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PROPERTY
by
James H. Wallenstein*

As in last year’s Survey Article on Property,¹ this Article will emphasize those topics which relate most directly to real property concepts and practice, but will not include topics which constitute major portions of other Articles in this Survey issue.

I. STATUS OF TITLE

Ownership and Boundary Disputes. As in previous years, of the generally recognized methods for proving title,² proof of title by adverse possession received primary attention in litigation during the survey year. Unlike previous years, however, the question of adverse possession remained essentially one of fact, with no unique legal issues being propounded.³ Nevertheless, at least three noteworthy ownership issues did arise in cases decided during the year. In State v. Sunray DX Oil Co.,⁴ the court denied the title claim of the State of Texas, holding in part that the defendant held superior title through sufficient proof of record title from the sovereign of the land. The holding of sufficiency was not altered by the state’s claims of invalid original


2. As noted in a case decided during the survey year, the three generally recognized proofs of title are as follows: “[R]ecord title from the sovereignty of the soil, title from common source, or title by limitation [adverse possession].” Reinhardt v. North, 507 S.W.2d 589, 591 (Tex. Civ. App.-Waco, writ ref’d n.r.e.). See also Land v. Turner, 377 S.W.2d 181, 183 (Tex. 1964).

3. United States v. Stanton, 495 F.2d 515 (5th Cir. 1974) (the federal government was held to own the entire undivided interest in a tract through a cotenant’s transfer to it of the entire fee interest, followed by the federal government’s adverse possession of the tract); Bridwell v. Long, 508 S.W.2d 466 (Tex. Civ. App.—Amarillo 1974, no writ) (summary judgment was precluded by the existence of a material fact as to whether the plaintiff’s fencing of the land had been a “casual and undesigned” enclosure resulting in incidental grazing or had been effected with the intent to hold the land as owner by limitation); Toscano v. Delgado, 506 S.W.2d 317 (Tex. Civ. App.—San Antonio 1974, no writ) (possession of a tract by the plaintiff’s predecessor after such predecessor had executed a quitclaim deed of his interest did not constitute adverse possession); Spring Branch Ind. School Dist. v. Lilly White Church, 505 S.W.2d 620 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (the school district was unable to establish its adverse possession of the property in that it had entered upon the land in recognition of the title of the church, and there was no evidence establishing notice to the church that this tenancy relationship had been repudiated); Hensz v. Linnstaedt, 501 S.W.2d 463 (Tex. Civ. App.—Corpus Christi 1973, no writ) (the plaintiff had not entered the land with the intention of claiming it as his own; therefore, his claimed occupancy under the ten-year statute was not adverse, but rather subservient to the paramount title); McDonald v. Batson, 501 S.W.2d 449 (Tex. Civ. App.—Waco 1973, no writ) (evidence of the plaintiffs’ acknowledgment of title in another, even though made after the limitation title had been completed, was admissible as tending to show that the possession had not been adverse), aff’d on appeal after remand, 514 S.W.2d 94 (Tex. Civ. App.—Waco 1974, no writ).

4. 503 S.W.2d 822 (Tex. Civ. App.—Corpus Christi 1973, writ ref’d n.r.e.).
conveyances, but the court confirming the doctrine of "juridical possession"—but unfortunately not adding any additional commentary as to how that doctrine should be classified among proof-of-title methods. In Lakefront Trust, Inc v. City of Port Arthur the court considered the question, evidently one of first impression, of whether land eroded by navigable waters (and thereby lost by the owners to the state) returns in part to the original owners when an island is later man-made at the same location. In holding that title to the new island remained in the state, the court in the Lakefront Trust decision first noted that the original owners had presented no evidence of additions to their land through accretion, and further concluded that even if addition to the owners' land through accretion had been shown, it would have been inward accretion from the island toward the mainland, which would not have enabled the owners to claim the island. Finally, in an opinion issued during the survey year, the Texas Attorney General stated that an execution sale based upon a void judgment does not pass title even to a bona fide purchaser.

Although there were no particularly significant decisions rendered during the survey year dealing with surveys and boundaries, two reported cases may be worthwhile preparatory reading for parties who employ surveyors for the purpose of proving original boundaries. In McHard v. State the trial court had withdrawn the plaintiffs' trespass to try title suit from the jury after it had returned inconsistent findings, but had then ruled that the plaintiffs had established their claimed lines of the survey as a matter of law. The appellate court affirmed the trial court, noting the rule from Kirby Lumber Corp. v. Lindsey that in establishing the lines of a survey as a matter of law it is sufficient if they are fixed with reasonable certainty. The court held that the testimony of the plaintiffs' surveyor, corroborated by the field notes of earlier surveyors, constituted sufficient evidence for the plaintiffs to prevail as a matter of law. On the other hand, in Waldrop v. Manning the court remanded a boundary dispute for a new trial, holding that the surveys pre-

5. Id. at 823-24. The State of Texas contended that the original grantees were not citizens of the sovereign of the land, the Republic of Mexico, and that the granting agency had no legal authority to issue title to such original grantees.

6. The court indicated that, although the doctrine of juridical possession created only a legal presumption, it was "particularly applicable" where the acts of the authorities remained unchallenged for an extensive period of time. In view of Tex. Rev. Civ. Stat. Ann. art. 5517 (1958), which denies the defense of adverse possession in claims by the State of Texas, the doctrine of "juridical possession" appears to create a presumption almost as conclusive as adverse possession but falling under the category of "proof of title traced from the sovereign." For further mention of the concept of juridical possession, see Wallenstein, supra note 1, at 27 n.3.

7. 505 S.W.2d 606 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

8. See Luttes v. State, 159 Tex. 500, 324 S.W.2d 167 (1958), where the supreme court held, in essence, that land created through the process of accretion was vested in the owner of the property from which the accretions commenced. See also Lorino v. Crawford Packing Co., 142 Tex. 51, 175 S.W.2d 410 (1943).

9. Tex. Att'y Gen. Op. No. H-358 (1974), which also concluded that where the judgment creditor has been paid twice because of the invalid execution sale, a court, as a matter of equity, should require him to repay the purchase money to the bona fide purchaser.

10. 509 S.W.2d 413 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

11. 455 S.W.2d 733, 740 (Tex. 1970).

12. 507 S.W.2d 626 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.).
pared for the plaintiffs should have been excluded from evidence as being of no probative value because they contained no factual information tying them to the original survey. In the *Waldrop* case the plaintiffs' surveyor had attempted to locate a boundary line of the original survey from a point called for in the field notes of a junior survey. The court rejected this attempt, concluding that the surveyor should have exhausted the possibility of locating the original senior survey boundary line through deed references and natural or artificial objects on the ground, prior to resorting to the secondary source of a junior survey.

One decision during the survey year, *Stewart v. Mobley*, involved the characterization of future interests in real property, the court having been presented with the familiar challenge of distinguishing between (i) the possibility of reverter which accompanies an estate in fee simple determinable (often referred by Texas courts as a "conditional limitation"), and (ii) the power of termination which accompanies an estate in fee simple subject to a condition subsequent. In the *Stewart* case, the plaintiffs in a declaratory judgment action alleged that the defendant had lost title because of his failure to comply with the provision in a 1902 deed to the defendant's predecessor as grantee, which prescribed that the grantee would hold the property for "so long as the same shall be used for the purpose aforesaid [a lifesaving station], and should the United States [the grantee] cease to use the same for the purposes aforesaid for the space of three years, then and in that event the said land shall revert to the said parties of the first part [the original grantors], their successors, heirs and assigns." The court's opinion, although seeming to be correct both in its functional approach to the issues and in its selection of supporting Texas case authority, nevertheless failed to halt a trend of imprecise terminology and characterization which has impeded accurate predictions as to the course of the common law with regard to future interests. In arguing its position to the court, the defendant relied upon the 1919 decision of *Stevens v. Galveston, H. & S. A. Ry.* as support for his contention that

13. 500 S.W.2d 246 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).
16. Judicial opinions contain may irreconcilable statements because the terms 'fee simple determinable' and 'fee simple subject to a condition subsequent' have been used loosely and interchangeably. Important differences of result flow from the difference between the *automatic* ending of an estate, which is characteristic of the estate in fee simple determinable, and the *terminating* only at the option of the grantor or his successor, which is characteristic of the estate in fee simple subject to a condition subsequent. Clarity and utility of doctrine of stare decisis would both be served by adherence to the use of only one term for a single type of interest.
17. 212 S.W. 639 (Tex. Comm'n App. 1919, jdgmt adopted). The deed of real property to a railroad contained a clause that the premises were to be used "exclusively
the quoted language of the 1902 deed had “created a condition subsequent which, having been satisfied, is of no further force or effect.” The plaintiffs on the other hand contended that the language of the 1902 deed had imposed a “conditional limitation” which had caused the land to revert to them automatically upon failure of compliance with the condition. In addition, relying upon the 1962 Supreme Court of Texas opinion, *Lawyers Trust Co. v. City of Houston*, the plaintiffs further contended that even if the deed had not created a conditional limitation, the property had reverted to them upon reentry, which had been effected by their filing of the instant lawsuit. The court acknowledged that both cases cited as precedent by the respective litigants involved fact situations and deed clauses analogous to the instant case. The court, however, ruled that the *Lawyers Trust* decision was controlling, and that regardless of whether the deed created a “conditional limitation” (which would cause the property automatically to revert to the plaintiffs) or a “condition subsequent” (with the right of reentry having been exercised by the plaintiffs’ filing of the instant lawsuit), the plaintiffs were entitled to recover the property. The court’s reliance on the *Lawyers Trust* decision was certainly well founded—after all, the *Stevens* decision predated the *Lawyers Trust* decision by more than forty years and the supreme court had merely adopted the judgment, not the full opinion, of the *Stevens* decision. However, the court in *Stewart* did not rebut, or even expressly distinguish, the *Stevens* case, but merely dismissed it summarily as not being applicable. The law of future interests in Texas, therefore, still has no definitive characterization of terms; moreover, it has neither a workable definition nor a rejection of the “enhancement of value theory” which determined the outcome of the *Stevens* case.

Nearly all of the status-of-title cases decided during the survey year were initiated under the trespass to try title form of action, the statutorily prescribed form for resolving ownership and boundary disputes in Texas. For

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19. *Id.* at 640. A second deed provided that the property was to remain in the railroad “so long as the said land shall be used as a railroad right of way and if not so used shall revert to the grantors herein.” *Id.* at 641.

20. 359 S.W.2d 887 (Tex. 1962). The instrument dedicating certain lands for parks and other purposes provided that “if, on or after the expiration of twenty-five (25) years from date hereof, any tracts or tracts . . . cease to be used for the purpose or purposes indicated thereon, the fee title to any such tract or tracts shall vest and be in . . . [the grantor].” *Id.* at 888.

21. The *Stevens* court, in dismissing without discussion the right of reentry issue, apparently relied heavily upon an assumption that the primary consideration received by the grantors was the enhancement in value of their adjoining property through the conditions imposed on the use of the property granted. Conveyance by the grantors of all of their remaining property was therefore deemed by the court to terminate their continued interest in enforcement of the conditions. The court in the instant case seemingly acknowledged this “enhancement in value theory,” but held, without discussing the theory (and in the face of the trial court’s findings of fact which supported applying the theory), that the grounds of decision would be the same even assuming the validity of a finding that enhancement of value was the primary consideration for the original deed.

the most part, these cases merely reiterated previously settled rules in Texas. However, in a case involving another form of action, Estabrook v. Wise, the court considered the question of the power of Texas courts to render judgments affecting title to real property situated in other states. The former wife had brought suit against her former husband seeking a court decree ordering him to execute a deed to her of her alleged one-half community interest in certain mineral interests in lands situated in Alabama and Florida, which properties the husband had failed to inventory at the time of the divorce property settlement. Although acknowledging that it did not have in rem jurisdiction over the out-of-state property, the court nevertheless held that the relief requested by the plaintiff could be granted as an exercise of a Texas court's equitable jurisdiction in personam over the husband. The action was therefore characterized as one which directly affected and operated upon the person of the husband, and not upon the subject matter consisting of out-of-state real property. To be sure, the authorities reviewed in the instant decision amply support the court's holding that it could obtain in personam injunction powers over a person owning out-of-state real property. Nevertheless, one dissenting judge questioned the court's determination that the instant action was essentially one in personam, arguing that since the title question itself was the essential element of the case, the situs of the property should determine the situs of the litigation.

