SMU | Dedman School of Law

SMU Law Review

Volume 43
Issue 1 *Annual Survey of Texas Law*

Article 11

1989

Real Property

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REAL PROPERTY

by

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IT was a tough year for the common law. The ancient rule of independent lease covenants was abolished,[1] the venerable doctrine of merger was undermined,[2] a warranty of suitability in commercial leases was invented,[3] the deed in lieu of foreclosure was itself foreclosed,[4] and an affirmative duty was fashioned requiring landlords to mitigate damages upon a tenant's default.[5] These changes, whatever their merits might be, were wrought without any legislator ever lifting a pen. They were the work of the Texas Supreme Court, which, armed with such indubitable nostrums as "the landlord is in a much better bargaining position than the tenant,"[6] determined to ally itself with "the modern trend towards consumer protection."[7]

It remains to be seen whether the Texas Supreme Court will be less ashamed of being old-fashioned in light of last November's decision by Texas voters to retire some of its most "modern" members. In the meantime, the sweeping doctrinal changes announced by the court should provide abundant food for thought and ample occasion for litigation. This Article reviews the cases setting forth these sweeping changes and examines other significant decisions handed down during the Survey period.

I. LANDLORD AND TENANT

The Texas Supreme Court decided two cases of enormous importance involving leasing, both of which promise to be bountiful fonts of litigation for years to come. In *Davidow v. Inwood North Professional Group—Phase I*[8] the high court created an implied warranty of suitability in commercial leases.[9] In *Brown v. Republic Bank First National Bank, Midland*[10] the

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1. Davidow v. Inwood N. Professional Group—Phase I, 747 S.W.2d 373, 377 (Tex. 1988).
2. Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988).
3. *Davidow*, 747 S.W.2d at 377.
4. Flag-Redfern Oil Co. v. Humble Exploration Co., 744 S.W.2d 6, 8-9 (Tex. 1987).
5. Brown v. RepublicBank First Nat'l Bank, Midland, 31 Tex Sup. Ct. J. 525 (June 22, 1988).
6. *Davidow*, 747 S.W.2d at 376.
7. *Id.*
8. 747 S.W.2d 373 (Tex. 1988).
9. *Id.* at 377.
10. 31 Tex. Sup. Ct. J. 525 (June 22, 1988).

court—or, rather, the four concurring justices and the one dissenter—announced that henceforth, landlords will have a duty to mitigate damages following a tenant's default.[11]

Although one may criticize parts of each decision—indeed, each presents much occasion for criticism—it is clear that a common idea informs both. The high court is disenchanted with the common law doctrine that leases are to be analyzed primarily as conveyances of property.[12] It is desirous of abandoning what it regards as leasing law's "feudal antecedents"[13] and, in the words of the *Brown* concurrence, replacing such "antiquated property law concepts with more equitable and contemporary solutions in contract."[14]

It is difficult to locate a more compelling set of facts for a constructive eviction claim than that presented in *Davidow*. Notwithstanding the landlord's lease obligation to provide air conditioning, electricity, hot water, maintenance, light bulbs, and security to its tenant, a dentist, the landlord chronically provided none of those services. Faulty air conditioning often kept the dentist's offices at eighty-five degrees, and a leaking roof stained the ceiling tiles and mildewed the carpet. Pests and rodents were constant companions of the patients who waited on the tenant. The patients were likely a determined lot, however, since by the time they arrived in the office, they had negotiated a garbage-filled parking lot and had groped their way down dark common area corridors. The premises had no hot water, and once went without electricity for several days when the landlord failed to pay its bill. Adding insult to injury, the premises were the target of several burglaries and acts of vandalism.

When the tenant abandoned the premises and ceased paying rent, the evidently shameless landlord sued for past due rent and the cost of renovation. The tenant answered with the affirmative defense of landlord's breach of the lease, but mysteriously failed to counter with a constructive eviction claim. The trial court tried to assist, allowing a post-verdict emendation of the pleadings to include such a claim.[15] The court of appeals determined, however, that the amendment came too late to provide requisite notice and, applying centuries-old common law doctrine, stated that the tenant's obligation to pay rent existed independent of the landlord's covenant to maintain the premises.[16] The brazen gall of the landlord appeared to have been rewarded, as the appeals court rendered judgment in favor of the landlord for lost rents and other costs.[17]

The Texas Supreme Court brushed away several centuries of settled law in

11. *Id.* at 528.

12. *Davidow*, 747 S.W.2d at 375-77; *Brown*, 31 Tex. Sup. Ct. J. at 527-28.

13. *Brown*, 31 Tex. Sup. Ct. J. at 527 (Kilgarlin, J., concurring).

