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Real Property: Purchase, Sale, Title, and Ownership

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CONSIDERABLE judicial and legislative activity took place in the area of real property law during the survey period. Thus, this Article will address only those matters of the greatest significance. The topics covered by this paper include purchase and sale, title and ownership, mortgages, mechanics' and materialmen's liens, condemnation, real estate brokers, condominium law, and legislation. Other topics relating to real estate are the subjects of other articles in this issue.

I. PURCHASE AND SALE

Covenants and Conditions. The builder and seller of a residence received the remedy of specific performance in *Clafin v. Hillock Homes, Inc.*¹ In *Clafin* the buyer and seller entered into a contract for the sale of a house. The contract was conditioned on the buyer's ability to sell her Houston townhouse and obtain a conventional loan at 13.5% annual interest prior to sale. The buyer later waived the condition pertaining to the sale of her Houston townhouse, but she was unable to obtain permanent financing at an interest rate of 13.5%. Subsequently, the seller and buyer rescinded the contract and entered into a second contract. The parties intentionally omitted from the second contract the condition requiring the sale of the buyer's Houston townhouse. This second contract, however, contained a condition that the buyer obtain a conventional loan at 16% annual interest, which loan she successfully obtained. The buyer refused to perform and the seller sued for specific performance. The buyer maintained that she should not be forced to purchase the residence and comply with the contract because to do so would be inequitable in light of the following circumstances: (1) interest rates on the “swing loan” with which she planned to make her down payment had increased from an expected 14% to 21% per annum; (2) all of the liquid assets with which she had planned to make payments until her Houston townhouse could be sold had been spent on

¹ 645 S.W.2d 629 (Tex. App.—Austin 1983, writ ref'd n.r.e.).
federal taxes instead; and (3) she had been unable to sell her Houston
townhouse. The court of appeals noted that none of these circumstances
had been included in the contract as conditions precedent. The buyer was
merely attempting to avoid the contractual remedy of specific performance
by claiming hardship. The court noted that under Texas law a claim of
hardship is an insufficient ground for denying specific performance of a
land contract fairly made absent a showing of overreaching or misleading
by the plaintiff so as to render the contract unconscionable. Accordingly,
the court held that the contract was freely and voluntarily made and that
the plaintiff thus had not misled or overreached the defendant in any
respect.

The buyer in Claflin also asserted that the seller had waived its right to
specific performance by continuing to offer the residence for sale following
notice from the buyer that she would not close the contract. The buyer
claimed that the seller had thereby evidenced an intent to treat the contract
as breached. The court held that merely offering the residence for sale to
others neither constituted an injury to the buyer nor evidenced an inten-
tion inconsistent with performance of the contract by the seller. On the
contrary, the seller remained ready, willing, and able to perform under the
contract at all times. The court of appeals further held that the trial court
had correctly awarded $21,862.20 in damages to the seller in an equitable
accounting. The award represented the interest that had accrued on an
interim construction loan that the seller was forced to maintain beyond the
scheduled closing date. The court would not allow the buyer to breach the
very contract that she had drafted and then state that the seller could not
recover by an equitable accounting the expenses it incurred as a direct
result of the buyer's actions.
In *Hudson v. Wakefield* the Texas Supreme Court reversed the lower courts' determination that a contract was not enforceable as a matter of law and remanded the case to the trial court to determine whether the breach that occurred was a material breach justifying repudiation of the contract by the seller. The lower courts had ruled that the disputed instrument never attained the status of a binding contract because the earnest money check was returned for insufficient funds. The supreme court stated that the primary issue was whether the earnest money provision amounted to a condition precedent or a mere covenant. If the earnest money provision constituted a covenant, as the purchasers argued, then the sellers would not be excused from performance under the agreement because of the return of the earnest money check. If, however, the earnest money provision amounted to a condition precedent to formation of the contract, as argued by the sellers, then no contract was ever formed. After reviewing and distinguishing earlier Texas cases, the supreme court stated that "'[i]t is a rule of construction that a forfeiture by finding a condition precedent is to be avoided when possible under another reasonable reading of the contract.'" An examination of the entire contract led the court to rule that the earnest money provision was intended as a penalty for breach and not as a condition precedent to formation of the contract. The material nature of the breach is generally a factual question. Accordingly, the supreme court remanded to the trial court for a determination of whether the return of the earnest money check because of insufficient funds was such a material breach of the contract that the seller's repudiation was warranted.

10. 645 S.W.2d 427 (Tex. 1983).
11. *Id.* at 431.
12. *Id.* at 428-29.
13. *Id.*
14. *Id.*
15. Antwine v. Reed, 145 Tex. 521, 523, 199 S.W.2d 482, 484 (1947) (parties did not have meeting of minds at time of purported acceptance because space in proposed contract for insertion of earnest money amount left blank); Bowles v. Fickas, 140 Tex. 312, 314, 167 S.W.2d 741, 742-43 (1943) (instrument remained mere offer by seller to be bound by terms specified in instrument if buyer would sign instrument and deposit earnest money with bank); Slam Properties v. Pickett, 495 S.W.2d 381, 383-84 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.) (instrument never constituted contract because offer to sell conditioned upon deposit of earnest money that was not deposited).
16. 645 S.W.2d at 430 (quoting Schwarz-Jordan, Inc. v. Delisle Constr. Co., 569 S.W.2d 878, 881 (Tex. 1978)). The court applied rules of construction governing contracts as opposed to escrows relying on Cowman v. Allen Monuments, Inc., 500 S.W.2d 223, 226 (Tex. Civ. App.—Texarkana 1973, no writ) (contracts for sale of real estate requiring earnest money payments are not escrow agreements). 645 S.W.2d at 430. In Cowman the Texarkana court of appeals held that, because the instrument in question was simply a contract for the sale of real estate requiring an earnest money payment and was not an escrow agreement, the law of contracts and equitable principles of specific performance applied, rather than the law of escrows. 500 S.W.2d at 226.
17. 645 S.W.2d at 430 (disapproving Slam Properties v. Pickett, 495 S.W.2d 381 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.), to extent it conflicted with holding).
18. 645 S.W.2d at 431.
19. *Id.*
In *Ryan Mortgage Investors v. Fleming-Wood* the Fort Worth court of appeals ruled in favor of the purchaser in his suit for breach of a real estate contract and for fraud. The breach arose when the sellers were unable to deliver marketable title to the property. Paragraph 17 of the contract provided:

> In the event the SELLER is unable to convey title to the Property in accordance with Paragraph 12 of this Contract, BUYER may at its option terminate this Contract by written notice delivered to SELLER on or prior to the scheduled closing date (as deferred by any postponement in accordance with Paragraph 19); otherwise BUYER shall be conclusively deemed to have accepted SELLER's title.

The buyer did not know until after he had signed the contract that the property was the subject of litigation and that a notice of lis pendens had been filed by a third party who had previously contracted to purchase the property. It was undisputed that the sellers could not deliver good and marketable title at the closing, which had already been postponed once to allow the sellers more time to clear up the pending litigation and have the lis pendens notice removed. The sellers' legal position was that the remedies that paragraph 17 afforded the buyer were exclusive. The sellers argued that their failure to have marketable title at the closing was excused because the buyer had not terminated the contract by written notice prior to the closing date. The court of appeals held that although paragraph 17 gave the buyer a remedy that he did not have at common law, that fact did not exclude his common law remedies.

Although, under the terms of the contract, the buyer may have been deemed to have accepted the sellers' title, he could still pursue common law remedies for defects in that title. With the lis pendens notice in place, the buyer received a title worth much less than the one he had bargained for and therefore had a cause of action for breach of the contract.

As to the form of relief for breach of a contract to convey marketable title, the court stated that the measure of damages would generally be the difference between the contract price and the market value of the property at the time of the breach. The court stated:

> It is only where the vendor is unable to make title through no fault of his own that the buyer is limited in his recovery to a return of the purchase price and special damages. In other words, the general rule still applies if the vendor is guilty of fraud. It also still applies if the vendor is not guilty of fraud, but nevertheless “disables” himself from

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20. 650 S.W.2d 928 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).
21. Id. at 938.
22. Id. at 933.
23. Id.
24. Id.
25. Id. at 933-34.
26. Id. at 934.
27. Id. at 935.
carrying out the contract or fails or refuses to perform.\textsuperscript{28}

The court further stated that title is not marketable if clouded by any outstanding contract, covenant, interest, lien, or mortgage sufficient to form a basis of litigation, or if it exposes the holder to a reasonable probability of litigation with the least chance of defeat.\textsuperscript{29} The buyer testified that he would not have entered into the contract had he known about the pending litigation and the fact that a lis pendens notice would be filed shortly after he signed the contract. The buyer was therefore entitled to the benefit of his bargain, which the jury found to be $2,000,000.\textsuperscript{30} He was also entitled to exemplary damages because the evidence was sufficient to support such an award.\textsuperscript{31} This case may be of particular interest to practitioners because paragraph 17 of the disputed contract is essentially the same as a provision in certain printed forms currently in wide usage, such as a form published by the Greater Dallas Board of Realtors.

\textit{Shuler v. Gordin}\textsuperscript{32} involved a suit by buyers seeking specific performance of a contract for the sale of an apartment complex. Performance of the contract was expressly conditioned upon the first lienholder's written approval of both the conveyance of the premises and the execution of a subordinate deed of trust securing the wraparound note to be given at closing by the buyers. The seller argued that written approval had not been obtained from the first lienholder because the lienholder's purported approval attempted to impose additional terms upon the parties' agreement by requiring the buyers to assume personal liability for the first lien debt and an increase in the interest rate on such debt. The purchasers testified unequivocably, however, that they were willing to assume personal liability on the wraparound note. The court found that a fact question therefore existed as to whether the added features rendered the lienholder's written approval defective.\textsuperscript{33} The evidence showed that the purchasers had offered to escrow an amount of funds equal to the seller's maximum potential liability for the increased interest rate. The seller would thus be insulated from greater liability in the event the buyers defaulted on the wraparound note. The court held this evidence sufficient to support the jury's finding that the "written approval" of the first lienholder had been

\begin{itemize}
  \item 28. \textit{Id.} The sellers argued that their inability to convey marketable title was through no fault of their own. The court found, however, that the sellers had filed a lawsuit arising under an earlier contract against third parties nearly two months before contracting to sell the property to the buyer. The third parties had in turn filed a counterclaim for specific performance and a lis pendens in that suit. \textit{Id.} at 932.
  \item 29. \textit{Id.} at 936. Although it was undisputed that the sellers could not convey marketable title, the Court nevertheless commented favorably upon the trial court's charge defining marketable title. The trial court charged: "'Marketable title' means a title free and clear from reasonable doubt as to matters of law and fact, such a title as a prudent man, advised of the facts and their legal significance would willingly accept." \textit{Id.}
  \item 30. \textit{Id.}
  \item 31. \textit{Id.} at 937. The court of appeals reformed the trial court's order by vacating an award to the buyer of $528,000 for the rental value of the premises. \textit{Id.} at 938.
  \item 32. 644 S.W.2d 446 (Tex. 1982).
  \item 33. \textit{Id.} at 448.
\end{itemize}
Options. The Dallas court of appeals ruled in *Weitzman v. Steinberg*\(^{35}\) that an elaborate letter-option agreement was merely an unenforceable agreement to agree among joint venturers.\(^{36}\) Weitzman, the optionee and a 12.5% venturer, sued for specific performance of the option agreement, which provided that upon its exercise Weitzman would increase his ownership in the venture to 90%. Although the agreement stated that the ultimate economic effect of the transaction would be that Weitzman would obtain an additional 77.5% interest in the venture, the court noted that the parties intentionally failed to indicate exactly what Weitzman was to purchase and provided, instead, for five alternative arrangements.\(^{37}\) The agreement provided that the parties would determine the form of the acquisition at a later time in light of their respective tax consequences. The optionor group refused to honor the option agreement when Weitzman attempted to exercise it, and Weitzman contended that the agreement was enforceable because it left only matters of form to future agreement and thus was sufficiently definite to warrant enforcement. The court disagreed, holding that the agreement omitted not only the form and structure of the proposed transaction but also the very essence of an option to purchase, a description of the interest that was to be purchased.\(^{38}\) Whether the parties intended Weitzman to purchase an interest in the property or an interest in the joint venture was unclear, and the option agreement was therefore merely an agreement to agree and as such was unenforceable.\(^{39}\)

Issues of homestead law were litigated in *Zable v. Henry*,\(^{40}\) in which Mr. Zable, without the joinder of his wife, granted an option to purchase certain real property that constituted the couple's homestead. Although the language of the option appeared to grant merely a ten-year right of first refusal, both parties to the litigation interpreted the instrument as granting a right of first refusal for ten years followed by an absolute option to purchase the property at a stated price. The Dallas court of appeals stated that, although it did not agree, it was bound to treat the instrument in accordance with this interpretation.\(^{41}\)

The primary issue in *Zable* was whether the option was presently void.

