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REAL PROPERTY: LANDLORD AND TENANT, MORTGAGES, AND LIENS

by

John O. Cunningham*
and James I. Harlan**

I. LANDLORD AND TENANT

COURTS decided nearly thirty cases affecting Texas law in the landlord-tenant area, and significant legislative developments took place during the survey period. None of the reported landlord-tenant cases reached the Texas Supreme Court in 1985, although the court did hold a property owner liable for failing to lock vacant apartments securely to prevent their use for crimes.¹

A. Interpretation and Construction of Leases

Attorneys drafting or negotiating lease provisions should be aware of several decisions in this area. In *Estes v. Wilson*² a commercial tenant sued his landlord for specific performance of an option to purchase after the landlord began taking steps to evict the tenant. Under the lease agreement, the landlord granted the option, and the tenant agreed to pay all taxes and to continue the current insurance until he exercised the purchase option. The trial court found a forfeiture of the tenant's interest by his failure to pay taxes or maintain insurance as required by the lease.³ The tenant argued on appeal that the tax and insurance requirements were covenants instead of conditions. The tenant urged that the proper remedy for the breach of a covenant was a suit in damages rather than forfeiture.⁴ The appellate court ruled that

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1. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985). Two Justices of the Supreme Court of Texas joined in a dissenting opinion by Justice McGee. 690 S.W.2d at 555.

2. 682 S.W.2d 711 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

3. *Id.* at 713. The trial court also found that the tenant forfeited his interest by subletting without the landlord's permission. *Id.*; see *infra* text accompanying notes 39-41.

4. Another case reported during the survey period provides support for this argument. In *Buffalo Pipeline Co. v. Bell*, 694 S.W.2d 592 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), the court construed an option to extend a lease as an automatic renewal that the lessee failed to terminate. *Id.* at 597. The court acknowledged the lessee's breach of a covenant to pay rent during the original term, but stated that the lessor's remedy was damages. *Id.* at 598. If the proper treatment of a lease clause appears doubtful, the court should construe the clause as a covenant and not as a condition because the law opposes forfeitures. *Id.* The court also

the insurance clause created a condition precedent to the exercise of the option rather than a covenant because damages could not adequately remedy a breach of this requirement.⁵ The meaningfulness or availability of a remedy in damages may determine whether a court will treat a clause as a covenant or condition.

A different appellate court reached a conflicting result in *Buffalo Pipeline Co. v. Bell*.⁶ The tenant, after failing to pay rent to the correct party, sought to exercise an option to renew. The lease contract did not specify that failure to pay rent caused a forfeiture of the lessee's interest. The appellate court noted the common law rule that the lease contract must specifically provide for forfeiture in the event of non-payment; otherwise, the landlord may sue only for damages.⁷ The court emphasized that the law does not favor forfeitures and favors covenants over conditions in doubtful cases.⁸ Presumably, since the renewal option was part of the lease, the rule that courts will construe a lease against the lessor applied to the option.

In *Chapman v. Orange Rice Milling Co.*⁹ the Fifth Circuit applied a number of principles of lease interpretation. A lessor sued a former tenant for breach of contract, alleging that the tenant had failed to clear the amount of acreage that the lease required. The tenant had agreed to clear and keep clear at least 7,000 acres during the ten year term of the lease. The lease further required that the tenant clear at least 700 acres each year and not less than 4,000 acres on or before the end of the third year. The district court held the lessor's claim barred by the statute of limitations¹⁰ because, under the court's interpretation, the lease ostensibly required the clearing of 7,000 acres more than five years before the lessor had filed suit,¹¹ and the lessor's failure to discover the breach caused the limitation period to run. Writing for the appellate court, Judge Higginbotham reversed, reasoning that the contract could not possibly mean what it appeared to say.¹² If the tenant cleared 4,000 acres during the first three years and then cleared 700 acres in each of the seven remaining years, the tenant would have cleared 8,900 acres, more acres than the entire leasehold comprised.¹³ The court concluded that it had to harmonize the three requirements: 700 acres per year; 4,000 acres by the end of the third year; and 7,000 acres during the ten year

stated that, generally, courts should construe a lease most strongly against the lessor. *Id.* See *infra* text accompanying note 8. Thus, an optionee might be well advised to incorporate his option into a lease agreement if possible.

5. 682 S.W.2d at 716.

6. 694 S.W.2d 592 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

7. *Id.* at 598.

8. *Id.* The *Estes* court did not emphasize this rule.

9. 747 F.2d 981 (5th Cir. 1984).

10. *Id.* at 983. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon 1958) has been repealed, effective September 1, 1985, and replaced by TEX. CIV. PRACT. & REM. CODE ANN. § 16.004 (Vernon Pam. 1986). Both provide a four year limitation period on certain contract actions.

11. The district court added 700 acres per year to the 4,000 acre minimum for the first three years and concluded that the lease required clearing of the entire 7,000 acres by the end of the eighth year of the ten year lease. 747 F.2d at 983.

12. *Id.* at 984.

13. 4,000 acres by the end of the third year plus (seven times 700) 4,900 acres equals 8,900 acres.

lease term.¹⁴ The court apparently decided that the 700 acre requirement was only an average annual requirement below which the tenant could not fall at any point in the lease.¹⁵ The court therefore held that the tenant did not have to reach the 7,000 acre total until the end of the ten year term and that the statute of limitations had not run before the lessor filed his claim.¹⁶

The *Chapman* court could have decided that the lease requirement to clear 700 acres each year meant just what it said if the court had recognized that the lease called for the tenant to clear and keep cleared 7,000 acres. This would have created only a duty to keep clear in the last two years of the lease. The court relied on the following well-established principles of lease law: (a) the intentions of the parties control interpretation;¹⁷ (b) the court must glean the parties' intentions from the complete document by harmonizing and effectuating all terms of the agreement so that each one has significance;¹⁸ and (c) the court must reconcile ambiguous provisions if possible,¹⁹ unless they prove unavoidably repugnant.²⁰ The court also reasoned that because the tenant failed to raise or prove the affirmative defense of limitations in the trial court, nothing in the record indicated that the parties intended that the lessee complete the clearing before the lease expired.²¹ Thus, failure to prove intent in the trial court may permit an appellate court to make its own construction of a lease for the parties.

In *Aldridge v. Young*²² a lessor, presumably to raise rents, sought declaratory judgment that certain leases were invalid and unenforceable. The tenants occupied the property under a lease addendum that granted them the right to extend the lease for an additional fifteen years. The lease addendum failed to specify the amount of rent for the additional term. The lessor therefore claimed that the contract failed for indefiniteness or uncertainty. The court stated that a general covenant to renew that does not specify renewal terms implies a renewal on the existing terms.²³ On this basis, the court held that the renewal implied the same rent as provided in the original lease and enforced the lease addendum.²⁴ The court distinguished other cases invalidating leases uncertain as to price by reasoning that none of the other cases involved renewals or options silent as to rent, but rather involved renewals or options with ambiguous or contradictory terms that could not be reformed.²⁵

14. 747 F.2d at 983.

15. Under the court's interpretation, at the end of each year the lease required that the tenant have a total cleared acreage of 700 times the number of years elapsed. *Id.* at 984.

16. *Id.*

17. *Id.* at 983.

18. *Id.* (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)).

19. 747 F.2d at 983 (citing *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983)).

20. 747 F.2d at 983 (citing *Western Oil Fields, Inc. v. Pennzoil United, Inc.*, 421 F.2d 387, 389 (5th Cir. 1970)).

21. 747 F.2d at 984-85.

22. 689 S.W.2d 342 (Tex. App.—Fort Worth 1985, no writ).

23. *Id.* at 347.

24. *Id.*

25. *Id.*

*Wadler v. American Motors Sales Corp.*²⁶ again required the Fifth Circuit to harmonize the provisions of a lease. Judge Williams wrote a well-reasoned opinion for a court that had examined much evidence in reaching an interpretation based on the parties' actions. A lessor sued former lessees for breach of covenants to repair, alleging that the tenants owed damages for failure to make repairs to the heating, ventilation and air conditioning systems. One lease covenant required the lessees to keep the premises in good order and condition by making all necessary repairs, structural and non-structural, at their own expense; another required only that the lessees return the property at the end of the lease term in the same condition as when the lease began except for reasonable use and ordinary wear. As in *Chapman*, the court stated that it must give effect to the intentions of the parties by harmonizing all provisions of the contract.²⁷ After noting that the lease involved the entirety of a new building, did not provide for escalating rents, required only lump sum payments, and permitted the lessor to inspect the property during the term and charge necessary repairs to the tenants, the court inferred that the tenants undertook to act as reasonable owners would for the term of the lease.²⁸ The court held that the lease obligated the lessees to repair or replace any part of the building not in good order and condition even if reasonable use and wear brought about the deterioration.²⁹ The court further held that the lessees need not repair deterioration due to reasonable use and wear if the property remained in good order and condition.³⁰ The opinion openly acknowledged that it might be contrary to Texas cases³¹ disfavoring broad interpretations of repair covenants.³²

Two other interpretation and constitution cases deserve mention. In *Brooks v. Blue Ridge Insurance Co.*³³ the court construed the word "tenant" for purposes of insurance coverage when the policy did not define the term. The court defined a tenant as one "authorized by a lease to occupy a dwelling to the exclusion of others . . ." ³⁴ A right of entry and permissive right to occupy a place but not exclude others would be inadequate.³⁵ In *Mayfield v. Benavides*³⁶ the appellate court simply applied the principles that the intentions of the parties as expressed in the lease govern and that the court

26. 764 F.2d 409 (5th Cir. 1985).

27. *Id.* at 414.

28. *Id.* at 415.

29. *Id.* at 416.

30. *Id.*

31. See *Orgain v. Butler*, 478 S.W.2d 610, 615 (Tex. Civ. App.—Austin 1972, no writ) (covenant to return premises in good condition did not make lessee an insurer); *B&B Vending Co. v. Carpenter*, 472 S.W.2d 281, 283 (Tex. Civ. App.—Waco 1971, no writ) (courts do not favor making a lessee an insurer by means of covenants to repair premises and return them in good condition).

32. 764 F.2d at 416.

