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REAL PROPERTY

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LIKE the Ice Age advance of glaciers, the slow but inexorable codification of real estate law scraped forward this Survey period. That vast statutory slab called the Texas Property Code again expanded with the passage of legislation that limits a mortgagee's deficiency rights upon foreclosure. In the process, the ever-shrinking terrain of the courts as common law adjudicators was further ground down and crushed under.

It remains to be seen, though, whether this latest legislative encroachment will survive judicial review. Earlier this century, the Texas supreme court struck down similar legislation as violative of the Texas Constitution's contract clause.¹ This time, however, it seemed that the lawmakers would steer clear of constitutional proscriptions. The drafting of HB 169 was guided by scholarly analysis and honed by competing interest groups, and the final product appeared both coherent and constitutionally sound.

Alas, after the bill's passage the lawmakers were not content to rest on their considerable achievement. While the lenders' lobbyists were returning home with the contented sense of having fought to a satisfactory draw, the borrowers' lobby was hard at work concocting a second bill and pushing it through to passage. This second bill, while touted as a helpful supplement to the first, may actually render them both unconstitutional.

This Survey period saw other notable events, including an assignment of rents case that may revolutionize the field,² a rare affirmation of the sanctity of contract,³ an intriguing study of the collision between real property and personal property foreclosure law,⁴ and a host of significant decisions about leasing, condemnation, brokers, and homestead.

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1. *Langever v. Miller*, 76 S.W.2d 1025 (Tex. 1934).

2. *Georgetown Assocs., Ltd. v. Home Federal Sav. & Loan Ass'n*, 795 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1990, writ dismissed w.o.j.)

3. *Parker Plaza West Partners v. Unum Pension & Ins. Co.*, 941 F.2d 349 (5th Cir. 1991).

4. *Van Brunt v. BancTexas Quorum, N.A.*, 804 S.W.2d 117 (Tex. App.—Dallas 1990, no writ).

I. MORTGAGES

A. *The New Deficiency-Limiting Legislation*

After several false starts over the past few years, the Texas legislature passed some sweeping and important legislation regarding deficiency judgments that arise out of real property foreclosures. The legislation, enacted in April and June of 1991 as HB 169 and HB 2825, adds sections 51.003, 51.004, and 51.005 to the Texas Property Code.⁵

The most carefully considered and thoroughly debated measure is HB 169, which is codified as Section 51.003. It applies to non-judicial foreclosures, and contains the following key provisions:

The mortgagee in any non-judicial foreclosure sale must institute any action to collect a deficiency within two years after the foreclosure.

"Any person" against whom such a collection is sought (including, presumably, both the mortgagor and any guarantor) may request that a court determine the fair market value of the foreclosed property as of the date of the foreclosure sale.

Both the mortgagor and mortgagee are allowed to introduce evidence of fair market value for consideration by the fact finder. That evidence may include, but is not limited to, expert opinions, comparable sales data, evidence concerning the anticipated marketing time and holding costs, evidence of the cost of sale, and evidence about the "necessity and amount of any discount to be applied to the future sales price or the cash flow generated by the property to arrive at a current fair market value."

If the fact finder determines that the property's fair market value exceeds its sales price, then the excess must be deducted from the deficiency amount.

Failing a request for a determination of fair market value, or failing the introduction of competent evidence in proceedings to arrive at such a determination, the foreclosure sales price shall be used to compute the deficiency.

The mortgagee shall credit the debtor with proceeds from private mortgage insurance; however, such required crediting shall not impair the insurer's right to proceed against the debtor or any other liable party by way of subrogation.⁶

The legislation changes the prior law in two significant ways. First, the four-year statute of limitations on deficiency actions is shortened to two years.⁷ Second, and most importantly, the legislation displaces the judge-made rule that, absent a procedural defect in the foreclosure sale, the amount of proceeds received at the sale must be "grossly inadequate" before the court will prohibit that amount from being used in calculating a deficiency.⁸

5. TEX. PROP. CODE ANN. §§ 51.003-.005 (Vernon Supp. 1992).

6. *Id.* § 51.003.

7. *Id.* §§ 51.003-.005.

8. For guidance on how inadequate sales proceeds must be in order to be regarded as "grossly inadequate," see *FDIC v. Blanton*, 918 F.2d 524, 531 (5th Cir. 1990) (generally, a sales price of more than 62.3% of market value is not grossly inadequate); *Georgetown Assocs.*

The most intriguing part of the legislation is the provision that outlines the types of evidence that may be considered in determining fair market value. The phrase fair market value is rarely elucidated in foreclosure statutes or decisional law, so the Texas law is praiseworthy in its effort to give the phrase some meaningful content. To say that the statute has the beginnings of a fair market value definition, however, does not suggest that the definition is comprehensive. Many questions remain to be answered by the decisional law as it develops, including whether parties can modify or supplement the statute's fair market value definition in their loan documents and whether the allowed consideration of marketing time and holding costs will justify a discount over a value amount arrived at by comparable sales data.

Despite the inevitable areas of uncertainty, the legislation is well-drafted and balanced. It creates clear and specific procedures, and it gives the mortgagor protection against inordinately low bids that sometimes occur at foreclosure sales,⁹ while also taking into account the high holding costs and thin markets that plague many mortgagees after foreclosure. The balance in the legislation is no accident. Drafts of the statute were intensively studied and debated by lobbyists on both sides of the question. The statute's passage was assured only after the lending interests had purged several open-ended provisions from the first draft.

One of the drafters' major concerns was the constitutionality of the statute. As Jim Wallenstein has pointed out in a thoughtful speech,¹⁰ the new legislation is remarkably similar to the Anti-Deficiency Judgment Law that was passed by the Texas legislature in 1933.¹¹ A year later, however, the Texas supreme court struck down the 1933 enactment as violative of the Texas Constitution's contract clause.¹² The court found the statute defective because it purported to impair existing contract rights.¹³

At the time of HB 169's passage, there were several reasons to believe that, standing alone, the new section 51.003 would not suffer a fate similar to

v. Home Fed. Sav. & Loan Ass'n, 795 S.W.2d 252, 255 (Tex. App.—Houston [14th Dist.] 1990, writ dismissed w.o.j.) (a sales price of 74% of market value is not grossly inadequate).

9. Olney Sav. and Loan Ass'n v. Farmers Market of Odessa, 764 S.W.2d 869 (Tex. App.—El Paso 1989, writ denied) (an egregious example of a lender acquiring property with a lowball foreclosure bid, selling it at a much higher price, then pursuing a deficiency action against the borrower based on the lowball bid price).

10. Jim Wallenstein, "Statutory Update: Judicial and Non-Judicial Foreclosures," Presented to the SMU Continuing Legal Education Program, Dallas, Texas, January 24, 1992

11. TEX. REV. CIV. STAT. ANN. art. 2218 (Vernon 1925), amended by Act of April 21, 1933, 43rd Leg. R.S., ch. 92, 1933 Tex. Gen. Laws 198 (the 1933 legislation amended then article 2218 of the Texas Revised Civil Statutes to provide that the defendant in a post-foreclosure deficiency suit "may plead as a defense or partial defense to such suit or against such deficiency judgment that said property at such foreclosure was sold for less than its actual value" Upon so pleading, the defendant was entitled to have his deficiency judgment reduced by the excess of the property's "actual value" over the foreclosure bid price. See *Langever v. Miller*, 76 S.W.2d 1025 at 1027 (Tex. 1934)).

12. *Langever v. Miller*, 76 S.W.2d 1025, 1028 (Tex. 1934).

13. *Id.* at 1029. (Art. I, Section 16, of the Texas Constitution provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.")

that of the 1933 enactment. First, since the New Deal courts have tended, for better or for worse, to take a more lenient view of the constitutional prohibition of laws impairing the obligation of contracts. Also, in 1937 the U.S. Supreme Court, in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*¹⁴ upheld the constitutionality of a North Carolina statute that was quite similar to the one struck down by the Texas high court in 1933. In *Richmond Mortgage*, the Court found that rather than impairing a contractual obligation, the law at issue "merely restricted the exercise of the contractual remedy . . ." ¹⁵ In interpreting the Texas Constitution, of course, Texas courts are not bound by the manner in which the U.S. Supreme Court interprets the U.S. Constitution. Still, *Richmond* suggests why section 51.003 should not suffer the fate of its 1933 predecessor. Like the statute at issue in *Richmond*, section 51.003 does not preclude a mortgagee from using a judicial foreclosure proceeding, and thereby escaping the judicial fair market value determination.¹⁶ Hence, the new law does not impair the mortgagor's obligation; rather, it merely limits the mortgagee's remedy.¹⁷

Alas, as soon as the mortgage lending lobbyists had headed home, the legislators concocted HB 2825, which contains two additional, and ill-advised, statutory provisions. The first, codified as section 51.004 of the Texas Property Code, applies to judicial foreclosure sales.¹⁸ It is otherwise identical to section 51.003 except that it (i) substitutes a 90-day statute of limitations for section 51.003's two-year limitations period, and (ii) tolls the statute for a guarantor who had no notice of the judicial foreclosure proceedings.¹⁹

The second provision, codified at section 51.005 of the Property Code, is designed to protect guarantors in instances where the mortgagee first sues the guarantor and then institutes foreclosure proceedings.²⁰ Section 51.005 allows a guarantor to bring an action of his own provided that it is brought within 90 days after the foreclosure sale date or, if he is unaware of the sale, within 90 days after he learns of it.²¹

The two patchwork provisions present some troublesome questions. The most obvious problem is that by subjecting a judicial foreclosure proceeding to the fair market value determination rule, the legislature has undercut the basis for distinguishing section 51.003 from its doomed 1933 predecessor.

14. 300 U.S. 124 (1937).

15. *Id.* at 131.

16. TEX. PROP. CODE ANN. § 51.003 (Vernon Supp. 1992).

17. See *Mixon, Deficiency Judgments Following Home Mortgage Foreclosures: An Anachronism That Increases Personal Tragedy, Impedes Regional Economic Recovery, and Means Little to Lenders*, 22 TEX. TECH L. REV. 1, 58-66 (1991) (where precisely this distinction led one commentator to conclude that, in order to pass constitutional muster, any deficiency-limiting legislation should "preserve existing note holders' substantive right to deficiency after judicial foreclosure" (emphasis in original)).

18. TEX. PROP. CODE ANN. § 51.004 (Vernon 1984 & Supp. 1992).

19. *Id.*

20. *Id.* § 51.005.

21. *Id.*

Hence, section 51.003 is vulnerable to a constitutional challenge. Also, some of the guarantor provisions of section 51.005 are just so much jabberwocky. For example, a guarantor is empowered to bring an action only after four conditions have occurred. One such condition is that the holder of the mortgage debt has obtained a judgment against the guarantor.²² What happens if the debt holder waits 90 days before instituting any such action? Assuming the guarantor had notice of the foreclosure sale, the guarantor is trapped. He can't bring an action until the holder has a judgment, yet he also can't bring an action after the judgment if it is entered more than 90 days after the foreclosure sale.

Besides being poorly conceived, section 51.005 is just plain unnecessary. As a "person against whom . . . "recovery is sought,"²³ the guarantor may proceed under section 51.003 in much the same way as the primary obligor.

Taken as a whole, the new legislation promises eventually to become a solid framework for foreclosure law. For now, however, the two last-minute additions of sections 51.004 and 51.005 make the whole enterprise questionable, and will likely invite challenges to the entire statutory scheme's constitutionality.

B. Foreclosures and Deficiency Judgments Under the Pre-April 1991 Law

The setting of the sun on the days when the common law governed large expanses in the territory of private foreclosure did not occur without a final flourish. Two cases, *Georgetown Associates, Ltd. v. Home Federal Savings & Loan Ass'n*²⁴ and *Pentad Joint Venture v. First National Bank of LaGrange*,²⁵ featured many of the issues that have animated the courts during the past few years and that will continue to be joined in litigation arising out of mortgages made before April of 1991.

Georgetown Associates saw a feisty 14th District court of appeals slam the door on yet another claim by borrowers that the proceeds from a private foreclosure sale were grossly inadequate, and hence precluded a deficiency judgment.²⁶ In support of their view that a gross disparity in market value over foreclosure price creates a jury issue, even despite the absence of a procedural irregularity in the sale, the borrowers relied on a familiar trio of cases: *Olney Savings & Loan Ass'n v. Farmers' Market of Odessa, Inc.*,²⁷ *Halter v. Allied Merchant's Bank*,²⁸ and *Lee v. Sabine Bank*.²⁹ The appeals court did not merely distinguish those cases; it demolished them. *Georgetown Associates* concludes that *Olney* has no precedential value because

22. *Id.*

23. TEX. PROP. CODE ANN. § 51.0005 (Vernon Supp. 1992).

24. 795 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1990, writ dismissed w.o.j.).