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34. *Id.* at 449. On motion for rehearing the supreme court remanded in part to the court of appeals for consideration of factual insufficiency points of error that the court of appeals had failed to consider. *Id.*
35. 638 S.W.2d 171 (Tex. App.—Dallas 1982, no writ).
36. *Id.* at 176.
37. *Id.* at 175.
38. *Id.*
39. *Id.* at 176. The court also rejected Weitzman's contention that the optionor group should be estopped from denying the existence of a contract because Weitzman had been encouraged to expend funds in reliance upon the agreement. *Id.* The court stated: "The doctrine of promissory estoppel enforces obligations which would otherwise be barred at law, e.g., an oral contract for the sale of real property, and does not create essential contractual elements where none before existed." *Id.*
40. 649 S.W.2d 136 (Tex. App.—Dallas 1983, no writ).
41. *Id.* at 137.
The court noted that Texas decisions have adhered strictly to the principle that homestead transactions executed by one spouse are not void but are merely inoperative while the property remains a nonsigning spouse's homestead.42 A purchase that is frustrated by the refusal of the vendor's spouse to ratify the sale can result in an action for damages against the signing vendor, which action necessarily is predicated on the premise that the instrument is not void.43 The court in Zable noted that although the option in question would be absolutely exercisable in 1988, the homestead status might cease prior to that time and the option would then become enforceable by specific performance.44 If the homestead status of the property were to continue until 1988 and the option were then exercised but Mrs. Zable refused to join in a conveyance, then the optionee would have a cause of action for damages against Mr. Zable.45 The court held that under either approach the option was currently valid and should not be declared void merely because the homestead nature of the property and Mrs. Zable's failure to join in the transaction rendered the option temporarily unenforceable.46

Definition of Sale. In Cherokee Water Co. v. Forderhause47 the Texas Supreme Court reaffirmed its position that the sale of an oil and gas lease constitutes a sale of a determinable fee interest in oil and gas in place.48 In Cherokee a deed conveyed the surface rights to the subject property to the Cherokee Water Company, reserved the mineral estate to the grantors, and granted Cherokee a preferential right to acquire the mineral estate in the event of a sale by the grantor. The grantor subsequently executed an oil and gas lease to a third party. The issue before the supreme court was whether the oil and gas lease constituted a sale giving rise to Cherokee's preferential right to acquire the minerals. The court stated that the term

43. 649 S.W.2d at 138 (citing Goff v. Jones, 70 Tex. 572, 577, 8 S.W. 525, 527 (1888); Nelson v. Jenkins, 214 S.W.2d 140 (Tex. Civ. App.—El Paso 1948, writ ref'd)).
44. 649 S.W.2d at 138.
45. Id.
46. Id. at 138-39. In distinguishing the instant case from cases involving deeds of trust and levies of execution on homestead property, the court, quoting Lewis v. Brown, 321 S.W.2d 313, 317 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.), stated: Deeds of trust and levies of execution on homestead property are not unlawful but good and valid. Wright v. Hayes, 34 Tex. 253. It is merely unenforceable so long as the homestead status exists.
47. 649 S.W.2d at 138 (emphasis supplied by the court).
48. Id. at 525 (citing W.T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929)).
“sale,” when used in a property context, is commonly understood to mean any conveyance of an estate for money or money’s worth regardless of the duration or quantity of the property interest conveyed.49 Thus the term encompasses transfers of fee simple interests, a determinable fee, a fee subject to a condition subsequent, and life estates.50 Because a common oil and gas lease creates a determinable fee, the court held that the lease in this case constituted a sale giving rise to Cherokee’s preferential right to purchase.51

Deceptive Trade Practices and Warranties of Fitness. During the survey period the Texas Supreme Court decided two significant cases involving the Deceptive Trade Practices Act.52 The first case, G-W-L, Inc. v. Robichaux,53 was a suit by the purchaser of a new home against its builder-seller for breach of the implied warranty of fitness. The Texas Supreme Court first recognized the implied warranty of fitness in 1968 in Humber v. Morton.54 The implied warranty requires that a house be constructed in a good and workmanlike manner and therefore be suitable for human habitation.55 The parties in Robichaux agreed that the implied warranty of fitness applied to their transaction unless certain language in the buyer’s purchase money note was sufficient to waive the warranty. The court therefore considered whether a certain provision in the note contained sufficient language to waive the warranty.56 Noting that this question was one of first impression, the supreme court agreed with the court of appeals that language waiving an implied warranty must be clear and free from doubt.57 The supreme court, however, overruled the appellate court’s determination that the language of disclaimer was insufficient.58 The note in question provided:

This note, the aforesaid Mechanic’s and Materialmen’s Lien Contract and the plans and specification signed for identification by the parties hereto constitute the entire agreement between the parties hereto with reference to the erection of said improvements, there being no oral agreements, representations, conditions, warranties, express or im-

49. 641 S.W.2d at 525.
50. Id.
51. Id. The court stated that the term “lease,” when used in an oil and gas context, is a misnomer. The lease creates a determinable fee, which is an interest in land. Id. The court in Cherokee held that evidence that the mineral owners had executed a number of oil and gas leases during the 30-year period following the conveyance to Cherokee and that production eventually occurred was extrinsic evidence that the trial court had improperly considered. Id. The deed itself was unambiguous and parol evidence was therefore inadmissible. Id. The deed expressly provided, moreover, that failure to exercise the option on one sale would not be a waiver of Cherokee's right with respect to subsequent sales.
52. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984).
53. 643 S.W.2d 392 (Tex. 1982).
54. 426 S.W.2d 554 (Tex. 1968).
55. Id. at 559.
56. 643 S.W.2d at 393.
57. Id.
58. Id.
plied, in addition to said written instruments.\textsuperscript{59}

The supreme court stated that this language could not be clearer and that parties have an obligation to protect themselves by reading what they sign.\textsuperscript{60} The court therefore held that the purchaser had waived the implied warranty of fitness upon signing the note.\textsuperscript{61}

The other noteworthy case concerning the Deceptive Trade Practices Act is \textit{Gupta v. Ritter Homes, Inc.},\textsuperscript{62} in which the second owner of a home sued the builder for defects that he alleged constituted a breach of the implied warranty of fitness. Like \textit{Robichaux, Gupta} involved a question of first impression, which was whether the implied warranty of fitness extends to subsequent purchasers.\textsuperscript{63} The supreme court held that the implied warranty does protect subsequent purchasers with respect to latent defects not discoverable by a reasonably prudent inspection of the building at the time of sale.\textsuperscript{64} The court's rationale was essentially that the builder has a duty to construct defect-free buildings and that the relative knowledge and ability of builder and consumer compel the extension of this duty to a subsequent purchaser.\textsuperscript{65} Furthermore, the court stated, a latent defect is just as harmful to a subsequent owner as it is to the original buyer, and the builder is no more able to justify inadequate work to a subsequent owner than to the original buyer.\textsuperscript{66} The defendant argued that an implied warranty of fitness should not extend to a subsequent purchaser because of the lack of privity. The court held, however, that the implied warranty of fitness is implicit in the contract between the builder and original purchaser and is automatically assigned to a subsequent purchaser.\textsuperscript{67} The defendant cited \textit{Cheney v. Parks}\textsuperscript{68} and \textit{Thornton Homes, Inc. v. Greiner}\textsuperscript{69} for the proposition that the implied warranty of fitness does not apply to sales of used homes. The court distinguished \textit{Cheney}, noting that the suit in that

\textsuperscript{59. Id.}
\textsuperscript{60. Id.}
\textsuperscript{61. Id. The plaintiff also argued that TEX. BUS. & COM. CODE ANN. § 2.316 (Vernon 1968 & Supp. 1984), concerning exclusion and modification of warranties, applies to an implied warranty of fitness and that therefore the disclaimer of warranties in the note should have been conspicuous. The supreme court held, however, that § 2.316 does not apply to the construction and sale of a house because the Texas Uniform Commercial Code is limited to the sale of “goods,” which are defined to be “all things ... that are movable ... .” 643 S.W.2d at 394 (citing TEX. BUS. & COM. CODE ANN. § 2.105 (Vernon 1968)).
\textsuperscript{62. 646 S.W.2d 168 (Tex. 1983).
\textsuperscript{63. Id. at 169.
\textsuperscript{64. Id.
\textsuperscript{65. The \textit{Gupta} court stated:

The reasons for this holding are: (1) a builder should be in business to construct buildings free of latent defects; (2) the buyer cannot, by reasonable inspection or examination, discern such defects; (3) the buyer cannot normally rely on his own judgment in such matters; (4) in view of the circumstances and the relations of the parties, the buyer is deemed to have relied on the builder; and (5) the builder is the only one who has or could have had knowledge of the manner in which the building was built.

\textsuperscript{66. Id.}
\textsuperscript{67. Id.}
\textsuperscript{68. 605 S.W.2d 640 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.).
\textsuperscript{69. 619 S.W.2d 8 (Tex. Civ. App.—Eastland 1981, writ ref’d n.r.e.).
case was against a prior owner who was not the builder. The mere fact that a house is used, while it does not create an implied warranty of habitability on the part of the nonbuilder owner, does not limit the liability of a builder. The court specifically disapproved the holding in *Thornton Homes* that purchasers are not entitled to recover against a builder for breach of an implied warranty of habitability when the home is used.

II. TITLE AND OWNERSHIP

**Legal Descriptions.** Two significant court of appeals decisions dealt with descriptions in plats and deeds during the survey period. The lot owners in *Baskin v. Jeffers* brought suit for a permanent injunction to prohibit Baskin, a developer, from building townhouses in violation of restrictive covenants limiting construction on the "lots" within a particular subdivision to single family residences. It was undisputed that Baskin knew of the restrictive covenants.

The lot owners argued that the disputed acreage was a lot as designated on the plat and therefore was burdened with the recorded restrictions. The subdivision itself contained seventeen blocks, each of which contained one or more lots. The plat indicated the location of lots and blocks by solid boundary lines and a block and lot numbering system. The plat also showed the areas designated for streets, parks, and other easements. In addition to these areas, several parcels of raw acreage bounded by broken lines on the plat were not designated for a particular use and were not numbered like the lots. Baskin proposed to develop this raw acreage.

