the full use and benefit of what it bargained for (i.e., the land); (2) the loan was secured by real property while the loan in Miller was secured by a collateral assignment of a lien on real property; and (3) the note in Tanner Development Co. contained a "savings" clause (but not a "spreading" clause) while the note in Miller did not. The court in Miller concluded that: "absent a savings clause in a loan agreement requiring what would have otherwise been usurious interest in any one year to be spread over the term of the loan, the prepayment of interest in excess of 10% per annum in any one year is a violation of the usury statute." The plaintiff was awarded penalties of $42,000, or twice the interest charged, recovered the $14,000 in interest already paid, and was excused from the payment of future interest on the note. It is difficult to distinguish the frozen account involved in Miller from a non-interest bearing compensating balance account which has not specifically been classified as interest, or an amount required to be deducted to arrive at the true principal amount of a loan.

Windhorst v. Adcock Pipe & Supply, although not a real property case, is noteworthy because it further clarifies the meaning of "charges" under article 5069-1.06. A retailer had charged to a customer's open account one and one-half percent of the balance per month as a "finance charge," even though there was no agreement with the customer that he would pay the charge, and in fact he did not pay the charge. In reversing the appellate court the Texas Supreme Court held that article 5069-1.06 does not require that interest be charged pursuant to an agreement. The court held: "By unilaterally charging the one and one-half percent per month 'finance charge', the retailer in this case charged more than ten percent per annum, and is, therefore, liable for penalties." There has been some question as to whether cases such as Windhorst and Moore v. Sabine National Bank, both involving finance charges on consumer loans, are authority for cases involving loans on real property. They appear to be such authority since the supreme court, in overruling Ferguson's motion for rehearing in Tanner Development Co., distinguished these cases only on the basis that the

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406. This apparently is not an important distinction; it is unclear whether the Texas Supreme Court in Tanner Development Co. intended, when stating that article 5069-1.07(a) merely codified Nevels, to draw a distinction between loans secured by real property and those that are not. The court said "[t]his opinion is limited to contracts covered by Article 5069-1.06(1)...," which pertains to all loans. 21 TEX. SUP. CT. J. at 31.

407. The note in Tanner Development Co. disclaimed any intent to collect usurious interest, and provided that any interest in excess of the lawful rate would be credited to the note as a payment on principal. See note 396 supra.

408. 551 S.W.2d at 98. The court in Miller found an implied intent to charge usury and, as in Tanner Development Co., held the fact that the borrower's attorney conceived the loan plan was irrelevant. Id. at 100-01. The court also held that penalty interest could be recovered on interest contracted for as well as interest actually collected. Id. at 100.

409. In an interview published in the January 26, 1977, edition of The Houston Post, Judge Spurlock is reported as having said that the court in Miller did not want to get into the issue of compensating balances which he acknowledged was a "first cousin" of the frozen account involved in Miller. See also Greig v. First Nat'l Bank, 511 S.W.2d 86 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).


411. TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1971).

412. 547 S.W.2d at 261. See also Wall v. East Tex. Credit Union, 333 S.W.2d 918 (Tex. 1976), and the attendant discussion in Heath & Bentley (1977), supra note 2, at 72.

413. 527 S.W.2d 209 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).
“charge” made by Tanner Development Co. was for the unpaid principal balance, thus implying that any unearned interest would be credited to principal in accordance with the terms of the note. Lawyers and their clients should heed the warning which is again sounded in Windhorst and Tanner Development Co. and be careful about the demands for interest which are made in collection letters.

Boyd v. Life Insurance Co. clearly settles the issue that a penalty charged by a noteholder for the right to prepay a promissory note is not interest. Hutchison v. Commercial Trading Co. is another case in a growing line in which an individual unsuccessfully alleged that he was the alter ego of a corporate borrower in an effort to claim that interest in excess of ten percent a year was usurious. The court in Hutchison observed that Texas courts have approved the lender-imposed requirement that the borrower incorporate before a loan is granted, and the rule that the borrower must show fraud or illegality to avoid the transaction. If, however, the court predicted, “a lender utilized his superior bargaining position to require an inexperienced borrower to incorporate for a loan known to be personal and necessitous, Texas courts would likely ignore the corporate form and find usury.” Walker v. Ross has been remanded for a new trial to determine whether a fee charged by a person who had obtained a loan for the ultimate borrower was interest or compensation for services separate and apart from the loan. The court of civil appeals determined that Ross was a lender rather than a broker, since he actually obtained the loan from the bank and made a loan in the same amount plus the “fee” to Walker.

Various constitutional questions have been raised recently regarding the Texas usury laws. First, it has been suggested that article 5069—1.07 violates the Texas Constitution because effective ceilings on interest rates under the usury laws are eliminated. On another point the Texas attorney general has opined that a proposed amendment to section 3.15 of the usury statute, which would authorize the state finance commission to establish maximum interest rates for small loans, would be an unconstitutional delegation by the legislature of its power to establish maximum interest rates. A third front for constitutional attack on Texas usury statutes may have been suggested in an unpublished notice of intended decision of a California court in Committee Against Unfair Interest Limitations v. California. The

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416. 427 F. Supp. 662 (N.D. Tex. 1977). The borrower was an existing corporation. Other Texas decisions on this point are discussed in Heath & Bentley (1977), supra note 2, at 66-69 and in Wallenstein & St. Claire (1976), supra note 2, at 46-47.
417. 427 F. Supp. at 666.
418. 548 S.W.2d 447 (Tex. Civ. App.—Fort Worth), writ ref’d n.r.e., per curiam, 554 S.W.2d 189 (Tex. 1977).
420. TEX. CONST. art. XVI, § 11.
1934 amendments to the California constitution that were tested in this case limited to ten percent a year the interest rate that could be charged by lenders. California banks, saving and loan associations, finance companies, and thrift and loan companies, however, were exempt from this ten percent limitation. The court held that the 1934 constitutional amendments violated both the commerce clause of the United States Constitution,\(^{425}\) by impeding the flow of money between California and other states, and the equal protection clause of the fourteenth amendment,\(^{426}\) by permitting exempt lenders to charge higher rates of interest than non-exempt lenders in non-consumer loan transactions. A valid question is raised as to whether the reasoning in the California case has any application to various Texas statutes that permit lenders in certain classes to charge higher rates of interest than other classes of lenders.\(^{427}\)

IV. MECHANIC'S AND MATERIALMEN'S LIENS

Once again the survey period was an active one in the area of mechanic’s and materialmen’s liens as the courts continued to clarify and interpret the Texas mechanic’s and materialmen’s lien statutes.\(^{428}\)

A. Perfecting the Lien

1. Sufficiency of Affidavit.

Although the mechanic’s and materialmen’s lien statutes of Texas are liberally construed in favor of protecting laborers and materialmen,\(^{429}\) the Texas courts, as evidenced in Perkins Construction Co. v. Ten-Fifteen Corp.,\(^{430}\) continued to follow the general rule that a purported lien affidavit containing only an acknowledgement, and no jurat, is fatally defective, and does not constitute an affidavit within the meaning of article 5453.\(^{431}\)

2. Sham Contractor Statute.

The sham contractor statute, article 5452—1(1),\(^{432}\) provides that whenever an owner enters into a construction contract with a corporation which the owner can “effectively control,” any subcontractor under such contract shall be deemed to be in a direct contractual relationship with the owner, and as such may perfect the lien of an original contractor against the property. In

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\(^{426}\) Id. amend. XIV, § 1.

\(^{427}\) See, e.g., TEX. REV. CIV. STAT. ANN. art. 852a, § 5.07 (Vernon 1964), which excepts from the definition of “interest” certain charges made by savings and loan associations, and TEX. REV. CIV. STAT. ANN. art. 5069—1.07 (Vernon Supp. 1978), which permits all lenders to charge interest of 11/2% a month to all borrowers on certain real estate loans of $500,000 or more. Article 852a, § 507 is discussed in Heath & Bentley (1977), supra note 2, at 73-74.


\(^{429}\) See Hayek v. Western Steel Co., 478 S.W.2d 786 (Tex. 1972). Under this rule substantial compliance with the statutory requirements is generally sufficient to give rise to a valid lien. Texcalco, Inc. v. McMillan, 524 S.W.2d 405 (Tex. Civ. App.—Eastland 1975, no writ).

\(^{430}\) 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ).


the undisputed evidence showed that the subcontractor was first contacted by one of the owners of the property who showed the subcontractor around the project and acted for the corporation in pointing out the work which needed to be done. Additionally, the corporation's name contained the name of the particular owner involved. The court of civil appeals held that this evidence was sufficient to support the conclusion that the corporation had some contact with the landowners and that the owners had control of the corporation within the meaning of the sham contractor statute. Accordingly, the subcontractor could perfect his lien by taking the steps prescribed for original contractors in article 5453(1), without complying with the additional requirements applicable to subcontractors in article 5453(2). Additionally, the court held that it was proper for the lien claimant to mail notice of the lien to the owner of the property as of the time the notice was sent, rather than to the former property owners as of the time the materials were furnished.436

B. Priorities

1. Inception of the Lien.

Section two of article 5459 provides that the inception of a mechanic's and materialmen's lien is the occurrence of the earliest of the following: (1) actual commencement of construction or delivery of material to be used in construction to the land if either is actually visible from inspection of the land; (2) the proper recording of the written agreement, if any, to perform or furnish materials; or (3) the proper recording of a sufficient affidavit by the lien claimant of an oral agreement for construction. Several cases decided during the survey period shed further light on what gives rise to the inception of a lien.