25. 797 S.W.2d 92 (Tex. App.—Austin 1990, writ denied).

26. *Georgetown Assocs.*, 795 S.W.2d at 255 (see Lawrence J. Fossi, et al., *Real Property Annual Survey of Texas Law* 2, 45 Sw. L.J. 595 (1991); Lawrence J. Fossi, et al., *Real Property Annual Survey of Texas Law*, 44 Sw. L.J. 249, 251 (1990)).

27. 764 S.W.2d 869 (Tex. App.—El Paso 1989, no writ).

28. 751 S.W.2d 286 (Tex. App.—Beaumont 1988, writ denied).

29. 708 S.W.2d 582 (Tex. App.—Beaumont 1986, writ refused n.r.e.).

Olney's lead opinion actually garnered no support from the other two judges, one of whom wrote a concurring opinion that relied on the contrary authority of *American Savings & Loan Ass'n v. Musick*,³⁰ and the other of whom merely joined in the result.³¹ Thus, *Olney* is a headnote rather than a holding.³²

Halter, decided by the Beaumont court of appeals, relies on *Lee*, decided by the same court two years earlier.³³ *Lee*, however, was absolutely unsupported by Texas law. Instead, *Lee* reached its result by analogizing a real property foreclosure with a repossession under the federal Ship Mortgage Act.³⁴ "Admiralty law in hand," said the *Georgetown Associates* court in a particularly biting passage, "the [*Lee*] court rolls out the ultimate authority: an article in 39 Tex.Jur.2d, *Mortgages and Trust Deeds*."³⁵ The *Lee* holding that a borrower may contest any sale in which there exists a probable disparity between sales price and fair market value is mere "dictum when applied to anything on dry land . . ."³⁶ While not a model of courteous regard for the work of its sister courts, the *Georgetown Associates* decision does have the rare virtues of pithiness and liveliness.

Citing *English v. Fischer*³⁷ and *FDIC v. Coleman*,³⁸ the court of appeals in *Georgetown Associates* also disposed of a claim that the lender owed a duty of good faith and fair dealing to the obligors.³⁹ Further, the appeals court decided that where some loan documents indicated that California law would govern, while others — including the guaranty at issue — selected Texas, Texas law was applicable for two reasons. First, the document in question stated that Texas law would govern. Second, the transaction's contacts with Texas would make the laws of Texas applicable in default of any selection by the parties, and the conflicting choice-of-law provisions in the documents was tantamount to a failure to select a particular forum's law.⁴⁰ Additionally, the court held that a dispute over the deficiency resulting from foreclosure would not bar execution on a guarantee for up to \$500,000 where it was clear that, in all events, the deficiency exceeded that amount.⁴¹ Finally, the court was required to determine whether the borrower was personally liable for taxes paid by the lender. The loan documents stated that the lender could pay such taxes "at [b]orrower's expense" if borrower failed to do so, but those documents also stated that foreclosure was the lender's only remedy in the event of default. The court acknowledged it was a close question,

30. 531 S.W.2d 581, 587 (Tex. 1975) (holding that mere inadequacy of price will not invalidate a foreclosure sale absent evidence of some irregularity which "caused or contributed to cause the property to be sold for a grossly inadequate price").

31. *Georgetown Assocs.*, 795 S.W.2d at 254.

32. *Id.*

33. 751 S.W.2d 286, 287-88.

34. *Id.*

35. *Georgetown Assocs.*, 795 S.W.2d at 255.

36. *Id.*

37. 660 S.W.2d 521 (Tex. 1983).

38. 795 S.W.2d 706 (Tex. 1990).

39. 795 S.W.2d at 254.

40. *Id.* at 253-54.

41. *Id.* at 254.

but held the borrower not personally liable for the taxes paid by the lender.⁴²

Pentad Joint Venture has a result that is somewhat more perplexing. Like the *Georgetown Associates* decision, *Pentad Joint Venture* made quick work of a borrower's affirmative defense to a deficiency action based on a claimed inadequacy of foreclosure sales price in comparison with fair market value.⁴³ Further, the *Pentad* decision swiftly disposed of claims that a mortgagee has a duty to conduct a foreclosure sale in a manner calculated to maximize the sales price,⁴⁴ and that the foreclosure sale was not commercially reasonable.⁴⁵ However, the appeals court reversed the trial court's summary judgment dismissal of the obligors' counterclaims based on breach of the duty of good faith and fair dealing, common law fraud, and unconscionability under the Texas Deceptive Trade Practices Act.⁴⁶ The appeals court based its reversal on the lack of conclusive evidence of the property's fair market value. Such evidence, said the court, was required to support the bank's summary judgment assertion that by bidding 70% of the property's fair market value, it had precluded the counterclaims.⁴⁷ Further, under the doctrine enunciated in *Texas Department of Corrections v. Herring*,⁴⁸ the obligors were entitled to an opportunity to amend their pleadings. In light of the remainder of the holding, it is unclear why the counterclaim based on a duty of good faith and fair dealing was not also ripe for summary dismissal.

C. Assignment of Rents

The most important case of this Survey period will surely be *FDIC v. International Property Management, Inc.*⁴⁹ if only it manages to take root in assignment of rents jurisprudence. The *International Property Management* decision, in its crisp analysis and clear holding, is a breath of fresh air in an area of law that, for the past decade, has been impenetrably dense, thanks in large part to the Texas supreme court's thoroughly inscrutable work in *Taylor v. Brennan*.⁵⁰ *Taylor* held out the theoretical possibility that an assignment of rents could be absolute in character, in which case the assignor would be entitled to rents from the date of the default.⁵¹ *Taylor* also, how-

42. *Id.* at 256.

43. *Pentad*, 797 S.W.2d at 95-96 (citing, *American Sav. & Loan Ass'n v. Musick*, 531, S.W.2d 581 587 (Tex. 1975); *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank, N.A.*, 786 S.W.2d 386 (Tex. App.—Houston [1st Dist.] 1990, writ denied)).

44. *Id.* at 97 (citing *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965)). The *Pentad* court would surely have also cited *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990), but the supreme court case was handed down on the same day as the *Pentad* decision, and hence not available to the court of appeals).

45. *Id.* (citing *Huddleston v. Texas Commerce Bank—Dallas, N.A.*, 756 S.W.2d 343, 347 (Tex. App.—Dallas 1988, writ denied) (lender has no duty to conduct a commercially reasonable real estate foreclosure sale). Again, *FDIC v. Coleman* would also have been an apt citation had it been available to the appeals court.

46. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1991).

47. *Pentad*, 797 S.W.2d at 97-98 (the court noted that the bank's theory appeared to be that, as a matter of law, 70% of value is not grossly inadequate).

48. 513 S.W.2d 6, 9 (Tex. 1984).

49. 929 F.2d 1033 (5th Cir. 1991).

50. 621 S.W.2d 592 (Tex. 1981).

51. *Id.* at 594-95.

ever, strongly suggested that any assignment of rents which secured payment of debt (and, as far as the real estate attorney is concerned, they all do) was collateral in nature,⁵² and thereby precluded a mortgagee from obtaining the rental revenues until he either obtained possession of the property, impounded the rents, secured the appointment of a receiver, or took some similar action,⁵³ whatever that might mean. The Fifth Circuit in *International Property Management* noted that the *Taylor* court could have recognized that all assignments in connection with a mortgage are made to secure the mortgage debt. Such a recognition, said the Fifth Circuit, would likely have led the *Taylor* court to adopt one of two approaches. First, it could have followed the common law rule and required the mortgagee always to take some step to perfect its interest in rents following default. Second, "it could have decided that it would not follow the common law rule when the parties sufficiently evidence their intent that the right to rents should pass automatically upon default."⁵⁴ Instead, however, the *Taylor* court "adopted neither of these straightforward alternatives," but rather resorted to a highly artificial distinction between title transfers and security interests.⁵⁵

In case after case since *Taylor*, rental assignments have invariably been found to be collateral in nature, notwithstanding express language reciting that they were intended to be absolute.⁵⁶ *International Property Management* finally snaps the skein. In finding that the assignment of rents clause created an absolute assignment, the Fifth Circuit pointed to the following factors: (i) the assignment at issue provided that it "is intended to be absolute, unconditional, and presently effective," (ii) the assignment did not require any affirmative action by the mortgagee to secure the rents, (iii) the same provision in the assignment which allowed the mortgagee to collect rents directly from lessees following a default also stated that such provision was intended solely for the benefit of each lessee and would not inure to the benefit of the assignor, (iv) the assignment was not contingent upon notice to the lessees, (v) rents paid to the mortgagor prior to notice of the lessees were, by the terms of the assignment, deemed held in trust for the benefit of the mortgagee, and (vi) the assignment stated that the assignor need never institute legal proceedings to enforce the provisions of the assignment.⁵⁷

The Fifth Circuit acknowledged that the assignment at issue was, in some sense, collateral in nature because it (a) allowed the mortgagor to receive rents until default, (b) required the mortgagee to apply rental income to the debt, with any remainder going to the mortgagor, and (c) provided for its own termination on release of a related deed of trust.⁵⁸ The Fifth Circuit noted, however, that *Taylor* states that the Texas supreme court will give

52. *Id.*

53. *Taylor*, 621 S.W.2d at 574.

54. *Int'l Property*, 929 F.2d at 1035.

55. *Id.*

56. See *NCNB Tex. Nat'l Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358 (Tex. App.—Dallas 1990, writ dismissed w.o.j.).

57. *Int'l Property*, 929 F.2d at 1037-38.

58. *Id.*

effect to an absolute assignment of rents if the parties' intent to create such an assignment is sufficiently clear.⁵⁹ In this case, the language "could hardly be clearer."⁶⁰

Another noteworthy assignment of rents case is *Treetop Apartments General Partnership v. Oyster*.⁶¹ In *Treetop* the foreclosure purchaser of an apartment complex sued for the post-foreclosure rents collected by the defaulting former owner. The foreclosure sale had occurred on the first Tuesday of the month, by which time the former owner had pocketed most of the month's rentals. The *Treetop* court refused to require disgorgement by the former owner, reasoning that his collection of the rents had severed them from the real property, and therefore the purchaser had acquired no interest in them.⁶² The purchaser's argument that its ratification of the leases entitled it to the rents notwithstanding any severance was unavailing because, according to the court, the foreclosure sale voided the junior leases. Therefore, the ratification was effective only between the purchaser and the tenants.⁶³ The general applicability of the *Treetop* holding may be limited because the deed of trust at issue did not empower the trustee to convey any rights in rentals.⁶⁴

D. Prepayment Premiums

In Texas, "[t]here is perhaps, no higher public policy of the state than to uphold contracts validly entered into and legally permissible in subject matter."⁶⁵ Texas courts actually used to say such quaint-sounding things; the quote is from a 1951 court of appeals decision.⁶⁶ Even if it is doubtful whether contracts still enjoy their wholly sacred⁶⁷ nature in state courts, a federal court decision, *Parker Plaza West Partners v. Unum Pension & Insurance Co.*,⁶⁸ shows that some judges still believe that a deal's a deal. At issue in *Parker Plaza* was a prepayment clause which required payment of a stiff prepayment premium equal to the greater of (i) 10% of the amount prepaid and (ii) an amount which when invested in U.S. government obligations would enable the noteholder to maintain its healthy 16% yield on the promissory note. The borrower defaulted by failing to pay \$1,900 of late fees and by becoming delinquent in the payment of property taxes, thus prompting an acceleration of the \$2.77-million outstanding in principal. The noteholder drew down on a letter of credit not only for the full principal amount outstanding plus about \$45,000 in interest and late fees, but also an additional \$947,731 as a prepayment premium. The maker urged that the pre-

59. *Id.*

60. *Id.*

61. 800 S.W.2d 628 (Tex. App.—Austin 1990, no writ).

62. *Id.* at 629.

63. *Id.* at 630.

64. *Id.* at 629.

65. *Mid-Continent Supply Co. v. Conway*, 240 S.W.2d 796, 804 (Tex. Civ. App.—Texarkana 1951, writ ref'd).

66. *Id.*

67. *Id.*

68. 941 F.2d 349 (5th Cir. 1991).

payment premium was an unenforceable penalty under Texas law. The trial court granted summary judgment in the maker's favor, prompting the appeal to the Fifth Circuit.

