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Real Property: Title and Ownership Problems and Purchases and Sales

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REAL PROPERTY: TITLE AND OWNERSHIP PROBLEMS AND PURCHASES AND SALES

by

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I. TITLE AND OWNERSHIP PROBLEMS

A. Title Disputes

Adverse Possession. A number of cases reported during the survey period involved claims of ownership of land based on adverse possession under the statutes of limitation applicable to actions for the recovery of lands. In Ellis v. Jansing plaintiffs sought to establish title to a strip of land, a portion of which previously had been dedicated by plaintiffs' and defendants' common source of title to the City of Waco and the general public for use as an alley. Defendants claimed title to the disputed tract under the ten-year statute of limitations. Plaintiffs and defendants did not dispute the fact that title was subject to the public easement. The trial court granted summary judgment for plaintiffs. The Waco court of civil appeals reversed and remanded the case for trial on the merits, rejecting defendants' claim that an action to establish title by limitation to land dedicated to public use was barred under article 5517. The court rea-

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1. Adverse possession is defined in TEX. REV. CIV. STAT. ANN. art. 5515 (Vernon 1958) as "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."
2. Texas has six limitations statutes that vest title to realty by adverse possession. TEX. REV. CIV. STAT. ANN. arts. 5507, 5509, 5510, 5519a (Vernon 1958), & arts. 5518, 5519 (Vernon Supp. 1982). The limitation period is either three, five, ten or twenty-five years depending on the circumstances. In some instances the record owner will be barred from suit despite the presence of legal disabilities during the limitation period. Id. arts. 518-5519a. See generally Larson, Limitations on Actions for Real Property: The Texas Five-Year Statute, 18 SW. L.J. 385 (1964); Larson, Texas Limitations: The Twenty-Five-Year Statutes, 15 SW. L.J. 177 (1961); Note, Adverse Possession: The Three, Five and Ten Year Statutes of Limitation, 7 ST. MARY'S L.J. 78 (1975).
5. 610 S.W.2d at 814.
6. Id. at 813.
7. Id. at 815.
8. Id. TEX. REV. CIV. STAT. ANN. art. 5517 (Vernon 1958) provides:
   The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, alley, sidewalk, or grounds which be-
soned that article 5517 was designed to protect the rights of the city and the general public against limitation claimants, and therefore, had no applicability in a dispute between private parties claiming fee simple title to land subject to a public easement. The Texas Supreme Court reversed the court of civil appeals and affirmed the trial court's grant of summary judgment. The court held that article 5517 was applicable in this case to protect the rights of the persons to whom the easement was dedicated and thereby prevent any claim of adverse possession with respect to the easement. Additionally, the court held that defendants had failed to present evidence of a title by limitation to the remaining portion of the disputed tract. The court noted that to establish title under the ten year statute, the defendants would have to tack their period of adverse possession, if any, to that of their grantor. The grantor testified by deposition that although he had bought the property thinking that the land in dispute was within his boundary and that he thereafter maintained it as part of his yard, he had never claimed or intended to claim any property other than that described in his deed, or what he thought was contained in his deed. The court relied on Wright v. Vernon Compress Co. and Orsborn v. Deep Rock Oil Co. in holding that mere occupancy or naked possession of land, no matter how exclusive and hostile to the true owner it may appear, cannot be adverse unless accompanied by the occupant's intent to make it so. Because the defendants' grantor did not have the requisite intent, his possession was not adverse and the defendants could not tack his period of possession to theirs to meet the requisite ten year period.

In Field Measurement Service, Inc. v. Ives the Corpus Christi court of civil appeals held that a deed allegedly obtained by fraud conveyed legal title to the grantees because the deed was not void on its face. When

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9. 610 S.W.2d at 814-15.
11. Id. at 570.
12. Id. at 571.
14. 620 S.W.2d at 571.
15. Id.
16. 156 Tex. 474, 482, 296 S.W.2d 517, 522 (1957). “Mere occupancy of land without any intention to appropriate it will not support the statute of limitation.”
17. 153 Tex. 281, 291, 267 S.W.2d 781, 787 (1954) (quoting Houston Oil Co. v. Stepney, 187 S.W. 1078, 1084: “No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to make it so. The naked possession unaccompanied with any claim of right will never constitute a bar.”).
18. 620 S.W.2d at 571-72.
19. Id.
20. 609 S.W.2d 615 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).
21. Id. at 619-21. Plaintiff was barred from establishing that the deed was fraudulently executed because the action was not brought within the limitation period prescribed by TEX. REV. CIV. STAT. ANN. arts. 5526, 5529 (Vernon 1958). 609 S.W.2d at 619. In Neal v. Pickett, 280 S.W. 748 (Tex. Comm'n App. 1926, judgment adopted), the court held that under
coupled with the jury's finding of three years of continuous, adverse possession by the defendant, who had purchased from the grantees named in that deed, the legal title so conveyed was held sufficient to vest title in the defendant under the three-year statute of limitations. Quitclaim deeds, however, were held insufficient to support a claim of title under the five-year statute of limitations in Bell v. Ott.

The court relied on Porter v. Wilson in holding that a quitclaim deed does not qualify as a deed under the five-year statute because it does not purport to convey the land itself, but instead an undefined and uncertain interest in the land. Because a quitclaim does not give any notice of the nature and extent of the claim which it asserts it cannot qualify as a deed under the five-year statute.

Several cases dealt with questions involving fences and use of the enclosed land. In Rudy v. Hardy the Waco court of civil appeals found the evidence supported the jury finding of peaceable, and adverse possession for a period of ten consecutive years, so as to establish a limitation title under the ten-year statute. The forty acres in dispute were part of a tract

the three-year statute of limitation, neither “title” nor “color of title” can be obtained from a deed procured by fraud so as to establish a limitation title because of the lack of intrinsic fairness and honesty in such a conveyance. A duly recorded fraudulently obtained deed, however, was a sufficient muniment of title such that adverse possession could be established under the five-year statute, presently TEX. REV. CIV. STAT. ANN. art. 5509 (Vernon 1958). In Field Measurement the adverse possessor had been in possession in excess of five years prior to commencement of the suit. 609 S.W.2d at 618. The case does not reveal whether the fraudulent deed had been recorded and the court made no mention of the five-year statute or the decision in Neal v. Pickett; thus the existence of a limitation title was decided solely under the three-year statute. In Hoester v. Wilke, 138 Tex. 263, 158 S.W.2d 288 (1942), the Texas Supreme Court held that an allegedly fraudulent deed, regular on its face so as to give rise to no suggestion of fraud, could be used to establish color of title under the three-year statute when it had not been established prior to the expiration of the three-year period that the deed was in fact fraudulent, even though the cause of action for fraud was not barred at the time. Id. at 265-66, 158 S.W.2d at 289-90.

22. 609 S.W.2d at 620-21. See TEX. REV. CIV. STAT. ANN. art. 5507 (Vernon 1958): “Suits to recover real estate, as against a person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action accrued, and not afterward.”

23. TEX. REV. CIV. STAT. ANN. art. 5509 (Vernon 1958). Article 5509 provides in part:

Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after cause of action shall have accrued, and not afterward.

24. 606 S.W.2d 942 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e.).


26. 606 S.W.2d at 952.

27. Id. The court also held that claims made under the ten-year statute, TEX. REV. CIV. STAT. ANN. art. 5510 (Vernon 1958), were not conclusively established by the evidence. 606 S.W.2d at 952.

28. 610 S.W.2d 565 (Tex. Civ. App.—Waco 1980, writ dism’d w.o.j.).

29. Id. at 567. See TEX. REV. CIV. STAT. ANN. art. 5510 (Vernon 1958). Article 5510 provides in part:

Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute a suit therefor within ten years next after his cause.
of land claimed by the defendants that had been enclosed within a substantial fence built by the defendants' father in 1951 or 1952, and which the defendants thereafter had maintained. The defendants had grazed cattle continuously within the enclosure, had bulldozed the property once to remove timber on the land, had cultivated a crop for two years, and had the brush cut twice during that period. According to several witnesses, the defendants claimed and used all of the land within the enclosure. In Karell v. West the defendants claimed title to a parcel of land adjoining land owned by the defendants. Both tracts of land were enclosed within the same fence, which was in existence when the defendants bought their acreage. The court held that enclosure of the land gives rise to a rebuttable presumption of an adverse claim by the party in possession, but that presumption was diluted in this case by the fact that the fence was not erected designedly by the defendants. The court held that the defendants failed to prove continuous use or enjoyment of the land because they had never lived on or cultivated the land, and there was no evidence of continued use by them or their tenants for any ten year period in any manner that would have put the record owner or notice of their claim. In DeArman v. Surf a fence, erroneously believed by all parties to be situated on the boundary lines of their respective properties, which had been in existence and maintained for more than fifty years, was held to be strictly a casual fence that under the statutes of limitations had "no more effect than if it had never come into existence." With no evidence introduced as to when, or by whom, or for what purpose the fence was originally built, the fence alone could not establish the existence of an intent to adversely possess the land in question. Additionally, entry upon the land by straying cattle, the occasional cutting of wood, and the use of an existing roadway on the disputed area were held insufficient to prove adverse possession as defined by article 5515. Several cases reported during the survey period dealt with sufficiency of notice of repudiation in order to commence adverse possession in favor of a tenant. Possession by a tenant pursuant to a landlord-tenant relationship