One of the most important of these cases is Blaylock v. Dollar Inns of America, Inc., in which the court of civil appeals considered what constitutes "commencement of construction" or "delivery of material." The court noted that these questions must be determined on the facts of each particular case, with the key inquiry being whether the commencement of construction or delivery of materials was of sufficient visibility that upon inspection of the land a person would have been put on notice that construction had commenced or that materials had been delivered. The court also held that the term "materials" under the lien statutes includes "stakes,  

433. 544 S.W.2d 497 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).
434. Id. art. 5453(1) (Vernon Supp. 1978).
436. Presumably the new owners were on notice of the ongoing construction on the property. See Inman v. Clark, 485 S.W.2d 372 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).
437. Id. art. 5459, § 2 (Vernon Supp. 1978).
440. Id. at 931.
441. The term "materials" is defined in Tex. Rev. Civ. Stat. Ann. art. 5452, § 2(b) (Vernon Supp. 1978) to include any "material, machinery, fixtures or tools" incorporated in the work or
Accordingly, the court held that when, prior to the execution or recording of the deed of trust in question, the contractor had delivered wooden stakes to the site, surveyed the property, placed the stakes at various points on the site, delivered lumber, begun the erection of batter boards, and started the excavation work, the mechanic’s lien had its inception prior to the deed of trust lien. The court did not state the precise date on which the mechanic’s lien commenced; rather, the court held only that there was sufficient work and delivery of materials prior to effective date of the deed of trust lien. Certainly it would be good policy for the lender to conduct an inspection of the property just prior to the closing of the loan and to photograph the property.

Nevertheless, the court of civil appeals held that, although the deed of trust lien was created subsequent to the inception of the mechanic’s lien, the deed of trust lien was superior to the extent of the purchase money lien to which it was subrogated. The court relied on Irving Lumber Co. v. Altlex Mortgage Co. which held that a vendor’s lien will always have its inception prior to a mechanic’s lien. In Blaylock, however, there was no express vendor’s lien, but the court of civil appeals extended the Irving Lumber decision by holding that a lien for purchase money is to be treated as a vendor’s lien for purposes of determining priorities. This priority extends, however, only to the extent of the purchase money advanced. Furthermore, although all mechanic’s liens were cut off by the foreclosure under the deed of trust, the court held that mechanic’s lienholders were entitled to have their liens satisfied out of any consideration received at foreclosure which exceeded the purchase money loaned by the grantee of the deed of trust. This holding implies that the lender could cut off all rights of lien claimants merely by bidding in at foreclosure no more than the amount of the purchase money advanced.

Hagler v. Continental National Bank raised many of the same issues dealt with in the Blaylock case. In Hagler the contractor argued that his

consumed in the direct prosecution of the work, or ordered and delivered for such incorporation or consumption.

442. 548 S.W.2d at 931.
444. Although the lien claimant was an original contractor, the court did not mention the inception standards under the constitutional lien provided in TEX. CONST. art. XVI, § 37.
445. Where money is advanced with an understanding or under circumstances giving rise to an understanding that the advancement shall be secured by a first lien upon the property, the lender will generally be subrogated to the prior liens discharged by the money so advanced. See Perkins Constr. Co. v. Ten-Fifteen Corp., 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ). See also Ferris v. Security Sav. & Loan Ass’n, 545 S.W.2d 208 (Tex. Civ. App.—Eastland 1976, no writ); Whiteselle v. Texas Loan Agency, 27 S.W. 309 (Tex. Civ. App. 1894, writ ref’d). See also notes 333-41 supra and accompanying text.
446. 468 S.W.2d 341 (Tex. 1971).
447. Actually the Texas Supreme Court opinion in the Irving Lumber case suggests this result. 468 S.W.2d at 343; see Youngblood, Mechanics’ and Materialmen’s Liens in Texas, 26 Sw. L.J. 665, 697 (1972).
448. 549 S.W.2d 250 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.).
mechanic’s lien was superior to the deed of trust lien, except to the extent of purchase money advanced. The construction contract, however, was not recorded as required by article 5459; and, therefore, the court held that although the contract was executed prior to the deed of trust, the lien could not relate back to the date of contract. The court of civil appeals affirmed the trial court’s judgment that the point in time when construction or materials became actually visible from an inspection of the land was subsequent to the deed of trust, and thus the deed of trust lien was superior.449

During the survey period two cases were decided which concerned the difficult question of whether the inception of each original contractor’s lien must be determined separately, or whether all such liens relate back to the inception of the first lien applicable to the property.450 Perkins Construction Co. v. Ten-Fifteen Corp.451 and Ferris v. Security Savings & Loan Association452 apparently adopted the rule that one original contractor cannot relate its lien back to the inception date of the lien of another original contractor.453 In the Ferris case the court held that the owner’s contract with a supplier to furnish air conditioners did not relate back to the time of the original construction contract because the supplier was not a subcontractor under the original contract nor was the obligation incurred under the original contract. Interestingly, the facts arose prior to the 1971 revision of article 5459454 and the Ferris decision appears to be in conflict with the single lien theory suggested in the well known case of Oriental Hotel Co. v. Griffiths455 and other cases decided prior to the revision.456

Even though the original contract price has been paid in full, the contractor generally may still perfect a lien for extra work.457 The court in Perkins Construction Co. v. Ten-Fifteen Corp.458 held, however, that the inception date of the lien for extra work done after the completion of and payment for the original work does not relate back to the date of the original contract.459

2. "Whirlpool Doctrine."

A mechanic’s and materialmen’s lien is given preference over all prior recorded liens unless the prior lien will be “affected” by the enforcement of the mechanic’s lien.460 Under the doctrine announced in First National Bank

449. The Hagler case also failed to discuss the possibility of different inception standards under the constitutional lien.


452. 545 S.W.2d 208 (Tex. Civ. App.—Eastland 1976, no writ).


454. The 1971 amendment is compatible with the single lien concept which appears to have been the prior law. See Youngblood, supra note 447, at 694-95.

455. 88 Tex. 574, 33 S.W. 632 (1896).


459. Id. at 496.

v. Whirlpool Corp., 461 a prior lien will be affected if the removal of improvements will cause material injury to the land, to pre-existing improvements, or to the improvements to be removed. The court in Ferris v. Security Savings & Loan Association 462 held that certain air conditioning units were so affixed to the realty that they were a part of the realty; thus, a prior deed of trust lien was held to be superior to the mechanic’s lien as to such units. The court, however, made no mention of whether the units could be removed without damage, and this is generally the key inquiry in such cases. 463

3. Trust Fund Statute. 464

In Stone Fort National Bank v. Elliot Electric Supply Co. 465 the court held that, although a materialman of a subcontractor had failed to send notices within the required thirty-six days after the tenth day of the month following each month during which materials were supplied, 466 the materialman nevertheless could recover under the trust fund statute ten percent of the contract price which had been retained by the original contractor from the subcontractor. The court also held that under article 5472e, 467 the materialman had priority over the security interest of a bank as to the accounts receivable of the subcontractor. 468

C. Performance and Payment Bonds 469

Article 5160 470 provides that no suit shall be brought on a performance bond after one year from the date the contract is finally completed. The court in Bayshore Constructors, Inc. v. Southern Montgomery County Municipal Utility District 471 held that because the contractor had agreed to correct any defects which appeared within one year after acceptance of the work, the contract was not finally completed until the one year “remedy” period had elapsed; therefore, suit on the performance was not statutorily prohibited.

V. LANDLORD AND TENANT

A. Construction of Lease Agreements

1. Renewal Options.

Lease agreements frequently give the tenant an option to renew the lease

461. 517 S.W.2d 262 (Tex. 1974). See also Hammann v. McMullen & Co., 122 Tex. 476, 62 S.W.2d 59 (1933); see Wallenstein (1975), supra note 2, at 48-49.
464. 548 S.W.2d 441 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).
465. 548 S.W.2d 441 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).
466. 548 S.W.2d 441 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).
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471. 548 S.W.2d 441 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).
for an additional term. Inflation makes it very difficult for landlords to predetermine the exact rental rate for the renewal period, which has resulted in their attempts to couch the provisions for renewal at the then prevailing rate for similar properties, "at a rate to be agreed upon by the parties," or some similar provision. The indefiniteness of the renewal rate in such a provision opens the provision to attack. In *Stephenson v. Chrisman* 472 discussed in the 1977 Property Article, the court concluded that there is a division of authority on the question, but postponed a decision on the enforceability of a lease renewal option provision which leaves the rental rate to the future agreement of the parties. One Texas court 473 has held that a lease provision giving the lessee the "first right to renew this lease at a price to be agreed upon or to meet any bona-fide offer" is indefinite, uncertain, and unenforceable, although the court might have enforced the provision if the language "or to meet any bona-fide offer" had been omitted. Another Texas court 474 refused to enforce an option to renew "at the price the party of the first part is willing to rent to any one else," but the Texas Supreme Court in refusing error 475 disagreed with the appellate court's conclusion that the renewal provision was void for uncertainty.

