Property

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THIS Survey Article incorporates several changes in format from the Property Articles in past Surveys. First, in considering the wealth of potential discussion topics and the obvious limitations of space, the author has elected to emphasize those topics which relate most directly to real property concepts and practice. For example, this Article chronicles the advancing procession of federal land use controls (even though the full legal impact of such controls will not be felt until after the close of the survey year), while cases involving the law of personal property are relegated to scant mention in the final section. On the other hand, real property topics which constitute major portions of other Articles in this Survey issue are omitted entirely from this Article. Finally, the internal structure of this Article has been altered from that of prior years in an attempt to achieve a functional sequence and to shift the emphasis of the Article from case summaries to substantive analysis.

I. STATUS OF TITLE

Ownership and Boundary Disputes. Ownership and boundary litigation generally evolves around one or more of the recognized proofs of title: proof of a regular chain of conveyances from the sovereign of the land to one of the litigants; proof of a superior title in one litigant traced from a common source acknowledged by both litigants; proof of adverse possession by one litigant for the applicable limitations period prescribed by statute; and, if neither litigant can prove superior title by one of the first three methods, proof of one litigant's prior possession combined with proof that such possession has not been abandoned. The third proof, adverse possession, produced more cases during the survey year than any other. Most of those cases merely reflect the familiar rule that "the question of adverse possession is essentially a question of fact"; however, a few interesting legal issues

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1. See section IV of this Article, beginning at note 178 infra.
2. For example: homestead and community property, McKnight, Matrimonial Property; mineral rights, Chappel, Oil and Gas; ad valorem taxes, Tracy, Taxation.
were discussed. In *Dorbandt v. Jones* the court held that the prescription in the ten-year statute of limitations for "cultivating, using or enjoying" the property to which title by adverse possession was claimed did not require putting the land to its highest and best use, which the court and the unsuccessful litigant assumed to be "recreational" use. The court instead determined that any use, in this case grazing and fishing, which showed "an assertion of exclusive ownership" would satisfy the statutory requirement.

In *Pirtle v. Henry* the court stated that a quitclaim deed did not satisfy the requirement of a "deed or deeds, or any instrument or instruments, purporting to convey [the property in question]," prescribed as a necessary element to proof of title under the twenty-five-year statute of limitations. Unfortunately, although the court's statement may be supported by the single source of authority which it cited, it ignored a controversial and relevant 1965 decision by the Supreme Court of Texas, *Porter v. Wilson*, which held a quitclaim deed to be inadequate under the five-year statute of limitations. To be sure, the statement in *Pirtle* may be a valid extension of the supreme court's prior decision; however, a different conclusion could have been reached in light of the distinguishable language of the twenty-five-year statute and the five-year statute, the intense three-man dissent in *Porter*, the critical academic response to that decision, and the fact that possession for an additional twenty years (over the five-year statute's required possession) may logically permit a reduction in the strict requirement of *Porter*.

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5. 492 S.W.2d 601 (Tex. Civ. App.—Austin 1973), error ref. n.r.e.
7. Of course, the extent of grazing or fishing may not always be sufficient to prove adverse possession. See Georgetown Builders, Inc. v. Heirs of John Yanksley, 498 S.W.2d 222 (Tex. Civ. App.—Austin 1973), error ref. n.r.e. See also Comment, *Seasonal Use of Land for Business Purposes as Regards Quality of Adverse Possession*, 21 BAYLOR L. REV. 217 (1969).
8. 486 S.W.2d 585 (Tex. Civ. App.—Tyler 1972), error ref. n.r.e.
10. 19 TEX. JUR. 2D Deeds § 11 (1960). The court's statement is, perhaps, further supported by TEX. REV. CIV. STAT. ANN. art. 1297 (1962), which incorporates the concept of warranty into the terms "grant" and "convey." See also Larson, *Texas Limitations: The Twenty-Five Year Statutes*, 15 Sw. L.J. 177 (1961), which, by failing to mention the factual situation in the instant case in an analysis of article 5519, may constitute tacit support for the rationale employed by the court.
11. 389 S.W.2d 650 (Tex. 1965).
13. Article 5509 requires the adverse possessor to be "claiming under a deed or deeds duly registered" whereas article 5519 requires "a deed or deeds, or any instrument or instruments, purporting to convey the same" (emphasis added). As pointed out in Note, *An Instrument Which Conveys Only the Grantor's Right in the Land is a Quitclaim and Will Not Support the Five-Year Statute of Limitations*, 43 TEXAS L. REV. 1129 (1965), Texas courts interpreting article 5509 have, often implicitly, distinguished "conveyance of land" instruments from "purported conveyance" instruments. Although the latter were not deemed adequate with regard to article 5509, they would appear to have greater applicability with regard to article 5519.
14. The dissent relied on a prior line of cases which appear to be in conflict with the majority opinion. See *Parker v. Newberry*, 83 Tex. 428, 18 S.W. 815 (1892), and Benskin v. Barksdale, 246 S.W. 360 (Tex. Comm'n App. 1923), *holding approved*.
In a case involving a plaintiff's attempt to prove a regular chain of title from the sovereign, *Jeffus v. Coon*, the court accepted the offered proof despite a missing link in the chain between April 5, 1857, and December 18, 1877. The court's decision was founded on two determinations: first, the facts proven at trial, which established strong circumstantial evidence of the existence—and loss during that twenty-year period—of a deed which would have restored the sequence of the chain; and second, the legal doctrine of "presumption of a grant," which is often used to justify the court's acceptance of proof of title despite a missing link. Although not essential to the holding of this case, the opinion perhaps demonstrates that courts are being less than precise in their use of the term "presumption of a grant." At one point in the opinion, for example, the court explained the presumption as follows: "[W]here there is a missing link in the chain of title many years prior to time such issue is raised, there is a presumption liberally indulged that a deed did exist covering the period." However, in the next paragraph of the opinion the court quoted with approval the following statement from a 1956 opinion by the Supreme Court of Texas: "A case of presumed grant is not made merely by proof of long, adverse claim of ownership and proof of nonclaim on the part of the apparent owner. There must be evidence proving or tending to prove acquiescence by the apparent owner in the claim of the adverse party." Admittedly, the latter statement was originally pronounced in a case involving only the proof of adverse possession; however, it does seem to be closer than the former statement to complying with the checklist established by the supreme court in 1920 for determining whether circumstantial evidence warrants a "presumption of a grant." Perhaps, as the supreme court has already indicated, the term "presumption of a grant" should be replaced with a term less vulnerable to obfuscation, such as "proof of title by circumstantial evidence," a term

17. Id. at 953. The emphasis on the word "liberally" in that statement is found not only in *Jeffus*, but also in Oswald v. Staton, 421 S.W.2d 174, 176 (Tex. Civ. App.—Waco 1967), error ref. n.r.e. See also Ballingall v. Brown, 226 S.W.2d 165, 171 (Tex. Civ. App.—Fort Worth 1950), error ref. n.r.e.
19. In Magee v. Paul, 110 Tex. 470, 478, 221 S.W. 254, 257 (1920), the supreme court listed the requirements as follows: "first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of nonclaim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim." This checklist was quoted and approved in Adams v. Slattery, 156 Tex. 433, 447-48, 295 S.W.2d 859, 868 (1956). Although the passage of time is certainly the primary element in the Magee checklist, considerations such as the "adverse" nature of the claim and the apparent owner's "acquiescence" indicate that other factual elements must be considered before a presumption is established. Cf. Sulphen v. Norris, 44 Tex. 204 (1875), discussed in Cadena, *The Pyramiding of Presumptions and Inferences in Texas*, 4 ST. MARY'S L.J. 1, 13-14 (1972).
20. Quoting again from Adams v. Slattery: "The rule is generally referred to as the presumption of a deed or grant, but it seems to us it could be more accurately termed proof of title by circumstantial evidence," 156 Tex. at 448, 295 S.W.2d at 868, quoting Love v. Eastham, 137 Tex. 462, 467, 154 S.W.2d 623, 625 (1941). See also Comment, *Proof of a Deed by Circumstantial Evidence*, 20 BAYLOR L. REV. 167, 168-69 (1968): "The presumption of a grant . . . [and similar terms] are all misleading terms which have been used to describe what is actually proof of a conveyance by circumstantial evidence."
which was given only terse reference in Jeffus.

In Mortgage Investment Co. v. Bauer\(^2\) the proof and accuracy of a survey was in issue due to a conflict between the calls for course and distance and a call adjoining two contiguous survey tracts. In affirming the award of acreage to the plaintiff, who was defending the call for adjoinder, the court not only restated the general rule which gives a call for adjoinder priority over a call for course and distance\(^2\) but also gave priority to that rule itself over another rule of conflict resolution which the defendant had advanced.\(^2\)

A few cases during the survey year involved the doctrine of constructive trust, the equitable attack on record title which is often used when a record holder has violated a fiduciary duty to the plaintiff in connection with the acquisition of title to property.\(^2\) In two of these cases the courts rewarded naiveté by finding a fiduciary relationship, and thus establishing a constructive trust.\(^2\) However, the supreme court in Tyra v. Woodson\(^2\) was unimpressed by the plight of two businessmen who thought they were members of a joint venture to acquire certain oil and gas leases. The plaintiffs explained their lack of a written agreement by testifying that the defendants had lulled them into complacency with protests of integrity.\(^2\) The supreme court rejected the plaintiffs’ claim, and restated its 1966 summary of the law in Consolidated Gas & Equipment Co. of America v. Thompson: “Our holdings above cited are to the effect that for a constructive trust to arise there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit.”\(^2\)

The statutory method for resolving ownership and boundary disputes in

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\(^2\) The other rule, espoused in two earlier cases, had emphasized the respective dates of award, holding that the junior award must yield to the senior award. Allen v. Draper, 254 S.W. 783, holding approved, modified, 256 S.W. 255 (Tex. Comm’n App. 1923); Post v. Draper, 205 S.W. 514 (Tex. Civ. App.—Amarillo 1918), error dismissed.

\(^3\) The doctrine is actually invoked in order to avoid the requirement of a written agreement by the defendant, which would otherwise be required by the Statute of Frauds. See TEX. BUS. & COMM. CODE ANN. § 26.01 (1968); TEX. REV. CIV. STAT. ANN. art. 7425b-7 (1960).

\(^4\) Dixon v. Huggins, 495 S.W.2d 621 (Tex. Civ. App.—Waco 1973), error dismissed (evidence showed that deeds to brother by his brothers and sisters were made as an accommodation to him in order to permit him to obtain government crop loans); Tuck v. Miller, 483 S.W.2d 898 (Tex. Civ. App.—Austin 1972), error ref. n.r.e. (evidence showed that the defendant courted the confidences of the plaintiff and her husband, and agreed that he would take title only to secure him for his expenses and services).

\(^5\) D & T RESTATING LAND TITLE § 116 (2d ed. 1947); Olds, supra note 24, at 135.


\(^7\) One plaintiff testified that, upon being asked about a written contract, one of the defendants replied: “If you can’t trust anybody you are in business with, you should not be in business with them in the first place.” 495 S.W.2d at 213.

\(^8\) 405 S.W.2d 333, 336 (Tex. 1966). For a critique of this principle see Olds, supra note 24, at 126.
Texas is by action of trespass to try title, and most status-of-title cases reported in this section involved that form of action. Moreover, a few cases were decided on issues relating to the action itself. In three instances the successful litigants in a previous action of trespass to try title were later denied title in subsequent judicial contests. In these three cases the victorious parties in the previous litigation, respectively, had possibly perpetrated a fraud, had been merely a co-defendant of the adverse party in the instant case, and had sued the present adversaries' predecessor after record title had passed to the adversaries themselves. Finally, in two cases bringing into question the standing of a plaintiff to institute an action for trespass to try title, the same court in different decisions held that a purchaser holding merely a land contract instead of a deed, the procedure used under the Texas Veteran's Land Program, had equitable title and therefore could institute such an action, but that a lienholder had only an equitable right and therefore had no standing to sue.

**Easement and Other Rights.** Although not necessarily imbued with novel legal doctrines, three cases decided during the survey year should be reviewed by all attorneys whose clients are buying recreational lots in water-front subdivisions. In all three cases the lot owners were successful in enforcing their easements of access and waterfront enjoyment, and in one of the cases the court upheld a mandatory injunction for the removal of a residence built in violation of the lot owners' easements. However, the very existence of litigation should cause the potential lot purchaser to review carefully the legal documentation for all publicized waterfront benefits appurtenant to his land.