In determining whether the disputed acreage was subject to the restrictive covenants, the court first had to decide whether the acreage was a lot, since only lots were burdened by the restrictions. The court stated that the term "lot" could have a variety of meanings depending upon the facts and circumstances surrounding its use. In the context of a subdivision depicted in a recorded plat, however, the court held that a lot can only mean a fractional part of a block as defined by the fixed boundaries on an approved and recorded plat. In the instant case the disputed acreage did not meet the definition of a lot because it was not sufficiently marked or

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70. 646 S.W.2d at 169.
71. Id.
72. Id. (citing *Thornton Homes*, 619 S.W.2d at 9). Justice Spears, joined by Justice Ray, concurred in the holding and the opinion of the majority in *Gupta*. Id. at 170. Justice Spears warned that, in creating this new cause of action in Texas, liability should be limited to latent defects that manifest themselves after the purchase and are not discoverable by a subsequent purchaser's reasonably prudent inspection at the time of sale. Id.
73. In addition, the supreme court dealt with the sufficiency of legal descriptions in *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 905 (Tex. 1982) (agreement to convey mineral leasehold interests in future). See *infra* note 147.
74. 653 S.W.2d 480 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.).
75. The restrictive covenants provided that "[n]o lots shall be used except for single family residential purposes." Id. at 481.
76. Id.
77. Id. at 482.
78. Id. (citing *Wall v. Ayrshire Corp.*, 352 S.W.2d 496, 501 (Tex. Civ. App.—Houston...
designated for a particular use on the plat. Consequently, the acreage was not burdened by the covenants.

The Houston court of appeals reviewed the sufficiency of a property description in a deed in *Teledyne Isotopes, Inc. v. Bravenec.* A dispute arose because of the sketchy legal description, and Bravenec sued to remove a cloud on title. The deed described the property conveyed as "100 acres of land and being out of the South east corner of a tract of land containing 300 acres more or less." The trial court granted summary judgment in favor of Bravenec on the ground that the description was insufficient.

Teledyne argued that the deed adequately described the property when supplemented with extrinsic evidence. The court of appeals rejected Teledyne's argument, stating that although a deed will not be declared void if the property's location can be ascertained, the deed by itself or by reference to an existing writing must identify the property with reasonable certainty. Extrinsic evidence may be used only to aid the certainty of the description by explaining the descriptive words, not to supply the location and description of the property conveyed. The deed in this case con-

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1961, no writ) (brokerage agreement did not include property not defined by fixed boundaries on plat)).

79. 653 S.W.2d at 482. To constitute a dedication the plat must clearly indicate an intent to designate the property for a particular use, not merely for a projected future use. *Ives v. Karnes*, 452 S.W.2d 737, 741 (Tex. Civ. App.—Corpus Christi 1970, no writ); *City of Dallas v. Crow*, 326 S.W.2d 192, 196 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.). Dotted boundary lines evidence a prospective intent to dedicate the area. *Crow*, 326 S.W.2d at 196.

80. 653 S.W.2d at 482. The lot owners also argued that the area should be burdened by the restrictions even if it did not constitute a lot, since it fell within the subdivision tract. The court found, however, that all the building restrictions specifically referred to lots and were not of a type that would apply to land not characterized as lots. *Id.* at 483.

81. 640 S.W.2d 387 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

82. *Id.* at 389.

83. Appellants argued that reference to the original deed and an area survey would be adequate to locate the tract.

84. 640 S.W.2d at 389-90. The Texas statute of conveyances requires an adequate legal description. *Tex. Prop. Code Ann.* § 5.021 (Vernon Pam. 1983) (formerly codified at *Tex. Rev. Civ. Stat. Ann.* art. 1288 (Vernon 1980)); *Teledyne*, 640 S.W.2d at 390 (citing *Wilson v. Fisher*, 144 Tex. 53, 56, 188 S.W.2d 150, 152 (1945) (written agreement must express essential terms with such certainty that intention of parties may be determined without recourse to parol evidence); *Osborne v. Moore*, 112 Tex. 361, 363, 247 S.W. 498, 499 (1923) (written agreement must contain essential terms of contract, expressed with such certainty that intention of parties can be determined without recourse to parol evidence); *Morrison v. Dailey*, 6 S.W. 426, 427 (Tex. 1887) (writing must be sufficient to identify property and contract, but not all terms of agreement must be included)). The authorities the court cited concerned requirements under the statute of frauds and not under the statute of conveyances. Generally, the detail required in formation of a contract is not as great as that required to support a link in the chain of legal title. *Spires v. Price*, 159 S.W.2d 137, 138 (Tex. Civ. App.—Eastland 1942, writ ref'd w.o.m.). For a discussion of the amount of descriptive detail necessary in a deed, see *W.T. Carter & Bro. v. Ewers*, 133 Tex. 616, 131 S.W.2d 86 (1939). *See also infra* note 147 and accompanying text.

85. 640 S.W.2d at 390; *see also Kuklies v. Reinert*, 256 S.W.2d 435, 442-43 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.) (if description is sufficient to enable party familiar with locality to identify premises intended to be conveyed, to exclusion of other premises, description is sufficient). *But cf.* *Skinner v. Noland*, 154 Tex. 615, 617, 281 S.W.2d 332, 333 (1955) (deed contained language that, when supplemented by parol evidence, was sufficient to locate property).
tained only two terms that could be construed as part of a description—the size, "100 acres," and an indefinite location, "out of the South east corner of a tract of land containing 300 acres." It provided no means of determining the shape or limits of the 100-acre tract. Consequently, the deed failed because the location of the property could not be ascertained.86

The court also rejected Teledyne's argument that the suit was barred by laches.87 Because laches is an equitable defense, the defendant raising it must show both that it would be inequitable to allow the plaintiff to pursue his action because of a change of position by the defendant in reliance on the plaintiff's in action and that the defendant cannot be restored to its prior state.88 As long as parties remain in their initial condition, little significance attaches to the extent of the delay. A cloud on title is a continuing injury and is never barred by laches unless the party raising the defense first shows that, unlike Teledyne, it is in possession of the disputed property.89 Further, the duty to sue to clear title does not arise until another claim to the property is made.90 In this case Bravenec timely brought suit when the adverse claim became apparent from the placement of an oil rig on the property.91

Covenants and Easements. Two Texas Supreme Court cases reviewed the requirements for enforcement of covenants and easements. In Frey v. DeCordova Bend Estates Owners Ass'n 92 the court examined the authority of a subdivision owners association to assess from its members certain fees. The association attempted to assess and collect fees for the issuance of permits to build, transfer ownership, or lease property within the subdivision. The primary question presented to the court was whether the assessments exceeded the authority of the association.93 The deed covenants granting the association the right to assess fees limited such authority to uniform assessments, but the disputed fees did not apply uniformly to all landowners. Consequently, the court held the fees invalid because the association did not have the authority to levy that type of fee.94

In Carrithers v. Terramar Beach Community Improvement Ass'n 95 the

86. 640 S.W.2d at 390. Where a portion of a larger tract is conveyed, however, descriptions that designate the acreage and locate it on one side or in one corner of the larger tract have been held sufficient. McDonald v. Denson, 199 S.W.2d 707, 708 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.).
87. Id. at 390.
88. Id.
89. Id. at 391.
90. Id.
91. Id. at 390. Laches is delay that works an injury on the opposing party. San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 277 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (citing City of Fort Worth v. Johnson, 388 S.W.2d 400 (Tex. 1964)).
92. 647 S.W.2d 246 (Tex. 1983).
93. Id. at 247. A second issue of whether Frey had demonstrated the type of injury that would allow the issuance of an injunction was examined. Id. Since the plaintiff had not sold, built upon, or leased his lot, he failed to show an actual, irreparable injury that would warrant injunctive relief. Id. at 248.
94. Id.
95. 645 S.W.2d 772 (Tex. 1983).
supreme court addressed the question of whether an easement across submerged land, lying under a turning basin in navigable waters, was enforceable. The turning basin in question is on Galveston Island and is part of a navigable body of water with access to the Gulf of Mexico. The basin was artificially submerged by a corporation that conveyed the property to its trustee in bankruptcy, who in turn transferred it to the parties' common source of title, 7500 Bellaire Corporation. Bellaire granted Terramar's predecessor in title an exclusive easement for the use of the turning basin and the waters under which it lay. Bellaire granted Carrithers and Coulton an interest in the property, subject to the easement. After Bellaire had transferred its remaining interest to the State of Texas, Carrithers and Coulton obtained a permit from the Army Corps of Engineers to construct a marina in the basin. Plaintiff obtained an injunction prohibiting the construction of the marina due to its interference with the easement. The supreme court dissolved that injunction, stating that navigable waters are held by the state in trust for the public, subject only to the federal government's right to exercise control. The court held that the easement was invalid because a grantor cannot convey more than he owns. Neither may an easement be created that violates either public policy or a statute. Because the right to control navigable waters belongs exclusively to the State of Texas and the United States, the supreme court ruled that the easement would contravene the sovereignty of the state and federal governments. The court therefore held the easement invalid and the marina's construction subject only to proper governmental authorization.

Cotenants. In Williams v. Shamburger, Williams, the owner of a one-tenth interest in farmland as a tenant in common, sued to partition the property and recover funds he had expended for maintenance, taxes, and

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96. Id. at 774 (citing Motl v. Boyd, 116 Tex. 82, 111, 286 S.W. 458, 473 (1926)). The water, shores, and beds of the Gulf of Mexico, within the gulfward boundary as determined in Texas v. Louisiana, 426 U.S. 465 (1976), are owned by the State of Texas, subject to certain federal powers. Tex. Nat. Res. Code Ann. § 11.012(a) (Vernon 1978). Texas holds these waters in trust for the public with a specific order of preferential uses. Motl v. Boyd, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926) (preferred uses are, first, navigation; second, riparian owners; third, best interest of all nonriparians; fourth, other uses); see also W. Hutchins, The Texas Law of Water Rights 77 (1961) (discussing interest of riparian owners in corpus of water as it flows in stream).


98. 645 S.W.2d at 774 (citing Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 202 (Tex. 1962)).

99. 645 S.W.2d at 774. Texas courts follow the general rule that an agreement in contravention of a valid statute is void and unenforceable. Woolsey v. Panhandle Ref. Co., 131 Tex. 449, 455, 116 S.W.2d 675, 678 (1938).

100. 645 S.W.2d at 774.

101. Id.

102. 638 S.W.2d 639 (Tex. App.—Waco 1982, writ ref'd n.r.e.). The suit originated from the decision in Williams v. Williams, 559 S.W.2d 888 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (holding that property was owned in cotenancy).
improvements to the property. The trial court found that the property could not be partitioned in kind, and so it ordered the property sold and the proceeds distributed equally among the cotenants. The court rejected Williams's claim for reimbursement.

The Waco court of appeals affirmed the judgment of the trial court, determining that the claimed expenditures had been fully offset by the benefits Williams had derived from the use of the property. Cotenants are obligated to share any income from the property and may also recover from their cotenants their share of expenses necessary for the preservation of the property. The rule differs, however, with regard to improvements. If a cotenant incurs expenses to improve the property without first obtaining the consent of the other cotenants, then he may only recover the amount of the increase in the value of the property attributable to the improvements. Applying these rules to the case at bar, the Texas Supreme Court found that Williams had not indicated the amount of the expenses that were incurred for the preservation of the property, nor did Williams overcome evidence showing that he had retained all the benefits from the property for twenty-five years. The supreme court therefore held that any claim for reimbursement that Williams might have had was fully offset by the benefits he retained.

Nuisance. In McAshan v. River Oaks Country Club the Houston court of appeals was asked to find that a country club's construction of a parking lot next to McAshan's home would constitute a nuisance per se, warranting issuance of an injunction. The plaintiff testified that automobile lights and noise interfered with his sleep and that liquor bottles were strewn throughout the parking lot area. The court held such evidence insufficient to establish that the lot constituted a nuisance per se, in light of other evidence that the directors of the country club could restrict the time and manner of the lot's use. An injunction is improper for the mere prospect of an injury or annoyance in the future, and absent proof that the lot would be a nuisance per se the court denied the injunction.