Finally, in Meadows v. Bierschwale the supreme court admitted that its 1966 decision in Consolidated Gas & Equipment Co. v. Thompson may have created confusion as to the Texas common law of constructive trust. In its earlier decision the supreme court had stated 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." In the Meadows decision the court cautioned that "this language must be viewed in the context of the fact situation that gave rise to it" and stated unequivocally that "actual fraud, as well as breach of a confidential relationship, justifies the imposition of a constructive trust."

Easements and Other Rights. In Coleman v. Forister the supreme court

23. Outlaw v. Noland, 506 S.W.2d 734 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (confirming that a take-nothing judgment against the plaintiff constitutes an affirmative recitation that title in the contested land is in the adverse party); Corder v. Foster, 505 S.W.2d 645 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (reviewing certain procedural rules); Sanders v. Taylor, 500 S.W.2d 684 (Tex. Civ. App.—Fort Worth 1973, no writ) (reviewing the effect of disclaimers or omissions in the answer by an adverse party).
25. Id. at 253 (Dunagan, C.J., dissenting).
26. 516 S.W.2d 125 (Tex. 1974).
27. 405 S.W.2d 333 (Tex. 1966).
28. Id. at 336, quoted favorably in Tyra v. Woodson, 495 S.W.2d 211 (Tex. 1973), noted in Wallenstein, supra note 1, at 30. For a critique of this principle, see Olds, Oral Trusts of Land for Grantor—Restitution, 6 HOUSTON L. REV. 113, 126 (1968). See also Comment, Tyra v. Woodson: Breach of a Fiduciary Relationship and the Constructive Trust, 26 BAYLOR L. REV. 91 (1974).
30. Id. at 128.
31. 514 S.W.2d 900 (Tex. 1974).
admitted that its 1968 per curiam opinion in the same case had been erroneous and restricted the plaintiffs' waterfront easement to one-foot strips across the eastern boundary of the property and the walkway along the waterfront. In reliance upon the earlier supreme court pronouncement, the trial court and court of appeals had determined the plaintiffs' easement to apply in "blanket" fashion to all of the defendants' property and had ordered the defendants to remove the residence which they had constructed on their property. The final reversal by the supreme court does appear to reflect a proper judicial aversion for "blanket" easements when relevant facts demonstrate a lesser easement to be sufficient for the enjoyment contemplated; however, as pointed out by the three-judge dissent, the decision probably does injustice to the plaintiffs who may have failed to present available evidence after the 1968 per curiam opinion.

Although not a new legal doctrine to Texas property law, the concept of "an implied easement appurtenant" was recognized and reaffirmed in Eric Erikson, Inc. v. Crooks. Both the plaintiffs' property and certain nearby subdivision property had previously been under the common ownership of the defendant-vendor's predecessor in title, and such predecessor had installed a drainage sewer pipe for the subdivision property which, at the time of the plaintiff's purchase, emptied onto the plaintiffs' land. In its decision the court acknowledged the following facts: the plaintiffs had not been aware of the existence of the drainage pipe on their property at the time of the purchase; the general warranty deed to the plaintiffs had contained no exception for the easement; record title to the property had revealed no recorded drainage easement; and the drainage pipe had not been in place long enough to establish an easement by prescription. Nevertheless, because the common ownership of all of the property had been in the defendant's predecessor in title, who had established what was subsequently to become the plaintiffs' property as the subservient estate for the benefit of the subdivision property, the court declared that the plaintiffs' property was in fact subject to an "implied drainage easement appurtenant." In rendering its decision, the court relied primarily upon the following statement from the 1959 supreme court opinion in Ulbricht v. Friedsam: "Where an owner of an entire tract of land . . . employs a part thereof so that one derives from the other a benefit or advantage of a continuous, permanent, and apparent nature, and sells the one in favor of which such quasi easement exists, such easement, being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication."
One further case dealing in part with the law of easements, *Intratex Gas Co. v. Burkholder*, reiterated the well settled rule that when one has obtained a right-of-way across the land of another through execution of an easement (in this case granting the right to construct and maintain a gas pipeline) the subservient landowner has no cause of action for damages resulting from the exercise of the rights under the easement, except upon a showing of negligent exercise of those rights.

**Title Insurance.** The 1974 Property Article pointed out that the 63rd Legislature of the State of Texas had considered proposed legislation which would have authorized attorneys in the state to insure title to real property. That proposed legislation was not passed; however, partially in response to the challenge of this potential competition from lawyers, the Texas Land Title Association did agree to meet with representatives from the State Bar of Texas to discuss and possibly settle their differences. This author has reviewed various agenda and proposals discussed during these joint meetings, and considers them to be quite meritorious. Unfortunately, the Texas Land Title Association and the State Bar of Texas seem to have relegated these proposals to a low priority for the 64th Legislature and have instead concentrated on a renewed effort to establish bar-related title insurance.

**II. PURCHASES AND OTHER TRANSACTIONS**

**Contracts of Sale.** Disputes concerning the sufficiency of precision in real property contracts were, as in prior years, the subject of a moderate amount

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37. 506 S.W.2d 342 (Tex. Civ. App.—El Paso 1974, no writ), which arose upon the easement holders' pleas of privilege to be sued in their home county; the appellate court sustaining such pleas in finding that no exception to the general venue rule was applicable to the facts of the case.

38. H.B. 1104, 63d Leg. (1973), which was reported favorably out of the house committee on the judiciary but was never acted upon by the house. See Wallenstein, supra note 1, at 34-35.

39. For example, at a meeting held October 5, 1974, of a special “Liaison Committee” between the Texas Land Title Association and the State Bar of Texas, Mr. Stanley D. Rosenberg, representing the State Bar members, advanced the following proposals (as evidenced by the official minutes of that meeting prepared by William W. Gibson, Jr., Professor of Law, The University of Texas School of Law, acting as co-chairman of the meeting): (1) that the State Board of Insurance receive adequate funding for effective regulation; (2) that the measure of insured loss be determined with regard to the actual monetary loss of the insured; (3) that premiums be reduced in certain instances of mere re-issuance; (4) that insurance companies be required to issue both an owner’s and a mortgagee’s policy at applicable closings; (5) that no special exception be permitted for area or quantity of land when a survey has been furnished; (6) that the exception for “rights of parties in possession” be subject to more restrictive rules; (7) that the practice of charging unregulated fees be reviewed; (8) that specific procedural rules be considered for bonding against liens; (9) that a standard form for an owner’s policy commitment be promulgated; (10) that continuing education in the area of title insurance be encouraged; (11) that time limits for payment of losses be considered; (12) that rulings and opinions of the State Board of Insurance be made public; (13) that practices of including unwarranted exceptions (such as “visible and apparent easements”) be investigated; (14) that copies of all applicable documents be furnished by the insurer; and (15) that formal escrow procedures be established.

40. House Bill No. 1856 and Senate Bill No. 880 each reflect the legislature’s concentration on bar-related title insurance. As this Article goes to the printer, the likelihood of passage of either bill is undetermined.
of litigation. All of the cases, including the only noteworthy decision, Johnson v. Snell[^43] (discussed in the 1974 Property Article because of the relationship between the lower court’s decision and the supreme court’s reversal of that decision[^42]), resulted from challenges as to the draftsmanship of the respective contracts, with two courts reviewing the sufficiency of land descriptions[^43] and one reviewing the required certainty as to the date of closing and time of payment[^44].

In addition to issues relating to the sufficiency of contracts of sale, the enforceability of such contracts after execution also received considerable judicial attention during the survey year. With the majority of fact situations occurring during a period of generally rising real estate values, one might speculate that this enforcement oriented litigation—primarily instituted by purchasers—resulted from attempts on the part of sellers to escape executory or partially executed contracts after receipt of better offers. This would appear to have been the situation in Sterling v. Apple[^45] where the defendant-sellers granted an option on their property to the defendant-purchasers, although having previously contracted to sell the same property to the plaintiff for one-half of the purchase price stated in the option. In ordering specific performance of the plaintiff’s contract, the court acknowledged that the jury had found that the plaintiff’s conduct “led . . . [defendant-sellers] reasonably to believe that he did not intend to complete the purchase of the land contracted for in the earnest money contract.”[^46] Nevertheless because the court found “no showing that . . . [the plaintiff] failed to take any action required of him”[^47] prior to the scheduled closing, the court affirmed the trial court’s specific enforcement of the original contract. This case should be read carefully by parties to a contract who wish to avoid their obligations under the rationales of anticipatory breach and estoppel[^48].

[^41]: 504 S.W.2d 397 (Tex. 1973), in which case the supreme court held that the contract to sell real property was not so vague and incomplete as to provisions which were necessary to the sale that specific performance was precluded.

[^42]: Wallenstein, supra note 1, at 35-36.

[^43]: National Resort Communities, Inc. v. Cain, 512 S.W.2d 367 (Tex. Civ. App.—Austin 1974, writ granted) (evidence permitted a finding that the parties to the contracts intended to describe particular and identified tracts of land, ratification being a component element of the purchasers’ case against the vendor); Riebe v. Foale, 508 S.W.2d 175 (Tex. Civ. App.—Corpus Christi 1974, no writ) (land descriptions in the listing agreement and the sales contract were sufficient to satisfy the statute of frauds). See also Note, Contracts—Texas Allows Reformation of Land Contracts To Correct Statute of Frauds Deficiencies if Identity is Clear in the Minds of the Parties, 5 Tex. Tech L. Rev. 839 (1974), discussing Shotwell v. Morrow, 498 S.W.2d 432 (Tex. Civ. App.—Eastland 1973, writ ref’d n.r.e.).

[^44]: Paxton v. Spencer, 503 S.W.2d 637 (Tex. Civ. App.—Corpus Christi 1973, no writ), wherein it was held that the uncertainty as to the date of closing and time of payment under the contract was such that specific performance of the contract for the sale of real property was precluded.


[^47]: Id. at 258.

[^48]: But see Dickey v. Johnson, 513 S.W.2d 876 (Tex. Civ. App.—Eastland 1974, no writ), for a more lenient interpretation of seller’s obligations when the purchaser takes actions inconsistent with the contract.
following a similar pattern the court ordered specific performance of the contract for the sale of real estate in favor of the purchaser, holding that although the placing of a check payable to the sellers in an envelope left with the appropriate bank, rather than depositing cash with the bank as required by the terms of the contract of sale, was a breach of the contract, it was not a material breach justifying the sellers' refusal to convey the property. Still other purchasers sought an order requiring their sellers to execute a general warranty deed in the face of a claimed forfeiture for default in payments, the court holding that the rendering of summary judgment by the trial court was precluded by the existence of a disputed fact as to whether the sellers had entered into an agreement with the purchasers subsequent to the claimed forfeiture extending the time for payment of the balance due and thereby waiving the asserted forfeiture. In remanding the case for trial, the court reiterated the general disfavor with which forfeitures are viewed in connection with contracts for the sale of real property. In another suit involving the issues of rescission and waiver the court rejected the sellers' attempt to rescind the contract for the sale of their ranch on the basis of an alleged misrepresentation by the purchaser as to the zoning status of an exchange tract of land. The court reasoned that the sellers' acceptance of certain benefits under the contract had effectively waived the alleged misrepresentation.

