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PROPERTY*

FOR ALL they lacked in precedent-setting character, the 1967 Texas property decisions were varied and sometimes quite novel. Moreover, a few cases indicated important trends and provided some insight into significant problems.

I. LANDLORD AND TENANT

Restrictive Covenants in Lease. While restrictive covenants are normally found in deeds, their use in leases, work agreements, and other arrangements is not uncommon. Neiman-Marcus v. Hexter was a suit to determine the viability of restrictive covenants in a retail store sub-lease. In the lease, executed to Neiman-Marcus by Hexter, the latter had covenanted with Neiman's not to lease other premises in the shopping center for certain types of retail establishments, especially those which might compete with the lessee. Neiman's assigned the lease to Nasher. Hexter brought suit for a declaratory judgment, contending that the restrictions were personal to Neiman's and could not be enforced by its assignee. The court found that as owner of the leases both Neiman-Marcus and Nasher had the right to enforce the restrictions contained therein. In construing the restrictive covenants contained in the sub-lease, the court looked to the intent of the parties. Since the lease to Neiman's defined "lessee" to include successors and assigns, the court held that these restrictive covenants were not personal but ran with the land, and thus were enforceable by Neiman's, Nasher, or any subsequent owner of the sub-lease.

Fixtures. In usual landlord-tenant relationships an improvement which is firmly attached to the land with the intent that it be permanent is considered a "fixture" and becomes the landlord's property. At the end of the lease it may not be removed. Trade fixtures, however, which are added by the tenant to enable him to carry out the business contemplated by the lease may be removed prior to the expiration of the lease or a reasonable time thereafter. In Eubank v. Twin Mountain Oil Corp., a lessee sought to remove casings from oil wells still capable of production after the expiration of the lease. Lessee contended that under prior decisions the doctrine of trade fixtures applied, and that the casings were therefore removable. Without discussing the fact that the lease terminated five years prior to the attempted removal, or the aspect of trade fixtures, the court held that, since the wells still could produce, the lessee had no right to remove the casings and thus destroy the wells. He was, however, entitled to compensation for their reasonable value.

A similar question was presented in Patton v. Rogers. Controlling here,

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* By the Board of Editors.
1 412 S.W.2d 915 (Tex. Civ. App. 1967) error ref. n.r.e.
4 406 S.W.2d 789 (Tex. Civ. App. 1966) error ref. n.r.e.
6 417 S.W.2d 470 (Tex. Civ. App. 1967) error ref. n.r.e.
however, was a determination of the meaning of “production in paying quantities.” Holding that a possibility of production was sufficient to prohibit removal of the casings, the court indicated that it would take a liberal view of “production” in order to prevent the possible waste of natural resources if the wells were destroyed. These decisions, following an established trend, seem sound in light of this policy argument.

Significant changes regulating fixtures were promulgated by legislative amendments to the Uniform Commercial Code during the year. These changes are thoroughly examined by Professor Cosway’s Article in the Journal.  

**Legislation.** Two new articles dealing with landlord-tenant relations are designed to prevent fraud in the creation of the relationship and to clarify the question of terminating a periodical tenancy. Article 1553a of the Penal Code (effective August 28, 1967) makes it a misdemeanor to obtain occupancy of a house, duplex or apartment by fraud or deception, or without the permission of the owner, or to give a worthless check for rent, or to stop payment on a check for rent which is due and which is not in controversy. This has conceivable relevance to the civil rights situation in which a member of one race rents an apartment for a member of another, although this would seem to be a peripheral effect. This article also provides that a landlord may be guilty of a misdemeanor by granting occupancy by fraud or without permission of the tenant, or by giving a worthless check for a refund or stopping payment on a check for a refund which is due and is not in controversy.

Article 5236a (effective August 28, 1967), also dealing with landlord-tenant, provides that a tenancy from month to month may be terminated by either the landlord or the tenant giving the other one month’s notice. If the intervals between the payments are less than a month, notice equal to the interval between rental payments is sufficient to terminate the tenancy. Tenancy need not be terminated on a day corresponding to the conclusion of the rent-paying period. This statute does not apply where a different period of notice is specified by a written agreement or where there is any breach of contract.

## II. Title and Conveyance

**Title.** Several cases concerning title to property restated established rules or presented further developments in previously reported cases.  

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7 Cosway, Fixtures Under the Uniform Commercial Code, 21 Sw. L.J. 713 (1967).
10 See Veterans’ Land Bd. v. Akers, 408 S.W.2d 791 (Tex. Civ. App. 1966) error ref. n.r.e. (where a deed contains a covenant of warranty, no recovery under the covenant can be had without the showing of an eviction); Baker v. Smith, 407 S.W.2d 4 (Tex. Civ. App. 1966) error ref. n.r.e. (the court upheld the validity of a deed which lacked the words “for the purposes and consideration therein expressed,” usually found in acknowledgments to Texas deeds since execution was proved and the parties to this suit were the identical parties to the instrument itself; Triplett v. Shield, 406 S.W.2d 941 (Tex. Civ. App. 1966) error ref. n.r.e. (when a general warranty covenant and covenant against incumbrances is found in a deed, the grantor must discharge all liens
Cooper v. Booker involved a trespass to try title action between two grantees from a common grantor. Cooper, the prior grantee, sued the subsequent grantee, Booker, for title and possession to the disputed tract, basing his claim on his earlier general warranty deed. He failed to allege tender or payment of the purchase money note. The prior general warranty deed had reserved superior title and a vendor’s lien to the vendor to secure the purchase money note. In reversing the trial court, the court of civil appeals stated that, since the prior vendee had defaulted in payment, the vendor retained superior title and the right to rescind the sale. This right had been exercised in the subsequent deed to Booker. The court held that in order to exercise his claim to the property the prior vendee must prove that superior title had passed to him. Therefore, the prior vendee could not sue either the grantor or a subsequent grantee claiming under the grantor for possession or title to the property as long as the purchase money note remained unpaid.