30. The action in trespass to try title was brought by the record owner in 1974. The defendants asserted adverse possession as a defense, claiming continuous use and enjoyment since 1951. 610 S.W.2d at 566.
31. 610 S.W.2d at 567.
32. 616 S.W.2d 692 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.) (per curiam).
33. Id. at 694-95.
34. Id. at 696. See McKee v. Stewart, 139 Tex. 260, 268, 162 S.W.2d 948, 952 (Tex. Comm'n App. 1942, opinion adopted).
35. 616 S.W.2d at 696. While the court referred to no particular statute of limitations, the facts demonstrate that the claim of adverse possession was made under the ten-year statute. Tex. Rev. Civ. Stat. Ann. art. 5510 (Vernon 1958).
36. 618 S.W.2d 88 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).
37. Id. at 91.
39. See 618 S.W.2d at 91.
40. Id. at 92-93.
will not be considered adverse to the record owner until the tenant repudiates the tenancy and the owner receives actual or constructive notice of the repudiation. In Junkerman v. Carruth the plaintiff had gone into possession in 1935 as a tenant under an agreement with the defendant's predecessor in title which permitted the tenant to farm the tract in dispute in return for keeping the surface taxes paid. After forty-two years of continuous possession of the twenty acre tract, the tenant brought suit in trespass to try title. The Corpus Christi court of civil appeals found that the jury could have reasonably inferred that the owner was aware of the tenant's repudiation of the tenancy relationship because the tenant sent a letter to the owner in 1960 stating that his son wanted to build a home on the tract, but that to do so, they needed a deed. The owner's reply letter dated almost two years later: "I have been advised by a lawyer that you were trying to get a title to this land." In Horrocks v. Horrocks and Hernandez v. Hernandez parties who were co-tenants were held not to have brought home notice of repudiation to their co-tenants against whom they allegedly claimed adversely. In each case the court relied on a long line of cases including Todd v. Bruner and Alexander v. Kennedy in holding that possession of land by one co-tenant is presumed to be in recognition of the common title until notice of adverse possession is brought home to the co-tenants not in possession, either by notice given by the co-tenant in possession, or by unequivocal and unmistakable acts of notoriety, that an adverse and hostile claim is being asserted such that the non-possessing co-tenants will be presumed to have notice of the adverse claim.

Easements. In Allen v. Keeling the plaintiffs and defendants owned adjacent tracts of land. The defendants had sought to connect a road from a residential subdivision on their land to an undedicated dirt roadway on the plaintiffs' land, over which an undisputed prescriptive easement existed in favor of the public. The Texas Supreme Court held that the prescriptive rights acquired by the public in the roadway were not limited to the roadway itself, but also extended to land reasonably needed for repairs, drainage ditches, and the convenience of travelers. In this case, the prescriptive easement extended into the "bar" ditches eighteen to twenty

44. Id. at 168. The letter was sent to the owner in Ohio; in it, the tenant stated that he had not heard from the owner since 1936. In the owner's reply letter, dated two years after the tenant's letter, he stated that he was living in Florida. Id. at 167.
45. Id. at 167-68.
46. 608 S.W.2d 733 (Tex. Civ. App.—Dallas 1980, no writ).
48. 608 S.W.2d at 737; 611 S.W.2d at 736.
49. 365 S.W.2d 155, 159-60 (Tex. 1963).
50. 19 Tex. 488, 492-93 (1857).
51. See 608 S.W.2d at 736-37; 611 S.W.2d at 735.
52. 613 S.W.2d 253 (Tex. 1981).
53. Id. at 25-55.
feet in width lying on either side of the roadway. The prescriptive easement did not, however, reach all the way to the boundary of the defendants' land because a narrow strip of land separated the outer edge of the "bar" ditch on the south side of the roadway from plaintiffs' fence, which itself was located approximately two and one-half feet inside the record title line to the plaintiffs' land. Relying on Brooks v. Jones, the court held that a landowner must be adjacent to an easement to acquire rights in the easement. Because the plaintiffs' land was not adjacent to the prescriptive easement, the defendants were held not to have a justiciable interest in the roadway and were enjoined from trespassing on the plaintiffs' land.

In Beck v. Mills the parents of the parties had given them adjacent tracts of land. Access to the plaintiff's land was provided by a road through the defendant's land. The road had been in continuous use for more than forty years and was well-defined and conspicuous. In a suit for an injunction to compel the defendant to remove a lock on a gate blocking the road, the defendant argued that the only easement which could exist was one created by an implied reservation and not by an implied grant, thereby requiring a finding of strict necessity rather than the standard of reasonable necessity applicable to implied grants. The court disagreed, holding that where the gifts partitioning the tracts were made simultaneously, and the roadway was in existence, was in apparent, continuous use, and was reasonably necessary to the enjoyment of the part of the land to which it provided access, each party took his part of the land subject to the roadway as it existed at the time of conveyance. The plaintiff therefore took by implied grant and the defendant took subject to the grant; as such, reasonable necessity was the appropriate standard.

In Meredith v. Eddy the trial court found that the plaintiffs, who had purchased a landlocked tract to which access was provided by a road over land belonging to the vendors at the time of purchase, were entitled to an easement under four theories: easement by prescription, easement by es-toppel, easement by implication and easement by necessity. In affirming

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54. 578 S.W.2d 669, 674 (Tex. 1979). In Brooks the plaintiff attempted to establish his right to use a dedicated road located wholly on defendant's land on a theory of public dedication. The court held that while public dedications are enforceable by private landowners with a property interest therein, the plaintiff had no justiciable interest in the road because his land was not adjacent to the road.

55. 613 S.W.2d at 255.
56. Id. at 254-55.
58. Id. at 355. See generally Mitchell v. Castellaw, 151 Tex. 56, 246 S.W.2d 163 (1952). Implied grants and implied reservations arise when the owner of a single parcel of land conveys away a portion of it under such circumstances causing an easement to arise between the two estates. If the easement favors the parcel granted, an implied grant is created. If the easement favors the parcel retained by the grantor, an implied reservation is created. 151 Tex. at 64-65, 246 S.W.2d at 167.

59. 616 S.W.2d at 355.
60. Id.
62. Id. at 238.
the judgment for plaintiff, the court of civil appeals held that there was no evidence of adverse holding of the road that would give rise to a prescriptive easement because of the testimony of one of the plaintiffs showing permission by the owner to use the road. The court, however, held there was sufficient evidence to support the requirements of an easement by estoppel, which are that (1) a representation be made to the promisee, (2) it is believed by the promisee, and (3) he relies upon the representation. There also was sufficient evidence to prove the requirements of an easement by implication, that (1) there be an apparent use, i.e. a road into or out of the granted area in existence at the time of the grant, (2) the use be continuous, and (3) the use be necessary. On the issue of easement by necessity, to which the defendants conceded the plaintiffs were entitled when they purchased their land, the defendants argued that there was no longer a necessity to use the original route of the easement along the old road because defendants had recently built a new road for them. The court rejected this argument, holding that once the easement by necessity was established, its location could not be changed except by the express or implied consent of both parties.

**Dedication.** Two cases reported during the survey period dealt with issues of common law dedication of roadways. In *Stewart v. Fitts* a fourteen year old boy ran his dirt bike into a barbed strand which was located on a strip of land which allegedly had been dedicated as a public road by defendants. In a suit filed on behalf of the boy, plaintiffs contended that defendants were negligent for barricading a public road. In affirming a take nothing judgment for defendants, the El Paso court of appeals rejected plaintiff's contention that the land in question had been dedicated for public use at common law. Although defendants had filed a dedication deed for record in the deed records of the county (which was never presented to or formally or informally accepted by the governing bodies of either the city or the county), the court held that there was insufficient evidence to indicate that the offer of dedication by the deed had been accepted by the public through actual use. *Lee v. Uvalde County* dealt

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63. *Id.* An essential element in the creation of a prescriptive easement is the use of the easement in a manner adverse to the holder of the land. *See*, e.g., *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622 (1950).

64. 616 S.W.2d at 238-39. *See* *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962).

65. 616 S.W.2d at 240.

66. *Id.* An easement by necessity ceases to exist when the necessity terminates. *E.g.*, *Bains v. Parker*, 143 Tex. 57, 61, 182 S.W.2d 397, 399 (1944). In *Meredith* the Court held that necessity was still present because the plaintiffs still needed a way of ingress and egress to their land. 616 S.W.2d at 240.

67. 616 S.W.2d at 240. *See* *Grobe v. Otmeis*, 22 S.W.2d 87, 89 (Tex. Civ. App.—San Antonio 1949, writ ref'd n.r.e.); *Carelton v. Dierks*, 203 S.W.2d 552, 555 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.).

68. 604 S.W.2d 371 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

69. *Id.* at 373.

70. *Id.* at 373-74.