In two other cases involving easement allegations, the claimants were unsuccessful. In the State of Texas in 1959 had purchased

29. **TOLLE v. SWAYTILL**, 485 S.W.2d 928, 920 (Tex. Civ. App.-Waco 1972), error ref. n.r.e.
31. **UNITED STATES v. 115.27 Acres of Land**, 471 F.2d 1287 (5th Cir. 1973).
32. **GRAY v. JOYCE**, 485 S.W.2d 928 (Tex. Civ. App.-Tyler 1972), error ref. n.r.e.
33. **TEX. R. REV. CIV. STAT. ANN. art. 5421m (Supp. 1974).**
35. **TEX. R. REV. CIV. STAT. ANN. art. 7364 (1960); TEX. R. CIV. P. 783.** Of course, not all ownership cases can be resolved in a trespass to try title action. See, e.g., Tolle v. Swaytill, 246 S.W.2d 916, 920 (Tex. Civ. App.—Eastland 1952), error ref. (trespass to try title is the wrong action for proving a constructive or resulting trust).
36. **COLEMAN v. FORISTER**, 497 S.W.2d 530 (Tex. Civ. App.—Eastland 1973), error ref. granted. The court did discuss the possibility of other actions which would have been accepted, such as a suit for cancellation, rescission, or reformation of a deed or deeds; however, it did not see fit to remand the case to the trial court for a review of such possibilities. See also Tolle v. Swaytill, 246 S.W.2d 916, 920 (Tex. Civ. App.—Eastland 1952), error ref.
37. **COLEMAN v. FORISTER**, 497 S.W.2d 530 (Tex. Civ. App.—Eastland 1973), error ref. granted. (Bee Creek, Travis County); Anderson v. McRae, 495 S.W.2d 351 (Tex. Civ. App.—Texarkana 1973) (Brooks Lake, Wood County); Austin Lake Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343 (Tex. Civ. App.—Austin 1973), error ref. n.r.e. (Lake Austin, Travis County).
38. **484 S.W.2d 387** (Tex. Civ. App.—Waco 1972), error ref. n.r.e.
certain lots for a proposed controlled access state highway, together with all rights of access from the other abutting lots in the same city addition. The highway had been completed in 1963, and in 1964 the plaintiff had purchased the remaining lots with actual notice that they did not have direct access to the highway. In rejecting the plaintiff's claim of a right to reacquire access, the court relied on an express statutory denial of the right of access to controlled access highway locations; however, in light of the facts in the case it is doubtful that the plaintiff could have succeeded even in the absence of such statutory denial. In Dailey v. Alarid the plaintiff unsuccessfully relied on the general public's use of a road for more than ten consecutive years in an attempt to impose a prescriptive roadway easement on the defendant's land. The court's opinion not only cited the ever-growing line of cases, beginning with the 1960 decision by the supreme court in O'Connor v. Gragg, which have held that use by the landowner renders the claimant's consistent use merely permissive and not adverse, but also rejected all contrary implications in a 1947 court of civil appeals case cited by the plaintiff.

Finally, in a case of first impression decided by the United States Court of Appeals for the Fifth Circuit, the court considered what rights and obligations arise when partially inconsistent right-of-way easements are granted to the same third party by two separate groups of co-tenants. In this case the third party, a pipeline company, first obtained a single-pipeline easement from one of two groups of co-tenants and then obtained a multipipeline easement from the second group. After both groups had transferred their interest to a single owner, the pipeline company notified the owner of its desire to utilize the multiple-pipeline easement. The owner objected and the pipeline company effected its plans despite the owner's objections. The court, in awarding damages to the owner, held: (1) a tenant in common cannot impose an easement upon the common property without its co-tenants' consent (citing ample Texas case authority); (2) a tenant in common,

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40. 486 S.W.2d 620 (Tex. Civ. App.—Tyler 1972), error ref. n.r.e.
41. 161 Tex. 273, 339 S.W.2d 878 (1960).
42. Fowler v. Matthews, 204 S.W.2d 80 (Tex. Civ. App.—Austin 1947). The Fowler opinion, together with two other opinions containing similar implications (one being a 1951 supreme court decision), were ignored by the supreme court in the O'Connor decision. See Rust v. Engledow, 368 S.W.2d 635, 638 n.1 (Tex. Civ. App.—Waco 1963), error ref. n.r.e.
44. Actually, the record reflected the existence of two pipeline companies; however, see note 2 of the court's opinion which resolves the existence of two pipeline companies with its continuous reference to a single third party. Id. at 499 n.2.
45. The term "owner" actually refers to a series of owners, the named appellee being the next-to-last in the series. Id. at 498-99.
therefore, cannot effectively grant to a third party an easement conferring a greater privilege than that authorized by its co-tenants; (3) in the instant case, when fee title merged into one owner, only the lesser easement had been validly granted; and (4) as a result, the greater easement was rendered void ab initio when fee title merged.

**Title Insurance.** In *Southern Title Guaranty Co. v. Prendergast* the supreme court set out the following “black-letter law” with regard to title insurance: (1) In the absence of an explicit negation of coverage, which the supreme court found does not exist in present title insurance forms, an insured may sue on his policy merely because of the failure of his title and need not prove an eviction, as is required in a suit for breach of warranty deed; (2) if title fails as to “less than the whole of the property,” quoting from the present title insurance forms, the amount recoverable on the policy bears the same ratio to the policy amount as the value of the outstanding interest as of the date of the policy bore to the value of the full insured title as of the date of the policy; and (3) the above formula is not limited, as the supreme court had in a prior opinion indicated, and as the court of civil appeals had ruled to a physically indentifiable portion which is “less than the whole” (such as two acres out of a ten-acre tract), but applies to any partial interest in the whole (such as the undivided one-tenth outstanding interest involved in the instant case). In addition the court apparently held that if a title insurer at any time removes the objectionable defect in title—even after the insured has lost a sale because of the insurer’s initial refusal or inability to remove the defect—the insured’s damages “will be no more than nominal.” Although perhaps generally consistent with the remainder of the court’s decision, this final principle should be clarified in future cases. In the instant case the court of appeals opinion pointed out that although the insured parties had lost a sale because of the title defect, the insurer originally had in writing denied “any further duty regarding this title,” and had not taken curative action until almost six years after the insureds’ initial request. The supreme court ignored these facts in its opinion, and instead indicated that the insureds had

46. 494 S.W.2d 154 (Tex. 1973).
47. Rancho Bonito Land & Live-Stock Co. v. North, 92 Tex. 72, 45 S.W. 994 (1898), discussed and approved in Gibson v. Turner, 156 Tex. 289, 301-03, 294 S.W.2d 781, 788-90 (1956), and reaffirmed by implication in the instant case. See Note, *Title Guaranty Companies Are Subject to Suit by the Insured on the Title Insurance Contract Although No Suit Has Been Filed Against the Insured and No Adverse Claimant Has Taken Possession of the Property*, 8 *Houston L. Rev.* 580 (1971).
49. Shaver v. Nat’l Title & Abstract Co., 361 S.W.2d 867, 870 (Tex. 1962) (title provision for proportionate payment is not applicable to a pipeline easement covering the entire tract which is insured). In the instant case the supreme court expressly overruled its prior decision, “to the extent of the inconsistency.” 494 S.W.2d at 158.
51. 494 S.W.2d at 158.
not given the insurer "a reasonable opportunity to clear the title" because during the initial trial, and, therefore, after the insurer's written denial and the insureds' loss of their sale, the insurer "expressed its willingness" to file a curative suit and the insureds "did not request that action."52

Although the Prendergast litigation was the only significant judicial activity during the survey year affecting title insurance, two other developments deserve mention. First, the State Board of Insurance in a title insurance bulletin53 adopted a position regarding the deletion of the printed "survey exception" in title policies,54 which represents a considerable concession to title insurance companies. Essentially, the new bulletin reverses in part a bulletin issued in 1972 which appeared to require that a deletion of the "survey exception" be drawn in such a way that the policy insures the area as well as the boundaries of the property.55 The new bulletin permits in certain instances, depending on the size and configuration of the insured property, that the title policy be drawn so that area is not insured when the "survey exception" is deleted. In light of the new board policy, and because the insurance of area is often quite valuable, especially in transactions where price is a direct correlative of area, purchasers should be advised to solicit a prospective insurer's willingness to insure area before placing an order with that insurer.

Secondly, during the regular session of the 63d Legislature the house committee on the judiciary reported out favorably a bill which, if enacted, would have authorized attorneys to provide a form of title insurance to their clients.56 This concept is not new; in Florida, for example, attorneys have been issuing title for approximately twenty-five years.57 Moreover, it represents primarily an attempt to restore to attorneys business which in the past two decades has been shifted to title insurance companies because of their ability to add the feature of insurance to the traditional attorney's title opinion.58 The bill would have allowed attorneys to compete with title companies by authorizing them to set up an insurance fund and embellish their title opinions with insurance of title.59 Viewed from one perspective, this attempted intrusion into title company business may be a proper response to the high-handed practices of certain title companies which dilute their in-
surance policies with unwarranted exceptions in order to reduce their risks and, at the same time, assure each consumer that because of their concern for his interests (and their willingness to draft the necessary legal documents as an additional low-cost "service") he need not employ an attorney to represent him in the transaction. On the other hand, one must question whether the consumer would necessarily be benefited merely by having the lawyer shift into the same role in which the title companies now find themselves. In allowing the lawyer to be a principal in a title transaction, i.e., one who may suffer financially because of his title insurance policy, the proposed statute, if enacted, might have added competition to the title insurance business without substantially curing the present evils. Notwithstanding an impressive recent espousal of bar-related title insurance by an eminently qualified author, this author has concluded that, although bar-related title insurance may provide some benefit to consumers, the real solution to title insurance abuse lies not as much in permitting new competitive sources of insurance as in urging effective regulation of existing sources.

II. PURCHASES AND OTHER TRANSACTIONS

Contracts of Sale. Each year courts are approached by litigants disputing whether their real property contracts are precise enough to be enforced. Most often, the controlling question is whether the property description "within itself, or by reference to some other existing writing, [furnishes] the means or data by which the land to be conveyed may be identified with reasonable certainty." During the survey year, as usual, at least two otherwise-qualified purchasers were given painful instruction in property identification. However, the supreme court in Johnson v. Snell did offer

60. The list of unwarranted exceptions, which are all too often added in kitchen-sink fashion without explanation to the insured, is legion; however, the most popular appear to be the following: "visible but unrecorded easements and encroachments" (often extended to cover underground easements as well); "rights of parties in possession" (actually added to many title company printed forms despite the Board's requirement that it be included only if the insured executes a written waiver); "restrictive covenants" (seldom annotated with the permitted annotation, "none of record"); "public and private roads" (seldom with an attempt to define them by reference to a survey). Moreover, frequently a customer is not advised of his right to have the survey exception deleted or to have area guaranteed. See notes 53-55 supra, and accompanying text. See also Thau, Protecting the Real Estate Buyer's Title, 3 REAL ESTATE REV., Winter 1974, at 71, 79: "On occasion, title companies in Texas will add exceptions to owner's policies . . . [which] are strictly prohibited by the Texas Insurance Board."

61. Balbach, Bar-Related Title Insurance, 37 TEX. B.J. 241 (1974). The author acknowledges that the opinions expressed in the preceding paragraph may reflect his role as the acknowledged "devil's advocate" in the Lawyer's Title Guaranty Fund Committee of the State Junior Bar of Texas. However, perhaps even a portion of the Balbach article, id., supports this author's opinions. Compare note 60 supra with the following excerpt from Mr. Balbach's exegesis: "Why should he [a lawyer issuing an insured title opinion] risk unlimited liability for himself by writing a good title opinion on a bad title? The experience in Florida has been that in writing opinions to adequately protect their clients, attorneys have adequately protected the company [i.e., the insurance fund]." Id. at 245.


64. Williams v. Ellison, 493 S.W.2d 734 (Tex. 1973) (plaintiff unsuccessfully attempted to demonstrate that his contract was a "selection type" contract in which exact
some hope for mortal draftsmen. In that case the defendant had denied her obligations under a land purchase contract because, among other defenses, the contract (1) had not recited the exact purchase price, (2) had not specified the amount of the vendor's lien note, (3) had not provided for the place of payment for the vendor's lien note, and (4) had not included any provisions for the deed of trust. Prior to the supreme court's decision which enforced the contract notwithstanding all allegations of the defendant, the court of civil appeals had ruled that the contract was too indefinite to be enforced. Moreover, the lower court's opinion had caused some concern to contract draftsmen in that it had approved the defendant's four principal defenses without clearly distinguishing their relative importance. In the supreme court's reversal, the court not only rejected the first two defenses by analyzing the facts of the case but also specifically negated the legal validity of the fourth defense and ignored the third defense entirely.

In Foster v. Bullard the court faced the factual determinations of an adequate property description and a sufficiently definite price and also considered two legal issues in connection with a "right of first refusal," that is, the option to purchase property when and if the owner decides to sell it to a third party. First, the court held that a first refusal option without a termination date could not be voided by recourse to the rule against perpetuities. In light of the facts in the case, the court's determination of this issue appears to be a correct extension of the case authority cited in the opinion which, even prior to the addition of article 1291b in 1969, reflected a liberal attitude of judicial contracts enforcement notwithstanding perpetuities defenses. However, the court's statement that "the contract does not fall within the rule against perpetuities" may incorrectly imply that the rule's applicability should not even be considered in refusal option situations. A more precise statement would have acknowledged that an option is to be reviewed from the perpetuities perspective even though under most fact situations the defense will not be invoked.

identification was unnecessary); Wright v. Povlish, 498 S.W.2d 686 (Tex. Civ. App.—Corpus Christi 1973), error ref. n.r.e. (plaintiffs unsuccessfully attempted to ascertain the exact boundaries of the property by reference to additional documents). But see Foster v. Bullard, 496 S.W.2d 724 (Tex. Civ. App.—Austin 1973), error ref. n.r.e., discussed at notes 67-73 infra, and accompanying text (property description held to be sufficient).


67. 504 S.W.2d at 398-99. See also Foster v. Bullard, 496 S.W.2d 724, 734 (Tex. Civ. App.—Austin 1973), error ref. n.r.e. (first refusal option upheld where price was to be "consistent with . . . [any other offer], but not less than $750 per acre").