The question again arose in *Aycock v. Vantage Management Co.* 476 which involved the following lease renewal option: "The rental for the renewal term shall be based on then prevailing rental rates for properties of equivalent quality, size, utility and location, with the length of the lease term and credit standing of the Lessee to be taken in account." 477 The court held that this option provision was not void for uncertainty. In *Aycock* the court endorsed section 2.305(a) of the Uniform Commercial Code which provides: "The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . . (2) the price is left to be agreed by the parties and they fail to agree. . . ." 478 Although the Uniform Commercial Code is inapplicable to leases of real property, the court nevertheless found the principle established in section 2.305(a) to be sound. The most recent draft of the proposed Uniform Land Transactions Act 479 incorporates this same provision with respect to leases of real property. In addition the court in *Aycock* said the renewal option did establish some standards for determining the renewal rate for the option period. The landlord contended that the renewal provision was less indefinite than a provision for a "reasonable"

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476. 554 S.W.2d 235 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

477. Id. at 236.


479. Section 2-203(a). The Uniform Land Transactions Act is discussed in Heath & Bentley (1977), *supra* note 2, at 102-103, and in this Article in the section "Legislation."
rental rate because it provided that the credit standing of the tenant could be considered. The court rejected this contention as there was no evidence that the tenant's credit standing was weak or would be a material factor in determining the rental rate. The court also held that the provision in the lease allowing the landlord to set the proposed renewal rate required that its determination be made in good faith and consistent with the standards provided in the renewal provision. Finally, although the lease renewal option clause before the court in Aycock provided standards for determining the renewal rental rate, there is language in the court's opinion indicating that the court would have enforced the option even if it had only provided that the renewal rate would be the rate agreed upon by the parties.

The court in Hampton v. Lum held that a lease provision calling for an automatic renewal for a "like term" was unambiguous. Furthermore, the court believed that the requirement that thirty days' notice be given in order to avoid the automatic renewal meant notice prior to the end of the original term. The court stated that a provision of this type should be treated as a present lease for the full original and renewal terms, subject to an option to terminate the lease at the end of the original term by giving the required notice.

2. Services Provided by Landlord.

Leases of office space now commonly limit the landlord's obligation to furnish air conditioning and heating to regular office hours, and require an additional charge for use at other times. A lease agreement signed before the recent energy crisis, considered by the court in Gihls Properties, Inc. v. Main LaFrentz & Co., provided that the landlord would keep the heating and air conditioning units "in good and substantial repair and in tenantable condition." After the energy crisis in 1974 the landlord notified the tenant that air conditioning or heating services would be provided after noon on Saturdays and on Sundays at a charge of $10.34 an hour. The court of civil appeals stated that air conditioning and heating obviously would be required

480. The court referred to TEX. BUS. & COMM. CODE ANN. § 2.305(b) (Vernon 1968), which requires that if the price is to be set by the seller it must be set in good faith. The same provision appears in the proposed Uniform Land Transactions Act § 2-203(c). For an analogy to a sale of land, the court cited Young v. Warren, 444 S.W.2d 777 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.), in which the court, under somewhat unusual facts, enforced an agreement to sell land for a "fair price."

The court in Schlusselberg avoided the supreme court's pronouncement in Pickrell on the grounds that the rental rate under the renewal option before the court in Pickrell was not to be set by the agreement of the parties, but by the choice of the lessor. The lessor could, the court in Schlusselberg concluded, under an option allowing him to set the renewal rate, simply set the rate higher than the lessee would be willing to pay. One court, however, has held that if the lessor chooses a renewal rate that is unconscionable, the court will set a proper rate. Tai On Luck Corp. v. Cirotta, 35 App. Div. 2d 380, 316 N.Y.S.2d 438 (1970).

481. 554 S.W.2d at 237.

482. 544 S.W.2d 839 (Tex. Civ. App.—Texarkana 1976, no writ).

483. Automatic renewal clauses are discussed in 2 M. Friedman, supra note 473, § 14.4.

484. 544 S.W.2d at 840. Statutes in New York and Wisconsin make automatic renewal clauses inoperative unless advance written notice is given to the tenant before the end of the original lease term. N.Y. GEN. OBLIG. LAW § 5-905 (McKinney 1964); WIS. STAT. ANN. § 704.15 (West 1975). California requires that such a provision in a printed lease is void unless printed in at least eight-point type. CAL. CIV. CODE § 1945.5 (West 1954).

to keep the premises in tenantable condition as provided by the lease, but that since the services were made available there was no basis for issuance of a temporary injunction pending trial.

3. Implied Warranty of Habitability in Residential Leases.

Texas courts have consistently rejected the concept of implied warranty of habitability in leases of residential real property. Two decisions during the survey period followed this well-established rule, but a very significant writ of error has been granted in one of those cases. In *Kamarath v. Bennett*486 the apartment tenant argued that a month-to-month oral lease carried an implied warranty of habitability and, along with it, a duty to repair in order to bring the property into compliance with city building code standards. The court of civil appeals was of the opinion that: "[t]he rule is well-settled in Texas that in the absence of fraud or deceit, there is no implied covenant that the demised premises are fit for occupation, or for the particular use which the tenant intends to make of them. A landlord is not bound to repair unless there be a covenant or agreement on his part to do so."487 The court in *Kamarath* refused to extend the holding of *Humber v. Morton*488 to a lease of residential property. In *Humber* the Texas Supreme Court discarded the doctrine of *caveat emptor* in the sale of a new house and found an implied warranty that the house had been constructed in a good workmanlike manner and was suitable for human habitation.489 The court in *Johnson v. Highland Hills Drive Apartments*490 likewise followed the established rule, and held that even if Texas adopted a rule of implied warranty of habitability, it would not operate to impose a requirement that the landlord provide mail delivery facilities for his tenants. In a concurring opinion Justice Guittard acknowledged the well-established rule, but questioned whether the present Texas Supreme Court will follow it: "[t]his rule has recently lost its vigor with the strong trend of decisions and legislation toward protection of consumers. It has collapsed and been pronounced dead in the case of sales of new houses. . . . *Caveat emptor* seems to me equally moribund as applied to residential leases."491 Additionally, the Texas De-

486. 549 S.W.2d 784 (Tex. Civ. App.—Waco 1977, writ granted). The city building inspector notified the landlord that he would have to repair the property or close down, and the landlord chose the latter.


488. 426 S.W.2d 554 (Tex. 1968).

489. *See also* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977). The court held that a manufacturer of a mobile home is liable for economic loss to the purchaser under the implied warranty of merchantability, the lack of privity between the manufacturer and the purchaser notwithstanding.


491. *Id.* at 496.
ceptive Trade Practices Act may offer the tenant a misrepresentation theory of recovery against a landlord who fails to disclose to the tenant defects in the premises which could not have been discovered by a reasonable inspection or who misrepresents the condition of the premises.\textsuperscript{492}

4. Delivery.

The delivery of a written lease was in issue in \textit{Scroggins v. Roper},\textsuperscript{493} The purchasers of a restaurant filed a forcible entry and detainer action against the lessee, alleging that the month-to-month lease had been terminated. The lessee claimed she was occupying the restaurant under a five-year written lease made with the former owner. The evidence showed that the former owner had asked his attorney to prepare a written lease in order to satisfy the lessee's banker's requirement that there be a written lease before the bank would loan the lessee money to buy inventory and fixtures for the restaurant. Although the former owner denied that the written lease had been executed and delivered, the court found that the written lease had been signed by the lessor and lessee at the time the bank loan was closed, and, therefore, that there had been a sufficient delivery to create a binding written lease.\textsuperscript{494} The court held that manual delivery of a lease was not necessary and that "delivery may be proved by evidence of acts or words showing that the grantor [lessor] intended to pass title, and by evidence that after execution the grantor treated and recognized the property as belonging to the grantee [lessee] although possession of the deed [lease] was retained by the grantor."\textsuperscript{495}

B. Mortgages and Liens

The relative priorities between a contractual and statutory landlord's lien and a bank's perfected security interest in the same personal property was determined in a case of first impression, \textit{Bank of North America v. Kruger}.\textsuperscript{496} The landlord had filed neither a financing statement under the Uniform Commercial Code nor an affidavit under article 5238.\textsuperscript{497} The court of civil appeals reversed a district court judgment in favor of the landlord, and held that only statutory landlord's liens are excepted, under section 9.104(2) of the Uniform Commercial Code,\textsuperscript{498} from the filing requirements of section 9.302 of the Code, and since the landlord did not perfect his lien by filing it, the bank's perfected security interest was superior to the prior unrecorded
landlord’s contractual lien.\textsuperscript{499} Further, the court held that the bank’s actual knowledge of the prior contractual landlord’s lien did not estop the bank from asserting its perfected security interest. The landlord’s statutory lien under article 5238, however, was, in the court’s opinion, superior to the bank’s security interest only with respect to rentals which accrued during the lease year in which the bank’s security interest was perfected, and those which were not more than six months past due, because the landlord had failed to file an affidavit under article 5238 with respect to rentals that were more than six months past due.\textsuperscript{500} Additionally, the court held that the bank was not liable to the landlord for conversion since, at the time of the bank’s foreclosure, the landlord’s lien was inferior. Finally, the bank was not liable to the landlord for damage to the leased property caused by the removal of the personal property; the bank did not participate in the negligence of the sheriff’s deputies who were acting under a writ of sequestration. In summary the statutory landlord’s lien need not be filed under the Uniform Commercial Code, but an affidavit must be filed under article 5238 in order to have priority over bona fide purchasers or secured or unsecured creditors with respect to rentals more than six months past due. Also, no filing is required to maintain the statutory lien as to rentals which accrue during the lease year in which the third party security interest has been perfected or with respect to rentals that are not more than six months past due.

