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Real Property

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I. INTRODUCTION

THIS Article surveys real property for the period October 1, 1995 through September 30, 1996. This Survey does not include every real property case decided during the Survey period; rather, it includes only ones the authors thought were important or interesting enough to be included. Generally, we would not consider any of the cases remarkable but what we do consider as noteworthy is the fact that there are fewer "good" cases from which to select. In fact, there are just

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fewer cases. Certainly, this is a direct result of alternative dispute resolution and represents a positive trend in the practice of law.

II. LENDING

A. MORTGAGES

Bonilla v. Roberson[1] considered the powers a trustee does not possess under a deed of trust. In 1980 Richard Roberson sold two lots to Felipe Bonilla. One lot contained a building with four rental units, and the other lot was vacant. Bonilla executed a promissory note for each lot, and each note was secured by a deed of trust in favor of Roberson. The deeds of trust contained the usual clauses requiring Bonilla to pay ad valorem taxes and maintain insurance on the two lots. In 1984, after Bonilla defaulted on the notes by failing to make mortgage payments and further defaulted under the deeds of trust by failing to pay taxes and maintain insurance, Roberson initiated non-judicial foreclosure sales of the lots covered by the two deeds of trust. Roberson bid and purchased the lots for amounts in excess of that owed on the notes.[2] Bonilla filed suit to recover the excess amount. After the foreclosure sale Roberson inspected the property and found the rental building damaged, thus rendering the units untenantable. Four days after suit was filed Roberson and the trustee (Roberson's father) rescinded the first sale and filed cancellation deeds. At a second foreclosure sale Roberson submitted successful bids in amounts considerably less than the original foreclosure sale. A non-jury trial upheld the second foreclosure sale and rendered judgment in favor of Roberson, even though the first sale compiled with all statutory requirements.[3]

On appeal Bonilla contested rescission of the original foreclosure sale, arguing that the original sale was valid and the subsequent cancellation deeds were invalid. The court of appeals stated that foreclosure under a deed of trust is a harsh remedy and a trustee should insure that foreclosures are conducted in strict compliance with the deed of trust and conditions of sale.[4] Furthermore, the trustee acts as agent for both parties and must act impartially to achieve the trust's objectives; however, a trustee has only limited authority to act as the mortgagor's agent in connection with the foreclosure sale.[5] The court discussed the trustee's role in a foreclosure sale and determined that a trustee does not have the power to execute a cancellation instrument purporting to take back title to the property and resurrect the underlying debt. In fact, said the court, to imply such a power would give powers never specified or contemplated

1. 918 S.W.2d 17 (Tex. App.—Corpus Christi 1996, no writ).

2. The amounts loaned were $51,500 for the lot with the building and $9,000 for the vacant lot. The foreclosure bid was $60,000 for the lot with the building and $20,000 for the vacant lot. *Id.* at 19.

3. At trial Roberson sought $69,700.00 in lost rental income in addition to the deficiency. The trial court awarded him $18,706.11. *Id.* at 20.

4. *Id.* at 21.

5. *Id.*

by the deed of trust.[6] Certainly, the court of appeals reached the right result, but it should be noted that the mortgagee son could have sued the trustee father to set aside the sale for breach of the "Father Knows Best" doctrine.

B. Foreclosure

In *Reyna v. State National Bank of Iowa Park*[7] the court considered (but denied) a debtor's request "to have his cake and eat it, too." Reyna was a partner in a construction company with his brother and father. After his father's death, Reyna, as representative of Reyna Construction, executed an extension of several promissory notes in favor of State National Bank. The notes were secured by Reyna's home. Despite the extension, Reyna defaulted on the loans. In an attempt to meet the payment schedule, Reyna asked permission to sell some of the company's equipment and apply the proceeds towards the notes; however, Reyna then missed his second payment. At that time, State National sent a ten day notice of intent to accelerate the notes. Reyna responded by mailing in his payment, but State National proceeded with the acceleration and then foreclosed its lien on Reyna's home. Reyna sued, and judgment was entered in favor of State National.

On appeal, Reyna complained that the trial court erred by refusing to set aside the foreclosure, since it was undisputed that State National did not send the twenty day notice required by law.[8] The court concluded that Reyna could not bring an action seeking damages for wrongful foreclosure and an action for rescission of the foreclosure sale. Since the jury had awarded damages for the wrongful foreclosure, the court would not permit a windfall to Reyna, especially since Reyna had full possession of the residence rent-free from the date of foreclosure.[9]

C. Usury

Lentino v. Cullen Center Bank and Trust[10] considered the effect of usury that results when a lender requires, as a condition to making a loan, that the borrower assume a third party's debt. In 1982, Eduardo and Jorge Lentino each individually executed separate promissory notes for $150,000 to Cullen Bank. Both notes were renewed in 1983, and in 1984 Eduardo and Jorge, along with four other parties, jointly and severally, executed a new promissory note to Cullen Bank in the amount of $2,252,250. Eduardo and Jorge also executed guarantee agreements unconditionally guaranteeing payment of the 1984 note, although no addi-

6. *Id.* at 22.
7. 911 S.W.2d 851 (Tex. App.—Fort Worth 1995, writ denied).
8. *See* Tex. Prop. Code Ann. § 51.002 (Vernon 1995).
9. *Reyna*, 911 S.W.2d at 855. The proper measure of damages for wrongful foreclosure is the difference between the fair market value of the land at the time of foreclosure and the amount received at the foreclosure sale. *Id.*
10. 919 S.W.2d 743 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

tional funds were advanced to Eduardo and Jorge as consideration for increasing their obligation. Subsequently, Cullen Bank filed separate suits against Eduardo and Jorge for defaulting on the 1984 loan. In 1987 Eduardo and Jorge both entered into settlement agreements with Cullen Bank, which included new notes.[11]

Eduardo and Jorge both defaulted on the 1987 notes and Cullen Bank sued to collect on these notes. The trial court entered final judgment in favor of Cullen Bank. During postjudgment discovery, Cullen Bank allegedly discovered fraudulent transfers by Jorge and Eduardo and subsequently filed another suit based on these discoveries. Eduardo and Jorge filed a response claiming several affirmative defenses, including usury. Eduardo and Jorge also filed counterclaims alleging usury. Cullen Bank filed a motion for partial summary judgment requesting the trial court to hold that the 1987 settlement agreements barred Eduardo and Jorge's counterclaims and affirmative defenses. The trial court granted Cullen Banks' motion. On appeal, the court reversed, holding that a fact issue existed as to whether the 1984 note obligated Eduardo and Jorge to pay interest exceeding the maximum lawful rate.[12]

Eduardo and Jorge argued that the 1984 note was usurious, therefore, the settlement agreements were void since they failed to purge the usury contained in the 1984 note. They also argued that summary judgment could not be based on a void instrument. In agreeing with this argument, the court relied upon *Alamo Lumber Co. v. Gold*[13] which held that "[w]hen a lender requires, as a condition to making a loan, that a borrower assume a third party's debt, such debt must be included in the interest computation to determine usury."[14] As previously mentioned, Cullen Bank conditioned the renewal of the 1983 note upon Eduardo and Jorge's agreement to be jointly and severally liable with third parties for the total sum of the 1984 note. This 1984 note had a one-year maturity, and Cullen Bank did not advance any funds to Eduardo and Jorge except for the original $150,000 loan.[15] Thus, the court found that the computed interest on the 1984 note under *Alamo Lumber* likely exceeded two million dollars for one year, even though no more than $150,000 was ever received from Cullen Bank.[16] It does not take a mathematician to determine that this amount was greater than the maximum lawful rate of interest of 24% at that time (the rate was closer to 1500%). The court noted

11. Under the settlement agreements, Eduardo and Jorge agreed that
(1) [Cullen Bank] would pay . . . each $10 and release them of their joint and several liability under the 1984 note and guaranty agreements; (2) if [they] defaulted on their notes, the defaulting party could be liable for the outstanding balance on the original 1984 note; and (3) [they] waived all affirmative defenses and causes of action relating to the loan documents in the underlying lawsuit.