14. *Id.* at 528. The phrase, "more equitable and contemporary solution" appears also in *Davidow*, 747 S.W.2d at 375.

15. 747 S.W.2d at 375.

16. Inwood N. Professional Group—Phase I v. Davidow, 731 S.W.2d 600 (Tex. App.—Houston [14th Dist.] 1987), *rev'd* 747 S.W.2d 373 (Tex. 1988).

17. *Id.* at 605.

four pages of bold strokes. After reviewing the hoary origins of the doctrine of independent covenants, it cited *Kamarath v. Bennett*[18] and *Humber v. Morton*[19] as evidence of its recent attempts to provide "a more equitable and contemporary solution to landlord-tenant problems."[20] The court made clear that it viewed its task as easing the "burden" that archaic property doctrines have placed on tenants.[21] According to the court, changing times have changed the nature of landlord-tenant relations, shifting them from an "agrarian" setting involving unimproved land to a more modern and urban setting.[22] The court noted that, in creating a warranty of habitability in residential leases, it had determined that the landlord usually is "in a much better bargaining position than the tenant."[23] This is true also in a commercial setting, the court said, stating that, "[A] businessman cannot be expected to possess the expertise necessary to adequately inspect and repair the premises, and many commercial tenants lack the financial resources to hire inspectors and repairmen to assure the suitability of the premises."[24]

Finding no good reason to distinguish between its treatment of residential and commercial leases, the court intoned its *fiat lux*: "[T]here is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose."[25] The court stated that there are two components of this warranty. First, the landlord warrants that, at the lease's inception, "there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose."[26] Second, the landlord warrants that "these essential facilities will remain in a suitable condition."[27] In light of this warranty, the court proclaimed the landlord's warranty of suitability and the tenant's covenant to pay rent to be mutually dependent.[28]

The court said that the question whether a suitability warranty had been breached would be one of fact.[29] According to the court, the factors to be considered include the nature of the defect, its effect on the tenant's use of the premises, how long the defect persists, the age of the structure, the amount of the rent, location of the premises, whether the tenant waived the defect, and whether the defect resulted from any unusual or abnormal use by the tenant.[30]

The outcome in *Davidow* seems equitable in that particular case, cor-

18. 568 S.W.2d 658, 660-61 (Tex. 1978) (establishing an implied warranty of habitability in residential leases).

19. 426 S.W.2d 554, 555 (Tex. 1968) (establishing an implied warranty of good and workmanlike construction for residential housing).

20. *Davidow*, 747 S.W.2d at 375.

21. *Id.*

22. *Id.* at 376.

23. *Id.*

24. *Id.*

25. *Id.* at 377.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* (paraphrasing Kamarath v. Benneth, 568 S.W.2d 658, 661 (Tex. 1978)).

recting as it does the manifest injustice that resulted from the tenant's failure to plead constructive eviction. Whether the court's new doctrine is a wise one (a question that has a decidedly legislative flavor in an age in which the Texas Legislature has not been bashful in the landlord-tenant area), will be long debated. Putting that question aside, one might still puzzle over some of the court's assumptions. For example, improved property, even improved commercial property, has been the subject of leases not just in this "modern" and "contemporary" age, but for hundred of years. It seems doubtful that the doctrine of independent covenants is a creature simply of an agrarian society. Moreover, it is hardly demonstrable that landlords generally have more bargaining power than tenants; scores of building owners in Texas would surely take issue with that assertion.

What lies ahead? Landlords suing defaulting tenants likely will frequently encounter allegations that the warranty of suitability has been breached. These allegations will result in the need for factual determinations, and thereby make litigation more protracted and expensive. It remains to be seen how narrowly the courts and juries will define "vital" and "essential" facilities in winnowing out frivolous claims. It appears clear, however, that a breach of warranty claim will be less severe in its proof requirements than a constructive eviction claim. Will contractual waivers of the warranty be upheld? The language of the opinion indicates that any waiver by a tenant is a factor to be considered, but gives no further guidance. Texas Supreme Court decisions can be cited to support either view.[31]

Brown, the second momentous case decided by the Texas Supreme Court, has two features that are almost as astonishing as the new doctrine it announces.[32] First, in concluding that the tenant had validly terminated a lease, every justice but the lone dissenter, Justice Phillips, egregiously misconstrued the rather plain language of the agreements at issue.[33] Second, having mistakenly determined that the tenant had the right to terminate his lease early, the concurring opinion in *Brown* proceeds to answer a question that was no longer presented: whether a landlord should have a duty to mitigate damages upon a tenant's default.[34]

The concurring opinion, expressing the views of five justices,[35] described the dichotomy between contract law and property law that permits a landlord, unlike an aggrieved party to a contract, simply to sue for rental pay-

31. *Compare* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982) (allowing contractual waiver of implied warranty of good and workmanlike construction of a residential habitation) *with* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987) (prohibiting waiver of implied warranty of good and workmanlike repair of personal property, saying that "[i]t would be incongruous if public policy required the creation of an implied warranty, yet allowed the warranty to be disclaimed").