68. 496 S.W.2d 724 (Tex. Civ. App.—Austin 1973), error ref. n.r.e.

69. Foster v. Bullard, 496 S.W.2d 724, 735 (Tex. Civ. App.—Austin 1973), error ref. n.r.e.


72. See Larson, supra note 71, at 756: "The optionee has a type of contingent future interest in a particular tract, and the policy of the Rule Against Perpetuities ex-
Further, the court held that the optionor's notice of a proposed sale and the optionee's failure to exercise his purchase right did not automatically extinguish the option; therefore, when the first proposed sale was not completed, the optionee's rights continued to apply to a subsequent proposed sale. In reaching this decision the court followed precedent from another state, having found no Texas decision on point.

Regulation of Brokers Drafting Contracts. During the past few years representatives of the State Bar of Texas and the Texas Association of Realtors have worked toward resolving the sensitive problem of determining what constitutes unauthorized legal practice in the preparation of real estate contacts. In January 1972 these two organizations reached agreement on a proposed “Statement of Principles” identifying functions and limitations of broker and lawyer and a proposed “Earnest Money Contract” for use by brokers in all real estate sales transactions. In order to achieve mandatory status for the Statement of Principles, it was submitted to the Texas Real Estate Commission which obtained a ruling from the Texas Attorney General that such mandatory status could be imposed upon licensed realtors by the commission. After hearings held August 14, 1973, the commission in December approved the Statement of Principles, in a revised form which failed to incorporate the Earnest Money Contract. As this Article goes to the printer, the State Bar of Texas has ratified the commission's action but with certain modifications to the form approved by the Texas Real Estate Commission.

The Statement of Principles has evoked intense debate by brokers and lawyers as to whether one profession is intruding into territory where the other feels it need not tread. In fact the Statement of Principles does seem to grant brokers more authority than they are authorized under present law. Moreover, the Statement of Principles and Earnest Money Contract

74. Membership in the Texas Association of Realtors is not mandatory for licensed real estate salesmen and brokers; however, a substantial percentage of those licensed in the state are members of that Association.
78. The State Bar Board of Directors approved the Statement of Principles during its April 25-26, 1974, meeting in Brownsville.
79. In Canere v. Martin, 238 S.W.2d 828 (Tex. Civ. App.—Waco 1951), error dismissed, the court held that a broker's preparing of a contract for a real property exchange did not constitute the practice of law. The Canere decision was quite possibly in conflict with supreme court authority when it was decided. See Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944). Moreover, the contract in question in the Canere case had been drawn prior to the effective date of
in their original forms certainly merited criticism conceptually—for example, in authorizing only one form of contract for all transactions—and technically. Nevertheless, the revisions appear to have remedied the conceptual deficiencies and have set the foundation for improving the technical deficiencies. As adequate standard form contracts are promulgated, the Statement of Principles, if adopted, should provide valuable consumer protection without unduly restricting broker activities.

**Conveyances.** Several cases during the survey year involved challenges to the validity, manner, or effect of conveyances. In *Venable v. Patti* a veteran had acquired equitable title to property through the Veteran's Land Board in March 1966, and had transferred his interest, as well as possession to the property, in December 1968. He later changed his mind and sued in trespass to try title to rescind the 1968 agreement. The court held that since the enabling legislation requires the "original veteran purchaser" to "enjoy possession for a period of three (3) years," the 1968 agreement was in direct contravention of the statute and, therefore, not enforceable. Although not discussed in its opinion, the court evidently believed the public policy of discouraging future transactions of this type to be greater than considerations of *in pari delicto* and unjust enrichment, which might have denied either party the right to judicial relief, thus leaving the defendant in possession.

Finally, two cases during the survey year involved the validity or extent of warranties in property conveyances. In one case the court reaffirmed the principle that a county is liable on warranties contained in a deed executed by its officials despite the absence of express permission in its enabling legislation for the granting of warranties. In the second

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the present § 17 of The Real Estate License Act, which clearly prohibits contract drafting by brokers. In fact, the opinion by the attorney general, cited *supra* at note 77, indicated that the Principles may be somewhat of a concession to brokers, granting them authority to fill in blanks on a form contract, which is not permitted under present law.

80. The revised Statement of Principles now gives a joint broker-lawyer committee authority to draft more than one form of standard contract. Thus, separate forms may be drawn for undeveloped speculative land, improved commercial real property, residential real property, etc.

81. 490 S.W.2d 194 (Tex. Civ. App.—Texarkana 1973), *error ref. n.r.e.*

82. *Tex. Rev. Civ. Stat. Ann.* art. 5421m (Supp. 1973) permits a veteran to select a tract of land (which must qualify under certain tests), solicit the Veteran's Land Board to purchase the tract, and take possession of and equitable title to the tract by executing a Contract of Sale and Purchase with the Board. Essentially, the Board merely provides attractive financing (5% down; 40-year amortization at 5½% interest) and has no possessory intent; however, the statute requires that the transaction be structured as a contract for deed instead of the normal first lien deed of trust.

83. See note 34 *supra*, and accompanying text, for mention of the procedural aspect of this case.

84. "[n]o property sold under the provisions of this Act shall be transferred, sold, or conveyed in whole or in part, until the original veteran purchaser has enjoyed possession for a period of three (3) years from the date of purchase of said property...." *Tex. Rev. Civ. Stat. Ann.* art. 5421m, § 17 (Supp. 1974).


87. See Brazos River Authority v. City of Graham, 163 Tex. 167, 354 S.W.2d 99
case, which involved warranties of fitness in a new home, the plaintiffs were allowed $2,980 in damages to cure a physical defect (a faulty foundation) but were denied any recovery based on the "serious emotional stress upon the lady of the house." 88

**Interstate Land Sales.** On September 4, 1973, the Department of Housing and Urban Development published an amended chapter of regulations 89 concerning the Interstate Land Sales Full Disclosure Act. 90 Because the Act itself is not limited to Texas transactions and because academic commentaries on the Act and the prior regulations have been plentiful, 91 this Article will not attempt to analyze the changes in depth. Nevertheless, a few comments do seem appropriate. The new regulations expressly include a condominium unit in the definition of a "lot" subject to the Act. Because most condominium unit sales and leases involve building contracts (if not existing structures), they will normally qualify for the exemption available when the seller or lessor is obligated to complete a structure within two years of the date of the contract; however, if proposed public facilities, such as a golf course or country club, constitute a major inducement to the purchaser or lessee, and if the seller or lessor is not obligated to complete such public facilities within the two-year period, the transaction may be subject to the filing and informational requirements of the Act. As for the property report which must be submitted to prospective purchasers and lessees, the new regulations have increased the informational content and have added safeguards against developers who attempt to satisfy the letter, but not the spirit, of the Act.

**Brokerage.** It is perhaps a comment on the increasing complexity of real estate brokerage that of the four noteworthy cases in this area decided during the survey year, three involved statutory restrictions and only one involved questions of common law. In the latter case 92 the court upheld the familiar rule that prior and contemporaneous agreements inconsistent with integrated written contracts 93 must be considered as having been either waived or merged into the writings. 94 As for the cases dealing with statu-

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93. In this case integration was not accomplished explicitly but rather implicitly by the following introduction: "This will confirm our agreement of a prior date . . . ." *Id.* at 951.
94. Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30 (1958); see Com-
tory interpretations, the case of *Sherman v. Bruton*\(^5\) constitutes a mild setback for attorney-brokers in Texas. In that case, apparently one of first impression concerning the relationship of the statute of frauds provision and the attorney's exemption under *The Real Estate License Act of 1955*,\(^6\) the court (1) ruled that a written contract is necessary for judicial enforcement of a real estate commission, even if the claimant is an attorney, and (2) characterized as a disguised commission claim the plaintiff's attempt to recover monies for real estate consulting, appraisal services, legal services, and professional engineering services. The plaintiff was licensed as an attorney and as a professional engineer and had even been successful in convincing the jury that he had performed legal and engineering services for the defendants and that for a portion of his claimed recovery he had not acted "as a real estate broker for the purpose of collecting a commission." However, in upholding the trial court's judgment for the defendants notwithstanding the verdict, the court held as a matter of law that the parties had considered all additional services to be merely incidental to the brokerage services performed by the plaintiff. Therefore, the court concluded, the plaintiff's claim was barred by the statute of frauds. The case is interesting because of the court's determination of the primary legal issue\(^7\) and also because of the practical lesson it teaches. The facts of the case show not only that the plaintiff was denied recovery after having performed considerable services, but also that his plea for compensation was rejected by another professional,\(^8\) who was an acquaintance of many years and "a kinsman of his wife."\(^9\)

The last two cases depart from traditional brokerage concepts and enter into the modern concept of "syndication."\(^10\) A quick summary of these two cases will have the appearance of a paradox because the most important brokerage case of the survey year—and probably the most important case

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\(^7\) *Tex. Rev. Civ. Stat. Ann.* art. 6573a (1967). Section 28 of the Act provides: "No action shall be brought in any court in this State for the recovery of any commission for the sale or purchase of real estate unless the promise or agreement upon which action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunder lawfully authorized." (Emphasis added.) However, subsection (3) of section 6 provides: "The provisions of this Act shall not be construed to include in any way services rendered by an attorney at law . . . ."

\(^8\) The court's careful analysis included the distinguishing of a previous supreme court decision, *Burchfield v. Markham*, 156 Tex. 329, 294 S.W.2d 795 (1956).

\(^9\) Jeff B. Bruton, co-defendant with his wife and mother, was a dentist. In fact, at one point in their dealings when the plaintiff had been asked about a written agreement, he allegedly had replied: "No. You are a professional and I am a professional, and we understand what it is, that I will be the only one working on it, and that I will be paid when a deal is made." 497 S.W.2d at 318.

\(^10\) *Id.* It is not clear which party was a kinsman to whose wife, but this fact is not essential for instilling the practical lesson of this case.

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in this area for several years—did not involve real estate brokerage, and because the second case exacerbates the danger of the first case in its holding that The Real Estate License Act was not applicable to the transaction in question. In the first case, The Rowland Corp. v. Integrated Systems Technology, Inc.,\(^{101}\) the plaintiff had sued the defendant for a brokerage commission allegedly arising from the plaintiff’s efforts in the private placement of the defendant’s securities. It was not disputed that the sale of the defendant’s securities was exempt from all securities registration requirements by virtue of section 51 of the Texas Securities Act.\(^ {102}\) While acknowledging this exemption, the court nevertheless interpreted section 34 of the Act as denying the enforceability of a commission claim for the sale of securities unless the claimant was a registered securities dealer at the time the claim arose.\(^ {103}\) Although the reasoning of the court is dubious at best, the brunt of analysis should be reserved to the corporate and securities bar.\(^ {104}\) The effect of the Rowland decision can be better appreciated when considered in light of Sunshine v. Mid-South Construction, Inc.,\(^ {105}\) a case in which the trial court had granted summary judgment against the plaintiff because he had not been a licensed real estate broker or salesman.\(^ {106}\) On appeal the court reversed the trial court, holding that in selling interests in real estate limited partnerships the plaintiff “was not acting as a real estate broker or salesman and hence required no license as such.”\(^ {107}\) Although not discussed by the court, a possible extension of its holding is that the plaintiff was selling “securities” as defined in the Texas Securities Act. To be sure, the development and extension of the category “securities” has been ably charted by legal commentators;\(^ {108}\) however, the emphasis is normally placed on registration and fraud issues. These two cases bring to the fore a new danger—loss of brokerage commissions.\(^ {109}\)

101. 488 S.W.2d 133 (Tex. Civ. App.—Waco 1972), error ref. n.r.e.
102. The Texas Securities Act is codified at TEX. REV. CIV. STAT. ANN. art. 581 (1957). Id. § 51 provides Texas’ version of the “private offering” exemption.
103. The court’s interpretation seems to have been determined by the existence of the last comma in § 34 which denies the enforceability of a commission agreement unless the claimant was licensed and the securities were registered “provided, however, that this section or provision of this Act shall not apply to exempt transactions set forth in Section 5 of this Act nor to the sale and purchase of exempt securities listed in Section 6 of this Act, when sold by a registered dealer.” (Emphasis added.) Although not expressed by the court, its determination that the last clause applies to § 5 exempt transactions may have been different if that clause had not been separated by a comma from the provision relating to § 6 exempt securities.
104. In the midst of an extended critical analysis of the case, Professor Alan R. Bromberg remarked: “Quite apart from ignoring precedent, the Rowland decision is wrong in terms of grammar, structure, history and policy.” Bromberg, Collectibility of Commissions on Exempt Transactions in Securities, 11 BULL. OF THE SECTION ON CORPORATION, BANKING & BUSINESS LAW, Oct. 1973, at 3.
105. 496 S.W.2d 708 (Tex. Civ. App.—Dallas 1973), error ref. n.r.e.
106. The Real Estate License Act, TEX. REV. CIV. STAT. ANN. art. 6573a, § 19 (1969), provides: “No person or company may bring or maintain any action for the collection of compensation . . . without alleging and proving that the person or company performing the brokerage services was a duly licensed real estate broker or salesman . . . .”
107. 496 S.W.2d at 711.
108. See the authorities cited at note 100 supra. See also Rifkind & Borton, SEC Registration of Real Estate Interests: An Overview, 27 BUS. LAW. 649 (1972).
109. For a recent analysis of federal law on this subject, with comparisons to Cal-
Fortunately for the real estate salesmen and brokers of this state, the State Securities Board of Texas has demonstrated a commendable degree of sophistication and flexibility in devising special rules and procedures which preserve the spirit of consumer protection but provide special assistance to real estate professionals. Early in the survey year the Board adopted a limited examination requirement (an examination essentially limited to the Texas Securities Act) for licensed real estate salesmen or brokers “seeking registration as a securities dealer or salesman for the purpose of dealing exclusively in real estate partnership interests.” Moreover, the Board has circulated a form for an intrastate real estate prospectus, which although not promulgated as final, is currently being accepted by the Board and is being processed (and the first letter of comment issued) within five-to-ten days. Finally, the Board has issued Proposed Guidelines for the Registration of Real Estate Programs in an attempt to provide both certainty in the registration process and a modicum of regularity in the substance of real estate syndication.