The Fifth Circuit stated that Texas law has never squarely addressed whether a prepayment premium is enforceable if it arises upon acceleration by the lender, rather than upon voluntary prepayment by the borrower.⁶⁹ As foundation principles, the court noted that, absent a contrary contractual provision, Texas law does not accord a borrower the right to prepay.⁷⁰ Further, a prepayment premium is not interest for purposes of usury law so long as the premium, when spread out over the note's maturity, does not exceed the legal rate.⁷¹ The rationale for prohibiting prepayment is that the borrower can avoid the premium by paying the note according to its terms.⁷² The Fifth Circuit made a careful review of pertinent Texas authority and concluded that, under the applicable precedent, prepayment premiums are barred as penalties only where the loan documents do not expressly permit them.⁷³ For example, a challenge to a prepayment premium was upheld in *North Point Patio Ventures v. United Benefit Life Insurance Co.*,⁷⁴ In *North Point* the lender sought to extract a premium from the borrower based on a due on sale clause. The *North Point* court would not allow the lender to collect the premium because the agreement at issue contained no provision allowing it, and because to permit its collection would constitute an unreasonable restraint on alienation.⁷⁵ The Fifth Circuit determined that a prepayment premium was permissible where the loan documents expressly provided that one could be collected upon default by the borrower and acceleration by the lender. The court relied both on the inferential support of *North Point* and similar cases, and also on the more direct support of *Meisler v. Republic of Texas Savings Ass'n*.⁷⁶ *Meisler* permitted collection of a premium upon borrower default, but was fuzzed-up somewhat by language in the loan documents stipulating that a tender by the borrower upon default and acceleration would be considered to be a voluntary prepayment.⁷⁷ Noting that *Meisler* and the famous *Sonny Arnold*⁷⁸ decision both supported the proposition that acceleration clauses serve a valid business purpose, the Fifth Circuit found no public policy that justified interference with the plain contractual intent, and remanded the case for further proceedings.⁷⁹

69. *Id.* at 352.

70. *Id.* (citing *Ware v. Traveler's Indem. Co.*, 604 S.W.2d 400, 401 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.)).

71. *Id.* (citing *Bearden v. Tarrant Sav. Ass'n*, 643 S.W.2d 247, 249 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.)).

72. See *Boyd v. Life Ins. Co. of the Southwest*, 546 S.W.2d 132, 133 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd).

73. 941 F.2d at 352.

74. 672 S.W.2d 35 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

75. *Id.* at 38.

76. 758 S.W.2d 878 (Tex. App.—Houston [14th Dist.] 1988, no writ).

77. *Id.* at 884.

78. *Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811 (Tex. 1982).

79. 941 F.2d at 353.

E. Guaranty Agreements

Guaranty agreements commonly contain limitation provisions which restrict the amount guaranteed to only a certain portion of the debt, such as the top 20% of the debt. Such provisions became particularly fashionable in the late 1970s, and the subsequent hard times in the Texas real estate market have produced several cases interpreting those provisions. Frailty being the human condition, it appears that many of the partial liability provisions were imprecisely drafted. A common shortcoming is a failure to address how proceeds received by a lender in foreclosure proceedings are to be applied in determining the dollar amount of liability under the guaranty.

*University Savings Association v. Miller*⁸⁰ is a textbook example of an imprecise partial liability provision. An individual guaranteed the corporate borrower's obligation under a \$2,740,000 mortgage note "to the extent of the first or top ten (10%) of all sums owing and to be owing upon the Note."⁸¹ The note was also secured by a deed of trust. When the borrower defaulted, the lender made demand on the guarantor for 10% of the total outstanding indebtedness, which stood at more than \$3-million. The guarantor refused to pay and the lender went ahead with a foreclosure sale which fetched \$2,400,000, leaving an unpaid balance of approximately \$627,000. The lender sought to collect approximately \$300,000, being 10% of the amount owed under the note at the time of foreclosure. The guarantor persuaded the trial court that his liability had been extinguished because the foreclosure sale proceeds were greater than 10% of the original note balance.

In reversing, the appeals court relied on language in the guaranty agreement stipulating that the lender need not exhaust its remedies against the borrower or foreclose its liens before proceeding against the guarantor.⁸² It relied also on language giving the lender discretion in exercising remedies under collateral agreements and stating that any exercise or refrain from exercise of such remedies would "in no wise impair or diminish the obligations of [the guarantor]."⁸³ Most importantly, the guaranty allowed the lender to apply the security to the unguaranteed portion of the debt before applying it to the guaranteed portion.

A second example, decided only months after *Miller*, is *Preston Ridge Financial Services Corp. v. Tyler*.⁸⁴ The guarantor promised to pay when due the amount by which the total principal outstanding under the note exceeded \$735,000. At the time of default, the principal outstanding was approximately \$1.1-million. The lender foreclosed its liens, collected \$735,000 at the foreclosure sale, and sought to recover the deficiency from the guarantor. The trial court granted summary judgment in favor of the guarantor, who contended that the foreclosure sale extinguished his liability under the guaranty by reducing the outstanding principal to below \$735,000. In a

80. 786 S.W.2d 461 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

81. *Id.* at 462.

82. *Id.* at 463.

83. *Id.*

84. 796 S.W.2d 772 (Tex. App.—Dallas 1990, writ denied).

rambling opinion, the appeals court reversed.⁸⁵ Focusing on a recitation to the effect that the guaranty was made to induce the lender to make the loan evidenced by a note and secured by a deed of trust, the court found clear proof that the lender's purpose in obtaining the guaranty was to supplement the security afforded by the deed of trust.⁸⁶ Additionally, the appeals court interpreted the "when due" language to mean that the liability of the guarantor was determined at the moment of the maker's default.⁸⁷

In *Dann v. Teambank*⁸⁸ the corporate borrower executed a note and deed of trust in the principal amount of \$550,000. The president of the corporation signed a separate guaranty agreement. Beneath her handwritten signature was the following typewritten text:

Kathy Towns Dann
President
Setcon Corporation

After a default by and foreclosure against the corporation, the lender sued the guarantor for the deficiency. The guarantor defended by contending that she was not liable in her individual capacity under the guaranty. The court noted that a written collateral undertaking given to secure a corporate debt would be rendered meaningless if the primary debtor was also the sole guarantor.⁸⁹ Consequently, it said that corporate designations appearing after the signatures of guaranties of this type are considered to be only *descriptio personae*; that is, the use of a word or phrase merely to identify the person intended and not as an intimation that the language applies to that person only in the technical character which might appear to be indicated by the word.⁹⁰ The court relied heavily on *American Petrofina Co. v. Bryan*⁹¹ in defending its holding.⁹² The court noted that the language of the guaranty made a distinction between the guarantor and borrower, and that clearly they were intended to be different persons.⁹³

*Waite v. BancTexas-Houston*⁹⁴ involved loans to a partnership whose partners included four individuals, each of whom signed guaranties. The note signed by the partnership contained a provision stating that the payee's only remedy against the maker or *its partners* in the event of a default would be to foreclose on a deed of trust given to secure the note. The note additionally stated that none of its provisions affected the payee's rights under the terms of any separate guaranty agreements relating to the note's pay-

85. *Id.* at 774.

86. *Id.* at 777-78.

87. *Id.* at 778-79.

88. 788 S.W.2d 182 (Tex. App.—Dallas 1990, no writ).

89. *Id.* at 184.

90. *Id.*

91. 519 S.W.2d 484 (Tex. App.—El Paso 1974, no writ).

92. *Dann*, 788 S.W.2d at 184-85. The court also rejected a contention by the guarantor that § 3.403 of the UCC was applicable. That section provides that if a negotiable instrument is signed in a representative capacity, then the signatory is not personally obligated; rather, the obligation belongs to the person represented. The court noted that a guaranty is not a negotiable instrument, and declined to extend the application of § 3.403 to guaranties. *Id.* at 186.

93. *Id.* at 184-85.

94. 792 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1990, no writ).

ment. Thus, the note relieved the partners from personal liability, but referred to guaranty agreements that made those partners personally liable. The court acknowledged that the language in the note could be considered confusing, but said it was not ambiguous insofar as it pertained to the partners' liability as guarantors.⁹⁵

It is gratifying for a draftsman to see that some of the standard stock provisions he invariably includes in guaranty agreements will actually be given effect by the courts. *Martin v. First Republic Bank, Fort Worth*⁹⁶ provides this pleasant feedback. The case arose out of the standard guaranty agreement scenario: a suit by a bank against guarantors after default by the primary obligor under a mortgage note. In defending against a summary judgment motion, the guarantors asserted that a question of fact existed regarding whether the lender could sue on the guaranties before a deficiency was established by foreclosure under the deed of trust. The court disagreed, and quoted the guaranty agreement language stating that, "it shall not be necessary for Bank, in order to enforce such payment by Guarantor, first, to institute suit or exhaust its remedies against Borrower or others liable on such indebtedness, or to enforce its rights against any security which shall ever have been given to secure such indebtedness."⁹⁷ That language meant what it said, said the court, and was perfectly enforceable.⁹⁸

F. Other Mortgage Decisions

*Fairfield Financial Group, Inc. v. Gawerc*⁹⁹ illustrates the dangers run by a mortgagee who chronically accepts payments that are too small or too late. In *Fairfield* the mortgagor obtained an injunction blocking a foreclosure based on his assertion that, by accepting a series of non-conforming payments, the mortgagee had waived its right to insist on payment in accordance with the loan documents. The appeals court, in sustaining the injunction, pointed to a lack of evidence suggesting that the mortgagee ever protested the mortgagor's irregular payments.¹⁰⁰ Under such circumstances, said the appeals court, the indulgent creditor may not thereafter insist on immediate adherence to the loan documents; rather, the creditor must first give the delinquent obligor a sufficient opportunity for redemption.¹⁰¹ The mortgagee contended that the indulgent creditor had no such duty after the note's final maturity date,¹⁰² but the appeals court held that the duty continued where, as here, the mortgagee continued to accept non-conforming payments after the maturity date.¹⁰³ Finally, the mortgagee

95. *Id.* at 541.

96. 799 S.W.2d 482 (Tex. App.—Fort Worth 1990, writ denied).

97. *Id.* at 486.

98. *Id.*

99. 814 S.W.2d 204 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

100. *Id.* at 208.

101. *Id.* at 209 (citing *Hill v. James*, 7 S.W.2d 910, 911 (Tex. Civ. App.—Eastland 1928, no writ)).

102. *Id.* (citing *U.S. Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971)).

103. *Id.*

contended that, assuming there was a duty to afford the obligor a sufficient opportunity for redemption, the amount of time between the note's maturity date and the foreclosure sale constituted such an opportunity.¹⁰⁴ The appeals court again disagreed. Once the waiver occurred, said the court, it devolved on the mortgagee to take some affirmative action to enforce the obligation; the mortgagee could not simply lay behind the log and capitalize on the obligor's inaction.¹⁰⁵

*Randle v. NCNB Texas National Bank*¹⁰⁶ illustrates that courts are taking a more skeptical look at lender liability claims. In *Randle* the borrowers had conveyed portions of the land pursuant to contracts for deed that were made subject to their mortgage. The mortgage loan went into default, discussions commenced, a foreclosure eventually occurred, and the bank sought to collect a deficiency judgment. The borrowers defended by contending that, on the eve of the foreclosure, the bank had made oral representations indicating that the parties had reached an agreed loan workout. Therefore, the borrowers claimed that pursuant to the doctrine of promissory estoppel, the bank was barred from foreclosing. The trial court entered judgment for the bank. The appeals court was similarly unimpressed with the borrowers' plea. The appeals court pointed out that the borrowers' evidence consisted largely of affidavits to the effect that the borrowers had assured their contract purchasers that matters would be resolved with the bank, and that the borrowers feared lawsuits from the contract purchasers as the result of the foreclosure.¹⁰⁷ Even if all this were true, said the appeals court, there was no claim or evidence that the alleged promises by the bank increased or diminished the enforceable contractual rights and obligations of the borrowers to their buyers under the contracts for deed.¹⁰⁸ While the foreclosure doubtlessly harmed the relations between the borrowers and the buyers, the detrimental reliance required to establish promissory estoppel was more than a mere disturbance of amicable relations.¹⁰⁹

*Kimsey v. Burgin*¹¹⁰ required the appeals court to interpret the 1987 Texas supreme court opinion in *Flag-Redfern Oil Co. v. Humble Exploration Co.*¹¹¹ The facts in *Kimsey* are somewhat elaborate. French, the original grantor of the property, conveyed a sizeable ranch tract to Enterprises, retaining a vendor's lien which secured the purchase money note. Enterprises subdivided the land and sold lots by means of contracts for deed. One of the contract purchasers, C & D, sold to Burgin, again by contract for deed. Burgin sold to Kimsey in exchange for a note, a deed of trust, and an instrument entitled Assignment of Agreement for Deed whereby Burgin assigned and Kimsey assumed Burgin's rights and obligations under Burgin's contract for deed.