33. 677 S.W.2d 646 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

34. *Id.* at 652 (quoting TEX. PROP. CODE ANN. § 92.001(6) (Vernon 1984) and citing *Mallam v. Trans-Texas Airways*, 227 S.W.2d 344, 346 (Tex. Civ. App.—El Paso 1949, no writ)).

35. 677 S.W.2d at 652.

36. 693 S.W.2d 500 (Tex. App.—San Antonio 1985, no writ).

must harmonize all provisions to reach a reasonable construction.³⁷ The parties' gas lease provided a renewal right for up to 640 acres so long as there was a producing well. The court applied the stated principles to decide that the tenant could renew only the acreage around the producing well and that the tenant could not pick and choose piecemeal acreage.³⁸

B. Subleases

Texas courts decided two cases pertinent to subleases that deserve mention. In *Estes v. Wilson*³⁹ the court simply held that when a landlord accepts rent payments after knowledge of a sublease, a material issue of fact exists as to whether the lessor has waived his statutory⁴⁰ right to terminate for subletting without consent.⁴¹ In *Bookkeepers Tax Service, Inc. v. National Cash Register Co.*⁴² a federal district court observed that the plaintiff-subtenants could not claim the benefit of warranties made by the lessor to the tenants in the original lease.⁴³ The court stated that no privity of contract existed between the original lessor and a sublessee under Texas law.⁴⁴ The court also noted that the sublessees could not recover from the original lessor even if he breached lease covenants.⁴⁵

C. Effecting Termination or Surrender

Two cases reported during the survey period pertained to termination or surrender. In *Flores v. Rizik*⁴⁶ a commercial tenant vacated leased premises without turning the keys over to the landlord or notifying the landlord of his departure. The court held the tenant liable for damages allegedly caused by vandals after he vacated the premises, stating that the building remained in the tenant's legal possession until he gave notice of termination.⁴⁷ Responsibility for damages accompanied legal possession.⁴⁸

In *Southmark Management Corp. v. Vick*⁴⁹ a residential lease provided that the tenant would be liable for a reletting fee if he failed to give written notice thirty days before moving. In the final month of the lease term the landlord sent a demand for surrender because of late payments. The tenant then paid his rent through the last month and left. The appellate court held that the landlord's demand letter and other conduct showing no intent to

37. *Id.* at 503.

38. *Id.*

39. 682 S.W.2d 711 (Tex. App.—Ft. Worth, writ ref'd n.r.e.).

40. TEX. REV. CIV. STAT. ANN. art. 5237 (Vernon 1962) has been repealed, effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. § 91.005 (Vernon 1984) (providing that tenant cannot sublet without landlord's consent).

41. 682 S.W.2d at 715.

42. 598 F. Supp. 336 (E.D. Tex. 1984).

43. *Id.* at 338.

44. *Id.*

45. *Id.*

46. 683 S.W.2d 112 (Tex. App.—San Antonio 1984, no writ).

47. *Id.* at 116.

48. *Id.*

49. 692 S.W.2d 157 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

continue the lease, coupled with the tenant's acquiescence, amounted to a termination and acceptance of surrender.⁵⁰ The termination destroyed the landlord's right to the reletting fee under the lease.⁵¹ Thus, a landlord wishing to sue on a lease should take care to avoid terminating it by writing or conduct.

D. Remedies and Damages

The Supreme Court of Texas has held that, in the absence of definitive lease language to the contrary, courts should not construe a lease to make a tenant liable for unaccrued rent after termination, forfeiture, or re-entry of the leased premises.⁵² Several subsequent cases have followed or elaborated on this holding.⁵³ *Glasscock v. Console Drive Joint Venture*⁵⁴ has implicitly done the same.

In *Glasscock* the lease permitted the lessor to terminate the lease or reenter and relet and hold the lessee responsible for deficiencies from inability to relet.⁵⁵ The lessor sought to recover rentals accruing after he had terminated the lease by a forcible detainer action. The court, without citing any authority, stated that the lessor clearly considered the lease terminated and that therefore he could not recover future rentals.⁵⁶ The court reversed the trial judge⁵⁷ who apparently did not know of the strict rule precluding the recovery of damages after termination.

In *Flores v. Rizik*⁵⁸ the appellate court demonstrated that the perils facing a tenant who fails to terminate equal those that confront a landlord who inadvertently terminates. In *Flores* the court held a vacating tenant liable

50. *Id.* at 159-160.

51. *Id.*

52. *Rohrt v. Kelly Mfg. Co.*, 162 Tex. 534, 537, 349 S.W.2d 95, 97 (1961).

53. *See, e.g., Maida v. Main Bldg.*, 473 S.W.2d 648, 652-53 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (abandoning tenant sued on lease contract cannot claim credit for excess of future rent payable under new lease over rent due under original lease); *Meehan v. Pickett*, 463 S.W.2d 481, 484 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.) (landlord's reference in letter to tenant to lease provision permitting declaration of forfeiture did not legally declare forfeiture; landlord therefore was not limited to suit for rents due up to date of letter); *Johnson v. Golden Triangle Corp.*, 404 S.W.2d 44, 46 (Tex. Civ. App.—Waco 1966, no writ) (letter to tenant giving notice of declaration of forfeiture if tenant failed to pay delinquent rent did not equal a declaration of forfeiture precluding liability for future rent). The landlord may bring a suit on the lease contract or for breach of the contract, but the landlord cannot do both. 473 S.W.2d at 651. The landlord may give up remedies in the lease if it is terminated. *Id.*

54. 675 S.W.2d 590 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

55. The landlord may have a duty to relet to mitigate damages, but some authority suggests that a landlord does not have a duty to mitigate damages unless the lease imposes that duty. *Metroplex Glass Center, Inc. v. Vantage Properties, Inc.*, 646 S.W.2d 263, 265 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). Other authority, however, suggests that a landlord has a duty to mitigate damages by trying to procure a new tenant whenever the landlord has reentered the vacated premises. *Williams v. Kaiser Aluminum & Chem. Sales, Inc.*, 396 F. Supp. 288, 292-93 (N.D. Tex. 1975).

56. 675 S.W.2d at 593.

57. *Id.*

58. 683 S.W.2d 112 (Tex. App.—San Antonio 1984, no writ); *see supra* text accompanying notes 46-48 for a discussion of this case.

for damages caused by vandals after he failed to give notice and terminate.⁵⁹ The court stated that the measure of damages to the landlord's personality and equipment in the leasehold was the diminution in market value of the items,⁶⁰ while the damage to the leasehold may equal the cost of repair unless the cost of repair is great or difficult to ascertain.⁶¹

In *Standard Container Corp. v. Dragon Realty*⁶² the court held a holdover tenant liable for a different measure of damages. The tenant had informed the landlord of its desire to hold over, but the parties had not agreed on a rental rate. The tenant stayed on the premises for approximately three months without an agreement. The court held that the proper measure of the landlord's damages was the reasonable market value of the use of the land for the time the tenant held over.⁶³ The court did not discuss whether this holding would apply to a holdover tenant in a declining rental market.

In *Baugh v. Myers*⁶⁴ the court construed an assignee's liability for damages after the lessor prevailed in a suit for trespass to try title, presumably for wrongful assignment. The court, without citing any authority, found the lessor entitled to recover not only the fair market value of rent for the premises used by the assignee, but also for the assignee's profit from the portion of the property that the assignee leased to others.⁶⁵ No other cases during the survey period addressed tenant liability for damages in a commercial context.⁶⁶

In *Mayfield v. Benavides*⁶⁷ the San Antonio court of appeals considered trespasser liability for damages in a commercial context. An oil and gas producer asserted that production from an existing well should not be counted in production limits on certain acreage. Although the producer knew that the lessors disagreed with his assertion, he drilled an additional well on the acreage. The producer's drilling permit application named a

59. 683 S.W.2d at 115.

60. *Id.*

61. *Id.* The lessor failed to plead cost of repair as a measure of damages and therefore could not recover that measure. The court, however, permitted evidence of the cost of repair to go to the jury. *Id.* at 116.

62. 683 S.W.2d 45 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

63. *Id.* at 48. The lease in question provided, "holding over shall constitute and be construed as a tenancy from month to month only, at a rental equal to the rental payable for the last month of the term of this lease plus twenty per cent (20%) of such amount. The inclusion of the preceding sentence shall not be construed as Landlord's permission for Tenant to hold over." *Id.* at 47. The tenant argued that this language was tantamount to a liquidated damages clause for holdover, but the court disagreed. The court emphasized that the lease provided that the stated remedies supplemented those provided by law. *Id.* The court also found that the clause in question implied that the landlord could deny permission to holdover, as it had in this case. *Id.* at 46-47.

64. 694 S.W.2d 64 (Tex. App.—Corpus Christi 1985, no writ).

65. *Id.* at 66.

66. In *Chapman v. Orange Rice Milling Co.*, 747 F.2d 981 (5th Cir. 1984), the Fifth Circuit had an opportunity to instruct the district court on the calculation of damages for a tenant's failure to clear agricultural land under a lease obligating the tenant to do so, but instead merely stated that the district court must recompute damages on remand. The opinion written by Judge Higginbotham focused almost entirely on the question of limitation periods. *Id.* at 985.

67. 693 S.W.2d 500 (Tex. App.—San Antonio 1985, no writ).

nonexistent lease. The court found that the producer was a trespasser in bad faith even though no action was pending against him at the time of the drilling.⁶⁸ The court therefore held the producer liable to the lessor for the value of the production without any deduction for drilling or production costs.⁶⁹

In *Barnstone v. Robinson*⁷⁰ the court held that a commercial tenant could not obtain a temporary restraining order (TRO) against a landlord if the TRO changed the status quo.⁷¹ The court held that ordering payment of a lower rent, as requested by the tenant under an unusual lease provision, changed the status quo.⁷² The court noted that the tenant would have an adequate legal remedy in damages if his proposed change in the rent calculations under the lease were correct.⁷³

In *Conroy v. Manos*⁷⁴ the Dallas court of appeals considered a recurring problem for landlords and their counsel: what to do with the possessions of an evicted tenant who has not appeared to contest judgment or to claim his belongings before their removal from the premises. The court decided the *Conroy* case en banc. The case involved constitutional questions, drew two dissenting opinions,⁷⁵ and may have influenced recent legislation concerning writs of possession.⁷⁶

The *Conroy* lessor sued the tenant for default in rent payment, but the tenant persuaded the justice of the peace to order application of her pet deposit to satisfy the overdue rent.⁷⁷ In the next month the lessor again sued for failure to pay rent, and the tenant allowed the entry of a default judgment against her.⁷⁸ The lessor then obtained a writ of restitution, but the constables could not find the tenant to serve it. The constables permitted two of the lessor's employees to remove the tenant's property and place it on the public way; the apartment manager watched as vandals and thieves took it away. In the first suit the tenant received notice that her property could be removed, and presumably she knew of that potential consequence.