III. DEVELOPMENT: FINANCING AND CONSTRUCTION

Senate Bill No. 209. The most significant development in the area of interest regulation during the survey year was an unsuccessful attempt by the 63d Legislature to adapt interest statutes to modern real estate transaction necessities. This attempt was embodied in Senate Bill No. 209 which, the legislature evidently believed, (1) would have withdrawn large real estate

10. Texas Securities Board, Policy Statement (Dec. 26, 1972). As of the date this Article goes to the printer, eighteen dealers and ninety-eight salesmen have qualified through the limited-examination procedure.

11. The most recent version, dated Nov. 13, 1972, has been reprinted at 8 H. KENDRICK & J. KENDRICK, supra note 100, § 86.23.

12. As of the date this Article goes to the printer, five intrastate real estate prospectuses have been filed with the board and three have been registered.

13. The latest version is dated March 8, 1974. Although subject to further revision, these guidelines do provide the basis for the board’s review of an intrastate real estate prospectus. [Editor’s Note: The board adopted its final version on May 24, 1974.]

14. Among the numerous academic requests for such adaption, see Loiseaux, Some Usury Problems in Commercial Lending, 49 TEXAS L. REV. 419, 444 (1971); Merriman & Hanks, Revising State Usury Statutes in Light of a Tight Money Market, 27 Md. L. REV. 1, 12-18 (1967); Pearce & Williams, Punitive Past to Current Convenience—A Study of the Texas Law of Usury, 22 SW. L.J. 233, 258 (1968). Of course, these articles also emphasize the recent concern of lenders due to rising interest rates, as do the following articles: Hershman, Usury and “New Look” in Real Estate Financing, 4 REAL PROP., PROB. & TRUST J. 315 (1969); Hershman, Usury and the Tight Mortgage Market—Revisited, 24 BUS. LAW. 1121 (1969); Rodell, The Application of Usury Laws to Modern Real Estate Transactions, 1 REAL ESTATE L.J. 136 (1972); Comment, Lender Participation in Borrower’s Venture: a Scheme to Receive Usurious Interest, 8 HOUSTON L. REV. 546 (1971); Comment, The Application of Texas Usury Laws to Equity Participation Agreements, 48 TEXAS L. REV. 925 (1970); Annot., 16 A.L.R.3d 475 (1967).

15. Entitled “An Act amending Chapter 1, Title 79, Revised Civil Statutes of Texas, 1925, as amended, by adding a new Article 1.042, providing a general rule for determination of the rate of interest on real estate loans secured by a lien and authorizing refund or credit of excess interest charges in the event of premature termination of loans and relating to real estate loans over $500,000 secured by a lien made by individuals; providing for prospective application only of this Act; and declaring an emergency.” S.B. 209, 63d Leg. (1973).
transactions from restrictive interest regulation by increasing the legal interest rate in such transactions from ten percent per annum to eighteen percent per annum, and (2) would have solidified the concept of "spreading" front-end interest over the term of a loan.\textsuperscript{116} Senate Bill No. 209 was passed by the legislature; however, it was vetoed by Governor Briscoe,\textsuperscript{117} apparently more as the result of ambiguities in draftsmanship than of any philosophical disagreement with the content of the bill.\textsuperscript{118} Not only were the two principal ambiguities specified by the Governor serious impediments to effective implementation of the bill,\textsuperscript{119} but the bill unfortunately suffered from numerous other ambiguities.\textsuperscript{120} Nevertheless, with interest rates reaching record

\textsuperscript{116} For an example of the use of "spreading" see Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338 (5th Cir. 1972), discussed in Hemingway, Property, Annual Survey of Texas Law, 27 Sw. L.J. 18, 25-26 (1973). Although generally excellent in analysis and comment, that law review article may be subject to misinterpretation as to one aspect of the Frenchman's Creek case. The case was not one which "dealt with ... whether ... loan or commitment fees constituted front end interest" as indicated in the article, id. at 25; instead, the court merely stated that the lender "does not contest the finding that the $67,500 commitment fee was front end interest." 453 F.2d at 1343. Moreover, as tacitly admitted during the course of litigation by the lender, the case does not deal with a true commitment fee in the commercial lending sense inasmuch as the so-called "commitment fee" was not paid until the day of the initial advance. For cases in which true commitment fees (i.e., a lender's fee for agreeing to consummate a loan on or before a future date, at the borrower's request) have been held not to be interest, see: Regional Enterprises, Inc. v. Teachers Ins. & Annuity Ass'n of America, 352 F.2d 768 (9th Cir. 1965); Chambers & Co. v. Equitable Life Assurance Co. of the United States, 224 F.2d 338 (5th Cir. 1955); Goldman v. Connecticut Gen. Life Ins. Co., 251 Md. 575, 248 A.2d 154 (1968); Paley v. Barton Sav. & Loan Ass'n, 82 N.J. Super. 75, 196 A.2d 682 (1964); Boston Road Shopping Center v. Teachers Ins. & Annuity Ass'n, 13 App. Div. 2d 106, 213 N.Y.S.2d 522 (1961). See also Wolf, The Refundable Commitment Fee, 23 Bus. LAW. 1065 (1968).

\textsuperscript{117} See TEX. CONST. art. IV, § 14 for the veto privilege authorized the Governor. Although that section permits legislative override of a veto, because the veto of Senate Bill No. 209 was handed down at the end of the legislative session, it was in effect an absolute veto.

\textsuperscript{118} In the Governor's proclamation of veto his comments on the purpose of the bill were neutral in tenor, and his conclusion was as follows: "Were the bill in an area less critical to the financial life of the state, I would be constrained to a clarification by the courts over a period of years. S.B. 209, however, deals with a subject so vital both to lending institutions and to borrowers, that I believe it is wise to await a more carefully drawn codification." Proclamation of the Governor of the State of Texas, June 16, 1973. On the other hand, it should be noted that a written opposition to the bill, prepared by Senator William N. (Bill) Patman, Ganado, Texas, and the Texas Consumers Association, was presented to the Governor, accompanied by examples of abuses which the bill allegedly would have permitted.

\textsuperscript{119} The Governor's objection to § 1(a) of the bill (the "spreading" provision) centered on the absence of a definition for the word "loan." In fact, that provision in the bill might have been interpreted to permit "spreading" of interest on the amount of the loan before discount, thus reversing established case law that the interest rate for usury determinations must be computed on the amount actually disbursed by the lender (i.e., after deducting "points" or other front-end charges). See Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1346 (5th Cir. 1972); Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046, 1049 (1937). The Governor's objection to § 1(b) of the bill (18% interest on $500,000 real estate loans) centered on the legislature's obvious mistake in authorizing only "an individual" to borrow at the higher rate. Inasmuch as art. 5069-1.01(e), the definitional preface to the proposed article, appears to exclude from the definition of "individual" a "partnership, corporation, joint venture, trust, association or any legal entity," the legislature's choice of words would have rendered that provision ineffectual without a later amendment or a quite liberal judicial interpretation.

\textsuperscript{120} In § 1(b), for example, the limitation of coverage to "loans which are over $500,000 and secured by a first lien real estate mortgage" raises questions such as the following: (1) Is, for example, a $550,000 construction loan commitment a "loan over
levels, and with the commercial loan participants’ traditional resort to a “nominee” (also called “dummy,” “straw,” or “conduit”) corporation loan being neither assuredly usury-proof for the lender nor even substantially sure of preserving the borrower’s individual tax benefits, the bill with all of its flaws probably would have been preferable to no bill at all. Certainly in large commercial transactions remedial legislation is needed. With the exception of a possible anti-inflation argument, which even if valid appears to be insufficient to support statutes of such a penal nature (especially as compared, for example, with the wage-freeze and price-freeze restrictions and procedures set up pursuant to the federal Economic Stabilization Program), this author has reviewed no effective argument against a separation of the commercial transactions from the politically sensitive consumer home mortgage loan. Such separation has already been accomplished in several other states, primarily through establishing a loan ceiling above which usury

$500,000” if the first advance is only $250,000 (especially complicated in the event of contingencies to full funding, such as unknown construction costs or rental requirements)? (2) Is a $1,000,000 corporate rehabilitation loan qualified when $450,000 of the loan is secured by the corporation’s real estate holdings and the remainder is secured by inventory? (3) Does the requirement of a “first lien” preclude the lien for ad valorem taxes (which attaches on January 1 of each year even though the tax itself is normally not payable until October 1)?

Moreover, by making reference to “the same rate of interest as corporations” the provision merely perpetuates the interpretative problem of whether the interest rate of “one and one-half percent (1½%) per month,” as permitted by the Texas Miscellaneous Corporations Laws Act, TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Supp. 1974), is the same as 18% per year. See note 134 infra. In § 1(a) the wording of the proviso caused lenders concern in that the use of imprecise language in a prepayment privilege could have required the refunding of interest, currently not necessary under Texas law. See Gulf Coast Inv. Corp. v. Prichard, 438 S.W.2d 638 (Tex. Civ. App.—Dallas 1969), errror ref. n.r.e.


123. Because commercial loan participants will attempt to find some way to structure their transactions so that lenders may receive a rate of return equal to the current market rate, it might be argued that the main effect of usury laws on the commercial economy is inflationary (i.e., adding to the borrower’s cost of obtaining financing) instead of anti-inflationary.

124. Obviously opponents of Senate Bill No. 209 were not objecting to the bill’s effect on the interest rates charged in normal credit card or finance company transactions inasmuch as those transactions are regulated by the Texas Consumer Credit Code, TEX. REV. CIV. STAT. ANN. art. 5069-2.01 (1971), which authorizes a return of 32% on a $300 12-month loan, 20% on a $1000 12-month loan, and 240% for a $30 one-month loan. See Comment, The Wolf in Sheep’s Clothing: Revolving Charge Accounts and Usury, 10 HOUSTON L. REV. 140 (1972); Comment, Consumer Credit Regulation in Texas—The Case for the Consumer, 49 TEXAS L. REV. 1011 (1971).
laws do not apply. Hopefully, the next session of the legislature will at least produce a bill sanctioning the commercial-consumer separation, perhaps in the form of a redrafted version of the demised Senate Bill No. 209.

125. See, e.g., Ala. Code tit. 9, § 67(4) (1972) (no interest limitation on loans of $100,000 or more); Ga. Code Ann. § 57-119 (1971) (no interest limitation on loans of $100,000 or more); N.J. Rev. Stat. § 31:101 (Supp. 1974) (no interest limitation on loans of $50,000 or more unless the security is the dwelling of the borrower); Ohio Rev. Code Ann. § 1343.01 (Page Supp. 1973) (no interest limitation on loans over $100,000). See also Conn. Gen. Stat. Rev. § 3709 (1973) (no interest limitation on various categories of loans including real estate mortgages over $5,000); Ill. Rev. Stat. ch. 72, § 4 (Supp. 1974) (no interest limitation on various categories of loans including a loan classified as a "business loan").

126. The author's suggestion for a revised § 1(b), which was clearly the more important section of Senate Bill No. 209, is set out below:

Section 1. Tex. Rev. Civ. Stat. art. 5069-1.01 shall be and the same is hereby amended by the addition thereto of a new section (f) to read as follows:

§ 1.01(f) "Exempt Transaction" means any transaction involving the use or forbearance or detention of money in which one or more of the following situations exist: (1) the use or forbearance or detention of money is effected pursuant to a bond, note, debt, contract or other obligation under which the original outstanding principal balance is at least $100,000.00; or (2) the use or forbearance or detention of money is effected pursuant to a bona fide commitment in which the total sum of money which may reasonably be expected to be used or forborne or detained is at least $100,000.00, and the initial advance pursuant to the commitment is at least $50,000.00; or (3) the indebtedness created by the use or forbearance or detention of money is effected pursuant to a bond, note, debt, contract or other obligation under which the original outstanding principal balance is at least $50,000.00, and the indebtedness thereby created is not secured by the residential homestead of any individual accepting such use or forbearance or detention; or (4) the person accepting such use or forbearance or detention of money is not an individual and the indebtedness is created for a business purpose pursuant to a bond, note, debt, contract or other obligation under which the original outstanding principal balance is at least $5,000.00.

Section 2. Tex. Rev. Civ. Stat. art. 5069-1.02 shall be and the same is hereby amended in full to read as follows:

1.02 Maximum rates of interest. Except as otherwise fixed by law, the maximum rate of interest shall be ten per cent per annum on all use or forbearance or detention of money other than an exempt transaction. A greater rate of interest than ten per cent per annum shall be deemed usurious unless charged in connection with an exempt transaction or unless otherwise authorized by law. All contracts for usury are void. [same as current statutory provision].