104. *Id.* at 209-10.

105. *Id.* at 210.

106. 812 S.W.2d 381 (Tex. App.—Dallas 1991, n.w.h.).

107. *Id.* at 386.

108. *Id.* at 386.

109. *Id.* at 386-87.

110. 806 S.W.2d 571 (Tex. App.—San Antonio 1991, writ denied).

111. 744 S.W.2d 6 (Tex. 1987).

Meanwhile back at the ranch, Enterprises ran into financial difficulties and deeded its land back to French in full satisfaction of the purchase money note. French executed a document in favor of Kimsey entitled Ratification and Agreement, whereby French ratified the contract for deed held by Kimsey from Enterprises, C & D, and Burgin. When Kimsey defaulted under his note to Burgin, Burgin foreclosed. Kimsey defended by arguing, among other things, that the reconveyance by Enterprises to French extinguished Burgin's interest in the land.

The court disposed of Kimsey's contentions by relying on *Flag-Redfern* and pointing to French's ratification.¹¹² The court did not actually discuss *Flag-Redfern*, but merely quoted from it. The clear import of the quoted portion, however, was that the deed in lieu of foreclosure from Enterprises to French could not act to cut off the rights of subsequent purchasers such as Burgin because, unlike a foreclosure proceeding, a deed-in-lieu transaction presents no opportunity for such subsequent purchasers to protect their interests by bidding at the foreclosure sale. In a sense, *Kimsey* is an extension of the *Flag-Redfern* doctrine inasmuch as it affords holders of equitable title (such as persons claiming under a contract for deed) the same protections extended by *Flag-Redfern* to the holders of legal title.

Kimsey also argued that because Burgin held only equitable title, he could not avail himself of the benefit of foreclosure proceedings. The appeals court rejected this view by noting that the old time distinction between equitable rights and equitable title was long ago abandoned by Texas courts, and that the provisions in the UCC serve to make Chapter 9 of the UCC inapplicable to the creation or transfer of an interest in or lien on real estate.¹¹³

*Van Brunt v. BancTexas Quorum*¹¹⁴ examines a collision at the intersection of real property foreclosure law and personal property foreclosure law. In *Van Brunt* a lender gave proper notice of its intent to foreclose on certain personal property under a security agreement. When the lender determined that the \$40,000 bid at the sale was too low, however, it rejected the bid. Without an additional notice to the debtor, it sold the collateral at a private sale some days later, collecting \$55,000 in proceeds. Later, the lender foreclosed on a tract of land pledged by the same borrower to secure some of the defaulted debt. When the lender sued a guarantor for the deficiency, the guarantor contended, and the court agreed, that the lender's failure to give notice of the private sale violated section 9.504(c) of the Texas Uniform

112. *Kinsey*, 806 S.W.2d at 575.

113. TEX. BUS. & COM. CODE ANN. §§ 1.201(37), 9.313, 9.104(10) (Vernon 1973 and Supp. 1989); see also *Huddleston v. Texas Commerce Bank-Dallas*, 756 S.W.2d 343, 347 (Tex. App.—Dallas 1988, writ denied).

114. 804 S.W.2d 117 (Tex. App.—Dallas 1990, no writ).

Commercial Code;¹¹⁵ therefore, the lender could not sue for a deficiency.¹¹⁶

The guarantor, pointing to the UCC section 9.505(b),¹¹⁷ maintained that by failing to give reasonable notice of the private sale, the lender was deemed to have elected to retain the collateral in complete satisfaction of the debt, and therefore could not sue for a deficiency.¹¹⁸ The court disagreed. It noted that under UCC section 9.501(d), a secured party with liens on both real and personal property may proceed as to both.¹¹⁹ A comment to that provision interprets the section as providing the secured party with an option to proceed separately under the UCC.¹²⁰ Other jurisdictions, however, have ruled that the UCC's default provisions (including section 9.505) are inapplicable to real property foreclosures.¹²¹ The majority said that because the creditor's loss of its right to seek a deficiency is judicially imposed rather than mandated by UCC section 9.505, and because of the UCC's intent not to interfere with real property foreclosure law, the lender should be free to pursue a deficiency judgment under its real property mortgage documents notwithstanding the defective notice and consequent waiver of deficiency rights under the UCC.¹²²

A well-argued dissenting opinion took issue with the majority.¹²³ The dissenter asserted that the UCC allows a secured party to proceed as to both real and personal property in accordance with his rights and remedies under the mortgage documents. Alternately, the UCC allows a secured party to proceed separately against the real and personal property, whether concurrently or successively. Once the secured party makes the latter election, he is then saddled with the rules of the UCC. If he loses his right to seek a

115. TEX. BUS. & COM. CODE ANN. § 9.504(c) (Vernon 1977). That statute provides, in pertinent part, as follows:

(c) . . . Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale

116. *Van Brunt*, 804 S.W.2d at 121-22.

117. TEX. BUS. & COM. CODE ANN. § 9.505(b). The pertinent portion of UCC Section 9.505(b) is as follows:

(b) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. . . . If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under Section 9.504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

118. The preclusion of the seeking of a deficiency judgment is not required by the language of UCC section 9.505, but rather is a judicial rule. See *Wright v. InterFirst Bank Tyler*, 746 S.W.2d 874, 877 (Tex. App.—Tyler 1988, no writ).

119. 804 S.W.2d at 124.

120. TEX. BUS. & COM. CODE ANN. § 9.505(d) (Vernon 1977).

121. 804 S.W.2d at 124-25.

122. *Id.* at 122.

123. *Id.* at 123-26.

deficiency judgment because of a faulty procedure under the UCC, then the act of foreclosing on a mortgage is not sufficient to revive the right.

*Shields v. Atlantic Financial Mortgage Corporation*¹²⁴ arose out of a deficiency action where the mortgagor defended by contending that the mortgagee's failure to pay mortgage insurance premiums violated the DTPA and resulted in a waiver by the mortgagee of the right to collect a deficiency judgment. In *Shields* the mortgagor had paid the premiums to the mortgagee as required by the loan documents. The court affirmed that mortgage insurance is for the benefit of mortgagee — not the mortgagor.¹²⁵ Moreover, because a written contractual provision required payment of the premiums, no misrepresentation of a warranty or guaranty could have occurred, thus precluding any DTPA claim. *Shields* thus implicitly confirms what is explicit in the deficiency legislation discussed earlier — that a private mortgage insurer has the right to proceed by way of subrogation against a foreclosed-upon mortgagor, even where the mortgagor paid its mortgagee for the insurance premiums.

*Security Bank v. Dalton*¹²⁶ involves borrowers who moved their banking business to a Flower Mound bank when their long-time lending officer became president of that bank. Thereafter, the bank became insolvent, the FDIC transferred the bank's assets to a newly-created bank, and the president was replaced. The new president assured the borrowers that it would be business as usual as regarded their loans. To the borrowers, business as usual evidently meant the habitual extension of the loans, notwithstanding that they exceeded the limit of money the bank could lawfully lend to one borrowing entity. When the loans at issue matured, however, the bank refused further extensions and demanded payment. The borrowers interposed a number of defenses, including breach of a duty of good faith and fair dealing and false, misleading, and deceptive acts under the DTPA. The borrowers won a sizeable jury award. The appeals court overturned the portion of the jury award based on a duty of good faith and fair dealing. Relying heavily on *FDIC v. Coleman*,¹²⁷ the appeals court all but suggested that no such duty could ever exist between a lender and borrower.¹²⁸ In all events, said the court, any special relationship between the bank or its former president ended when the FDIC stepped in, transferred the assets, and fired the former president.

A borrower hardly needs a duty of good faith in its arsenal, however, when it has at its disposal the DTPA. The appeals court found that the borrowers were "consumers", thus making the DTPA applicable to the loan transactions, because the bank knew that the loan proceeds were to be used

124. 799 S.W.2d 441 (Tex. App.—El Paso 1990, no writ).

125. *Id.* at 444.

126. 803 S.W.2d 443 (Tex. App.—Fort Worth 1991, writ denied).

127. 795 S.W.2d 706 (Tex. 1990).

128. *Id.* at 453 (see the dubious case of *Knight v. Int'l. Harvester Credit Corp.*, 627 S.W.2d 382 (Tex. 1982) (because the bank knew that the borrower intended to use the loan proceeds to purchase a dump truck, the borrower was a consumer under the DTPA)).

for purchasing goods.¹²⁹ The evidence in the record that it would be business as usual was thus sufficient to support the DTPA damages awarded by the jury.

The bank presented *D'Oench, Duhme*¹³⁰ and 12 U.S.C. § 1823(e) defenses, but these were rejected out of hand by the court because, it said, the borrowers' cause of action was predicated upon enforcement of affirmative misrepresentations rather than any alleged secret agreement.¹³¹ The borrowers can count their lucky stars that they were in state rather than federal court.¹³²

*Deposit Insurance Company Bridge Bank v. McQueen*¹³³ confirmed, in a detailed fashion, that (i) a foreclosure notice mailed to one spouse at a place where they reside as husband and wife is effective as to both spouses and (ii) the recitals in a trustee deed are prima facie evidence of the validity of the foreclosure sale, including evidence of service of timely notice on the debtor.¹³⁴ The deed of trust at issue provided that the recitals in any trustee's deed would be prima facie evidence of the truth of such facts. It appears from the case, that even if the deed of trust had not had such a provision, the law would imply one.

Finally, *Bryant v. Texas American Bank/Levelland*¹³⁵ confirmed again that in counting the 21 days that are required by section 51.0002(b) of the Texas Property Code between the notice of foreclosure sale and the sale itself, one excludes the day of sale and includes the day of notice.¹³⁶

II. LANDLORD & TENANT

A. Damages

The death of an apartment visitor by smoke inhalation following a fire on premises where no smoke detector was provided presented some novel questions in *Garza-Vale v. Kwiecien*.¹³⁷ The deceased's parents filed a wrongful death action and recovered damages on a common law negligence theory. The judgment was reversed on appeal, however, with the appellate court applying the provisions of the Texas Property Code dealing with residential tenancies.¹³⁸ The court commenced by noting that at common law a landlord does not owe a duty to repair leased premises and thus is not liable for personal injury to a tenant or his guests resulting from dangerous existing conditions.¹³⁹ The court noted that the common law rule was abrogated to

129. 803 S.W.2d at 451-52.

130. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), *reh'g. denied*, 315 U.S. 830 (1942).

131. *Security Bank*, 803 S.W.2d at 453.

132. *See Langley v. FDIC*, 484 U.S. 86 (1987) (claimed oral misrepresentations may not vary a borrower's loan obligation).

133. 804 S.W.2d 264 (Tex. App.—Houston [1st Dist.] 1991, no writ).

134. *See Houston First American Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983).

135. 795 S.W.2d 915 (Tex. App.—Amarillo 1990, writ granted).

136. *Id.* at 916.

137. 796 S.W.2d 500 (Tex. App.—San Antonio 1990, writ denied).

138. *Id.* at 503 (applying TEX. PROP. CODE ANN. ch. 92 (Vernon 1984 & Supp. 1992)).

139. 796 S.W.2d at 502.

the extent of the implied warranty of habitability for residential leases adopted in the seminal Texas case of *Kamarath v. Bennett*.¹⁴⁰ The holding in *Kamarath* in turn, was itself abrogated by legislative enactments.¹⁴¹ The court went on to note that although there was no Texas case in point, other jurisdictions have found that there is no common law duty to provide smoke detectors.¹⁴²

The court then turned to claims that the landlord had failed to repair a defective furnace flue and found no liability because the tenant did not notify the landlord of the condition as required by section 92.052(a) of the Texas Property Code.¹⁴³ This section imposes a duty upon a landlord to repair or remedy a defective condition, provided the tenant has given notice of the condition to the landlord, the tenant is not delinquent in rent, and the condition materially affects the physical health or safety of an ordinary tenant.¹⁴⁴ Turning next to the lack of a smoke detector, the court held the field was preempted by the Texas Smoke Detectors Statute,¹⁴⁵ the liability provisions of which specifically require that a tenant request installation or repair of a smoke detector and that written notice be given if the landlord fails to comply with the request.¹⁴⁶ Since a request was not made pursuant to the statute, the condition precedent to liability under the remedial provisions had not been satisfied and recovery was not available.¹⁴⁷ The court further found that there was no basis for supporting the trial court's judgment on a negligence theory as another provision of the Texas Smoke Detectors Statute specifically provides that the duties of the landlord, and the tenant's remedies thereunder, are in lieu of the common law.¹⁴⁸ Finally, the court rejected a two-pronged due process constitutional challenge to the Texas Smoke Detectors Statute, finding that the statute bore a reasonable relation to proper legislative purpose and did not arbitrarily restrict a tenant from court access inasmuch as no cause of action for failure to install a smoke detector exists at common law.¹⁴⁹

Breach of the implied warranty of habitability was again the focus of a dispute but was alleged in a different context. In *Bolin Development Corp. v. Indart* a residential tenant's right to recover for property damage for breach of an implied warranty of habitability was asserted.¹⁵⁰ Following a fire in a rental residence, the tenant brought suit for recovery of property damage

140. 568 S.W.2d 658, 660-61 (Tex. 1978).