103. 638 S.W.2d at 641.
104. Id. at 640 (citing Gonzalez v. Gonzalez, 552 S.W.2d 175, 181 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (duty to preserve common property rests on all co-owners and he who expends more than his share may recover a pro rata share of expenses from other cotenants); Wooley v. West, 391 S.W.2d 157, 160 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (supporting same proposition)).
105. 638 S.W.2d at 640-41 (citing Burton v. Williams, 195 S.W.2d 245 (Tex. Civ. App.—Waco 1946, no writ)). The law will not cause a nonconsenting cotenant to pay a pro rata share of the costs of improvements. Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965). A cotenant that has improved property may recover only increase in the value of that property. Id. at 202 (where improvement is designed to enhance mineral production, increase in value cannot be determined until mineral production has begun).
106. 638 S.W.2d at 640.
107. Id. at 641.
108. 646 S.W.2d 516 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).
109. Id. at 518.
110. Id. at 518-19 (citing Schulman v. City of Houston, 406 S.W.2d 219, 225 (Tex. Civ.
Rule Against Perpetuities. In *Peveto v. Starkey*\textsuperscript{111} the Texas Supreme Court held that a top deed, conditioned upon the reversion of a determinable fee, violated the rule against perpetuities.\textsuperscript{112} The top deed was executed four months prior to the expiration of the primary term of an earlier royalty deed.\textsuperscript{113} The rule against perpetuities is applied as of the time of the initial conveyance.\textsuperscript{114} In this case the possibility arose that the interest might not vest within the limits of the rules since that interest was subject to the first deed, which contained the normal secondary-term language that could allow an interest to continue indefinitely.\textsuperscript{115} The court held the deed void because the interest could not vest until the reversion of the determinable fee, which might not occur until beyond the period of the rule.\textsuperscript{116}

Zoning. In *Texans to Save the Capitol, Inc. v. Board of Adjustment*\textsuperscript{117} the plaintiffs challenged the issuance of a building permit that they contended violated a zoning ordinance.\textsuperscript{118} The ordinance allowed buildings in downtown Austin to exceed a 200-foot height limitation by three feet for every one foot the buildings were set back from the street line. The controversy centered around the definition of the term “setback” as embodied in the zoning ordinance.\textsuperscript{119} Plaintiffs alleged that there could be only one setback per building. The City of Austin had accepted the administering

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\textsuperscript{111} 645 S.W.2d 770 (Tex. 1982).

\textsuperscript{112} Id. at 772. The rule against perpetuities is embodied in the Texas Constitution as against the “genius of a free government.” TEX. CONST. art. I, § 26. The rule renders any interest invalid “which by any possibility may not become vested within a life or lives in being . . . and twenty-one years thereafter . . . .” Foshee v. Republic Nat’l Bank, 617 S.W.2d 675, 677 (Tex. 1981).

\textsuperscript{113} 645 S.W.2d at 771. The clause that gave rise to the dispute provided, “This grant shall become effective only on the expiration of the above described Royalty Deed to R.L. Peveto [sic] dated April 23, 1960.” Id.

\textsuperscript{114} Id. at 772 (citing Brooker v. Brooker, 130 Tex. 27, 38-39, 106 S.W.2d 247, 254 (1937)).

\textsuperscript{115} 645 S.W.2d at 772. As long as oil and gas was produced in paying quantities Peveto’s interest would continue indefinitely. Thus Peveto’s interest met the definition of a determinable fee, which is “an interest which may continue forever, but the estate is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent.” Id. (quoting Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 173, 254 S.W. 290, 295 (1923)).

\textsuperscript{116} 645 S.W.2d at 772.

\textsuperscript{117} 647 S.W.2d 773 (Tex. App.—Austin 1983, writ ref’d n.r.e.). Texans to Save the Capitol, Inc., is a nonprofit corporation concerned with protecting the view of the capitol in the downtown Austin area.

\textsuperscript{118} The court first addressed the issue of whether the corporation had standing to bring the suit. The court found that plaintiff had standing. Id. (citing Austin Neighborhoods Council, Inc. v. Board of Adjustment, 644 S.W.2d 560 (Tex. App.—Austin 1982, writ ref’d n.r.e.) (plaintiff must show damage or injury other than as a member of general public)).

\textsuperscript{119} Austin City Code § 13—2—130(a)(1). The ordinance allowed buildings to be constructed three feet above the maximum 200-foot limit for each foot of “setback” from the streetline. Texans to Save the Capitol, Inc., disputed a city agency’s interpretation that the setback could occur anywhere in the first 200 feet of height, allowing a wedding cake-shaped building to be constructed above the maximum height even though no setback existed at the street level.
agency's interpretation that the ordinance allowed more than one setback per building. The Austin court of appeals found that the meaning of "setback" as embodied in the ordinance was ambiguous. The court afforded deferential treatment to the construction placed on the ordinance by the administering agency, since that interpretation was reasonable and had been applied for nearly fifty years. The court therefore held that issuance of the permit in accordance with the agency's interpretation of the ordinance was not an abuse of discretion.

**Constructive Trusts.** The San Antonio court of appeals imposed a constructive trust on profits made by one joint venturer after the termination of the joint venture in *Sanchez v. Matthews*. Sanchez, Matthews, and one other person had formed a joint venture for the purpose of holding for resale a certain piece of real property in Bexar County. The venture was to terminate either upon the sale of the property or July 1, 1971, whichever occurred first. If the property was not sold by July 1, 1971, efforts would be made to sell the property at a price sufficient to recoup the money invested in the acreage.

The property was not sold by July 1, 1971. The joint venturers agreed on July 12 to offer the property at a price adequate to recover their costs and expenses. On July 19 Sanchez, acting for the venture, entered into a sales contract with Berger. On August 2 Sanchez agreed with Berger and a third party to repurchase Sanchez's fifty percent interest in the property following transfer of the property to Berger. On August 9 the joint venture conveyed the property to Berger. On August 10 Berger conveyed an undivided fifty percent interest in the acreage to Sanchez and a twenty-five percent interest to Toland. Sanchez did not record his deed until February 22, 1972. He later conveyed a twenty-five percent interest to Benson. The evidence showed that prior to the sale to Berger, Sanchez had discussed the property with Toland. The property was sold in November 1973 for a substantial profit, of which Sanchez's share amounted to $153,728. Matthews sued to recover twenty-five percent of Sanchez's profits, representing the portion attributable to Matthews's interest in the original venture.

The trial court imposed a constructive trust on Matthews's share of Sanchez's profits. The court of appeals agreed that Sanchez had profited from the fiduciary relationship and affirmed the imposition of the con-

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120. 647 S.W.2d at 775.
121. Id. (citing Calvert v. Kane, 427 S.W.2d 605 (Tex. 1968); Slocomb v. Cameron Indep. School Dist., 116 Tex. 288, 288 S.W. 1064 (Tex. 1926); State v. Aransas Dock & Channel Co., 365 S.W.2d 220 (Tex. Civ. App.—San Antonio 1963, writ ref'd)).
122. 647 S.W.2d at 776. The evidence indicated that the agency's interpretation was first formulated shortly after the ordinance's adoption in 1931, more than fifty years prior to this case, and had governed the building of several of Austin's historic landmarks. Id. at 776 n.6.
123. Id. at 777-78.
124. 636 S.W.2d 455 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).
125. The contract was a fifteen-day earnest money contract.
The court determined that the fiduciary relationship had existed at the time the plan to obtain an interest in the property was formulated, so that the plan fell within the scope of the original venture. Consequently, the profits belonged to the venture, and the trial court had properly placed a constructive trust upon those proceeds of the sale that corresponded to Matthews's ownership interest in the original venture.

In contrast, the Fifth Circuit Court of Appeals, applying Texas law, reached a different result in deciding when a constructive trust should be imposed. In *Harris v. Sentry Title Co.* Ward wanted to obtain a parcel of property owned by the Tarrant County Water Control Board. Ward did not want his name known for fear it would drive up the price of the property. Ward therefore contacted Whatley and reached an agreement that Ward would submit bids through either Whatley or an affiliate of Whatley. The water control board rejected the first round of bids. Ward and Whatley then devised a strategy to acquire the property that included purchasing a second parcel of property, which was the property in dispute, because such parcel carried an easement over the target property. The disputed property was acquired by Home Engineering, Inc., a Whatley company, for $30,500, with Ward furnishing the down payment. Home Engineering later transferred the property to Sentry Title Company, another Whatley corporation.

Ward eventually concluded that the target parcel was overpriced and discontinued bidding. He then demanded title to the disputed property, claiming beneficial ownership. Whatley refused to convey the property to Ward. The district court held that the oral agreement to convey the property to Ward was unenforceable because it violated the statute of frauds. The court imposed a constructive trust, however, on the proceeds from a foreclosure sale of the property. No party raised the issue of a resulting trust. The circuit court reversed, holding that failure to comply with the

126. 636 S.W.2d at 458. The court recognized that persons in a joint venture have a fiduciary relationship in many instances. *Id.* (citing 5 A. Scott, *The Law of Trusts*, § 495 (3d ed. 1967)).

127. 636 S.W.2d at 459 (citing Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977)). The court also noted that recent decisions of the Texas Supreme Court had limited the scope of joint ventures for the purpose of imposing a constructive trust. 636 S.W.2d at 459 (citing Huffington v. Upchurch, 532 S.W.2d 576 (Tex. 1976) (constructive trust was proper because fiduciary relationship existed and second deal was within scope of original venture)).

128. 636 S.W.2d at 460.

129. 715 F.2d 941 (5th Cir. 1983).

130. Travis Ward is a successful business and oil man in Athens, Texas.

131. Whatley's affiliate was Hart, who was to receive $30,000 to $35,000 if the bid was successful.

132. The trial court determined that three bids had actually been made on behalf of Ward. Hart made a bid to purchase the property. Pan American Properties, Inc., Ward's holding company, submitted a bid. Home Engineering, Inc., one of Whatley's companies, made a bid. Ward had hoped that one of the three bids would be the high bid, and that it could then be withdrawn with one of the other Ward-related bids winning the 490 acres.

133. 715 F.2d at 944.

134. *Id.* The significance of a constructive trust in this case is that such trusts, although involving real property, are not subject to the statute of frauds. *Id.* at 945.

135. *Id.* at 946. A resulting trust arises when A provides purchase money to B so that B
The court stated that in order to achieve a constructive trust under Texas law a party must show (1) a prior fiduciary relationship with the other party other than the transaction at hand and (2) that the party against whom the trust would be imposed would otherwise be unjustly enriched. The court found that a fiduciary relationship existed, but the first element was still not satisfied because the relationship was neither longstanding nor unrelated to the disputed transaction. The court also determined that it was not inequitable for Whatley to retain the large profits he had realized. The court further stated that Ward could have avoided this result had he reduced the oral agreement to writing. Because Ward did not do so his suit was barred by the statute of frauds.

Consequently, the court allowed Sentry to retain the proceeds of the foreclosure sale.