The tenant contended that the removal violated her constitutional rights by depriving her of her property without due process.⁷⁹ The majority opinion, written by Justice Guillot, held that the constable and the apartment manager's employees acted within the law because the tenant had full opportunity to appear and defend the suit and the notice of suit stated that the landlord sought possession of the apartment.⁸⁰ Furthermore, the writ ex-

68. *Id.* at 504-05.

69. *Id.* at 506.

70. 678 S.W.2d 562 (Tex. App.—Houston [14th Dist.] 1984, writ *dism'd*).

71. *Id.* at 563.

72. *Id.*

73. *Id.*

74. 679 S.W.2d 124 (Tex. App.—Dallas 194, writ *ref'd n.r.e.*).

75. *Id.* at 127 (Stephens, J., dissenting, joined by Vance and Allen, JJ.); *id.* at 130 (Whitham, J., dissenting, joined by Storey and Stewart, JJ.).

76. See TEX. PROP. CODE ANN. § 24.0061 (Vernon Supp. 1986); *infra* text accompanying notes 140-54.

77. 679 S.W.2d at 125.

78. *Id.*

79. *Id.* at 126. The tenant asserted a cause of action under 42 U.S.C. § 1983 (1982).

80. 679 S.W.2d at 126.

plicitly called for the constable to enter the building so that "peaceable possession thereof [be] restore[d] to the said plaintiff"⁸¹ The majority stated that the landlord had no duty to preserve or store the tenant's property.⁸² The court's statement may seem harsh, but landlords repeatedly face the question of what to do with the property of a defaulting tenant who may never return to the premises or repay the costs of storage.⁸³ Frequently, the costs of packing, hauling, and storage for even a short time would exceed the market value of the tenant's belongings.

Justice Stephens' dissent focused on the absence of notice to the tenant that her failure to appear and contest the second suit would result in the loss of her personal belongings.⁸⁴ Justice Whitham, dissenting, argued that Texas Rules of Civil Procedure 749⁸⁵ and 755⁸⁶ require execution of writs of restitution by the same procedures applicable to other writs of execution. These procedures require offering personal property for sale on the premises where it is taken or at the courthouse door after posting proper public notice for ten days.⁸⁷ Justice Whitham did not address any differences among writs of execution, possession, or restitution. Neither did he state where the landlord should store the property during the notice period or discuss the landlord's potential liabilities for improper sale or the sale of property exempt from execution. In light of the current state of the law, a landlord should probably avoid any involvement with the tenant's property except for removal, and possibly statutory sale.

E. Attorney's Fees

Two cases during the survey period discussed recoverability of attorney's fees. In *Byler v. Garcia*⁸⁸ the court pointed out that a residential tenant suing for return of a deposit need not rely solely on article 2226 of the Texas Revised Civil Statutes for recovery of attorney's fees.⁸⁹ A tenant could also rely on former articles 5236c, d, and e.⁹⁰ In *Bookkeepers Tax Services, Inc. v.*

81. *Id.* at 125.

82. *Id.* at 127.

83. It is the author's personal experience while representing both residential landlords and tenants that tenants often leave the premises and their belongings without giving notice of when they shall return. If they do return, they do not think that the landlord should have charged them for the cost of storing the belongings. For the landlord to sell the belongings is potentially perilous, since all or some may be exempt from execution, or the sale may not comply with the law. See TEX. PROP. CODE ANN. ch. 54 (Vernon 1984 & Supp. 1986).

84. 679 S.W.2d at 130.

85. TEX. R. CIV. P. 749.

86. *Id.* 755.

87. 679 S.W.2d at 131 (citing TEX. R. CIV. P. 649, 650).

88. 685 S.W.2d 116 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

89. *Id.* at 12-0. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon 1971) has been repealed, effective September 1, 1985, and recodified without substantive change at TEX. CIV. PRAC. & REM. CODE ANN. § 38.001-006 (Vernon Pam. 1986) (providing for recovery of attorney's fees in certain situations including contract claims).

90. 685 S.W.2d at 120. TEX. REV. CIV. STAT. ANN. art. 5236c, d, e have been repealed, effective January 1, 1984, and recodified without substantive change at TEX. PROP. CODE ANN. §§ 91.002, 54.041-045, 92.001, .102-109 (Vernon 1984 & Supp. 1986) (providing for recovery of attorney's fees in certain situations involving residential landlord's liens, security deposit refunds, interruption of utilities, and exclusion of tenants).

*National Cash Register Co.*⁹¹ a federal district court awarded attorney's fees against the plaintiffs-tenants and their counsel for making groundless arguments.⁹² The court stated that Federal Rule of Civil Procedure 11⁹³ makes an attorney's signature on a pleading his guarantee that, after reasonable investigation, he believes the suit has a sufficient factual basis and legal justification.⁹⁴

F. Guarantors and Sureties

In *Glasscock v. Console Drive Joint Venture*⁹⁵ the court construed the obligations of a guarantor or surety for a tenant under a lease contract. The landlord received cash for part of the rent the tenant owed him and a promissory note from the tenant for the remainder. When the tenant defaulted on the note, the lessor sued the tenant and the tenant's guarantor. The court observed that a contract by which the principal secures an extension of time to pay releases the surety's obligations if the surety is not a party to the extension.⁹⁶ The court, however, found no Texas precedent on the effect of an extension of time to pay part of an obligation.⁹⁷ The court decided that the extension discharged the guarantor's obligation to the extent of the rentals included in the note.⁹⁸ The court did not discuss whether payment of the other rentals by the tenant in partial settlement discharged the guarantor or affected the guarantor's remaining obligation.

G. Options to Purchase or Renew

In *Estes v. Wilson*⁹⁹ the court found that certain lease clauses requiring the payment of taxes and insurance were preconditions to the exercise of an option to purchase and not mere covenants for which a damage suit constituted a proper remedy.¹⁰⁰ The court noted that courts generally construe option contracts against the optionee because the contracts operate to benefit him.¹⁰¹ In *Tye v. Apperson*¹⁰² the Fort Worth court of appeals reached a different result. The Fort Worth court of appeals ordered specific performance of an option to purchase that was expressly "conditioned upon the true and full performance of . . . Lessee's obligations," even though the trial court found that the lessee had violated the lease in several respects.¹⁰³ The option agreement provided that, in the event of the lessee's default, the agreement

91. 598 F. Supp. 336 (E.D. Tex. 1984).

92. *Id.* at 340.

93. FED. R. CIV. P. 11.

94. 598 F. Supp. at 340.

95. 675 S.W.2d 590 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

96. *Id.* at 591-92.

97. *Id.* at 592.

98. *Id.*

99. 682 S.W.2d 711 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

100. *Id.* at 715.

101. *Id.*

102. 689 S.W.2d 320 (Tex. App.—Fort Worth 1985, writ granted).

103. *Id.* at 321-22.

would terminate at the optionor's election.¹⁰⁴ The court found that this provision implied a right to notice of the optionor's election to terminate as a result of the lessee's violations of the lease.¹⁰⁵ A key difference between the *Estes* and *Tye* cases may be that in *Estes* the option strictly construed against the optionee was a separate agreement, while in *Tye* the option construed against the landlord was part of the lease contract. Optionees should be advised to make their options part of the lease.

H. Leases Involving a County

In *Jack v. State*¹⁰⁶ the court found a lease of county land to a developer void. Texas Revised Civil Statutes article 1577¹⁰⁷ prescribes the manner in which a county must make conveyances.¹⁰⁸ Since the lease did not comply with article 1577, the assignee acquired no rights under the lease and none of the parties could bring suit on the lease.¹⁰⁹

I. Waiver

Estes v. Wilson,¹¹⁰ discussed above,¹¹¹ also dealt with the subject of waiver.¹¹² The *Estes* lessee argued that the lessor waived her statutory right¹¹³ to approve a sublease by accepting payments from the subtenant. The court disagreed, stating that waiver required an intent to waive a right.¹¹⁴ The lessor complained continually about the subletting, evidencing no intent to accept the sublease.¹¹⁵ The court found no "clear, unequivocal and decisive" act that might have proved a waiver.¹¹⁶

J. Litigating the Landlord-Tenant Case

In *Pharis v. Culver*¹¹⁷ a lessor complained about the refusal of a county court to dismiss an allegedly improper appeal. Instead of the correct forcible entry and detainer appeal bond, the tenant had sent a criminal misdemeanor appeal bond to the judge. The judge approved the appeal bond one day after the judgment, and the bond was not filed until after the period for appeal had expired. Nevertheless, the appellate court held that the judge had timely accepted the bond for filing and that the tenant could amend the bond

104. *Id.* at 322.

105. *Id.* at 323.

106. 694 S.W.2d 391 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

107. TEX. REV. CIV. STAT. ANN. art. 1577 (Vernon Supp. 1986).

108. 694 S.W.2d at 397.

109. *Id.*

110. 682 S.W.2d 711 (Tex. App.—Fort Worth 1985, writ granted).

111. *See supra* text accompanying notes 99-101.

112. 682 S.W.2d at 713-15.

113. TEX. REV. CIV. STAT. ANN. art. 5237 (Vernon 1962) has been repealed, effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. § 91.005 (Vernon 1984) (providing that tenant cannot sublet without landlord's consent).

114. 682 S.W.2d at 714.