141. *Garza-Vale*, 796 S.W.2d at 502 (citing TEX. PROP. CODE ANN. § 92.052 (Vernon 1984)).

142. 796 S.W.2d at 503.

143. *Id.* (citing TEX. PROP. CODE ANN. § 92.052(a) (Vernon 1984)).

144. TEX. PROP. CODE ANN. § 92.052(a) (Vernon 1984).

145. TEX. PROP. CODE ANN. §§ 92.251-.262 (Vernon 1984 & Supp. 1992).

146. TEX. PROP. CODE ANN. § 92.259(a)(1) (Vernon 1984 & Supp. 1992) (requiring tenant to request a smoke detector) and § 92.259(a)(2) (requiring a tenant to give written notice to be landlord).

147. 796 S.W.2d at 504.

148. *Id.* (citing TEX. PROP. CODE ANN. § 92.252(a) (Vernon 1984)).

149. 796 S.W.2d at 505-06.

150. 803 S.W.2d 817 (Tex. App.—Houston [14th Dist.] 1991), *writ denied with per curiam opinion*, 814 S.W.2d 750 (Tex. 1991).

alleging negligence and breach of an implied warranty of habitability. The jury found that negligence was not the proximate cause of the damage, but awarded damages to the tenant, presumably based upon breach of the implied warranty of habitability.¹⁵¹ The appellate court noted that an implied warranty of habitability in residential tenancies had been established by the supreme court in *Kamarath v. Bennett*,¹⁵² but that the *Kamarath* warranty had been legislatively superseded by chapter 92 of the Texas Property Code.¹⁵³ The court referred to those cases holding that damages for personal injury are not recoverable under the *Kamarath* implied warranty,¹⁵⁴ and held that providing a remedy for property damages would be contrary to those cases holding the warranty was abrogated by statute and would create inconsistent remedies for tenants seeking property damages, as opposed to those seeking damages for personal injury.¹⁵⁵ A dissenting judge would have upheld the jury's verdict based upon the duty imposed upon a landlord in tort to repair a defect after notice of the defective condition.¹⁵⁶ The Texas supreme court, in denying an application for writ of error in the case, specifically noted that it was not approving or disapproving the appellate court's discussion of actual damages under chapter 92 of the Texas Property Code.¹⁵⁷

Old lease concepts and new lease issues were joined in *HTM Restaurants, Inc. v. Goldman, Sachs & Co.*,¹⁵⁸ a case involving mortgage and lease priority and claims concerning asbestos containing materials. Following a loan default by a building owner, the foreclosure of liens by his mortgagee, and termination of a tenant's lease because it was subordinate to the mortgage, the tenant sued the building owner with whom it had negotiated, a subsequent building owner, and that building owner's managing agent for fraud, fraudulent concealment, negligent misrepresentation, and non-disclosure of the existence of asbestos in the building. The appellate court affirmed summary judgment in favor of the owners and manager, first dealing with the tenant's assertion that the covenant of quiet enjoyment had been breached.¹⁵⁹ The court agreed that in every lease there is an implied covenant that the tenant shall have quiet and peaceful enjoyment of its premises.¹⁶⁰ The covenant in this case, however, was squelched by the specific provisions of the lease that made it subject to any deeds of trust, security interests, or mortgages which might then or thereafter encumber the build-

151. *Id.* at 818.

152. *Kamarath*, 568 S.W.2d at 660-61.

153. 803 S.W.2d at 819 (citing TEX. PROP. CODE ANN. § 92.061 (Vernon 1984 & Supp. 1991)).

154. *Id.* at 820 (citing *Porter v. Lumbermen's Inv. Corp.*, 606 S.W.2d 715, 717 (Tex. Civ. App.—Austin 1980, no writ) and *Morris v. Kaylor Eng'g Co.*, 565 S.W.2d 334 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.)).

155. 803 S.W.2d at 820.

156. *Id.* at 821 (citing *Harvey v. Seale*, 362 S.W.2d 310, 312 (Tex. 1962)).

157. *Indart v. Bolin*, 814 S.W.2d 150, 950 (Tex. 1991).

158. 797 S.W.2d 326 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

159. *Id.* at 328.

160. *Id.*

ing.¹⁶¹ Turning next to some rather disjointed arguments made by the tenant concerning the existence of asbestos in the building, the court first noted that the party who had originally negotiated the lease asserted he had no personal knowledge that the building contained asbestos.¹⁶² Since those assertions were unopposed by the tenant, the court found there could be no basis for fraudulent concealment.¹⁶³ The claim of negligent misrepresentation was similarly dealt with since the tenant had admitted in interrogatories that the original owner had made no representations regarding the presence of asbestos, thereby defeating an essential element of the misrepresentation claim.¹⁶⁴ Finally, turning to another version of the concealment allegation, the court found that there was no duty on the part of the owner to disclose the existence of a mortgage that had affected the property for some five years prior to execution of the lease, the tenant having had ample opportunity to make its own investigation as to the state of title.¹⁶⁵

Breach of an implied warranty was again reviewed by a Texas court during the survey period. In *Kerrville HRH, Inc. v. City of Kerrville* the court reviewed the applicability of the doctrine of contributory negligence in a suit for breach of the implied warranty of suitability.¹⁶⁶ The implied warranty of suitability was first established by the Texas supreme court in *Davidow v. Inwood North Professional Group - Phase I*.¹⁶⁷ *Kerrville* involved a variety of claims including fraud and DTPA assertions. The determinations relevant to Texas landlord and tenant law, however, were the court's statements concerning the implied warranty in a commercial lease that the premises are suitable for their intended commercial purpose.¹⁶⁸ The tenant had leased a farm from a city for the purpose of running a wholesale nursery business, based upon the city's statements concerning the effectiveness of an irrigation system servicing the farm. The tenant later learned that the irrigation system did not work. In upholding a damage claim in favor of the tenant, the appellate court held that a landlord can be subject to common law damages based upon breach of an implied warranty, and while not specifically holding that there was a breach of implied warranty, nonetheless went on to discuss the case as if such a finding had been made.¹⁶⁹ The trial court had reduced the damage award in favor of the tenant by 49% based on a jury finding that the tenant was contributorily negligent in failing to make a proper inspection of the premises.¹⁷⁰ On appeal, the court reversed this point, finding that the *Davidow* implied warranty covers latent defects and that "[a] tenant, even one who inspects the premises prior to leasing . . . is under no obligation to discover each latent defect that would render the premises unsuitable for his

161. *Id.*

162. *Id.* at 329.

163. *Id.*

164. *Id.* at 330.

165. *Id.* at 329.

166. 803 S.W.2d 377 (Tex. App.—San Antonio 1990, writ denied).

167. 747 S.W.2d 373, 377 (Tex. 1988).

168. *Id.* at 385 (citing *Davidow*, 747 S.W.2d at 377).

169. *Id.* at 385-86.

170. *Id.* at 380.

purposes at the risk of being found contributorily negligent."¹⁷¹ Thus, contributory negligence could not defeat the cause of action for breach of the implied warranty.¹⁷² It is difficult to ascertain the exact effect of this case since the damage award in favor of the tenant could also have been based upon fraud findings as well as breach of an implied warranty, and the statements concerning contributory negligence may be dicta, although the reasoning seems sound.

B. Priority

Consider the following situation: on day one, landlord and tenant enter into a lease and tenant occupies space in a shopping center; on day two, a bank loans money to landlord and the shopping center is mortgaged as security; on day three, the lease is amended to extend the term, extinguish a renewal right, and provide for cash payments from landlord to tenant to enable the tenant to renovate the premises; on day four, landlord defaults on the mortgage, bank forecloses its liens and takes possession of the premises, and demands and accepts rent from the tenant; and on day five, tenant demands the landlord's cash payment from the bank - result? In *Ontiveros v. MBank Houston*¹⁷³ the court found in favor of the tenant and entered judgment against the Federal Deposit Insurance Corporation as receiver for the then-failed bank for the defaulted payment plus interest and attorneys fees.¹⁷⁴ The court in reaching this result relied on long-settled Texas real property law establishing the priority of the tenant's rights in the property by occupancy and held that the foreclosure of a subsequent lien could not affect those rights.¹⁷⁵ The court noted that the burden is on a subsequent mortgagee to protect itself by inquiring into the terms of existing leases and reaching suitable agreements with its mortgagor to protect its interests.¹⁷⁶ The tenant had moved out of the leased premises following the bank's failure to make the payment. The court held that the bank's failure prevented the tenant from completing a renovation necessary to the tenant's occupancy, which constituted an eviction allowing the tenant to abandon the property as established in *Davidow v. Inwood North Professional Group*.¹⁷⁷

III. BROKERS

In *Kubinsky v. Van Zandt Realtors*¹⁷⁸ the Fort Worth court of appeals refused to impose a duty on a listing agent to inspect the seller's property and refused to create an implied warranty under the Texas Deceptive Trade

171. *Id.* at 386.

172. *Id.*

173. 751 F. Supp. 128 (S.D. Tex. 1990).

174. *Id.* at 131.

175. *Id.* (citing *F. Groos & Co. v. Chittim*, 100 S.W. 1006, 1010 (Tex. Civ. App.—1907, no writ)).

176. *Id.* at 130-31 (citing *Collum v. Sanger Bros.*, 82 S.W. 459, 460 (Tex. 1904)).

177. *Id.* at 131 (citing *Davidow*, 747 S.W.2d 373).

178. 811 S.W.2d 711 (Tex. App.—Fort Worth 1991, writ denied).

Practices - Consumer Protection Act (DTPA)¹⁷⁹ that services involving the exercise of professional judgment will be performed in a good and workmanlike manner.¹⁸⁰ Shortly after purchasing their house, the purchasers noticed cracks in the walls, around the windows, and in the foundation. Upon further inquiry, they discovered that foundation work had been performed three months before they purchased their home. As is wont to happen in such situations, the purchasers sued everybody involved in the transaction, including the listing agent for the house, even though they had hired an inspector to inspect the property, whose report noted minor foundation movement. The trial court granted the agent's motion for summary judgment and severed the cause of action against the agent from the actions against the other defendants.¹⁸¹ On appeal, the purchasers claimed the trial court improperly granted the agent's motion for summary judgment because there were genuine issues as to material facts regarding whether the agent breached her duty to inspect the property and inform the purchasers of material facts that such an inspection would reveal and whether the agent breached an implied warranty under the DTPA that her services would be performed in a good and workmanlike manner. The appellate court affirmed the trial court's decision.¹⁸²

Section 15(a)(6)(A) of the Real Estate Licensing Act authorizes a temporary or permanent renouncement revocation of a license if an agent makes a material misrepresentation or fails to advise a potential purchaser of any unmanifested structural defect or any other defect known to the agent.¹⁸³ This section, the court noted, does not impose a duty on the agent to inspect the listed property or to make an affirmative investigation for possible defects; it merely requires the agent to disclose defects of which it has knowledge.¹⁸⁴ Further, the Real Estate License Act makes it unlawful for a person to act as a real estate inspector unless he has received a license to do so,¹⁸⁵ and prohibits one from acting as an inspector and broker for the same transaction.¹⁸⁶ The only duty that the agent of the seller owes to the purchaser is to treat him fairly.¹⁸⁷ This duty, the court held, is adequately fulfilled by requiring disclosure of latent structural defects or other defects known to the agent.¹⁸⁸ Because the court found the Real Estate License Act did not impose a duty on the agent to inspect the property, the court refused to follow a California case cited by the purchaser to support the imposition of a duty to inspect on the listing agent;¹⁸⁹ such additional liability, the court

179. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987).

180. 811 S.W.2d at 715-16.

181. *Id.* at 713.

182. *Id.*

183. TEX. REV. CIV. STAT. ANN. art. 6573(a), § 15(a)(6)(A) (Vernon Supp. 1991).

184. 811 S.W.2d at 714. There was evidence the sellers did not notify the agent of the foundation problems. *Id.* at 716.