An owner who leases his land to a tenant who plans to build on the land may be asked to subordinate his title to the mortgage which finances the tenant’s improvements. In order to protect his title, the landowner may either require the mortgagee to give him notice of any default under the mortgage and to allow him the opportunity to cure the default, or impose other requirements to assure that the mortgage payments are made. Additionally, he may require the tenant to indemnify him against loss in the event of foreclosure. The landlord’s remedies in the lease before the court in \textit{Rodriquez v. Dipp}\textsuperscript{501} were to terminate the lease\textsuperscript{502} or to cure the default on

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\item \textsuperscript{499} The court found some support for its holding in the pre-Code decision of Skwiff v. City of Dallas, 327 S.W.2d 598 (Tex. Civ. App.—Dallas 1959, writ ref’d n.r.e.), which held that a landlord’s contractual lien is a chattel mortgage which must be perfected by filing under the then applicable registration statute. The court relied upon decisions under the Uniform Commercial Code in other states for direct authority.

\item \textsuperscript{500} TEX. REV. CIV. STAT. ANN. art 5238 (Vernon 1962) states in part that “the lien for rents to become due shall not continue or be enforced for a longer period than the current contract years, it being intended by the term ‘current contract years’ to embrace a period of twelve (12) months, reckoning from the beginning of the lease or rental contract, whether the same be in the first or any other year of such lease or rental contract.” The lien under this provision has priority only for rents which accrued during that particular lease year, whether it is the first year of the lease or a subsequent year. After a security interest is filed by another creditor on the same property, the landlord’s lien: (1) has absolute priority with respect to all rentals that accrue during the lease year in which the security interest is perfected; (2) has an absolute priority with respect to rentals that are not more than six months past due which would extend beyond the end of that lease year; and (3) has an absolute priority over bona fide purchasers or unsecured or lien creditors of the tenant for rentals that are more than six months past due only if he files an affidavit in accordance with article 5238 for that six-month period (\textit{i.e.}, an affidavit should be filed for each six-month period). See Industrial State Bank v. Oldham, 148 Tex. 126, 221 S.W.2d 912 (1949).

\item \textsuperscript{501} 546 S.W.2d 655 (Tex. Civ. App.—El Paso 1977, writ ref’d n.r.e.).

\item \textsuperscript{502} If a lease is terminated and makes no provision for damages for the breach, the landlord cannot recover future rentals or damages. Rohrt v. Kelley Mfg. Co., 162 Tex. 534, 349 S.W.2d 95 (1961).
\end{itemize}
the mortgage and hold the tenant liable; the lease agreement, however, contained no contractual obligation for the tenant to pay the mortgage. After the mortgagee foreclosed on the land and improvements, the landlord sued the tenant in tort for interference with a contractual relationship, electing to forego any recovery on the lease. The court of civil appeals held that the failure of the tenant to pay the mortgage was at most a breach of contract which would not have been grounds for damages in tort even if there had been a contractual obligation to the landlord to pay the mortgage. The failure to pay a note when due, the court said, was not a breach of a legal duty constituting tortious conduct nor was it negligence. Although it is unclear whether it was of any importance in the court’s decision, the evidence showed that the landlord had received $40,000 to agree to an extension of the loan and to deliver a deed to the land to a third party after the foreclosure, although that amount appears to have been substantially below the market value of the land. The court also denied recovery on the theory of conversion. Conversion technically applies only to personal property and not real property; the theory is, however, sometimes applied to a wrongful foreclosure of real property under a deed of trust.

C. Remedies for Breach

Late payment of rentals resulted in litigation in three cases during the survey period, each involving a different theory of recovery. The practice of accepting late rental payments may be difficult to overcome, as the landlord learned in *Wendlandt v. Sommers Drug Stores Co.* Although rent was due under the lease agreement on the first day of each month, the tenant customarily mailed the rental checks several days after the first day of each month. For more than a year the landlord allowed this practice without complaint. On November 4, 1974, however, the tenant was notified that the November rent had not been received and was reminded that rent was due on or before the first day of the month. The tenant testified that the November rent check was mailed on November 4, although the landlord denied receiving it. On December 4, 1974, the landlord gave the tenant notice that the lease had been forfeited for failure to pay the November and December rentals. The court held that the November 4th notice was not sufficient to serve either as a demand for payment or a notice of default, saying: “[n]otice of default in payment of rent must convey a message that the notifier is initiating steps necessary to finally assert his legal rights that if default is not cured, he may take final action as provided in the contract.”

The court held that the tenant did not waive the requirement that the landlord demand performance as a condition precedent to forfeiture. Waiv-

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503. The court cited Bowman v. Goldsmith Bros., 109 N.E.2d 556 (Ohio App. 1952), and decisions from other states. In *Bowman* the court stated the rule that “the mere omission to perform a contract obligation is never a tort unless the omission is also the omission to perform a legal duty.”

504. *See* Donnelly v. Young, 471 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1971, writ ref’d n.r.e.).


er, the court held, was the only exception to the rule that a landlord cannot forfeit a lease for failure to comply with its provisions without first making demand upon the tenant for performance.507 Furthermore, the court said that the practice of accepting late rental payments precluded the landlord from treating the late payment of November’s rent as a breach of the lease. Thus, the thirty day period provided in the lease for curing any default did not begin to run until the December notice was given. The tenant did not, however, have to cure a default based upon the failure to pay the November rental because the court accepted the tenant’s testimony as to its general practice of mailing checks, and the November check in particular, over the landlord’s testimony that the check was not received.508

In Kaiser v. Northwest Shopping Center, Inc.509 the tenant, whose rental checks were dishonored, answered the landlord’s suit for recovery of the rentals with the contention that the landlord’s failure to present the checks within a reasonable period of time caused the underlying debt to be discharged under the provisions of sections 3.601 and 3.802 of the Uniform Commercial Code.510 The court disagreed, however, holding that: “[r]etention of the check, even beyond a reasonable time, does not discharge either the check or the underlying debt under § 3.601(b) or under § 3.802.”511 The question before the court in M.L.C. Loan Corp. v. P.K. Foods, Inc.512 was whether the tenant had abandoned the leased property, allowing the landlord to terminate the lease. The landlord notified the tenant that rentals were delinquent and that it had ten days to pay the rentals or to vacate the property. A few days later a second notice was given to the tenant stating that the lease was being terminated because the property had been abandoned for more than five days in breach of the lease agreement. Within ten days of the first notice the tenant tendered the delinquent rentals, but the landlord refused to accept the payment. The court of civil appeals held that the required intention to abandon was lacking in this case; the tender of the rental payments negated any such intention, and evidence of nonuse alone would not support an abandonment.

In Frank v. Kuhnreich513 the landlord argued that the tenant’s failure to carry liability insurance on the leased premises was an obvious breach of the lease agreement, and since the tenant knew of the breach the landlord was excused from giving notice of default required by the lease agreement.514

508. 551 S.W.2d at 490. The court stated that American courts have long recognized the impracticality of requiring proof of mailing only by direct proof of proper address, stamping, and mailing and have allowed circumstantial evidence for this purpose. 2 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1514 (2d ed. 1956). This does not mean that the tenant escaped payment of the November rent if, in fact, it was never received by the landlord.
511. 544 S.W.2d at 787.
513. 546 S.W.2d 844 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.).
514. The landlord was completing repairs of damage caused by fire, as he was required to do under the lease, and had attempted to negotiate a new lease at a higher rental rate, when the notice of forfeiture was given to the tenant. The tenant obtained the liability insurance within fifteen days, the time given to cure a default, after the notice of forfeiture. In EVCO Corp. v.
The court noted the historical judicial disfavor of forfeiture and recognized the principal that any doubt in the meaning of a lease will be resolved most strongly against the landlord who prepared it, and, therefore, the court rejected the landlord's argument. The court did hold, however, that the evidence of the tenant's lost profits from the landlord's delay in returning the premises to the tenant were too uncertain and speculative. The evidence presented by the tenant was based upon profits from another business he owned. The court of civil appeals also reversed the trial court's award of damages based on the difference between the rental rate paid to the landlord and the greater rate that was to be paid to the original tenant under a sublease to a company owned by the tenant; the court so reversed because (1) a tenant had a duty to mitigate damages; (2) there was no showing that the rental rate paid under the sublease had any relationship to market value; and (3) there was no showing that the tenant suffered any real loss.

The purpose and effect of a forcible entry and detainer action was fully explored in Johnson v. Highland Hills Drive Apartments. The tenant on appeal challenged a summary judgment founded on a holding by the trial court that a judgment of possession for the landlord in a forcible entry and detainer action constituted an estoppel by judgment of the tenant's suit for damages for wrongful eviction. The court of civil appeals reversed, holding that the action for damages was not barred. The appellate court based its decision on the clear language of article 3994, which states: "[t]he proceedings under a forcible entry, or forcible detainer, shall not bar an action for trespass, damages, waste, rent or mesne profits." The court analyzed the effect of article 3994 as follows:

when properly construed, article 3994 prevents any issue in the detainer action, other than immediate possession, from acting as an estoppel by judgment in a subsequent action in the district court with respect to a determination of the adverse parties' rights under a lease even though this determination may very well result in a different ultimate disposition of possession of the premises. This conclusion is consistent with numerous decisions holding that the forcible entry and detainer action is cumulative of other remedies.