115. *Id.*

116. *Id.*

117. 677 S.W.2d 168 (Tex. App.—Houston [1st Dist.] 1984, no writ).

under rule 430,¹¹⁸ because the Supreme Court of Texas has held that a court's power to amend the appeal bond is extremely broad.¹¹⁹

In *Lawyers Civil Process, Inc. v. State*¹²⁰ the Dallas court of appeals held that private process servers could not execute such popular landlord remedies as writs of attachment, writs of sequestration, or distress warrants, but, under rule 21a of the Texas Rules of Civil Procedure,¹²¹ could serve notices of the writs as provided by rules 598a, 613, and 700a¹²² of the Texas Rules of Civil Procedure.¹²³

Several reported cases indicate that a lawyer who lacks sufficient experience, fees or resources to fully prosecute a landlord-tenant appeal should refrain from attempting to do so. In these cases findings of fact or conclusions of law were improperly filed or not filed at all, and the appellate court had to affirm the judge rendered by the trial court if the judgment could be sustained on any reasonable legal theory that found support in the evidence.¹²⁴

K. Statutory Rights of Residential Tenants

The cases reported during the Survey period did not significantly modify or reinterpret the statutory rights of residential tenants, but the cases merit brief mention because they illustrate a tenant's statutory arsenal against a landlord. In *Alltex Construction, Inc. v. Alareksoussi*¹²⁵ the court found the landlord liable for attorney's fees and treble damages under section 92.109(d) of the Texas Property Code¹²⁶ because the landlord retained the tenant's security deposit in bad faith.¹²⁷ The Dallas court of appeals noted

118. TEX. R. CIV. P. 430 has been repealed, effective April 1, 1984, and replaced by *id.* 363a, which provides that "[o]n motion to dismiss an appeal . . . for a defect of substance or form in any bond . . . given as security for costs, the appellate court may allow the filing of a new bond . . . in the trial court on such terms as the appellate court may prescribe."

119. 677 S.W.2d at 170. The Texas Supreme Court has held that rule 430 should be liberally construed to carry out its purpose. "If the appellant files any sort of instrument that is intended to be a bond and to invoke the appellate jurisdiction, the instrument may, on timely request, be awarded to cure any defect of either form or substance." *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 570 (Tex. 1975).

120. 690 S.W.2d 939 (Tex. App.—Dallas 1985, no writ).

121. TEX. R. CIV. P. 21a.

122. *Id.* 598a, 613, 700a.

123. 690 S.W.2d at 943-44.

124. *See, e.g.*, *Baugh v. Myers*, 694 S.W.2d 64, 65 (Tex. App.—Corpus Christi 1985, no writ) (appellant requested findings but failed to complain within five days after end of judge's time to file findings); *W.H. McCrory & Co. v. Contractors Equip. & Supply Co.*, 691 S.W.2d 717, 720 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (party failed to request submission of special issues regarding application of statute of frauds); *Tye v. Apperson*, 689 S.W.2d 320, 322 (Tex. App.—Fort Worth 1985, writ granted) (because trial court did not file findings of fact or conclusions of law, appellate court must affirm if judgment can be affirmed under any legal theory supported by the record); *Estes v. Wilson*, 682 S.W.2d 711, 716 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (appealing party failed to submit special issues or request filing of a statement of findings of fact or conclusions of law); *see also Walker v. Horine*, 695 S.W.2d 572, 579 (Tex. App.—Corpus Christi 1985, no writ) (litigant failed to protect appeal by filing transcript).

125. 685 S.W.2d 93 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

126. TEX. PROP. CODE ANN. § 92.109(d) (Vernon 1984).

127. 685 S.W.2d at 95-96.

that no statutory presumption of bad faith arose because the lessor timely provided itemized reasons for retaining the deposit, as required by the statute.¹²⁸ The court nevertheless based a finding of bad faith on evidence that the landlord knew that the tenant was not entirely responsible for the itemized damage, on the vagueness of the itemized list, and on the arbitrariness of amounts charged for damages.¹²⁹

In *Southmark Management Corp. v. Vick*¹³⁰ the court pointed out that a landlord cannot keep any portion of a security deposit to cover normal wear and soil.¹³¹ A tenant can leave a normal amount of wear and soil and still recover his deposit.¹³² The court did not explain what constitutes a normal amount.

In *Ackerman v. Little*¹³³ the court held that, under section 6(a) of article 5236e of the Texas Revised Civil Statutes, a landlord has no more than 30 days after receiving a tenant's forwarding address to either refund the deposit or furnish an itemized list of reasons for keeping the deposit.¹³⁴ In *Ackerman* the landlord failed to rebut the statutory presumption establishing that he acted in bad faith in failing to return the tenant's deposit within thirty days. The appellate court, however, apparently considered ignorance of the law to be pertinent proof of the landlord's good faith.¹³⁵ In *Minor v. Adams*¹³⁶ the court found the landlord not liable for damages for bad faith because the landlord reasonably thought that the lease complied with section 92.103 of the Texas Property Code.¹³⁷ Section 92.103(b) permits a landlord to require that a tenant give advance written notice of surrender in order to obtain a refund of his deposit; however, only notice requirements "underlined or printed in conspicuous bold print in the lease" are enforceable.¹³⁸ The court held, however, that the *Minor* landlord could not keep the tenant's deposit because the lease did not require advance written notice of surrender in both conspicuous and bold print.¹³⁹

128. *Id.* at 94. TEX. PROP. CODE ANN. §§ 92.103(a), 92.104(c) (Vernon 1984) require that the landlord furnish a written statement within 30 days after the tenant vacates the property.

129. *Id.* at 96.

130. 692 S.W.2d 157 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

131. *Id.* at 160.

132. *Id.*

133. 679 S.W.2d 70 (Tex. App.—Dallas 1984, no writ).

134. *Id.* at 75. TEX. REV. CIV. STAT. ANN. art. 5236e, § 6(a) (Vernon Supp. 1986), has been repealed, effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. §§ 92.103, .107 (Vernon 1984), which has been interpreted to the same effect. See *Minor v. Adams*, 694 S.W.2d 148, 151 (Tex. App.—Houston [14th Dist.] 1985, no writ) (landlord must refund deposit within 30 days of receiving forwarding address).

135. 679 S.W.2d at 74 (noting that, in finding bad faith, trial court could disbelieve testimony of lessor who was a real estate agent that he was ignorant of the law). The maxim that ignorance of the law should be no excuse has been so often repeated that it does not merit citation.

136. 694 S.W.2d 148 (Tex. App.—Houston [14th Dist.] 1985, no writ).

137. *Id.* at 152; see TEX. PROP. CODE ANN. § 92.103(b) (Vernon 1984).

138. TEX. PROP. CODE ANN. § 92.103(b) (Vernon 1984).

139. 694 S.W.2d at 150.

L. Legislation During the 1985 Session

1. *Remedies; Writ of Possession.* The most significant statutory change during this session codifies the Dallas court of appeals decision in *Conroy v. Manos*.¹⁴⁰ Section 24.0061 was added to chapter 24 of the Texas Property Code to provide for issuance of writs of possession.¹⁴¹ Section 24.0061(c) provides that the writ of possession shall order the officer executing the writ to return possession to the lessor.¹⁴² The executing officer may physically remove the tenant and may supervise removal of the tenant's personal property from the leased premises.¹⁴³ If it is not raining, sleeting, or snowing, the officer may place the removed property outside nearby but not on a sidewalk, passageway, street, or parking area.¹⁴⁴ The writ of possession also permits an officer to hire a bonded warehouseman to store the removed property, but does not require him to do so,¹⁴⁵ and authorizes the use of reasonable force in executing the writ.¹⁴⁶ In addition, the new section permits a successful tenant in a forcible entry and detainer action to recover costs, and, when appropriate, attorney's fees.¹⁴⁷

2. *Remedies, Seizure of Property.* The legislature also amended chapter 54 of the Texas Property Code to restrict landlords' rights to seize and sell a tenant's personal property.¹⁴⁸ The new provisions prohibit sale or other disposition of property seized to satisfy landlord's liens unless authorized in a written lease.¹⁴⁹ The landlord must also give written notice by certified mail thirty days before a proposed sale.¹⁵⁰ After seizure the landlord must leave in a conspicuous place in the premises notice of entry, an itemized list of the property removed, and a statement of the rent owed and that the property will be returned on payment of the rent.¹⁵¹ The landlord cannot charge the tenant for removing or storing property seized unless the written lease permits the charge.¹⁵² A landlord's lien cannot attach to children's toys,¹⁵³ no matter how costly, as the legislature believed that landlords exercising lien remedies attached children's toys too often.¹⁵⁴

140. 679 S.W.2d 124 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). See *supra* text accompanying notes 74-87.

141. TEX. PROP. CODE ANN. § 24.0061 (Vernon Supp. 1986). Section 24.0061 is effective for execution of judgments entered on or after September 1, 1985.

142. *Id.*

143. *Id.* § 24.0061(c).

144. *Id.* § 24.0061(c)(3).

145. *Id.* § 24.0061(d)(2).

146. *Id.* § 24.0061(f).

147. *Id.* § 24.0061(a).

148. *Id.* § 54.044 (Vernon Supp. 1986). The amended section is effective August 26, 1985.

149. *Id.* § 54.045(a). The written lease must also authorize seizure of the tenant's property. *Id.* § 54.044(a).

150. *Id.* § 54.045(b). The content of the notice is also prescribed. *Id.* § 54.045(b)(1)-(3).

151. *Id.* § 54.044(b).

152. *Id.* § 54.044(c).

153. *Id.* § 54.042(13). Other property previously exempted from attachment by landlords' liens includes clothing, family pictures, beds, and food. See *id.* § 54.042(1)-(12), (14), (15).