Section 3. Tex. Rev. Civ. Stat. art. 5069-1.04 shall be and the same is hereby amended in full to read as follows:

1.04 Limit on rate. The parties to any exempt transaction may agree to and stipulate for any rate of interest. The parties to any other written contract may agree to and stipulate for . . . [same as current statutory provision].

Section 4. Tex. Rev. Civ. Stat. art. 1302-2.09 shall be and the same is hereby amended in full to read as follows:

2.09 Authority of certain corporations to borrow money. Notwithstanding any other provision of law, corporations, domestic or foreign, may agree to and stipulate for any rate of interest as such corporation may determine, on any bond, note, debt, contract or other obligation . . . [same as the current statutory provision].

The author's suggested substitute for section 1(a), the "spreading" section of Senate Bill No. 209, discards the concept of "spreading" and returns to the concept espoused in Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046 (1937), that front-end interest charges are not considered interest at the commencement of the loan but rather are deemed to reduce the "sum actually loaned" (quoting from the Nevels decision) for determining the interest rate.
Usury Cases. Two cases decided since the last survey should be noted more for what may be inferred from the written opinions than for what was expressed. In *Sud v. Morris* 127 an individual plaintiff sued to recover usurious interest (the court computed an effective interest rate in excess of fifteen percent per annum) paid on a promissory note which had been co-signed by the plaintiff and a corporation. 128 The defendants answered by a plea of abatement alleging, in part, that the corporate co-maker was a necessary party to the suit. On appeal the court held that because the loan was not usurious as to the corporation, the individual plaintiff could sue without joining as co-plaintiff the corporate co-maker. In *Texas Tool Traders v. W.E. Grace Manufacturing Co.* 129 the court of civil appeals held that a corporation had contracted to pay usurious interest and awarded recovery to that corporation in accordance with its computation of the interest charged. The Supreme Court of Texas has recently modified the lower court's opinion 130 in what may be a significant usury decision, 131 but in no way negating the conclusions of this Article. Although not expressed in either opinion, the courts—which seem to have been the first courts to rule on the 1967 corporate usury statute 132—appeared to have assumed, first, that loans to corporations may bear interest at the rate of one and one-half

be and the same is hereby amended in full to read as follows:

1.01(a) "Interest" is the compensation allowed by law for the use or forbearance or detention of money; provided, however, that compensation paid on or before the date of initial use or forbearance or detention of money in any transaction regulated by this chapter, shall not be deemed "interest" for purposes of this chapter, even if it is classified as interest by the parties to the transaction or if it otherwise would be subject to classification as interest under the laws of this state. The term "interest" shall not include any time price differential however denominated arising out of a credit sale.

Section 2. *Tex. Rev. Civ. Stat.* art. 5069-1.01 shall be and the same is hereby amended by the addition thereto of a new section (f) [or section (g) if the definition of "exempt transaction" is enacted as section (f)] to read as follows:

1.01(f) "Interest Base" shall mean the sum actually used or forborne or detained, and upon which interest is to be calculated for purposes of this chapter. The "interest base" in any transaction regulated by this chapter shall be reduced by compensation paid on or before the date of initial use or forbearance or detention of money if such compensation is classified as interest by the parties to the transaction or if such compensation would have been subject to classification as interest under the laws of this state if it had not been excluded pursuant to section (a) of this article.

128. Although, as the court pointed out, no proof had been shown that the co-maker, MPS Production Company, was a corporation, the court assumed that fact from the record.
131. In distinguishing its 1930 decision in *Shropshire v. Commerce Farm Credit Co.*, 120 Tex. 400, 30 S.W.2d 282 (1930), the supreme court seems to have corroborated the Fifth Circuit's *Frenchman's Creek* decision as to the effect of a "saving clause" on the "spreading" of interest. See note 116 supra, and accompanying text.
percent per month,\textsuperscript{133} and secondly, that the statutory corporate rate of "one and one-half percent per month" is no more restrictive than a rate of eighteen percent per annum.\textsuperscript{134} On the other hand, the \textit{Sud v. Morris} decision should remind lenders that, in situations where loans are made to corporate borrowers but are guaranteed by individuals, such guarantors being denied the defense of usury,\textsuperscript{135} the guaranty should not be subject to an interpretation that the guarantor is a primary obligor.

One final case, \textit{Maloney v. Andrews},\textsuperscript{136} dealt with whether a lease provision calling for the payment of late charges constitutes a contract for "interest" as defined by article 5069-1.01.\textsuperscript{137} The unequivocal answer of the court was negative, with the court stating that interest considerations were not present in a rental arrearage when the landlord's forbearance was clearly involuntary. Unfortunately, the court did not review the case of \textit{Alexander v. Golden West Free Press, Inc.}\textsuperscript{138} which held that when no late charge or interest was specified in a lease, the landlord was entitled to statutory interest. Although the earlier case was decided under different constitutional and statutory provisions, the similarity of relevant language in the previous and current provisions indicates that the two court decisions may be in conflict.\textsuperscript{139}

\textbf{Mortgages.} Mortgage litigation generally focuses on questions of foreclosure, and the past year was no exception. In two cases courts affirmed the well-established principle that a foreclosure sale will not be voided

\textsuperscript{133} This question has not caused concern to lenders and certainly does not seem to have impeded the making of high-interest loans to corporations; however, writers at times have questioned whether the 1967 statute fully complies in all technical respects with the constitutional permission to the legislature to "classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest." \textit{Tex. Const.} art. XVI, § 11. See \textit{Loiseaux, supra} note 114, at 438; \textit{Pearce & Williams, supra} note 114, at 254. Although not presented to the supreme court in \textit{Grace Mfg.}, the question does seem to have received a tacit answer by the court's comment: "[C]orporations are now authorized to stipulate for any rate of interest not in excess of 1 1/2% per cent per month ...." \textit{17 Tex. Sup. Ct. J.} at 171.

\textsuperscript{134} This question has been of slightly more concern than the question of constitutionality because only the corporate usury statute uses a \textit{monthly} percentage instead of an annual percentage. Presumably, the choice of time periods was merely an attempt to "talk the language" of standard loan amortization schedules, with perhaps some added statutory assurance that collecting monthly installments of 1 1/2\% per month could never be interpreted as collecting more than 18\% per annum. For cases in which this latter possibility was advanced but rejected by Texas courts, see \textit{Shropshire v. Commerce Farm Credit Co.}, 120 Tex. 400, 30 S.W.2d 282 (1930); \textit{Vela v. Shackett}, 12 S.W.2d 1007 (Tex. Comm'n App. 1929), \textit{judgment affirmed}. On the other hand, the legislature's choice of time periods could be disconcerting in loans where interest rates vary considerably from month to month but never exceed 18\% per annum. In this regard, however, note the court of civil appeals' comment in \textit{Grace Mfg.}: "Tex. Rev. Civ. Stat. Ann. art. 1302-2.09, provides that a corporation may contract to pay interest at a rate not to exceed 1 1/2\% per month, or 18\% per annum." 488 S.W.2d at 501. Although the supreme court opinion does not contain such a clear statement, the opinion does make use of annual rates in its analysis.


\textsuperscript{136} 483 S.W.2d 703 (Tex. Civ. App.—Eastland 1972), \textit{error ref. n.r.e.}


\textsuperscript{138} 363 S.W.2d 825 (Tex. Civ. App.—Austin 1960).

\textsuperscript{139} Former art. 5070, which was in effect during the \textit{Alexander} litigation and which is repeated verbatim in current art. 5069-1.03, permitted 6\% interest "when no specified rate of interest is agreed upon by the parties . . . ." \textit{See Tex. Rev. Civ. Stat. Ann.} art. 5069-1.03 (1971).
merely because the property was sold for a price well below fair market value. And in French v. May the court reached back to apply 1892 precedent to uphold a trustee's sale, even though the deed of trust specified that the property was to be sold for cash and the actual sale had been partially on credit. The court's holding appears to demonstrate that although a non-judicial foreclosure sale normally must comply in all details with the provisions of the deed of trust, when a deviation from such prescriptions actually enhances the position of the debtor the court may be willing to except to the general rule.

Two cases during the survey year dealt with actions for wrongful foreclosure. In Calverly v. Gunstream the court held that the ten-year statute of limitations for setting aside foreclosure sales does not apply to a suit for damages for wrongful foreclosure. In Boswell v. Hughes the court, apparently in a case of first impression, held that even if the defendant's wrongful foreclosure had been actuated by malice, as the jury had found, the plaintiff's remedy was in contract instead of tort, and, therefore, the plaintiff could not receive exemplary damages. The dissent interpreted the particular foreclosure involved in the case as "an action sounding in tort" and argued that exemplary damages were justified. To be sure, the majority opinion does seem to draw the line between contract and tort in a manner which perhaps unduly favors treatment as a contract.

Finally, although the case of Yeager Electric & Plumbing Co. v. Gaines Building, Inc. may be somewhat peculiar in its facts, it does serve to emphasize the value of recitations, even self-serving recitations, in purchase money and refinancing loan documents. In that case a mortgage was deemed inferior to a simultaneously effective mechanic's lien, in part because the record showed "no provisions in any of the [mortgage] documents concerning vendor's lien . . . purchase money mortgage, or subrogation of one lien [the mortgage in question] to any other lien [the mortgage which was released on the day the property was conveyed to the grantor of the mortgage]." Although acknowledging that purchase money liens prevail

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140. Jefferson Standard Life Ins. Co. v. Elledge, 463 F.2d 639 (5th Cir. 1972) (sales price was barely more than one-third the alleged fair market value); Mitchell v. Foster, 492 S.W.2d 632 (Tex. Civ. App.—Eastland 1973), error ref. n.r.e. (sales price was barely more than one-half the alleged fair market value); see Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473, 475 (Tex. 1965), where the Supreme Court of Texas repeated the general rule that "mere inadequacy of consideration alone [a $1,200 purchase price when the alleged value of the property was $4,000] does not render a foreclosure sale void if the sale was legally and fairly made."

141. 484 S.W.2d 420 (Tex. Civ. App.—Corpus Christi 1972), error ref. n.r.e.


144. In this case, the purchase on credit relieved the debtor of any deficiency claim.

145. Cf. First Fed. Sav. & Loan Ass'n v. Sharp, 359 S.W.2d 902 (Tex. 1962), where the Supreme Court of Texas held that the trustee should have given a potential buyer "a little time" to obtain the cash purchase price after having bid the highest price at the foreclosure sale. 359 S.W.2d at 904.

146. 497 S.W.2d 110 (Tex. Civ. App.—Dallas 1973), error ref. n.r.e.


148. 491 S.W.2d 762 (Tex. Civ. App.—El Paso 1973), error ref. n.r.e.


150. Id. at 923.
over simultaneously effective mechanics' and materialmen's liens,\(^{151}\) and although not denying that subrogation of priority is a well established rule of property law in this state,\(^ {152}\) the court's review of the transaction led it to conclude that the lender had not preserved either of such potential advantages.

**Master Mortgage Legislation.** In an attempt to reduce mortgage recording costs and to conserve time and space in the recording process, the 63d Legislature enacted a new article 6626b of the civil statutes, which authorizes a lender to record in county records a "master form of a mortgage or of a deed of trust" and then incorporate into later instruments "any or all of the provisions of such a master form . . . by reference."\(^ {153}\) This legislation, which appears not to represent any radical legal concept but rather is merely a statutory embellishment to an existing common-law principle of incorporation by reference, has already been given adequate review and commentary.\(^ {154}\)

**UCC Fixture Amendments.** Certain provisions affecting fixture filing, included in the 1973 amendments to the Texas Business and Commerce Code (Texas' version of the Uniform Commercial Code), deserve emphasis in a real estate context. Specifically, sections 9.313 and 9.402 of the Code have been substantially revised in an attempt to give more certainty to security interests in hybrid property, i.e., property which is neither clearly realty nor clearly personalty and is often called a "fixture."\(^ {155}\) Although the new section 9.313 still defers to the real estate law of the state for a definition of "fixture,"\(^ {156}\) it does go substantially further than the prior section in determining relative priorities between the holder of a UCC security interest in the specific fixture item, and the mortgagee of the real estate to which the item has been affixed. The secured party is given relative priority in most cases where its security interest is a purchase money security interest arising before the goods become fixtures, and the secured party complies with certain filing requirements.\(^ {157}\) The main exceptions are the secured party's inferior position (1) during construction, to a construction mortgage, specified as such in the recorded documentation and filed prior to when the goods

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\(^{151}\) See Irving Lumber Co. v. Alltex Mortgage Co., 468 S.W.2d 341 (Tex. 1971).