32. 31 Tex. Sup. Ct. J. 525 (June 22, 1988).

33. The majority's mistake is evident from a simple comparison of the court's opinion with the dissenter's. Had the majority taken care to recite even the dates of the agreements at issue, perhaps it would not have so obviously stumbled.

34. 31 Tex. Sup. Ct. J. at 527.

35. Justice Kilgarlin, who wrote the concurring opinion, and Justice Spears, who joined the concurrence, no longer sit on the Texas Supreme Court.

ments as they come due rather than taking steps to mitigate.[36] The landlord's quietude has been tolerated, the court said, because of the traditional notion that the tenant is the owner of the property during the term of the lease, and thus the landlord need not concern itself with the tenant's abandonment of its own property.[37]

The *Brown* concurrence also noted that a Texas court once suggested that when a landlord seeks a remedy that is based on a contractual theory, the usual contract rules involving mitigation of damages apply.[38] The court stated that the time has come for an acknowledgment that contract law is at least as important as property law to the analysis of leases.[39] The court noted that decisions in a number of other states require landlords to make efforts to mitigate damages, and said that a similar departure in Texas would be similarly founded upon the public policy of not discouraging injured parties from averting economic losses by dint of reasonable mitigation efforts.[40]

The usual difficulty of predicting the consequences of such an abrupt change in the law is compounded in *Brown* because the change was announced in concurring and dissenting opinions, hardly any definition was given to the new duty to mitigate, and the composition of the court has changed considerably since the opinions were announced. Among questions that courts likely will confront are whether a tenant's waiver can relieve a landlord of the duty to mitigate, and whether a landlord is free to lease all other vacant space in its building before leasing the abandoned premises.

A. Formal Requisites of Leases

What makes a lease a lease? In answering that question, Texas courts took two steps forward and one step backward during the Survey period.

In one of the forward steps, *Vallejo v. Pioneer Oil Company*,[41] the Texas Supreme Court addressed the question of whether an instrument entitled "Lease and Operating Agreement" was, in fact, a lease binding on its successors and assigns, or was rather a personal contract binding only upon its

36. 31 Tex. Sup. Ct. J. at 527-28.

37. The court did not acknowledge that the landlord's unique property law remedy has a concomitant limitation: absent a contractual provision allowing a landlord to terminate a lease on tenant's default, a landlord may not so terminate. *Brown*, 31 Tex. Sup. Ct. J. at 527. *See* Dillingham v. Williams 165 S.W.2d 524, 525-26 (Tex. Civ. App.—El Paso 1942, writ ref'd w.o.m.) (absent a forfeiture provision, a landlord's remedy lies only in suit for damages). *But see* Edwards v. Worthington, 118 S.W.2d 328, 333 (Tex. Civ. App.—Amarillo 1938, no writ) ("The effect of a sub-leasing of leased premises, without the consent of the lessor, is to give to the lessor the right to forfeit the lease."); Reynolds v. McCullough, 739 S.W.2d 424, 431-32 (Tex. App.—San Antonio 1987, writ denied) (permitting forfeiture upon assignment without lessor's consent).

38. Employment Advisors, Inc. v. Sparks, 364 S.W.2d 478 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 368 S.W.2d 199 (Tex. 1963). In *Employment Advisors* the landlord sought future rentals from an abandoning tenant under a contractual theory premised on anticipatory repudiation of the lease. The court of appeals sustained the remedy, and noted that such damages would be "subject, of course, to the usual rules concerning mitigation." *Sparks*, 364 S.W.2d at 480.

39. *Brown*, 81 Tex. Sup. Ct. J. at 528.

40. *Id.*

41. 744 S.W.2d 12 (Tex. 1988).

signatories.[42] The agreement at issue denominated the owner of a convenience store as the "Lessor" and a gasoline distributor as the "Lessee." The agreement gave the distributor the right to install self-service gasoline equipment at the convenience store and the exclusive right to sell its gasoline in exchange for a percentage of the dollar sales and a fixed monthly "rent." The agreement described the premises, reserved to the distributor a right of entry to check the equipment, provided that the gasoline in underground storage tanks was the property of the distributor, set forth a lease term and renewal options, and gave the distributor the right to remove its equipment upon termination.