136. 715 F.2d at 950.
137. Id. at 947. The court quoted from an earlier Texas Supreme Court decision in explaining the rationale behind constructive trusts: "[A] person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." Id. at 946 (quoting Fitz-Gerald v. Hull, 150 Tex. 39, 49, 237 S.W.2d 256, 262 (1951); see RESTATEMENT OF RESTITUTION § 160 (1937). The Sentry court then reviewed the judicial application of this definition. After reviewing Rankin v. Naftalis, 557 S.W.2d 940 (Tex. 1977); Consolidated Gas & Equip. Co. v. Thompson, 405 S.W.2d 333 (Tex. 1966); and Panama-Williams, Inc. v. Lipsey, 576 S.W.2d 426 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ), the Sentry court concluded that two elements were necessary to establish a constructive trust, a prior unrelated fiduciary relationship and unjust enrichment. 715 F.2d at 946-48.
138. Id. at 948. Whether or not a fiduciary relationship exists is a question of fact, but whether or not a relationship is sufficiently longstanding to warrant imposition of a constructive trust is a matter of law. Id. (citing Fitz-Gerald v. Hull, 150 Tex. 39, 51, 237 S.W.2d 256, 263 (1951)). The court ruled as a matter of law that the relationship was not sufficiently longstanding. 715 F.2d at 948.
139. Id. at 949-50. The transaction was not found to be the result of mistake, duress, or fraud. Ward had made an intentional business decision to enter into the transaction. Id. at 950. The court also intimated that Ward did not have clean hands due to his dealings and could not seek equitable relief in any event. The court misapplied this concept, however, since the party asserting unclean hands as a defense must have been harmed by the unclean act. Omohundro v. Matthews, 341 S.W.2d 401, 410 (Tex. 1960). The circuit court did not find that the unclean act harmed Whatley.
140. 715 F.2d at 945.
141. Id. at 950-51. The dissent makes a compelling argument that even under the majority's analysis there was sufficient evidence to support the imposition of a constructive trust by the trial court. Id. at 951-61 (Will, J., dissenting).
142. 637 S.W.2d 903 (Tex. 1982).
tiffs sought to enforce an area of mutual interest agreement\textsuperscript{144} signed by Gulf’s predecessor in title, Chambers & Kennedy. On August 4, 1966, Mobil had entered into a farmout agreement with Westland. Chambers & Kennedy desired to take over Westland’s obligations under the farmout agreement. Chambers & Kennedy entered into an unrecorded letter agreement with Westland that outlined the purchase provisions.\textsuperscript{145} In addition to other terms, the agreement included an area of mutual interest agreement.\textsuperscript{146} Thereafter, Gulf purchased Chambers & Kennedy’s interest in the property.

The mutual interest agreement became the focus of the lawsuit.\textsuperscript{147} The primary question was whether Gulf took the property without notice of Westland’s equitable claim. The Texas Supreme Court followed the settled rule that “a purchaser is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims.”\textsuperscript{148} The court

\textsuperscript{144} An area of mutual agreement is one by which parties describe a certain geographic area within which they agree to share any additional leasehold interests that are obtained by one of the parties. \textit{id.} at 905.

\textsuperscript{145} The agreement provided that Chambers & Kennedy would assume all of the obligations of the Mobil/Westland farmout agreement, pay Westland $50,000 in cash, assign Westland a \(\frac{1}{16}\) of \(\frac{3}{4}\) overriding royalty on any acreage earned from Mobil, \(\frac{1}{2}\) of the working interest obtained from Mobil under the farmout agreement, and a production payment of $150,000 from the test well.

\textsuperscript{146} It was the area of mutual interest agreement, contained in the letter agreement of November 15, 1966, that Westland sought to enforce against Gulf. The mutual interest agreement provided:

5. If any of the parties hereto, their representatives or assigns, acquire any additional leasehold interests affecting any of the lands covered by said farmout agreement, or any additional interest from Mobil Oil Corporation under lands in the area of the farmout acreage, such shall be subject to the terms and provisions of this agreement. . . .

\textit{637 S.W.2d} at 905 (emphasis added).

\textsuperscript{147} Since the agreement called for the conveyance of oil and gas lease interests, the statute of frauds, \textit{Tex. Bus. & Com. Code Ann.} § 26.01 (Vernon 1968 & Supp. 1984) had to be satisfied. \textit{637 S.W.2d} at 908. Gulf contended that the agreement contained an insufficient description of the property to allow conveyance.

The letter agreement contained descriptions of two different properties. The first description referred to “any of the lands covered by said farmout agreement.” The second description referred to “under lands in the area of the farmout acreage.” \textit{id.} at 905. Each description was examined independently. The first description was held to be sufficient because “such farmout” was a term defined as the Mobil/Westland farmout agreement. The Mobil/Westland farmout agreement in turn contained an adequate description. \textit{id.} at 909.

The second description, however, was found to be inadequate. Westland’s attempt to supplement the description with extrinsic evidence was rejected. Extrinsic evidence is proper only to clarify the written description and not provide the actual location or description of the property. \textit{id.} at 909-10 (citing \textit{Wilson v. Fisher, 144 Tex. 53, 57, 188 S.W.2d 150, 152 (1945)}). For further discussion regarding the sufficiency of descriptions contained in deeds or contracts of sale, see \textit{supra} notes 81-86 and accompanying text.

\textsuperscript{148} \textit{637 S.W.2d} at 908 (emphasis supplied by court) (quoting \textit{Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668, 670 (Tex. Civ. App.—Eastland 1952, writ ref’d)}). In support of this rule the court cited five other cases: \textit{Williams v. Harris County Houston Ship Channel Navigation Dist., 128 Tex. 411, 418, 99 S.W.2d 276, 280 (1936)} (vendee charged with constructive knowledge of restrictive provisions of deed); \textit{Texas Co. v. Dunlap, 41 S.W.2d 42, 44 (Tex. Comm’n App. 1931, judgmt adopted)} (cited for same proposition); \textit{Guevara v. Guevara, 280 S.W. 736, 737 (Tex. Comm’n App. 1926, judgmt adopted)} (same rule); \textit{Tuggle v. Cooke, 277 S.W.2d 729, 731 (Tex. Civ. App.—Fort Worth 1955, writ ref’d n.r.e.) (vendee
held that this rule applies regardless of whether the document is recorded or affects the chain of title.\textsuperscript{149}

In the instant case, the property was conveyed subject to an operating agreement that referred to the letter agreement. It was the duty of the purchaser to investigate the operating agreement.\textsuperscript{150} Consequently, Gulf was placed on notice not only of the operating agreement but also of any interest arising from a document listed in the contents of the operating agreement.\textsuperscript{151} Gulf therefore took the property subject to Westland's equitable claim.\textsuperscript{152}

\textbf{Homestead—Foreclosure of Federal Tax Lien.} In \textit{United States v. Rodgers},\textsuperscript{153} the United States Supreme Court in effect added a fourth exception to the provision of the Texas Constitution that protects homesteads from charged with constructive notice that portion of mineral rights had been previously alienated; Abercrombie v. Bright, 271 S.W.2d 734, 740 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.) (same rule).

\textsuperscript{149} 637 S.W.2d at 908.
\textsuperscript{150} Id.
\textsuperscript{151} Id. The dissent distinguished the cases cited by the majority on the basis that in those cases the instrument referred to in the deed affected the purchaser's title, while in the present case the purchaser's title was not affected. \textit{Id}. at 913-14 (Wallace, J., dissenting). There are two types of notice according to the dissent, actual and constructive. \textit{Id}. at 911. Problems arise when courts use the terms interchangeably to mean the same thing. \textit{Id}. This case did not involve constructive notice because such notice is implied by law from properly recorded instruments. \textit{Id}. The letter agreement was not recorded. Consequently, the question was whether or not Gulf had actual notice of Westland's equitable claim. Gulf did not have express knowledge of the claim; therefore, any actual notice would have to be implied. \textit{Id}. at 912. Implied notice is the result of an inference of fact that would cause a prudent person to investigate. Gulf should be charged with implied actual notice of any facts that a reasonably prudent person could have ascertained. \textit{Id}. (citing Exxon v. Raetzer, 553 S.W.2d 842 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.)).

The dissent then determined the extent of the duty to investigate. In Flack v. First Nat'l Bank, 148 Tex. 495, 226 S.W.2d 628 (1958), the court limited the duty to matters suggested by the facts really known. \textit{Id}. at 497, 226 S.W.2d at 631. Each case cited by the majority involved documents that affected title. 637 S.W.2d at 913. In each case the instrument giving rise to the disputed equitable right was referred to in the chain of title. \textit{Id}. at 913-14 (citing Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668 (Tex. Civ. App.—Eastland 1952, writ ref'd) (deed contained in chain of title referred to unrecorded prior contract); Williams v. Harris County Houston Navigation Dist., 128 Tex. 411, 99 S.W.2d 276 (1936) (purchaser's deed referred to another deed within chain of title containing restrictive covenants); Texas Co. v. Dunlap, 41 S.W.2d 42 (Tex. Comm'n App. 1931, judgmt adopted) (deed within chain of title reserved a vendor's lien); Guevara v. Guevara, 280 S.W. 736 (Tex. Comm'n App. 1926, judgmt adopted) (deed recital recognized existence of purchase money note and vendor's lien); Tuggle v. Cooke, 277 S.W.2d 729 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.) (deed in chain of title referred to another deed containing restrictive provisions); Abercrombie v. Bright, 271 S.W.2d 734 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.) (deed in chain of title recited prior conveyance of certain interest); Loomis v. Cobb, 159 S.W. 305 (Tex. Civ. App.—El Paso 1913, writ ref'd) (purchaser bound by recital in original deed from grantor town); W.T. Carter & Bro. v. Davis, 88 S.W.2d 596 (Tex. Civ. App.—Beaumont 1935, writ disc'd) (both recorded deeds in chain of title)). The dissent would not have charged Gulf with knowledge of a document referred to in the operating agreement as a matter of law. 637 S.W.2d at 913. The dissent would have required a factual determination as to whether or not Gulf had notice of Westland's equitable claim. \textit{Id}. at 914.

\textsuperscript{152} \textit{Id}. at 908.
\textsuperscript{153} 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983).
forced sale. The Court ruled that any property in which a delinquent taxpayer owns an interest is subject to forced sale under section 7403 of the Internal Revenue Code. The Court noted that the Texas homestead provisions vest in each spouse an interest similar to an undivided life estate. The Court nevertheless subjected the homestead of a Texas widow to forced sale to satisfy the separate tax liability of her late husband. This decision rejected the Fifth Circuit’s determination that only the interest in the property owned by the delinquent taxpayer, and not the entire jointly owned property, was subject to sale. The Court reasoned that the clear wording of section 7403 favored this construction because that section specifically refers to “any property, of whatever nature, of the delinquent, or in which he has any right, title or interest.” In addition, the Court noted that the statute requires that all persons having an interest in the property be made parties to the proceeding, and that it further requires the district court to determine the interests of the parties in and to the property.