71. *Id.* at 373.
with the issue of implied dedication, the elements of which were stated to include: (1) a person competent to dedicate, (2) a public purpose to be served by the dedication, (3) a tender or offer of dedication, and (4) acceptance of the tender or offer.\textsuperscript{73} The court held that the intent element must be shown by an unequivocal act or declaration of the owner.\textsuperscript{74} In \textit{Lee} acquiescence by the landowners to the maintenance of roads by the county was held insufficient to establish an intent to dedicate or to estop the landowners from denying an intention to dedicate the roads.\textsuperscript{75} The court also noted that because the road was used only by the landowners in the area, rather than by the public in general, no dedication had arisen by use of the road by such a limited segment of the public.\textsuperscript{76}

In \textit{City of Fort Worth v. Bewley}\textsuperscript{77} the court dealt with an 1873 dedication of a tract of land in downtown Fort Worth for park purposes. In 1892, the dedicator gave her permission to use the tract for a public library. Because fee title to the property had not been conveyed by the dedication, the successors of the original dedicator were held to be entitled to recover the land when the library was moved to a new location in 1978.\textsuperscript{78}

\textbf{Equitable Claims.} Several cases during the survey period involved the recovery of interests in real property based upon equitable claims. In \textit{Crume v. Smith}\textsuperscript{79} plaintiffs sought partition of land that had been owned jointly by four daughters (plaintiffs’ predecessors), a brother (defendants’ predecessor), and their mother. The original owners had conveyed a portion of the land to a vendee by a general warranty deed that expressly retained a vendor’s lien securing payment of purchase money notes payable to the mother only. When the vendee was unable to pay the notes he reconveyed the land to the mother and brother only, thereby depriving the daughters of legal title. The court held that because the daughters had furnished a portion of consideration for the notes, a resulting trust arose in their favor, although the mother as payee held legal title to the notes.\textsuperscript{80} Thus, the daughters were entitled to the same benefit enjoyed by the mother of the superior title in the land which was retained by virtue of the reservation of the vendor’s lien in the deed.\textsuperscript{81} Because of this superior title, neither the vendee nor his successors in interests could assert title against the vendor until the purchase money notes were paid, which they were not.\textsuperscript{82} Accord-
ingly, the plaintiffs, who were the heirs of the four daughters, were entitled to reclaim their interests from the heirs of the brother because any title the brother's heirs held by virtue of the reconveyance was inferior to that of the daughters. Additionally, the court found ample evidence that the mother was acting in a fiduciary capacity with respect to her daughters' interest during the transactions, and therefore, their interests also were protected by a constructive trust imposed by the court. 

Uriarte v. Petro involved a transfer of $15,000 in cash and the execution of a deed to real property by a woman to her sister. The property was to be used to care for the grantor who was seriously ill at the time of the transfers. After the transferor's death, her husband sued to recover the remaining assets, including the proceeds from the sale of the real property. The jury found that the wife had not made a gift of the money or the realty to her sister. The trial court made a finding of fact that although consideration was recited in the deed, no consideration was given or received. The court of civil appeals held that a resulting trust in favor of the husband arose from the transaction because the transfer was not a gift and was without consideration. Because the transfer was entered into for the one specific purpose of benefiting the transferor, after that purpose was fulfilled the remainder reverted to her estate and consequently to her husband as her heir. 

In Turner v. Miller plaintiff, guardian of an elderly woman sought to have the court set aside deeds that were executed by the woman to defendants, who after her son's death had befriended her and permitted a close family-like relationship between them to arise. The trial court made an implied finding that a fiduciary relationship had arisen between defendants and the woman. The appellate court noted that the existence of a fiduciary relationship placed the burden of proof upon the defendants to show the fairness of the transaction and that the trial court was justified in finding that the presumption of unfairness was not rebutted. In Thames v. Johnson a fiduciary relationship was held to have arisen between a father and his daughters by reason of the parent-child relationship and the daughters' youth at the time of the death of their mother in 1960. The daughters instituted suit to recover damages for fraud.

83. Id
84. Id. at 215-16. A court may impose a constructive trust on property to prevent a fiduciary from holding for his own benefit something of value gained by reason of the fiduciary relationship. See, e.g., Fitz-Gerald v. Hull, 150 Tex. 39, 48-53, 237 S.W.2d 256, 261-64 (1951). In Horton v. Harris, 610 S.W.2d 819 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) the court refused to impose a constructive trust when the evidence did not indicate the presence of fraud or a confidential relationship. Id. at 823-25.
85. 606 S.W.2d 22 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
86. Id. at 25.
87. Id.
88. Id. at 215.
89. Id.
90. 618 S.W.2d 85 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.).
91. Id. at 87. See Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 509 (Tex. 1980).
92. Id.
arising out of the sale by the father of land in which the daughters had inherited an undivided one-half interest from their mother. In affirming the decision of the trial court in favor of the daughters, the court of civil appeals held that the father's failure to advise the purchaser or the title company of the daughters' interest in the land, to which legal title was in the father's name only, constituted constructive fraud. The court held that the daughters were not estopped to assert their interest in the land on the basis that they had not contributed their fair share to the maintenance and taxes assessed on the land because the co-tenant relationship existing between the father and his daughters was not between parties dealing at arm's length.

Conveyances. In Bexar-Medina Atascosa Counties Water Improvement District No. 1 v. Wallace the plaintiff water district sought to enjoin construction of a septic tank on land which it claimed under a 1917 deed. The deed described three tracts of land as beginning from points designated as points "1", "2" and "3" respectively, but the deed was silent concerning the location of those points or reference to another instrument from which their location could be determined. The court held that while parol evidence is admissible to explain descriptive words and identify the land when the instrument itself contains a "nucleus of description," to be admissible the parol testimony must be directly connected to the descriptive data. Because the 1917 deed did not contain sufficient information to locate the land, the court of civil appeals upheld the trial court's holding that the deed was void.

Yoast v. Yoast involved a dispute over three separate gift deeds to the plaintiff and his brother from their parents. Each deed purported to convey to each of them a 1/13 undivided interest in a 442.94 acre tract of land. Before the execution of any of the gift deeds, the plaintiff had perfected title by limitation to a 160 acre tract contained within the 442.94 acres. In a suit for trespass to try title and partition, the trial court awarded the plaintiff the 160 acre tract by limitations and 102.45 acres, representing 3/13 of the original acreage, under the three gift conveyances. The court of civil appeals held that, because limitations title to the 160 acre tract had been perfected before execution of the gift deeds, there was a partial failure of title with respect to the 3/13 interest that the deeds purported to convey in the 160 acres. The extent of the undivided interest transferred, therefore, was to be based only upon 282.94 acres, the number

94. See id. at 614.
95. Id.
96. 619 S.W.2d 551 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).
97. Id. at 555. See Jones v. Mid-State Homes, Inc., 163 Tex. 229, 231, 356 S.W.2d 923, 924-25 (1962); Smith v. Sorelle, 126 Tex. 353, 358, 87 S.W.2d 703, 705 (1935).
98. 619 S.W.2d at 554, 556.
100. Id. at 230.
of acres remaining in the tract. The court then modified the part of the trial court's judgment granting 102.45 acres to grant recovery of only 55.76 acres by virtue of the gift deeds.

Trespass to Try Title. Texas courts distinguish between an action of trespass to try title and an action in the nature of trespass to try title. Disputes concerning actual title to realty are usually brought as trespass to try title actions. Boundary disputes typically are tried as actions in the nature of trespass to try title. In a trespass to try title action, a litigant must prove that title is vested in him as against all the world, but in an action in the nature of trespass to try title, the litigant need only prove that his title to the land is superior to that of the adverse party.

Plumb v. Stuessy involved a thirty-foot wide strip of land a mile and a half in length, consisting of two tracts acquired by the plaintiffs' predecessor in title in 1899 and 1900 and which provided access from the highway to the plaintiffs' ranch. After a dispute with a neighbor whose land adjoined the strip, the plaintiffs brought a trespass to try title action claiming ownership of the two tracts and any other land in the lane between the two fences bordering the strip. The trial court applied the rules for trial of a formal trespass to try title action and granted a directed verdict at the close of plaintiffs' evidence, rendering a judgment for the defendant which deprived the plaintiffs of their title to the two tracts and denied their adverse

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102. 620 S.W.2d at 230.
103. Id. The court stated:
   We have arrived at this figure in the following manner: in 1965, when the first
gift deed was executed, [the parents] owned 282.94 acres, out of which the
conveyed an undivided 1/13 interest to both [plaintiff] and [his brother] (21.76
acres each) leaving 239.42 acres; a second conveyance of an undivided 1/13
interest was made in 1966 to the sons in 1966 [sic] out of the remaining 239.42
acres of 18.42 acres each; in 1967 a final 1/13 undivided interest was conveyed
to [the sons] out of the remaining 202.58 acres, thus entitling each of them to
an additional 15.58 acres and a total of 55.76 acres.

104. See, e.g., Brown v. Eubank, 378 S.W.2d 707, 711 (Tex. Civ. App.—Tyler 1964, writ

105. See, e.g., Stanolind Oil & Gas Co. v. State, 136 Tex. 5, 133 S.W.2d 767 (1939).


109. See id. at 668. For the various theories that may be used to recover in trespass to try title, see Land v. Turner, 377 S.W.2d 181, 183 (Tex. 1964).
possessory claim to any other land in the lane. The court of civil appeals affirmed, holding that the plaintiffs had failed to establish title from the sovereignty, from a common source, or by limitation, and that they had waived the issue of prior possession. The Texas Supreme Court reversed and remanded the case to the trial court, holding that the petition asserted more than a pure trespass to try title action. The court concluded that the action was a boundary case, because the plaintiffs’ title was not disputed, despite the defendants’ formal “not guilty” plea, and the defendant’s theory of the case that a fence was not the correct boundary and thus encroached on his land. Holding that the proper test is that a case is one of boundary where there would have been no case but for the question of boundary, even though it may involve questions of title, the court concluded that the case was a boundary case, and that it was not necessary for plaintiffs to establish superior title in the manner required by a formal trespass to try title action to avoid losing title to the property.

McCarthy v. George was a trespass to try title suit in which the trial court ordered an absent co-tenant joined as an involuntary plaintiff. The court of civil appeals held the absent co-tenant to be an indispensable party whose absence deprived the court of jurisdiction. In a per curiam opinion, the Texas Supreme Court reversed and remanded the case to the court of civil appeals to consider other points of error raised but not decided, holding that under Rule 39 the absent co-tenant was not jurisdictionally indispensable where the case had been tried as to the parties present without objection at the trial level concerning nonjoinder of a party.

Aquiere v. Mayfield was a suit for injunction to prohibit an adjoining landowner from constructing a new boundary fence that would result in the defendant’s taking possession of approximately 2,000 acres previously claimed by the plaintiff. The court held that the trial court could not grant an injunction that prevented a change in the supposed boundary and thereby awarded possession to a party in the absence of a pleading asserting a cause of action in trespass to try title.