Two decisions during the survey year involved suits by purchasers seeking specific performance of land contracts against the heirs of the original seller. In Roeber v. DuBose the seller had died after entering into the sales contract with the purchasers, but prior to executing a general warranty deed. The court ordered specific performance of the contract, with the exception that the seller's daughter, his sole heir, was permitted to execute a deed without warranty instead of the general warranty deed specified in the contract. The court cited no authority in support of its conclusion to dispense with a general warranty deed in this situation, and instead merely determined that it would be inequitable to require the heir to execute a general warranty deed since she should not be made to assume the risk of warranting title under a contract to which she was not a party. Although this author has found no cases directly in point, it would appear that the court's alteration of the contract terms is incorrect. In enforcing the contract, the court obviously required the purchaser to pay to the heir the full purchase price specified in the contract; however, after receiving a deed without warranty, the purchaser (or the purchaser's title insurer, if title was insured) ap-

51. "The remedy by rescission is not favored, and ... slight circumstances, when they may be properly treated as indicative of a purpose upon the part of the vendor not to insist on that remedy, may be treated as a waiver of the right to rescind, unless its maintenance becomes necessary to enable the vendor to enforce the payment of the consideration for which he contracted to sell the land...." Id. at 883, the court quoting from Moore v. Giesecke, 76 Tex. 543, 551, 13 S.W. 290, 293 (1890).
52. De Puy v. Bodine, 509 S.W.2d 698 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).
parently would have no claim against the heir for refund of the purchase price if title proved defective. Inasmuch as warranties of title are generally limited in amount by the amount of the purchase price, the heir would not have incurred any unfair risk of loss if the court had enforced the contract as written. Another case decided during the survey year, dealing with the obligation of the heirs of a seller to convey title, offers indirect support for the above conclusion that the Roeber contract embellishment was incorrect. In this case, the court ordered specific performance of an option to purchase contained in a lease made with the deceased lessor. The court required the lessor's heirs to convey title to the land to the lessee-purchaser, affirming, without analysis as to deed form (which evidently had not been questioned by the parties), the trial court's order requiring conveyance by general warranty deed.

Though already discussed adequately in prior law review commentaries, the decision of Allen v. Monk decided by the Supreme Court of Texas during the survey year, should be noted. In that case, the supreme court held that a purchaser could obtain specific performance of a written contract for the sale of a homestead executed only by the husband. The result is dictated by the recent repeal of statutes granting to the wife the privilege of retracting her consent to the conveyance prior to confirmation by her separate acknowledgment.

The means by which damages may be fixed upon a purchaser's breach of a contract to sell realty were at issue in two cases decided during the survey year. In Ashton v. Bennett the court upheld as valid a provision for treating an earnest money deposit as liquidated damages for the purchaser's anticipatory breach of a contract to sell oil and gas leases. Validation of the liquidated damages provision, however, was approved by the court only after a review of the instant fact situation and the supreme court's 1952 decision in Stewart v. Basey, where that court had adopted the following Restatement of Contract rule: "(1) An agreement, made in advance of breach fixing the damages therefor, is not enforceable as a contract and does not affect damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable

54. See Wiggins v. Stephens, 246 S.W. 84 (Tex. Comm'n App. 1922, opinion adopted); Comment, Damages for Breach of Warranty in a Deed, 19 Baylor L. Rev. 289 (1967). See also Tex. Prob. Code Ann. § 269 (1956) which states that "no one of such distributees shall be liable beyond his just proportion of the estate he shall have received in distribution."
57. 505 S.W.2d 523 (Tex. 1974).
58. Articles 1300, 6605, and 6608 of the Texas Revised Civil Statutes were repealed by the Texas Legislature as of January 1, 1968. Ch. 309, § 6, [1967] Tex. Laws 735.
59. See also Rich v. McMullan, 506 S.W.2d 745 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.), which was decided during the survey year and which followed the supreme court's decision in Allen v. Monk.
60. 503 S.W.2d 392 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).
61. 150 Tex. 666, 245 S.W.2d 484 (1952).
or very difficult of accurate estimation. The case of Redding v. Ferguson was significant for its holding that the contract price is not admissible to prove the value of the described land when the purchasers had never actually paid that price and, in fact, had never consummated the transaction. The court of civil appeals rejected two previous condemnation cases, Robards v. State and State v. Clevenger, as authority that unconsummated contracts are admissible as proof of value, distinguishing both from the instant case in that the contracts there held admissible were not between the same parties to the litigation and were not the same contracts out of which the litigation arose. To be sure, a distinction can be drawn between the Robards and Clevenger decisions and the instant case; nevertheless, it may be questioned whether the distinction is material inasmuch as the courts in the former cases emphasized repeatedly that the controlling question in determining admissibility was whether the proffered evidence constituted merely an unaccepted offer or whether it was a valid and binding contract merely lacking, for one reason or another, final consummation. In the instant case, because the trial court specifically found that the contract of sale was valid and binding, the contract of sale was not merely an unaccepted offer and accordingly should have been admitted as evidence of market value. As pointed out in the Robards decision, failure to consummate a contract or the fact that it has been rescinded, as well as all other attendant circumstances, should not completely preclude the admissibility of the contract price as evidence of market value, but rather should go to the weight which should be given the contract price as evidence of value.

Prospective purchasers were alerted by two courts during the year of potential risks that may arise from a lackadaisical follow-up of agreements to purchase real property. In Vallejo v. Romero the failure of the sellers to confirm in writing their oral lease-purchase option of a house caused the court to deny the enforceability of the option, with the court also finding insufficient evidence of improvements made by the tenants in reliance upon the oral option to remove the contract from the statute of frauds. In Willeford v. Walker the court reminded purchasers that financing "outs" in purchase contracts are not as absolute as many laymen believe. The admi-

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62. Restatement of Contracts § 339 (1932). But see Lane v. Holloway, 509 S.W.2d 894 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.), which perhaps implies that in a real estate joint venture a provision for forfeiture may be enforced if clearly set out in the agreement—and without regard to the Restatement rule.

63. 501 S.W.2d 717 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.). This was a suit by the seller for damages for the breach by purchasers of a contract for the sale of 2,000 acres of land.

64. 285 S.W.2d 247 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.).

65. 384 S.W.2d 207 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).


69. 499 S.W.2d 190 (Tex. Civ. App.—Corpus Christi 1973, no writ). This case involved an action by the vendors against the purchaser of their house to recover an earnest money deposit as liquidated damages, the vendors alleging the purchaser's breach of the contract through inadequate attempts to obtain financing.
tion was bolstered by the citation of *Nelson v. Jenkins* and *Huckleberry v. Wilson*, which stand for the proposition that by entering into a contract of sale where final consummation is contingent upon the purchaser's obtaining specified financing, the purchaser impliedly promises to pursue a loan application with reasonable diligence. The court in the *Willeford* case, however, did ultimately rescue the instant purchaser by finding that he had not been dilatory in pursuing his loan application.

**Conveyances.** Only one case decided during the survey year dealt with the validity or extent of warranties in property conveyances, and that decision merely followed the supreme court's 1968 ruling in *Humber v. Morton* that one who builds and sells new houses impliedly warrants that they have been constructed in a workmanlike manner and are suitable for human habitation. The question of warranties on new residential property has also received attention by the National Association of Home Builders which, in an effort to stem consumer dissatisfaction with the homebuilding industry, has instituted a Home Owners Warranty program which allows participating homebuilders to provide a relatively full package of express warranties to customers.

Finally, although not effective until June 20, 1975, the Real Estate Settlement Procedure Act of 1974, passed by the 93rd Congress at the conclusion of the survey year, will substantially alter closing procedures for one-to-four family residences which are purchased through "federally-related mortgage loans" (a term which is defined quite broadly in the Act). As of the date this Article goes to the printer, the Department of Housing and Urban Development has issued proposed rules for implementation of the Act, which include forms as well as procedural instructions. Essentially, the Act and proposed rules require advance notice to the consumer (twelve days in the proposed rules) of all closing costs. In addition, certain restrictions are placed on title companies, real estate brokers, lending institutions, and sellers to assure that the purchasing consumer has the opportunity to negotiate such closing costs.

**Regulation of Brokers Drafting Contracts.** The "Statement of Principles by The State Bar of Texas and the Texas Real Estate Commission" was accepted in final form by both participants on July 18, 1974. However, although meetings have been held by the Broker-Lawyer Joint Committee in an effort to activate the Statement of Principles with the promulgation of

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70. 214 S.W.2d 140 (Tex. Civ. App.—El Paso 1948, writ ref’d).
77. *See* Wallenstein, *supra* note 4, at 37-38, for a discussion of the evolution of these principles.
standard form real estate contracts,78 no such promulgation is likely in the near future.79

**Interstate Land Sales.** Although too complex for brief analysis in this Article, the reader should be cognizant of the 1974 guidelines80 and additional regulations81 to the Interstate Land Full Disclosure Act.82

**Brokerage.** As was true of the brokerage cases discussed in the 1974 Property Article, questions of statutory construction again were prominent in determining the rights of real estate brokers and salesmen. In one such case, *Avent v. Stinnett,*83 the court was called upon to construe the license exemption provisions of the Real Estate License Act.84 The plaintiff brought suit to recover the balance of a commission claimed to be owed to him for his services in procuring a purchaser for the defendants' ranch, it being undisputed that the plaintiff was not licensed under the Act. The plaintiff claimed exemption from the Act under section 6(1), which provides: "The provisions of this Act shall not apply to the advertising, negotiation or consummation of any purchase, sale, rental or exchange of . . . real estate by any person, firm, or corporation when such person, firm, or corporation does not engage in the activities of a Real Estate Broker as an occupation, business or profession on a full or part-time basis."85 The court found the exemption inapplicable to the plaintiff. Another decision requiring statutory construction86 involved an action by the purchasers of a house against the broker-seller (being one and the same person) for damages on the basis of a false representation made to the purchasers by another real estate agent with whom the property had been listed. The court held that although at common law a real estate agent's status as a special agent precluded him from binding his principal by his false representations as to the property,87 section 27.01 (b) of the Texas Business and Commerce Code88 now provides that a person who makes a false representation and a person who benefits from it are jointly and severally liable.

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78. The first meeting of the joint committee was held November 20, 1974, in Austin, Texas. The secretary of the meeting was William W. Gibson, Jr., Professor of Law, The University of Texas School of Law.

79. Nevertheless, broker-lawyer "teams" were designated to draft special forms for the following types of residential real estate contracts: assumption contracts; VA/FHA contracts; existing homes (new loan or cash consideration); and new home/townhouse.


83. 51 S.W.2d 89 (Tex. Civ. App.—Amarillo 1974, no writ).

84. *TEX. REV. CIV. STAT. ANN.* art. 6573a (1967). Note: Effective May 19, 1975, this Act has been totally rewritten by Senate Bill No. 344, signed into law on that date.

85. Ibid., art. 6573a, § 6(1) (1967).


88. *TEX. BUS. & COMM. CODE ANN.* § 27.01(b) (1968).
Another interesting case involving brokers' commissions was *Anderson v. Griffith*, in which the sellers sued the broker for recovery of a commission paid to the broker, as well as for profits realized by the broker in a subsequent resale of the land. In this case the sellers had entered into an agreement whereby, according to the facts accepted as correct by the court, the defendant became their real estate agent and the purchaser of their land in his capacity as a "Trustee" for an undisclosed principal. However, prior to the time of such agreement, the defendant had negotiated with various parties to arrange for a personal profit to himself after obtaining the property from the sellers. The court held that the defendant had forfeited his right to the contractual commission by breaking his fiduciary obligation as agent to the sellers, that is by failing to disclose his extraneous negotiations for his own account. Moreover, relying upon the 1942 supreme court decision in *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, the court further required the defendant to pay to the sellers his profit in the reconveyance. Although probably correct in light of its accepted facts, the *Anderson* decision should serve as a warning to real estate brokers who attempt to "tie-up" a property by executing a contract themselves as both broker and purchaser. A provision should be included in the contract which negates the possibility of a fiduciary relationship with the seller.