The Texas Supreme Court noted in *Vallejo* that the agreement contained many of the requisites of a valid lease, but that the indispensable requisite of a granting clause was "conspicuously absent."[43] The *Vallejo* court held, therefore, that the court of appeals decision[44] for the oil company conflicted with the 1929 Texas Supreme Court decision in *Brown v. Johnson*.[45] The *Vallejo* court cited *Brown v. Johnson* for the proposition that although no particular words are necessary to create the relationship of landlord and tenant, it must appear to have been the intent of one party to dispossess itself of the premises and the intent of the other party to occupy them.[46] The court held that no terms of the purported lease conferred such a right of possession on the distributor.[47]

Texas courts took another forward step in *Hebisen v. Nassau Development Co.*,[48] addressing the issue of whether the lease failed to identify with certainty the location of the leased premises and consequently violated the Texas Statute of Frauds.[49] The lease agreement identified the premises as "1275 Space Park Drive, Suite 100, Houston, Harris County, Texas." The tenant, seeking a defense for its default, contended that the building was physically located in Nassau Bay, Texas. The landlord countered that the lease agreement correctly set forth the mailing address for the premises; Nassau Bay has no post office, and therefore mail must be addressed to Houston. The *Hebisen* court recited the established rule that an adequate property description must be written and must contain the means or data by which the property may be identified with reasonable certainty.[50] The court sided with the landlord, finding that the lease in question fulfilled such

42. *Id.* at 13.

43. *Id.* at 14.

44. Pioneer Oil Co. v. Vallejo, 736 S.W.2d 227 (Tex. App.—Corpus Christi 1987), *aff'd*, 750 S.W.2d 928 (Tex. 1988).

45. *Vallejo*, 744 S.W.2d at 13 (citing Brown v. Johnson, 118 Tex. 143, 12 S.W.2d 543 (1929)).

46. 744 S.W.2d at 15 (quoting from Brown v. Johnson, 12 S.W.2d at 545).

47. *Id.*

48. 754 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1988, no writ).

49. TEX. BUS. & COM. CODE ANN. § 26.01(b)(5) (Vernon 1987) (providing that "a lease of real estate for a term longer than one year" is not enforceable unless it is in writing and signed by the person to be bound).

50. 754 S.W.2d at 351 (citing Garner v. Rideaux, 678 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)).

requirements.[51]

Texas courts took a step backward in *Magcobar North American v. Grasso Oilfield Services, Inc.*[52] Magcobar, a drilling fluids supplier to the oil industry, leased land on an island near Corpus Christi and began constructing a dock for supplying oilfield service boats. Grasso indicated that it wanted to obtain the dock's fuel-selling concession. Following negotiations, Magcobar allowed Grasso to install its equipment and a trailer for its personnel. The parties had no written agreement about Grasso's presence and no agreement whatsoever about any commission that would be paid to Magcobar.

Grasso paid no commission during its first year on the dock, and Magcobar became disenchanted. Magcobar ordered Grasso to vacate and installed another fuel distributor in lieu of Grasso at a two cents-per-gallon commission. Grasso asserted that Magcobar had breached an oral lease and that Magcobar was estopped to deny the existence of the lease because of the tenant's part performance. The jury found in favor of Grasso and slapped Magcobar with $2.65 million in actual damages and $3.75 million in punitive damages.

On appeal Magcobar urged, as it had at trial, that the statute of frauds precluded any finding that a lease existed. The court of appeals cited authority for the proposition that a promise to make a writing that would comply with the statute of frauds is enforceable in order to avoid an unjust result.[53] The appellate court also found authority, although the authority did not involve conveyances of real property, for the proposition that where a contract's price term is left open, the law presumes that a reasonable price was intended.[54] Blending the two rules, the court held that because a writing that omits essential terms that are to be agreed upon later is enforceable as a contract, estoppel may be grounded upon a promise to sign a writing where the promise is made in contemplation of future determination of a reasonable price.[55] *Magcobar* pushes the doctrine of promissory estoppel into a new dimension and, in the process, grossly contorts the precedent on which it purportedly rests. If *Magcobar* is good law, one wonders what remains of the statute of frauds.

B. Construction and Interpretation

Once again, the fortress of precedent has repulsed an assault by those who would obligate landlords to act reasonably in deciding whether to grant consent to a proposed assignment or sublease. The most recent battleground is

51. *Id.*

52. 736 S.W.2d 787 (Tex. App.—Corpus Christi), *writ granted*, 31 Tex. Sup. Ct. J. 138 (1987), *writ dism'd by agr.*, 754 S.W.2d 646 (Tex. 1988).