111. Id. at 354-55.
112. 617 S.W.2d at 668-69.
113. Id. See TEX. R. CIV. P. 788. See generally 56 TEX. JUR. 2d Trespass to Try Title § 92 (1964).
114. Id. at 669. See Schiele v. Kimball, 113 Tex. 1, 3, 194 S.W.2d 944, 944 (1917).
115. Id.
117. Id. at 762.
118. 609 S.W.2d 630, 633 (Tex. Civ. App.—Fort Worth 1980).
119. TEX. R. CIV. P. 39.
120. 618 S.W.2d at 763. But see Carper v. Halamicek, 610 S.W.2d 556 (Tex. Civ. App.—Tyler 1980, writ ref’d n.r.e.), which holds that in a suit for partition joinder of all co-tenants is mandatory. Id. at 557.
122. Id. at 167-68. See also Frost v. Mischer, 463 S.W.2d 166, 167-69 (Tex. 1971).
Other Title Problems. In Jensen v. Bryson in 1979 under a written contract for conveyance to her upon payment of the cash portion of the purchase price and the assumption of other indebtedness against the land. Bryson had performed her contractual obligations fully to December 10, 1977, but the seller could not be located to execute a deed until July 14, 1980. The warranty deed was recorded on August 27, 1980. Meanwhile, Jensen had obtained a judgment against the seller, an abstract of which was recorded on April 29, 1980. Execution of that judgment was levied on the realty in late June, with a sheriff's sale to occur on September 2, 1980. In a suit by Mrs. Bryson to enjoin the sheriff's sale, the court considered the effect of article 6627 and held that it only operates on a writing passing title to land and not on an unrecordable interest that arises by operation of law. The parties' contract, therefore, was not governed by article 6627. It was not a "bargain, sale or other conveyance" because it merely outlined the agreed conditions for passage of title in the future. Bryson's rights were held to be superior to Jensen's judgment lien for two reasons. First, upon full performance of her obligations under the contract, she became vested with equitable title, superior to the seller's legal title. This equitable title was not subject to registration and, therefore, did not come within article 6627 with respect to the rights of creditors. Second, her possession of the land was held to impart notice of her equitable title, and therefore Jensen did not qualify as a creditor without notice under the statute.

B. Ownership Problems

Use Restrictions. The validity of restrictive covenants which require submission of plans to, and consent by, the developer or an architectural control committee before construction of improvements was at issue in Davis v. Huey. The case involved restrictions that had been imposed on a subdivision prior to the sale of any lots. Paragraph 7 of the recorded declaration of restrictive covenants provided for minimum set-back requirements from the front, side, and rear lot lines, while Paragraph 8 of the declaration required the approval of all construction plans by the developer or an architectural committee before construction could commence. Paragraph 8 provided that refusal of approval could "be based on any

124. TEX. REV. CIV. STAT. ANN. art. 6627 (Vernon Supp. 1982) provides:

All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they be made for passing any estate of freehold of inheritance or for a term of years . . . shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law . . . .

125. 614 S.W.2d at 933.
126. Id.
127. Id. See Blankenship v. Douglas, 26 Tex. 226, 229 (1862).
128. Id. See Paris Grocer Co. v. Burks, 101 Tex. 106, 111, 105 S.W.2d 174, 175 (1907).
129. 620 S.W.2d 561 (Tex. 1981).
ground, including purely aesthetic grounds, which in the sole and uncontrolled discretion of the Developer or Architectural Committee shall seem sufficient.\textsuperscript{130} Relying upon the broad authority permitting refusal conferred by Paragraph 8, the developer refused to approve the defendants' plans for a house on their lot, which complied with the set-back requirements of Paragraph 7 because the proposed placement of the house on the lot was inconsistent with the general plan of the subdivision. Despite the developer's refusal to approve the plans, the defendants started construction. The plaintiffs, owners of a neighboring lot, filed a suit to enjoin the construction. The trial court granted a permanent injunction prohibiting further construction and requiring removal of a part of the house already construed. The court of civil appeals affirmed.\textsuperscript{131} In reversing the lower courts, the Texas Supreme Court held that covenants requiring prior consent to proposed building plans are valid "insofar as they furnish adequate notice to the property owner of the specific restriction sought to be enforced."\textsuperscript{132} The court held that Paragraph 8 failed to provide notice that it was intended to regulate placement of improvements on individual lots, in addition to the specific set-back requirements of Paragraph 7, and held that there was no evidence of a general scheme or plan in that regard at the time the restrictions were filed in the deed records. Therefore, the defendants had no notice at the time they purchased the lot that Paragraph 8 would be enforced to regulate placement of improvements, so that as a matter of law Paragraph 8 failed to provide notice of the placement restrictions sought to be enforced, and the refusal of the developer to approve the plans exceeded the authority granted by the covenants and was void.\textsuperscript{133}

A number of other cases reported during the survey period involve various issues pertaining to restrictive covenants. In \textit{Brown v. Wehner}\textsuperscript{134} the court applied the rule that a restrictive covenant is to be strictly construed against the party seeking to enforce it in holding that a restriction prohibiting any structure on a lot "except one single family residence" does not prohibit the resubdivision of an original lot into three smaller lots, all of which meet the minimum side and front set back requirements of the original restrictions.\textsuperscript{135}

\textit{Scott v. Rheudasil}\textsuperscript{136} was a suit by lot owners to enforce restrictive covenants prohibiting house trailers. The covenants had been filed by the developer, a corporation which was no longer in existence, and no provision was made for enforcement by anyone other than the developer and its assigns. The court held that the plaintiffs had standing to enforce the restrictions, at least to the extent necessary to obtain a temporary injunction.

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.} at 563.
  \item \textsuperscript{131} 608 S.W.2d 944 (Tex. Civ. App.—Austin 1980).
  \item \textsuperscript{132} 620 S.W.2d 566. \textit{See generally} 20 AM. JUR. 2d Covenants, Conditions and Restrictions §§ 304-11 (1965).
  \item \textsuperscript{133} 620 S.W.2d at 567-68.
  \item \textsuperscript{134} 610 S.W.2d 168 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
  \item \textsuperscript{135} \textit{See}, e.g., \textit{Baker v. Henderson}, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941).
  \item \textsuperscript{136} 610 S.W.2d at 171.
  \item \textsuperscript{137} 614 S.W.2d 626 (Tex. Civ. App.—Fort Worth 1981, no writ).
\end{itemize}
because the entity to which the right of enforcement was reserved was defunct, all the lots had been sold and the developer had relied on the covenants as a selling point.\textsuperscript{138} The court noted that upon trial on the merits, the burden would be on the plaintiffs to prove that the covenants were intended to inure to their benefit and that the defendants had purchased their lot with notice of that intent.\textsuperscript{139}

In \textit{Bryant v. Lake Highlands Development Co.}\textsuperscript{140} the court dealt with a provision in restrictive covenants that permitted ninety percent of the lot owners, together with all their first lien holders, to amend the covenants and restrictions. The amendment in question permitted the development of fourplex units on lots originally restricted to single family townhouses, but it did not affect the developed lots, all of which remained subject to the original restrictions. The court held that, having purchased their lots with notice of a right to amend the restrictions, the plaintiffs had no guaranty that the entire subdivision would remain devoted exclusively to single family townhouses.\textsuperscript{141}

Two cases decided during the survey period dealt with attempts to impose existing restrictions on additional property owned by the same developer. \textit{Wren Mortgage Co. v. Timber Lakes & Timber Ridge Association}\textsuperscript{142} was a suit for a declaratory judgment that a 31.78 acre tract did not lie within a subdivision and, therefore, was not burdened with the restrictions imposed on that subdivision. The court held that a clause in a deed covering the tract providing that the deed was subject to the restrictions in question, and which referred to the appropriate volume and page numbers of the deed records containing the restrictions, was merely a precautionary recital to protect the grantor. Thus, the recital in the deed did not burden the tract with the restrictions.\textsuperscript{143} The court also held that no evidence existed that the restrictions were imposed by a general plan or scheme of development, where the restrictions were imposed upon nine different subdivisions platted and restricted at different times, and each instrument permitted its restrictions to be changed or abolished by a majority of lot owners separately from other property owners in other subdivisions.\textsuperscript{144} \textit{Sills v. Excel Services, Inc.}\textsuperscript{145} was a suit by homeowners in a subdivision to enforce single-family residential covenants on a 4.22 acre tract upon which an apartment complex was to be constructed. When the residential subdivision was platted, the 4.22 acres was shown on the plat labeled as “Future Development.” The court denied a temporary injunction, holding that the 4.22 acre tract labeled for “Future Development” was not within the sub-

\textsuperscript{138} Id. at 629. See \textit{Monk v. Danna}, 110 S.W.2d 84, 87 (Tex. Civ. App.—Dallas 1937, writ dism’d w.o.j.).

\textsuperscript{139} Id. at 614 S.W.2d at 629.

\textsuperscript{140} Id. at 618 S.W.2d 921 (Tex. Civ. App.—Fort Worth 1981, no writ).

\textsuperscript{141} Id. at 923.

\textsuperscript{142} Id. at 612 S.W.2d 618 (Tex. Civ. App.—Beaumont 1980, writ ref’d n.r.e.).

\textsuperscript{143} Id. at 620-21.

\textsuperscript{144} Id. at 622. See \textit{Davis v. Congregation Shearith Israel}, 283 S.W.2d 810, 814 (Tex. Civ. App.—Dallas 1955, writ ref’d n.r.e.).