Our holding, here, is consistent with the theory that a forcible detainer action is for the primary purpose of resolving who is entitled to immediate possession of the premises. It is cumulative of other remedies, rather than exclusive. Thus, a judgment of possession is not intended to be a final determination of whether the eviction is wrongful or not; rather, it is a final determination only with respect to the right of

Ross, 528 S.W.2d 20 (Tenn. 1975), the landlord was held to be obligated to rebuild after total fire destruction because the lease made him responsible for all major repairs and he had agreed to carry fire insurance. Circumstances permitting the tenant to recover in tort for intentional interference with tenant's business arising from the landlord's breach of duty to repair were found in Cherberg v. Peoples Nat'l Bank, 88 Wash. 2d 595, 564 P.2d 1137 (1977) (landlord's failure was for purpose of ousting tenant so a better use could be made of the property). See generally Committee Report, Fire Insurance and Repair Clauses in Leases, 5 REAL PROP., PROB. & TRUST J. 532 (1970), 515. See generally Annot., 88 A.L.R.2d 1024 (1963). 516. 546 S.W.2d at 850. 517. 552 S.W.2d 493 (Tex. Civ. App.—Dallas 1977, no writ). The court also found that an implied warranty of habitability did not arise from the landlord-tenant relationship. See discussion of this point at notes 490-92 supra and accompanying text. 518. TEX. REV. CIV. STAT. ANN. art. 3994 (Vernon 1966).
immediate possession, which determination by a county court at law is not appealable. Consequently, the judgment of possession in a detainer suit does not determine the ultimate rights of the parties with respect to any other issue in controversy regardless of whether this other issue results in a change of possession of the premises.\(^9\)

In reaching this decision the court either distinguished or declared erroneous a line of Texas cases holding that a final judgment of possession in a forcible entry and detainer action was a bar to a subsequent suit concerning the validity of the lease.\(^{520}\) The court found precedent in *House v. Reavis*.\(^{521}\) To reach the opposite conclusion, the court in *Johnson* would have been required to read article 3994 to mean that a forcible entry or detainer action is not a bar to an action by the landlord for trespass, damages, waste, rent, or mesne profits, but that it is a bar to a similar action brought by the tenant. There may be some basis for reaching this opposite conclusion.\(^{522}\)

Damages for conversion of leasehold improvements was the issue before the court in *Fenlon v. Jaffee*.\(^{523}\) The lessee of space in a shopping mall had a retail outlet called a kiosk constructed in the leased space. Before any rentals were paid, however, the tenant was adjudicated a bankrupt. The landlord paid the balance due to the contractor and took possession of the kiosk. The lease agreement permitted the tenant to remove leasehold improvements at the end of the lease term if all rentals were current. The tenant’s bankruptcy receiver refused the landlord’s offer to return the kiosk, and sued the landlord for the value of the kiosk. The court held that, having not complied with the condition precedent of paying the rentals, the tenant’s right to remove the kiosk had been forfeited along with his right to recover damages for conversion. In *Catania v. Garage De Le Paix, Inc.*\(^{524}\) the court held that the original tenant who had assigned the lease and sold the personal property used on the leased premises no longer had title or right to possession of the personalty, and, therefore, could not maintain an action against the landlord for conversion of the personalty.

Article 5236e\(^{525}\) defines a “security deposit” to be “any advance or deposit of money, regardless of denomination, the primary function of which is to secure full or partial performance of a rental agreement for a residential premises” and, with certain exceptions, requires the landlord to refund the deposit to the tenant within thirty days after the tenant surrenders

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519. 552 S.W.2d at 495-96 (citations omitted).
521. 89 Tex. 626, 35 S.W. 1063 (1896). The *House* case is certainly not direct authority because it involves a suit for trespass to try title, which the court held was not barred by the forcible entry and detainer judgment. The holding in *House* seems to rest primarily upon the proscription of former arts. 2529 and 3984, now TEX. R. CIV. P. 746, which states that in a forcibly entry or detainer action “their merits of title shall not be inquired into.” The court held that “trespass” as used in art. 3994 means trespass to try title and that the right of possession “as a matter of title should not be thereby adjudicated.” 89 Tex. at 635, 35 S.W. at 1067.
523. 553 S.W.2d 422 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).
524. 342 S.W.2d 239 (Tex. Civ. App.—Tyler 1976, writ ref’d n.r.e.).
in the premises. In *Holmes v. Canlen Management Corp.*, the tenant contended that a “non-refundable painting and cleaning fee” of $40 was in fact a security deposit which had the primary function of securing performance of the lease. The court held, however, that the painting and cleaning fee was either an advance payment of rent or consideration for the execution of the lease, and therefore was not governed by the statute providing for security deposits. The court said that article 5236e

is only concerned with a deposit which purportedly must be returned to the tenant upon his compliance with the terms of the lease. It is settled that a landlord can agree with his tenant for any amount of compensation for the use of the property. There is no requirement that prohibits the landlord from stating in the agreement the use to which he intends to put this consideration...

A landlord should be cautioned, however, from freely analogizing his situation to the *Holmes* decision, especially when the fees or deposits are to cover damages to the leased premises only if damages actually occur.

VI. RESTRICTIONS ON LAND USE

A. Private Restrictive Covenants

As in past years there were several cases involving private restrictive covenants in residential areas. One recurring issue, the scope of prohibitions against trailers, was again considered by the Texas Supreme Court in *Lassiter v. Bliss*. The restriction at issue provided that “no trailer... or temporary quarters shall at any time be used as a residence...” The supreme court held that

the intention of the restrictive covenant in the present case was to prohibit trailers from being used as residences ‘at any time,’ whether as a temporary or permanent residence. Under the *Bullock* and *Zmotony* cases, we hold that the mobile home in this case was a ‘trailer’ and was prohibited by the restrictive covenant.

Justice Johnson dissented, arguing that there is a distinction between a “mobile home” and a “trailer,” and since the structure in question was a mobile home, it was not prohibited by the restrictive covenant.

Another recurring issue concerned restrictions which limit the use of lots in subdivisions to single family residences and prohibit businesses, apart-
ments, or duplexes. The particular restrictive covenant involved in *Southampton Civic Club v. Foxworth*\(^{531}\) provided that no part of the property could ever be used for a wholesale or retail business and that "no apartment house or duplex will be permitted in the Additions; the object of this provision being to prohibit multible [sic] housing throughout the entire addition."\(^{532}\) The plaintiff brought suit claiming that the defendants had violated the covenant by renting a garage apartment to a Rice University student. The trial court denied the temporary injunction, but the court of civil appeals reversed and rendered judgment for the plaintiff. The appellate court reasoned that although renting a room within a private residence would not have violated the restriction the rental of the garage apartment separate and apart from the dwelling house was a violation.\(^{533}\)

In *Mathis v. Wallace*\(^{534}\) the plaintiff sought a mandatory injunction requiring the defendant to remove the defendant's house from the subdivision. The facts showed that, although the defendant owned twenty-four acres, in erecting the house in question only one acre surrounding the house had been mortgaged. The plaintiff contended this violated a restriction that no house be placed upon a lot of less than three acres. The court disagreed, however, noting that mortgaging less than three acres was not prohibited and that the twenty four acres owned by the defendant were not resubdivided. The plaintiff additionally argued that the defendant's method of construction, whereby he had the house partially pre-assembled off the premises, cut into halves, then moved onto the property and later joined together, violated a prohibition against moving a building onto a lot. The court held that no building had been moved onto the property; rather, parts of the building had been erected upon the property, the whole of which formed a complete structure.

In *Lovelace v. Bandera Cemetery Association*\(^{535}\) the two original developers of a commercial project had died and no committee of owners had been elected to supervise the project as provided in the restrictions. The surviving spouse of one of the original developers, therefore, had been acting as the committee, and the court held that she was entitled to function as the committee until a new committee was elected in accordance with restrictions. The court, however, held that, since such surviving spouse had created a cemetery on certain lots on which commercial use was permitted, she was precluded from obtaining an injunction against the planned use of certain residential lots for another cemetery.\(^{536}\)

Two cases in the survey period concerned suits to have certain restrictions declared unenforceable. In *Jones v. Young*\(^{537}\) the court held that an

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531. 550 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).
532. Id. at 152.
535. 545 S.W.2d 194 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).
536. The court's rationale was that the surviving spouse had "unclean hands" because of her prior development of a cemetery on the commercial lots, and it is an established rule that one who seeks equity must come before the court with clean hands. *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960).
537. 541 S.W.2d 200 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).
action for a declaratory judgment removing restrictions as a cloud on the title was an appropriate means for a landowner to seek relief against restrictive covenants which would limit his use and enjoyment of the property.538 In Underwood v. Webb539 a landowner attempted either to show an intention on the part of the property owners to abandon the general scheme of a residential subdivision, or to establish a waiver of the restrictions imposed on landowners due to the existence of violations in the subdivision. The evidence showed only two nonresidential uses in the subdivision, a telephone company repeater station and a credit union office. The court held that when a landowner who had never used his property for business sought to have the restriction removed based on violations in existence elsewhere in the subdivision, such landowner must show extensive violations throughout the entire subdivision. Since the telephone company had the right of eminent domain, the court held that the presence of the repeater station could not be considered an abandonment or waiver of the restrictions by the property owners.540 Further, the court held that the presence of the credit union office was not sufficient to constitute such extensive violations throughout the subdivision as to indicate an intention on the part of the property owners to abandon the general scheme of the residential area, or to establish a waiver of the right to enforce the restrictions.