53. 736 S.W.2d at 795 (citing "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 938 (Tex. 1972); Retama Manor Nursing Centers, Inc. v. Cole, 582 S.W.2d 196, 200 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.). In both these cases, however, unlike in *Magcobar*, written instruments existed setting forth definitive contract terms; the parties had agreed to sign such instruments, but failed to do so.

54. Bendalin v. Delgado, 406 S.W.2d 897, 900 (Tex. 1966); Hydro-Line Mfg. Co. v. Pulido, 674 S.W.2d 382, 387 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

55. 736 S.W.2d at 796.

Reynolds v. McCullough[56] wherein the original tenant under a ground lease and improvements lease assigned his interest in those leases to a national banking association as security for indebtedness. The lease allowed such an assignment to secure actual indebtedness, but otherwise required the consent of the landlord to any assignment or sublease. When the tenant defaulted on the debt, the bank foreclosed its interests on the leases, and subsequently assigned the leases. The landlord refused to accept rentals tendered by the ultimate assignee, and instead sought to terminate the leases.

The trial court ruled in favor of the landlord. On appeal, the bank first pointed to language in the lease that subordinated the landlord's interest in the premises to the interest of any mortgagee of the original tenant's interest. The court of appeals held that the bank was not a third party beneficiary under the lease and, therefore, could not avail itself of the subordination clause.[57] The appellate court then rejected the bank's claim that the restriction on assignment applied only to the first assignment and consequently was not applicable to any subsequent assignment made by the tank.[58] In support of its view, the court pointed to language in the lease defining "tenant" to include its successors and assigns.[59] The bank then contended that the federal law prohibiting national banks from holding title to real estate for more than five years[60] constituted additional proof that there was to be no restriction on the bank's ability to assign the leases. The appeals court rejected the bank's argument and pointed out that the bank had not been forced into the transaction.[61]

All other arguments having failed, the bank urged the court to follow the lead of the California courts and adopt an implied covenant of reasonable consent on the part of the landlord.[62] The court declined to adopt the implied covenant, however, and noted that section 91.005 of the Texas Property Code[63] sets forth a statutory prohibition against assignments without consent, absent agreement to the contrary.[64]

Boyett v. Boegner[65] confirmed the liberal definition of trade fixtures found in other Texas cases.[66] Upon termination of a lease, the tenant removed five air conditioning condensing units and two interior gas heating blowers from the premises. The condensing units had been installed on concrete pads

56. 739 S.W.2d 424 (Tex. App.—San Antonio 1987, writ denied).

57. In a somewhat murky passage, the court suggested that even if effect is given to the subordination provision, that provision does not permit assignment of the leases by the bank without the landlord's consent. *Id.* at 428.

58. *Id.*

59. *Id.*

60. 12 U.S.C. § 29 (1982).

61. 739 S.W.2d at 428 n.1.

62. *Id.* at 429.

63. TEX. PROP. CODE ANN. § 91.005 (Vernon 1984).

64. Section 91.005, which codifies TEX. REV. CIV. STAT. ANN. art. 5237 (repealed 1984), states: "During the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord." TEX. PROP. CODE ANN. § 91.005 (Vernon 1984).

65. 746 S.W.2d 25 (Tex. App.—Houston [1st Dist.] 1988, no writ).

66. *See, e.g.*, Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

outside the premises, and were connected to the building by a suction line, discharge line, thermostat line, and electrical line.[67] The landlord contended that the blowers and condensers were improvements that became the landlord's property upon installation; the tenant contended that they were trade fixtures whose removal the lease allowed. The court recited the definition of trade fixtures as articles that are annexed to the realty by the tenant for the carrying on of his business and that can be removed without material or permanent injury to the freehold.[68] The court noted that under Texas cases that distinguish between improvements and trade fixtures, the tenant is given great latitude, and said that in this case there was ample evidence that removal of the articles did not damage the building.[69]

Norman's Inc. v. Wise[70] stands for the proposition that a lease clause that terminates the lease upon a condemnation of the premises does not permit termination for a partial taking.[71] The property subject to the taking was a 20-foot strip out of a parking lot across the street from the tenant's clothing store. The court stated that the language in the lease applied only to a total condemnation. The parties could have provided otherwise by including a provision about partial takings. Without such a provision, the court said that the tenant's sole remedy was to seek an apportionment of the damages assessed against the condemning authority based on the reduced value of his lease.[72]

A lease provision placing a tenant in default if it deserts or vacates any substantial portion of the premises was held, in *PRC Kentron, Inc. v. First City Center Associates, II*,[73] to require no proof of the tenant's intent to forsake the premises altogether. In that case, the tenant contended that the words desert and vacate should be construed as synonymous with abandon, thus requiring an intentional forsaking. The tenant contended that its continued payments of rent precluded any finding of intentional forsaking. The court disagreed, holding that the lease clearly provided that the tenant would be in default if it moved out, regardless of how long it was gone, whether it intended to return, and whether it paid rent in the meantime.[74]