185. TEX. REV. CIV. STAT. ANN. art. 6573(a), § 18C(c) (Vernon Supp. 1991).

186. TEX. REV. CIV. STAT. ANN. art. 6573(a), § 18C(i)(5) (Vernon Supp. 1991).

187. Tex. Real Estate Comm'n, 22 (West January 1, 1976) TEX. ADMIN. CODE § 531.1 (Canons of Professional Ethics and Conduct for Real Estate Licenses).

188. *Kubinsky*, 811 S.W.2d at 715.

189. *Id.* at 715. The purchaser cited *Easton v. Stassburger*, 199 Cal. Rptr. 383 (Cal. App.

said, should be left to the Texas legislature.¹⁹⁰

Finally, the court refused to recognize an implied warranty that services involving the exercise of professional judgment will be performed in a good and workmanlike manner.¹⁹¹ Because the Texas supreme court expressly left open the question whether such an implied warranty existed under the DTPA¹⁹², the court was compelled to follow *Dennis V. Allison*,¹⁹³ which indicated that no such implied warranty exists.¹⁹⁴

IV. EMINENT DOMAIN

A. Statutory Condemnation

*City of Houston v. Religious of the Sacred Heart of Texas*¹⁹⁵ arose out of the celebrated condemnation of a portion of the Duchesne campus for the extension of Chimney Rock Road. The condemnation severed about two acres of the 15-acre campus, and the school appealed from the commissioners' award of \$7,250,000. At trial, the school urged that the so-called substitute facilities doctrine provided the correct means of assessing damages. Under the doctrine, a landowner is entitled to additional compensation over and above market value to allow for the replacement of the condemned facility.¹⁹⁶ Based on the substitute facilities doctrine, the trial court awarded damages of \$18,451,398.

On appeal, the city challenged the vitality of the substitute facilities doctrine, contending that the applicable standard should be the customary fair market value standard. The appeals court noted that only two Texas appellate cases discussed the substitute facilities doctrine,¹⁹⁷ and that the doctrine has, since it was first announced, fallen into disrepute with the U.S. Supreme Court.¹⁹⁸ Relying on the U.S. Supreme Court's revised analysis, the appeals court said that the subjective elements inherent in the substitute facilities doctrine enhance the risks of error and prejudice, and diverge from the principle that just compensation is to be measured by an objective standard. While the doctrine might be applicable to some public facilities that cannot readily be bought on the market such as streets and sewage treatment plants,

1st Dist. 1984) in which the California court imposed a duty on the listing agent to inspect the listed property and to disclose to the prospective purchasers all facts materially affecting the value of the property that such an investigation would reveal.

190. 811 S.W.2d at 715.

191. *Id.*

192. *Id.* In *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987), the Texas supreme court held that there exists an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner under § 17.50(a)(2) of the DTPA.

193. 698 S.W.2d 94, 95-96 (Tex. 1985).

194. *Kubinsky*, 811 S.W.2d at 715.

195. 811 S.W.2d 734 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

196. *Id.* at 737. The doctrine arose from dictum in *Brown v. United States*, 263 U.S. 78 (1923).

197. *City of Houston*, 811 S.W.2d at 737 (citing *State v. Waco Indep. School Dist.*, 364 S.W.2d 263 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.); *City of San Antonio v. Congregation of Sisters of Charity of the Incarnate Word, Inc.*, 404 S.W.2d 333 (Tex. Civ. App.—Eastland 1966, no writ)).

198. *Id.* at 737 (citing *United States v. 50 Acres of Land*, 469 U.S. 24 (1984)).

it should not be used where there is evidence of fair market value for the property involved.¹⁹⁹

The court noted that the jury based its verdict on testimony that it would cost the school approximately \$18-million to acquire and build on adjacent property. The court observed, however, that acquisition of the adjacent property would give the school approximately six acres more land than it owned before the condemnation. Further, the court said the trial verdict amounted to a windfall to the school, which had no obligation to purchase the adjoining property or even to operate the school at that or any other location.²⁰⁰ Accordingly, the appeals court remanded for a new damage determination in accordance with the customary fair market value measurement.

*State v. Windham*²⁰¹ involved the intriguing question of whether the courts or the legislature are the proper arbiters of the Texas Constitution. *Windham* arose after the state condemned a two-acre strip out of a 19-acre tract for the widening of a state highway. The landowner designated an approximately 4-acre tract as a commercial development unit, waived damages as to the remainder of the land, and contended that the per acre value of the 4-acre unit was much larger than the average per acre value of the entire tract. The trial court permitted the unit designation and the waiver with regard to the remainder of the land. On appeal, the state contended that the landowner's action violated a 1984 statute which mandates that any increase in the value of adjoining land shall also be taken into account in determining a condemnation award.²⁰² The appeals court agreed, but declined to follow the statute. The appeals court said that the statute directly contravenes the Texas supreme court's interpretation of article I, section 17 of the Texas Constitution; that interpretation provides that adequate compensation is to be determined without reference to the benefits that a landowner might derive from the improvement to be made by the condemnor.²⁰³ The appeals court said it was not bound to give effect to the 1984 statute, because the high court had never held the statute constitutional, nor had the constitution been amended to comport with the statute.²⁰⁴

*Mellon v. Southern Pacific Transport Co.*²⁰⁵ considered the special nature of railroad easements. In *Mellon* a fee owner challenged the right of a railroad to whom he had granted an easement to, in turn, grant another easement to a communications company for a fiber optic cable to be buried approximately three feet beneath the railroad right-of-way. The federal trial court held for the railroad on two separate grounds. First, it said that under

199. *Id.* at 737-38.

200. *Id.* at 738.

201. 803 S.W.2d 340 (Tex. App.—Houston [14th Dist.] 1990, writ granted).

202. See Tex. Prop. Code Ann. § 21.042(e) (Vernon 1984).

203. *Windham*, 803 S.W.2d at 341 (citing *Buffalo Bayou, Brazos & Colo. R.R. Co. v. Ferris*, 26 Tex. 588 (1863)).

204. *Id.* at 341-42 (relying on *State v. Enterprise Co.*, 728 S.W.2d 812 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)).

205. *Id.* at 253 (citing *Heddin v. Delhi Gas Pipeline Co.*, S.W.2d 886 (Tex. 1975)).

the so-called incidental use doctrine, a railroad is free to permit others to occupy its right of way in a manner that it considers best fitted to promote the public use.²⁰⁶ This doctrine has vitality not only under federal law, but also under Texas law; indeed, while a railroad cannot make use of the mineral estate in its right-of-way, it can authorize uses of the remainder of the right-of-way.²⁰⁷ Second, the court noted that even if the railroad did not have power to grant the easement to the communications company, the communications company, as a legislatively preferred class of utility, would have the power to condemn the privately owned property under Texas law.²⁰⁸ In response to the owner's argument that Texas law is more restrictive than federal law on the rights of railroads and telecommunications companies, the court held that, to the extent that federal and state law are divergent, the former preempts the latter.²⁰⁹

The crucial issue in *Hooks v. Fourth Court of Appeals*²¹⁰ was the moment at which a condemnor loses its right to dismiss a condemnation proceeding. *Hooks*, decided by the Texas supreme court, arose out of the All American Pipeline project which has given rise to a healthy amount of condemnation litigation during the past several years. The pipeline company filed its condemnation action in 1986, after surveying the condemnee's property and, in the process, cutting down 23 trees along the proposed right-of-way. A month later, the pipeline company deposited approximately \$56,000 in the trial court's registry based on the commissioners' award. The landowner withdrew a portion of the award to construct an access road for the part of his ranch that would be cut off by the proposed easement. Thereafter, several years of federal court litigation ensued over whether the pipeline company had properly complied with environmental impact statement requirements. The pipeline company agreed to relocate the large portion of its proposed right-of-way as a consequence of that litigation. Because the relocation bypassed the condemnee's property, the pipeline company sought to dismiss its condemnation proceeding and to recover the amounts it had deposited into the court's registry, less the condemnee's reasonable attorneys' fees. When the trial court refused to dismiss the matter, the pipeline company sought mandamus relief, contending that its motion to dismiss was, in essence, a motion for non-suit, to which it was entitled as a matter of absolute right. The court of appeals issued a writ of mandamus, resulting in the condemnor's appeal to the state's high court.

The Texas supreme court noted that, in ordinary cases, the plaintiff had an absolute right to take a non-suit. The rule in condemnation cases is, however, more restrictive. Once a condemnor has taken possession of the prop-

206. *Id.* at 229-30 (citing *Western Union Tel. Co. v. Pa. R.R.*, 195 U.S. 540, 570 (1904)).

207. *Id.* at 230 (citing *Lo-Vaca Gathering Co. v. Mo. K.T.R.R.*, 476 S.W.2d 732, 739 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.)).

208. *Id.* at 231 (referring to TEX. REV. CIV. STAT. ANN. art. 1416 (Vernon 1980); *City of Brownwood v. Brown Tel. & Tel. Co.*, 106 Tex. 114, 157 S.W. 1163 (1913)).

209. *Windham*, 803 S.W.2d 232-33 (citing 49 U.S.C.A. § 10749 (West Supp. 1989)); *Missouri Pac. R.R. Co. v. Railroad Commission of Tex.*, 833 F.2d 570, 576 (5th Cir. 1987).

210. 808 S.W.2d 56 (Tex. 1991).

erty, dismissal is allowed only if no prejudice or harm to the landowner would result.²¹¹ While the pipeline company had not taken actual possession of the easement it originally sought, it was clear that the deposit of the commissioners' award into the court's registry constituted constructive possession. The issue, therefore, was whether the landowner had been prejudiced or harmed as a result of the constructive possession. That issue, said the high court, should be tried by the trial court and reviewed by the court of appeals subject to the ordinary appeals process.²¹²

*All American Pipeline Co. v. Ammerman*²¹³ another case arising out of the transcontinental pipeline, is notable because it indicates that a trial court may properly consider the prospective fear that would be engendered in the minds of the buying public by the condemnor's activities. In *Ammerman* the commissioners had awarded \$11,760 in damages for a 2.23-acre permanent easement across a 140-acre tract. On appeal to the trial court, the landowners presented evidence that the pipeline would run within 90 feet of the residential improvements on the ranch property, and that potential buyers would find the property far less valuable for that reason. Based on this evidence, the trial court awarded the condemnee approximately \$75,000 in damages. The appeals court disagreed with the pipeline company's contention that the landowner's witnesses failed to offer any reasonable information concerning the general public's fear of being in close proximity to a crude oil pipeline, and affirmed the trial court's award.²¹⁴ The appeals court noted that a Bureau of Land Management decision, admitted into evidence, indicated that 27 oil spills could be expected along the pipeline from California to the Gulf Coast, and said this type of evidence shows either an actual danger that forms the basis of fear or the type of fear which is reasonable.²¹⁵

B. Inverse Condemnation

Five cases from this Survey period illustrate the difficulties of proving an inverse condemnation case.

In *State v. Westgate, Ltd.*²¹⁶ a shopping center owner sought to prove that a city's alleged undue delay in instituting condemnation proceedings resulted in extra damages, compensable by an inverse condemnation proceeding. In reversing the trial court's award of such extra damages, the appeals court noted that a landowner complaining of inverse condemnation must show a material and substantial interference with access to its property.²¹⁷ To do this, the landowner must prove either "(1) a total but temporary restriction of access; (2) a partial but permanent restriction of access; or (3) a temporary limited restriction of access brought about by an illegal activity or one

211. *Id.* at 60 (citing *Murray v. Devco, Ltd.*, 731 S.W.2d 555, 557 (Tex. 1987)).

212. *Id.* at 61.

213. 814 S.W.2d 249 (Tex. App.—Austin 1991, n.w.h.).

214. 750 F. Supp. 226 (W.D. Tex. 1990).

215. *Id.* at 252-53 (distinguishing *Tennessee Gas & Transmission Co. v. Zirjacks*, 244 S.W.2d 837 (Tex. Civ. App. 1951, writ dism'd)).

216. 798 S.W.2d 903 (Tex. App.—Austin 1990, writ granted).