B. Public Restrictions: Zoning

There was much litigation involving zoning restrictions during the survey period. Additionally, article 1011e,541 requiring three-fourths vote of a city council to change a zoning ordinance, was amended during the survey period by deleting the provision which included within the protest area owners of lots directly opposite to the proposed change or those within 200 feet from the street frontage of such opposite lots. Article 1011e was further amended by the addition of a provision allowing the legislative body of a municipality to provide by ordinance that a vote of three-fourths of all its members be required to overrule a recommendation of the zoning commission that a proposed change be denied.

During the survey period two cases were decided which concerned article 1011e prior to its amendment. In City of San Antonio v. Lanier542 the court of civil appeals held that a city ordinance placing the burden upon the landowners to obtain a three-fourths favorable vote in order to override the recommendation of the planning commission that a zoning change be disapproved was an unlawful delegation by the city of its legislative power.543 The

539. 544 S.W.2d 187 (Tex. Civ. App.—Waco 1976, writ ref’d n.r.e.).
540. Id. at 190; see Lebo v. Johnson, 349 S.W.2d 744 (Tex. Civ. App.—San Antonio 1961, writ ref’d n.r.e.).
542. 542 S.W.2d 232 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.).
543. The court reasoned that cities are confined to the express authority delegated to them by the legislature and that there was no statutory authorization for the city to require a three-fourths favorable vote because of the disapproval of the planning commission.
1977 amendment to article 1011e now expressly provides the legislative authorization for ordinances such as the one in question in *City of San Antonio v. Lanier*. Midway Protective League v. City of Dallas also dealt with the requirements of article 1011e. In this case an association of landowners brought suit attacking the validity of a city ordinance that re-zoned a portion of a tract for use as a “dry” shopping center. Among other points the landowners urged that the ordinance was void since it was not passed by a three-fourths majority of the city council. The court, however, held that twenty percent of the owners of land within 200 feet of the shopping center had failed to protest the change. Additionally, article 1011f requires that the city council receive a final report from the planning commission before holding hearings or taking action on a zoning ordinance. The court held that this rule does not mean that a zoning amendment must actually have been discussed by the commission, but only that an opportunity has been afforded for discussion. The court recognized that there is authority that this rule may only apply to minor zoning changes, but held that there was no evidence that the zoning change in question was major.

In *Goode v. City of Dallas* a landowner sued, contending that a Dallas zoning ordinance which prohibited the storage of motor vehicles within a residential district when storage is not incidental to the use of the property as a residence was unconstitutionally vague. The court found that the term “motor vehicle” as used in the ordinance refers to a means of transportation, and that if stored on a residential lot to provide transportation for the residents, such storage is “incidental to the use” of the property as a residence. Accordingly, the court held that the ordinance was not unconstitutionally vague. Finally, the court of civil appeals in *Hitchcock v. City of Killeen* affirmed a temporary injunction against the defendant’s operation of a “theatre” featuring nude dancing in violation of a zoning ordinance. The defendant challenged the validity of the ordinance arguing that the city had failed to give proper notice prior to the adoption of the ordinance as required by article 1011d. The court held that the validity of the ordinance had been previously determined in *Wells v. City of Killeen*, and that this determination was binding on the defendants.

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545. Apparently the developers of the shopping center owned the balance of the tract surrounding the center and thus precluded the possibility of a protest by twenty percent of the adjoining landowners.
546. TEX. REV. CIV. STAT. ANN. art. 1011f (Vernon 1963).
547. 552 S.W.2d at 173; see City of Corpus Christi v. Jones, 144 S.W.2d 388 (Tex. Civ. App.—San Antonio 1940, writ dism’d).
548. 554 S.W.2d 752 (Tex. Civ. App.—Dallas 1977, no writ).
549. Id. at 757. The court also held that TEX. REV. CIV. STAT. ANN. art. 1011h (Vernon 1963) is merely an enabling statute which authorizes cities to define violations of zoning ordinances as misdemeanors. 554 S.W.2d at 758.
551. TEX. REV. CIV. STAT. ANN. art. 1011d (Vernon 1963).
552. 524 S.W.2d 735 (Tex. Civ. App.—Beaumont 1975, writ ref’d n.r.e.).
553. The court held that a judgment for or against a county or municipality is binding and conclusive upon all residents, citizens, and taxpayers in regard to matters actually adjudicated which are of “general public interest.” 553 S.W.2d at 24.
VII. MISCELLANEOUS

A. Real Estate Partnerships and Ventures

Interests in real estate limited partnerships, joint or profit sharing real estate ventures, and certain real estate general partnerships generally have been thought to be securities under both section 2(1) of the Federal Securities Act of 1933 and section 4A of the Texas Securities Act. A recent Texas case discussing the definition of a security in the context of real estate is *McConathy v. Dal Mac Commercial Real Estate, Inc.*, in which the purchaser of a joint venture interest brought suit under the Texas Securities Act against the organizer of the venture, its president, and the salesman, seeking to rescind his purchase. The court held that the interest in the joint venture was not an investment contract or a certificate in or under a profit-sharing or participation agreement as defined by the Texas Securities Act. With regard to question of whether the interest constituted an investment contract, the court held that, although there was an investment of money in a common enterprise, there was no expectation of profits solely or substantially from the efforts of others. The court stated that the term “efforts of others” means operational, managerial, or developmental efforts, and not “the mere holding of property in anticipation of appreciation in value,” citing *Davis v. Rio Rancho Estates, Inc.*, *Happy Investment Group v. Lakeworld Properties, Inc.*, and *Contract Buyers League v. F. & F. Investment Co.* All three cases involved the direct purchase of lots in a subdivision rather than the purchase of an interest in a partnership or other venture which in turn owned lots. The court, therefore, in *McConathy* ignored the fact that there was an additional layer of investment in the business enterprise, not just a purchase of the underlying assets. The court


556. 545 S.W.2d 871 (Tex. Civ. App.—Texarkana 1976, no writ).

557. An “investment contract” as defined in SEC v. W.J. Howey Co., 328 U.S. 293 (1946), is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, . . . This definition of investment contract has generally been adopted by the courts in Texas. In Bruner v. State, 463 S.W.2d 205 (Tex. Crim. App. 1970), the court held that an investment contract “is any contract, transaction or scheme whereby a person invests money in a common enterprise and is led to expect profits solely from the efforts of the third party;” however, the court went on to point out that mere token participation by an investor would not prohibit the transaction from being an investment contract. See also Clayton Brokerage Co. of St. Louis, Inc. v. Mouer, 520 S.W.2d 802 (Tex. Civ. App.—Austin 1975), controversy dismissed, 531 S.W.2d 805 (Tex. 1975); King Commodity Co. of Tex., Inc. v. State, 508 S.W.2d 439 (Tex. Civ. App.—Dallas 1974, no writ); Koscot Interplanetary, Inc. v. King, 452 S.W.2d 531 (Tex. Civ. App.—Austin 1970, writ ref'd n.r.e.).

558. 545 S.W.2d at 875.


in McConathy stressed that there was no investment contract involved because "[t]here was no reliance on the developmental, managerial or operational skills of a promoter or third party in attempting to make a profit . . . ."\textsuperscript{[562]} Curiously, the court went on to state that "neither would the evidence justify a conclusion that Appelants [sic] investment was a certificate in or under a profit-sharing or participation agreement as included in the Securities Act."\textsuperscript{[563]} No reason was given for this holding, and it seems to be contrary to the position taken by the SEC\textsuperscript{[564]} and the Texas Securities Commissioner.\textsuperscript{[565]}

An interesting decision involving the common practice of placing title in the hands of a "trustee"\textsuperscript{[566]} for undisclosed beneficiaries is Spiritas v. Robinowitz.\textsuperscript{[567]} In this case Spiritas and Robinowitz had entered into a joint venture agreement to purchase a tract of land. Each party signed the agreement as "trustee," and the agreement provided that it was to be governed by the Texas Uniform Partnership Act.\textsuperscript{[568]} When the tract was purchased, title was taken in the name of Robinowitz as "trustee." Later, Robinowitz personally purchased a second tract adjacent to the first tract, and in financing the purchase of the second tract, Robinowitz granted a second lien covering the first tract. Spiritas brought suit to have the second lien declared invalid because Robinowitz had no authority to grant the lien. The lender argued that its second lien on the first tract was protected by the Texas Blind Trust Act\textsuperscript{[569]} which provides in part that when a conveyance is made to a trustee and the names of the beneficiaries are not disclosed, the trustee has the power to encumber the title. The court held, however, that the mere designation of a party as trustee did not in itself create a trust, and that no trust existed unless there was an actual trust which complied with the requisites of the Texas Trust Act.\textsuperscript{[570]} The court held that there was no trust created by Robinowitz, and, thus, the lien on the first tract was not protected under the Blind Trust Act. This aspect of the decision raises some interesting questions as to whether title companies will continue to rely on the Blind Trust Act in issuing title policies in connection with conveyances made by so-called "trustees."

\textsuperscript{[562]} 545 S.W.2d at 876. \textit{See also} Pawgan v. Silverstein, 265 F. Supp. 898 (S.D.N.Y. 1967) (court held that certain general partnership interests were either "investment contracts," or participations in a "profit-sharing agreement" and thus were securities under § 2(1) of the 1933 Act, because the general partnership agreement indicated that there would be substantial reliance on central management).

\textsuperscript{[563]} 545 S.W.2d at 876.


\textsuperscript{[565]} \textit{See} Regulations of Texas Securities Board, Chapter IX; Burton, \textit{supra} note 554, at 244-45.


\textsuperscript{[567]} 544 S.W.2d 710 (Tex. Civ. App.—Dallas 1976, writ ref’d n.r.e.).

\textsuperscript{[568]} TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970).