Id. at 744.

12. *Id.* at 746.

13. 661 S.W.2d 926 (Tex. 1983).

14. *Lentino*, 919 S.W.2d at 746 (citing *Alamo Lumber*, 661 S.W.2d at 928).

15. *Id.*

16. *Id.*

that when the original usurious obligation extends into the subsequent settlement agreements, the subsequent settlement agreements will be void and unenforceable.[17] The court does indicate that the bank could have taken a different route and avoid this result; i.e. purging the settlement instrument of usury contained in the underlying rate. This can be done by cancelling the obligation tainted by usury and creating a new obligation free of usury.

In *William C. Dear & Associates, Inc. v. Plastronics, Inc.*,[18] the court made a no-nonsense decision in favor of Plastronics. The controversy arose from investigatory services performed by Dear on behalf of Plastronics. An invoice was sent to Plastronics itemizing the outstanding debt and amount of interest that accrued thereon from May 1992 through October 1992. As disclosed on the invoice, and conceded by Dear, the interest charged was one percent per month, compounded monthly. Dear instituted this appeal from a final summary judgment in favor of Plastronics.[19] The appeals court had no trouble affirming the trial court summary judgment regarding the usury issues.[20] There was no agreement between the parties specifying an applicable rate of interest, and under those circumstances, the relevant statute permitted Dear to charge Plastronics simple interest at six percent per annum.[21] The court calculated the interest and determined that the entire amount of interest charged on the November invoice equalled $2,990.62, while the Code allowed Dear to receive approximately $1,458.36.[22] Dear argued that article 5069-1.06,[23] applied by the trial court, did not apply to transactions like the one in question. Again, the court did not play around with this argument and stated that the application of article 5069-1.06 was beyond doubt.[24] The court held that the charge represented a fee for withholding payment, and this was nothing more than compensation for the detention of money purportedly due, which is "interest" under article 5069-1.06 of the civil statutes.[25] Although not a "real estate" case, a key point made by the court (applicable in real estate transactions) is that "a creditor need not have the specific intent to charge usury to violate the usury statutes, he need only intend to charge the rate charged." This raises the question of what affect this might have on a usury savings clause which might otherwise have been upheld.

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17. *Id.* at 747.

18. 913 S.W.2d 251 (Tex. App.—Amarillo 1996, writ denied).

19. The final summary judgment awarded Plastronics $9,375.11. "The sum consisted of three times the amount of interest charged in excess of that allowed by law, that is, $4,375.11, plus attorney's fees of $5,000.00." *Id.* at 253.

20. *Id.*

21. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987).

22. *Plastronics*, 913 S.W.2d at 253.

23. Article 5069-1.06 sets for the penalties for any person who charges interest greater than the amount allowed by the statute. TEX. REV. CIV. STAT. ANN. art. 5069-1.06(a) (Vernon 1987). "Interest" is defined as compensation for the use, forbearance, or detention of money. *Id.* art. 5069-1.01(a).

24. *Plastonics*, 913 S.W.2d at 253.

25. *Id.*

D. GUARANTY

Cases concerning guaranty agreements were scarce this Survey Period. *Bishop v. National Loan Investors, L.P.*[26] focused on the effect of an unconditional guarantee and notice requirements regarding foreclosure on secured realty. In September of 1990, Dan Royall, Jr., borrowed $41,261.17 from Kerens Bank to purchase property. Later that year, Phillip R. Bishop signed a guaranty agreement regarding the note. Royall also had an outstanding 1987 loan with Kerens Bank. The guaranty specifically stated that it did not apply to other debts that Royall had with Kerens Bank. Thereafter, the FDIC took control of the bank at the time Kerens Bank became insolvent. National Loan Investors, L.P. (NLI) then acquired both the 1987 and 1990 notes from the FDIC. After Royall defaulted on the 1990 note, NLI filed suit to collect the 1990 note from Bishop based on his status as guarantor. During this same time period, NLI sold the land securing the 1987 note and also filed a motion for summary judgment on the Bishop lawsuit. Bishop claimed that NLI should have sued Royall first and that NLI failed to properly notify him before selling the collateral securing the 1990 note. Summary judgment was granted in favor of NLI.

On appeal, Bishop relied on the Texas Uniform Commercial Code (UCC) to support his claims.[27] With regard to Bishop's first argument that NLI should have sued Royall first, the court of appeals concluded that the 1990 note placed no conditions on the guarantee agreement thereby making Bishop an unconditional guarantor.[28] As an unconditional guarantor, Bishop was primarily liable for the debt and waived any requirement that the holder take action against the maker as a condition precedent to his liability.[29] In striking down Bishop's second argument regarding the notice of foreclosure sale, the court pointed out that the 1990 note was not secured by the 1987 deed of trust against the foreclosed property since the two documents involved different parties.[30] Additionally, the court indicated that even if the 1990 note had been secured by the real property, the UCC's notice provision did not apply to "guarantors secured by realty."[31]

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26. 915 S.W.2d 241 (Tex. App.—Fort Worth 1995, writ denied).

27. TEX. BUS. & COMM. CODE ANN. § 34.02(a) & (b)(2) (Tex. UCC) (Vernon 1987) (requiring that if a surety to a contract requires that the obligee sue on the contract, the obligee must sue the obligor during the first term of court after receiving the notice, or during the second term showing good cause for the delay); *Id.* § 9.504(c) (Vernon 1991) (providing that a secured party must notify the debtor of the collateral's sale).

28. *Bishop*, 915 S.W.2d at 244.

29. *Id.*

30. *Id.* at 245. The 1987 deed of trust secured any future debts of Royall and Gatlin; the note involved Royall only. *Id.*

31. *Id.*; TEX. BUS. & COMM. CODE ANN. § 9.104(10) (Tex. UCC) (Vernon 1988) (indicating that the UCC expressly omits governance over "the creation or transfer or an interest in or lien on real estate").

III. HOMESTEAD

National Union Fire Insurance Co. v. Olson[32] dealt with the issue of whether a surviving minor child's mere existence would cause a homestead to descend free of a decedent's debt. The decedent died testate survived by his son, Judd Olson, and minor daughter, Stephanie Olson. The son acted as independent executor and inherited his father's homestead. The decedent's estate was insolvent and owed National Union over $750,000. To secure payment of this debt, National Union requested a judgment lien against the homestead property, arguing that the property was non-exempt real estate. Judd Olson filed a declaratory judgment action seeking a declaration that because the decedent had a minor child at the time of his death, the homestead passed to him as devisee free and clear of National Union's claim. The probate court granted summary judgment in favor of Judd Olson and National Union appealed.