217. *Id.* at 906.

that is negligently performed or unduly delayed."²¹⁸ The appeals court said that although the landowner was proceeding under the third category, it never pleaded or proved a temporary limited restriction of access; indeed, the landowner conceded that the city did not interfere with or physically block access to the subject property.²¹⁹

In *City of El Paso v. Madero Development*²²⁰ a landowner sought damages after the city rezoned approximately 34-acres for planned mountain development, which the landowner claimed would reduce the tract's potential number of residential lots from 150 to 11. The city appealed a trial court award of \$871,200, urging that the ripeness doctrine precluded any determination of the matter since the landowner had not applied for a variance to the new zoning.²²¹ The appeals court noted that under the ripeness doctrine an essential prerequisite to a takings claim is a final authoritative determination regarding the type and intensity of development legally permitted on the subject property.²²² Here, the landowner had failed to seek a variance, hence no final determination had occurred. The landowner countered by arguing the so-called futility doctrine made his case an appropriate exception to the ripeness requirement.²²³ That is, because the zoning authority had no authority to make variances not in keeping with the intent of the rezoning, any requests for such a variance would be futile. The court declined to apply the futility doctrine, noting that while the zoning authority might not have authority to allow 150 building lots, it might be authorized to allow more than 11.²²⁴ A dissenting opinion agreed with the majority's analysis under the ripeness doctrine, but noted that the city had failed to file a plea in abatement, and said that the ripeness doctrine was therefore waived.²²⁵

In *Hues v. Warren Petroleum Co.*²²⁶ the property owners asserted that gas leaks from an oil company's plant amounted to an inverse condemnation. Consequently, they brought their suit within the condemnation law's 10-year statute of limitations rather than the 2-year statute that would apply to an ordinary damage claim. The appeals court agreed with the oil company's claim that it had no eminent domain powers under Texas statutes. Further, it said that the decrease in the property owner's fair market values was in the nature of damaged property rather than the actual physical appropriation of the property or an unreasonable interference with the owner's use and enjoyment of the property.²²⁷

218. *Id.* (citing *City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986).

219. *Id.* at 906-07.

220. 803 S.W.2d 396 (Tex. App.—El Paso 1991, writ denied).

221. *Id.* at 398-99.

222. *Id.* at 400 (citing *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986)).

223. *Id.* (citing *MacDonald*, 477 U.S. 340).

224. *Id.* at 400-01.

225. *Id.* at 401-02 (Osborn, J., concurring and dissenting).

226. 814 S.W.2d 526 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.).

227. *Id.* (citing *Allen v. City of Texas City*, 775 S.W.2d 863, 864 (Tex. App.—Houston [1st Dist.] 1989, writ denied)).

At issue in *City of Grapevine v. Grapevine Pool Road Joint Venture*²²⁸ was whether the city's barricading of a road constituted a damaging or taking under the Texas Constitution. Reviewing an award of damages by the trial court, the appeals court stated that, as a matter of law, a property owner's right of access is not materially and substantially impaired if the access restriction merely results in a diversion of traffic or circuitry of travel.²²⁹ Here, although one public street was barricaded, another public street continued to furnish access to the subject property along 162 feet of frontage. Hence, no condemnation award was proper.²³⁰ The appeals court distinguished *DuPuy v. City of Waco*²³¹ as a case in which the property owner was left with access only from an alleyway rather than a public street.²³²

Finally, in *City of Carrollton v. OHBA Corp.*²³³ a landowner obtained a declaration by the trial court that a city ordinance was unconstitutional. The ordinance prohibited the issuance of a construction permit on any property subject to a city-initiated condemnation proceeding unless the proposed construction reflected the post-condemnation condition of the property. The appeals court reversed, holding that because the condemnation proceeding was strictly administrative, and because the condemnee had not invoked the trial court's legal jurisdiction by filing objections to the commissioners' award, the third court lacked jurisdiction to grant the declaratory relief.²³⁴

V. TITLE AND CONVEYANCING

If one dedicates property to a municipality, has he conveyed fee simple title to the municipality? Not necessarily so. In *Russell v. City of Bryan*,²³⁵ Tyler Haswell delivered a deed to the City of Bryan for approximately ten acres of land to be maintained as a park in honor of his mother. The deed recited that the land was dedicated to the City, provided that certain conditions were satisfied; the deed did not contain the words grant, sell, or convey. More than sixty years later, the heirs of Haswell sought a declaratory judgment regarding the interests of the City of Bryan and North Central Oil Corporation in the park. The heirs claimed that Haswell conveyed an easement for the surface use of the land only, while the City and the oil company contended that Haswell conveyed fee simple title to the land, with a right of reentry and reversion for failure of specified conditions. The trial court granted the City's and oil company's motions for summary judgment.²³⁶ The appellate court, however, held that summary judgment was improperly granted because the deed used the word dedicate and did not use any of the

228. 804 S.W.2d 675 (Tex. App.—Fort Worth 1991, no writ).

229. *Id.* at 677-78 (citing *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988)).

230. *Id.* at 678 (distinguishing *DuPuy v. City of Waco*, 396 S.W.2d 103 (Tex. 1965)).

231. 396 S.W.2d 103 (Tex. 1965).

232. *City of Grapevine*, 804 S.W.2d at 678.

233. 809 S.W.2d 587 (Tex. App.—Dallas 1991, no writ).

234. *Id.* at 589 (citing *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240 (Tex. 1984)).

235. 797 S.W.2d 112 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

236. *Id.* at 115.

typical words of conveyance (i.e., grant, sell, or convey).²³⁷ The court noted that dedicate means an appropriation of one's property to some public use; it is not a synonym for the words grant, sell or convey.²³⁸ Accordingly, it could not be ascertained from the deed whether Haswell intended to convey fee simple title to, or an easement across, the land. Thus, summary judgment was inappropriate because a factual issue existed regarding Haswell's intent when he delivered the deed to the City.²³⁹

*Riley v. Campeau Homes (Texas), Inc.*²⁴⁰ involves the proper interpretation of a right of first refusal. The tenant leased a condominium unit under a lease which granted the tenant the right to purchase the unit if it were offered for sale to a third party. The landlord delivered notice to the tenant that it intended to sell the tenant's unit in a bulk sale for a specified purchase price. The tenant timely notified the landlord that it intended to exercise its right of first refusal. The landlord responded that the unit in question was part of a bulk sale and would be sold only as part of the bulk sale; further, if the tenant did not waive its right of first refusal as to the bulk sale, then the landlord would seek to exclude the unit from the sale. Undaunted, the tenant demanded its right of first refusal be honored and tendered the \$5,000 earnest money deposit required under the contract. The landlord refused to recognize the tenant's right of first refusal and advised the tenant that its unit was being withdrawn from the proposed sale. The tenant filed suit seeking damages for breach of contract and specific performance. The trial court, relying on case law from other jurisdictions and reasoning that the tenant would receive an unanticipated profit if allowed to purchase the condominium at the per-unit-bulk-sale price, granted the landlord's motion for partial summary judgment ruling that the right of first refusal was unenforceable as to this sale.²⁴¹

The appellate court, however, reversed the summary judgment, refusing to rewrite the contract of the parties.²⁴² Once the landlord elected to sell the unit, it became obligated to offer the unit to the tenant on the terms offered to the third party.²⁴³ The failure of the landlord to offer to sell the unit to the tenant was a breach of contract for which the remedy of specific performance was available.²⁴⁴ The lease did not exclude bulk sales from the tenant's right of refusal,²⁴⁵ and the court refused to provide for such an ex-

237. *Id.*

238. *Id.*

239. *Id.*

240. 808 S.W.2d 184 (Tex. App.—Houston [14th Dist.] 1991, writ *dism'd* by *agr.*)

241. *Id.* at 187.

242. *Id.* at 189.

243. *Id.* at 187.

244. *Id.* at 188.

245. The lease provided that if the

"Landlord should receive a bona fide offer from any person . . . to purchase in whole or in part, the Leased Premises, the Landlord shall send Tenant a copy of the proposed Contract and notify Tenant of its intentions to accept the same. Tenant shall have the right . . . to accept the terms of the Contract in writing . . . for the gross purchase price and on the price and terms specified in said contract."

clusion.²⁴⁶ In so doing, the court acknowledged its duty to give effect to the intention of the parties when construing a contract; however, the intention expressed in the contract must be honored and not the intention which the parties may have had, but failed to express.²⁴⁷

VI. RESTRICTIVE COVENANTS

Last year's Survey article included an extensive description of the appeals court decision in *Evans v. Pollock*.²⁴⁸ The decision was remarkable for its thorough review of some root and branch principles of restrictive covenants. Among those principles was the rule that, for an implied reciprocal negative easement to arise, the development plan must originate with the common owner and apply to the entire tract on which the restrictions are sought to be enforced.²⁴⁹

This year, relying on logical extensions of Texas decisions,²⁵⁰ as well as decisions from Connecticut, Kentucky, Missouri, New Mexico, and Virginia, the Texas supreme court reversed the holding below.²⁵¹ In so doing, the high court disposed of the requirement that an entire tract must be restricted in order for the doctrine of implied reciprocal negative easements to apply.²⁵² Two long-standing rules, that extreme caution is to be used in imposing reciprocal negative easements²⁵³ and that evidence of the general development plan must be clear and unmistakable,²⁵⁴ are also of dubious vitality in light of the high court's opinion. The sole dissenter, Justice Gonzalez, pointed to the reasons stated in the appeals court decision as the basis for his dissent.²⁵⁵

VII. HOMESTEAD

In *First Huntsville Properties Co. v. Laster*²⁵⁶ a divorce decree granted to

Id. at 186.

246. *Id.* at 189.

247. *Id.*

248. 1993 S.W.2d 14 (Tex. App.—Austin 1989), *rev'd*, 796 S.W.2d 465 (Tex. 1990) (the case is discussed in Lawrence J. Fossi, et al., *Real Property, Annual Survey of Texas Law*, 45 Sw. L.J. 595, 634-635 (1991), to which the reader is referred for the complex facts.)

249. *Evans*, 793 S.W.2d at 19.

250. The rather distinguishable decisions included *Curlee v. Walker*, 112 Tex. 40 (1922); *Lehmann v. Wallace*, 510 S.W.2d 675 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *Cambridge Shores Homeowners Ass'n, Inc. v. Spring Valley Lodge Co.*, 422 S.W.2d 10 (Tex. Civ. App.—Dallas 1967, no writ); *Cannon v. Ferguson*, 190 S.W.2d 831 (Tex. Civ. App.—Fort Worth 1945, no writ); *Betha v. Lockhart*, 127 S.W.2d 1029 (Tex. Civ. App.—San Antonio 1939, writ ref'd); and *Hooper v. Lottman*, 171 S.W. 270 (Tex. Civ. App.—El Paso 1914, no writ). The high court never seriously grappled with the expressly contrary holding of *Saccomanno v. Farb*, 492 S.W.2d 709 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.), on which the appeals court relied.

251. *Evans v. Pollock*, 796 S.W.2d 465 (Tex. 1990).

252. *Id.* at 472.

253. See *Saccomanno v. Farb*, 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).

254. *Id.*

255. *Evans*, 796 S.W.2d at 472 (Gonzalez, J., dissenting).

256. 797 S.W.2d 151 (Tex. App.—Houston [14th Dist.] 1990), *aff'd* 35 Tex. Sup. Ct. J. 229 (Dec. 14, 1992).

Ms. Laster a 73.83% interest in the family's residence, and an exclusive right to occupy the residence until the Lasters' child reached the age of 18 or was no longer in school, whichever occurred first. Three years later, Mr. Laster obtained a loan and granted to the bank a lien against his 26.17% interest in the residence. Upon default, the bank foreclosed its lien and conveyed the interest to First Huntsville Realty Corporation, which then conveyed it to First Huntsville Properties Company.

Ms. Laster's exclusive right of occupancy terminated in 1988, and First Huntsville filed suit to partition its interest from that of Ms. Laster, and requested that the trial court order a forced sale of the residence and partition the proceeds. The trial court denied First Huntsville's request and held the residence was not subject to a forced sale because Ms. Laster's homestead interest in the property was paramount to First Huntsville's rights as a co-tenant to partition the property.²⁵⁷ The appellate court disagreed, noting that the foreclosure of the bank's lien did not affect Ms. Laster's possessory estate, and First Huntsville, as a subsequent purchaser, took the property subject to Ms. Laster's homestead interest for the balance of the estate created in the divorce decree.²⁵⁸ The court found, however, that when the exclusive right to possess the property terminated, First Huntsville and Ms. Laster became co-tenants of the property.²⁵⁹ The homestead right of one co-tenant may not prejudice the rights of other co-tenants, the court said, and does not affect the co-tenants' right to partition the property or to a court-ordered sale, even when the homestead right precedes the inception of the co-tenancy.²⁶⁰ Further, the court held that such a court-ordered sale is not a forced sale under article XVI, section 50 of the Texas Constitution.²⁶¹ The court construed the phrase forced sale to be limited to the sale of property for the payment of a debt.²⁶²

The holding in *Laster* was a victory for First Huntsville, as the Texas supreme court affirmed the decision and rejected the following points raised by Ms. Laster: (a) the appellate court's failure to hold that Ms. Laster's homestead interest in the residence was paramount to the right of a co-tenant where the inception of a co-tenancy came after the homestead exemption sale was affixed to the property; and (b) the appellate court's failure to hold that article XVI, section 50 of the Texas Constitution protects homestead property from a forced sale by writ of partition where the undivided interest was obtained by a creditor of another by non-judicial foreclosure upon default in payment of indebtedness.²⁶³

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 153.