\(^{155}\) For recent commentary on the success of the drafters' attempt, compare Coogan, The New UCC Article 9, 86 Harv. L. Rev. 477 (1973), with Lloyd, Proposed Revisions of the Uniform Commercial Code Seek Uniformity on Fixtures, 2 Real Estate L.J. 444 (1973). For preamendment articles relating to unique "fixture" problems, see Cosway, Fixtures Under the Uniform Commercial Code, 21 Sw. L.J. 713 (1967), and Hamilton, Integration of UCC Fixture Filings with the Real Estate Recordation System—Recent Developments, 45 Texas L. Rev. 1175 (1967).


become fixtures, and (2) after construction, to the extent that the mortgage is given to refinance a construction mortgage which was prior to the secured party's interest. The secured party is given absolute priority, even over the holder of a construction mortgage, in certain instances where the security interest is prior in filing, where the contractual right of removal has been granted, or where "the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this chapter [i.e., either fixture filing or central filing with the secretary of state]." With the exception of the quoted provision, embodied in subsection 9.313(d)(3), these absolute priority qualifications appear to be quite clearly explained in the Code provisions. The latter provision, although commendable in its evident purpose—to remove the ambiguity of filing requirements for certain "readily removable" items—may create unfortunate negative presumptions of fixture filing requirements for other "readily removable" items which were not included in the subsection and may not otherwise even have been vulnerable to inclusion in the category of "fixture," such as the following: factory or office equipment; and residential equipment, machines, and appliances which are not consumer goods.

Section 9.402 of the Code effects substantial changes in fixture filing requirements. First, the section provides that a mortgage is effective as a UCC fixture filing if the goods are described in the mortgage by item or type and are to become fixtures related to the real estate described in the mortgage and if the mortgage is duly recorded and is in compliance with the prescribed form of a fixture financing statement, other than the requirement of a recital that it is to be filed in the real estate records. The new provisions prescribing the form of a fixture financing statement require the following: (1) a statement that the security is or is to become a fixture, (2) a recital that the statement is to be filed for record in the real estate records, (3) a description of the real estate "sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage," and (4) if the debtor does not have an interest of record in the real estate, the name of the record owner.

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160. Even Mr. Coogan, one of the drafters of the new art. 9, admits that the provision was not drafted properly. See Coogan, supra note 155, at 495-98.
162. Id. § 9.402(e). The quoted section of this provision evidently takes precedence over § 9.110 of the Code which provides: "For the purposes of this Chapter any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." For a case during the survey year in which this requirement (similar under the prior Code provisions) was not deemed satisfied by listing the real estate in the section where the debtor's address was requested, see Home Sav. Ass'n v. Southern Union Gas Co., 486 S.W.2d 386 (Tex. Civ. App.—El Paso 1972), error ref. n.r.e.
Finally, it should be noted that as of the date this Article goes to the printer the attorney general is preparing an option as to whether fixture financing statements must be acknowledged, despite the absence of an acknowledgment requirement in the Code.\textsuperscript{164} The attorney general's opinion should be published by the date of publication of this Article, and fixture financing statements should be prepared and filed in accordance with that opinion.

\textit{Mechanics' and Materialmen's Liens.} For the second consecutive legislative session the Texas Legislature reacted in remedial fashion to an opinion by the Supreme Court of Texas by legislatively revoking that opinion.\textsuperscript{165} In this instance the legislature responded to \textit{Hayek v. Western Steel Co.}\textsuperscript{166} in which the supreme court had held that article 5469, the statutory retainage provision,\textsuperscript{167} required owners to hold back from their contractors during construction a retainage of ten percent of the total improvement cost instead of merely ten percent of a particular contract for specific work. The response was not an amendment of article 5469 but rather was an amendment to section 2 of article 5452, the definitional section.\textsuperscript{168} This amendment changes the statutory definition of "work" to that "which is performed pursuant to an original contract, as that term is defined herein" and adds a definition of "contract price" which limits costs to those incurred "pursuant to an original contract, as that term is defined herein."\textsuperscript{169} Article 5469 requires the owner to retain ten percent of the "contract price" of "work" done whereby a mechanic's or materialman's lien may be claimed; and so the legislature's restriction of those terms, by its amendments to section 2 of arti-

\textsuperscript{164} Subsection 9.403(g) provides that the fixture filing "shall be filed for record and the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement.


\textsuperscript{167} TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1974). See generally Youngblood, supra note 165, at 682-87, 707.

\textsuperscript{168} TEX. REV. CIV. STAT. ANN. art. 5452 (Supp. 1974). The relationship of the \textit{Hayek} decision and the instant statutory revision is analyzed in 11 \textit{HOUSTON L. REV.} 185 (1973).

\textsuperscript{169} Emphasis added. The term "original contract" is defined in the following subsection of art. 5452, § 2, as "an agreement to which the owner is a party."
cle 5452, seems effectively to have shielded courts from the quandary, described in the vigorous dissent in Hayek, of charging the wrongful failure of a late-phase “original contractor” (e.g., roofer) to pay its subcontractors against either an innocent owner or an innocent early-phase “original contractor” (e.g., foundation contractor). Under the new statutory provision the owner may pay the foundation contractor in full thirty days after completion of its work, and subcontractors under the roofer will be limited in their retainage fund to ten percent of the roofing “original contract.” On the other hand, as indicated in the majority opinion in Hayek, the legislative revision may well result in increased litigation caused by owners’ schemes to change a single turn-key “original contract” into multiple ones in order to avoid the need for a continuing retainage requirement. To some extent, the statutory sham-contract provision added in 1965 may protect subcontractors in those instances where the owner executes multiple “original contracts” with its own alter ego; however, this statute will be of little assistance when the owner and a single third party general contractor (not a statutory term, but one readily recognized in the construction industry) agree that the latter will contract for the work in phases through separate entities, each of which will execute an “original contract.” Moreover, even in cases suited for application of the sham-contract provision, a subcontractor will likely be faced with a jury trial before it can recover. This new potential source of litigation could probably be cured by an amendment to the sham-contract provision which incorporates the multiple-entity arrangement into its sanctions and which perhaps even creates a statutory presumption of sham in certain instances (e.g., more than two “original contracts” with individuals or entities which are related through ownership or interlocking directorships). Hopefully, though, a legislative session in the near future will not be content with patchwork amelioration of unsatisfactory statutory provisions, but rather will review proposals for a complete recodification of this area of the law.

Mechanic’s lien litigation during the survey year was generally founded on established principles; however, Panhandle Bank & Trust Co. v. Graybar

170. 478 S.W.2d at 796.
173. “The development of our mechanic’s lien laws has been a relentless progression from the simple to the complex, which is not to be equated with qualitative progress. To reverse the direction will be a prodigious undertaking, but it will be worth the effort.” Youngblood, supra note 165, at 707.
174. See Dowdy v. Hale Supply Co., 498 S.W.2d 716 (Tex. Civ. App.—Fort Worth 1973) (statutory attorney’s fees not applicable when subcontractor sues owner with whom it had no direct contractual relationship; thirty-day filing requirement in article 5469 is not applicable when owner did not retain the prescribed 10% retainage); United Distrib. of Texas, Inc. v. Riggs Properties, Inc., 496 S.W.2d 719 (Tex. Civ. App.—Waco 1973); Herrington v. Luce, 491 S.W.2d 478 (Tex. Civ. App.—Tyler 1973) (notice prescribed in statute is a condition precedent to the validity of the lien claim by a subcontractor); Inman v. Clark, 485 S.W.2d 372 (Tex. Civ. App.—Houston
Electric Co.\textsuperscript{175} appears to be the first state decision to interpret article 5472e, the trust fund statute.\textsuperscript{176} In its opinion the court reviewed favorably a previous federal decision\textsuperscript{177} which had given article 5472e "broad construction to effectuate its protective purposes" and held that compliance with the other mechanics' and materialmen's lien laws was not a prerequisite to beneficiary status for the trust funds constituted as such by that article.

IV. PUBLIC AND PRIVATE RESTRICTIONS ON LAND USE

Governmental Land Use Restrictions. Although few additional governmental restrictions on real estate development in Texas became effective during the survey year, the year was certainly a "year of awakening," leaving many developers with a feeling of paranoia that all branches of local, state, and federal government were bearing down on them. Of course, the concept of governmental restrictions on land use is not a new concept. At least since 1926 when the United States Supreme Court decided Village of Euclid v. Ambler Realty Co.,\textsuperscript{178} courts have recognized the state's right to protect its citizenry through reasonable land use controls.\textsuperscript{179} Moreover, proposals for increased state and federal governmental regulation have been asserted in academic publications for several years,\textsuperscript{180} have been adopted in recent years by state governments,\textsuperscript{181} and have been evident (although often

\textsuperscript{175} 492 S.W.2d 76 (Tex. Civ. App.-Amarillo 1973), error ref. n.r.e.

\textsuperscript{176} TEX. REV. CIV. STAT. ANN. art. 5472e (Supp. 1973), which provides in part that all monies or funds paid to a contractor or subcontractor under a construction contract constitute trust funds for the benefit of contractors and subcontractors. See Youngblood, supra note 165, at 687.


\textsuperscript{178} 272 U.S. 365 (1926), in which the Supreme Court upheld a municipality's comprehensive zoning ordinance against legal attacks founded on U.S. CONST. amend. XIV.


\textsuperscript{180} See Dunham, A Legal and Economic Basis for City Planning, 5 COLUM. L. REV. 650 (1958); Freilich, Model Regulations for the Control of Land Subdivision, 36 Mo. L. Rev. 1 (1971); Harr, Regionalism and Realism in Land Use Planning, 105 U. PA. L. REV. 515 (1957); Williams, Planning Law and Democratic Living, 20 LAW & CONTEMP. PROBLEMS 317 (1955); Symposium, Public Regulations of Land Use, 8 REAL PROP., PROBATE & TRUST J. 509 (1973); Symposium, Environmental Law, 19 WAYNE L. REV. 73 (1972); Report, Variations in Land Use Controls, 1 REAL PROP., PROBATE & TRUST J. 431 (1966). See also ALI, MODEL LAND DEV. CODE (Tentative Draft No. 1, 1968) (now in its third draft, dated April 22, 1971).

\textsuperscript{181} Probably the first state to adopt a statewide land use policy was Hawaii in 1961. HAWAII REV. STATS. §§ 205-1 to -15 (1968). Other state regulations have been much more recent. See, e.g., Coastal Zone Conservation Act, CAL. PUB. RES. CODE § 27000 (West 1972); Environmental Land and Water Management Act, 14 FLA. STAT. ANN. § 380 (1972); Environmental Management Act, IND. CODE § 35-5201-65 (Supp. 1974); Site Location of Development Act, ME. REV. STAT. ANN. tit. 38, § 481 (Supp. 1974); Zoning Appeals Act, MASS. GEN. LAWS ANN. ch. 40A, § 20 (Supp. 1974); En-
However, before the beginning of the survey year most observers felt that governmental restrictions on private developers in Texas lay off in the distant future. This complacency was mildly upset early in the survey year with the judicial decision in National Resources Defense Council Inc. v. Environmental Protection Agency, in which the District of Columbia Circuit Court of Appeals ordered the Environmental Protection Agency (EPA) to speed up and intensify its review of state implementation plans for enforcing the national ambient air quality standards prescribed by the Clean Air Amendments of 1970. The response of the EPA to that judicial order, soon followed by other land-use legislative activity at state and federal levels, transformed the developers' former complacency into turbulence.

EPA "Indirect Source" Regulations. Prior to the National Resources Defense Council decision, pronouncements from the EPA were limited to the improvements of air quality through control of transportation polluters (such as automobiles) and direct stationary polluters (such as smelter plants). Shortly after that decision, however, the EPA shocked the real estate industry by publishing an advance notice of draft regulations affecting "indirect sources" such as highways and airports, shopping centers, sports complexes or stadiums, large parking facilities, and large amusement and recreational facilities. Unlike the direct stationary polluter, which is defined as a "stationary source" in the Clean Air Act, the term "indirect source" is not contained in the Act. The EPA, however, has authority under section 110(a)(2)(B) of the Act to reject a state implementation plan if such plan does not contain "such other measures as may be necessary . . . including, but not limited to, land-use and transportation controls."


183. 475 F.2d 968 (D.C. Cir. 1973).


185. The term used in the advance notice was "complex sources." 38 Fed. Reg. 6279 (Mar. 8, 1973). Although many commentators still refer to this original term, it was deleted in the proposed regulations and the final regulations, the term "indirect sources" being substituted. 38 Fed. Reg. 9599 (April 18, 1973); 38 Fed. Reg. 15834 (June 18, 1973); and 39 Fed. Reg. 7270 (Feb. 25, 1974).

186. The term "stationary source" is defined in the Act as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C.A. § 1857c6(a)(3) (Supp. 1974).

therefore, not only has issued "transportation" regulations which were always expected, but also has issued "indirect source" regulations which were not anticipated a year ago. Inasmuch as the final "indirect source" regulations were promulgated after the end of the survey year and do not become effective until January 1, 1975, a complete discussion of their implementation will be reserved for next year's Survey issue. However, real estate developers should be aware that the regulations require governmental approval for all urban construction commenced after January 1, 1975, which will create a new parking area for 1,000 cars or more (2,000 if in a non-urban location), or which will increase an existing parking area by 500 cars or more (1,000 cars or more, if in a non-urban location). The EPA has urged the states to assume the responsibility for such "governmental approval," but inasmuch as the attorney general of Texas has already assured the Texas Air Quality Control Board (AQCB) that it need not accept this political hot-potato role, until additional state legislation is passed the EPA will likely be the reviewing authority.