National Union urged the appellate court to condition the exempt nature of the homestead upon Stephanie's actual occupancy of the homestead. Stephanie had lived with her mother since her parents' divorce in 1989. Affirming the probate court, the appeals court referenced the Texas Constitution and the Texas Probate Code, which indicate that a determination of whether homestead property is exempt from satisfaction of the decedent's debts turn upon whether the decedent is survived by a spouse, minor child, or unmarried adult child residing with the family.[33] The court stated that the right to occupy the homestead and the right to receive the homestead debt free were separate and independent rights.[34] Regardless of whether Stephanie exercised her right to occupy the homestead, the homestead passed exempt from creditors; once this exempt status is established, the homestead never becomes subject to debt.[35] Lastly, since Stephanie's existence determined the homestead's exempt status, that status was immediately ascertainable upon the decedent's death and, by definition, post mortem events have no effect on the homestead's exempt status.[36]

Another case dealing with homestead issues attempted to reconcile a 1991 Texas Supreme Court case with prior case law establishing that a party's dispossession from his homestead by judicial act does not defeat his homestead rights. In *Lawrence v. Lawrence*[37] the court of appeals denied the defendant's affirmative defense of homestead. Irene and John Lawrence were divorced in 1988. The decree awarded ten acres of land to John as his separate property. The decree awarded Irene both a $50,000 judgment against John and the exclusive use and right of occupancy of the tract awarded to him as separate property. Irene filed a

32. 920 S.W.2d 458 (Tex. App.—Austin 1996, no writ).
33. TEX. CONST. art. XVI, § 52; TEX. PROB. CODE ANN. § 279 (Vernon 1980).
34. *National Union*, 920 S.W.2d at 462.
35. *Id.*
36. *Id.*
37. 911 S.W.2d 450 (Tex. App.—Texarkana 1995, writ denied).

judgment lien against the property when the decree was signed. Later that month, John conveyed the ten acre tract to his son, John Lawrence, Jr. Irene then filed a declaratory judgment action, claiming that her judgment lien attached to the land. In response, the son argued that the property had been his father's homestead and that he had become his successor in interest. The trial court granted Irene's partial summary judgment.

On appeal, John Lawrence, Jr. relied upon the holdings in *Posey v. Commercial National Bank*[38] and *Speer & Goodnight v. Sykes*[39] to assert his affirmative defense of homestead. The appeals court politely pointed out that *Laster v. First Huntsville Properties Co.*[40] effectively overruled both *Posey* and *Speer*.[41] Based upon the explicit and unambiguous language of the *Laster* opinion, the appeals court concluded "that one who holds only a future interest in property with no present right of possession cannot claim a homestead right in the property, regardless of how he was dispossessed."[42] The divorce court ousted the father from possession of the ten acre tract by granting a life estate in the property to Irene Lawrence. Therefore, John Lawrence, Sr. only had a future interest in the property and without a present possessory interest was not entitled to homestead exemption. That being the case, as a matter of law, John Lawrence, Jr. could not be a successor to a homestead defense.[43]

IV. DEEDS/DEDICATIONS

In *Russell v. City of Bryan*[44] the Houston Court of Appeals considered whether the words "dedicate" and "dedication" in a dedication instrument compelled the conclusion that the grantor intended to merely convey an easement permitting use of land as a park so as to retain ownership of the fee, including minerals, in the grantor. In 1925, Tyler Haswell dedicated a tract of land to the City of Bryan for use as a park. In 1981 the City leased the mineral rights to North Central Oil Company. In 1978, however, Haswell's daughter had conveyed all of the rights, title and interest in and to any mineral or royalty interest she owned in Brazos County to John M. Lawrence, which would include the park. Lawrence then conveyed fractional shares of interests to Michele Russell and Intervenors. Russell and Intervenors sued the City for declaratory judgment and conversion claiming ownership of the minerals under the park through Haswell. A jury found that Haswell intended to convey to the City more than merely the right to use the park's surface land.

Affirming the trial court judgment, the court of appeals disagreed with the appellants' contentions that the term "dedication" was synonymous

38. 55 S.W.2d 515, 517 (Tex. Comm'n App. 1932, judgm't adopted).
39. 119 S.W.2d 86, 88 (Tex. 1909).
40. 826 S.W.2d 125 (Tex. 1991).
41. *Lawrence*, 911 S.W.2d at 453.
42. *Id.*
43. *Id.* at 454.
44. 919 S.W.2d 698 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

with "easement."[45] "'Dedication' is defined as '[t]he appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public.'"[46] "Thus, the key is public use, and a fee simple estate, or a lesser estate such as an easement, can be conveyed."[47] The court agreed with the City that Haswell's use of the term "dedication" only indicated "why" the property was conveyed, not "what" was conveyed.[48] Thereafter, the court concluded that the extent of the estate conveyed in a dedication by deed is determined by the grantor's intent; when the deed is ambiguous, examination may be made of circumstances surrounding the deed's execution, as well as other actions from which the grantor's intent may be implied.[49]

Houston Lighting and Power Co. v. State[50] involved the evaluation of dedication law with respect to a public utility easement. Both the State and Houston Lighting and Power (HL&P) filed petitions for declaratory judgment concerning the State's duty to reimburse HL&P for the cost of relocating electric facilities in three locations. HL&P had its electric distribution service installed in three public utility easements dedicated by subdivision plats prior to displacement by the State for roads. Two of HL&P's utilities occupied dedicated public utility easements parallel to roads which were widened by the State. The State acquired the lots, which included within their boundaries the dedicated public utility easements. HL&P was ordered to relocate its utilities and did so. The State then built a barrier on U.S. Highway 59 necessitating the raising of the power lines by HL&P that were on a dedicated public utility easement.

This was a case of first impression, since there were no Texas cases directly concerning a State taking a dedicated public utility easement from a utility that had used the easement for public purposes. The court ruled that HL&P had acquired an easement by estoppel in pais.[51] This ruling was predicated upon the Texas Supreme Court holding in *Drye v. Eagle Rock Ranch, Inc.*[52] which held that where a purchaser buys property by reference to a plat or map which shows designated easements, and the purchaser then spends money to make improvements thereon, the seller cannot deny the easement's existence.[53] In the present case, HL&P had invested money in the installation of its equipment based upon the representation that it was a public utility easement. The State was the successor in title to the owners who dedicated the public utility easements and the State acquired these lots subject to the dedicated easements.[54]

45. *Id.* at 702.
46. *Id.* (citing BLACK'S LAW DICTIONARY 412 (6th ed. 1990)).
47. *Id.*
48. *Id.*
49. *Id.* at 703.
50. 925 S.W.2d 312 (Tex. App.—Houston [14th Dist.] 1996, writ denied).
51. *Id.* at 315.
52. 364 S.W.2d 196 (Tex. 1963).
53. *Id.* at 209-210.
54. *HL&P*, 925 S.W.2d at 315.

Therefore, HL&P was entitled to compensation for its relocation expenses.

Laurel Land Memorial Park, Inc. v. Dallas Central Appraisal District[55] presented a grave, but unanswered question of law. In *Laurel Land* the court decided whether publicly dedicated cemetery property was exempt from ad valorem taxation even though a for-profit corporation owned the property. The cemeteries owned publicly dedicated land used or to be used exclusively for human burial. Before 1992, the cemeteries had enjoyed tax exempt status on their publicly dedicated cemetery property.[56] But in 1992, the District ended its practice of exempting dedicated cemetery property if a corporation chartered and organized for profit owned the land and operated the cemetery. The cemeteries unsuccessfully protested the District's tax notices and appealed the review board's decision to the district court. There, the cemeteries argued that the Texas Health and Safety Code exempts dedicated cemetery property from taxation, regardless of the cemetery owner's corporate character. Each party filed motions for summary judgment. The trial court granted the District's motion in its entirety, agreeing with the District's position that under the Texas Tax Code, the property was not exempt from taxation since the property was held for profit.