261. *Id.* (construing TEX. CONST. of 1869, Art. 16, § 50 (1973), which provides as follows: "The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, . . .")

262. *Laster*, 797 S.W.2d at 153.

263. *Laster v. First Huntsville Properties Co.*, 35 Tex. Sup. Ct. J. 229 (Dec. 14, 1992).

*First Interstate Bank of Bedford v. Bland*²⁶⁴ reinforces the rule that a bank may not rely solely on the representations in a deed of trust regarding the homestead status of property, but must inspect all relevant information to determine that the representations are consistent with the actual use of the property. Bland and another person purchased approximately 12 acres in 1979. In 1981, Bland began constructing a permanent home on the land, and actually moved into the house in 1982, although the house was not completed. In February 1984, Bland and his co-tenant partitioned the land, with Bland receiving the house and four acres.

In March 1984, Bland's son requested a loan from a bank and represented he owned the four-acre tract and used it as a summer home. The bank's officer inspected the property with Bland's son while Bland was there. Bland testified that he agreed to guarantee his son's debt at that time, but refused to pledge his house as collateral. The bank officer denied discussing such a matter. Subsequently, Bland received a call telling him the documents for his son's loan were ready. Bland, thinking he was signing documents to guarantee his son's debt, executed a real estate note and deed of trust, which indicated that his son and wife were the borrowers under the documents. The deed of trust contained a representation that the property described therein was not the homestead of the party signing the document. The loan was subsequently renewed, and the son and his wife executed a new promissory note and a new deed of trust covering the property, which Bland did not sign. The son defaulted on his loan and the bank sought to foreclose its liens against Bland's property.

Bland sought an injunction to prohibit the bank from foreclosing its liens against his property. The bank defended, claiming that Bland was estopped from claiming the homestead exemption based on the representation in the deed of trust.²⁶⁵ The court rejected the bank's argument.²⁶⁶ The court found that this was not a case where the observable facts would lead one to conclude the property in question was not a homestead or where the use of the property was consistent with the owner's representation that the property was not a homestead.²⁶⁷ Bland was the record owner of the property, he was paying taxes on the property, he lived on the property, and the property was the only land he owned. The bank argued the use of the property was not inconsistent with the son's representation that he used it as a summer home and that he lived elsewhere. The court responded the son's representations were irrelevant since he did not own the property and held Bland was not estopped from claiming the homestead exemption.²⁶⁸

*In re John Taylor Company*²⁶⁹ involved the issue of whether the business homestead claim is lost when the owner of property leases it to a wholly-

264. 810 S.W.2d 277 (Tex. App.—Fort Worth 1991, no writ).

265. *Id.* at 285.

266. *Id.* at 286.

267. *Id.*

268. *Id.*

269. 935 F.2d 75 (5th Cir. 1991).

owned corporation. The Fifth Circuit reluctantly held that it is not.²⁷⁰ Mr. Taylor leased property on which he conducted his business to two wholly-owned corporations and operated the family business on the property through the corporations. The corporations and Mr. and Mrs. Taylor filed for bankruptcy, and the cases were consolidated and converted to liquidation proceedings, and the trustee filed a complaint asking for authority to sell certain property of the estate free of all liens. Mrs. Taylor claimed some of the property was exempt as a business homestead. Both the bankruptcy court and district court disagreed, holding that the property lost its homestead character when it was leased to the wholly-owned corporations, citing several Texas cases holding the homestead character of property is lost when it is leased to another person or entity.²⁷¹ The Fifth Circuit, however, disagreed, noting that the cases cited by the lower courts to support their conclusion did not involve the leasing of property to a corporation wholly-owned by a claimant who continues to conduct business thereon.²⁷² The Fifth Circuit concluded that in Texas the transfer or conveyance of property to a claimant-owned corporation terminates the business homestead exemption, but the business homestead exemption survives the leasing of the property to such a corporation.²⁷³

VIII. EASEMENTS & ROADS

There was a dearth of significant cases dealing with easements during the Survey period, but in *Sentell v. Williamson County*²⁷⁴ a court was called upon to determine whether a county had obtained a superior route to its property so as to warrant cancellation of an easement. The county obtained an access easement on the express condition that if it obtained a better and more direct access route, the easement would terminate. Subsequently, the county obtained an easement across adjacent property and, following a dispute with the grantor of that easement, entered a compromise agreement which provided for a land exchange and the acquisition of a permanent easement. This resulted in providing the county with ownership of land adjoining both sides of an interstate highway. The grantors of the first easement then sought a declaratory judgment that the county had acquired better access. The court held the issue was to be determined as matter of law because the facts were not in dispute and the terms of the agreement were not ambig-

270. *Id.* at 76.

271. *Id.* at 76-77. (the following cases were cited by the lower courts: *Duncan v. Woolf*, 380 S.W.2d 862 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e); *Westergreen v. Campbell*, 127 S.W.2d 985 (Tex. Civ. App.—Galveston 1939, no writ); *Yates v. Home Building & Loan Co.*, 103 S.W.2d 1091 (Tex. Civ. App.—Beaumont 1937, no writ)).

272. *Id.* at 77.

273. *Id.* (citing *Inman v. Inman*, 80 S.W.2d 1103 (Tex. Civ. App.—El Paso 1935, no writ) (holding business homestead was not lost when owner leased it to a partnership in which owner was a partner) and *Long Bell Lumber Co. v. Miller*, 240 S.W.2d 405 (Tex. Civ. App.—Amarillo 1951, no writ) (holding that a business homestead was not abandoned when owner continued to conduct his individual business on premises along with the business of a corporation owned by him and his family)).

274. 801 S.W.2d 220 (Tex. App.—Austin 1990, no writ).

uous.²⁷⁵ Since the county had obtained direct access over its own property this was, as a matter of law, a better and more direct route than one that burdened an adjacent landowner, even if the route across the county's land was more circuitous or more physically difficult to use.²⁷⁶ Accordingly, the court rendered judgement that the county's easement had terminated.²⁷⁷

IX. ADVERSE POSSESSION

There were three cases of relative significance dealing with adverse possession during the Survey period, two of them involving the supreme court. *Rhodes v. Cahill*²⁷⁸ afforded the supreme court an opportunity to discuss the requirements for establishing title by adverse possession as a matter of law. The claimant, seeking title to five tracts of land by adverse possession, was awarded one tract by the trial court following a non-jury trial.²⁷⁹ The court of civil appeals reversed that holding, finding that the claimant had established title as a matter of law as to all five tracts.²⁸⁰ The supreme court noted that proving adverse possession under the applicable ten-year statute of limitations²⁸¹ requires a showing of actual, visible, continuous, notorious, distinct, hostile, and adverse possession constituting an actual and visible appropriation of the land for ten or more consecutive years.²⁸² Addressing the evidence in the case, the supreme court first noted that the claimant's assertion that cedar trees had been sold and cleared from the land was some evidence of adverse possession, but the claimant could not verify that the trees in question had been removed from the tracts in question, and also noted that isolated commercial sales of cedar or selective clearing for grazing purposes was not sufficient to show adverse possession as a matter of law over a ten-year period.²⁸³ The parties' stipulation as to payment of taxes was also insufficient because at most it showed that the claimant had paid taxes on property of her own and on the tracts in dispute - while this was competent evidence of adverse possession it also was insufficient to establish the same as a matter of law under the ten-year statute.²⁸⁴ Likewise, the grazing of cattle and goats on the disputed tracts was insufficient since those tracts had been included within a parcel owned by the claimant and under fence existing at the time of acquisition. Such a fence constitutes a casual fence and not a fence that designedly enclosed the area in question and, thus, again, was not sufficient to establish as a matter of law the requisite adverse possession.²⁸⁵

275. *Id.* at 223.

276. *Id.* (citing *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974)).

277. *Sentell*, 801 S.W.2d at 223-24.

278. 802 S.W.2d 643 (Tex. 1990).

279. *Id.* at 644.

280. *Id.*

281. TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986 & Supp. 1992).

282. 802 S.W.2d at 645, (citing *Satterwhite v. Rosser*, 61 Tex. 166 (1884)).

283. *Id.*

284. *Id.* at 646.

285. *Id.* (on rehearing, the court of civil appeals held that the trial court's judgment was

*McLaren v. Beard*²⁸⁶ also involved the supreme court in a case of adverse possession, this time dealing with the requirements for affirmative repudiation of title by a co-tenant and the necessity for a jury instruction on the issue. The dispute arose out of a partition deed executed by two family members. Walter's branch of the family claimed title to a part of the partitioned land through adverse possession and prevailed at trial.²⁸⁷ The other branch of the family, Claude's branch, appealed, arguing that the trial court's failure to give instructions on repudiation of title required reversal. A majority of the supreme court found that the doctrine requiring an occupying co-tenant to expressly notify its co-tenants not in occupancy that its possession was notorious and adverse was limited to cases where a co-tenant grantor remained in possession of land after execution of a deed conveying the land to another co-tenant.²⁸⁸ Since in this case it was agreed that Walter's branch had not occupied the disputed tract prior to execution of the partition deed, specific notice of repudiation was not required and, thus, the court's failure to give the requested instruction was not reversible error.²⁸⁹ The court also went on to hold that where the doctrine of repudiation does apply, the jury need not be separately instructed as to the doctrine, as the requirement is subsumed in the general requirement that possession must be commenced and continued under a hostile claim inconsistent with that of another, which is covered in the statutory definition of adverse possession.²⁹⁰ Justice Hightower dissented, chiding the court for ignoring the special circumstances applicable to co-tenancies, and would have held that following a partition, a prior co-tenant's dominion would be adjudged permissive, similar to that of a grantor who remains in possession after a conveyance, and that express notice of repudiation of title should be required before the limitations periods for adverse possession would begin to run.²⁹¹

This issue of notice of repudiation of title required of a co-tenant was also the subject of *Spiller v. Woodward*.²⁹² In the case, a co-tenant had exclusively occupied the co-owned property since 1917, had paid all taxes, and had constructed improvements. The other co-tenant instituted a partition suit and lost at trial, the court determining that the occupying co-tenant had established title to the property by adverse possession.²⁹³ On appeal, the court of civil appeals reversed.²⁹⁴ First, the court held that since in 1940 and 1953 the non-occupying co-tenant had joined with the occupying co-tenant in executing easements, this indicated that the non-occupying co-tenant still

not against the great weight and preponderance of evidence. *Cahill v. Lyda*, 814 S.W.2d 390 (Tex. App.—Austin, 1991, no writ).

286. 811 S.W.2d 564 (Tex. 1991).

287. *Id.* at 565.

288. *Id.* at 568 (citing *Sweeten v. Park*, 276 S.W.2d 794, 797 (1955) and *Kidd v. Young* 190 S.W.2d 65, 66 (1945)).

289. *Id.* at 569.

290. *Id.*

291. *Id.* at 569-70.

292. 809 S.W.2d 624 (Tex. App.—Houston [1st Dist.] 1991, no writ).

293. *Id.* at 626.

294. *Id.*

asserted dominion over the property and destroyed the continuous ownership claim of the occupying co-tenant.²⁹⁵ The court then found that the purported conveyance of one acre of the property by the occupying co-tenant was not sufficient to give constructive notice of a claim of adverse possession since the non-occupying co-tenant, being vested in title, was under no duty to constantly examine the public records to guard against instruments affecting its title.²⁹⁶ As to inferred notice, the court of appeals agreed that where a possessory co-tenant's occupancy is "long, continuous, notorious, exclusive, and inconsistent with the title of others," that will be sufficient to infer notice of adverse possession.²⁹⁷ In this case, however, the assertion of ownership by the execution of the easements interrupted the occupier's continuity, and the court held that possession since the execution of the last easement in 1953 was not long enough as to raise the inference of notice necessary as between co-tenants.²⁹⁸ This decision is probably not inconsistent with *McLaren v. Beard*, discussed above, as apparently the occupying co-tenant was in occupancy of the property at the time the co-tenancy was established. However, it does seem that this court was far less tolerant of the adverse claim of the co-tenant than the supreme court was in *McLaren*.

295. *Id.*

296. *Id.* at 627.

297. *Id.* at 628.

298. *Id.* at 629.