**Senate Bill 268.** On June 21, 1973, the United States Senate passed Senate Bill 268, which, if passed by the House of Representatives, will be enacted under the title of the Land Use Policy and Planning Assistance Act. Because this legislation has not been passed by the House, it will not be analyzed in depth in this Article. However, a few comments do seem warranted. First, Senate Bill 268 does not impose mandatory land-use controls but merely encourages the states to identify areas of critical environmental concern and critical land uses, regulate the land-use activities of local

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188. Not even all of the transportation regulations were expected. For example, the "Texas Transportation Control Plan" issued by the EPA at the end of the survey year restricts construction in the "Houston-Galveston Intrastate Region" (the only region in the state so restricted) of any "parking facility with parking capacity for 500 or more motor vehicles" without prior written approval from the EPA (or a state or local agency approved by the EPA). 38 Fed. Reg. 30626, 30749 (Nov. 6, 1973). The effective date of the parking restrictions, however, has been postponed until Jan. 1, 1975. 39 Fed. Reg. 1848 (Jan. 15, 1974). In addition, these restrictions are being challenged in Congress and in the courts. See, e.g., State of Texas v. Environmental Protection Agency, Case No. 73-3540 in the United States Court of Appeals for the Fifth Circuit (case in progress; no reported opinion to date).


190. In fact, the EPA has announced that it will also require comprehensive state "air quality maintenance plans" and "significant deterioration plans," either or both of which could seriously affect real estate development. Of course, as with any sensitive social or economic issue, the EPA "indirect source" regulations are likely to receive lobbyist opposition and judicial challenges from both sides, e.g., National Resources Defense Council (which already has filed an administrative review request, and has in the past sought to obtain EPA review for all parking facilities with more than a ten-car capacity) and the International Council of Shopping Centers (participating with the State of Texas in the litigation referenced at note 188 supra).


192. The House version, H.R. 10294, is quite similar to Senate Bill 268. The major difference appears to be the House bill's imposition of sanctions (by denial of federal monies, and possibly even by imposition of federal land-use regulations) upon states which do not comply with the statutory requirements; however, a non-sanction version is also being considered by the House.

193. Or demands of the states, depending on whether the final version of the act includes sanctions as discussed in note 192 supra.

194. This concept includes both fragile lands (such as coastal plains, flood plains, and forests) and key facilities (such as airports, highway interchanges, and large utilities).

195. This concept includes vital institutions (such as hospitals, schools, and perhaps
governments in the small percentage of cases involving "areas of critical environmental concern" and "critical land uses" the impacts of which extend beyond local jurisdictions, and provide appeal mechanisms for affected parties who are dissatisfied by local rulings. Second, if passed into law, Senate Bill 268 will be administered by the Department of the Interior. By itself, this aspect of the bill is not particularly worthy of comment; however, its importance becomes apparent in light of the administrators specified in other federal land-use laws: e.g., Environmental Protection Agency (Clean Air Act); the Department of Commerce (Coastal Zone Management Act); Army Corps of Engineers (Water Control Act); Council on Environmental Quality (National Environmental Policy Act and Environmental Quality Improvement Act). Especially if combined with the presence of local administrators and the potential presence of administrators under imminent state legislation, the inability of federal enactments to select a single land-use authority creates the specter of a regulatory octopus with which a real estate developer must tangle each time he wishes to consummate a single project.

State Legislation. Although not completely passive in environmental concerns, the 63d Legislature rejected two attempts to enact comprehensive land-use legislation. Nevertheless, with federal monetary encouragement imminent for cooperating states, and with the equally imminent possibility of federal regulations being imposed upon non-cooperating states, the next session of the legislature will certainly give more serious consideration to such legislation.
Private Restrictive Covenants. As usual, numerous cases during the survey year involved the creation, duration, and effect of restrictive covenants. In *Burns v. Wood* the Supreme Court of Texas held that restrictions contained in a recorded subdivision plat and dedication instrument never sprang into being because “[t]here was no evidence that the plan reflected therein was implemented pursuant to or in accordance with the recorded requirements, or that the Subdivision as so cast ever came into existence.” Acknowledging that Texas law does recognize restrictive covenants imposed through a “general scheme or plan,” which in turn may be evidenced by a subdivision plat, the court found that the plat was never adopted by owners of the affected property, by deed reference or otherwise. The plat, therefore, remained inert and ineffective—even though the deed conveying the questioned property to the defendant (against whom the restrictions were claimed) described the property with reference to the subdivision named in the plat. In *Saccomanno v. Farb* a Texas court acknowledged for the first time the concept of “reciprocal negative easement,” which applies in instances when a common owner of related parcels conveys one parcel and includes restrictions evidencing “a scheme or intent that the entire tract should be similarly treated.” In upholding a summary judgment in opposition to this concept, however, the court made clear its reluctance to consider the possibility of a “reciprocal negative easement” in anything other than an obvious situation.

In *Amason v. Woodman* the supreme court gave additional assurance to real estate transactions by standing firmly in favor of a bona fide purchaser in opposition to the restrictive covenant rights of parties not of record. The restrictive covenants for a subdivision had been released by all record owners but not by three parties with equitable title, i.e., contracts to purchase tracts within the subdivision. In reversing the court of appeals decision the supreme court ruled that although the consent of equitable owners is necessary to terminate restrictive covenants, subsequent purchasers without actual notice of equitable interests may rely on the written release of the record owners. Furthermore, in clear contradiction to the court of appeals, the supreme court set the burden of proof squarely upon the equitable owners to prove that the subsequent purchasers had actual notice of their position. In another case involving duration of restrictive covenants, a court of appeals held that the instrument in question did not cause the restriction to survive the signator’s conveyance of the property which she had restricted.

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202. 492 S.W.2d 940, 943 (Tex. 1973).
204. 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973), error ref. n.r.e. See also 20 Am. Jur. 2d Covenants, Conditions, Etc. § 173, at 733 (1965).
205. 498 S.W.2d 142 (Tex. 1973).
The cases previously reviewed demonstrate a judicial reluctance to expand the effect of restrictive covenants; however, this reluctance is not uniform. In what appears to be an issue not previously decided in Texas, two courts of civil appeals considered whether a restriction on certain land may be extended to abutting unrestricted land. In both cases the restricted land was to serve as a parking area essential to a use on the unrestricted land which violated the restriction. In both cases the court extended the restriction to the abutting unrestricted land. In one of these cases, H.E. Butt Grocery Co. v. Justice, the court recognized and conscientiously documented the conflicting lines of authority in this area; however, the court determined that parking, ingress, and egress are so integral to a primary use that the restriction must be upheld despite the general rule that "any doubt or ambiguity will be resolved against the restriction." In three cases courts showed a clear willingness to order affirmative relief against a violating property owner, even when, in one of such cases, Walker v. Vaughn, the violation resulted in a more attractive residential structure than that required by the restriction. Finally, in Johnson v. Linton the court's thorough analysis of law relating to architectural control committees formed the basis of its holding that homeowners had complied with restrictions on their property prior to remodeling their home. In that case the architectural control committee had been duly selected by the entity specified in the restrictions; and although the entity had later been dissolved, the court held under the facts in the case that the architectural control committee continued in existence and had authority to approve the homeowners' remodeling.

V. LANDLORD-TENANT

Legislation. Perhaps the most publicized real property legislation during the survey year was that affecting residential leases. Although the 63d Legislature did not enact reforms as extensive as those proposed in the Uniform Residential Landlord and Tenant Act which has been approved by the Commissioners on Uniform State Laws and is currently under consideration by the American Bar Association, two acts passed by the legislature

209. 484 S.W.2d at 631 n.1 and accompanying text.
210. Id. at 630.
212. 491 S.W.2d 489 (Tex. Civ. App.—Fort Worth 1973), error ref. n.r.e.
214. The "committee" was in fact a single individual.
216. See the critique by a Report of Subcommittee on the Model Landlord-Tenant Act of Committee on Leases (A.B.A.) at 8 REAL PROP., PROB. & TRUST J. 104 (1973). See also Strum, Proposed Uniform Residential Landlord and Tenant Act: A Departure
will have a considerable—and in this author's opinion a beneficial—impact on landlord-tenant relations in residential premises.\textsuperscript{217}

The statutory amendments will be discussed in the order in which they have been codified;\textsuperscript{218}

\textit{Article 5236b.} This article provides an equitable balance between certain landlords' desire for privacy and the tenants' need to locate a landlord's agent for service of process. It does not require owners to reveal their identity to tenants but instead provides that if the owner's name and address or that of the landlord's management company have not been furnished in writing to the tenant, then the tenant in any law suit shall be entitled to have served the landlord's "on-premise manager, or rent collector serving such dwelling unit."

\textit{Article 5236c.} This article deprives landlords of certain self-help devices such as the interruption of utilities paid for by the tenant directly to the utility company and the exclusion of a tenant from the leased premises. It does, however, grant the landlord a quite unique, although limited, self-help remedy. A landlord may now change the door locks of a leased premises when the tenant's rentals are delinquent in whole or in part; however, the landlord must leave a written notice on the tenant's front door describing where the new key may be obtained at any hour and giving the name of the individual who will provide the tenant with the new key. Moreover, the new key must be given to the tenant upon request, regardless of whether the delinquency is cured. Essentially, this provision, which in the legislative hearings was often referred to as the "eyeball-to-eyeball provision," merely provides the landlord a legal means to arrange a personal confrontation with a delinquent tenant. It may, however, prove to be a valuable right. The article also permits the landlord to remove the contents of the premises when the tenant has abandoned the premises and provides that a landlord's "bona

\textit{From Traditional Concepts, 8 REAL PROP., PROB. \\ & TRUST J. 495 (1973); cf. Hicks, The Contractual Nature of Real Property Leases, 24 BAYLOR L. REV. 443 (1972).}

\textsuperscript{217} House Bill No. 877, ch. 433, [1973] Tex. Laws 1182 (enacted as article 5236b) and House Bill No. 1684, ch. 441, [1973] Tex. Laws 1226 (adding articles 5236b, 5236c and 5236d and repealing article 5238a). It should be noted that although the substantive provisions of House Bill No. 1684 do not in all cases limit themselves to \textit{residential} leases, the statute's caption and effective date provisions clearly do contain such limitations (it being urged that the following provisions be preserved in all published versions of the statute):

\textit{Caption}

An Act providing for service of process on agents of a \textit{residential} landlord under certain circumstances; relating to the willful interruption of utility services by a \textit{residential} landlord; relating to the willful exclusion of a tenant by a \textit{residential} landlord; relating to \textit{residential} landlord liens; repealing all laws in conflict and specifically article 5238a, Vernon's Texas Civil Statutes; adding articles 5236b, 5236c, and 5236d, Vernon's Texas Civil Statutes; declaring an effective date; and providing a savings clause.

\textit{Effective Date}

This Act shall take effect on September 1, 1973, and shall apply to all \textit{residential} rental agreements, written or oral, executed or entered into after such date.

(Emphasis added.) House Bill No. 877 is internally clear as to its being limited to \textit{residential} leases. Ch. 443, § 5236(e), [1973] Tex. Laws 1182.

\textsuperscript{218} The author wishes to express appreciation to the Texas Apartment Association, Inc. for permitting him access to the "TAA Redbook," a recently-published analysis of landlord-tenant laws which is being made available to Association members.
fide repairs, construction, or emergencies" are exempted from the article's coverage. Finally, the article lists statutory remedies for the landlord's violations and precludes the modification by contract of the statutory rights, liabilities, and duties contained in the article.

**Article 5236d.** In 1969 the 61st Legislature enacted article 5238a, generally referred to as "the baggage lien law" because it provided residential landlords a lien and right of self-help similar to that of a hotelman. In 1972 that provision was held to be unconstitutional in *Hall v. Garson*, a case decided by the United States Court of Appeals for the Fifth Circuit. The 63d Legislature expressly repealed the former article 5238a and substituted article 5236d, which is much more restrictive and, therefore, may pass constitutional muster. The new article denies the landlord self-help as to the tenant's property unless such right is granted in a written rental agreement between the landlord and the tenant. Moreover, the article precludes the landlord from enforcing a contractual landlord's lien (and perhaps any lien) unless a provision is underlined or printed in conspicuous, bold print. Even when a lien is duly authorized in the written rental agreement, the article excludes thirteen categories of property as being exempt from the landlord's lien. Finally, the article expressly authorizes a landlord to remove the tenant's property from the leased premises when the tenant has abandoned the premises.

**Article 5236e.** This article attempts to regulate, and therefore to curb abuses in, the actions of both landlords and tenants with regard to security deposits. The landlord is obligated to keep accurate records of all security deposits, to refund the full amount of each security deposit (minus only those itemized deductions of which the landlord notifies the tenant in writing) within thirty days after the tenant surrenders the premises and to assure that when the premises are transferred to a new owner, such new owner will deliver to the tenant a signed statement acknowledging that the new owner has received and is responsible for the tenant's security deposit (with an acknowledgment as to the exact amount of the tenant's security deposit). The article does provide that the lease may condition the return of the tenant's security deposit upon the tenant's having given advance notice of surrender of the premises; however, such lease provision in order to be effective must be underlined or printed in conspicuous, bold print in the rental agreement. The tenant, too, has obligations. He is obligated to furnish the

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220. 430 F.2d 430 (5th Cir. 1972).

221. Although probably not the intent of the statute, art. 5236d (and specifically §§ 4, 5) may not only preclude non-contractual *self-help* but may also be interpreted as precluding any landlord's *lien* unless a contractual provision for such lien is included in a written rental agreement and such provision is underlined or printed in conspicuous, bold print.