154. See Senate Bill Analysis for S.B. 1211 (1985).

3. *Utilities Services and Submetering.* The legislature made important changes in laws regulating landlords' providing and submetering of utilities. Amended article 1446d of the Texas Revised Civil Statutes limited the application of utility submetering requirements to apartment houses, rooms in apartment houses, or mobile homes in mobile home parks; thus precluding submetering by lessors taking only occasional or transient borders.¹⁵⁵ The amended article also permits utility submetering for water consumption under rules to be promulgated by the Public Utility Commission of Texas.¹⁵⁶ Amended article 6053 extended gas metering requirements to apartment houses and apartment units, as defined in the Act, making the rules applicable to virtually all landlords.¹⁵⁷ Article 6053, as amended, requires that the Commission promulgate rules for fairly allocating gas consumption among units and for prohibiting sale or resale of gas for a profit.¹⁵⁸ The landlord must keep records of submetering and make the records available for inspection by residents.¹⁵⁹

New article 1446f applies to allocation of all utility services and imposes five requirements: (1) that the lease describe the method of allocating central system utility costs to each tenant; (2) that the lease contain a statement of the average monthly utility costs for each unit; (3) that the landlord not resell for a profit; (4) that the landlord keep adequate records of unit consumption; (5) that the landlord make all records available for inspection by tenants.¹⁶⁰ The tenant may recover treble damages for any overcharges plus one month's rent, attorney's fees and court costs if the landlord violates any Commission rule regarding submetering or allocating central system utility costs.¹⁶¹ The landlord, however, shall not be liable if he proves his violation was a "good faith, unintentional mistake."¹⁶²

4. *Miscellaneous Legislation.* The legislature amended section 24.005(a) of the Texas Property Code to require that all landlords operating under any lease agreement give tenants written notice to vacate three days before filing a forcible entry and detainer (FED) suit.¹⁶³ The landlord and tenant may agree otherwise, but only in a written lease.¹⁶⁴ The notice to vacate now also serves as a demand for possession for purposes of acquiring relief in an FED action under section 24.002 of the Property Code.¹⁶⁵

To recover attorney's fees, a landlord must still give at least ten days' written notice to vacate before filing an FED suit, but, under the amended

155. TEX. REV. CIV. STAT. ANN. art. 1446(d), § 1(1), (2) (Vernon Supp. 1986).

156. *Id.* § 3.

157. *Id.* art. 6053, § 1a(a)(1), (2).

158. *Id.* § 1a(b).

159. *Id.* § 1a(b)(2).

160. *Id.* art. 1466f, § 2.

161. *Id.* art. 1446g.

162. *Id.*

163. TEX. PROP. CODE ANN. § 24.005(a) (Vernon Supp. 1986). The amended section is effective September 1, 1985. Before amendment the section applied only to leases for periods longer than week to week. *Id.* § 24.005(a) (Vernon 1984).

164. *Id.* § 24.005(a) (Vernon Supp. 1986).

165. *Id.* §§ 24.002, .005(d).

section 24.006, when the landlord's right to recover attorney's fees is specified in the notice or in the written lease, then the prevailing party, either landlord or tenant, may recover attorney fees.¹⁶⁶ Section 24.009 permits agents who are not lawyers to represent parties to FED suits in justice courts.¹⁶⁷

Appeal from the final judgment of a county court on the issue of possession in an FED action is permitted only for residential premises.¹⁶⁸ Amended section 24.007 also requires the filing of a supersedeas bond within ten days of judgment to effect a stay of the county court judgment.¹⁶⁹ Amended section 54.021 permits a lessor leasing only part of a building for non-residential use to have a commercial landlord's preference lien.¹⁷⁰

II. MORTGAGES

In 1963 the Texas Legislative Council began a recodification program resulting in part in the Texas Property Code, which became effective January 1, 1984. The recodification was intended to make the law of real property more accessible and understandable without making substantive changes.¹⁷¹ In most survey period cases the courts review and analyze the prior statutory laws of the state, make reference to the Texas Property Code, and assume no legislative intent to change the substance of the law.¹⁷²

A. Notice

In *Medley v. Medley*¹⁷³ the Corpus Christi court of appeals considered the effect of a prior recorded deed on the right of a subsequent grantee. The plaintiff sought partition and removal of a cloud on title. Two of seven children who had inherited interests in a tract of land executed deeds to the plaintiff in the spring of 1980. In the spring of 1981 the same two children executed deeds to the defendant. The defendant recorded these deeds on June 16, 1981, four months before the first grantee recorded his deeds on October 21, 1981. Priority between the first and second grantee was governed by Texas Revised Civil Statutes article 6627,¹⁷⁴ recodified at section 13.001 of the Texas Property Code.¹⁷⁵

The court noted that the Recordation Law of 1836 did not require that the

166. *Id.* § 24.006(d). Before amendment the section permitted recovery of fees only by the landlord and only if the tenant had held over after notice to vacate and commencement of suit. *Id.* § 24.006 (Vernon 1984).

167. TEX. PROP. CODE ANN. § 24.009 (Vernon Supp. 1986).

168. *Id.* § 24.007.

169. *Id.*

170. *Id.* § 54.021.

171. TEX. PROP. CODE ANN. § 1.001 (Vernon 1984).

172. See *Medley v. Medley*, 683 S.W.2d 877, 878 n.2 (Tex. App.—Corpus Christi 1984, no writ) (no legislative intent to change substantive law).

173. 683 S.W.2d 877 (Tex. App.—Corpus Christi 1984, no writ).

174. TEX. REV. CIV. STAT. ANN. art. 6627 (Vernon 1969 & Supp. 1986) has been repealed, effective January 1, 1984, and recodified at TEX. PROP. CODE ANN. § 13.001 (Vernon 1984).

175. TEX. PROP. CODE ANN. § 13.001 (Vernon 1984).

second grantee pay value and be without notice.¹⁷⁶ In 1840 the legislature limited the benefits of the recording statute to second grantees without notice who had paid consideration.¹⁷⁷ In a suit by a prior grantee seeking to deny the benefit of the recording statute to a subsequent grantee holding a prior recorded deed, the subsequent grantee has historically borne the burden of proving he acquired his title for valuable consideration and without notice of the prior unrecorded instrument, the court stated.¹⁷⁸ The court noted that because of this historical placement of the burden of proof, the court would treat the invocation of article 6627 as an affirmative defense.¹⁷⁹ The defendant was required to produce evidence that raised an issue of fact regarding each element of the affirmative defense.¹⁸⁰ Real estate litigators should therefore plead the current recording statute, section 13.001 of the Property Code,¹⁸¹ as an affirmative defense in their responsive pleadings in order to avoid a waiver of the defense.

In *Cooksey v. Sinder*¹⁸² the Texas Supreme Court stated that a purchaser is charged with notice of the contents of deeds that were necessary components of his chain of title.¹⁸³ The court therefore held that the failure of a prior owner to file a separate lien instrument did not inure to the benefit of a subsequent purchaser.¹⁸⁴ In *Cooksey* the prior owner, Cooksey, sought to foreclose on a vendor's lien. The purchasers had executed a promissory note and Cooksey had executed a warranty deed with vendor's lien providing that Cooksey retained superior title until the purchasers paid the note in full. This deed was properly filed in the county deed records before the purchasers resold the property. The purchasers subsequently sold that property by an assumption deed to relatives who sold part of the property to an unrelated person. The original purchasers defaulted on their note to Cooksey, and Cooksey sued. The district court granted judgment on the note but denied foreclosure of the lien. The Texas Supreme Court held that the vendor could foreclose as a matter of law if she refuted one of the essential elements of the innocent purchaser defense.¹⁸⁵ The vendor had to prove that the owners did not purchase in good faith and did not purchase for value.¹⁸⁶ The latter requirement can be substituted for the requirement that the owners had legal notice of the lien.¹⁸⁷ Because Cooksey's deed reserving a vendor's lien was properly recorded within the chain of title, the landowners had legal

176. 683 S.W.2d at 879; see Law of Dec. 20, 1836, § 40, 1836 Laws of the Republic 156, 1 H. GAMMEL, LAWS OF TEXAS 1216 (1898).

177. 683 S.W.2d at 879 (citing *Ryle v. Davidson*, 102 Tex. 227, 231-32, 115 S.W. 28, 29 (1909)).

178. 683 S.W.2d at 879 (citing *Dowson v. Bluhm*, 252 S.W.2d 515, 517 (Tex. Civ. App.—Beaumont 1952, no writ)).

179. 683 S.W.2d at 879.

180. *Id.*

181. TEX. PROP. CODE ANN. § 13.001 (Vernon 1984).

182. 682 S.W.2d 252 (Tex. 1984).

183. *Id.* at 253.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* (citing *Strong v. Strong*, 128 Tex. 470, 473, 98 S.W.2d 346, 347 (1936)).

notice of the lien.¹⁸⁸ They therefore could not successfully assert the innocent purchaser defense to foreclosure of the lien but took subject to the lien.¹⁸⁹

B. Waiver of Notice of Intent to Accelerate

In *Real Estate Exchange, Inc. v. Bacci*¹⁹⁰ the Houston court of appeals considered whether the maker of a note could by the terms of the note expressly waive his right to notice from the note holder of intention to accelerate. In *Bacci* the makers of the note purchased an apartment complex and signed a promissory note, secured by a deed of trust on the property. The makers often made their payments late and their bank returned one check due to insufficient funds. The holders notified each maker in writing that they would not accept any more late payments. When the holders did not receive the next payment on time, they proceeded to foreclose. The holders received the payment six days later and returned it with written notice that the note had been accelerated and that a foreclosure sale was pending. The note contained the following provision:

In the event default is made in the payment of the principal of this note, . . . then the legal holder hereof shall have the option without demand or notice to the maker . . . to declare this note immediately due and payable and may thereupon foreclose the liens given to secure its payment.¹⁹¹

The district court temporarily enjoined the foreclosure, but the court of appeals reversed, finding that the provision in the note was sufficient to constitute a waiver by the makers of prior notice of acceleration.¹⁹² The court of appeals stated, “[a]lthough this acceleration is optional rather than automatic, the note expressly provides that the option may be exercised by the holder *without demand or notice* to the maker.”¹⁹³ The court distinguished the 1982 case of *Ogden v. Gibraltar Savings Association*.¹⁹⁴ In *Ogden* the Texas Supreme Court considered whether the holder of a promissory note containing an optional acceleration provision must notify the maker of the holder’s intention to exercise the option. The deed of trust in *Ogden* contained a provision declaring that upon default the balance due on the underlying note should “at the option of the holder or holders thereof, immediately become due and payable”¹⁹⁵ When the maker defaulted, the holder gave notice to the maker that “failure to cure such breach on or before [particular date] *may* result in acceleration of the sums secured by the Deed of Trust and sale of the property”¹⁹⁶ The *Ogden* court found this

188. 682 S.W.2d at 253.

189. *Id.*

190. 676 S.W.2d 440 (Tex. App.—Houston [1st Dist.] 1984, no writ).

191. *Id.* at 441.

192. *Id.* at 440-41.

193. *Id.* at 441 (emphasis in the original).

194. 640 S.W.2d 232 (Tex. 1982).

195. *Id.* at 233.