Legislation. New article 9.08 of the revised insurance title provisions of the Insurance Code (effective October 1, 1967) enlarges the scope of regulation of the sale of title insurance. This article prohibits insurance companies from guaranteeing the payment of real estate mortgages and prohibits “insuring around” (the willful issuance of a title policy showing no enforceable recorded lien when the insurer knows of a recorded lien against the property). The State Board of Insurance, however, can permit “insuring around” under rules to be promulgated by it. This revision may well affect the present practice employed when interim financing is used. Much depends upon the Insurance Board’s rules.

Innocent Purchaser. In Triangle Supply Co. v. Fletcher, a case involving a working interest in an oil and gas lease, the assignee from the drilling company owner sued to remove cloud from its title. The drilling company had assigned its working interest in a 640-acre oil and gas lease to the plaintiff in 1963. This lease was then filed for record in the wrong county. This error was subsequently discovered and a correct filing was made in 1965, but meanwhile, in 1964, judgment creditors of the owner levied on all the interest of the drilling company, including the oil and gas lease. The execution purchaser, having actual knowledge of the plaintiff’s outstanding interest, then sold 560 acres of this interest to a vendee who was without and incumbrances, even those known to the grantee, which the grantee does not assume); Graham v. Hubbard, 406 S.W.2d 747 (Tex. Civ. App. 1966) (where two grantees claim under deeds from the same grantor and the second grantee’s deed is recorded first, the first grantee defeats the second if the second (or his predecessor) knew of the first deed).

On recordation of a deed as evidence of an intent to deliver where no delivery can be shown and the questionable use of negative evidence to rebut this presumption, see Williams v. Anderson, 414 S.W.2d 711 (Tex. Civ. App. 1967), noted in 21 Sw. L.J. 870 (1967).

See also Bounds v. Taylor, 415 S.W.2d 940 (Tex. Civ. App. 1967) error ref. n.r.e. (where the court held that calls for quantities and courses and distances in a deed yield to calls for lines, corners and objects fixed on the ground and which are capable of definite ascertainment); Socony Mobil Oil Co. v. Frost, 407 S.W.2d 248 (Tex. Civ. App. 1966) error granted (where the court found that calls for adjoiner in a deed prevail over calls for distance).

13 408 S.W.2d 765 (Tex. Civ. App. 1966) error ref. n.r.e.
notice of the plaintiff’s title. In upholding the vendee’s title to the 560-acre interest, the court applied the rule that "an innocent purchaser from one who purchased with notice is as fully protected as if he had bought without notice from the vendor of the party from whom he purchased." The court also rejected plaintiff’s contention that open, exclusive, visible and unequivocal possession of the remaining eighty acres of the original tract would be sufficient to put the vendee on notice as to a claim concerning the entire tract, since the only open acts of ownership had been connected solely with the eighty-acre segment.

Royalties. In Clyde v. Hamilton the supreme court again considered the question of whether a conveyance of "personal property" included unaccrued royalties. Relying upon prior decisions the court affirmed the concept that unaccrued royalties and the rights thereto are not personal property but a return of corpus. Thus a right to a future royalty payment is an interest in land.

Homestead. In Aetna Insurance Co. v. Ford the Eastland court of civil appeals had occasion to examine the problem of two non-contiguous lots claimed as part of a business homestead exemption. While finding that a lot contiguous to the claimant’s home and purchased for its protection qualified for an exemption, the court refused to allow a business homestead exemption for the two non-contiguous lots. The court required the claimant to elect between the latter lots. The supreme court reversed and remanded, holding that if the two non-contiguous business lots were used as a place for the operation of the business and were both essential to and necessary for such business, the homestead exemption applied.

Legislation. Article 7401A (effective August 28, 1967) now permits an unsuccessful defendant in a trespass to try title suit to remove improvements made by him on the land in controversy, if they were made without the intent to defraud, provided he gives a surety bond and meets other conditions of removal specified by the Act.

III. ADVERSE POSSESSION

The concept of adverse possession requires an open claim which is adverse in content to the claim of ownership of the record owner. Where cotenants hold property it is the rule that, each having the right to use the property, such use cannot normally be "adverse" to the right of the other. In a matter which has been before the courts in various forms for twenty years, the Houston court of civil appeals decided that acquiescence in claims of ownership for some fifty years led to a clear presumption of an
unrecorded deed\textsuperscript{19} conveying the interest of one cotenant to the other. Sweeny and Page were cotenants of record. For some fifty years Page apparently knew of and failed to protest Sweeny’s claims of sole ownership. Since they were cotenants, it was argued, Sweeny’s use of the land could not be “adverse” so no right accrued through the doctrine of adverse possession. The court of civil appeals affirmed a judgment for Sweeny’s assigns, stating that the presumption of an unrecorded conveyance from Page to Sweeny permitted summary judgment for those claiming through the latter.