Upon appeal, the Dallas Court of Appeals reversed the trial court and concluded that the property was exempt from taxation.[57] Cemeteries historically have received special favor under Texas law. In particular, the Texas Constitution,[58] the Texas Tax Code,[59] and the Texas Health and Safety Code,[60] recognize society's interest in protecting and preserving places of burial. The court recognized that tension exists between the Tax Code,[61] which provides that cemetery property held for profit is not exempt from taxation, and the Health and Safety Code,[62] which provides

55. 911 S.W.2d 783 (Tex. App.—Dallas 1995, writ denied).

56. The tax exempt status applied only on property "in which at least one interment had taken place or at least fifty percent of the burial spaces had been sold even if there had not yet been an interment." *Id.* at 784-85.

57. *Id.* at 784.

58. TEX. CONST. art. VII, § 2(a).

59. TEX. TAX CODE ANN. § 11.17 (Vernon 1992).

60. TEX. HEALTH & SAFETY CODE ANN. § 711.035 (Vernon Supp. 1995).

61. The Code states: "A person is entitled to an exemption from taxation of the property he owns and uses exclusively for human burial and does not hold for profit." TEX. TAX CODE ANN. § 11.17 (Vernon 1992).

62. The Health and Safety Code states:

> (a) Property may be dedicated for cemetery purposes, and the dedication is permitted in respect for the dead, for the disposition of remains, and in fulfillment of a duty to and for the benefit of the public.
>
> (b) Dedication of cemetery property and title to the exclusive right of sepulture of a plot owner are not affected by the dissolution of the cemetery organization, nonuse by the cemetery organization, alienation, encumbrance, or forced sale of the property.
>
> * * *
>
> (e) All property of a dedicated cemetery, including a road, alley, or walk in the cemetery:

for exemption of publicly dedicated cemetery property even if owned by a corporation chartered for profit. In reconciling the two statutes, the court began its analysis by pointing out that once a cemetery organization publicly dedicated property, the organization could not use that property for any purpose other than for human burial[63] and the dedication may be removed only through judicial proceeding.[64] As you can see, the dedication fixes the property's use, thus meeting the first condition of the two part test for tax exemption set forth in the Tax Code.[65]

To satisfy the second part of the Tax Code test, the court reviewed the consequences upon the owner of dedicated property. Once public dedication fixes the property's use, the dedication also caused the property not to be held "for profit," which is the second part of the Code's test for tax exemption.[66] Public dedication of land for burial purposes effects an abandonment of the land's use and possession for all purposes other than burial.[67] After public dedication a corporate owner retains only the legal title to the dedicated property and its dominion over the land is extinguished since it no longer has the power to sell or convey the land for any purpose other than burial. The court stated that

> merely because the property ultimately may be sold for more money than the owner paid for it does not mean the property is "held for profit" . . . [therefore] as a matter of law the public dedication of property for cemetery purposes causes the property to be held for the sole purpose of burying the dead.[68]

As a result, the court found that the two prong test for tax exemption had been satisfied and the cemetery property was exempt from ad valorem taxation as a matter of law.[69] The Supreme Court denied writ, so for all practical purposes this matter has been laid to rest.

V. EASEMENTS

Daniel v. Fox[70] contains a good discussion about easements. There were many parties involved and the facts were such that it was almost necessary to hire a schematic artist to assist in visualizing the circum-

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(1) is exempt from public improvements assessments, fees, and public taxation; and

(2) may not be sold on execution or applied in payment of debts due from individual owners and plots.

(f) Dedicated cemetery property shall be used exclusively for cemetery purposes until the dedication is removed by court order or until the maintenance of the cemetery is enjoined or abated as a nuisance under Section 711.007.

TEX. HEALTH & SAFETY CODE ANN. § 711.035 (Vernon Supp. 1995).

63. *Laurel Land*, 911 S.W.2d at 787.

64. TEX. HEALTH & SAFETY CODE ANN. § 711.036 (Vernon Supp. 1995).

65. *See supra* note 61.

66. *Id.*

67. Smallwood v. Midfield Oil Co., 89 S.W.2d 1086, 1090 (Tex. Civ. App.—Texarkana 1935, writ dism'd).

68. *Laurel Land*, 911 S.W.2d at 787.

69. *Id.*

70. 917 S.W.2d 106 (Tex. App.—San Antonio 1996, writ denied).

stances. Basically, in 1955 the owner of a large tract of land partitioned it into five parcels running parallel to each other with each parcel being divided by a creek. The owners of the subdivided parcels could not cross to the other side of their property without using a road that ran along both sides of the creek and crossed each of the other parcels of land. In 1974, Lydia Kothmann Fuchs deeded her tract to her sons, the Fox brothers. Neither of the brothers lived on the property and eventually leased the property to Uncle Silas Kothmann who already owned one of the five parcels of land. The other owners also leased their tracts to Uncle Silas. Uncle Silas turned over his property and the leased tracts to his son Eldon Kothmann. In 1991, when the lease between the Fox brothers and Eldon expired they elected not to renew the lease, choosing instead to lease the tract to individuals for hunting purposes. Later that year, Eldon demanded that the Fox brothers and the hunters discontinue use of both roads and erected a fence to prevent entry onto his land. In 1992, the Fox brothers filed suit seeking a declaratory judgment that an easement existed, allowing use of the road on the east side of the creek.

During trial, all defendants acknowledged an easement in favor of the Fox brothers on the west side of Beaver Creek. "At the conclusion of the trial . . . the trial court awarded an 'implied easement by necessity' in favor of [the Fox brothers] across all tracts on the east side of [the creek.]"[71] The owner of the southernmost tract appealed, claiming that the trial court ruling was unclear as to whether they granted an implied easement or an easement by necessity. Upon appeal, the court concerned itself not with the issue of whether the easement was implied or of necessity, but instead focused on whether the easement arose by implication or by way of grant to the dominant estate as a necessary means to ensure the enjoyment of the estate where an easement was neither expressly reserved nor granted.[72] It was concluded that whether the easement arose impliedly[73] as a result of reservation by the dominant estate or by way of necessity[74] to ensure the enjoyment of the estate, the elements of each were identical and what was being alluded to was that it was an easement by necessity regardless of how it arose. The evidence supported a finding of unity of ownership of the dominant and servient estates prior to severance, the necessity of a roadway and the existence of such necessity at the time the estates were severed.[75] From this point on, the focus of the

71. *Id.* at 109.

72. *Id.* at 110.

73. An implied easement requires that "(1) there was unity of ownership of the dominant and servient estates and that the use was (2) apparent, (3) in existence at the time of the grant, (4) permanent, (5) continuous, and (6) reasonably necessary to the enjoyment of their premises granted." *Id.* at 110 (citing Bickler v. Bickler, 403 S.W.2d 354, 357 (Tex. 1966)).