196. *Id.* (emphasis in original).

notice insufficient because it merely restated that the holder might exercise its option to accelerate, not that the holder was actually exercising that option.¹⁹⁷ The *Bacci* court reached a contrary result, stating that if the maker of the note expressly waives notice, notice is not required.¹⁹⁸

Several post-*Ogden* decisions focused on waiver of notice of the intent to accelerate. In *Chapa v. Herbster*¹⁹⁹ the Tyler court of appeals held that a waiver of notice of intent to accelerate in a note or deed of trust dispensed with the requirement.²⁰⁰ In *Bodiford v. Parker*²⁰¹ the Fort Worth court of appeals found that a provision in a deed of trust that "the entire indebtedness hereby secured . . . may, at the option of the Beneficiary, . . . be immediately matured and become due and payable without demand or notice of any character . . ." was ineffective to waive notice of intent to accelerate but merely waived notice that the debt had been accelerated.²⁰² As the *Bacci* court emphasized, however, if by the term of the note the maker expressly waives the right to notice of acceleration, then notice of acceleration is unnecessary.²⁰³ Because Texas courts disagree as to the effectiveness of clauses waiving notice of intent and acceleration, real estate practitioners should draft waivers of acceleration specifically, with all provisions separated from any other attempted waiver. The drafter should use the express word "accelerate" to refer to waivers of notice of intent to accelerate as well as to refer to notice that the debt has been accelerated.

C. Notice of Nonjudicial Foreclosure

In *Mitchell v. Texas Commerce Bank-Irving*²⁰⁴ the Fort Worth court of appeals considered notice requirements under section 51.002 of the Texas Property Code, which provides for that is commonly referred to as nonjudicial foreclosure.²⁰⁵ In *Mitchell* the mortgagee sued for a deficiency judgment and the mortgagor counterclaimed for wrongful foreclosure. The bank sent notice of the sale to the makers at their old address even though the bank

197. *Id.* at 234.

198. 676 S.W.2d at 441.

199. 653 S.W.2d 594 (Tex. App.—Tyler 1983, no writ).

200. *Id.* at 601.

201. 651 S.W.2d 338 (Tex. App.—Fort Worth 1983, no writ).

202. *Id.* at 339. Two dissenting judges considered the provision to be a clear waiver of notice of intent to accelerate. *Id.* at 340-41 (Jordon, J., dissenting).

203. 676 S.W.2d at 441. See *Cortez v. Brownsville Nat'l Bank*, 664 S.W.2d 805, 808 (Tex. App.—Corpus Christi 1984, no writ) (the language "Each Maker, Surety and Endorser waives Notice, Presentment for Payment, Demand for Payment and Acceleration of Maturity, and protest . . ." was effective to waive notice of intent and acceleration). The *Cortez* holding appears incorrect and drafters should not rely on it. The waiver of the "Demand for Payment and Acceleration of Maturity" may constitute a waiver of notice of acceleration but does not include a waiver of intent to accelerate. See *Slivka v. Swiss Ave. Bank*, 653 S.W.2d 939, 940-41 (Tex. App.—Dallas 1983, no writ) (express waiver effective); *Valley v. Patterson*, 614 S.W.2d 867, 872 (Tex. App.—Corpus Christi 1981, no writ) (same); *Burnett v. Manufacturer's Hanover Trust Co.*, 593 S.W.2d 755, 759 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (same); *Whalen v. Etheridge*, 428 S.W.2d 824, 828 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.) (same).

204. 680 S.W.2d 681 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

205. TEX. PROP. CODE ANN. § 51.002 (Vernon 1984).

had their new address on file. The makers received the forwarded notice a few days before the sale and they came to the sale. Section 51.002 provides that, at least twenty-one days before the sale, the holder of the debt must mail a certified notice of the sale addressed to the debtor's most recent address as shown in the holder's records.²⁰⁶ Noncompliance with section 51.002 can invalidate the sale.²⁰⁷ The Fort Worth court of appeals stated that the purpose of the notice statute is to provide a minimum level of protection for the debtor.²⁰⁸ The court reasoned that sending notice to the wrong address results in the debtor receiving less pre-sale preparation time, defeating the purpose of the statutory notice provision.²⁰⁹ The court held that the mortgagors' receipt of actual notice of foreclosure and their presence at the sale did not preclude finding that they suffered harm as a result of the insufficient notice due to the mailing of the notice to an old address.²¹⁰ The court further noted that the trustee may allow a purchaser some time to obtain cash for the purchase. If, however, after other prospective purchasers have dispersed the purchaser cannot obtain the cash, the trustee cannot reconvene the sale without further advertisement or notice.²¹¹ The court therefore found the trustee's sale later the same day and without further notice invalid.²¹²

In *Johnson v. First Southern Properties, Inc.*²¹³ the Houston court of appeals considered nonjudicial foreclosure under section 51.002 of the Texas Property Code and related notice requirements.²¹⁴ In *Johnson* an individual purchased a condominium apartment subject to covenants and conditions in documents filed in the county records. One of these documents obligated all co-owners to contribute their proportionate share of certain common expenses and provided that the homeowners' council had a lien on each apartment for any unpaid assessments. The homeowners' council was authorized to enforce the lien through nonjudicial foreclosure; "co-owner[s] . . . expressly grant[ed] to the Board a power of sale in connection with said lien."²¹⁵ The purchaser failed to make monthly maintenance payments, foreclosure occurred and a third party purchased the property. The original

206. *Id.*

207. 680 S.W.2d at 682 (citing *Lido Int'l, Inc. v. Lambeth*, 611 S.W.2d 622, 624 (Tex. 1981)).

208. 680 S.W.2d at 682.

209. *Id.*

210. *Id.* The bank argued that mailing the notice to an incorrect address should not invalidate the sale. The court, however, distinguished the cases relied on by the bank because they did not involve delay in delivery of the notice. *Id.* at 683. See *Ogden v. Gibraltar Sav. Ass'n*, 620 S.W.2d 926, 929-30 (Tex. Civ. App.—Corpus Christi 1981), *rev'd on other grounds*, 640 S.W.2d 232 (Tex. 1982) (wrong post office box number and street address caused no delay); *Hausmann v. Texas Sav. & Loan Ass'n*, 585 S.W.2d 796, 800 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (mailing notice to actual residence rather than post office box listed as more recent address caused no delay).

211. 680 S.W.2d at 683.

212. *Id.* (citing *Clearman v. Graham*, 4 S.W.2d 581, 582-83 (Tex. Civ. App.—Austin 1928), *writ dismissed per curiam*, 14 S.W.2d 819 (Tex. Comm'n App. 1929)).

213. 687 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

214. TEX. PROP. CODE ANN. § 51.002 (Vernon 1984).

215. 687 S.W.2d at 401.

purchaser sued to have the foreclosure sale set aside, but the trial court upheld the sale. The Houston court of appeals also held the foreclosure sale valid.²¹⁶ The aggrieved condominium owner argued that the condominium was his homestead and that the forced sale for payments of the monthly maintenance fees violated his constitutional homestead protections.²¹⁷ The court stated "[t]he shelter of a homestead is not unassailable. Rather, a right, such as a lien, may prevail over a homestead claim if such right exists before the land becomes a homestead."²¹⁸ Creation of a homestead requires intent to claim the property as a homestead and concurrent usage of the property.²¹⁹ When usage does not begin until after the inception of intent, the owner may waive his homestead claim during the intervening period.²²⁰ The court concluded that since the purchaser signed the purchase closing papers more than two weeks before moving into the condominium, the interim period rule applied.²²¹ The deed and the deed of trust provided that the purchaser took the property subject to the recorded documents, which contained provisions creating the homeowners' council's assessment lien. These provisions constituted a prior relinquishment of the purchaser's homestead claim.²²² The court then applied the rationale of *Cooksey v. Sinder*²²³ and held that the condominium owner had legal notice of the assessment lien expressed in the validly recorded documents, and he therefore took title to the property subject to the lien.²²⁴ The assessment lien constituted a valid pre-existing debt that overcame the homestead claim.²²⁵

In *Mercer v. Daoran Corp.*²²⁶ a senior lienholder's 1975 deed of trust omitted to recite that it renewed and extended a lien filed in 1974. A junior lienholder filed a judgment lien in early 1975, before the senior lienholder had filed his 1975 deed of trust. Both lienholders later foreclosed. The court addressed the issue of whether the foreclosure of the deed of trust lien cut off the rights of the judgment creditor. The trial court awarded summary judgment to the purchaser at the deed of trust foreclosure sale; the appellate court affirmed. The Texas Supreme Court reversed and remanded.²²⁷ The

216. *Id.*

217. See TEX. CONST. art. XVI, § 50; TEX. REV. CIV. STAT. ANN. art. 3839 (Vernon 1966) (repealed, effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. § 41.002 (Vernon Supp. 1986)).

218. 687 S.W.2d at 401 (citing *Miles Homes of Texas, Inc. v. Brubaker*, 649 S.W.2d 791, 793 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); *Minnehoma Fin. Co. v. Ditto*, 566 S.W.2d 354, 357 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); *Savell v. Flint*, 347 S.W.2d 24, 27 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.)).

219. 687 S.W.2d at 401 (citing *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)).

220. 687 S.W.2d at 401 (citing *Savell v. Flint*, 347 S.W.2d 24, 27 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.)).

221. 687 S.W.2d at 402.

222. *Id.*

223. *Id.*; *Cooksey*, 682 S.W.2d 252 (Tex. 1984); see *supra* notes 182-89 and accompanying text.

224. 687 S.W.2d at 402.

225. *Id.*

226. 676 S.W.2d 580 (Tex. 1984).