IV. Water Rights

In the continuation of a set of proceedings characterized by the Texas Supreme Court as one of “great magnitude,”\textsuperscript{20} the court of civil appeals at Corpus Christi was petitioned to issue a writ of mandamus compelling the ninety-third district court of Hidalgo County to enter a “final judgment” in the continuing Valley Water Case.\textsuperscript{21} The district court had entered a judgment purporting to authorize itself to “enlarge or abrogate or modify from time to time any portion or feature of the decree.”\textsuperscript{22} While most of the decision deals with judgments in general under Texas law, the court was obliged to consider the standing of this “open-end” judgment dealing with rights to the use of water. The court reviewed similar open-end judgments rendered in other jurisdictions and found that, in all cases where such judgments have been used, authority for such action was based on a statute, or, as in California,\textsuperscript{23} upon the declared public policy in water rights cases (that water be put to its fullest beneficial use) found in a self-enacting amendment to the state constitution. The court stated that the Texas constitutional conservation amendment\textsuperscript{24} was not self-executing and that the only relevant statutory authority\textsuperscript{25} limited retention of jurisdiction to the period of time pending appeal. In denying the application for mandamus, the court stated that the trial court’s judgment had not transcended the statutory limitation.

In \textit{City of San Antonio v. Texas Water Commission}\textsuperscript{26} the supreme court was called on to settle a dispute over the use of waters in multiple watersheds. The supreme court found that sufficient evidence sustained rulings by the Texas Water Commission to the effect that the Guadalupe-Blanco River Authority had the right to appropriate water from the Canyon Dam Reservoir in Comal County while denying a similar right to San Antonio to draw water from the same source for like purposes. The Commission had discretion and the evidence adduced was sufficient to indicate that discre-
tion had not been abused. The court thus supported the Commission in its efforts to carry out a broad, comprehensive regulation of the use of waters from rivers, streams and lakes.

V. EASEMENTS AND Dedications

Easements. Williams v. Humble Pipe Line Co. considered the nature of an additional line right clause contained in a pipe line easement. The easement was granted in 1937 by plaintiff to defendant's assignor and authorized the laying of pipe line within a fifty-foot right-of-way. Additional lines could be laid at any later time upon the payment of an additional fee. In 1966, defendant sought to lay an additional pipe line and tendered payment therefor, which was refused by plaintiff. After defendant commenced construction, plaintiff brought a suit for damage to his land alleging invalidity of the additional line clause. Plaintiff contended that the clause was merely the grant of an option and as such was lost because it had not been exercised within a reasonable time. He further contended that, since the asserted option was unlimited in time, it was in violation of the Rule Against Perpetuities and therefore void. In affirming the summary judgment granted defendant, the court of civil appeals held that the questioned clause did not convey a mere option; the right was an expansible easement which presently vested in the grantee an interest in land and as such was not barred by delay in exercise. In defining this interest in land, the court adopted the Restatement of Property explanation: "The 'expansible aspect' of some such interests can be thought of as the progressive utilization, in its entirety, of an interest fully created at the beginning, or as the creation of an original less inclusive interest to which new rights are added from time to time."

Dedication. When a purchaser buys property with knowledge of dedicated streets, he is entitled to rely on the dedication and entitled to the benefit thereof. These rights of the purchaser are private contract rights which are not affected by the failure of a city to take any affirmative action to open such streets. The purchaser has a right to use the easement in the reasonable enjoyment of his property and usually may make such improvements to insure such enjoyment. In Dykes v. City of Houston the supreme court had to balance the landowner's right to an easement-of-way over land dedicated for use as a street against the municipality's use of its police power to block off unimproved streets to protect the public from danger. Plaintiffs had purchased their lots from a vendor who exhibited a map showing an abutting unopened street. When the city failed to open

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27 See Teich v. Haby, 408 S.W.2d 562 (Tex. Civ. App. 1966) error ref. n.r.e. (in order to establish an easement by implied grant a need for reasonable necessity must be shown); Colborn v. Bailey, 408 S.W.2d 327 (Tex. Civ. App. 1966) (an easement for "driveway purposes" gives rights of ingress and egress but not of parking a car on the grantor's property).
29 Restatement of Property § 399, comment g (1944).
30 Id.
31 406 S.W.2d 176 (Tex. 1966).
the street, one of the plaintiff's sought to bulldoze it open. The city erected a permanent barrier to prevent autos from entering the then semi-improved street, stating that it was unsafe and dangerous to vehicles. After unsuccessful attempts to remove the barrier by force, the landowner sued for an injunction to force removal by the city. The court stated that when a vendee purchases a lot, relying on the exhibition of a map on which a street is described, and the street is not yet open, this operates as an immediate dedication, and the purchaser acquires a private easement, whether or not the street is ever opened by the city. Such rights are, of course, subject to the valid police powers of the city. The court held that, while the city might well have the right to erect signs and barriers to warn the public of possible injury, it could not prevent the reasonable use of the street by the plaintiffs and thus destroy their easement.

In Peterson v. Greenway Parks Home Owners' Ass'n a substantial amount of choice land in a subdivision had been dedicated for use as a park. The Association claimed that the land could not be used practicably as a park and sought cancellation of the restriction in use and the right to dispose of the property. The court found no great changes in the neighborhood and refused to permit the sale. It held, as one might expect, that the mere fact that the land might be more valuable when used in another way was not sufficient to permit a court to approve a change in a restriction of this sort. The court stated that to obtain a change in restriction based on changed condition, it must be shown that the neighborhood has so changed that it was truly unsuitable or inadequate for the restricted purpose.