74. An easement by necessity requires "(1) unity of ownership of the dominant and servient estates prior to severance, (2) the necessity of a roadway, and (3) that the necessity existed at the time the estates were severed." *Id.* at 111 (citing Koonce v. Brite Estate, 663 S.W.2d 451, 452 (Tex. 1984)).

75. *Id.*

court was on the degree of necessity required for an easement by necessity as a result of an implied grant. The court stated that "[t]he doctrine of strict necessity prohibit[ed] the imposition of a burden upon an estate for the mere convenience of another estate."[76] In view of the evidence, the court found that the Fox brothers had met their burden of showing not only the required necessity but that the only other option was prohibitively expensive and therefore, the necessity shown by then was more than for their mere convenience.[77]

VI. EMINENT DOMAIN

A. PROPER PARTIES

In *Barshop v. Medina County Underground Water Conservation District*,[78] the Supreme Court of Texas addressed the question of regulation of water usage under the Edwards Aquifer Act (Act).[79] That Act regulates the use of the primary source of water for residents in the south central part of Texas. The Act's permit system established a preference for the Edward's Aquifer's existing users. Appellees sought to enjoin administration and enforcement of the Act, and the district court complied. On direct appeal to the Supreme Court, the court addressed whether appellees had a vested interest in the water beneath their land,[80] including whether use of the water ran with the landowner or with the land. Appellees argued that if use of the water ran with the landowner, the preference to existing users would make the landowner unable to transfer the land to future users, who would be unable to "bootstrap" their use to prior owners, thus imparing their use.[81] The court disagreed, holding that the term "user" in the Act includes prior and future owners of land, thus making the land freely transferrable.[82] In addition, a landowner could show historical use of the property in establishing its water use permits, thus making the land freely transferable and maximizing the amount of available water for withdrawal.[83]

In *Beutel v. Dallas County Flood Control District*[84] the court addressed the question of who is a proper party in a condemnation action. The Flood Control District authorized funds to purchase the subject property for flood control purposes. One month later, the tract was purchased by appellant Cross, who then sold the property to her son. Beutel then purchased the property at a Sheriff's sale, which was brought about by a judgment held by Beutel. In the Flood Control District's condemnation

76. *Id.* at 112.
77. *Id.* at 113.
78. 925 S.W.2d 618 (Tex. 1996).
79. Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.06, 1993 Tex. Gen. Law 2355, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505.
80. *Id.* at 625.
81. *Id.* at 630.
82. *Id.*
83. *Id.*
84. 916 S.W.2d 685 (Tex. App.—Waco 1996, writ denied).

proceedings, appellant Beutel intervened.[85] The court of appeals determined that Beutel was not a proper party to the condemnation proceedings.[86] "The only parties entitled to a condemnation award are the owners of the condemned property at the time of the taking."[87] Beutel argued that he became an owner the day he abstracted his judgment which led to the Sheriff's sale. In response, the Flood Control District claimed that the taking occurred in 1984, seven years before Beutel claimed to become an owner. The court rejected Beutel's claim that he was a lienholder on that date, finding instead the Beutel had no ownership interest on the taking date.[88]

B. DAMAGES

For the last two years, this Survey has dealt with the question of *Schmidt* factors; that is, those compensable damages available to a landowner for remaining property following a taking.[89] In *State v. Heal*,[90] residents of Dallas had property condemned for the widening of Southwestern Boulevard in conjunction with the expansion of North Central Expressway. The Heals appealed the Special Commissioner's findings in the State's condemnation petition, arguing that the condemnation would increase traffic and cause a bottleneck in front of the remaining property, which would impair access to that property. The court initially noted that, under the *Schmidt* factors, "[h]ad the Heals sought damages merely for increased traffic, increased noise, and the overall impact of the Central Expressway project, their claims would be precluded" under the rule that there could be no compensable damages to remainder property caused by the acquisition and use of adjoining property.[91] The Heals, however, sought compensation for the diminution in value of their property caused from increased traffic and bottlenecks. Thus, *Schmidt* did not preclude recovery for impaired access by a landowner.[92]

The *Heal* court also rejected the State's argument that impaired access is a community injury. The court held that while circuity of travel is a community injury, and thus noncompensable, impaired access is specific to a particular property's use and is compensable.[93] After determining that the Heals' claims were not precluded, the court turned to deciding the ultimate question of impaired access, which is a question of law.[94] The court, to permit recovery, must find that access rights have been ma-

85. Beutel has secured a judgment against the son, and the property was sold at the Sheriff's sale in satisfaction of that judgment. *Id.* at 691.
86. *Id.* at 692.
87. *Id.* at 691 (citing City of Austin v. Capitol Livestock Auction Co., 453 S.W.2d 461, 463 (Tex. 1970)).
88. *Id.* at 692.
89. *See* State v. Schmidt, 867 S.W.2d 769 (Tex. 1993).
90. 917 S.W.2d 6 (Tex. 1996).
91. *Id.* at 8.
92. *Id.*
93. *Id.* at 9.
94. *Id.*

terially and substantially impaired. Relying on *DuPuy v. City of Waco*,[95] the seminal case on impaired access damages, the court determined that the Heals had not suffered impaired access, which required essentially no access, but rather only diminished access which is not compensable.[96] The court held that evidence that a new configuration would create confusion, be more hazardous and result in difficulty turning left into the Heals' property is evidence of inconvenience, not evidence of material and substantial impairment.[97]

In *Oddo v. State*[98] a portion of property improved by a two-story office building was condemned. The trial court excluded evidence as to the value of the remaining property, holding the evidence was inadmissible under *Schmidt*. The appellate court disagreed, stating that *Schmidt* only barred evidence of damages which are noncompensable; that is, damages from diversion of traffic, circuitousness, lessened visibility, inconvenience, community damages, and damages from the use of the State's pre-existing right of way.[99] Specifically, evidence that the property no longer complied with zoning laws, had lost parking space, and had lost value due to reconfiguration were admissible, as those were compensable damages.[100]

Typically, when a portion of property is taken, the proper measure of damages to the remainder is the diminution in value. The same is true when only an easement interest is taken. The court in *McClain v. Elm Creek Watershed Authority*[101] dealt with a "double partial-taking" case; that is, the condemning authority took only an easement interest in a portion of the landowner's property. In that instance, "the proper measure of damages is the market value of the . . . tract, considered as severed land, before the taking, minus the value of the same tract, considered as severed land, after the taking."[102] Since the State's testifying expert did not render an opinion based upon the value of the property *as severed land*, the court reversed the trial court's judgment and remanded for further proceedings.[103]

In *Felts v. Harris County*,[104] the court addressed the issue of noise damages. The Felts owned property in Harris County. The County decided to build four-lane "major thoroughfare" that ran adjacent to the Felts' property. The Felts put their home on the market before the construction

95. 396 S.W.2d 103 (Tex. 1965).
96. *Heal*, 917 S.W.2d at 10-11.
97. *Id.* at 11. Following *DuPuy* and *Heal*, the court in Taub v. City of Deer Park, 912 S.W.2d 395 (Tex. App.—Houston [14th Dist.] 1995, no writ), on remand from the Supreme Court of Texas, held that impaired access can be a special compensable damage, although in *Taub* the landowners access was not materially and substantially impaired.
98. 912 S.W.2d 831 (Tex. App.—Dallas 1995, writ denied).
99. *Id.* at 833.
100. *Id.* at 834.
101. 925 S.W.2d 756 (Tex. App.—Austin 1996, no writ).
102. *Id.* at 759.
103. *Id.* at 760.
104. 915 S.W.2d 482 (Tex. 1996).