227. *Id.* at 582.

court held that since the 1974 deed of trust was on record, the judgment creditor acquired his interest with knowledge of the prior lien and would be bound by any valid renewal and extension agreement even if not filed of record.²²⁸ The Texas Supreme Court further noted that although a subrogation might exist,²²⁹ a renewal and extension was not proved.²³⁰

The court applied article 5522 of the Texas Revised Civil Statutes, which has been recodified in the Texas Civil Practice and Remedies Code at sections 16.036 and 16.037.²³¹ Article 5522 required record filing of a signed and acknowledged contract of extension in order to keep a lien in force.²³² The Texas Supreme Court found the language in the 1976 deed of trust insufficient to renew and extend the senior lienholder's 1974 lien.²³³ The 1975 deed of trust did not mention the 1974 note and lien or state that it renewed and extended anything. The court held that the 1975 deed of trust did not qualify as an article 5522 contract of extension.²³⁴ As one commentator has observed,

The *Mercer* case illustrates the importance of renewing and extending a mortgage within four years after the maturity date, and then filing the extension of record. The extension agreement, whether in the form of an extension or a new note and deed of trust, should make a reference to the mortgage it is extending (amount, date, parties, recording infor-

228. *Id.*

229. As one commentator has written,

[q]uery why equitable subrogation alone would not have sufficed to achieve priority under holdings such as *Houston Investment Bankers Corp. v. First City Bank of Highland Village*, 640 S.W.2d 660 (Tex. App.—Houston [14th Dist.] 1982, no writ). The answer may lie in the fact that the judgment lien was recorded prior to the 1975 deed of trust. In such a case, equitable subrogation may not work and the new lender may need to obtain a specific assignment of the prior lien. See *Lewis v. Investors Sav. Ass'n*, 411 S.W.2d 794 (Tex. App.—Fort Worth 1967, no writ). Would a blanket subrogation clause like the one found in the deed of trust in this case work even without an assignment? Perhaps this question will be answered in subsequent developments in this case.

Recent Real Property Decisions, 20 REAL PROP. PROB. & TR. J. 215, 340 (1985).

230. 676 S.W.2d at 581.

231. TEX. REV. CIV. STAT. ANN. art. 5522 (Vernon 1958). Article 5522 has been repealed, effective September 1, 1985, and replaced by TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.036-037 (Vernon Pam. 1986). Article 5522 authorized the owner of the land and the holder of the note to "at any time enter into a valid agreement renewing and extending the debt and lien, so long as it does not prejudice the rights of lien holders or purchasers subsequent to the date such liens became barred of record" The third party who acquired the land after the 1975 lienholder's foreclosure sale contended that even if the 1975 deed of trust proved insufficient as a contract of extension under article 5522, a valid extension agreement existed between the parties. The court noted that:

[t]he rule is well established that a junior lien holder who acquires his lien when the debt securing a first lien is not barred, and does not appear of record to be barred, is bound by an extension agreement between the owner of the land and the holder of the first lien, provided the contract of extension is sufficient between the parties thereto.

676 S.W.2d at 582 (quoting *W.T. Rawleigh Co. v. Terrell*, 171 S.W.2d 198, 199 (Tex. Civ. App.—Eastland 1943, writ ref'd)).

232. TEX. REV. CIV. STAT. ANN. art. 5522, recodified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.036-037 (Vernon Pam. 1986).

233. *Id.*

234. 676 S.W.2d at 581.

mation and property description) and should expressly state that the prior mortgage is being extended to a certain future date.²³⁵

In *Lyons v. Montgomery*²³⁶ the purchaser apparently knew of the risks attending a purchase of property subject to an existing deed of trust containing a due on sale clause. The purchaser knew that the holder of the note had the legal right to accelerate the amount due and that the purchaser could lose the property through foreclosure proceedings.²³⁷ The court found that legally sufficient notice of the due on sale clause was given to the purchaser by the title policy, which described the deed of trust and its recordation.²³⁸ The court stated further that the purpose of a title policy is to provide purchasers notice of the existence of instruments affecting the property, not to explain in detail the terms and implications of those instruments.²³⁹ If every title exception in a title policy set forth the details of every pertinent instrument the title policy would resemble an abstract of title, noted the court.²⁴⁰

III. LIENS

A. Homestead

In *Stewart v. Clark*²⁴¹ the Corpus Christi court of appeals stated that liens on homesteads must comply with the Texas Constitution.²⁴² Under the constitution a lienor may foreclose on homestead property only to pay for: (1) a purchase money lien; (2) taxes due on the homestead property; and (3) work and materials used to construct improvements on the property.²⁴³ The *Stewart* plaintiff had a mechanic's and materialman's lien on a home owned by defendants, two single adults. The defendants were joint tenants. One defendant had orally authorized the plaintiff to begin repairs of hurricane damage to the home. The parties never executed a written contract. The district court declared the lien null and void. The court of appeals affirmed, finding that the applicable constitutional provision, as amended, required that assertion of a lien for improvements against a single adult's homestead be

235. *Id.* Heath & Sharkey, *Recent Significant Texas Real Estate Decisions*, 1985 STATE BAR OF TEXAS ADVANCED REAL EST. L. COURSE A, A-25.

236. 685 S.W.2d 390 (Tex. App.—San Antonio 1985, writ granted).

237. *Id.* at 393.

238. *Id.*

239. *Id.*

240. *Id.*

241. 677 S.W.2d 246 (Tex. App.—Corpus Christi 1984, no writ).

242. *Id.* at 249 (citing *Fidelity Sav. & Loan Ass'n v. Baldwin*, 416 S.W.2d 482, 484 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.)).

243. 677 S.W.2d at 249 (citing TEX. CONST. art. XVI, § 50; *Franklin v. Woods*, 598 S.W.2d 946, 950 (Tex. Civ. App.—Corpus Christi 1980, no writ)). The Texas Constitution provides that:

[t]he 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 a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead . . .

TEX. CONST. art. XVI, § 50.

founded upon a written contract.²⁴⁴ The trial court could properly have found the property to be the homestead of one of the two homeowners stated the court.²⁴⁵

In 1973 the Texas Legislature amended the constitution to afford single individuals protection from foreclosure on homestead property.²⁴⁶ The court inferred that the Legislature intended the same protections to be available for single households as had previously existed for marital homesteads.²⁴⁷ The purpose of a written contract requirement is to protect homestead property regardless of marital status, stated the court.²⁴⁸ The *Stewart* court found requiring a written contract for a marital homestead, but not for a single person's homestead, to be discriminatory and in derogation of the constitution.²⁴⁹ The court therefore concluded that a written contract was required to establish a lien for improvements on either a single or a family homestead.²⁵⁰

In *Jeter v. Seminole State National Bank*²⁵¹ a United States Bankruptcy Court held that to maintain the vigor of the homestead provisions of the Texas Constitution, both spouses must sign mechanic's lien contracts for improvements on their homestead, and both spouses must confirm and consent to extensions and renewals of mechanic's and materialmen's liens for those improvements.²⁵² The court also found a mechanic's lien contract that was not executed until after completion of the construction to be ineffective against a Texas homestead.²⁵³ Texas law requires that both spouses sign a written contract for homestead improvements before materials are delivered and labor commenced.²⁵⁴ The *Jeter* case also contains a good discussion of the distinction between the Federal Deposit Insurance Corporation as receiver and as a corporate insurer.²⁵⁵

244. 677 S.W.2d at 250.

245. *Id.*

246. *Id.* at 249.

247. *Id.*

248. *Id.* at 249-50.

249. *Id.* at 250.

250. *Id.*

251. 48 Bankr. 404 (Bankr. N.D. Tex. 1985).

252. *Id.* at 408.

253. *Id.*

254. *Id.* at 407 (quoting TEX. REV. CIV. STAT. ANN. art. 5460 (Vernon 1958)). Article 5460 has been repealed, effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. § 53.059 (Vernon 1984).

255. 677 S.W.2d at 409-12. See *Gunter v. Hutcheson*, 674 F.2d 862, 873-76 (11th Cir.), cert. denied, 459 U.S. 826, reh'g denied, 459 U.S. 1059 (1982) (comprehensive discussion of the distinction between the FDIC as receiver and the FDIC as corporate insurer). Familiarity with the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-32 (1982 & Supp. 1984), and with the *D'Oench* doctrine, *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), is important in dealing with failing and insolvent lending institutions. The *Jeter* court explains:

[t]he basic premise of *D'Oench* and its progeny is that the maker of a note is estopped from raising defenses against FDIC, because the maker has acted in contravention of a general policy to protect the FDIC, and the public funds which it administers, against misrepresentations of the assets of a bank which is to be insured.

48 Bankr. at 409-10.

B. Labor

Priority contests involving mechanic's and materialmen's liens occur not only between mortgagees and statutory lienholders but also among statutory lienholders. Because of the continued uncertainty arising from conflicting case law, mortgagees, original contractors, subcontractors, developers, and property owners do not know how best to protect their interests. In *Branecky v. Seaman*²⁵⁶ an architect asserted statutory and constitutional liens, but the Corpus Christi court of appeals denied enforcement of both liens.²⁵⁷ The architect contracted with a developer to provide architectural services for a proposed motel, prepared the plans and specifications, and applied for a building permit. The architect later learned that someone had traced or copied his plans and put an engineer's seal on them. The architect concluded that the developer intended to breach the contract and filed an affidavit for a mechanic's and materialman's lien. The landowner was neither a party to the architect's contract nor a partner of the developer. The land that the architect filed the lien against belonged solely to the landowner and remained unimproved. The district court ruled that the architect was not entitled to a lien. The court of appeals affirmed, holding that the labor expended by the architect in preparing plans and specifications for improvements to land that were never begun was not labor expended in the making or repairing of a building;²⁵⁸ therefore the architect was not entitled to a constitutional or statutory lien.²⁵⁹

Courts have considered the language of article 5452 of the Texas Revised Civil Statutes²⁶⁰ evidence of a legislative intent to provide a lien for any person who labors to build a structure or improvements.²⁶¹ Architects who prepare plans and supervise construction perform labor apparently within the meaning of the article 5452 and they may therefore obtain a statutory lien.²⁶² To obtain a lien, an architect may have to supervise construction in addition to preparing plans.²⁶³ The *Banecky* architect merely prepared plans that were never used. The court of appeals construed the statutory language to require more than the mere preparation of plans for a project that is never started.²⁶⁴ The court stated that owners often need to have plans prepared to decide whether or not to build an improvement.²⁶⁵ The court further stated that until construction begins, no property exists to

256. 688 S.W.2d 117 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

257. *Id.* at 120.

258. *Id.*

259. *Id.*

260. TEX. REV. CIV. STAT. ANN. art. 5452 (Vernon 1958 & Supp. 1986). Article 5452 has been repealed, effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. §§ 53.021-.023 (Vernon 1984).

261. 688 S.W.2d at 119 (citing *Stanguinett & Statts v. Colorado Salt Co.*, 150 S.W. 490, 491 (Tex. Civ. App.—Fort Worth 1912, writ ref'd)).

262. 688 S.W.2d at 119 (citing 150 S.W. at 491).