VI. Land Utilization: Covenants, Zoning

Creation of a servitude running with the land requires either the express joint intent of the grantor and grantee to impose a restriction on the grantee's land for the benefit of the grantor's retained land or knowledge by the grantee at the time of purchase that a general plan or scheme encompassing the tracts exists. In Interstate Circuit, Inc. v. Pine Forest Country Club the grantor placed restrictions in a deed to the vendee country club limiting the vendee's use of the purchased premises. The grantor retained land in the area but the deed to the club did not state that the restrictions were imposed for the benefit of the retained land nor was any overall plat ever filed. Grantor later conveyed the retained rights to the country club and conveyed the retained land to the defendant. The club sued to remove the cloud on its title, contending that the original restrictions were personal to the grantor and were subsequently extinguished by the conveyance of these rights to the club. In affirming the trial court's judgment n.o.v. for the club, the court of civil appeals stated that the covenant was personal to the grantor. There was no evidence to indicate

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34 409 S.W.2d 922 (Tex. Civ. App. 1966) error ref. n.r.e.
35 See City of Fort Worth v. Burnett, 131 Tex. 190, 114 S.W.2d 220 (1938).
36 408 S.W.2d 261 (Tex. Civ. App. 1966) error ref. n.r.e.
either a general plan or scheme encompassing the retained land or to show an intent by the covenantee to subject his land to the restrictions for the benefit of the retained land.

Two cases considered the rule of construing covenants strictly in favor of the free use of land. Both found the restrictions not binding. In Kent v. Smith the defendant had placed an outbuilding on his lot with the approval of a planning committee as required by deed restriction. The court rejected a contention by plaintiffs that a clause in the deed restrictions limiting use to "single family dwelling" prohibited the erection of more than one building. In Lochwood Meadows, Inc. v. Buck a deed restriction prohibited a "fence." Plaintiff brought suit for an injunction to require defendant to remove a wooden fence and a ligustrum hedge which ran parallel to the wooden fence, asserting both were in violation of the restriction. The trial court granted the injunction requiring removal of the wooden fence but refused to order removal of the hedge. Plaintiff appealed, claiming the hedge was included within the definition of fence and relied on a dictionary definition of fence as applied by a criminal case in 1902. The court rejected plaintiff's contention, stating that the instant hedge did not form a "complete enclosure" since gaps existed between the plants sufficient to permit the entry or escape of cattle. One wonders if the hedge will mature into a fence.

Zoning: Procedure. Pursuant to the Zoning Enabling Act, the legislative body of a municipality may provide for the manner in which zoning regulations and restrictions are to be adopted, amended, or supplemented. Section (d) of the Act requires the municipality to "provide for the manner in which such regulations and restrictions...shall be determined...."

Under this Act, the city of Tyler enacted a city zoning ordinance. Part of this ordinance established a City Plan Commission and required that a "plan for use and development" be submitted to this planning commission and be approved by it in a final report prior to action by the City Commission. In Wallace v. Daniel landowners in Tyler, whose property adjoined rezoned property, brought suit for a declaratory judgment that the rezoning ordinance was void. A proposed change had been submitted to the City Plan Commission and a public hearing held thereon, but, since a plan for the use and development had not been properly filed by the applicant, the City Plan Commission gave only a qualified approval to the proposal. Thereafter, the City Commission held a hearing and adopted the proposed change. In reversing for the plaintiffs, the court of civil appeals held the ordinance void since the procedural requirements set out in the basic zoning ordinance had not been followed. The court stated that the city must follow the procedure it adopts. The court did not discuss or dis-

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42 Id. art. 1011d.
43 409 S.W.2d 184 (Tex. Civ. App. 1966) error ref. n.r.e.
tistinguish an earlier case\textsuperscript{41} which held that, since a city council can adopt or reject any recommendation of a planning commission, a failure to follow zoning ordinance procedure (as in the principal case) will not invalidate changes adopted by the city council.

VII. EMINENT DOMAIN

A large number of cases considered problems involved in eminent domain proceedings, especially in the realm of compensation.\textsuperscript{42} In \textit{Haley v. State}\textsuperscript{43} the Beaumont court of civil appeals passed on the right of the state, as condemnor, to have the market value of the land condemned reduced by the amount which the value had been enhanced three years earlier when a railroad had abandoned a right of way easement over a portion of the land. The court recognized the general rule that a condemnor is not obligated to pay for an enhancement in value of the property occurring as a result of a public improvement made before the date of the taking\textsuperscript{44} but found that the instant enhancement in value was not related to the proposed taking and that the condemnees were thereby constitutionally entitled to the full market value of the property as of the date taken.

In \textit{Renault, Inc. v. City of Houston}\textsuperscript{45} the court was faced with the problem of damage to personal property in an amount close to $1 million. Renault stored automobiles on premises next to a road which was maintained by the city. The lay of the road caused rainwater to be impounded on Renault's leased acreage and many of its automobiles were damaged. Renault's suit against the city alleged strict liability based on a violation of article 7589a\textsuperscript{46} and, also, a "taking" within the constitutional definition as the basis of liability. The court held that the city was not strictly liable for impounding the waters since the instant statute applied only to a diversion of water by a "person, firm or private corporation," not to acts by a public corporation. Nevertheless, since Renault's property was damaged as the result of the maintenance of the road, a "public use," the court held that compensation was due under the terms of the Texas Constitution, article I, section 17. The court rejected the city's argument that, if the constitutional requirement of payment of compensation applies to private property subjected to a "perpetual servitude,"\textsuperscript{47} no payment would be owed.