opened and disclosed to potential purchasers the thoroughfare's proposed location. The home sold for $55,000 less than the Felts were asking. The appellate court held that noise damages are sufficient to qualify as compensable damage under the Texas Constitution.[105] An actual taking of physical appropriation is not required.[106] The court did hold, however, that the noise damages suffered by the Felts were no different than damages suffered by their neighbors, which qualified only as community damages.[107] Since community damages are not compensable, the Felts could not recover for noise damages.[108]

VII. ZONING

Zoning issues were not a major topic of discussion in the courts this year, and there were only three cases of interest. In *FM Properties Operating Co. v. City of Austin*,[109] the court considered the constitutional question of whether the denial of approval for a subdivision plan was arbitrary or capricious and therefore an unconstitutional taking. In 1987, House Bill 4 was enacted requiring that applications for construction permits be approved or disapproved under one set of local laws.[110] The City of Austin adopted an interpretation of House Bill 4 that divided land development activities into two series of permits—a series of permits for subdividing unplatted raw land into legal lots and a series of permits for vertical construction of improvements on existing legal lots. FM Properties acquired the property in question in June 1992. Two months prior to that date, the previous owner filed thirteen applications for preliminary subdivision plat approval with the City. These applications were the first documents in the series of necessary permits for a subdivision project which under House Bill 4 required that all remaining applications be judged by the then existing 1991 ordinances. While these applications were under consideration FM Properties filed their site plan. The site plan was the first permit application in the series of permits required for approval of construction on a subdivided property. FM Properties failed to file all the necessary documents before the site plan expired and the

105. *Id.* at 484; TEX. CONST. art. I, § 17.
106. *Felts*, 915 S.W.2d at 484.
107. *Id.* at 486.
108. *Id.*
109. 93 F.3d 167 (5th Cir. 1996).
110. House Bill 4 was codified in the Texas Government Code, which provides as follows:

> The approval, disapproval, or conditional approval of an application for a permit shall be considered by each regulatory agency solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other duly adopted requirements in effect at the time the original application for the permit is filed. If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other duly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project.

TEX. GOV'T CODE ANN. § 481.143(a) (Vernon 1990 & Supp. 1997).

city rejected the site plan application for that reason. In October 1993, FM Properties refiled the site plan application. By that time, however, the prior 1991 ordinance had been replaced.[111] Because FM Properties' original site plan application expired, the new ordinance governed the subsequent filing of the refiled plan. FM Properties' refiled site plan did not comply with the new ordinance and was therefore rejected. Suit was filed against the City under the allegation that the City had violated FM Properties' Fifth and Fourteenth Amendment rights. A jury trial resulted in a favorable finding for FM Properties.

On appeal, the Fifth Circuit concluded that there was a single dispositive issue, which was whether the City violated FM Properties' substantive due process rights by denying the subsequent site plan application for noncompliance with the new ordinance. The court began by discussing the constitutional standard by which the City's conduct would be judged. By established constitutional law, government action comports with substantive due process if the action is rationally related to a legitimate government purpose. To show that the action is not rationally related to a legitimate government activity requires that such government action be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[112] The court concluded that FM Properties' due process rights had not been violated.[113] The City adopted its interpretation of House Bill 4 to guarantee that land developers would be made to comply with the most current standards at each stage of development. Therefore, the City's policy was rationally related to avoiding inferior and potentially hazardous construction and thus advance the city's health, safety, and welfare.[114]

A similar case is *Williamson Pointe Venture v. City of Austin*.[115] In *Williamson Pointe* land was annexed by the City of Austin and zoned only for houses, farms and ranches. The land's former owner applied for rezoning, and in 1987 rezoning was approved[116] to use the land multifamily dwellings and warehouse or light office purposes. A preliminary subdivision plan has been filed and approved in January 1985; unfortunately, the property owner did not file for final plat approval and the plan expired in September 1987. Williamson Pointe Venture acquired the property in March 1992 and quickly filed a site plan application to avoid the environmentally stringent requirements of the pending Austin Save Our Springs referendum (SOS). However, this application was designed to comply with the ordinance in effect at the time of rezoning, not the one in place in 1992, prior to the SOS ordinance. Williamson Pointe also failed to file a subdivision application to replace the expired one. The site plan application was never approved and the SOS subsequently passed. Williamson

111. *FM Properties*, 93 F.3d at 171.
112. *Id.* at 174 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
113. *Id.* at 175-76.
114. *Id.* at 175.
115. 912 S.W.2d 340 (Tex. App.—Austin 1995, no writ).
116. Austin City Ordinance No. 870326-A; *see Williamson Pointe*, 912 S.W.2d at 341.

Pointe filed suit against the City claiming that it should have to comply only with the standards existing at the time of rezoning. The trial court found in favor of the City. Upon appeal, the court referred to the Texas Government Code for guidance. The Government Code provided that if a series of permits is required for a project, the ordinances in effect at the time of the application for the first permit shall be the sole basis for the consideration of all permits required for the project.[117] Therefore, the relevant issue upon appeal was whether a grant of rezoning by the city council constitutes a permit.

The court held that it did not. It reasoned that rezoning is a legislative act[118] and did not fit the definition of a permit as an approval or authorization for a project.[119] The court further reasoned that the city council is not a regulatory agency which would normally issue permits.[120] The term agency would normally apply to an agency of the executive branch of the government, not a legislative body like the city council. Since the legislature did not include a city council in the definition of a regulatory agency,[121] and the word agency does not normally apply to a legislative body, the court refused to consider the city council a regulatory agency which would issue permits.[122]

West Texas Water Refiners, Inc. v. S & B Beverage Co.[123] addressed whether a board of adjustment (the Board) has the power to grant a special exception when such exception is not explicitly spelled out in the ordinance. The zoning ordinance at issue created various commercial districts. "A C-1 district expressly permit[ted] the operation of a 'retail store'" with a "parenthetical exception that provide[d] for 'no secondhand goods, beer or liquor.'"[124] S & B handled the Texas alcoholic beverage permits for Furr's Supermarkets. S & B applied to the Board for a special exception to sell beer and wine for off premises consumption at one of the Furr's grocery stores located in a C-1 district. West Texas Water Refiners (WTWR) instituted suit seeking an injunction against S & B Beverage and seeking a declaratory judgment that the Board's action in granting the special exception was null and void. The trial court entered judgment declaring that the special exception was not void.

The appeals court, in reversing the trial court, began its analysis with the assertion that possible exceptions must be explicitly spelled out in the

117. TEX. GOV'T CODE ANN. § 481.143(a) (Vernon 1990).

118. *Williamson Pointe*, 912 S.W.2d at 343 (citing City of Pharr v. Tippitt, 616 S.W.2d 173, 175 (Tex. 1981)).

119. A permit is defined as a "license, certificate, approval, registration, consent, permit, or other form of authorization required by law, rule, regulation, or ordinance that must be obtained by a person in order to perform an action or initiate a project for which the permit is sought." TEX. GOV'T CODE ANN. § 481.142(2) (Vernon 1990).

120. *Williamson Pointe*, 912 S.W.2d at 343.

121. A regulatory agency is an agency, bureau, department, division or commission of the state or any department or other agency of a political subdivision that processes and issues permits. TEX. GOV'T CODE ANN. § 481.142(3) (Vernon 1990).