While this ruling may appear harsh, the Court recognized that section 7403 vests the district court with discretion in deciding whether to order a sale and noted that the district court must review equitable considerations because “financial compensation may not always be a completely adequate substitute for a roof over one’s head.” The full impact of Rodgers
has yet to be realized. It promises to be an important decision, especially in Texas, where the concept of homestead is almost sanctified. As Mr. Justice Brennan stated, "The provisions of section 7403 are broad and profound."163

**Mortgages, Foreclosure, and Notice of Intent to Accelerate.** In *Ogden v. Gibraltar Savings Association*164 the Texas Supreme Court considered the question of whether the holder of an installment note containing an optional acceleration provision must, upon default, notify the maker of the holder's intent to exercise the option. The deed of trust in issue contained a provision declaring that upon default the balance due on the underlying note should "at the option of the holder or holders thereof, immediately become due and payable."165 Upon default, the holder gave notice to the maker of the note that "failure to cure such breach on or before [a particular date] may result in acceleration of the sums secured by the Deed of Trust and sale of the property. . . ."166 The court held this notice to be insufficient because it only restated the option contained in the deed of trust.167

Post-*Ogden* decisions have focused on waiver of the notice of intent to accelerate. The Tyler court of appeals in *Chapa v. Herbster*168 held that a waiver of notice in a note or deed of trust dispensed with the requirement of notice of intent to accelerate.169 The Fort Worth court of appeals, however, in *Bodiford v. Parker,*170 held ineffective as a waiver of notice of intent to accelerate, language in a deed of trust providing that "the entire indebtedness hereby secured . . . may, at the option of the Beneficiary, . . . be immediately matured and become due and payable without demand or notice of any character . . . ."171 Two dissenting judges viewed the quoted language as a clear waiver.172 There seems to be little reason why an installment debtor cannot waive notice of intent to accelerate and little doubt that language such as that contained in the *Parker* deed of trust would act as such a waiver.173

163. Id. at 2145, 76 L. Ed. 2d at 256-57.
164. 640 S.W.2d 232 (Tex. 1982).
165. Id. at 233.
166. Id. (emphasis in original).
167. Id. at 234.
168. 653 S.W.2d 594 (Tex. App.—Tyler 1983, no writ).
169. Id. at 601.
170. 651 S.W.2d 338 (Tex. App.—Fort Worth 1983, no writ).
171. Id. at 339.
172. Id. at 340-41 (Jordan, J., dissenting).
Mortgages—Due-on-Sale Clause. The progeny of Sonny Arnold, Inc. v. Sentry Savings Association continue to give the appellate courts opportunities to determine whether various due-on-sale clauses are restraints on alienation. In Sonny Arnold the Texas Supreme Court looked to the Restatement of Property definition of restraint on alienation and determined that the due-on-sale clause at issue was not a restraint on alienation and was valid and enforceable. The Tyler court of appeals reached the opposite result in Metropolitan Savings & Loan Association v. Nabours. In Nabours the deed of trust provided that any voluntary inter vivos transfer of the property securing the debt without the consent of the lender would both accelerate the sums due and subject the borrower to a prepayment penalty. The Nabours due-on-sale provision differed from the Sonny Arnold provision in that it contained both a prepayment penalty clause and an agreement by the borrower not to convey without the lender's consent. The Tyler court concluded that the Nabours provision was a “promissory” restraint on alienation as defined in section 404(1)(b) of the Restatement of Property and further concluded that the restraint was unreasonable and therefore void and unenforceable. In reaching this conclusion the court noted that the Nabours provision gave the lender free rein to renegotiate the terms of the loan at a time when interest rates were escalating and mortgage money was in short supply.

174. 633 S.W.2d 811 (Tex. 1982).
175. RESTATEMENT OF PROPERTY § 404 (1944) states:
(1) A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance
(a) to be void; or
(b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or
(c) to terminate or subject to termination all or a part of the property interest conveyed.
(2) If a restraint on alienation is of the type described in Subsection (1), Clause (a), it is a disabling restraint.
(3) If a restraint on alienation is of the type described in Subsection (1), Clause (b), it is a promissory restraint.
(4) If a restraint on alienation is of the type described in Subsection (1), Clause (c), it is a forfeiture restraint.
176. 633 S.W.2d at 816. The deed of trust provision at issue in Sonny Arnold gave the lender an option to accelerate but provided that the option would not apply if, prior to the conveyance, the transferee (who was acceptable to the lender) executed an assumption agreement, which could include an increase in the interest rate payable under the note. Id. at 813.
177. 652 S.W.2d 820 (Tex. App.—Tyler 1983, writ dism’d w.o.j.).
178. Id. at 821.
179. See supra note 175.
180. 652 S.W.2d at 824; see infra notes 285-89 and accompanying text (discussing Garn-St. Germain Act, 12 U.S.C. § 1701j-3 (1982), and effect it could have on decisions such as Nabours).
181. 652 S.W.2d at 823. The due on sale provision at issue in Nabours was also distinguished from the provision reviewed in Crestview Ltd. v. Foremost Ins. Co., 621 S.W.2d 816 (Tex. Civ. App.—Austin 1981, writ ref’d n.r.e.), which provided for optional acceleration upon a sale of the mortgaged premises without the approval of the lender but also provided that such approval would not be unreasonably withheld.
Mechanics' and Materialmen's Liens. During the survey period, Texas appellate courts decided numerous cases dealing with the liens of mechanics and materialmen. The large amount of judicial resources consumed by such cases is directly linked to problems with the statutes involved. As Justice Campbell stated in First National Bank v. Sledge, the mechanics' and materialmen's lien statutes "are very lengthy, have been subjected to several revisions, and are not exactly a model of clarity."

The Sledge case is typical of many mechanics' lien cases in that it addresses issues of both perfection and priority of the lien. The owner of two lots entered into a mechanic's lien contract with a general contractor for the construction of a house on each lot. The contractor then assigned the contract to a bank as collateral for interim construction financing. The contractor completed one house, but went bankrupt before completing the other. Five unpaid subcontractors filed lien affidavits and mailed one copy of each affidavit to the owner. The bank brought suit against the owner and the subcontractors to quiet its title to the property, or, in the alternative, for a declaratory judgment that its mechanics' and materialmen's contract lien was superior to the liens of the subcontractors.

The bank contended that the subcontractors' notice to the owner was deficient because the subcontractors sent only one copy of the lien affidavits, the invoices referred to in the affidavits were not attached, and the notice did not contain the statutory warning to the owner as to retainage. In resolving this issue, the court distinguished a lien under article 5463, which it described as a "trapping" statute, from a lien under article 5469, which it described as a "retainage" statute. The fund for payment of subcontractor claims arising under the former statute

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183. 653 S.W.2d 283 (Tex. 1983).
184. Id. at 285-86.
186. Tex. Prop. Code Ann. § 53.056(c)-(d) (Vernon Pam. 1983) (formerly codified at Tex. Rev. Civ. Stat. Ann. art. 5453, § 2(b)(2) (Vernon Supp. 1982-1983)) applies to the notice of debts incurred by a general contractor to be given an owner and requires the lien claimant to notify the owner that if the debt is not paid, "the owner may be personally liable and the owner's property may be subjected to a lien unless: (1) the owner withholds payments from the contractor for the payment of the bill; or (2) the bill is otherwise paid or settled."
189. 653 S.W.2d at 286.
is created only upon notice to the owner that subcontractors remain unpaid. The ten percent retainage under article 5469, however, is statutorily mandated and requires no third-party action for its creation.

Since the "statutory warning" requirement is a condition precedent to perfection of a lien under article 5463, the court ruled that the subcontractors' claims under that statute must fail. Article 5469, however, has different notice requirements, which do not include the statutory warning, and which were met by the subcontractors. Thus the court ruled that the subcontractors had perfected liens under article 5469 and that such liens, covering ten percent of the value of the work completed, were entitled to a preference over the bank's lien.

The relative priority and scope of a general contractor's mechanics' and materialmen's lien and a previously recorded deed of trust lien as to removable improvements were decided in L&N Consultants, Inc. v. Sikes. At the time the general contractor substantially completed construction of thirty-six townhomes, the development company that had employed him owed him approximately $38,000, of which about $19,700 was for removable improvements. The total amount of removable improvements in the project was in excess of $69,000. The noteholder, who had foreclosed on the project under its deed of trust, claimed that the contractor's lien should attach to specifically identifiable removable improvements for which the contractor had not been paid. The noteholder argued that to allow the contractor's lien to attach to all removable improvements, whether or not they had previously been paid for, would allow the contractor to use his lien to recover for nonremovable improvements even though article 5459 gives a priority over superior deed of trust liens only to removable improvements. The Dallas court of appeals rejected this argument and held that article 5452, section 1194 and article 5459, section 1195 do not limit the amount of a contractor's lien to that portion of the contract price that may be allocated to removables; rather, they give

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190. Id. at 287.

191. The court disregarded the failure to provide the owner with two copies of the lien affidavit as required by art. 5453 on a harmless error rationale. Justice Campbell stated that the "only apparent purpose for requiring two copies of the lien affidavit be sent to the owner is so the owner can notify the general contractor that a lien is claimed for a particular unpaid claim." Id. at 287-88. Since the general contractor in question was in bankruptcy, the court found there was "no harm" in sending only one copy, noting that "[t]he mechanic's and materialman's lien statutes must be liberally construed for the purpose of protecting laborers and materialmen." Id. at 288.

192. Id. The court held that the liens under Tex. Rev. Civ. Stat. Ann. art. 5469 (Vernon Supp. 1982-1983) (current version at Tex. Prop. Code Ann. §§ 53.101-.105 (Vernon Pam. 1983)) enjoyed a preference over the lien of a general contractor since all liens had a common time of inception and the retainage fund was created to be a fund to pay mechanics, materialmen, and artisans if the general contractor defaulted. 653 S.W.2d at 288.

193. 648 S.W.2d 368 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).


him a preference lien on removables furnished under his contract, and
for which he is responsible, for the entire amount due him for the
materials and labor furnished by him under that contract, even
though some of the items furnished are not removable.\textsuperscript{196}

**Condemnation.** In *Zinsmeyer v. State*\textsuperscript{197} the State of Texas brought a con-
demnation suit to acquire land for highway expansion. The Zinsmeyers
owned a 1.308 acre tract of land that had been conveyed by warranty deed
to Mr. Zinsmeyer from his father. Included in the deed was an easement
granting Zinsmeyer the use of a water well located on the father's highway
frontage property. The highway expansion project affected .392 acres of
Zinsmeyer's land and that portion of his father's land on which the ease-
ment lay. The Zinsmeyers received $3500 as compensation for the value
of the land taken and for damages to the remaining property. They ob-
jected to the award, which stated that it included water rights and easem-
ents whether or not they were located on the Zinsmeyers' land. The
Zinsmeyers appealed the award and obtained a trial as to the value of the
remaining land and improvements after the taking. The jury found that
the damage to the remaining property was zero.

On appeal, the San Antonio court of appeals held that the trial court
erred in refusing to submit the landowners' requested special instruction
advising the jury not to consider any payment made to Zinsmeyer's father
for the taking of his water well.\textsuperscript{198} The court stated that an easement is an
interest in land, and an easement owner is entitled to compensation if the
easement is extinguished by a taking, regardless of whether the servient
estate owner is paid for the taking of his own estate.\textsuperscript{199} Because of the
failure of the trial court to delineate the ownership rights of the easement
holders and the owner of the servient estate, the case was reversed and
remanded.\textsuperscript{200}

**Brokers.** In Texas an unlicensed real estate broker who acts as an agent
and collects a commission is liable to the aggrieved party for the amount of
the commission plus a penalty of not more than three times the amount of
such commission.\textsuperscript{201} The Waco court of appeals in *Holloman v. Denson*\textsuperscript{202}

\textsuperscript{196} 648 S.W.2d at 371.
\textsuperscript{197} 646 S.W.2d 626 (Tex. App.—San Antonio 1983, no writ).
\textsuperscript{198} Id. at 629. The court indicated that when a jury sits as a factfinder, it is the court's
duty to determine the nature and extent of the property condemned and to instruct the jury
regarding the rules of compensation or damages applicable to the particular case. Id.; see
Texas Pig Stands, Inc. v. Krueger, 441 S.W.2d 940, 946 (Tex. Civ. App.—San Antonio 1969,
wrift ref'd n.r.e.).
\textsuperscript{199} 646 S.W.2d at 628-29; see also Harris County Flood Control Dist. v. Shell Pipeline
Corp., 578 S.W.2d 495, 497 (Tex. Civ. App.—Houston [1st Dist.]) (easement owner entitled
to compensation upon governmental taking), aff'd, 591 S.W.2d 798 (Tex. 1979); Ruble v.
San Antonio, 479 S.W.2d 86, 89 (Tex. Civ. App.—San Antonio 1972, writ ref’d n.r.e.) (court
should instruct as to nature of easement); cf. City of Dallas v. Anderson, 570 S.W.2d 62, 64-
65 (Tex. Civ. App.—Dallas 1978, wrift ref'd n.r.e.) (judge's failure to instruct fully regarding
condemnor's easement rights requires reversal).
\textsuperscript{200} 646 S.W.2d at 629.
\textsuperscript{201} TEX. REV. CIV. STAT. ANN. art. 6573a, § 19(b) (Vernon Supp. 1984); see Persky v.
Greever, 202 S.W.2d 303 (Tex. Civ. App.—Fort Worth 1947, wrift ref’d n.r.e.) ("aggrieved"
held that, for purposes of the recovery of a real estate commission, an aggrieved person is one who is sold real estate by an unlicensed individual. The court stated:

A person hiring a real estate agent is seeking to employ services of an expert who has been tested and found to be such, and if, unknown to him, he gets a person who has not been tested and found to be an expert, but is charged the full commission rate, that person has suffered a loss since he did not get what he was paying for.