\textsuperscript{41} Clesi v. Northwest Dallas Improvement Ass'n, 263 S.W.2d 820 (Tex. Civ. App. 1953) \textit{error ref. n.r.e.}

\textsuperscript{42} See generally on this subject, State v. Hilton, 412 S.W.2d 41 (Tex. 1967) (the state has a right to examine a condemnee's witness who had served as a commissioner in a case where the special commission's award and this witness' trial testimony differed); Urban Renewal Agency v. Trammel, 407 S.W.2d 773 (Tex. 1966) (where a lease and reversion are at issue, the value of each must be found; a single jury finding of the value of the entire premises is not sufficient); Crouch v. State, 413 S.W.2d 141 (Tex. Civ. App. 1967) (trial court has broad discretion in determining whether sales offered in evidence are of comparable properties); Naumann v. Urban Renewal Agency, 411 S.W.2d 803 (Tex. Civ. App. 1967) \textit{error ref. n.r.e.} (the loss of income sustained by reason of a loss in rentals or reduction in rental income due to an impending condemnation cannot be recovered).

\textsuperscript{43} 406 S.W.2d 477 (Tex. Civ. App. 1966) \textit{error ref. n.r.e.}

\textsuperscript{44} See City of Dallas v. Shackelford, 141 Tex. 528, 199 S.W.2d 103 (1947).

\textsuperscript{45} 415 S.W.2d 948 (Tex. Civ. App. 1967) \textit{error granted.}

\textsuperscript{46} See \textit{TEX. REV. CIV. STAT. ANN. art. 7589a} (1964).

\textsuperscript{47} Language to this effect was used in \textit{DuPuy v. City of Waco}, 396 S.W.2d 103, 108 (Tex. 1961).
in the instant case since there would obviously be no perpetual servitude present. The court also rejected the city's argument that the damage resulted solely from a maintenance of the street, a proprietary function, and that the doctrine of governmental immunity prevented a recovery by the plaintiff. Writ of error has been granted in this case.

In *State v. Fuller* 44 the Texas Supreme Court examined an easement and right of access problem. The action was instituted by the state to determine the surface ownership of a segment of an abandoned railroad right of way. The right of way abutted U.S. Highway 69, which had been deeded to the state in fee, on one side and the land of Fuller on the other side of the right of way. The court applied the well-settled rule that a deed to land abutting a railroad right of way conveys title to the center of the right of way unless the contrary intention is expressed in the deed. 45 Thus the state and Fuller would own the surface rights of the abandoned right of way equally. Fuller contended that the problem came under an exception to this rule created in *Haines v. McLean*. 46 The court found that the *Haines* rule was not applicable since in that case the state did not have fee simple title in the abutting land, only a determinable fee, thus the state did not have title to the center of the right of way. In discussing Fuller's right of access to Highway 69, the court held that no such right existed since his property did not adjoin the highway (the state owning one-half of the abandoned right of way nearest the highway). Fuller's right to access can not materialize until the state expands the highway to abut Fuller's land.

VIII. Public Lands

*Mines and Minerals.* In *Duval Corp. v. Sadler* 51 the supreme court, in considering statutes dealing with minerals and prospecting on public lands, held that articles 5388-5403 52 of the Mineral Act of July 31, 1919 were not repealed by article 5421c 53 as amended in 1939, and hence that the Land Commissioner, in a proper case, could be ordered to issue mineral awards to one who has done all that the prior statutes required. Plaintiff made a sulphur development application to the Commissioner of the General Land Office of Texas. His application involved public free school lands which had been sold by the state with a reservation of mineral rights. The Commissioner rejected all the applications on the basis that the minerals could only be acquired under article 5421c, apparently believing that the reserved minerals constituted unsold public free school lands. The court rejected the Commissioner's view and held that articles 5388-5403 had not been repealed. 54

Legislation: School Land Leases. Article 5421c-10 55 (effective March 15,

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44 407 S.W.2d 215 (Tex. 1966).
45 Cox v. Campbell, 135 Tex. 428, 143 S.W.2d 361 (1940).
51 154 Tex. 227, 276 S.W.2d 777 (1955).
52 407 S.W.2d 493 (Tex. 1966).
54 *Id.* art. 5421c.
55 *Id.* art. 5421c-10 (Supp. 1967).
now makes the owner of the soil the agent of the state for the purpose of leasing coal, lignite, sulphur and potash on land sold by, and with all minerals reserved to, the state. Lessees are required to pay sixty per cent of all bonuses, rentals, and royalties to the state, and forty per cent to the owner. With production, the state receives not less than one-sixteenth of the value of the minerals produced. Oil and gas, and the Relinquishment Act, are expressly excluded from the operation of this article.

IX. Mechanics' and Materialmen's Liens

Liens. Article 5469 requires an owner who enters a construction contract to withhold a retainage of ten per cent of the contract price for thirty days after completion in order to ratably guarantee the claims of mechanics and materialmen. In Hunt Developers, Inc. v. Western Steel Company a court of civil appeals comprehensively examined the method by which a materialman can perfect a lien against property when the owner has paid the full contract price to the contractor in violation of article 5469. In Hunt, at the time of payment by the owner, there was an outstanding indebtedness owed to a materialman. The materialman gave notice of this debt to the owner within thirty days of completion of the contract, as required by statute. The owner contended that since the materialman did not follow the article 5453 requirements for notice, itemization, and warning of personal liability, he had not perfected his lien under article 5469. The court held that the requirements of article 5453 are fulfilled when notice is given sufficient to appraise the owner that a materialman remains unpaid, at least as long as no one is mislead to his detriment. Since the warning was sufficient, the owner was held liable to the materialman for an amount up to ten per cent of the contract price. The court also pointed out that the statutory ten per cent retainage requirement means ten per cent of the entire contract price, not ten per cent of the subcontract to the materialman.