222. The list, although extensive, does not include televisions, stereos, records, musical instruments, certain paintings, typewriters, adding machines, calculators, certain books, sewing machines, clocks, radios, motorcycles and bicycles (if found within the tenant's dwelling or in the storage room), certain furniture, and sports equipment.
landlord with a written copy of his forwarding address when he vacates the premises and he is precluded from withholding payment of his last month's rental, or any portion thereof, on the grounds that the security deposit serves as security for the unpaid rental. The article further provides that its provisions apply to leases in which the parties are eighteen years of age or older. Finally, the article lists statutory remedies for violations by a landlord or a tenant and precludes the modification by contract of the statutory rights, liabilities, and duties contained in the article.

**Landlord-Tenant Cases.** In *Crowell v. Housing Authority* the Supreme Court of Texas removed Texas from the list of states in which an exculpatory clause in a lease is given absolute recognition. Unfortunately, the court's decision does not clearly delineate the extent of judicial rejection of such clauses. In this particular case a tenant in a public housing complex was alleged to have died as a result of carbon monoxide leaking from a defective gas heater in his apartment. Because the lease between the defendant and the deceased contained an unequivocal exculpatory clause, the trial court entered summary judgment for the defendant. The court of civil appeals affirmed the trial court, citing and quoting the 1957 opinion by the Supreme Court of Texas, *Mitchell's, Inc. v. Friedman*, for the general principle that exculpatory clauses are recognized in this state, and refusing to accept the plaintiff's argument that the defendant's identity as a housing authority should prompt "public policy" considerations which override the general principle. The supreme court reversed the lower courts, in part upon the plaintiff's "public policy" allegations. However, the supreme court did not stop with that concept, but rather chose to cite examples and include references which imply that in any case where the parties are not at a relatively equal bargaining power the exculpatory clause might not be given judicial recognition. Unfortunately, the supreme court has probably encouraged litigation in each instance of tenant loss or injury in order to determine whether the parties were bargaining "from positions of substantially equal strength" (in which case, according to the supreme court, "the agreement is ordinarily enforced by the courts") or "where one party is at such a disadvantage in bargaining power that he is practically compelled to submit to the stipulation" (in which case, again according to the supreme court, "the exculpatory agreement will be declared void").

Again during the survey year a Texas court considered the question of what constitutes the landlord's acceptance of a "surrender of a lease" by the tenant who vacates the leased premises. It appears that after briefly indulging in a concept which would have placed unrealistic obligations upon an innocent landlord whose tenant vacates the leased premises before the

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223. 495 S.W.2d 887 (Tex. 1973).
224. "[N]or shall the Landlord nor any of its representatives or employees be liable for any damage to person or property of the Tenant, his family, or his visitors, which might result from the condition of these or other premises of the Landlord, from theft or from any cause whatsoever." Id. at 888-89.
225. 157 Tex. 424, 303 S.W.2d 775 (1957).
226. 495 S.W.2d at 889.
end of the lease term (in some cases releasing the tenant from his contractual obligations under the lease if the landlord re-enters the premises without actual consent from the tenant)\textsuperscript{228} the Texas courts may have returned to a position where the controlling issue is merely the intent of the landlord, and the burden is placed upon the tenant to show that the landlord released the tenant by accepting the tenant's surrender.\textsuperscript{229}

In two cases courts of civil appeals decided tough questions for which there is a conflict of authority in Texas and various other jurisdictions in the country. In \textit{Maloney v. Andrews}\textsuperscript{230} the court determined that a late charge under a lease did not constitute interest and thus was not regulated by either the constitutional or statutory provisions regarding usury.\textsuperscript{231} In \textit{Nitschke v. Doggett}\textsuperscript{232} the court rather reluctantly held that a lease which specified that its term was “for the balance of the life of the tenant” was at law a tenancy at will terminable at any time by either the landlord or the tenant.\textsuperscript{233}

Finally, in \textit{Skinner v. HCC Credit Co.}\textsuperscript{234} the court reviewed a provision in the lease which attempted to allocate condemnation proceeds between the landlord and the tenant. The fact that the court acknowledged the proceeds-allocation provision to be ambiguous and subject to jury determination, and the fact that such provision (which is quoted in the court’s opinion) is in fact clearer than that contained in many leases, should alert draftsmen to give serious thought to this provision in the early stages of lease drafting.

\section*{VI. Miscellaneous}

\textit{Conservation and Reclamation Districts.} In Texas, a builder who develops outside the perimeter of existing municipal utility sources may finance certain utility installation costs through the creation of its own “conservation and reclamation district,” a generic term which includes a “water district,” a “municipal utility district” (often called a “MUD”), and other subclassifications.\textsuperscript{235} Often the subject of consumer complaint in recent years,\textsuperscript{228}

\textsuperscript{228} See Comment, \textit{Lease Drafting and Surrender by Operation of Law}, 41 \textsc{Texas L. Rev.} 428 (1963). See also Updegraff, \textit{The Element of Intent in Surrender by Operation of Law}, 38 \textsc{Harv. L. Rev.} 64 (1924), which was cited and quoted favorably in the \textit{Arrington} opinion. 486 S.W.2d at 607, 608.


\textsuperscript{230} 483 S.W.2d 703 (Tex. Civ. App.—Eastland 1972), \textit{error ref. n.r.e.}

\textsuperscript{231} See notes 136-39 \textit{supra}, and accompanying text, for additional discussion of this case.


\textsuperscript{233} The court’s decision is consistent with that in \textit{Perren v. Baker Hotel}, 228 S.W.2d 311, 317 (Tex. Civ. App.—Waco 1950), and with earlier cases in connection with relevant principles of real property law. But as the court pointed out in its opinion, its holding is not consistent with the present attempt to view leases through the perspective of contract law rather than real property law. 489 S.W.2d at 337. See Note, \textit{Creation and Termination of Periodic Tenancies}, 15 \textsc{Baylor L. Rev.} 329 (1963). See also \textit{Mills v. Thomason}, 211 So. 2d 790, 792 (La. Ct. App. 1968), in which under a similar fact situation the court concluded: “The lease is not one in perpetuity. Its fixed duration . . . would be at the death of appellant . . . .”

\textsuperscript{234} 498 S.W.2d 708 (Tex. Civ. App.—Fort Worth 1973).

\textsuperscript{235} \textsc{Tex. Const. art. XVI, § 39}; \textsc{Tex. Water Code Ann. §§ 50.001-56.311}
conservation and reclamation district operations were the source of nine bills passed by the 63d Legislature. The focus of these bills was threefold: (i) adequate notice and information to consumers both before and after they purchase property within the district, (ii) elimination of conflict of interests on district governing bodies, and (iii) increased supervision by the Texas Water Rights Commission.

Creditor Seizures of Debtor Property. The effect of the United States Supreme Court's decisions in Sniadach v. Family Finance Corp. and Fuentes v. Shevin on creditor pre-judgment seizure practices need not be chronicled again in this Article; however, two developments should be noted. First, during the 63d Legislature the House of Representatives passed House Bill 369 which, if enacted, would have amended the non-judicial deed of trust foreclosure statute to require that notice of foreclosure sales be effected as follows: (i) posting (same as present practice although only one posting, at the county courthouse door, would have been required), (ii) newspaper advertisement, and (iii) delivery of a copy of the notice by certified mail return receipt requested to the record owner and any inferior lien holder of record. House Bill 369 was not acted upon by the Senate; therefore, the legislature has two more years to review the methods by which non-judicial deed of trust foreclosures and other pre-judgment seizure practices may survive challenges based upon the Sniadach and Fuentes decisions. Secondly, in two federal court judgments rendered after the close of the survey year the district courts each held that because non-judicial deed

(1972); TEX. REV. CIV. STAT. ANN. arts. 7808-80 (Supp. 1973); id. tables I-IV; see Comment, The Water Control and Improvement District: Concept, Creation and Critique, 8 HOUSTON L. REV. 712 (1971). The author of that Comment points out that although there are 13 types of “water districts,” the one most commonly utilized is the water control and improvement district authorized by TEX. WATER CODE ANN. §§ 51.001-836 (1972). However, the article was written before enactment of ch. 54, tit. 4, of the Texas Water Code, entitled “Municipal Utility Districts.” TEX. WATER CODE ANN. §§ 54.001-738 (1972).


237. See TEX. WATER CODE ANN. § 50.301 (Supp. 1974), which requires written notice to a consumer at or prior to the final closing of his purchase of real property within a conservation and reclamation district, and imposes harsh penalties for the seller's failure to provide such notice.


243. For recommendations of similar notice procedures, see Catelllesse, Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice, 49 TEXAS L. REV. 1085 (1971).
of trust foreclosures are consummated pursuant to a private contractual arrangement (with article 3810 merely recognizing such contractual arrangement and not granting any foreclosure powers above those authorized in the contract), they are not "clothed with the authority of state law" and do not constitute "state action" sufficient to support federal jurisdiction.\textsuperscript{244} Although certainly not applicable to all pre-judgment seizure practices,\textsuperscript{245} these two decisions may at least temporarily ameliorate the quandary of a deed of trust creditor who does not wish to avoid "the law of foreclosure" but who does wish, not unreasonably, to be given legislative or judicial guidance as to what that law requires.\textsuperscript{248}

\textbf{Personal Property.} The six cases worthy of mention in the field of personal property law involve finding lost goods,\textsuperscript{247} bailment,\textsuperscript{248} trover and conversion,\textsuperscript{249} adverse possession,\textsuperscript{250} eminent domain,\textsuperscript{251} and escheat.\textsuperscript{252} As promised at the beginning of this Article, mention of these cases has been scant.

\textbf{Eminent Domain and Zoning.} The cases listed in this section were originally designated for inclusion in a \textit{Survey} article on local government.\textsuperscript{253} In the absence of such an article in this year's \textit{Survey}, they are referenced below. In the two supreme court decisions rendered during this survey year involving questions of eminent domain, the court reviewed in depth only procedural issues.\textsuperscript{254} Lower courts also ruled on procedural issues,\textsuperscript{255} as

\textsuperscript{244} Hoffman v. United States Dept. of Housing & Urban Dev., Civil Action No. CA-7-878 (N.D. Tex., Feb. 6, 1974); Leisure Estates of America, Inc. v. Carmel Dev. Co., Civil Action No. 73-C-70 (S.D. Tex., Jan. 24, 1974).

\textsuperscript{245} See Hall v. Garson, 430 F.2d 430 (5th Cir. 1972), discussed supra at note 220, and accompanying text. See also the authority cited at note 241 supra.

\textsuperscript{246} See Anderson, \textit{A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver, 79 CASE & COMMENT 24 (1974).}

\textsuperscript{247} Neal v. Kirkland, 486 S.W.2d 165 (Tex. Civ. App.—Dallas 1972) (in a case involving $42,500 in currency unearthed while a contractor was digging a ditch, the court reversed and remanded the trial court's judgment for further findings as to whether one or more of the claimants were "owners" of the currency).

\textsuperscript{248} H.O. Dyer, Inc. v. Steele, 489 S.W.2d 686 (Tex. Civ. App.—Houston [1st Dist.] 1972) (the bailee, a parking lot owner, was held liable for damages when the bailor's automobile was stolen from the lot, inasmuch as the jury found negligence on the part of the bailee).

\textsuperscript{249} Masso v. Bryan, 498 S.W.2d 19 (Tex. Civ. App.—Austin 1973), error ref. n.r.e. (a $4,000 award for exemplary damages was affirmed in a case where the plaintiff proved malicious conversion of personal property and $4,200 actual damages).

\textsuperscript{250} Wilcox v. St. Mary's Univ., 497 S.W.2d 782 (Tex. Civ. App.—Austin), appeal dismissed on other grounds, 501 S.W.2d 875 (Tex. 1973) (the court held that the plaintiff university had acquired title to valuable documents, which the defendants claimed had merely been transferred to the university as a temporary custodian).

\textsuperscript{251} Porter v. United States, 473 F.2d 1329 (5th Cir. 1973) (the court determined that when the state takes otherwise commonplace items of personal property which have acquired unique value as collectible items, the condemnation award should reflect the enhanced value).

\textsuperscript{252} State v. Texas Elec. Serv. Co., 488 S.W.2d 878 (Tex. Civ. App.—Fort Worth 1972) (held that Tex. REV. CIV. STAT. ANN. article 3272a (1968) entitled the state to retain not only funds owing on utility deposits and uncashed checks but also unclaimed preferred stock dividends).


\textsuperscript{254} Austin Ind. School Dist. v. Sierra Club, 495 S.W.2d 878 (Tex. 1973) (in which the court rejected a collateral attack on a county court eminent domain proceeding); Rose v. State, 497 S.W.2d 444 (Tex. 1973) (in which the court held that a county court could entertain a bill of review and reform a prior award rendered on a mutual
well as a river authority's power of condemnation,\textsuperscript{258} and the validity of a dedication deed in lieu of condemnation;\textsuperscript{257} however, as usual the vast majority of eminent domain cases evolved around the question of damages.\textsuperscript{258} Zoning cases during the survey year were decided upon the following issues: whether a city has the authority wholly to exclude school facilities from its boundaries;\textsuperscript{259} whether a city has authority to require that a building permit for an apartment complex be conditioned upon the project's financing not being insured by the Federal Housing Administration;\textsuperscript{260} and whether a public utility's power of eminent domain is superior to a city's zoning ordinance.\textsuperscript{261}