\textsuperscript{145} Id. at 617 S.W.2d 280 (Tex. Civ. App.—Tyler 1981, no writ).
division and thus was not subject to the declaration of restrictions only pertaining to the subdivision.\textsuperscript{146}

\textbf{Condominiums.} In \textit{Scott v. Williams}\textsuperscript{147} the plaintiffs, owners of apartments in a condominium regime established pursuant to the Texas Condominium Act,\textsuperscript{148} sued other apartment owners who also served as members of the board of administration, alleging that the defendants had controlled the condominium regime for their own gain and had mismanaged its affairs and funds. The plaintiffs sought damages and an injunction against future mismanagement or misapplication of funds. Not all of the apartment owners were parties to the suit, although the plaintiffs alleged that the suit was brought for themselves individually and as equitable representatives of the other co-owners. Reasoning that a condominium regime results in two distinct real property interests in each owner—his individual apartment which is owned in fee, and his undivided interest in the common elements, the court held that the plaintiffs lacked standing to sue for damages on behalf of other co-owners, because the owner of one estate in severalty cannot sue for the owner of a separate parcel, whether the suit be for title or damages, and one co-tenant normally cannot sue for damage to common property without the joinder of all co-tenants.\textsuperscript{149} The court held that the plaintiffs did, however, have standing to represent their co-tenants in obtaining an injunction to protect and preserve the common property.\textsuperscript{150}

\textbf{Disputes between Adjoining Landowners.} \textit{Carrion v. Singley}\textsuperscript{151} was a suit for injunction to require the defendant to repair or replace a retaining wall on his land which provided lateral support for the plaintiff’s property. The court held that the right of lateral support applies only to land in its natural state.\textsuperscript{152} Because both the plaintiff’s and the defendant’s lots had been excavated, terraced, and filled above the natural grade by the developer, the defendant had no duty to maintain the retaining wall on his land to provide lateral support to the plaintiff’s land.\textsuperscript{153}

\textit{Wingfield v. Bryant}\textsuperscript{154} involved loss of lateral support due to excavation on adjacent land and trespass on plaintiff’s land by going upon it and dumping debris. The court held that before recovery may be permitted for loss of lateral support, a party must show that his land has been injured.\textsuperscript{155} The requirement for proof of injury to the land was met by evidence of a

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 283-84.
\item \textsuperscript{147} 607 S.W.2d 267 (Tex. Civ. App.—Texarkana 1980, writ ref’d n.r.e.).
\item \textsuperscript{148} TEX. REV. CIV. STAT. ANN. art. 1301a (Vernon 1980).
\item \textsuperscript{149} 607 S.W.2d at 270-71.
\item \textsuperscript{150} \textit{Id.} at 271-72.
\item \textsuperscript{151} 614 S.W.2d 916 (Tex. Civ. App.—Waco 1981, writ ref’d n.r.e.).
\item \textsuperscript{152} \textit{Id.} at 917. \textit{See, e.g., Williams v. Thompson, 152 Tex. 270, 277-78, 256 S.W.2d 399, 403 (1953).}
\item \textsuperscript{153} 614 S.W.2d at 917.
\item \textsuperscript{154} 614 S.W.2d 643 (Tex. Civ. App.—Austin 1981, writ ref’d n.r.e.).
\item \textsuperscript{155} \textit{Id.} at 645.
\end{itemize}
depression on plaintiff’s property which was fifty to seventy-five feet in diameter and twenty-five feet deep caused by the excavation on the adjacent land. On the issue of trespass, the court held that the award of $12,360.00, the amount the jury found as the cost of removing the debris, was a proper measure of damages as the cost in restoring the land to its former condition.

In Gardner v. Kerly the defendant went onto his neighbor’s lot and removed a barbed wire fence adjacent to the rear of the property. Although the plaintiff had been callous in erecting the fence along the property line next to a residential subdivision and letting the fence remain after he became aware of injuries to four children playing near it, the defendant did not have the right to trespass on or destroy the plaintiff’s property. The court concluded from the evidence that the defendant’s act of trespass was willful and intentional, and therefore supported an award of exemplary damages.

Community Properties, Inc. v. Neely involved the plaintiffs’ claim for damages resulting from the construction of an apartment complex on adjacent land owned by the defendant. The project diverted the natural flow of surface water and flooded the plaintiffs’ property. The proof showed that flooding occurred when rainstorms washed out the defendants’ drainage and water retention facilities and that the overflow could be abated by construction of storm sewer facilities. The trial court entered judgment on the jury’s verdict awarding the plaintiffs $40,000 in damages for “permanent” injury based upon the difference in market value before and after the flooding. The plaintiffs also were awarded damages for personal discomfort, inconvenience, and annoyance, based on a finding that the defendants acted with malice in failing to take adequate action to prevent the condition from recurring.

The court of civil appeals reversed and remanded the part of the judgment awarding damages for permanent injury, concluding that the injuries to the plaintiffs’ property were temporary rather than permanent because the flooding occurred sporadically and could be terminated by the construction of an underground storm sewer. The court also noted that the injury was of such a nature that the defendants could have been enjoined from diverting the flow of water. The court upheld and rendered judg-
ment for the plaintiffs on the award of damages for personal discomfort and annoyance, which was not challenged, noting that such recovery is allowed whether the nuisance is temporary or permanent. The award of exemplary damages was reversed and judgment was rendered for the defendants on the ground that neither negligence nor want of ordinary care nor a mere unlawful act will subject the actor to exemplary damages. The record did not show circumstances to support a finding of malice because the defendants had taken steps to remedy the situation after being notified of the drainage onto the plaintiffs' land.

II. PURCHASES AND SALES OF REAL PROPERTY

A. Formation, Performance, and Interpretation of Contracts

Enforcement of Contracts. In Jones v. Kelley the Supreme Court of Texas ruled that four separate documents were to be construed together as a single contract for the sale of a 127.55 acre tract of land and that the description of the property in the four documents, when read together, was sufficient to satisfy the statute of frauds. The documents were the following: (a) an earnest money contract by which Mr. and Mrs. Jones agreed to sell to Mr. and Mrs. Kelley "36 acres out of the W.W. Wagstaff Survey, A-796, in Shelby County, Texas," (b) an earnest money contract in which the Joneses agreed to sell to the Kelleys "91.55 Acres out of the W.W. Wagstaff Survey A-796 and D.G. Green Survey A-263 in Shelby County, Texas," and which contained a provision that the sale was to be closed in conjunction with the 36 acre contract, (c) an application and contract of sale for the Texas Veterans' Land Program providing, with reference to the 36 acre tract, for attachment by Jones of a field note description of the property, and (d) a seller's affidavit for the Veterans Land Board of Texas wherein Mr. and Mrs. Jones averred that they were the sellers of the 36 acre tract, which was purchased by them for $10,000 from C. Balsimo, and that a surveyor's field note description for an access easement was being furnished. When the Joneses refused to convey the property, the

“sporadic and contingent upon some irregular force such as rain.” Id. Another characteristic of a temporary injury is the ability of a court of equity to enjoin the injury causing activity. An injury which can be terminated cannot be a permanent injury. The concepts of temporary and permanent injuries are mutually exclusive and damages for both may not be recovered in the same action. Lone Star Gas Co. v. Hutton, [58 S.W.2d 19 (Tex. Comm'n App. 1933, holding approved)] at 21.

565 S.W.2d at 227.
166. 611 S.W.2d at 951-52.
167. Id. at 952-53.
168. Id.
169. 614 S.W.2d 95 (Tex. 1981).

170. Id. at 98. The Texas Statute of Frauds provides that a contract for the sale of real estate is not enforceable unless such agreement is in writing and signed by the person to be charged with the agreement or by someone lawfully authorized to sign for him. Tex. Bus. & Com. Code Ann. § 26.01 (Vernon Supp. 1982).

171. 614 S.W.2d at 97. The 36 acre contract was to be assigned by the Kelleys to the Veterans Land Board of Texas, which would take title to the land and resell it to the Kelleys.
Kelleys sued for specific performance. After a jury trial, the court entered judgment for the Kelleys, decreeing specific performance. The court of civil appeals affirmed.\textsuperscript{172}

The supreme court held that the parties clearly intended that the execution of the four documents was for the primary purpose of conveying the entire 127.55 acres to the Kelleys; therefore, the four documents were to be construed together as one contract.\textsuperscript{173} Under Texas law, a statement of ownership of property in a written contract and evidence showing that the party owns only one tract of land answering the description is sufficient to identify the land with reasonable certainty.\textsuperscript{174} Here, the seller's affidavit to the Veterans Land Board, one of the four documents constituting the contract, recited that the Joneses were owners of the land conveyed by deed from C. Balsimo to Jones,\textsuperscript{175} and the jury found that the Joneses intended to sell the entire tract, which was all of the land owned by them in Shelby County. Moreover, at the time the contracts were signed, the 36 acres to be conveyed to the Veterans Land Board had been chosen by the Joneses and outlined, with calls for course and distance, on a plat of the entire tract.\textsuperscript{176} Construing the instruments together, the court found the description of the entire property sufficient to satisfy the statute of frauds.\textsuperscript{177}