In *Jackson v. Williams*, one of three cases where brokers sought their commissions from their principals on common law principles of contract, the broker had secured a purchaser for the property, contingent on the purchaser's securing an appraisal of the property equal to the purchase price. Although the seller had instructed her broker not to return the purchaser's earnest money without first obtaining a written appraisal valuing the property at less than the purchase price, the broker had returned the earnest money after receiving incorrect oral information that the appraisal was inadequate. The seller did eventually close the sale after litigating the enforceability of the contract. The court, with one judge dissenting, held that the broker was not entitled to a commission on the conveyance. The majority opinion in the case held that an agent is not entitled to compensation for services after a violation, although innocent, of his principal's instructions. By way of dictum, the opinion further held that this rule would apply even if the agent's disobedience resulted in no substantial harm to his principal's interest. A concurring opinion would have declared the applicable legal principle to be that by returning the earnest money the broker had ceased her efforts to procure a purchaser, and therefore would not be entitled to a commission when the sale was independently made by the seller, even if to the same purchaser. The converse of *Jackson v. Williams* was presented

89. 501 S.W.2d 695 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).
90. 138 Tex. 565, 160 S.W.2d 509 (1942).
91. 510 S.W.2d 645 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).
92. The court quoted with approval from RESTATEMENT (SECOND) OF AGENCY §§ 385, 469 (1958).
93. 510 S.W.2d at 647 (Keith, J., concurring). The case of Air Conditioning, Inc. v. Harrison-Wilson-Pearson, 151 Tex. 635, 639-40, 253 S.W.2d 422, 425 (1952), formed the basis for this proposition.
in *Knight v. Hicks*,4 where the court found the broker entitled to his commission despite his failure to comply with a statutory provision requiring brokers to advise the purchaser in writing of the need to have the abstract examined or to obtain title insurance.5 After acknowledging that the question was one of first impression as to the construction of this statute, the court rendered an equivocal holding, that the broker's failure to advise the purchaser in accordance with article 6573a is to be excused "if [as the unique facts of this case showed] he is precluded from doing so by the act of the seller in dealing directly with the buyer."6

In a final decision during the survey year7 involving an action for a brokerage commission, the potentially noteworthy feature of the court's opinion was its holding that the plaintiff was entitled to recover attorney's fees upon the successful conclusion of her case. The court's statement, that "it is well settled that a suit where recovery is sought for personal services on labor rendered will entitle one under Article 2226 to attorney's fee[s] even if the suit is for breach of a special contract,"8 appears to be a somewhat broader statement of the law than that found in other cases.9

The 1974 Property Article analyzed several recent developments in securities regulation affecting the form of brokerage often referred to as "syndication."10 There was no important litigation in Texas in this area during the survey year;11 however, several important administrative developments did occur. On May 24, 1974, the State Securities Board of Texas adopted a "final" version of its Guidelines for the Registration of Real Estate Programs (two letter requests have been issued subsequent to such adoption suggesting possible future amendments). The federal Securities and Exchange Commission (SEC) also made several changes in the rules and guidelines

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4. 505 S.W.2d 638 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e).
8. *Id.* at 893.
10. Wallenstein, *supra* note 1, at 40-42.
interpreting the federal securities acts, which changes will have a substantial effect on real estate transactions. For example, the SEC adopted rule 146, regulating exemptions from SEC registration under the category of the "private offering," and rule 147, regulating exemptions from SEC registration under the category of the "intrastate offering." In addition the SEC issued the proposed Guide which was formulated to regulate the content and form of registration statements relating to interests in real estate limited partnerships—and by implication providing a guide for "private offering" memorandums which must include the same information as an investor would have received in a registration statement. These extremely important administrative rulings, too complex for brief analysis in this Article, have been reviewed quite adequately in other commentaries.

III. DEVELOPMENT: FINANCING AND CONSTRUCTION

Public Law 93-501. Responding to record levels of interest rates for loans during the survey year, the 93rd Congress passed Public Law 93-501, amending until July 1, 1977, various sections of the United States Code to permit the contractual interest rate in certain "business or agricultural loans in the amount of $25,000 or more" to be as high as "5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district where the . . . [bank, institution, small business investment company] is located." The new law, effective October 29, 1974, also expressly supersedes any state law to the contrary unless such state law is passed subsequent to October 29, 1974.

111. "The amendments made by this title shall apply to any deposit made or obligation issued in any State after the date of enactment of this title, but prior to the earlier of (1) July 1, 1977 or (2) the date (after such date of enactment) on which the State enacts a provision of law which limits the amount of interest which may be charged in connection with deposits or obligations referred to in the amendments made by this title." Pub. L. No. 93-501, § 304 (Oct. 29, 1974).
Certainly welcome in the commercial marketplace (but, unfortunately, tending to discriminate against insurance companies, real estate investment trusts, and other lending institutions which are not covered by the law), the new law nevertheless contains several ambiguities which will likely keep the commentators guessing educatedly for the duration of its existence.\footnote{112}

**Usury Cases.** The cases of *W. E. Grace Manufacturing Co. v. Levin*\footnote{113} and *Imperial Corp. of America v. Frenchman's Creek Corp.*,\footnote{114} discussed in the 1974 Property Article,\footnote{115} may well be labelled the “lull before the storm” as to that area of Texas usury law which relates to the “spreading” of front-end charges.\footnote{116} These cases created the impression that courts would give due recognition to “savings clauses” in loan documents and would refuse to charge lenders with the entirety of their front-end charges in the initial period of the loan term.\footnote{117} The cases of *Southwestern Investment Co. v. Hockley County Seed & Delinting, Inc.*\footnote{118} and *Riverdrive Mall, Inc. v. Larwin Mortgage Investors*\footnote{119} decided during the survey year, constituted a “storm” of such intensity that the “lull after the storm” may well have been characterized by the absence of commercial loan transactions in this state.\footnote{120} In the *Hockley* decision the lower court, although deciding the case correctly on its facts, incorrectly infused into its opinion (1) an implied denial of “spreading” over even a one-year period, and (2) a failure to distinguish between the effects of fluctuating interest rates during the loan term and the effects of front-end charges at the beginning of the loan term. The supreme court, responding to a large number of amicus curiae briefs submitted to it requesting clarification of both issues, refused error with a per curiam “n.r.e.” opin-
ion carefully worded in order to render the lower court's opinion ineffectual as to both components of its breathtaking dictum. Unfortunately, in the Riverdrive Mall decision, rendered before the supreme court's per curiam opinion in the Hockley case, the court of appeals relied heavily on the Hockley dictum in making similar gratuitous commentaries on the Texas usury laws, and upon remand the trial court rendered judgment on the basis of such commentaries. The progress of this case will be watched carefully by all lenders having current loans in this state.\textsuperscript{121} A few other cases decided during the survey year in the area of usury regulation deserve footnote mention,\textsuperscript{122} as do two excellent student commentaries published during the survey year.\textsuperscript{123}

Mortgages. As has been true in previous years, mortgage litigation during the survey year involved the usual volume of challenges to foreclosure. The fact that it is fairly easy to stall a foreclosure sale was again made evident by at least one decision during the year,\textsuperscript{124} where the court refused to find that the trial court had abused its discretion in granting a temporary injunction against a foreclosure (in this case, on the basis of an allegation that no default in payment existed on the indebtedness). The principle of waiver operated in another case\textsuperscript{125} to bar the seller's assertion of forfeiture under a contract for the sale of realty. The seller's consistent past conduct of accepting late payments of monthly installments under the contract, in light of the attendant circumstances, made the court's decision an easy one in holding that the right of forfeiture had been waived, particularly so when there were no delinquent installments at the time the seller finally undertook to effect the forfeiture. In Jeffrey v. Bond\textsuperscript{126} the supreme court was confronted with a foreclosure situation, the outcome of which depended to some extent on the applicability of the doctrine of merger. The court held that when one of two cotenants of real property pays a mortgage debt and receives an assignment of the note and mortgage, such mortgage is not lost by merger of

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\item\textsuperscript{121} In light of Mr. Justice Douglas' recommendations, Douglas, \textit{Law Reviews and Full Disclosure}, 40 \textit{WASH. L. REV.} 227 (1965), the author wishes to point out, with respect to his conclusions accompanying this and the immediately preceding footnotes, that his law practice includes representation of both real estate lenders and real estate developers.
\item\textsuperscript{124} Miller v. A-OK Motel, Inc., 511 S.W.2d 620 (Tex. Civ. App.—Fort Worth 1974, no writ).
\item\textsuperscript{125} Jordan v. Crockett, 511 S.W.2d 618 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).
\item\textsuperscript{126} 509 S.W.2d 563 (Tex. 1974).
\end{enumerate}
the cotenant's legal and equitable interests. On the basis of prior authority, the court found that the cotenant who paid the mortgage in full was entitled to foreclosure and sale of the land, as well as to priority in the collection of his debts as against an intervening lienholder.128

Numerous decisions during the survey year involved the validity of the foreclosure proceedings themselves. In two federal court decisions, both discussed in the 1974 Property Article, the courts held that non-judicial foreclosures do not constitute "state action" sufficient to support federal jurisdiction since they are consummated pursuant to a private contractual arrangement.131 In Hutson v. Sadler the court upheld the validity of a non-judicial foreclosure sale against a claim that the notices had not been posted for the statutory twenty-one days prior to the sale. In a well-reasoned and well-documented opinion, the court held that in computing the length of time for which notice must be posted, the day of posting may be included when the day of sale is excluded. The Hutson case is apparently the first state decision to rule precisely on this issue, and although the difference of one day may seem insignificant, in light of current market conditions, it may very well serve to provide the additional time needed for "eleventh-hour" negotiation.

The principle that a foreclosure sale will not be voided merely because the property was sold for a price well below its fair market value was reiterated in three cases decided during the survey year. The court in one of the cases emphasized the rule that in order to support a request to set aside a foreclosure sale: "(1) There must be irregularity calculated to affect the sale; and (2) The irregularity must be coupled with a grossly inadequate pur-

128. The court in Jeffrey v. Bond also noted the principle set forth in Hodges v. Roberts, 74 Tex. 517, 12 S.W. 222 (1889) that "any person capable of contracting may create a lien on his property to secure the debt of another without subjecting himself to any further obligation than the lien contract gives."
130. Wallenstein, supra note 1, at 63-64.
133. TEX. REV. CIV. STAT. ANN. art. 3810 (1966) provides, in part, that "[n]otice of such proposed sale shall be given by posting written notice thereof for three consecutive weeks prior to the day of sale.
134. The court did acknowledge certain inconsistent dicta in Cawley v. Security State Bank & Trust Co., 126 S.W.2d 715 (Tex. Civ. App.—Beaumont 1939, writ ref'd); however, as the instant court pointed out, such dicta was in fact inconsistent within itself, since the court had miscalculated the number of days for which notice had been posted.
135. Biddle v. National Old Line Co., 513 S.W.2d 135 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (the note was in the principal sum of $235,000.00 and the property was sold for $100,000.00); Delley v. Unknown Stockholders of the Brotherly and Sisterly Club of Christ, Inc., 509 S.W.2d 709 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); a deed of trust covering 70% of the property secured a note which was in the principal sum of $2,000.00, and the 70% interest in the property was sold for $500.00); Brimberry v. First State Bank, 500 S.W.2d 675 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.) (the evidence indicated the property had a fair market value ranging between $19,200.00 and $40,000.00, and the property was sold for $3,000.00).
However, in a fourth case during the year involving claimed irregularities and inadequacy of the selling price, this time in an execution sale, the court held that the sale was properly set aside. In that case, the court acknowledged the general rule quoted above but determined that the case fitted within the exception that "where there is inadequacy of price and a prompt offer to pay off the indebtedness, equity will step in and set aside the sale." In setting aside the sale on this basis, the court also gave a quite liberal interpretation of the word "prompt" in holding that an offer two and one-half months subsequent to the execution sale constituted a sufficiently prompt offer.