Medical Towers, Ltd. v. St. Luke's Episcopal Hospital[75] plunged an appellate court into a complex exercise in construction of a ground lease clause. The clause provided for rental adjustments based on the appraised value of land on which a medical office building had been constructed. The tenant sought a land residual technique that would measure land value without regard either to location or to the values of other area properties. The tenant

67. The opinion does not indicate in what manner the heating blowers were connected to the building.

68. 746 S.W.2d at 27 (citing Granberry v. Texas Pub. Serv. Co., 171 S.W.2d 184, 186 (Tex. Civ. App.—Amarillo 1943, no writ)).

69. *Id.*

70. 747 S.W.2d 475 (Tex. App.—Beaumont 1988, writ denied).

71. *Id.* at 476.

72. *Id.* at 477 (citing Elliott v. Joseph, 163 Tex. 71, 351 S.W.2d 879, 881 (1961)).

73. 762 S.W.2d 279 (Tex. App.—Dallas 1988, n.w.h.).

74. *Id.* at 283.

75. 750 S.W.2d 820 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

supported its interpretation by pointing to a lease provision stipulating that the value of the improvements was not to be included by the appraisers in arriving at value. The landlord argued for a comparable sales approach pursuant to which value is determined by reference to area market conditions. In support of its view, the landlord pointed to a lease provision requiring the appraisers to be familiar with the value of area real estate. The court found that only the landlord's interpretation comfortably harmonized the various lease provisions, and upheld a trial court decision based on the comparable sales approach.[76]

Corum Management Co. v. Aguayo Enterprises, Inc.[77] illustrates how the Texas Deceptive Trade Practices Act (DTPA) has worked its way into leasing law as an additional weapon upon default. In *Corum* the tenant and the landlord had orally agreed that the tenant's sandwich shop would sell pizza and other items. The parties also agreed that the use of the phrase "Sandwich Shop" in the lease's use clause would include the sale of pizza. When the landlord later refused to permit pizza sales, the tenant moved out and brought suit alleging misrepresentation of the lease. The court of appeals upheld the tenant's recovery of treble damages.[78]

Corum also construes section 115.015 of the Texas Property Code,[79] which requires that a plaintiff bringing suit against a trust give notice to each beneficiary known to the trustee within a certain period after commencement of the action.[80] The appellant, which was the trustee, claimed that the tenant had failed to give the requisite notice and had therefore failed to comply with the proper statute. The *Corum* court rejected the trustee's claim because the trustee had failed, in contravention of the same statute, to supply the plaintiff with the names of the beneficiaries after the plaintiff's timely request.[81]

C. Tenant's Damages and Remedies

Downtown Realty, Inc. v. 509 Tremont Building, Inc.[82] may be among the last of a dying breed of constructive eviction decisions if *Davidow*[83] and its implied warranty of suitability takes hold. The lease at issue in *Downtown* specified that the landlord would pay all air conditioning repair costs in excess of $2,000 per year. Several months after the tenant began operating its boarding house, the air conditioning failed, prompting the tenant to make a number of unanswered requests, some in writing, for the needed repairs. In its notices, the tenant offered to pay its $2,000 share of costs, and advised the landlord that the absence of heating and air conditioning was adversely af-

76. *Id.* at 824.
77. 755 S.W.2d 895 (Tex. App.—San Antonio 1988, writ denied).
78. *Id.* at 898.
79. TEX. PROP. CODE ANN. § 115.015 (Vernon 1984).
80. 755 S.W.2d at 900.
81. *Id.* at 901.
82. 748 S.W.2d 309 (Tex. App.—Houston [14th Dist.] 1988, no writ).
83. 747 S.W.2d 373 (Tex. 1988). For a discussion of *Davidow*, see text accompanying notes 8-30.

fecting the tenant's business. Finally, ten months after the air conditioning failed, and seven months after the tenant's first written notice, the tenant abandoned the premises and sued for losses, pleading constructive eviction.