263. 688 S.W.2d at 120 (citing *Lancaster v. McKenzie*, 439 S.W.2d 728, 729 (Tex. Civ. App.—El Paso 1965, no writ)).

264. 688 S.W.2d at 120.

265. *Id.*

which a statutory lien can attach.²⁶⁶ Finally, the court found no case authority for the architect's contention that he was entitled to a constitutional lien.²⁶⁷

C. Payment Bonds

In some contrast to *Branecky*, the Texas Supreme Court stated in *Industrial Indemnity Co. v. Zack Burkett Co.*²⁶⁸ that the Texas mechanic's and materialman's lien statutes are to be liberally construed to protect laborers and materialmen.²⁶⁹ In its per curiam opinion refusing an application for writ of error,²⁷⁰ the court also considered the necessity of statutory warnings in a subcontractor's notice to perfect his claim against a payment bond.

The subcontractor contracted with the general contractor who later obtained a payment bond. After the general contractor failed to pay him, the subcontractor wrote to the general contractor demanding payment and giving notice of his intent to file a lien on the property if the general contractor did not pay him within ten days. A copy of the letter was sent to the property owner. The subcontractor filed suit; the general contractor declared bankruptcy. The subcontractor received a partial payment through the bankruptcy court. The district court awarded the subcontractor the ten percent contractual retainage. The court of appeals reformed the district court's judgment and rendered judgment for the subcontractor's full claim against the payment bond. The court of appeals found compliance with the retainage statute sufficient to perfect a claim against the surety on the payment bond.²⁷¹ The Texas Supreme Court stated that Texas Revised Civil Statute article 5469, the retainage statute, required the owner to retain ten percent of the contract price for unpaid mechanics and materialmen.²⁷² If a payment bond covered the project, however, subcontractors were relegated to claims on the bond, relieving the owner of any obligation to retain funds or to pay undisputed claims.²⁷³ The court held that compliance with the retainage statute did not constitute compliance with the article 5472d, the payment bond statute,²⁷⁴ for perfecting a claim against a payment bond.²⁷⁵ The court expressly disapproved *Trinity Universal Insurance Co. v.*

266. *Id.*

267. *Id.* (citing TEX. CONST. art. XVI, § 37).

268. 677 S.W.2d 493 (Tex. 1984).

269. *Id.* at 495.

270. *Id.*

271. *Id.* at 494-95. The court of appeals decision, *Zack Burkett Co. v. Industrial Indemn. Co.*, 662 S.W.2d 161 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.), was discussed in Dooley, *Real Property: Landlord and Tenant, Mortgages, and Mechanics' and Materialmen's Liens*, 39 Sw. L.J. 272 (1985).

272. 677 S.W.2d at 495. TEX. REV. CIV. STAT. ANN. art. 5469 (Vernon 1958 & Supp. 1986) has been repealed, effective January 1, 1984, and replaced by TEX. PROP. CODE ANN. §§ 53.101-.105 (Vernon 1984).

273. 677 S.W.2d at 495 (citing TEX. REV. CIV. STAT. ANN. art. 5472d (Vernon Supp. 1986) (repealed)).

274. Article 5472d has been replaced by TEX. PROP. CODE ANN. §§ 53.201-.211 (Vernon 1984). See also Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 655, 699 (1972).

275. 667 S.W.2d at 495.

Palmer.²⁷⁶ In *Trinity*, the San Antonio court of appeals held that statutory warnings were required to perfect a claim against a payment bond.²⁷⁷ The Texas Supreme Court concluded, that “[t]o require that an owner be warned that ‘he may be personally liable and his property subjected to lien’ when, because of the presence of the payment bond, the owner is relieved of liability, would be to require subcontractors to perform a meaningless exercise.”²⁷⁸

An original contractor may furnish a payment bond for the benefit of claimants.²⁷⁹ If a valid bond is filed, a lienholder must look to the surety for payment and not to the property owner.²⁸⁰ If the lienholder has perfected his lien against the surety and the claim remains unpaid for sixty days after perfection thereof, then the lienholder may sue the principal and surety on the bond, jointly or severally.²⁸¹

In *Sentry Insurance Co. v. Radcliff Materials of Texas, Inc.*²⁸² a supplier of materials to a subcontractor brought suit against the surety on the original contractor’s bond. The subcontractor and original contractor had entered into a contract agreement for construction on a parking lot. The surety issued a performance and payment bond naming the subcontractor as principal and the original contractor as obligee. Radcliff Materials supplied the building materials to the subcontractor. After the subcontractor failed to pay for the materials on time, Radcliff sent notices, filed a mechanic’s and materialman’s lien on the property, and initiated a lawsuit. The trial court awarded Radcliff a judgment against the surety. The trial court treated the bond as a Hardeman Act Bond.²⁸³ The Houston court of appeals reversed, holding that the bond did not comply with the requirement of section 53.202 of the Property Code and therefore was not a Hardeman Act Bond.²⁸⁴ The Hardeman Act provides a statutory scheme for the substitution of an original contractor’s payment bond for whatever relief derivative claimants (subcontractors and those furnishing materials and labor) might obtain against the owner and his property.²⁸⁵ A properly executed and recorded Hardeman Act Bond relieves the owner of liability to derivative claimants.²⁸⁶ To comply with the statutory requirements of the Hardeman Act the bond must be conditioned on prompt payment for all labor, subcontracts, materials, specially fabricated materials, and normal and usual extras not exceeding

276. 412 S.W.2d 691 (Tex. Civ. App.—San Antonio 1967, writ ref’d n.r.e.).

277. 667 S.W.2d at 495; 412 S.W.2d at 695-96.

278. 667 S.W.2d at 495.

279. TEX. PROP. CODE ANN. § 53.201 (Vernon 1984).

280. TEX. PROP. CODE ANN. § 53.206 (Vernon 1984).

281. TEX. PROP. CODE ANN. § 53.208 (Vernon 1984).

282. 687 S.W.2d 437 (Tex. App.—Houston [14 Dist.] 1985, no writ).

283. *Id.* at 440. The provisions of the Hardeman Act (TEX. REV. CIV. STAT. ANN. arts. 5452-5457e) have incorporated into TEX. PROP. CODE ANN. §§ 53.201-211 (Vernon 1984).

284. 687 S.W.2d at 440.

285. *Id.* (citing *Fidelity & Deposit Co. v. Felker*, 469 S.W.2d 389, 390 (Tex. 1971)). See also TEX. PROP. CODE ANN. § 53.201 (Vernon 1984).

286. 469 S.W.2d at 390.

fifteen percent of the contract price.²⁸⁷ The bond must also be in favor of the owner, have the written approval of the owner endorsed on it, and be executed by the original contractor as principal.²⁸⁸ The bond in *Sentry* was in favor of the original contractor and was executed by the subcontractor. In addition, the *Sentry* bond stated that the subcontractor would reimburse the original contractor for all loss and damages sustained only if the subcontractor failed to perform its obligations. There was no language in the *Sentry* bond indicating that it was intended for the protection of subcontractors or materialmen who were not paid for services or material provided to the general contractor. The court concluded that even if it modified the terms of the bond to include parties not named or to realign priorities among the obligees of the bond, the bond would still contain a substantial defect in that it was not conditioned on prompt payment for labor, contracts, or materials as required by section 53.202 of the Property Code.²⁸⁹

D. Construction Contract Trusts

In *RepublicBank Dallas, N.A. v. Interkal, Inc.*²⁹⁰ a bank sued the beneficiary-materialman of a construction contract trust, claiming a superior right to money received by the contractor for construction and remodeling of gymnasiums. The contractor had contracts to build gymnasiums for schools. Interkal furnished materials to the contractor. The contractor had borrowed money from RepublicBank, using its accounts receivable as security. The contractor defaulted on its loan to RepublicBank, and the bank sued to collect. Since the events giving rise to the cause of action took place before the enactment of the Property Code, the language of Texas Revised Civil Statutes article 5472e was controlling.²⁹¹ Interpreting article 5472e, the Texas Supreme Court considered whether the materialman, Interkal, or the creditor, RepublicBank, had the superior right to the funds held by the contractor. The court stated that

the material part of article 5472e provides that the act shall have no application to any bank, savings and loan association or other lender or to any title company or other closing agent in connection with *any transaction to which this act is applicable*. . . . The legislature clearly

287. Section 53.202 of the Property Code provides that a bond to pay liens or claims *must* meet the following requirements:

- (1) be in a penal sum at least equal to the total of the original contract amount;
- (2) be in favor of the owner;
- (3) have the written approval of the owner endorsed on it;
- (4) be executed by:
 - (a) the original contractor as principal; and
 - (b) a corporate surety authorized to do business in this state; and
- (5) be conditioned on prompt payment for all labor, subcontractors, materials, specially fabricated materials, and normal and usual extras not exceeding fifteen percent of the contract price.

TEX. PROP. CODE ANN. § 53.202 (Vernon 1984).

288. 687 S.W.2d at 440.

289. *Id.* at 441.

290. 691 S.W.2d 605 (Tex. 1985), *rev'g* 677 S.W.2d 759 (Tex. App.—Dallas 1984).

291. TEX. REV. CIV. STAT. ANN. art. 5472e (repealed); *see* TEX. PROP. CODE ANN. §§ 162.001-.033 (Vernon 1984).

stated that the act protecting materialmen's liens is not applicable to any transaction involving a bank.²⁹²

The court concluded that "under the plain language of the statute, the bank's priority as a secured creditor over the materialman is not defeated."²⁹³

It appears that the recodification of article 5472e at current section 162.004 of the Property Code has in fact effected a substantive change.²⁹⁴ The Property Code eliminates the words that formed the basis of the *Interkal* opinion, "in connection with any transaction to which this act is applicable."²⁹⁵ Whether or not the Texas Supreme Court will reach the same conclusion when confronted with facts similar to the *Interkal* case under section 162.004 of the Property Code is uncertain because of the legislature's editorial omission of the exact words the court relied on in reaching its decision.

292. 691 S.W.2d at 607 (court's emphasis).

293. *Id.* at 608. The Texas Supreme Court's decision essentially followed the dissent of Justice Sparling of the Dallas court of appeals. 677 S.W.2d 759 at 762-4 (Sparling, J., dissenting).

294. TEX. PROP. CODE ANN. § 162.004 (Vernon 1984).

295. *Id.*