In a case dealing with the disposition to be made of excess proceeds subsequent to a foreclosure sale on 206 acres of land, one claimant having a subordinate interest in 205 acres and the other having a subordinate interest in the remaining one acre, the court held that a pro rata sharing in the excess proceeds on the basis of acreage was appropriate. It might be argued that the court should have considered the fair market values of the respective tracts in determining the basis of sharing by each claimant, especially as much as the one-acre tract in this case appeared to be considerably more valuable than 1/205th of the value of the 205-acre tract. In another case involving derivative claims, the court held that the grantee's acceptance of a deed containing an assumption clause in favor of a gas company created a vendor's lien in favor of that company.

In *Evans v. Steiner* summary judgment was held to have been improperly rendered by the trial court, since a material issue of fact remained in controversy as to whether the mortgagor's homestead had been included in a deed of trust, and, therefore, included in the judgment at foreclosure. The court noted prior authority to the effect that a lender cannot disregard the mortgagor's long-time residence on a tract of land, notwithstanding the mortgagor's declaration that another tract of land constitutes his homestead.

**Claims of Mechanics and Materialmen.** The Supreme court in *First National Bank v. Whirlpool Corp.* rendered a noteworthy opinion with respect to the qualification of certain removable improvements for the lien provided by the mechanic's lien laws. The court held that the supplier was entitled
to a preferential mechanic’s lien (that is, in preference to a prior-recorded mortgage) with respect to the dishwashers and disposals which it had installed, but not with respect to the refrigerators and ranges. In the first part of its opinion, the court reviewed the manner of installation of the respective appliances in order to determine which ones qualified for statutory mechanic’s lien protection. Inasmuch as each disposal and dishwasher had been physically fastened to the adjacent wall, principally through the use of screws, the court found a sufficient incorporation in the realty to give rise to the statutory mechanic’s lien, which, as the court stated, encompasses only “realty and such personal property as has been incorporated in or consumed in the construction or repair thereof or delivered for such purposes.”\(^{145}\) However, no mechanic’s lien was deemed available with respect to the refrigerators and ranges since they were in no way connected to the realty beyond the fact that their cords were plugged into electrical wall outlets\(^{146}\) (a fact of installation which may well change as the *Whirlpool* case is reviewed by suppliers). Secondly, the court determined that a constitutional mechanic’s lien\(^{147}\) was not available with respect to any of the appliances, the court holding that such a lien is available with respect to manufactured chattels only when the articles are made especially for a purchaser pursuant to a special order and in accordance with the purchaser’s specifications. Finally, the supplier’s statutory lien with respect to the disposals and dishwashers was held to have priority over the prior-recorded mortgage on the principle that “a mechanic’s and materialmen’s statutory lien upon improvements made is superior to a prior recorded deed of trust lien where the improvements made can be removed without material injury to the land and pre-existing improvements, or to the improvements removed.”\(^{148}\)

Another noteworthy decision during the survey year, *Alpert v. Jarrell Carpentry Co.*\(^{149}\) involved the frequently litigated question of whether a contractor, who recovers through litigation the contract sum specified in a contract for repairs and remodeling of real property, is entitled also to recover attorneys’ fees under article 2226 of the Texas Revised Civil Statutes.\(^{150}\) In

\(^{145}\) 517 S.W.2d at 266.

\(^{146}\) These items were, of course, subject to a security interest under the Texas Business and Commerce Code; however, the supplier had not perfected the security interest in a manner which would have enabled it to obtain superiority over a prior-recorded mortgage.

\(^{147}\) TEX. CONST. art. XVI, § 36.

\(^{148}\) 517 S.W.2d at 269, citing *Sunnerville v. King*, 98 Tex. 332, 83 S.W. 680 (1904); Parkdale State Bank v. McCord, 428 S.W.2d 121 (Tex. Civ. App.—Corpus Christi 1968, writ ref’d n.r.e.), noted in Stalcup & Williams, *Property, Annual Survey of Texas Law*, 23 SW. L. J. 29, 34-35 (1969); Freed v. Bozman, 304 S.W.2d 235 (Tex. Civ. App.—Texarkana 1957, error ref’d n.r.e.). *But see Kaspar v. Cockrell-Riggins Lighting Co.*, 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ), which serves as a reminder to materialmen that their liens will be defeated if identification and segregation of the items supplied is not possible. In the *Kaspar* case, the claimant had supplied lighting and other fixtures to a general contractor who used the materials in the construction of an apartment complex. The supplier’s lien claim was denied because its materials could not be distinguished from similar materials furnished by other suppliers.

\(^{149}\) 510 S.W.2d 136 (Tex. Civ. App.—Dallas 1974, no writ).

\(^{150}\) TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1974), which provides:
denying attorneys' fees in this case, the court relied heavily on the 1970 supreme court opinion in Tenneco Oil Co. v. Padre Drilling Co.,\textsuperscript{151} and held that the contractor's suit was not "for purely personal services or for labor only," or for "material furnished," but was "based primarily upon a contract for a product or for a general service."\textsuperscript{152} The court found significant the fact that the painting and carpentry work billed to the property owner did not constitute a "personal service" rendered to him nor "labor done" for him, but rather constituted personal service rendered to and labor done for the contractor itself by its workmen. Similarly, the court noted that the materials had been furnished to the contractor, not the property owner. Moreover, in its final analysis, the court held that even if the 1971 amendments to article 2226 had broadened the statute to permit the recovery of attorneys' fees in a suit for "personal services rendered" and "labor done" by employees of the claimant, the amendments could not be construed as permitting attorneys' fees in a suit on a contract "for a product or a general service" (emphasis added) as distinguished from "personal services rendered" or "labor done." It is submitted that the court's opinion does not give proper effect to the 1971 amendments to article 2226, although quite likely the fault lies not with the court but with the statute in its overly technical delineation of qualified classes of claimants. The 1971 amendments to article 2226 added the words "corporation, partnership, or other legal entity" after the initial words "any person," and deleted the word "personal" which had previously modified "services rendered." These changes probably demonstrate the legislature's intention to adopt a policy similar to that proposed in the concurring opinion in the Tenneco decision, in which two justices expressed the view that a corporation or other legal entity should be permitted to recover attorneys' fees when the claim is for labor done or services rendered by such entity, through its employees, to the property owner. However, the deletion of the word "personal"—which is never expressly acknowledged in the Jarrell opinion—also appears to lessen the former rigorous requirement that services be rendered directly for the property owner. In fact, in Clark Advertising Agency, Inc. v. Tice\textsuperscript{153} the United States Court of Appeals for the Fifth Circuit reached that very conclusion. Had the court in Jarrell given full recognition to this deletion, the instant contractor might have been entitled to attorneys' fees. However, as the court pointed out, its decision, like many decisions construing the article, necessarily rested on narrow technical grounds since the statute selects certain classes of litigants for favored treatment without "any consideration of

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Any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation for services rendered, labor done, material furnished . . . may present the same to such persons or corporation . . . and if, at the expiration of 30 days thereafter, the claim has not been paid or satisfied, and he should finally obtain judgment for any amount thereof . . . he may . . . also recover, in addition to his claim and costs, a reasonable amount as attorney's fees.
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\textsuperscript{151} 453 S.W.2d 814 (Tex. 1970).
\textsuperscript{152} 510 S.W.2d at 141.
\textsuperscript{153} 490 F.2d 834, 837-38 (5th Cir. 1974).
whether fairness and justice would permit an award of attorneys' fees to one successful litigant and deny it to another." Moreover, the court in Jarrell should at least be commended for its refusal to base its decision on the unworkable distinction between a suit on a "special contract" and a suit for the value of labor and materials as the critical question in determining the merit of claims for attorneys' fees, a distinction apparently rejected by the Tenneco decision.

Several cases decided during the survey year involved the role of bonds in mechanics' and materialmen's lien litigation. In Sherwin-Williams Co. v. American Indemnity Co. the materialman sought to recover for painting materials furnished and to foreclose its materialmen's lien on an apartment project in a suit against the property owner, the original contractor, and a subcontractor. Subsequently, the materialman sought to join the original contractor's surety as a defendant. The supreme court held that the attempted joinder of the surety was timely since the shorter limitation period applicable to bonds meeting the requirements of the "Hardeman Act" (the common name given to the applicable statutory provisions) did not apply because the surety bond in this case was not a Hardeman Act bond. The court held that in light of a substantial defect in the amount of the bond, the provision in the bond reciting that it was executed in attempted compliance with the statute was insufficient to bring the bond within the statute's requirements. A vigorous dissenting opinion in this case pointed out that the legislature had clearly expressed its intent in section 8 of article 5472d to have any bond treated as a Hardeman Act bond which "by its express terms evidenc[e] its intent to comply with this Article." In fact, the majority opinion may have been unnecessarily strict in neglecting the obvious legislative intent, which would appear to have brought the instant bond within the terms of the statute.

Finally, three cases decided during the survey year examined the effect of this state's mechanic's lien laws on voluntary protection contracted for the benefit of subcontractors. In Johnson Service Co. v. Transamerica Insurance Co. the court concluded that although a contractor provides a payment


155. But, as a demonstration of the illogical complexity in this area of the law, see Clark Advertising Agency, Inc. v. Tice, 490 F.2d 834, 838-39 (5th Cir. 1974), in which after acknowledging the deletion of the word "personal" from article 2226, the court appears to assume that the "special contracts" doctrine is still valid in Texas.

156. 504 S.W.2d 400 (Tex. 1973), noted in 52 Texas L. Rev. 1447 (1974).


158. Id. art. 5472d.

159. After a quite thorough and perceptive analysis of this case, a student author concluded: "By holding article 5472d inapplicable in Sherwin-Williams, the majority inadvertently denied subcontractors the assurance that their claims would be paid and undermined their statutory protection. The court obfuscated the applicability of article 5472d, confused owners and subcontractors alike about the scope of protection afforded by nonconforming bonds, permitted Sherwin-Williams to recover even though it delayed in filing its claim, and ignored one of the primary goals of the statute—the insulation of the owner's property from liability to aggrieved subcontractors." Note, note 156 supra, at 1459.

160. 485 F.2d 164 (5th Cir. 1973), noted in 6 St. Mary's L.J. 266 (1974) (in which
bond in compliance with the Hardeman Act, such bond does not preclude the subcontractor's action against another bond furnished voluntarily (in this case, in order to comply with federal law) by the owner on the same project. In Lesikar Construction Co. v. Acoustex, Inc. the court allowed a subcontractor to recover against a general contractor and its bonding company and refused to condition the contractor's recovery on a contractual provision requiring that the subcontractor furnish the general contractor with an affidavit showing that all bills for labor and materials had been paid. And in Corpus Christi Bank & Trust v. Smith the court held that subcontractors and materialmen were entitled to contractual retainage funds in cases where the "final payment" provision of the construction contract between the original contractor and the owner (in this case a municipality) evidenced a clear intent to make them third party beneficiaries of such construction contract. Hopefully, the supreme court, which has granted writ of error in the Corpus Christi Bank case, will analyze the very careful reasoning of each of these three courts (as well as a 1971 decision by the same appellate court which rendered the Corpus Christi Bank decision) and will synthesize them into a clear exegesis of this area of the law.

IV. PUBLIC AND PRIVATE RESTRICTIONS ON LAND USE

Federal Restrictions. Calendar year 1974 ended with a sense of "mark time" in connection with the "advancing procession of federal land use controls" described in the 1974 Property Article. For example, the proposed federal legislation to have been entitled the "Land Use Policy and Planning Assistance Act," which had passed the Senate in 1973, stalled and expired (at least temporarily) in the House of Representatives. As for the Environmental Protection Agency (EPA), the beginning of the year saw it accelerate the previous year's activities in land-use and parking-management control by preparing (1) regulations, and then modifications to such regulations, in connection with the review and restriction of "indirect sources" of pollution; (2) a set of technical pamphlets, entitled "Interim Guidelines for the

the student author concur with the court's opinion), and 52 TEX. L. REV. 773 (1974) (in which the student author disagrees with the court's opinion).