The trial court found that the tenant had been constructively evicted and awarded damages.[84] On appeal, the landlord maintained that the tenant had failed to abandon the premises within a reasonable time after the air conditioning breakdown.[85] Citing cases in which courts held that periods of three months[86] and ten months[87] were held reasonable, the appeals court rejected the landlord's contention.[88] The landlord also contended, with rather plucky inconsistency, that it had not been afforded adequate time within which to make the repairs. The court refused to overturn the jury's finding and, noting that the lease provided the tenant with only fifteen days to cure defaults, suggested that what is fair for the goose might also be fair for the gander.[89] The landlord also contended that the tenant's failure to maintain liability insurance excused the landlord's failure to make the repairs. The court noted that the landlord's act giving rise to the constructive eviction occurred months before the tenant allowed its insurance to lapse, and found it "axiomatic" that an evicting landlord will not be allowed to insulate itself by reason of a subsequent failure of tenant.[90]

Magcobar North American v. Grasso Oil Field Services, Inc.,[91] which represents an ambitious use of promissory estoppel to swallow the statute of frauds,[92] also illustrates the extent to which tort law has encroached on contract law. The *Magcobar* court, while allowing recovery of reliance damages, overturned a jury award of damages to the tenant based on breach of contract, stating that such recovery would be inconsistent with the equity that underlies all exceptions to the statute of frauds.[93] The court permitted the tenant to recover those same damages under its tort claim, however, because the landlord had wrongfully interfered with the tenant's possession of the premises.[94] One wonders whether there is any contract claim that cannot also be fashioned as a tort claim. *Magcobar* thus emerges as the

84. 748 S.W.2d at 311. The elements of constructive eviction are: (1) an intention (which may be inferred from the circumstances) on the landlord's part that the tenant no longer enjoy the premises, (2) a material act by landlord or his agents that substantially interferes with such enjoyment (3) resulting in a permanent deprivation to tenant of such enjoyment, and (4) an abandonment of the premises by tenant within a reasonable time after landlord's act. *Id.* (citing Metroplex Glass Center v. Vantage Properties, 646 S.W.2d 263, 265 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)).

85. *Id.*

86. Briargrove Shopping Center Joint Venture v. Vilar, Inc., 647 S.W.2d 329, 335 (Tex. App.—Houston [1st Dist.] 1982, no writ).

87. Richker v. Georgandis, 323 S.W.2d 90, 96-97 (Tex. Civ. App.—Houston [1st Dist.] 1959, writ ref'd n.r.e.).

88. *Downtown*, 748 S.W.2d at 311.

89. *Id.* at 312.

90. *Id.* at 313.

91. 736 S.W.2d 787 (Tex. App.—Corpus Christi), *writ granted*, 31 Tex. Sup. Ct. J. 138 (1987), *writ dism'd by agr.*, 754 S.W.2d 646 (Tex. 1988).

92. For a discussion of Magcobar North American v. Grasso Oilfield Services, Inc., see *supra* text accompanying notes 52-55.

93. 736 S.W.2d at 796.

94. *Id.* at 801.

worst real estate decision of the year, both in its holding on substantive law and on damages.

At issue in *Right to Life Advocates, Inc. v. Aaron Women's Clinic*[95] was whether a tenant in a general use office building had the right to injunctive relief against anti-abortion protestors. The protestors engaged in picketing and sidewalk counseling on the building's parking lot and interior sidewalks. The court held that the protestors' first amendment right to engage in free expression activities did not extend to the parking lot and sidewalks of a private office building.[96] Further, it found that the tenant had a leasehold right in the parking lot and allowed the tenant to seek injunctive relief because, according to the court, the tenant had shown that the activities of the protestors would cause irreparable injury to the tenant's property and would leave tenant with no adequate remedy at law.[97] In response to the protestors' claims that the building's owner had not sought an injunction, the court found that testimony given by the property manager reflected the owner's tacit approval of the suit for injunction.[98] It is difficult to know how much precedential weight to assign to the *Right to Life* opinion because, of the three judges who heard the appeal, one judge dissented, arguing that the injunction was overly broad and vague, and the other judge concurred only in the result.[99]

D. Landlord's Damages and Remedies

The landlords are not without their unusual victories. In *Hebisen v. Nassau Development Co.*[100] the tenants were attorneys who failed to make a single rental payment, refused to vacate the premises on demand, and continued to stay after losing a forcible detainer action in both justice court and county court at law. The tenants finally left only on the day that a writ of restitution was to issue. The landlord alleged fraud, claiming that the tenants had falsely represented they would pay rent. Based on a fraud finding, the jury awarded punitive as well as actual damages. On appeal, the tenants contended that the only evidence of the landlord's reliance was the covenant to pay rent in the lease agreement, and relied on *Hott v. Pearcy/Christon, Inc.*[101] for the proposition that reliance solely on a written contract is insufficient to support a fraud claim. The appeals court, noting that the *Hott* court had cited no authority for its holding, declined to follow *Hott* and held that the tenants' written promise to pay rent was sufficient to support the jury finding of reliance.[102] The landlord was unable to capitalize on its victory, however, because the jury's award of fraud damages equalled the amount of

95. 737 S.W.2d 564 (Tex. App.—Houston [14th Dist.] 1987), *cert. denied*, 109 S. Ct. 71, 102 L. Ed. 2d 47 (1988).