In *Holloman* the Densons had entered into three real estate transactions with Holloman, who was not licensed as a real estate broker. The Densons filed three separate suits, which were consolidated for purposes of the trial. The first suit involved a claim by the Densons for $2500 in earnest money that they paid for a lake lot in a transaction that was never completed. In the second suit the Densons sought to recover a commission paid to Holloman by a third party in connection with that third party’s sale of his house to the Densons. The third suit was to recover statutory penalties as a result of commissions the Densons paid to Holloman in connection with the sale of their house.

The court found that the Densons were entitled to the return of the earnest money paid for the purchase of the lake lot. The Densons were also entitled to recovery of damages for the commissions they had paid, because they were aggrieved persons within the meaning of article 6573a. The Densons were found not to be aggrieved, however, where the commission was paid by the third party to Holloman, because it was no concern of the Densons whether the party from whom they purchased their house paid a commission to Holloman.

*Pace v. State* resolved the question of whether treble damages under the Deceptive Trade Practices Act (DTPA) are payable from the Real Estate Recovery Fund because of misrepresentations made by a real estate broker. The Texas Supreme Court relied on the wording of the Act itself to find that, because the Real Estate License Act states that the fund is to be used to reimburse persons who have suffered monetary damage as a result of unscrupulous acts of real estate agents or brokers, treble damages under the DTPA, as punitive damages, are not recoverable. Damages assessed to punish or as an example to others are not the same as funds expended to restore aggrieved persons who suffer monetary

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202. 640 S.W.2d 417 (Tex. App.—Waco 1982, writ ref'd n.r.e.).
203. *Id.* at 420.
204. *Id.*
205. *Id.* at 421.
206. *Id.* at 420.
207. *Id.*
208. 650 S.W.2d 64 (Tex. 1983).
209. TEX. BUS. & COM. CODE ANN. § 17.50(B) (Vernon Supp. 1984).
210. The Real Estate Recovery Fund was established as part of the Real Estate License Act, TEX. REV. CIV. STAT. ANN. art. 6573a, § 8 (Vernon Supp. 1984).
211. 650 S.W.2d at 65.
A second question resolved in *Pace* involved the amount of recovery allowed an individual under the Real Estate License Act. When the Act became effective in 1975, the maximum recovery allowed to any individual was $10,000. By amendment effective September 1, 1979, the maximum amount recoverable was increased to $20,000. The court held that the language of the Act itself makes clear that the date of the act or acts giving rise to a cause of action determines the maximum amount of recovery. In *Pace*, because the acts that gave rise to the judgment occurred before September 1, 1979, $10,000 was the maximum amount recoverable.

In *Corman v. Carlson* a real estate broker sued the co-owner of a shopping center to recover a commission he allegedly earned for negotiating a lease on premises within the center. The Dallas court of appeals, reversing the trial court, held that a broker is not entitled to recover a commission when the only writing containing the parties' agreement for payment of a commission fails to satisfy the statute of frauds. The agreement to pay a real estate commission in this case was set forth in a letter stating that the commission was to be paid for negotiating the lease of a doughnut store at the Richardson East Shopping Center. The court held this description insufficient to satisfy the statute of frauds, which requires a writing to contain, within itself or by reference to some other existing writing, a reasonably certain description of the property to be transferred. A writing, describing land only as a part of a larger tract, without specific data by which to identify the tract to be sold or leased, will not satisfy the statute of frauds.

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214. TEX. REV. CIV. STAT. ANN. art. 6573a, § 8, pt. 8(c) (Vernon Supp. 1984).

215. 650 S.W.2d at 65-66. The Act provides that the fund is “for reimbursing aggrieved persons who suffer monetary damages by reason of certain acts committed by a . . . real estate broker or salesman . . . provided the broker or salesman was licensed by the State of Texas at the time the act was committed . . . .” TEX. REV. CIV. STAT. ANN. art. 6573a, § 8, pt. 1(a) (Vernon Supp. 1984) (emphasis by the court).

216. 650 S.W.2d at 65-66; *see also* Texas Real Estate Comm'n v. Lamb, 650 S.W.2d 66 (Tex. 1983) (supreme court reaffirmed holding in *Pace* that date of acts committed, not date of judgment, controls amount recoverable from Real Estate Recovery Fund).

217. 638 S.W.2d 21 (Tex. App.—Dallas 1982, no writ).

218. *Id.* at 22.

219. The letter provided:

This letter is to serve as our commission agreement for negotiating a lease with Denny's Inc. for a donut store at the Richardson East Shopping Center located at Belt Line and Plano Road in Richardson, Texas.

Mr. Brown and Mr. Corman agree to pay Bob Carlson the commission amount of $8,424.

*Id.*

220. *Id.*; *see* Wilson v. Fisher, 144 Tex. 53, 56-57, 188 S.W.2d 150, 152 (1945) (writing or memorandum insufficient to comply with statute unless it furnishes within itself, or by reference to some other existing writing, means or data by which land to be sold may be identified with reasonable certainty).

221. 638 S.W.2d at 22; *see also* Bayer v. McDade, 610 S.W.2d 171, 172 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (“50 acres, more or less” in larger tract held insuff-
Rahmberg v. McLean\textsuperscript{222} interpreted section 20(a) of the Real Estate License Act.\textsuperscript{223} That section states that a person may not maintain an action for the collection of brokerage and other real-estate-related commissions unless he proves he was a duly licensed real estate broker or salesman at the time he commenced the alleged services.\textsuperscript{224} The defendant in Rahmberg argued that in order for a person to maintain an action for the collection of brokerage-related commissions, he had to allege and prove that he was a duly licensed broker or salesman at the time the cause of action arose. The court interpreted the Act, however, to require that the individual be duly licensed at the time the alleged services were commenced.\textsuperscript{225} Thus the broker, who was licensed when she procured the original listing but whose license had lapsed for nonpayment of licensing fees by the time the contract was executed, was entitled to recover a commission.\textsuperscript{226}

Condominiums. In Dutcher v. Owens\textsuperscript{227} the Texas Supreme Court addressed a question of first impression regarding the allocation of liability among condominium\textsuperscript{228} co-owners for tort claims arising out of the ownership, use, and maintenance of common elements.\textsuperscript{229} The court rejected the lower court's holding that condominium unit owners have joint and several liability\textsuperscript{230} and held instead that the liability of a co-owner for claims involving management of the common areas is limited to his pro rata interest in the condominium as a whole.\textsuperscript{231} The court found that both the Texas Condominium Act\textsuperscript{232} and Texas case law are silent as to tort liabil-

\begin{itemize}
\item \textsuperscript{222} 640 S.W.2d 401 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)
\item \textsuperscript{223} 640 S.W.2d 401 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)
\item \textsuperscript{224} id.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. at 402-03; cf. Reyna v. Gonzalez, 630 S.W.2d 439 (Tex. App.—Corpus Christi 1982, no writ) (section 1(d) of Real Estate License Act requires denial of real estate salesperson's claim for commission based on sale of property listed but not contracted for until after termination of his employment).
\item \textsuperscript{227} 647 S.W.2d 948 (Tex. 1983).
\item \textsuperscript{228} "Condominium" means the separate ownership of single units or apartments in a multiple unit structure or structures with common elements. Texas Condominium Act, Tex. Prop. Code Ann. § 81.002(3) (Vernon Pam. 1983) (formerly codified at Tex. Rev. Civ. Stat. Ann. art. 1301a, § 2(d) (Vernon 1980)). It is actually a combination of two estates in real property, a fee simple in a portion of the multiple unit structure and a tenancy in common with other co-owners in the common elements. 647 S.W.2d at 949 (citing Scott v. Williams, 607 S.W.2d 267, 270 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (co-owners hold as tenants in common)).
\item \textsuperscript{230} Owens v. Dutcher, 635 S.W.2d 208, 211 (Tex. App.—Fort Worth 1982), rev'd, 647 S.W.2d 948 (Tex. 1983).
\item \textsuperscript{231} 647 S.W.2d at 951.
\end{itemize}
ity, and looked to California law to buttress its conclusion that, given the unique type of ownership that condominiums involve, the onus of liability for injury should reflect the degree of control exercised by co-owners, which, in the instant situation, was very slight.

In *Board of Directors of By the Sea Council of Co-Owners, Inc. v. Sondock*, certain condominium apartment owners brought suit to enjoin the condominium board of directors from removing carports and to compel the board to repair the carports. The main issues in the case were the validity of an amendment to the condominium declaration and the necessity of joinder of all owners in a suit that affects the interests of the absent owners. The declaration amendment purported to give the board authority to cover or uncover parking spaces, which were common elements of the condominium project. The appellants contended that the right to the parking facilities constituted a vested property right and that removal of the covers, because it would decrease each owner's percentage of undivided interest in that common element, required approval of one hundred percent of the owners. The court rejected the idea that a decrease in percentage ownership would result from the removal of the covers and, since no Texas case was directly in point, looked to the law of other jurisdictions in concluding that the declaration was properly amended. The court held that the unit owners purchased

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233. 647 S.W.2d at 951. The court of appeals had also noted the silence, but found in the nature of condominium ownership the basis for joint and several liability, stating that "[i]n the absence of a statutory limitation, there appears to be no escape-proof method of insulating the unit owners in a condominium regime from unlimited liability . . . ." Owens v. Dutcher, 635 S.W.2d 208, 210 (Tex. App.—Fort Worth 1982).

234. 647 S.W.2d at 950 (citing White v. Cox, 17 Cal. App. 3d 824, 830, 95 Cal. Rptr. 259, 262 (1971)). The California court noted that it "would be sacrificing reality to theoretical formalism" to conclude that a condominium unit owner had any effective control over the common elements. 17 Cal. App. 3d at 830, 95 Cal. Rptr. at 263.

235. 644 S.W.2d 774 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

236. The condominium declaration was adopted pursuant to the Texas Condominium Act, TEX. PROP. CODE ANN. §§ 81.001-210 (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 1301a (Vernon 1980)), and was amended pursuant to paragraph 40 of the by-laws, which permitted amendments "with the written consent of Unit Owners . . . who in the aggregate own at least 66 2/3% of the common elements . . . ." 644 S.W.2d at 779 & n.2.

237. Id. at 776.

238. Id.; see also Texas Condominium Act, TEX. PROP. CODE ANN. § 81.002(6)-(7) (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 1301a, § 2(l)-(m) (Vernon 1980)) (definition of general and limited common elements).

239. 644 S.W.2d at 781.

their units subject to applicable law and to the terms of the recorded declaration, which specifically provided that the by-laws and the declaration could be amended by a two-thirds vote.\textsuperscript{241} This holding apparently has resulted in the amendment to the Texas Condominium Act that is discussed below.