\textsuperscript{[569]} Id. art. 7425a (Vernon 1960).

\textsuperscript{[570]} \textit{See id.} art. 7425b-7. The court stated that the use of the term "trustee" was merely descriptive and without legal effect. \textit{Compare} Hudson & Hudson Realtors v. Savage, 545 S.W.2d 863 (Tex. Civ. App.—Tyler 1976, no writ) with Goree v. Axelrad, 519 S.W.2d 139 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ), which inferred that use of the term "trustee" is indicative of the interests of others.
The court held, however, that the transaction was governed by the Texas Uniform Partnership Act. Section 10(3) of the Act provides that the partners in whose name title is held may convey the property subject to the right of the partnership to recover the property "if the partner's act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder of value, without knowledge." Section 9(1) provides that every partner is the agent of the partnership for apparently carrying on in the usual way the business of the partnership, unless the partner so acting actually has no authority to act for the partnership and the person with whom he is dealing has knowledge of such lack of authority. In light of these provisions the court held that since Spiritas had permitted another venturer, Robinowitz, to hold legal title to the partnership property, Spiritas had the burden of proving that Robinowitz did not have at least apparent authority to place the lien on the partnership property. The court held that Spiritas had failed to meet this burden and the lien, therefore, was declared valid.

Developers of promotional subdivisions and recreational property frequently employ an outside sales force to handle the advertising and sale of the lots under an arrangement allowing the sales agent to receive a percentage of the total sales proceeds. The sales program typically requires the purchaser of a lot to make a small down payment under an installment land contract, in which event the sales agent is allowed to receive all or a part of the down payment. A similar arrangement was involved in Coastal Plains Development Corp. v. Micrea, Inc. in which the sales agent was to retain the first twenty percent of all of the down payments on lots, with the developer agreeing that if the down payments were insufficient to pay the sales agent's expenses, the developer would reimburse the sales agent monthly for the deficiency. After all expenses of development were paid, the profits were to be divided equally between the developer and the sales agent. Based primarily upon the agreement to share profits, the court held that the developer and sales agent were in a joint venture. In so holding the court disregarded a provision in the agreement negating the creation of a partnership or joint venture. Although the sharing of losses was not an

572. Id. § 9(1).
574. Id. at 817-18. The court cited Ives v. Watson, 521 S.W.2d 930 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), and Lane v. Phillips, 509 S.W.2d 894 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.), for the characteristics of a joint venture. But see Tex-Co. Grain Co. v. Happy Wheat Growers, Inc., 542 S.W.2d 934, 936-37 (Tex. Civ. App.—Amarillo 1976, no writ) (court refused to find a joint venture between a cattle owner and a feedlot, despite the provision in their agreement that they were "to engage in a joint venture" and were to share any profits, although losses were to be borne entirely by the feedlot).
575. Justice Keith dissented on the basis that the intention of the parties not to create a joint venture, as stated in the agreement, should be observed. Justice Keith, to whom the cases cited by the majority in support of the existence of a joint venture were attributed, retorted as follows:

In his immortal work 'Through the Looking-Glass,' Lewis Carroll finds Alice puzzled with Humpty Dumpty's 'unbirthdays.' Being questioned by Alice, Humpty said: 'When I use a word, it means just what I choose it to mean—neither more nor less.' But, objected Alice: 'The question is, whether you can make words mean so many different things.' To which Humpty replied: 'The question is, which is to be master—that's all.' Do the words mean what the parties said or do
issue before the court, the court held that the sales agent would have been liable as a matter of law for one-half of the losses of the joint venture. The court, however, upheld the jury verdict awarding the sales agent $109,695.00 in damages for losses from the developer’s failure to complete the development, and upheld the jury finding that the developer suffered no loss as a result of the sales agent’s acts. After finding the sales agent to be a joint venturer, the court decided that the sales agent was selling the property for its own account and, therefore, was not required to have a license to sell real estate. After all the court’s labor to find the existence of a joint venture, it concluded that this was not a suit to recover a real estate commission; it was a suit for breach of contract. Writ of error has been granted by the Texas Supreme Court.

B. Legislation

The Sixty-fifth Legislature enacted an array of new legislation affecting real property, and declined to enact much more. Although the impact of much of this legislation will appear minor to most lawyers, there are several legislative developments which will have an obvious and significant impact on real property. Some of the legislation listed in this section covers matters other than real property, but only the real property application is discussed. This section is not intended to be a comprehensive discussion of the legislation, and only a few of the new laws are discussed in any detail.

1. Building Requirements and Zoning.

Article 1446d, which prohibits a city after January 1, 1978, from issuing any permit, certificate, or other authorization for the construction or occupancy of a new apartment house or for a conversion to a condominium, unless the plan provides for individual metering or submetering of electricity was added. Under the same statute any rental increase attributable to electricity which is made during the ninety days preceding the installation of individual meters or submeters must be retracted. The statute further requires the Public Utility Commission to promulgate rules, regulations, and standards for submetering. The language of the new statute is unclear as to whether there will be any difficulty after January 1, 1978, in obtaining a permit for construction, other than for construction of an apartment house, a conversion, or a certificate of occupancy because the project does not have individual metering or submetering. Another question was whether they mean what the court has said? Or, more importantly, who is to be the master?

576. The court, although clearly in error, felt that an agreement to share losses is a prerequisite to the existence of a joint venture. Rather, the sharing of losses is a consequence of a joint venture, unless the agreement expressly provides otherwise. Was the provision in the agreement that disclaimed the existence of a joint venture tantamount to an agreement not to share losses? See generally J. CRANE & A. BROMBERG, PARTNERSHIP § 14(e), at 72 (1968); Comment, Joint Adventurers—The Sharing of Losses Dilemma, 18 U. MIAMI L. REV. 429 (1963).

577. See Mooney v. Ingram, 547 S.W.2d 314 (Tex. Civ. App.—Dallas 1977, writ ref’d n.r.e.), discussed at note 201 supra.


cities could issue permits or certificates of occupancy prior to January 1, 1978, if the project would be completed after that date and would not be in compliance with the statute. The Texas attorney general ruled that this new statute does not prohibit the issuance of a certificate of occupancy for an apartment building or a conversion which lacks individual metering or sub-metering completed after January 1, 1978, as long as a building permit was issued prior to that date.580

Two amendments concerned physically handicapped persons and their access to housing and private facilities. Article 4419e581 was amended to prohibit discrimination in access to housing against physically handicapped persons; however, “access” does not require modification of the property. On the other hand amendments to article 687582 added a considerable list of building criteria pertaining to the use of facilities by handicapped persons that are applicable to certain private buildings.583

Formerly, subdivision A of article 5160584 and section 2 of article 5472585 provided that a “prime contractor” entering into a formal contract with the state in excess of $15,000.00 was required to give a statutory bond. The amount has now been increased to $25,000.

There were also two legislative amendments relating to zoning. The legislature repealed article 976a586 which formerly required a vote of the residents of an annexed area in order to change a zoning ordinance which existed in that area prior to the annexation. Additionally, article 1011e587 was amended by the addition of a provision permitting a municipality to require a three-fourths vote of the council to override certain planning or zoning commission recommendations.

2. Deceptive Trade Practices.

The Texas Deceptive Trade Practices-Consumer Protection Act588 was again amended during the survey period. In particular section 17.45589 has been broadened by deleting from the definition of “services” the restriction “for other than commercial or business use” and by expanding the definition of “consumer” to include any “governmental entity.” Additionally, the amendment added a definition of an “unconscionable action or course of action,” thus bringing this type of conduct under the ambit of the Act. The combination of these new amendments with the 1975 amendments,590 ex-

582. TEX. REV. CIV. STAT. ANN. art. 678g (Vernon Supp. 1978).
583. The requirements apply to all buildings, building elements, and improved areas that are open to the public for education, employment, transportation, or acquisition of goods and services and which are constructed on or after January 1, 1978, in counties with a population of 50,000 or more.
584. TEX. REV. CIV. STAT. ANN. art. 5160(A) (Vernon 1971).
585. Id. art. 5472d, § 2 (Vernon Supp. 1978).
587. TEX. REV. CIV. STAT. ANN. art. 1011e (Vernon Supp. 1978). This amendment is discussed in greater detail at note 541 supra and accompanying text.
panding the definitions of “consumer” to include a “partnership or corporation” and “goods” to include “real property purchased or leased for use,” could have the effect of bringing most commercial real estate transactions within the scope of the Act. Additionally, section 17.46(b)\textsuperscript{591} of the Act was amended to expand the definition of “false, misleading, or deceptive acts or practices” to include the filing of a suit on a contract for consumer goods, services, or loans intended for personal or agricultural use in any county other than either the county in which the defendant resided at the time of the action or the county in which the defendant signed the contract.

3. **Attorneys’ Fees.**

Three legislative enactments concerned the recovery of attorneys’ fees. Article 2226 was amended to permit recovery of attorneys’ fees in suits founded upon all oral or written contracts, except certain contracts of insurers.\textsuperscript{592} Further, the amended article deleted the former reference to the State Bar Minimum Fee Schedule. New article 5523b\textsuperscript{593} has been added to entitle the prevailing party in an adverse possession case to recover attorneys’ fees.\textsuperscript{594} Finally, new article 1239b\textsuperscript{595} has been added to permit recovery of attorneys’ fees in a suit for breach of a restrictive covenant.