Article 5460, the exclusive procedure for establishing a lien on a homestead, requires a properly acknowledged and recorded contract for improvements executed by the owner. A materialman may establish a lien if he has contracted directly with the owner. If the materialman has not contracted directly with the owner, but a contract exists between the owner and a contractor, this contract inures to the benefit of the materialman,

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97 See Rhodew v. Miller, 414 S.W.2d 942 (Tex. Civ. App. 1967) (a constitutional lien for labor done or materials furnished does not include attorney's fees; the reasonableness of attorney's fees is a question of fact to be determined by the court or jury as any other fact issue and as such is required to be supported by competent evidence); Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691 (Tex. Civ. App. 1967) err error n.r.e. (statutory warning of potential liability of an owner which must be given as a condition precedent to the owner's authority to withhold funds from a contractor and hence to the creation of a lien are not fulfilled by the mailing of copies of billing statements to the owner by the subcontractor; also, the subcontractor could not recover on surety bond since he failed to give proper notice to the surety and the original contractor).
101 Id. art. 5460 (1964); see Tex. Const. art. XVI, § 10.
giving him a lien for the materials he furnishes. In W & W Floor Covering Co. v. Project Acceptance Co., a case of first impression in Texas, a question arose concerning the priority of a materialman's lien and a lien of a holder in due course of a negotiable note secured by a contractual lien against a homestead. The contract was in the form of a mechanic's and materialman's lien and was properly executed and acknowledged before any work began. To secure payment, a negotiable promissory note was executed to the contractor on the same date as the lien contract and was duly recorded. Before construction began, the note was assigned to Project Acceptance Company. The contractor undertook construction and at his request the flooring company furnished materials. The contractor abandoned the construction and Project Acceptance completed the home. Plaintiff floor company was not paid and thereupon gave proper notice and filed its lien. It then instituted suit against the owner, the contractor, and the noteholder to foreclose its lien on the homestead and to establish that its lien was superior to that of the noteholder. The court stated that since a materialman's lien is derivative and is based on funds in the hands of the owner which are owed to a contractor, the instant assignment of the note and lien to a third party by the contractor cut off the materialman's lien, since there were no funds owed to the contractor in the hands of the owner after the assignment, and therefore the materialman's lien could not attach to the land.

Appellant also contended that a lien had attached to the property since the owner had failed to retain ten per cent of the contract price in violation of article 5469. The court found that a lien would have attached except for the fact that Project Acceptance was a holder in due course of the note and lien and thus entitled to priority in the enforcement of its lien. But, since the owner violated article 5469, a personal judgment for the amount owed to the appellant was granted, the amount being within the ten per cent of the contract price. The result of this holding would seem to be a warning to the owner who is having improvements made on his land: if he gives a negotiable note in payment for the improvements, the note should not be for more than ninety per cent of the contract price; then if a materialman has not been paid, and if the note has been assigned, the owner will only be liable for the ten per cent retainage. If the owner follows this procedure there will be no possibility of liability in excess of the contract price. The remedy left open to the subcontractor seems at best to be extremely shallow. In giving priority to the holder in due course, the court left the materialman only a personal judgment which more than likely could not be enforced where the owner and contractor have already defaulted. It would seem that the courts should do more than give a personal judgment to protect the subcontractor when a note is assigned. If the owner had paid cash to the contractor, the subcontractor would have had a lien under article 5469 for the statutory retainage of ten per cent

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of the contract price. This lien is based upon the fact that the owner is required to hold certain funds in his hands for the thirty-day period. It does not logically follow that the owner should be able to relieve himself of the duty of retainage simply by executing a note and lien instead of paying in cash.

Priorities. The constantly recurring problem of the relation back doctrine of Oriental Hotel Co. v. Griffith arose in several cases during the past year. The doctrine basically states that when there is a general construction contract between an owner and a contractor for the construction of a projected building, all the liens resulting from the construction are on a general parity and have their inception on the date the general contract was executed or work was begun. Thus, these liens have priority over any deed of trust subsequently executed by the owner. This doctrine was applied in Security Lumber Co. v. Weighard Construction Co. Weighard Company, a speculative builder, owned three lots in Houston and entered into an oral agreement with Security to furnish materials for three houses under construction on the lots. Material was delivered to the construction sites before and after the owner had obtained a construction loan, secured by a deed of trust, from University Savings & Loan. Following Weighard's default in payment, Security brought suit, joining University Savings as defendant. University Savings asserted that its deed of trust lien had priority over the lien for material furnished subsequent to the execution of the deed of trust since each delivery of material by Security constituted a separate contract. The trial court, agreeing with University Savings, held that Security's liens had priority only for the materials delivered prior to the execution of the deed of trust. The court of civil appeals reversed, holding that the deliveries of material were not separate contracts; they related back to the original material contract. Thus, Security's lien for the entire contract price was prior to that of the deed of trust lien of University Savings. The court reasoned that to hold that each delivery was a separate contract would place a harsh burden upon a supplier to check the lien records before each delivery, regardless of the particular arrangement with the contractor. Such a result, the court found, would be against the legislative intent. The supreme court has subsequently affirmed the court of civil appeals holding on this issue.