A vigorous dissenting opinion stated that this was "a classic example of what the Statute of Frauds was intended to prevent," as there were "two contracts to convey two tracts of land to two purchasers with two deeds, one to the [Veterans Land Board] and one to the Kelleys."\textsuperscript{178} According to the dissent, the description of the 36 acres as part of a larger tract of land was insufficient without an identification of the specific part of the larger tract to be conveyed. The contract for the 36 acres, therefore, in the dissent's view, was invalid for uncertainty of description.\textsuperscript{179} The contract

\begin{itemize}
  \item for \$400 per acre in cash. The 91.55 acres were to be sold directly to the Kelleys for \$400 per acre with a cash payment of \$5,493, and a note and deed of trust for the balance of the purchase price.
  \item \textsuperscript{172} Jones v. Kelley, 602 S.W.2d 573, 576-77 (Tex. Civ. App.—Beaumont), aff'd, 614 S.W.2d 95 (Tex. 1981).
  \item \textsuperscript{173} 614 S.W.2d at 99. The court noted the general rule that separate instruments executed "at the same time, for the same purpose, and in the course of the same transaction" are to be read and construed together. \textit{Id.} at 98 (citing Miles v. Martin, 159 Tex. 336, 341, 321 S.W.2d 62, 65 (1959); Veal v. Thomason, 138 Tex. 341, 348, 159 S.W.2d 472, 475 (1942); Braniff Inv. Co. v. Robertson, 124 Tex. 524, 535, 81 S.W.2d 45, 50 (1935); Libby v. Noel, 581 S.W.2d 761, 764 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.)).
  \item \textsuperscript{174} 614 S.W.2d at 99 (citing Kmiec v. Reagan, 556 S.W.2d 567, 569 (Tex. 1977); Pickett v. Bishop, 148 Tex. 207, 210, 223 S.W.2d 222, 224 (1949)). The court in \textit{Pickett} stated: The stated ownership of the property 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 \textit{within itself}, or by reference to some other existing writing, \textit{the means or data by which the particular land to be conveyed may be identified with reasonable certainty.”’\textit{Id.} (emphasis in original).
  \item \textsuperscript{175} A metes and bounds description of the property was in evidence. 614 S.W.2d at 99.
  \item \textsuperscript{176} \textit{Id.} at 99-100. The plat, which was in evidence, showed the 36 acres situated within the larger 116 acre tract.
  \item \textsuperscript{177} \textit{Id.} at 100.
  \item \textsuperscript{178} \textit{Id.} at 101.
  \item \textsuperscript{179} \textit{Id.} at 101-02.
\end{itemize}
for conveyance of the 91.55 acre tract to the Kelleys, according to the dis- 
senters, also was lacking for the same reason.\footnote{180}

In \textit{Vendig v. Traylor}\footnote{181} the seller was the owner of two lots encumbered 
by mortgages and posted for foreclosure on September 5, 1978. The buyer 
contracted to purchase one lot, Lot 18B, on the condition that he obtain 
financing by August 18, 1978, which later was changed in writing to Au-
gust 28. The buyer asserted a subsequent oral modification that extended 
the time to September 1. When the buyer failed to obtain financing by 
August 28, the seller sold both lots to another party before the September 5 
foreclosure date. In a suit by the buyer for damages, one issue was 
whether testimony of the oral agreement was barred by the statute of 
frauds. The court stated that under Texas law "an oral modification of a 
written contract is enforceable under the Statute of Frauds only if the 
modification does not \textit{materially} alter the obligations imposed by the 
underlying agreement."\footnote{182} Applying this rule, the court found that the Au-
gust 28 date was an integral and material part of the contract because the 
buyer’s failure to acquire financing by that date would allow the seller to 
find another purchaser before the foreclosure sale.\footnote{183} Thus, the oral modi-
fication extending the date to September 1 was unenforceable, and the 
contract terminated by its express terms on August 28.\footnote{184}

A buyer was denied summary judgment in a suit for specific perform-
ce of a contract for the sale of real property in \textit{Chessher v. McNabb}.\footnote{185} 
To be entitled to specific performance, the buyer had to prove compliance 
with all the terms of the contract.\footnote{186} The contract in this case stipulated 
that the buyer would assume the unpaid balance of an existing mortgage 
loan and contained the following provision:

\textbf{FINANCING CONDITIONS:} If a Noteholder on assumption . . . 
(iii) requires approval of Buyer or can accelerate the Note and Buyer 
does not receive from the Noteholder written approval and acceleration 
waiver prior to the Closing Date, Buyer may terminate this con-
tact . . . . Buyer shall apply for the approval and waiver under (iii) 
avove within 7 days from the effective date hereof and shall make 
every reasonable effort to obtain the same.\footnote{187}

Because the record contained no evidence that the lender had approved 
the purchaser as assumptor of the mortgage, the purchaser failed to sustain 
the burden of showing that he was entitled to a judgment for specific per-

\footnotesize{180. \textit{Id.} at 102.}
\footnotesize{181. 604 S.W.2d 424 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.).}
\footnotesize{182. \textit{Id.} at 427 (emphasis in original) (citing Smith v. Hues, 540 S.W.2d 485, 490 (Tex. 
Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.); Grayson Enter., Inc. v. Texas Key 
Broadcasters, Inc., 390 S.W.2d 346, 352 (Tex. Civ. App.—Eastland 1965, writ dism’d)). \textit{See} 
Dracopoulas v. Rachal, 411 S.W.2d 719 (Tex. 1967).}
\footnotesize{183. 604 S.W.2d at 428. In reaching its conclusion the court relied on the fact that the 
property was posted for foreclosure on September 5, and the contract expressly provided 
that it would be null and void if financing was not obtained by August 28. \textit{Id.}}
\footnotesize{184. \textit{Id.}}
\footnotesize{185. 619 S.W.2d 420 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).}
\footnotesize{186. \textit{Id.} at 421 (citing Bell v. Rudd, 144 Tex. 491, 497, 191 S.W.2d 841, 844 (1946)).}
\footnotesize{187. 619 S.W.2d at 421.
formance as a matter of law.\footnote{188}

An opposite result was reached by a different court of civil appeals in \textit{Vordenbaum v. Rubin},\footnote{189} in which the contract provision requiring the noteholder's approval was identical to that of the \textit{Chessher} case.\footnote{190} The sellers contended that the contract never was effective because the buyers failed to apply for approval and waiver from the lender. The court disagreed and affirmed a trial court judgment awarding specific performance to the buyers because "the contract by its terms authorizes the buyers rather than the sellers to terminate the contract for lack of approval by the note holder."\footnote{191} The provision requiring the buyers to apply for approval and waiver within seven days was found to be a limitation to prevent buyers from terminating in the absence of timely application and reasonable efforts to obtain approval.\footnote{192}

The \textit{Vordenbaum} case also dealt with the issue of whether a seller can avoid specific performance of a contract because a note to be executed to the seller would be usurious on its face. The court concluded that the sellers could not avoid enforcement on that ground.\footnote{193} A usurious contract is not wholly void and is enforceable if allowance is made for the statutory penalty imposed by article 5069—1.06.\footnote{194} In reaching its decision the court also relied on the fact that the buyers had the right to waive the usury and pay the note at any time.\footnote{195}

In \textit{Advance Components, Inc. v. Goodstein}\footnote{196} an option to purchase in a lease provided for assumption of an outstanding mortgage debt, but the purchaser was unable to assume the debt because the mortgagee bank required individual guaranties on the assumption. The purchaser arranged financing for the entire price with another lender, and the seller refused to close because of the purchaser's failure to assume the note. In a suit for specific performance the trial court granted a summary judgment for the seller, which was reversed and remanded by the court of civil appeals.\footnote{197} The appeals court first decided that the law governing bilateral contracts, rather than the rule of strict compliance, was applicable to this case, because a bilateral contract was formed when the option was exercised.\footnote{198}
Although the buyer did not strictly comply with the contract in that the mortgage debt was to be paid off rather than assumed, the court found no material breach of the contract. Thus, under the rule in *Farris v. Bennett's Executors*, the buyer still was entitled to specific performance.

Numerous other cases reported during the survey period involved enforcement or attempted enforcement of contracts for the sale of real property. *Arreguin v. Cantu* affirmed a judgment for specific performance of a lost contract because the circumstantial evidence was sufficient to sustain jury findings that a written agreement had been entered into. In *Odum v. Sims* the court applied the rule that a written option to purchase real property may be accepted orally unless the option contains terms to the contrary and, accordingly, granted specific performance to buyers who had given oral notice of their desire to exercise the option. The contract in *Donahue v. Allen* was contained in a deed conveying a 45 acre tract of land in which the sellers reserved 1.5 acres, which was to be sold to the grantee for $2,400 when the grantors abandoned the 1.5 acre tract as their homestead. After the grantors' interest terminated at their deaths, the grantee's assignee tendered payment to the grantor's devisee in order to purchase the property. The assignee brought suit for specific performance of the contract of sale and was awarded the judgment, which was affirmed on appeal. Under the test of *Paramount Fire Insurance Co. v. Aetna Casualty & Surety Co.* the court found both parties bound to perform the terms of the agreement upon termination of the interest. The agreement thus constituted an enforceable contract of sale, rather than an option to be exercised by the grantors during their lives.

Specific performance was also granted in *Estate of Griffin v. Sumner*, a case that involved a written agreement between a brother and sister who each owned an undivided one-half interest in a tract of land. The agreement granted the survivor the right to purchase the interest of the deceased.

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199. *Id.* at 739-40. In determining the issue of materiality, the court relied on three of the factors listed in *Restatement (Second) of Contracts* § 241 (1981).

200. 26 Tex. 568, 572 (1863).

201. 608 S.W.2d at 739. The court also held that if the seller pleaded and proved damages caused by the buyer's breach, the trial court might condition the decree of specific performance on payment to the seller of reasonable compensation. *Id.*

202. 609 S.W.2d 639, 641 (Tex. Civ. App.—San Antonio 1980, no writ). The court stated the rule that "the existence, execution and content of a lost instrument may be shown by circumstantial evidence." *Id.* at 639. The evidence relied on included the friendship between the buyer and seller, and the fact that the buyer paid the entire purchase price and was in possession of the property continuously after the sale. *Id.* at 640.