4. **Loans and Interest.**

There were a number of legislative developments in the area of loans and interest rates. New article 5069—1.09\textsuperscript{596} provides that certain federally insured loans may bear interest or be discounted at rates permitted by federal law. Article 5069—1.07\textsuperscript{597} was amended by the addition of subsection (c), providing that any borrower may pay the same rate as corporations on loans of $500,000 or more made for certain oil and gas development costs, “provided that the value of the collateral securing such loan is reasonably estimated by the lender at the time of making the loan to be in excess of the amount of the loan.” Also, an exhaustive effort was made in the legislature to amend article 5069—1.07(a) and (b). After many revisions an abridged version was submitted to the legislature, but it failed to pass since it could not be brought to a vote by the final day of the session. Article 5069—6.05\textsuperscript{598} was amended to permit retail installment contracts or charge agreements for the sale or construction of a residence which place a first lien upon real property, provided the time-price differential does not exceed an annual rate of ten percent.

Article 21.48A of the Insurance Code\textsuperscript{599} was amended to expand both the

\textsuperscript{591.} TEX. BUS. & COMM. CODE ANN. § 17.46(b) (Vernon Supp. 1978).
\textsuperscript{592.} TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978).
\textsuperscript{593.} Id. art. 5523b.
\textsuperscript{594.} Attorney’s fees are recoverable from the “party unlawfully in actual possession” if the prevailing party has given written notice and demand to vacate at least ten days prior to filing suit. The written demand must include notice that a judgment for costs and attorney’s fees may be entered.
\textsuperscript{595.} TEX. REV. CIV. STAT. ANN. art. 1239b (Vernon Supp. 1978).
\textsuperscript{596.} Id. art. 5069—1.09.
\textsuperscript{597.} Id. art. 5069—1.07.
\textsuperscript{598.} Id. art. 5069—6.05.
\textsuperscript{599.} TEX. INS. CODE ANN. art. 21.48A (Vernon Supp. 1978).
definitions of "lender" and "borrower" and the subject matter covered. The subject matter includes both real and personal property subject to a mortgage, deed of trust, lien, security agreement, or other security interest. The amendment also prohibits a lender from using information on an insurance policy for the purpose of soliciting business. Additionally, no lender may require a borrower to furnish evidence of insurance more than fifteen days prior to the policy expiration date, although a lender may provide full insurance coverage to the extent of its security interest upon the borrower's failure to provide an adequate policy within this fifteen-day period. This provision should be of interest to mortgagees who are using one of several popular printed deed of trust forms that require evidence of insurance thirty days before the existing policy expires. A lender may also require the borrower to designate an insurance agent, except in case of a policy renewal, furnish insurance information to another who has a lien on the same property, or process an insurance claim.

Other legislation relating to loans and interest rates included an amendment to article 342-508 which provides that on loans of $100.00 or more for a period of one month or more, a bank, in lieu of all other interest charges in connection with the loan, may charge the reasonable value of services rendered, not to exceed fifteen dollars for each loan transaction. Also, article 1302-2.06 of the Texas Miscellaneous Corporation Laws was amended to expand the authority of a corporation to guarantee the indebtedness of any subsidiary, parent, or affiliated corporation. Article 342-507, which limits the liability of any one borrower to twenty-five percent of its capital and certified surplus, was amended to exclude from the limitation liability under an agreement by a third party to repurchase from the bank an indebtedness guaranteed by the United States Government to the extent of the value guaranteed. Articles 5069-8.01, 8.02 and 8.04 relating to the civil liability and penalties for contracting for, charging, or receiving certain interest, time-price differential, or other charges, and for failing to perform certain duties in consumer credit transactions were amended.
The amendments also provide venue rules and alter the limitations periods for bringing actions.\(^6\)

5. **Foreign Limited Partnerships; Assumed Names.**

The Texas Uniform Limited Partnership Act\(^6\) was amended to permit the voluntary filing by a foreign limited partnership of a petition to transact business in Texas by paying the same substantial filing fee charged to Texas limited partnerships. After filing, the foreign limited partnership now enjoys the same rights and privileges and is subject to the same duties, restrictions, and liabilities as a Texas limited partnership. Its internal affairs, however, and the liability of its limited partners are governed by the laws of the state of its formation. There has been some question as to the liability of limited partners of a foreign limited partnership for Texas obligations.\(^6\) The amendment to the UPA provides a method for receiving limited liability status in Texas if it is accorded under the foreign law. The amendment expressly provides, however, that no inference is intended with respect to the law governing a foreign limited partnership that does not qualify under the Texas act.

The assumed name statute also has been expanded and clarified.\(^6\) Any person, other than a corporation, who regularly conducts business or renders professional services under an assumed name now must file a certificate in each county where a business or professional service is maintained or where business or services are conducted. "Any person" includes an individual, joint venture, partnership, estate, real estate investment trust,\(^6\) and company. A corporation which regularly conducts business or renders professional services in Texas must file a certificate with the Secretary of State and, if it is required to maintain a registered office in Texas, in the county where its registered office and principal office are located. If a certificate becomes "materially misleading" a new certificate must be filed. Certificates filed under the prior law become void on December 31, 1978, unless a new certificate is filed under the new statute. Civil (inability to sue) and criminal (fine up to $2,000) penalties now are imposed for noncompliance.

6. **Miscellaneous.**

The legislature enacted the Licensed State Land Surveyor's Act of 1977\(^6\) to provide for examination and license requirements of state land surveyors

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\(^6\) Article 5069-8.04 now restricts venue to the county where the transaction was entered into or where the defendant resided at the time the action was filed. The periods of limitation are now two years from the date of the occurrence of the violation or four years from the date of the loan or retail installment transaction, whichever is later, and in the case of open end credit transactions, to two years from the date of the violation.

\(^6\) TEX. REV. CIV. STAT. ANN. art. 6132a (Vernon 1970).

\(^6\) TEX. REV. CIV. STAT. ANN. art. 4282-6 (Vernon Supp. 1978).

\(^6\) A real estate investment trust is not defined in the statute, and it is unclear if this term includes only a trust qualified as such under Texas law or one qualified as such under the Internal Revenue Code. Many real estate investment trusts, as defined in the Internal Revenue Code, have recently elected not to qualify under the Code; but some states have amended their statutes to recognize a trust as a real estate investment trust even though it no longer qualifies for that purpose under the Internal Revenue Code. See, e.g., Act 526, 1977 La. Sess. Law Ser. (West).

\(^6\) See J. CRANE & A. BROMBERG, supra note 576, § 26, at 146 n.31.

and for the establishment of a Board of Examiners of Licensed State Land Surveyors. The filing fee requirements for certain legal papers, including real property records, were amended. Article 1396-2.02 of the Texas Non-Profit Corporation Act was amended to allow non-profit corporations to hold real property donated to them and articles 1302-4.01 and 4.02 of the Texas Miscellaneous Corporation Laws Act were amended to permit certain non-profit corporations to acquire and hold "surplus" real property.

Five major amendments were passed in the area of water law, most notably the consolidation of the Texas Water Development Board, the Texas Water Rights Commission, and the Texas Water Quality Board into a single agency called the Texas Department of Water Resources. The other four amendments related to the authority to set water rates, construction bids on contracts for water control and improvement districts, levee improvement districts, and local elections for weather modification permits.

The 1977 Property Article reported that three significant uniform acts involving real property had been approved by the National Conference of Commissioners on Uniform State Laws—the Uniform Land Transactions Act, the Uniform Simplification of Land Transfers Act, and the Uniform Condominium Act. Substantial revisions have been made to all of these uniform acts since the 1977 Property Article was written. It is anticipated that these uniform acts will receive final approval within a few months and will be presented to various state legislatures shortly thereafter. Also, the Department of Housing and Urban Development, Veterans Administration, Federal Home Loan Mortgage Corporation, and Federal National Mortgage Associations have joined to propose uniform condominium policies, and Congressmen Minish and Reuss introduced House Bill 3519 dealing with national standards to protect purchasers of units of condominiums and planned unit developments. The growing popularity of condominiums and planned unit developments is certain to bring about greater restrictions on developers and protection for purchasers. Professor Casner is chairing a committee that is proposing a Model Buyer’s Title Protection Notice Act.

614. TEX. REV. CIV. STAT. ANN. arts. 3930a-1, 3930(b), 3930(c) (Vernon Supp. 1978).
615. Id. art. 1396-2.02.
616. Id. arts. 1302-4.01 to 4.02.
618. Id. § 51.140.
619. Id.
620. Id. § 57.
621. Id. § 14.0641.
622. The House of Delegates of the American Bar Ass’n gave its approval to all three articles on Feb. 14, 1978, although its approval of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act was by a narrow margin. Recent articles dealing with the Uniform Land Transactions Act before the latest revisions include Bruce, Mortgage Law Reform Under the Uniform Land Transactions Act, 64 GEO. L.J. 1245 (1976); Maggs, Remedies for Breach of Contract Under Article Two of the Uniform Land Transactions Act, 11 GA. L. REV. 275 (1977); Comment, Secured Transactions Under Article 3 of the Uniform Land Transactions Act, 1976 WIS. L. REV. 899.
624. See Miller v. Granados, 529 F.2d 393 (5th Cir. 1977), which suggests that condominium management agreements may be unlawful tying arrangements under section I of the Sherman Act if the sale of units is conditioned upon the purchaser’s acceptance of an exclusive management agreement.
which requires that purchasers of residential property receive notice if a title policy or title opinion is being issued only for the mortgagee's benefit. Texas has a similar requirement, but it applies only to title policies and not to title opinions.