162. 509 S.W.2d 877 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.).
166. See the discussion of this Act at Wallenstein, supra note 1, at 55-56.
167. Id. at 54-55.
Review of the Impact of Indirect Sources on Ambient Air Quality” and (3) proposed parking-management rules for implementing the previous year’s “transportation and land use control” regulations. Just as in 1973 when the EPA had introduced the concept of an “indirect source” of pollution (such as certain types of shopping centers and other real estate developments), so in 1974 in the “parking-management” rules the EPA introduced the concept of reducing “vehicle miles traveled” (VMT); and this year’s newcomer was no less of a bombshell. In fact, the EPA’s “parking-management” contribution to the law of environmental control, if sustained, could have a far more serious effect on real estate development than its “indirect source” regulations. Whereas the “indirect source” regulations are currently limited in scope to the reduction of local carbon monoxide concentrations, primarily through engineering design to promote more efficient traffic flow and less stop-and-go driving, the “parking-management” rules with their emphasis on VMT would, for example, require shopping center developers covered by such rules to submit scientific data, a market analysis, or some other quantitative study “illustrating that customers will travel shorter distances to stop than they would if the new facility were not constructed.”

However, the development of these regulations by the EPA was at least temporarily halted by the United States Court of Appeals for the Fifth Circuit, and even by the EPA itself.

172. “In order to achieve the applicable standards [i.e., National Ambient Air Quality Standards], it is also necessary to develop and implement transportation controls which both reduce emissions from in-use vehicles on the road and reduce the vehicle miles traveled by the vehicles in the affected area.” 39 Fed. Reg. 30440 (Aug. 22, 1974) (emphasis added). Inasmuch as the type of automobile travel (whether continuous or stop-and-start) has a considerable impact on the type and concentration of pollutants emitted from the automobile, the above conclusion by the EPA has been subjected to serious challenges.
173. ICSC State Environmental Action Committee Bulletin, EPA Issues Proposed Amendments to Parking Regulations (Aug. 28, 1974). In this author’s opinion, the International Council of Shopping Centers (ICSC) has developed the most sophisticated framework of information gathering and political action resources of any real estate organization which monitors environmental developments.
174. In Texas v. Environmental Protection Agency, 499 F.2d 289 (5th Cir. 1974), noted in 60 A.B.A.J. 1439 (1974), the Fifth Circuit postponed implementation of the “Texas Plan,” see note 170 supra, until further ambient air quality data had been assembled in connection with air quality controls imposed by the Texas Air Quality Control Board. But see Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390 (5th Cir. 1974), cert. granted, 417 U.S. 942 (1974) (No. 73-1742), noted in 52 TEXAS L. REV. 1217 (1974), in which the EPA’s approval of the State of Georgia implementation plan was rejected.
175. In the Agricultural-Environmental and Consumer Protection Appropriation Act of 1975, Pub. L. No. 93-563, § 510, 88 Stat. 1822, advocates of EPA “mark time,” led to a considerable degree by Congressman Bob Casey of Houston, were successful in adding the following provision: “No part of any funds appropriated under this Act may be used by the Environmental Protection Agency to administer any program to tax, limit, or otherwise regulate parking facilities.”
176. On December 23, 1974, the EPA announced its suspension of indirect source implementation procedures until further notice. It also stated that facilities which are
Finally, in two opinions issued during the year, the Attorney General of Texas advised the Texas Air Quality Control Board that it had no current authority to assist the EPA in enforcing the federal law.177

Local Restrictions. A frequently raised issue in zoning cases is whether a particular rezoning of a small area constitutes unwarranted “spot zoning.”118 In Burkett v. City of Texarkana179 certain property owners challenged as “spot zoning,” a rezoning ordinance which had changed the classification of a city block from a single-family residential district to a two-family residential district to permit duplexes. The question presented on appeal was whether the trial judge had abused his discretion in denying the temporary injunction sought by the plaintiffs. After defining “spot zoning” to be a “process of singling out a small parcel of land for a use classification different and inconsistent with that of the surrounding area, for the benefit of the owner of that parcel and to the detriment of the rights of other property owners,”1180 the court emphasized that the amendatory zoning ordinance did not on its face demonstrate that it was passed either for the benefit of a particular property owner or to the detriment of other property owners. The court therefore concluded that the trial judge had not abused its discretion in denying the temporary injunction; however, it pointed out to the plaintiffs that they still would have an opportunity for a trial on the merits if they pursued an action for permanent injunction. In a second “spot zoning” case, Thompson v. City of Palestine,181 a would-be shopping center developer was not successful. The lower court had upheld the zoning change of the developer’s 4.1-acre tract, concluding after an extensive analysis of the relevant law that a change in the condition of an area is not a prerequisite to a change in zoning as long as the amendatory zoning “bears a reasonable relation to the general welfare, to an ordered plan of development and does not constitute spot zoning . . . .”182 The supreme court, apparently determining that the last category of the lower court’s guidelines begged the question of the case, stated that any presumption of validity normally given to city ordinances “disappears if it is shown that a city acted arbitrarily rather than on the basis of changed conditions.”1183

179. 500 S.W.2d 242 (Tex. Civ. App.—Texarkana 1973, writ ref’d n.r.e.).
180. Id. at 244.
181. 510 S.W.2d 579 (Tex. 1974).
183. 510 S.W.2d at 582. The supreme court relied primarily on Hunt v. City of San Antonio, 462 S.W.2d 536 (Tex. 1971), noted in 26 Sw. L.J. 213, 219-20 (1972).
In contrast to the Thompson case, the principle of judicial deference to the zoning power of municipalities was evidenced both at the state and federal court levels during the survey year. In Charlestown Homeowners Association v. LaCoke, for example, the trial court had upheld a zoning change of a thirty-five-acre tract from “residential” to “planned development,” concluding that it must defer to the decision of the zoning authority if reasonable minds might differ as to whether the particular zoning regulations had a substantial relation to the public health, safety, morals, or general welfare. The appellate court affirmed, holding that because the evidence raised such reasonable differences of opinion, resolution of the question lay within the discretion of the legislative agency rather than the courts. The opinion is replete with language to the effect that the legislative agency “could have” reasonably concluded that the zoning change was unwarranted. Such language should alert property owners to the concept of judicial deference in the area of zoning, thus making it imperative that they present their strongest and best arguments to the applicable agency. Similarly, in Blackman v. City of Big Sandy the federal district court acknowledged that local zoning is not subject to federal court review unless the complaining property owner can show that the zoning is arbitrary and capricious.

The effect of zoning ordinances on restrictive covenants running with the land was analyzed in the case of City of Gatesville v. Powell. In that case the plaintiff’s property, already subjected to restrictive covenants limiting the use of the property to residential or commercial purposes, was included in a new zoning ordinance which further limited the property to residential use. The plaintiff challenged the zoning ordinance and obtained a judgment from the trial court to the effect that the zoning ordinance was invalid with regard to the plaintiff’s lands because it would destroy the existing restrictive covenants. In a well-reasoned opinion, the appellate court held that when a zoning ordinance restricts the use of property more than has already been done by existing restrictive covenants, the zoning should be given full effect since it does not adversely affect the existing restrictive covenants.

In a case involving a mandamus action to compel issuance of a building permit, the property owner succeeded at trial only to be reversed upon appeal. In City of Dallas v. Crownrich the Dallas Department of Planning and Urban Development proposed in March 1972 that a certain area be designated an historic district, restricting future development. In June 1972 the city council instructed the planning department to prepare an historical preservation ordinance to effectuate that proposal. In January 1973 the city planning commission recommended that such ordinance be enacted, and on February 1, 1973, the planning commission conducted a public hearing on

184. 507 S.W.2d 876 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).
185. 377 F. Supp. 771 (E.D. Tex. 1974). The facts of that case do indicate a certain planned course of action by the City of Big Sandy to prevent the plaintiff from selling liquor from his property. In fact, the plaintiff may have been more successful in state court where he would not have had to prove a federal question as well as illegal zoning changes.
186. 500 S.W.2d 581 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).
187. 506 S.W.2d 654 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).
this recommendation. On February 9, 1973, the plaintiff applied for a building permit to construct a high rise apartment building on his property in the area under study. Subsequently, on March 12, 1973, the city council passed an ordinance which authorized the city to rezone certain historical areas, including the area in question, such rezoning to have the effect of prohibiting the destruction of any building with historic, architectural, or cultural importance. The ordinance also granted to the zoning authority the power to regulate the erection of new buildings in an historic area. A week later the city council passed a resolution prohibiting the issuance of building permits in a certain zoning classification (to which the plaintiff's property belonged) until the question of historic preservation could be resolved. On April 10, 1973, the plaintiff filed a petition for writ of mandamus seeking to compel the issuance of a building permit, and the following month the trial court granted his writ and directed the chief building inspector to issue a permit for the plaintiff's highrise. The appellate court reversed, noting that even though no zoning ordinance had been enacted at the time of the plaintiff's application for a building permit, a city under the authority of its police power could maintain the status quo of an area when a zoning plan is under consideration or pending at the time a party applies for a building permit. The court also held that an applicant obtains no vested right by merely filing for a building permit and that he is therefore subject to a zoning ordinance adopted after the filing of his application. The court reasoned that the process of passing zoning ordinances can require a substantial amount of time and that it would be inconsistent with the grant of the zoning power to cities to allow individuals to circumvent proposed zoning by rushing for a building permit before rezoning could take effect. However, the court's holding was limited to the denial of building permits for a reasonable period of time and only if the proposed zoning was contemplated before the application for a permit. 188

A conflict between a city's zoning power and the rights of a school district was the question in dispute in Austin Independent School District v. City of Sunset Valley 189 where the supreme court held that a city was without power to prevent totally the location of school facilities within its borders by use of zoning regulations. In reversing the lower court, the supreme court first distinguished the instant case from cases cited by the city, involving the issue of whether a school district must comply with zoning ordinances dealing with building regulations. The court noted that such cases turned on the police power of the city to enforce necessary health and safety regulations related to construction and that no such regulations were present in the instant case. The court concluded that while a city may validly subject a school district's

188. Although this instant case appears to have been a good "test case" for the city, the rule of law espoused by the court is not universally accepted. See Cooper v. Dubow, 342 N.Y.S.2d 564 (2d Dept. 1973); Annot., Retroactive Effect of Zoning Regulation, in Absence of Savings Clause, on Pending Application for Building Permit, 50 A.L.R.3d 596 (1973).
189. 502 S.W.2d 670 (Tex. 1973).
construction to legitimate building regulations, it may not, in the absence of the school district's unreasonableness or nuisance, prevent a school district from locating a facility within its borders. The court further implied, with two judges failing to concur on this point, that a school district's activities, unless proven to be unreasonable, are not subject to the zoning power of a city.

Finally, in Board of Adjustment v. Willie, the court reaffirmed the principal that, although Texas law permits zoning boards to grant variances, a variance is not authorized by the statute "merely to accommodate the highest and best use of the property," in the instant case, apparently a multi-storied office building or motor hotel, inconsistent with the 35-foot maximum building height, but rather, a variance is appropriate only "where the zoning ordinance does not permit any reasonable use."

Private Restrictive Covenants. Two cases decided during the survey year concerned the attempted characterization of mobile homes as conventional homes in order to comply with restrictive covenants requiring conventional housing. In Bullock v. Kattner the defendant had moved a mobile home onto a lot of a subdivision having the following restriction: "No trailer, basement, tent, shack, garage, barn or other out buildings erected in this subdivision shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence." Because the defendant had removed the wheels of his mobile home and had permanently connected it to the lot by means of water pipes, electricity lines, and block foundations, the trial court held that the mobile home was not a "trailer" within the meaning of the restriction. The court of appeals reversed, holding that as a matter of law the mobile home was a "trailer" within the meaning of the restriction. The court placed great emphasis on the term "or permanently" in the restriction, using it to distinguish prior cases, and concluded that such term revealed the intent of the homeowners in the sub-


191. The court's shifting of the burden appeared to be based upon the dual rationales of the public's need for schools and the school districts' legislative power to acquire property through eminent domain. Tex. Educ. Code Ann. §§ 23.26(a), 23.31 (1972).