Another question involving application of the Oriental doctrine arose in Finger Furniture Co. v. Chase Manhattan Bank. A general contract was executed between a property owner, F.B. & D., Inc., and a general contractor for the construction of an apartment building. The contractor was also the president and general manager of F.B. & D. Subsequent to the execution of the contract F.B. & D. entered into a building loan agreement

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66 413 S.W.2d 111 (Tex. Civ. App. 1967) error ref. n.r.e.
with Chase Manhattan, secured by a deed of trust which was recorded at that time. The suit arose as a contest of priorities between Chase Manhattan and two materialmen. One materialman's lien arose from work and material furnished before the deed of trust was executed; the other lien arose after execution. Although the work was expressly contemplated by the general contract and the contractor was obligated to furnish the materials, the material was furnished to the owner, individually, at his request. The court applied the relation back doctrine of Oriental in holding that the liens had their inception at the date of the general contract. The decision was based upon the fact that the work and material furnished was contemplated by the general contract. Oriental was relied upon since some of the materialmen in that case dealt directly with the owner rather than the general contractor.

The court in Finger seems to ignore cases following Oriental which limit recovery to work arising out of the general contract.\(^6\) The instant extension of the relation back doctrine may be justified since the owner and the general contractor were essentially the same party and the contract stated that all materials were to be furnished by the contractor. But, this decision may allow the creation of liens superior to the deed of trust lien, even though not contemplated by the general contract. The court is possibly adopting a slanted view of Oriental in allowing recovery for materialmen who deal with the owner, especially those who furnish material after the execution of the deed of trust.

The question of priority between the holder of a mechanic's lien and the holder of a garnishment judgment was raised in Wm. J. Burns International Detective Agency, Inc. v. General Electric Supply Co.\(^7\) Burns obtained a valid judgment against the owner of certain property and proceeded to garnish the owner's funds held by Stewart Title Company. General Electric, the assignee of a materialman's lien against the owner's property, also served a writ of garnishment against Stewart Title. The court of civil appeals held that in order for a valid mechanic's and materialman's lien to take priority over funds previously garnished by a creditor, it must be shown that the lien was validly perfected prior to the garnishment; otherwise the garnishment prior in time has the prior right.

**Legislation.** In an attempt to curb the practice by some contractors and subcontractors of absconding with funds paid them on contracts before paying mechanics and materialmen, the legislature enacted article 5472 (e).\(^7\) This article, effective August 28, 1967, provides that all moneys paid to a contractor or subcontractor under a construction contract for the improvement of real property, above a reasonable amount for overhead, are declared to be trust funds for the mechanics and materialmen working on


\(^{7}\) 413 S.W.2d 775 (Tex. Civ. App. 1967).

\(^{7}\) TEX. REV. CIV. STAT. ANN. art. 5472(e) (Supp. 1967).
the property. The contractor or subcontractor is made trustee of the fund and punishment by fine or imprisonment is imposed for misapplication of the trust funds. Moneys received under a construction contract are exempt if the full contract amount is covered by a corporate surety payment bond.

X. Personal Property

Conditional Sale of Vehicles. In Alexander v. Ling-Temco-Vought, Inc.\textsuperscript{72} the court of civil appeals at Texarkana considered the effect of the chattel mortgage registration laws and the Texas Certificate of Title Act\textsuperscript{73} on the sale of a house trailer under a conditional sales contract. A Texas manufacturer of a house trailer sold and delivered the trailer to a dealer in Georgia pursuant to a conditional sales contract. The bill of sale and the manufacturer’s statement of origin of a motor vehicle (the “manufacturer’s certificate”) were intentionally not delivered, being retained until full payment was received. The dealer sold the trailer to Smith, and Smith sold it in Louisiana to Alexander, who had no actual notice of the interest of the original vendor. Alexander urged that the law applicable to the last sale was that of Georgia or Louisiana and that under either he was a bona fide purchaser without notice and took free of any claim by the manufacturer. The court, however, applied Texas law and found that Alexander was not protected as an innocent purchaser for value. The court stated that “the lien of a lender having exclusive physical possession of a certificate of title is superior to the equities of subsequent purchasers or lien holders, although the lien is not noted on the certificate as directed in the Certificate of Title Act, when the subsequent sale transaction is not influenced by the omission of the lien notation from the certificate.”\textsuperscript{74} The court found no prejudice here. Justice Davis, dissenting, urged that the law of Georgia was applicable; that the sale was made without notice of any lien, that seller was negligent in handling its claim; and that to make Alexander in effect pay twice would be “degrading.”\textsuperscript{75}

Loss of Property by Common Carrier. Interstate carriers are permitted under the Motor Vehicle Act\textsuperscript{76} to limit their liability for loss of a passenger’s baggage which has been carried free with one paying fare by filing with the Interstate Commerce Commission and publishing a tariff.\textsuperscript{77} In Greyhound Corp. v. Stevens\textsuperscript{78} plaintiff sought damages for the loss of two bags which had been entrusted to defendant during plaintiff’s trip from Texas to Delaware. Plaintiff asserted that the limitation of liability printed on her bus ticket and the posted notices to that effect in the Texas bus terminal had not been called to her attention and consequently she had not been given a fair opportunity to elect to pay a higher fare to insure her

\begin{itemize}
\item \textsuperscript{72}406 S.W.2d 919 (Tex. Civ. App. 1966) error ref. n.r.e.
\item \textsuperscript{73}Tex. Pen. Code Ann. art. 1436-1, § 1 (1964).
\item \textsuperscript{74}406 S.W.2d at 923.
\item \textsuperscript{75}Id. at 927.
\item \textsuperscript{76}49 U.S.C. § 319 (1964).
\item \textsuperscript{77}Id. § 20(11).
\item \textsuperscript{78}413 S.W.2d 439 (Tex. Civ. App. 1966).
\end{itemize}
property. The court of civil appeals reversed the trial court's award of $500 and rendered judgment for the plaintiff in the amount of the tariff ($25). The court of civil appeals restated the rule that posting of notices or printing of the limitation of liability on the tickets is sufficient to offer an interstate passenger a fair opportunity to choose between a higher or lower liability for loss, and the passenger need not be actually informed that a choice of rates is available.