205. *Id.* at 748.

206. In *Paramount Fire Ins. Co. v. Aetna Casualty & Sur. Co.*, 353 S.W.2d 841, 843 (Tex. 1962) the supreme court held that where an instrument itself is designated a contract of sale and its language is of sale and purchase, and where it does not require the vendor to accept the sum forfeited in full settlement of the buyer's liabilities for default, the contract is one of purchase and sale rather than an option.

207. 608 S.W.2d at 747.

208. *Id.* at 748.

209. 604 S.W.2d 221 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).
sibling for $8,000. After the brother died intestate, the sister demanded that the administratrix of his estate convey the one-half interest in the property for the stipulated sum. When the administratrix refused to do so, the sister filed suit seeking specific performance. In affirming the trial court, the court of appeals rejected the estate’s argument that the agreement was not a valid contract and found that the agreement was “mutual, certain, complete and based upon a valuable consideration.”

Post-Sale Disputes. Land Title Co. v. F.M. Stigler, Inc., involved the sale of forty-three acres of land under an agreement giving the seller’s agent authority to subordinate the seller’s lien on the buyer’s deed of trust in favor of a lien for construction and improvements. The buyer financed the purchase through a loan that was secured by giving the lender a deed of trust to the property. Prior to the loan, the agent executed an agreement subordinating the seller’s deed of trust lien to that of the lender. When the buyer defaulted on the loan, the lender foreclosed and purchased the property. After refusing to repudiate the sale, the seller filed suit to set aside the foreclosure and establish priority of his lien over the lender’s lien. The Supreme Court of Texas held that the seller’s refusal to tender back the funds after learning of the source constituted ratification of the agent’s subordination agreement with the lender. Moreover, because ratification includes the entire transaction, the seller could not affirm the loan, in order to keep the funds paid, while disaffirming the lien subordination.

In Turberville v. Upper Valley Farms, Inc. the doctrine of merger by deed prevented purchasers from recovering the agreed price per acre for land with an allegedly defective title. The buyers in that case discovered after the closing date that they did not own a railroad right-of-way that ran across the property purchased. Because the deed prepared by the seller’s attorney provided that the property was being conveyed subject to a “Railroad right-of-way of Missouri Pacific Railway Company crossing said premises,” the court concluded that the seller knew of the right-of-way, and the purchasers were on notice that a deficiency existed in the acreage for which they had contracted. Under these facts, neither mutual nor unilateral mistake could be found to avoid the merger by deed doctrine. The court also rejected the buyers’ allegation of fraudulent misrepresentation by the seller.

210. Id. at 230.
211. 609 S.W.2d 754 (Tex. 1980).
212. Id. at 757.
213. Id.
214. 616 S.W.2d 676, 678 (Tex. Civ. App.—Corpus Christi 1981, no writ). Under the doctrine of merger by deed, all prior written and oral transactions of the parties are merged into the deed itself. Id.
215. Id. at 678-79.
216. Id. at 679.
217. Id. at 678-79.
218. Id. at 679.
Liability of Escrow Agents. The issue in Capital Title Co. v. Mahone219 concerned the burden of proof necessary to recover damages from an escrow agent who negligently fails to cash an earnest money check. The earnest money contract provided that in the event of default by the purchaser, the earnest money would be forfeited to the seller, who then would pay one-half to the buyer's real estate broker. The earnest money check for $30,500 was never cashed by the escrow agent. After the buyers defaulted, the sellers sued the escrow agent for $30,500, and the real estate broker intervened seeking one-half. The court of civil appeals held that in order to prove that negligence is a proximate cause of the damages in such a case, the plaintiff must show "that the check or some part thereof would have been collectible except for the breach of duty by the escrow agent."220 Because the plaintiff in this case did not plead or prove that any part of the amount represented by the check was collectible, judgment was rendered for the defendant escrow agent.221

B. Representations and Warranties; Fraud

Turner v. Conrad222 was a suit for breach of implied warranties of fitness and workmanlike performance brought by purchasers of a lot and refurbished home after the collapse of a brick retaining wall, constructed by the seller before the sale as an improvement. Rejecting the plaintiffs' contentions, the court concluded that their implied warranty theory was not applicable to this case because the article sold—the home—was "used."223 Additionally, even if implied warranties were found, their effect would have been negated by the express language in the sales contract that the buyer accepted the property "as is."224 Finally, although noting the implied warranties have been extended to the sale of new homes or structures, the court declined to extend such buyer protection to the present situation in which a new ancillary improvement was conveyed with a used principal structure.225

C. Brokers

Validity and Enforceability of Agreements for Commissions. In Bayer v. Mc-

220. Id. at 207. The court noted that this cause of action is comparable to attorney malpractice suits, in which the claimant has the burden of proving that (1) the attorney was negligent, (2) the client would have been entitled to a judgment but for the negligence, and (3) the amount of the judgment would have been collectible. Id.
221. Id.
222. 618 S.W.2d 850 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).
223. Id. at 852.
224. Id. See TEX. BUS. & COM. CODE ANN. § 2.316(c)(1) (Vernon 1968). The contract provided that the buyer "accepts the Property in its present condition, subject only to lender required repairs" and certain installations. An addendum provided that failure to inspect would "be deemed a waiver of Buyer's inspection and repair rights and Buyer agrees to accept Property in its present condition." Id.
225. Id. at 853. See Thornton Homes, Inc. v. Greiner, 619 S.W.2d 8 (Tex. Civ. App.—Eastland 1981, no writ); Cheney v. Parks, 605 S.W.2d 640 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
Dade\textsuperscript{226} the court held that even though the seller does not plead the statute of frauds as a defense, a broker seeking to recover a commission under the Real Estate License Act\textsuperscript{227} must prove a valid written agreement describing the land with the same certainty as required in cases arising under the statute of frauds and statutes of conveyances.\textsuperscript{228} The broker in this case claimed a commission because the owner failed to execute an earnest money contract with a prospective purchaser, thus allegedly breaching the listing agreement between the owner and the broker. The court held that the deed was void because the description in the listing agreement did not provide, either within itself or by reference to another existing writing, a means for identifying the land with reasonable certainty.\textsuperscript{229} The court also found that a substantial difference existed between the sale terms of the listing agreement and the earnest money contract; therefore, the purchaser's proposal was merely a counteroffer that the owner could refuse without incurring liability to pay a broker's commission.\textsuperscript{230}

\textit{Smith v. Knapp}\textsuperscript{231} involved a sales transaction in which a broker, acting under a written agreement to "handle the sale, financing, or acquisition" of a business, introduced the seller and purchaser and conducted early negotiations between them.\textsuperscript{232} The seller and purchaser subsequently entered into a sale through direct negotiations. The court held that the broker's acts and the trial court's finding that the broker did not abandon efforts to conclude the sale were sufficient to justify recovery of the commission.\textsuperscript{233} The court also held that even though the broker acted through his unlicensed sole proprietorship, he was entitled to the commission because he personally was licensed and had filed assumed name certificates for the company.\textsuperscript{234}

A broker and his salesmen were precluded from recovering commissions

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\textsuperscript{226} 610 S.W.2d 171 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
\textsuperscript{227} TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1982). Section 20(b) of the Act provides:
  An action may not be brought in a court in this state for the recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged or signed by a person lawfully authorized by him to sign it.
\textsuperscript{228} 610 S.W.2d at 172 (citing Owen v. Hendricks, 433 S.W.2d 164, 166 (Tex. 1968); Tidwell v. Cheshier, 153 Tex. 194, 196, 265 S.W.2d 568, 569 (1954); O'Boyle v. DuBose-Killeen Properties, Inc., 430 S.W.2d 273, 277 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.)).
\textsuperscript{229} 610 S.W.2d at 172 (citing Wilson v. Fisher, 144 Tex. 53, 56, 188 S.W.2d 150, 152 (1945); Smith v. Sorelle, 126 Tex. 353, 357, 87 S.W.2d 703, 705 (1935); Lawrence v. Barrow, 117 S.W.2d 116, 119 (Tex. Civ. App.—Galveston 1938, writ dism'd). The land was described as "50 acres, more or less, out of the John H. Callihan Survey . . . ." 610 S.W.2d at 172.
\textsuperscript{230} Id. at 173.
\textsuperscript{231} 606 S.W.2d 46 (Tex. Civ. App.—Fort Worth 1980, no writ).
\textsuperscript{232} Id. at 47.
\textsuperscript{233} Id. at 47-48.
\textsuperscript{234} Id. at 48.
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The broker had failed to inform the seller of a purchase offer by a third party and then had sought to purchase the property himself and sell it to the same third party. When the broker was unable to purchase the property, the owner sold it to the third party, thus giving rise to claims for commissions by the broker and his salesmen. The court held that because a fiduciary relationship exists between the seller and broker, a conflict is created when the broker undertakes to buy the property on his own behalf. The law requires the broker to disclose to the seller "all facts that would reasonably affect the [seller's] judgment." Thus, the failure to disclose the offer made by the third party was a breach of the broker's fiduciary duty and precluded recovery of a commission by him or his salesmen.

**Licensing of Real Estate Brokers and Salesmen. Young v. Del Mar Homes, Inc.** was a case of first impression in Texas with respect to interpretation of the Real Estate Licensing Act of Texas. A real estate salesman who had been employed by a builder sued to recover commissions earned on sales under contracts he had obtained that closed after he left the builder's employment. The trial court found that in order to recover under the Act, a broker must plead that he is licensed and must produce a written agreement for compensation. On appeal the plaintiff asserted that he was exempt from these requirements under subsection 3(f) of the Act. In reversing the trial court, the court of appeals held that "subsection 3(f) totally exempts the plaintiff from complying with any and all requirements of art. 6573a, including §§ 20(a) and (b)." Consequently, neither a Texas real estate license nor a written agreement for payment of commissions was required to entitle the plaintiff to a judgment for the commissions.