192. 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).


195. 502 S.W.2d 828, 829 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

division to restrict even those mobile homes which are connected to their respective lots. In *Atkins v. Fine*\(^{197}\) the restrictive covenant in question prohibited the moving of any buildings onto the defendant's property other than "new ready-built homes." The defendants after purchasing lots so restricted and with full knowledge of the restriction, had moved a mobile home onto the lots, had removed the wheels and bolted it to a concrete foundation and had constructed and attached a new den, a carport, a sunporch and a gabled roof. Finally, they had covered the structure with wooden walls attached to the roof. The trial court held that the structure violated the restrictive covenants and issued a mandatory injunction ordering removal of the structure. The court of appeals affirmed, rejecting the defendants' argument that the term "ready-built homes" was broad enough to encompass the altered mobile home. Relying upon stipulations that an expert witness would testify that ready-built homes are simply conventional homes constructed at various business locations and then moved onto a buyer's property with standard housemoving equipment, the court held that such expert testimony established the meaning of a trade term or the local sense of the term and that the defendants' mobile home was not within the scope of the term "ready-built home."

The case of *Collum v. Neuhoff*\(^{198}\) might well be labelled the "Catch-22" of restrictive covenants. In that case the defendants wished to construct a swimming pool on their property, but within twenty-five feet of a "park line" in their addition. Unfortunately for the defendants, restrictive covenants applicable to their property prohibited the construction of a fence within twenty-five feet of such "park line" while a city ordinance prohibited the construction of a swimming pool without a surrounding fence. The trial court found the covenants enforceable upon the following two theories: (1) that the restriction against the defendants' fence was a negative covenant running with the land and (2) that the restriction was imposed as part of a general plan or scheme for the development of the addition, and since the defendants accepted their property with notice of the restriction it was binding as an equitable servitude against the defendants personally. After analyzing the cases and secondary authority relevant to both theories,\(^{199}\) the appellate court concluded that the restriction on the defendants' land was a covenant running with the land, thereby rendering unnecessary any finding that it was part of a general plan of development. One dissenting judge observed that a general plan of development, while not necessary to establish a covenant running with the land, may be relevant to a determination of the inducement and consideration for the covenant and therefore also relevant to issues regarding its enforceability. The dissenting judge in fact concluded that since there was no

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evidence of a similar fence setback restriction in other lots, he would reverse the trial court. In denying the defendants' motion for rehearing the court, obviously in response to the dissent, noted that the record did contain evidence of a general plan or scheme for development.

In *Lehmann v. Wallace* the "general plan of development" concept, essentially overlooked in the *Collum* case, proved invaluable to the successful plaintiffs. In the *Lehmann* case the plaintiff's tract within a subdivision had been restricted to prohibit the construction of more than one primary residence. The restrictions stated that their purpose was "to carry out a general plan of development" of the subdivision, and in fact the subdividers had executed an affidavit and agreement for the plaintiffs in which they had covenanted and agreed to attach and incorporate similar restrictions in each conveyance (although testimony revealed that only seventy-three percent of the deeds executed by the subdividers actually contained the restrictions). Subsequently, the subdividers conveyed by separate deeds both halves of an existing tract to the owner-defendants, designating the half-tracts as 12-A and 12-B. After the owner-defendants had constructed a residence upon 12-B and had announced their anticipated construction of a second residence on 12-A, the plaintiffs brought suit against the subdividers and the owner-defendants. The appellate court, in affirming the trial court's injunction against construction of the second residence, rejected the defendants' arguments that the covenants were unenforceable against the owner-defendants. The court held that a "general plan of development" necessary to enforce restrictions can be established in various ways such as by express covenant, by implication from a filed map, by parol representations made in sales brochures, maps, and advertising, and by oral statements on which the purchaser relies in making his purchase. The court then concluded that the necessary requisites for the "general plan of development" had been proved in this case and that such plan prohibited the subdivision of tracts into small tracts for separate development. Indeed, any other decision would have been inequitable in light of the facts of the case.

V. LANDLORD-TENANT

Although no appellate decisions under the 1973 landlord-tenant legislation were reported during the survey year, the Attorney General of Texas rendered an opinion that article 5236c, added to the Texas statutes in 1973, applies to short-term or weekly tenancies as well as tenancies of a longer term. In another opinion the attorney general held that a tenant is subject to prosecution under section 31.04 of the new Penal Code for "theft
of service" if he knowingly pays his rent with a worthless check, provided that the tenant’s right to possession under the lease is expressly made contingent upon the payment of rent. The latter opinion should have a significant effect on landlord-tenant relations because, although a tenant generally realizes that he can be prosecuted for the issuance of a bad check under section 32.41 of the new Penal Code, a misdemeanor, the attorney general now has given authority for prosecution under the theft provisions of section 31.04, which can result in a second-degree felony charge, depending on the amount of the rental check.

Two significant cases decided during the survey period involved the applicability of Texas' statutes of frauds to leasing situations. In McCloud v. Knopp a tenant brought action for a declaratory judgment to determine her right to enforce an oral lease for her lifetime tenancy on certain realty. Although both statutes of frauds provide that a lease of real estate for a term longer than one year is not enforceable unless the agreement is in writing, the court held that the lease was not within the prohibition of either statute since the term of the lease depended upon a contingency that might occur before a year had elapsed, i.e., the tenant's death within one year. Although not mentioned in McCloud decision, the court's ruling would appear to be contrary to the decision in Nitschke v. Doggett discussed in the 1974 Property Article, which held that a lease "for the balance of the life of the tenant" constituted a tenancy at will and not an estate for years. In the McCloud decision the court, which noted substantial authority in support of its holding, determined not only that such an agreement would be enforceable as a lease (and thus not merely a tenancy at will) but also that it did not require a written memorandum to be enforced. In McDonald v. Roemer the court held that a year-to-year tenancy, with either party having the right to terminate the tenancy at the end of any annual term, was not within the statute of frauds. The court noted the well-established rule that a lease for a primary term of one year, with an option in the tenant to extend the term, constitutes a demise for the entire primary-plus-option period, and is thus within the statutes of frauds. On the other hand, a one-year lease authorizing the tenant's renewal only with permission by the lessor is not within the statute of frauds; and the court properly viewed the term-

207. Id. § 32.41.
211. Wallenstein, supra note 1, at 62.
212. Warner v. Texas & P. Ry., 164 U.S. 418 (1896); Chevalier v. Lane's, Inc., 147 Tex. 106, 213 S.W.2d 530 (1948); Wright v. Donaubauer, 137 Tex. 473, 154 S.W.2d 637 (1941). See also Perren v. Baker Hotel, 228 S.W.2d 311, 317 (Tex. Civ. App.—Waco 1950, no writ), which was erroneously described in the 1974 Property Article. Wallenstein, supra note 1, at 62 n.233, as being consistent with the Nitschke decision but which this author now concludes to be inconsistent by implication with the Nitschke decision.
nation provision in the instant case as falling within the ambit of the latter category.

The rights and obligations of subtenants received judicial attention during the year. The fact that there is no privity of contract between a subtenant and the original landlord was reiterated and embellished in one case,\textsuperscript{2} the court holding that a paragraph in the sublease to the effect that such sublease was "subject to all terms and conditions of . . . [the primary lease]" did not obligate the subtenant, in order to exercise his renewal option, to give the same sixty-day notice which the tenant-sublessor was required to give to the landlord. The court interpreted the quoted phrase as being merely an acknowledgment of the subtenant's inferior status and not an incorporation of all lease terms into the sublease. Regardless of the wisdom of the court's contractual interpretation, the obvious lesson in the case for sublease drafting is to set out fully all of the subtenant's obligations in the sublease. In fact, the failure of a sublease to specify clearly the subtenant's obligations resulted in loss to the tenant-sublessor in yet another case decided during the survey year.\textsuperscript{2} In that case the court held that the subtenant's agreement to assume the tenant-sublessor's obligations under the primary lease was not so clear and unequivocal as to constitute an agreement to indemnify the tenant-sublessor for damages, resulting from violations of the primary lease which had occurred prior to the sublease.

The appurtenant rights of tenants were dealt with in two cases decided during the survey year. In one case\textsuperscript{2} the court acknowledged the general principle that when a lease for a certain term expires, a tenant is not entitled to crops planted on the demised premises at such a time that they cannot mature before expiration of the lease. Nevertheless, the court held that because the landlord knew the crop could not mature during the term of the lease and still consented to or acquiesced in its planting or cultivation the subtenant was entitled to the crops.\textsuperscript{2} Likewise in \textit{Texas City Dike & Marina, Inc. v. Stikes}\textsuperscript{2} the tenant was successful in establishing his claim to appurtenant rights. There the tenant sought judgment declaring his right to a parking easement on property retained by the landlords. In declaring that the tenant was entitled to the parking easement, the court held that the landlords were estopped by their representations to deny that such an easement existed. The court found that a parking area was necessary to the success of the tenant's business, and since the landlords had known this fact and had made representations in connection with it, the doctrine of estoppel in pais prevented them from denying it.\textsuperscript{2} One concurring judge\textsuperscript{2} explained

\textsuperscript{2}15. Manges v. Willoughby, 505 S.W.2d 379 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).
\textsuperscript{2}18. 500 S.W.2d 953 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).
\textsuperscript{2}19. Id. at 957. "Estoppel in pais precludes a litigant from asserting or denying anything which has, in contemplation of law, been established as the truth by such litigant's
that more than permissive use of the parking area was shown by the evidence, in that the landlords had accepted rentals from the tenant based on revenues from the tenant's customers who continually used the parking area, and further, the landlords' reversionary interest in the demised premises was benefited by the tenant's improvements of the leasehold which necessarily gave rise to the need for more parking as customers increased in number. The court's finding of estoppel would certainly appear justified in light of the facts revealed in the concurring opinion.

In *Ace Drugs Marts, Inc. v. Sterling* the court permitted reformation of a unilateral mistake in the lease, contrary to the general rule that reformation is available only in the situation of a mutual mistake. In ordering reformation of an apparent typographical error (inserting "lessor" instead of "lessee" in the utility payment clause of the lease), the court properly relied on two earlier decisions, one holding that reformation was appropriate when the mistake of one party was accompanied by inequitable conduct of the other party, and another decision holding that knowledge by one party of the other's mistake makes reformation an appropriate remedy. The facts of the instant case were found to fall within both of these noted exceptions to the general rule providing for reformation only upon mutual mistake.

As usual courts reviewed various tort claims against landlords and tenants by invitees suffering injuries on or near the demised premises. The general rule that a landlord is not liable for injury to any person entering under the tenant's title or by the tenant's invitation was held to bar a tenant's business invitee from recovery against the landlord in *Wallace v. Horn*. The court's decision was consistent with the well-recognized rule set forth in *Morton v. Burton-Lingo Co.* and is noteworthy primarily for its succinct listing of the general exceptions to that rule. The court noted that Texas cases had recognized the landlord's liability to the tenant's invitees for injuries resulting from unsafe conditions on the premises where the landlord had agreed to make repairs, where the landlord could be charged with fraud or concealment in failure to disclose hidden facts, where the landlord had retained control over certain portions of the premises, and where a nuisance on the premises had existed when the premises were leased. However, none of those exceptions were deemed applicable in the *Wallace* own conduct or representation." *Rust v. Eastex Oil Co.*, 511 S.W.2d 358 (Tex. Civ. App.—Texarkana 1974, no writ).