122. *Williamson Pointe*, 912 S.W.2d at 344.

123. 915 S.W.2d 623 (Tex. App.—El Paso 1996, no writ).

124. *Id.* at 625.

ordinance itself, and a board of adjustment may not grant exceptions not otherwise expressly provided for in the ordinance.[125] The zoning ordinance in question allowed two exceptions with regard to usage of property. First, the Board could grant an exception for the extension of a nonconforming use into different areas of a pre-existing building; that exception was inapplicable. Second, the Board could grant an exception for a use conditionally allowed by the ordinance's provisions. If this second statute did not apply, the allowed special exception was void.[126] The parties stipulated that the provision was not ambiguous. The parties also offered two possible interpretations of the provision and the impact of the parenthetical reference. WTWR argued that the parenthetical reference unambiguously prohibited products which could be sold; thus, beer and wine were prohibited *products* in any store. Conversely, S & B argued that the parenthetical reference only prohibited the *types* of stores in the C-1 district (thus no beer stores or wine stores); grocery stores, however could sell beer and wine. The court concluded that

> [i]f the ordinance is unambiguous as stipulated and if the sale of beer and wine is either permitted or prohibited as the parties allege, it follows that the ordinance does not purport to allow the conditional use of beer and wine sales to be determined at the discretion of the Board.[127]

Therefore, any special exception allowing such use under the conditional use provision of the ordinance was void.[128]

VIII. LIENS/MECHANIC'S LIEN

During the Survey period the Texas Supreme Court addressed the issue of whether a third party may be subrogated to a federal government tax lien and thus, entitled to enforce such a lien against the taxpayer's homestead. Although the case of *Benchmark Bank v. Crowder*[129] dealt with homestead issues as well, the court primarily discussed the subrogation question. Frank Crowder owned and operated a insurance agency of which he was the sole officer, director and shareholder. When the IRS assessed liens for his unpaid payroll taxes, Crowder and his wife signed a promissory note payable to Benchmark Bank (the Bank) to pay off the tax debt. The promissory note was secured by a deed of trust creating a lien against the Crowder's homestead. The deed of trust also provided that if the proceeds of the promissory note were used to pay any outstanding lien the Bank would be subrogated to any and all rights of those liens. The Bank foreclosed on the property after the Crowders defaulted on the note. Thereafter, the Crowders sued the Bank for declaratory re-

125. *Id.* at 627.
126. *Id.*
127. *Id.* at 628.
128. *Id.*
129. 919 S.W.2d 657 (Tex. 1996).

lief[130] and damages for wrongful foreclosure. Both parties filed summary judgment motions. The trial court granted summary judgment in favor of the Bank indicating that the deed of trust given by the Crowders created a valid lien against their homestead pursuant to the deed of trust.[131] The court of appeals reversed the trial court's take-nothing judgment, concluding that the Bank's attempt to obtain or enforce the IRS's tax lien was precluded by the Texas Constitution.[132]

Of the many issues involved in the case the Texas Supreme Court stated that the principal issue was whether a third party may be subrogated to a federal government tax lien. Relying upon *Staley v. Vaughn*[133] for support, the court concluded that subrogation in these circumstances was proper.[134] The court pointed out that the *Staley* case was not clearly dispositive since there was no discussion of why the court in that case found that subrogation was proper. But the *Staley* case, along with other cases holding that "a third party who refinances a debt secured by a valid mechanic's lien against a homestead may be subrogated to the lien," convinced the court that such should be the case here as well.[135] The court stated that there was no difference between the refinancing of a debt secured by a mechanic's lien and the refinancing of a debt secured by a federal tax lien.[136] "Once valid, the lien does not become invalid against the homestead simply because the original debt has been refinanced," therefore, the Bank was contractually and equitably subrogated to the IRS's tax lien against the Crowders.[137]

In *Hoarel Sign Co. v. Dominion Equity Corp.*,[138] the court dealt with the doctrine of removables as it related to a mechanic's & materialman's liens (M & M lien). Hoarel Sign Co. contracted with Hilton Investments for the removal and installation of signs on a Hilton-owned building. The building and land were encumbered by a pre-existing deed of trust in favor of Caprock Savings and Loan Association. Hilton experienced financial difficulties, which resulted in a default of the agreement between Hilton and Hoarel and the foreclosure and sale of the building and property to Dominion Equity Corporation. Hoarel then sued Dominion. Hoarel acknowledged that it had not followed the proper procedures to secure a statutory M & M lien, but claimed that they were entitled to a constitutional M & M lien. Summary judgment was granted in favor of

130. "The Crowders sued . . . seeking a declaration that (1) the lien granted by the deed of trust was invalid, (2) the deed of trust did not authorize a nonjudicial foreclosure, and (3) the foreclosure was wrongful." *Id.* at 659.

131. *Id.* at 659-60.

132. *See* TEX. CONST. art. XVI, § 50 (1876, amended 1973 and 1995).

133. 50 S.W.2d 907, 911-12 (Tex. Civ. App.—Amarillo 1932, writ ref'd) (holding, without discussion, that holder of deed of trust to secure payment of a federal income tax lien was the owner of the lien and subrogated to the government's rights).

134. *Crowder*, 919 S.W.2d at 661.

135. *Id.* (citing Farm & Home Sav. & Loan Ass'n v. Martin 88 S.W.2d 459, 469-70 (Tex. 1935)).

136. *Id.*

137. *Id.*

138. 910 S.W.2d 140 (Tex. App.— Amarillo 1995, writ denied).

Dominion. The appeals court in Amarillo reversed the trial court and found that a material issue existed with regard to whether the sign fell within the doctrine of removables. The doctrine indicates that an item is removable if it can be detached from the building without materially injuring the remaining property.[139] An affidavit submitted by Hoarel indicated that the sign was installed in such a fashion that it could be removed without material injury to the land.[140] The court stated that if such is the case then the Hoarel's mechanic's lien would have been superior to Dominion's pre-existing deed of trust.[141] It was irrelevant whether the lien was statutory or unconstitutional, since the doctrine of removeables applied to both.[142]

IX. LANDLORD/TENANT

Where there's smoke, there's fire! *Rao v. Rodriguez*[143] was a wrongful death action in connection with a fire in which the smoke detector failed to function because it lacked a battery. Rao appealed from a judgment n.o.v., contending that he had both a statutory cause of action based upon the smoke detector statute and a common law cause of action for negligence. The apartment manager was responsible for making sure the smoke detectors were operable at the time the premises were rented. Prior to the fire Rao had never requested the manager or landlords install, inspect or repair the smoke detector in the Rao apartment. Reading the statute, the court noted that "[a] landlord has liability under the smoke detector statute if the landlord fails to install, inspect, or repair a smoke detector within the time set forth in the statute."[144] However, this obligation does not arise unless a request by the tenant to do so is made and until further notice from the tenant that the tenant might exercise his statutory remedies.[145] Therefore, the court concluded that Rao was not entitled to judgment against either the manager or landlord because he never made a request or gave notice prior to the fire.[146] The court went on to find that the liability provisions of the smoke detector statute were an exclusive remedy as between tenant and landlord, therefore precluding any common law cause of action brought by Rao.[147]

One important case decided by the Supreme Court established the duty a landlord owes to prevent criminal acts of third parties who are not under the landowners' supervision or control. *Walker v. Harris*[148] was a wrongful death case arising out of a fatal stabbing incident. The Walkers