Several other cases concerning the licensing of real estate brokers were decided during the survey period. In **Smith v. Bidwell** the defendant brokers were found jointly and severally liable for negotiating the sale of real

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235. 604 S.W.2d 290 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).
236. Id. at 292 (citing Anderson v. Griffith, 501 S.W.2d 695, 700 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.)). The conflict stems from the fact that in his capacity as seller's agent, the broker must seek the highest price possible, while as a purchaser he seeks the lowest price possible. 604 S.W.2d at 292.
237. Id. at 293 (citing Ramsey v. Gordon, 567 S.W.2d 868, 871 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)).
239. 608 S.W.2d 804 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ. ref'd n.r.e.).
240. TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1982).
241. 608 S.W.2d at 806. These requirements are set forth in TEX. REV. CIV. STAT. ANN. art. 6573a §§ 20(a)-(b) (Vernon Supp. 1982).
242. Subsection 3(f) exempts "a salesperson employed by an owner in the sale of structures and land on which said structures are situated, provided such structures are erected by the owner in the due course of his business." Id. § 3(f).
243. 608 S.W.2d at 807 (emphasis in original). The court based its decision on the legislative intent clearly expressed in the statute. Id.
244. Id. at 808.
estate without a license. An out-of-state broker was denied recovery of a commission in *Tower Ten, Ltd. v. Real, Inc.* because the person (who was himself a licensed broker in Texas) who signed the listing agreement on behalf of the seller did so only as the seller’s representative. The court of appeals in *Conrad v. Artha Garza Co.* found that a corporation that failed to show it had a broker’s license could not recover a commission.

**Deceptive Trade Practices Act.** In *Cameron v. Terrell & Garrett, Inc.* the purchasers of a house sued the seller’s real estate agent for misrepresentation of the square footage. The primary issue was whether the plaintiffs were “consumers” within section 17.45(4) of the Deceptive Trade Practices-Consumer Protection Act, which defines a consumer as “an individual who seeks or acquires by purchase or lease, any goods or services.” The Supreme Court of Texas held that the plaintiffs satisfied both requirements for qualifying as consumers: they had acquired the goods by purchase, and the goods purchased formed the basis of the complaint. Furthermore, the court held that privity with the defendant is not necessary for the plaintiff to qualify as a consumer. The purchasers, therefore, were entitled to recover treble damages, reasonable attorney’s fees, and costs under the Act.

In *Brunstetter v. Southern* purchasers sued the listing broker of a house alleging unlawful failure to disclose a structural defect in violation of the Act. The court denied recovery because prior to trial the plaintiffs had entered into settlements with other defendants in which they received $5,000, more than three times their actual damages of $1,639.95. The “credit rule” was held to bar any recovery against the defendant because the plaintiffs had received full satisfaction of their claim.

### III. Legislation

Several new laws affecting the areas covered by this article were enacted by the 67th Texas Legislature during the survey period. Two pieces of legislation that affect the preparation of deeds and other instruments pertaining to real property are H.B. 196, effective January 1, 1982, and H.B. 428, effective August 31, 1981. H.B. 196 requires deeds and other docu-
ments conveying an interest in real estate to contain a mailing address of each grantee, either on the document or in a separate instrument signed by a grantor or grantee and attached to the document. Failure to include an address of each grantee does not affect the validity of the document, but a document which does not contain the mailing address of each grantee may be filed for record with the county clerk only upon payment of a penalty filing fee equal to the greater of (1) twice the statutory filing fee for the document or (2) $25.00. H.B. 428, which adds article 6607a, provides for short forms of acknowledgement. The Act provides that the statutory forms of acknowledgement may be altered as circumstances require and that the use of other forms is not prevented by the authorization of the statutory forms. Statutory forms are provided for a natural person acting in his or her own right and by attorney-in-fact, a partnership acting by one or more partners, a corporation, and a public officer, trustee, executor, administrator, guardian or other representative.

Dedication of private roads for public use in counties having a population of 50,000 or less according to the last preceding federal census is affected by H.B. 1589, effective August 31, 1981. H.B. 1589 defines “dedication” as “the explicit, written communication to the commissioners court of the county in which the land is located of a voluntary grant of the use of a private road for public purposes.” A county is permitted to acquire a public interest in a private road only by purchase, condemnation, dedication or adverse possession. A public interest, once established, must be recorded in the records of the commissioners court, and a person asserting any right, title or interest in a road in which a public interest has been asserted may file suit in the district court within two years after the notation of the public interest in the road in the records of the commissioners court. Neither verbal dedication nor intent to dedicate by overt act is sufficient to establish a public interest in a private road under the Act, and adverse possession will not be established by either the use of a private road by the public with the owner’s permission or by maintenance with public funds of a private road in which no public interest has been recorded in the records of the commissioners court.

H.B. 838, effective August 31, 1981, amends the Natural Resources Code, to permit the Commissioner of the General Land Office to cancel a patent located in a block or system of surveys that is in conflict with senior surveys in the same block or system, and to issue a corrected patent conforming to such block or system of surveys. In the event excess acreage exists, a deed of acquittance is to be procured and issued simultaneously with the correct patent. The act is not to affect adversely the rights of any party in or entitled to possession of land affected by the Act, but merely clarifies ownership as if the patent had been correctly issued on the date

258. Id. art. 6626(b).
259. Id. art. 6607a.
260. Id. art. 6812h.
261. Id. art. 6812h, §§ 1-6.
Replatting of existing subdivisions is affected by S.B. 767, effective April 22, 1981, which amends article 974a.\textsuperscript{264} The Act permits a replat or resubdivision of a plat, or a portion thereof, without vacation of the immediate previous plat where the replat (1) is signed and acknowledged by the owners of the property being resubdivided or replatted, (2) has been approved by the City Planning Commission or other appropriate governing body after a public hearing at which parties in interest and citizens have the opportunity to be heard, and (3) does not alter, amend or remove any covenants or restrictions.\textsuperscript{265} Where any of the proposed area to be replatted or resubdivided was limited, within the immediate preceding five years, to residential use for not more than two residential units per lot, either by zoning or deed restrictions, the Act also requires publication of the notice of the City Planning Commission or other appropriate governing body, hearing and written notice to owners of all lots in the immediate preceding subdivision plat, or if the immediate preceding subdivision plat contained more than 100 lots, notice to owners of lots located within 500 feet of the lots which are sought to be replatted or resubdivided.\textsuperscript{266} Such notices are to be given at least fifteen days in advance of the hearing. If twenty percent or more of the owners to whom notice is required to be given file written protest prior to or at the hearing, then the City Planning Commission or other appropriate governing body must require written approval of 66\% percent of (1) the owners of all lots in such plat, or (2) the owners of all lots within 500 feet of the property sought to be replatted if the immediate preceding plat contains more than 100 lots. In computing percentages of ownership, each lot is equal regardless of size or number of owners, and the owners of each lot are entitled to cast only one vote per lot.\textsuperscript{267} The Act also permits amendments by amending plats signed by the applicants only to correct errors in prior plats as specified in the Act. Finally, the Act exempts from the platting requirements of article 974a "a tract of land that is located entirely within an incorporated city or town having a population of 5,000 or fewer persons, according to the most recent federal census, that is divided into parts, all of which are larger than 2\% acres, and that abuts or otherwise attaches to any part of an aircraft runway."\textsuperscript{268} Homeowners' associations may qualify as non-profit corporations which are exempt from franchise tax under H.B. 189, effective May 1, 1982, providing that the corporate franchise tax shall not apply to a non-profit corporation organized and operated primarily to obtain, manage, construct and maintain the property in or of a condominium or residential real estate development, voting control of which is vested in the owners of indi-

\textsuperscript{263} Id. § 51.250(d).
\textsuperscript{265} Id. § 5(b).
\textsuperscript{266} Id. § 5(c).
\textsuperscript{267} Id. § 5(c)(2).
\textsuperscript{268} Id. § 1A.
individual lots, residences, or residential units and not in the developer.269

The Real Estate License Act was amended by S.B. 478,270 effective August 31, 1981, providing for the registration and regulation of persons who perform inspections for a buyer or seller of real property pursuant to the provisions of any earnest money contract form approved by the Texas Real Estate Commission, with the designation “Registered Real Estate Inspector.” The Act does not apply to electricians, plumbers, carpenters, persons engaging in the business of structural pest control under the Texas Structural Pest Control Act, or any other person who repairs, maintains or inspects improvements to real property and does not hold himself or herself out to the public as being in the business of inspecting such improvements pursuant to any earnest money contract form adopted by the Texas Real Estate Commission. The Act also provides that it will be a deceptive trade practice under the Deceptive Trade Practices—Consumer Protection Act (DTPA)271 for any person required to register under the Act to perform an inspection pursuant to a written contract that does not contain a statement in at least ten-point type above or adjacent to the signature of the purchaser of the inspection advising the buyer of rights under the DTPA in the form specified in the Act.272

The Real Estate License Act was also amended by S.B. 484, effective April 23, 1981, to provide a curriculum of “core real estate courses” required for licensure and to provide for increased requirements for applicants for licensure as real estate brokers and salesmen of successfully completed semester hours in core real estate courses or other courses of study approved by the Texas Real Estate Commission as specified in the Act.273

271. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1982).
272. TEX. REV. CIV. STAT. ANN. art. 6573a, § 18C (Vernon Supp. 1982).
273. Id. §§ 7(a), (c), (d).