III. Legislation

\textit{Property Code.} During the survey period the legislature enacted a state \textit{Property Code},\textsuperscript{242} intended to be a nonsubstantive codification and revision of Texas property law statutes relating to real and personal property.\textsuperscript{243} The Code contains ten titles covering general provisions, conveyances, public records, actions and remedies, liens and exempt property, escheat, condominiums, landlord and tenant, trusts, and miscellaneous beneficial property interests. It attempts to clarify the statutes by restating them in modern American English, rearranging them into a more logical order, employing a format and numbering system meant to facilitate citation, and eliminating repealed, duplicative, unconstitutional, outdated, or ineffective provisions.\textsuperscript{244} The Code Construction Act\textsuperscript{245} applies to construction of the Code.\textsuperscript{246} A committee of the State Bar Real Estate, Probate, and Trust Law Section is reviewing the Property Code to determine whether substantive changes were inadvertently made.\textsuperscript{247}

\textit{Condominiums.} The Sixty-Eighth Legislature considered, but rejected, major revisions to the Texas Condominium Act\textsuperscript{248} that would have brought Texas law closer to that of the proposed Uniform Condominium Act.\textsuperscript{249} During the special summer session, however, the legislature, apparently in response to the Sondock case,\textsuperscript{250} amended section 6(b) of the Act to provide that "[a] condominium association may not alter or destroy a unit or a limited common element without the consent of all owners affected and the first lien mortgagees of all affected owners."\textsuperscript{251} Section 7(B) of the Act was also amended, and section 7(D) was added to require con-

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\item \textsuperscript{241} 644 S.W.2d at 779, 781.
\item \textsuperscript{242} Property Code, ch. 576, 1983 Tex. Gen. Laws 3475 (codified at \textit{TEX. PROP. CODE ANN.} (Vernon Pam. 1983)).
\item \textsuperscript{243} \textit{TEX. PROP. CODE ANN.} § 1.001(a) (Vernon Pam. 1983).
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} \textit{TEX. REV. CIV. STAT. ANN.} art. 5429b—2 (Vernon Supp. 1984).
\item \textsuperscript{246} \textit{TEX. PROP. CODE ANN.} § 1.002 (Vernon Pam. 1983).
\item \textsuperscript{247} \textit{Editor's Message, State Bar Newsletter, Real Estate, Probate and Trust Law}, Oct. 1983, at 2. The committee is chaired by J.R. Schneider.
\item \textsuperscript{248} \textit{TEX. REV. CIV. STAT. ANN.} art. 1301a (Vernon 1980) (codified before amendment in \textit{TEX. PROP. CODE ANN.} §§ 81.001-210 (Vernon Pam. 1983)).
\item \textsuperscript{249} St. Claire, \textit{The Proposed Texas Uniform Condominium Act}, 46 TEX. B.J. 44 (1983) (comparison of existing Condominium Act with proposed legislation).
\item \textsuperscript{250} Board of Directors of By the Sea Council of Co-Owners, Inc. v. Sondock, 644 S.W.2d 774 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); see supra notes 235-41 and accompanying text.
\end{itemize}
dominium declarations to provide that any amendment to the declaration must be approved at an owners' meeting by the holders of at least sixty-seven percent of the ownership interests. The amendments raise certain questions, including the meaning of "all owners affected" and the validity of the practice of "phasing" in the development of condominiums in separate stages. In any event, the amendments, as a practical matter, will require developers to employ an effective proxy system to obtain the required two-thirds vote for amendments in light of the fact that meetings of owners are often poorly attended.

**Urban Homesteads.** Amendments to the Texas Constitution and the Homestead Exemption Law redefined urban homesteads in terms of size instead of value. Under old law an urban homestead was defined as a lot or lots with a value not exceeding ten thousand dollars at the time of designation as a homestead. The amendments provide that an urban homestead is limited to one acre or less, together with its improvements, irrespective of the dollar value of the lot or the improvements and regardless of the date on which the homestead was created.

**Filing of Foreclosure Notice.** The legislature also amended the Texas statute regulating the sale of real property under a contractual power of sale. The statute retains requirements for a valid foreclosure under a deed of trust but, in addition, a copy of the notice of trustee's sale must now be filed at the office of the county clerk of the county in which the sale is to be made at least twenty-one days preceding the date of the sale. Furthermore, the clerk must make all such notices available for public inspection.

**Easements, Zoning, and Political Subdivisions.** The Texas Natural Resources Code now has a new chapter permitting parties to grant and convey "conservation easements." Such easements are nonpossessory interests in real property imposing limitations or affirmative obligations

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257. *Id.*

258. *Id.*

designed to maintain open spaces, protect natural resources, enhance air or water quality, or preserve the historical, architectural, archeological, or cultural aspects of real property.\textsuperscript{260} In a similar vein cities and incorporated villages may now impose zoning restrictions to protect and preserve sites, buildings, and areas of architectural importance, as well as those of historical and cultural importance.\textsuperscript{261} Other legislation\textsuperscript{262} now encourages private investment in certain designated economically depressed areas ("enterprise zones")\textsuperscript{263} by providing incentives in the form of reduced or eliminated taxes and fees,\textsuperscript{264} regulatory relief,\textsuperscript{265} and preferences for state grants or loans and lease opportunities at nominal rentals.\textsuperscript{266} Several items of recent legislation concern subdivisions. A city governing body may now issue an amending plat authorizing a relocation of lot lines if the owner or owners of all affected lots join in the application for plats amendment, as long as the amendment neither removes recorded covenants or restrictions nor increases the number of lots.\textsuperscript{267} A county commissioners court may cancel a subdivision, upon application of the owner or owners of seventy-five percent of the affected land area, after three weeks' notice and public meeting, provided it is shown that the revision or cancellation will not interfere with established rights of any land owner within the subdivision.\textsuperscript{268} Only persons directly affected by the cancellation may maintain an injunction action.\textsuperscript{269} An action extending governmental control of subdivisions requires plats from all landowners planning to subdivide outside city limits in all counties, rather than merely in counties having a population of less than 190,000 people.\textsuperscript{270} In addition, road-width minimum requirements have been extended\textsuperscript{271} and an optional system of subdivision controls is available for certain counties.\textsuperscript{272} Plats filed before September 1, 1983, are governed by the prior provisions of article 6626a.\textsuperscript{273}

**Brokers.** The Real Estate License Act previously provided that a salesperson had to be in the employ of the broker under whom he was licensed at the time the compensation was earned and at the time the compensation was paid.\textsuperscript{274} An amendment now allows a salesperson to accept compen-

\begin{itemize}
\item \textsuperscript{260}TEX. NAT. RES. CODE ANN. \S 183 (Vernon Supp. 1984).
\item \textsuperscript{261}TEX. NAT. RES. CODE ANN. \S 1011(a) (Vernon Supp. 1984).
\item \textsuperscript{262}Texas Enterprise Zone Act, ch. 841, 1983 Tex. Gen. Laws 4771 (codified at TEX. REV. CIV. STAT. ANN. art. 5190.7 (Vernon Supp. 1984)).
\item \textsuperscript{263}TEX. REV. CIV. STAT. ANN. art. 5190.7, \textsuperscript{264}§ 9-14.
\item \textsuperscript{265}Id \textsuperscript{266}§ 15.\textsuperscript{267} Id. \textsuperscript{268}§ 16.\textsuperscript{269} Id. \textsuperscript{270}art. 974(a), \textsuperscript{271}§ 3.
\item \textsuperscript{268}TEX. REV. CIV. STAT. ANN. art. 6626d(a)-(b) (Vernon Supp. 1984).
\item \textsuperscript{269}Id. \textsuperscript{270}art. 6626d(c).
\item \textsuperscript{270}Id. \textsuperscript{271}art. 6626a, \textsuperscript{272}§ 1(b).
\item \textsuperscript{271}Id. \textsuperscript{272}§ 3.
\item \textsuperscript{273}Id. \textsuperscript{274}art. 6626a.1.
\item \textsuperscript{275}TEX. REV. CIV. STAT. ANN. art. 6573a, \textsuperscript{276}§ 1(d) (Vernon 1969).}

sation from a broker for whom he no longer works, as long as the right to compensation accrued while he was employed.275 The Act now also permits brokers to complete contract forms binding a real estate transaction, if such forms are promulgated by the Texas Real Estate Commission or prepared by a licensed Texas attorney.276

_Fraud—Real Estate and Stock Transactions._ A person who makes a false representation or false promise with respect to a real estate or stock transaction is now liable to the person defrauded for actual damages by reason of his awareness of the falsity of his statement, without proof of "willfulness," under section 27 of the Business and Commerce Code.277 Exemplary damages may be imposed on a person who benefits from false representations or promises made by another that such person knows of and fails to disclose.278 In each instance actual awareness may be inferred from objective manifestations of awareness.279 Attorneys’ fees and costs are now recoverable under section 27(e).280

_Sale of Minor’s Property._ A probate court may now grant permission to sell a minor’s real or personal property when the value of the minor’s interest does not exceed ten thousand dollars.281 Previous law permitted a sale only when the value of the property exceeded ten thousand dollars.282

_Mechanics’ Liens._ Attorneys’ fees and other reasonable costs of collection are now recoverable if a properly fixed mechanic’s or materialman’s lien is not paid within 180 days from perfection.283 If the lien is not properly perfected, however, the owner, surety, contractor, or subcontractor against whom the lien was filed may recover reasonable fees and costs of defending against the lien claimant.284

_Garn-St. Germain._ One item of federal legislation that became law in late 1982 is of interest. Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 provides for federal preemption of state laws and judicial decisions that restrict the enforcement of due-on-sale clauses in real property loans,285 except for loans originating or assumed during a “win-

276. TEX. REV. CIV. STAT. ANN. art. 6573a, § 16(b) (Vernon Supp. 1984).
278. Id. § 27.
279. Id.
280. Id. § 27(e).
282. Id. § 339A(a) (Vernon 1980).
284. Id.
The Federal Home Loan Bank Board issued regulations\textsuperscript{287} to implement the Act, one of which lists the restrictions imposed by the Act on the exercise of a due-on-sale option and limits applicability of the restrictions to loans made on homes occupied or to be occupied by the borrower.\textsuperscript{288} In addition, the regulations provide that a lender "[s]hall not impose a prepayment penalty or equivalent fee for or in connection with acceleration of the loan by exercise of a due-on-sale clause."\textsuperscript{289} In light of two recent Texas cases\textsuperscript{290} upholding due-on-sale laws in Texas mortgage instruments, the Act is of less import here than in many other states. The Act, however, would seem to impact due-on-sale clauses like that in \textit{Metropolitan Savings & Loan Association v. Nabours}.\textsuperscript{291} Some commentators have suggested that the outcome in \textit{Nabours} would be different under the Act and the regulations because the due-on-sale clause would be enforceable and only the prepayment penalty would be unenforceable.\textsuperscript{292}

\textsuperscript{286} \textit{Id.}


\textsuperscript{288} 48 Fed. Reg. at 21,559. Thus, construction and other commercial loans are not subject to the restrictions listed in the Act, § 341(d)(1)-(9), 12 U.S.C. § 1701j-3 (1982).

\textsuperscript{289} 48 Fed. Reg. at 32,161-62 (to be codified at 12 C.F.R. § 591.5(2)).

\textsuperscript{290} Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 633 S.W.2d 811 (Tex. 1982) (not unreasonable restrain on alienation); Crestview, Ltd v. Foremost Ins. Co., 621 S.W.2d 816 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) (not unreasonable for lender to condition transfer approval upon increase in interest rate or prepayment of certain magnitude).

\textsuperscript{291} 652 S.W.2d 820 (Tex. App.—Tyler 1983, writ dism'd w.o.j.); \textit{see supra} notes 177-81 and accompanying text.

\textsuperscript{292} Bloodworth & Santos, \textit{Recent Case Developments} 1-20 (Univ. of Texas Law School Mortgage Lending Inst. 1983).