139. *Id.* at 142 (citing Federal Deposit Ins. Corp. v. Bodin Concrete Co., 869 S.W.2d 372, 382 (Tex. App.—Dallas 1993, writ denied)).
140. *Id.* at 143.
141. *Id.* at 142.
142. *Id.*
143. 923 S.W.2d 176 (Tex. App.—Beaumont 1996, no writ).
144. *Id.* at 180; *see* TEX. PROP. CODE ANN. § 92.259 (Vernon 1995 & Supp. 1996).
145. *Rao*, 923 S.W.2d at 180.
146. *Id.*
147. *Id.*
148. 924 S.W.2d 375 (Tex. 1996).

owned and operated two separate fourplex apartment units in Brookshire, Texas. In 1990, Ronald Harris attended a party at one of the apartments and was stabbed to death near one of the fourplexes. Neither Harris nor his killer were tenants in the fourplex. The Harrises sued the Walkers for negligence, alleging that the Walkers knew or should have known that the area was located in a criminally active area. The Walkers responded that although property owners may owe a duty to protect individuals from the criminal acts of third parties, they did not owe such a duty in this case because the stabbing was not foreseeable. The court stated that foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable.[149] The Walkers were entitled in summary judgment if they could show that violent crimial activity was foreseeable.[150] The summary judgment evidence indicated that the neighborhood was an area of low to moderate crime with no reports of violent crimes, no burglaries and few incidents of vandalism.[151] This evidence established that the Walkers had no reason to foresee the likelihood of violent criminal activity at their fourplex. Consequently, the stabbing was not foreseeable as a matter of law.[152]

In *Nalle v. Taco Bell Corp.*,[153] the court of appeals ruled in favor of the tenant when the landlord sued for breach of the lease. In 1976, Alan Nalle's predecessor leased property to Taco Bell for use in the operation of a Taco Bell franchise. The lease provided that Taco Bell "may use" the premises for the purpose of conducting the business of a Taco Bell food outlet or for any other legally permissible business or commercial venture. The rent was to be the higher of either $1,350 or five percent of gross sales. In 1993, Taco Bell closed the restaurant and began using the property as an equipment storage facility. Since he was no longer entitled to income from the percentage of sales, Nalle filed suit and alleged that Taco Bell had breached the lease.[154] Taco Bell moved for summary judgment arguing that the words "may use" did not require it to continue operating the premises as a restaurant. The trial court granted summary judgment for Taco Bell.

On appeal, Nalle first argued that the lease expressly required that Taco Bell "must" continue operating a restaurant on the lease premises. The appeals court quickly ruled against Nalle's argument, pointing out that "[t]he word 'may' means possibility, permission, liberty or power; it does not indicate a mandatory requirement."[155] Nalle then argued that the trial court should have implied a covenant of continuous operation in the lease, thereby obligating Taco Bell to operate a restaurant on the premises throughout the lease period. Again the court ruled against

149. *Id.* at 377.
150. *Id.*
151. *Id.*
152. *Id.* at 378.
153. 914 S.W.2d 685 (Tex. App.—Austin 1996, writ denied).
154. *Id.* at 686.
155. *Id.* at 687 (citing BLACKS LAW DICTIONARY 979 (6th ed. 1990)).

Nalle. Stating the general rule that courts should look only to the written contract to discern the parties' obligations, the appeals court held that an implied covenant is necessary only if the obligations were so clearly within the contemplation of the parties that they deemed it unnecessary to express it.[156] The court relied heavily on *Weil v. Ann Lewis Shops, Inc.*,[157] where the court refused to imply a covenant of continuous operation because the lease had been extensively negotiated and the fixed rental clause reasonably protected the lessor in case the lessee failed to conduct a certain level of business.[158] The court in *Weil* refused, as a matter of law, to imply the covenant because it was not plainly necessary to effectuate the intent of the parties nor obviously within their contemplation.[159]

Finally, the *Nalle* court also found it unnecessary to decide on the application of a California case subscribing to an "adequacy" rule. That rule would require that the court determine whether the agreed fixed amount was adequate. The court held that the fixed minimum rental rate covered Nalle's financial obligations, and was thus adequate as a matter of law.[160]

Campos v. Investment Management Properties, Inc.[161] considered the rights of a landlord with regard to removing a tenant's property from the premises pursuant to a writ of possession. After obtaining a writ of possession, Investment Management Properties (IMP) along with two deputy sheriffs, took possession of the premises in question. Under the sheriffs's supervision, Campos' property was moved and placed on the front lawn. Thereafter, Campos filed suit against IMP alleging conversion and negligence for the destruction of his property as a result of rain. The appeals court struck down all of Campos' arguments and imposed sanctions against him for filing a frivolous appeal. The court held that IMP did not convert Campos' property because it was legally authorized to remove the property pursuant to a writ of possession. Further, IMP was not negligent because it did not have a duty to care for the property once it was removed from the premises.[162]

X. MUNICIPAL CORPORATION

Roberts v. City of Grapevine[163] dealt with the causal connection necessary to hold a city liable for a defect in a mandated crosswalk. Gerri Roberts tripped and fell while walking down the steps of a pedestrian crosswalk. The fall resulted in injuries to both of her ankles and she brought suit against the City of Grapevine for premises liability. The pri-

156. *Id.* at 687.
157. 281 S.W.2d 651 (Tex. Civ. App.—San Antonio 1955, writ ref'd).
158. *Id.* at 655-56.
159. *Id.*
160. *Nalle*, 914 S.W.2d at 689.
161. 917 S.W.2d 351 (Tex. App.—San Antonio 1996, writ denied).
162. *Id.* at 354-355.
163. 923 S.W.2d 169 (Tex. App.—Fort Worth 1996, writ requested).

mary issue was whether the condition of the steps constituted a "special defect" or simply an "ordinary premise defect,"[164] which in turn determined the duty owned to Roberts by the City. The question was whether the City must have actual knowledge or just reasonable knowledge of the crosswalk's condition.[165]

Special defects are statutorily defined as "defects such as excavations or obstructions on highways, roads, or streets."[166] The court noted that "[a] condition can be a special defect without actually being on the roadway if it is close enough to present a threat to the 'normal users of [the] road.'"[167] Evidence indicated that the steps were crumbling and cracked, thus creating a hole in the step; the step was also and elevated, thus creating an unusually high first step. These facts, in addition to the fact that the City mandated that the crosswalk be used as the only means of crossing the street, dictated that the defect was special. Therefore the City had a duty to warn of the condition, even if the City did not create that condition. The court added that to hold otherwise would encourage cities to neglect their delineated crosswalks, because any injured party would have to prove the city had actual knowledge of the defect as opposed to a standard of ordinary care.[168]

164. *Id.* at 171.

165. If the defect amounts to a premises defect the city owes the same duty that a private landowner owes a licensee. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (Vernon 1986). If the defect amounts to a special defect, then the City owes Roberts the same duty to warn that a private landowner owes invitee. *See id.* § 101.022(b). For and ordinary premises defect, Roberts must prove that the City had actual knowledge of the defects and she did not actually know of the condition. *Roberts*, 923 S.W.2d at 173.

166. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(b) (Vernon 1986).

167. *Roberts*, 923 S.W.2d at 172 (citing State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 238 n.3 (Tex. 1992)).

168. *Id.* at 173.