220. 500 S.W.2d at 957.
221. 502 S.W.2d 935 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.).
223. Warren v. Osborne, 154 S.W.2d 944 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.).
224. 506 S.W.2d 325 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.), where the injured invitee was a paying guest at a motel operated by the tenant.
225. 136 Tex. 263, 150 S.W.2d 239 (1941).
226. *Id.*
case. A variation of the third exception noted above was applied in another case decided during the survey year,\textsuperscript{230} where the court denied the plaintiff recovery against a tenant for injuries sustained in a fall on the walkway outside the tenant's demised premises. The court held that the tenant was not responsible for the maintenance of premises not exclusively leased to it.

A few cases decided during the survey year dealt with actions by landlords against their tenants for lease defaults. In \textit{Nielson v. Okies} \textsuperscript{231} the court applied the general rule that, in an action for wrongful damages to the premises by a tenant, a landlord may recover the reasonable cost of repairs which may be necessary to restore the damaged property to its condition immediately prior to the injury.\textsuperscript{232} In that case, where the landlord prior to trial had made only $247 of the estimated $3,900 of needed repairs, the court further held that in determining damages it is immaterial whether the landlord actually makes the repairs. A similar measure of damages was utilized in another decision,\textsuperscript{233} the court citing considerable authority\textsuperscript{234} for the proposition that when a tenant fails to discharge his obligation to return the demised premises in good condition, the landlord may recover as damages the reasonable cost of repairs to place the property in its original condition.

Tenants' actions for wrongful eviction, actual or constructive, were prevalent during the survey year. In one action for wrongful eviction\textsuperscript{235} the court held that although the evidence did not support a judgment for exemplary damages, such recovery would be available for the landlord's breach of a lease contract if the breach were shown to have been "accompanied by malicious, oppressive, or fraudulent conduct, or to have occurred in such a manner as to constitute a tort, accompanied by fraud, malice or oppression."\textsuperscript{236} No cases were cited in support of this statement, and it would appear to be contrary to the holding in \textit{Boswell v. Hughes}.\textsuperscript{237} In \textit{Boswell}\textsuperscript{238} the court stated that regardless of the nature of the conduct accompanying a breach of contract (in that case, the wrongful foreclosure of a mortgage), if the remedy lies in contract, exemplary damages are not available. The financial significance of this issue and the apparent frequency of litigation on this point seem to justify a definitive statement in the area by the supreme court. Several established principles were reiterated in \textit{Rust v. Eastex Oil Co.},\textsuperscript{239} all relating to partial or total constructive eviction. In that case the court found

\textsuperscript{232} Pasadena State Bank v. Issac, 149 Tex. 47, 228 S.W.2d 127 (1950); Hill & Hill Truck Line, Inc. v. Powell, 319 S.W.2d 128 (Tex. Civ. App.—Waco 1958, no writ).
\textsuperscript{235} Van Sickle v. Clark, 510 S.W.2d 664 (Tex. Civ. App.—Fort Worth 1974, no writ).
\textsuperscript{236} Id. at 669.
\textsuperscript{237} 491 S.W.2d 762 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.).
\textsuperscript{238} For a discussion of this case see Wallenstein, supra note 1, at 48.
\textsuperscript{239} 511 S.W.2d 358 (Tex. Civ. App.—Texarkana 1974, no writ).
actionable eviction in the landlord's dismantling of the rented building several days prior to its notice to the tenant to vacate. A final case, where the court found that the facts supported the finding of a constructive eviction, is mentioned primarily for its enumeration of the elements necessary to establish constructive eviction, as previously set forth in the often-cited case of Stillman v. Youmans. The essential elements are as follows: (1) An intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred from the circumstances; (2) a material act by the landlord which substantially interferes with the use and enjoyment of the premises for the purpose for which they are let; (3) such act permanently depriving the tenant of the use and enjoyment of the premises; and (4) an abandonment of the premises by the tenant within a reasonable time after the commission of the act. A case which should be noted with care by landlords and tenants alike is Glau-Mya Parapsychology Training Institute, Inc. v. Royal Life Insurance Co., where the court held that a prior forcible entry and detainer action between the parties was res judicata as to the present action for a declaratory judgment. Both suits were held primarily to involve the question of possession of the premises, although it is arguable that the later declaratory judgment was essentially concerned with matters of title. The decision should serve as a warning to the parties to a forcible entry and detainer suit that such suit may in fact determine more than the issue presently being litigated.

The landlord's continuing dilemma as to the extent of self-help measures which may be utilized in recovering possession of the demised premises upon the tenant's default or termination under the lease was at issue in Emby v. Bel-Aire Corp. Upon the tenant's refusal to vacate the premises of a mobile home park following a proper termination of his tenancy by the landlord under express provisions of the lease, the landlord terminated utility services to the house trailer while the tenant was out of the city. Termination of utility services was accomplished by flipping a switch on a utility pole (cutting off the electric service) and turning a valve under the house trailer (shutting

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240. However, judgment was ultimately rendered in favor of the landlord in the Rust case since the tenant's pleading established the landlord's statute of frauds defense as a matter of law.
241. Steinberg v. Medical Equip. Rental Servs., Inc., 505 S.W.2d 692 (Tex. Civ. App.—Dallas 1974, no writ), finding that evidence that the landlord had allowed trucks to be parked at or near the entrance to tenant's place of business and had allowed trash containers to be placed in such proximity to the entrance that trash and foreign substances blew into tenant's place of business was sufficient to constitute constructive eviction on the basis of substantial interference by the landlord.
244. 507 S.W.2d 824 (Tex. Civ. App.—San Antonio 1974, no writ).
245. 508 S.W.2d 469 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).
off the gas service), the court holding that such action by the landlord was permissible under the general rule that one entitled to possession of premises has the right to re-enter the premises so long as such right is exercised peaceably and without force or violence.\textsuperscript{246} Although one would have to agree with the court that flipping a switch and turning a valve is peaceable and without force or violence, the distinction between this conduct and that of the lessor in \textit{Gulf Oil Corp. v. Smithey}\textsuperscript{247} in picking a lock, which was held to constitute entry by force or violence, would seem to be tenuous at best.\textsuperscript{248} The rule which requires these technical distinctions to be made on a case-by-case and fact-by-fact basis places an unreasonable burden on landlords, who must hazard a guess as to the appropriate extent of self-help measures which they may utilize in recovering their premises after the tenant's wrongful breach of lease. Although a re-examination of self-help rules would seem to be warranted,\textsuperscript{249} the supreme court unfortunately refused to accept the challenge in reviewing the case of \textit{Big Country Homes, Inc. v. Christianson},\textsuperscript{250} where the appellate court had approved the landlord's seizure of four

\textsuperscript{247} 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1968, writ dism'd).
\textsuperscript{248} The \textit{Smithey} case, which involved merely a plea of privilege and therefore did not reach the question as to how much damages occurred in the landlord's picking of the tenant's lock, has been the source of much analysis—and consternation. See Stalcup & Williams, \textit{Property, Annual Survey of Texas Law}, 23 Sw. L.J. 29, 30-31 (1969), which infers from the \textit{Smithey} case the essential prerequisite of notice prior to the landlord's self-help (which the landlord in the \textit{Smithey} case had failed to give but which had to some extent been given by the landlord in the instant case). However, that article also emphasizes the forcible \textit{entry} aspect of the \textit{Smithey} case, there having been no entry in the instant case. See also Annot., \textit{Right of Landlord Legally Entitled To Possession To Dispossess Tenant Without Legal Process}, 6 A.L.R.3d 177 (1966), the supplement to which in this author's opinion incorrectly reports the \textit{Smithey} case as being a per se rejection of the landlord's picking a lock.
\textsuperscript{249} For Texas cases which appear contradictory to the \textit{Smithey} decision, and to the analyses of that case set out in the preceding footnote, see Singer Mfg. Co. v. Rios, 96 Tex. 174, 71 S.W. 275 (1903) (permitting the repossession of a sewing machine despite the objections of the person using the machine at the time of repossession); Ford Motor Credit Co. v. Cole, 503 S.W.2d 853 (Tex. Civ. App.—Fort Worth 1973, writ dism'd), and Collins v. Ford Motor Credit Co., 454 S.W.2d 469 (Tex. Civ. App.—Beaumont 1970, no writ) (two of numerous automobile repossession cases in Texas, with the court in each case upholding the creditor's actions under facts that somewhat parallel the \textit{Smithey} method of "re-taking"); Harris v. Panhandle & S.F. Ry., 163 S.W.2d 647 (Tex. Civ. App.—El Paso 1942, writ ref'd w.o.m.) (the landlord's \textit{destruction} of the demised premises was not challenged by the tenant; and although the tenant did challenge the landlord's removal of personal property within the premises, the court upheld the landlord's actions); Runnels Chevrolet Co. v. Clifton, 46 S.W.2d 426 (Tex. Civ. App.—Beaumont 1932, no writ) (another automobile repossession case, with the court providing a good analysis for allowing self-help in the absence of "forcible resistance"); Phoenix Furniture Co. v. McCracken, 2 S.W.2d 545 (Tex. Civ. App.—Beaumont 1928, no writ) (permitting the repossession of furniture through actions much more threatening than in the \textit{Smithey} case); Henderson v. Beggs, 207 S.W. 565 (Tex. Civ. App.—Fort Worth 1918, no writ) (the landlord's changing of the lock to the demised premises was held to be valid, although the landlord's conversion of the tenant's personal property was held to be invalid in the absence of a lease provision permitting it); Heironimus v. Duncan, 11 Tex. Civ. App. 610, 33 S.W. 287 (1895, no writ). Texas cases which deny self-help appear to be distinguishable from \textit{Smithey} because in these cases force was used. See, e.g., Loftus v. Maxey, 72 Tex. 242, 11 S.W. 272 (1889); Godwin v. Stanley, 331 S.W.2d 341 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.). See also, in addition to Annot., supra note 248, Annot., \textit{What Conduct by Repossessing Chattel Mortgage or Conditional Vendor Entails Tort Liability}, 99 A.L.R.2d 358 (1965).
\textsuperscript{250} 513 S.W.2d 600 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e., 519 S.W.2d 845 (Tex. 1975).
mobile homes owned by his tenant. The supreme court's per curiam "n.r.e." refusal of the tenant's application for writ of error made clear the fact that the court would "express no opinion on the other issues discussed and other points of error ruled upon by the court of civil appeals,"251 the principal point in issue having been the abuse of discretion by the trial court in denying a temporary injunction.

Finally, brief mention will be given to the increasing antitrust attacks on restrictive covenants in commercial leases.252 Although such covenants appear to be generally recognized in Texas,253 with a limited, if somewhat puzzling, exception,254 and have withstood fairly well all private challenges in federal courts,256 the Federal Trade Commission (FTC) has made clear its intentions to attack them vigorously, at least as they are imposed by major tenants and by owners of large shopping centers. During the survey year the two major prongs of the current phase of FTC attack were completed, in the form of consent orders rendered against a major department chain258 and a regional shopping center.257 Although the FTC attack does not in itself invalidate restrictive covenants in this state, it should alert lease negotiators to analyze carefully the form of restrictive covenant being negotiated (perhaps attempting to follow the consent order guidelines) and to include specific severability clauses in restrictive covenant sections of each lease.

251. 519 S.W.2d at 845.
254. In Schnitzer v. Southwest Shoe Corp., 364 S.W.2d 373 (Tex. 1963), the "exclusive" given to a tenant by the owners of two contiguous shopping center tracts was held to be an illegal restraint of trade. The supreme court acknowledged the validity of such a restriction within a single-owned tract; however, even though the two tracts were represented to the public as being a single shopping center, the court found the separate ownership element to be fatal. See also Kroger Co. v. J. Weingarten, Inc., 380 S.W.2d 145 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.), where the Schnitzer rule was applied despite the fact that the various owners were related corporations and trusts.
257. Tysons Corner Regional Shopping Center, FTC Dkt. 8886, Consent Order announced March 5, 1974.