XI. Other Problems

Married Women's Property. There have to date been only a limited number of cases construing the 1963 legislation relative to married women's rights. In Diamond v. Borenstein the court of civil appeals at El Paso had before it a deed of trust covering a married woman's separate realty. The acknowledgment was clearly defective under existing Texas law in that the disqualification of the notary taking it was apparent on its face, he being one of the beneficiaries. The court, in view of the repeal of article 1299 and other recent legislation, held that narrow, technical requirements would no longer serve to frustrate the intent of a married woman as to a deed of trust executed after the legislation, as was the case here, and the deed was valid. This court thus followed the lead of Kitten v. Vaughn. On appeal, the decision was affirmed, per curiam, by the Texas Supreme Court. However, the court pointed out that articles 6605 and 6608, dealing with the manner and form of a married woman's acknowledgment, had not, at that time, been repealed but that the trust deed was not void as between the parties. Those sections have been repealed, effective January 1, 1968.

Taxation of Property. In a case which may be before the courts for some time, Clark G. Thompson sought to require the city of Houston and others to include personal property on the tax rolls through the technique of enjoining the collection of the real estate taxes assessed in the area. Armed with substantial evidence that personal property was largely untaxed and the decision of the Texas Supreme Court in City of Arlington v. Cannon, which dealt with equality and uniformity of taxation, Thompson claimed that his real property taxes would be substantially reduced if his demands were met. The court nevertheless found that the trial court had not abused its discretion in refusing an injunction since the taxpayer was not entitled to relief unless he could show substantial injury and, on the record, he failed to do so in that he failed to show that he owned, subject to taxation,

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81 410 S.W.2d 417 (Tex. Civ. App. 1966) error ref. n.r.e., per curiam, 414 S.W.2d 414 (1967).
83 414 S.W.2d 454 (Tex. 1967).
86 Thompson v. City of Houston, 410 S.W.2d 813 (Tex. Civ. App. 1967) error ref. n.r.e.
87 153 Tex. 366, 271 S.W.2d 414 (1954).
substantially more real than personal property." No doubt in time such showings will be made in these or similar cases and an apparently widely followed practice will have to be considered on the merits.

**Legislation.** Article 7172\(^8\) (effective August 28, 1967), dealing with tax liens on mineral estates, has been amended with respect to severed mineral estates. For such estates, the statute provides that the lien for ad valorem taxes will expire when the mineral estate terminates, and is not thereafter enforceable against (1) any part of the surface estate not owned by the owner of the encumbered mineral interest, (2) any other part of the same mineral interest under a different ownership, (3) personally against the surface owner unless he also owns the encumbered mineral interest, or (4) against any personalty not owned by the owner of the encumbered mineral interest. The former mineral interest owner remains personally liable for the taxes assessed on his interest.

**Brokers.**\(^9\) In Texas, as elsewhere, limitations are placed on the activities of brokers who are licensed only in other states but wish to do business here. Section 7(b) of the Real Estate License Act\(^1\) permits a non-resident broker or salesman to engage in transactions in Texas if he associates himself with a Texas licensee who actually conducts the transaction. In *White v. Cooper*,\(^2\) a suit for a real estate commission by an out-of-state broker, the defense was advanced that only a duly licensed broker could maintain such an action in Texas. The court stated that association with a Texas broker who actually conducted the sale was all that could be required of an out-of-state broker. It was a question of fact as to who conducted the sale and the court remanded the case for a finding on this issue.

**Legislation.** Article 6573a\(^3\) (effective August 28, 1967) was changed by the Sixtieth Legislature to tighten the educational and experience requirements prerequisite to receiving real estate brokers’ and salesmen’s licenses.

**Nuisance.** In *Ellen v. City of Bryan*\(^4\) the right to maintain a chicken farm was challenged by the city in an action to abate a nuisance. While the instant odoriferous condition was found to be temporary, the nuisance was also found to be a recurring one. The court of civil appeals consequently had little trouble in sustaining an injunction whether or not there was a remedy available at law.

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\(^8\) For a similar suit in which the taxpayer had difficulty convincing the court that he was being discriminated against, see *Kirkpatrick v. Parker*, 406 S.W.2d 81 (Tex. Civ. App. 1966).


\(^1\) On a time limit clause in a commission contract for procuring a lease, see *Shamaley v. Sayklay*, 406 S.W.2d 719 (Tex. Civ. App. 1966); on the strict rule requiring that a commission contract be in writing before a commission can be claimed, see *Randolph v. Cary*, 406 S.W.2d 311 (Tex. Civ. App. 1966) *error ref. n.r.e.*; on distinguishing a broker from a joint venturer, see *Amen v. Texas Gulf Indus., Inc.*, 411 S.W.2d 779 (Tex. Civ. App. 1967).


\(^3\) 415 S.W.2d 246 (Tex. Civ. App. 1967).


\(^4\) 410 S.W.2d 463 (Tex. Civ. App. 1966) *error ref. n.r.e.*
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