96. 737 S.W.2d at 569.

97. *Id.* at 570 (citing 49 TEX. JUR. 3d *Landlord and Tenant* § 106 (1986); Southwest Weather Research, Inc. v. Jones, 160 Tex. 104, 327 S.W.2d 417 (1959)).

98. 737 S.W.2d at 570.

99. *Id.* at 573.

100. 754 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1988, no writ).

101. 663 S.W.2d 851, 855 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

102. 754 S.W.2d at 347. The appeals court relied on Dodson v. Sizenbach, 663 S.W.2d 13,

past due rents and the landlord never introduced evidence of fraud damages. The appeals court therefore concluded that those damages actually were contract damages and reversed the punitive damages award.[103]

Section 91.002 of the Texas Property Code, which became effective in 1987, codified article 5236c of the Texas Civil Statutes, which governed lockouts in residential leases. Existing side-by-side with article 5236c was the common law self-help lockout remedy available to landlords in commercial leases.[104] Did the codification of article 5236c in chapter 91 of the Texas Property Code, which appears to apply to commercial as well as residential leases, have the effect of narrowing the commercial landlord's common law lockout remedies? The court of appeals in *Design Center Venture v. Overseas Multi-Projects Corporation*[105] confronted this question and answered no. The trial court held that section 91.002 applied to commercial as well as residential tenancies, and ruled in favor of the defaulting tenant's wrongful dispossession claim arising out of a lockout. The court of appeals, in a carefully researched and written opinion, reversed the lower court.[106] It noted that chapter 91 of the Texas Property Code, which is entitled "Provisions Generally Applicable to Landlords and Tenants," seems to apply to commercial as well as residential tenancies.[107] The court, however, demonstrated that chapter 91 flows from former article 5236c, which specifically dealt with "willful exclusion by residential landlords."[108] As part of the codification that repealed article 5236c and moved it into the Texas Property Code, the legislature gave instructions that no substantive revisions of the codified statutes should be made.[109] Because of these instructions the court stated that section 91.002 did not extend to commercial tenancies.[110] More recently, an opinion by Judge Nathan Hecht for the Dallas court of appeals, *PRC Kentron, Inc. v. First City Center Associates, II*,[111] exhaustively reviewed the ancestry of section 91.002 and reached the same conclusion as the *Design Center* opinion.

Since the *Design Center* opinion, the Texas Legislature has moved the residential lockout statute to chapter 92 of the Texas Property Code,[112] thereby making it clear that the statute applies only to residential tenancies. In an effort to codify the common law regarding lockouts in commercial leases, the

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15 (Tex. App.—Houston [14th Dist.] 1983, no writ) (promise in written contract was sufficient to justify reliance element of fraud). 754 S.W.2d at 349.

103. 754 S.W.2d at 348.

104. *See* Embry v. Bel-Aire Corp., 508 S.W.2d 469 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (mobile home party operator's termination of utilities to trailer space where occupant had no legal right to remain in space was peaceable entry and appropriate); Gulf Oil Corp. v. Smithey, 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1968, writ dism'd w.o.j.) (recognizing that landlord's have a common law self-help lockout remedy).

105. 748 S.W.2d 469 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

106. *Id.* at 474.

107. *Id.* at 472-73.

108. *Id.* at 472.

109. *See* TEX. GOV'T CODE ANN. § 323.007(b) (Vernon 1988).

110. 748 S.W.2d at 473.

111. No. 05-86-01290 CV (Tex. App.—Dallas, Nov. 30, 1988).

112. TEX. PROP. CODE ANN. § 92.008 (Vernon Supp. 1989).

Real Estate Legislative Subcommittee of the State Bar of Texas Real Estate, Probate and Trust Section has proposed a statute that would govern interruption of utilities and lockouts in commercial leases.[113] The proposed section 91.002 is similar to section 92.008 in many respects, but would entitle a locked-out tenant to a new key only after the tenant had paid its delinquent rent.[114]

Does the absence of a forfeiture provision in a lease agreement waive any right on the part of the landlord to declare the lease forfeited upon a default of the tenant? Authority in Texas is divided.[115] In *Reynolds v. McCullough*[116] the court permitted forfeiture upon a lease assignment without the landlord's consent.[117] A concurring opinion found the majority's discussion of the forfeiture cases unpersuasive and noted[118] that the sole clear authority for allowing forfeiture[119] reached its conclusion only because it mistakenly interpreted an earlier case.[120]

Between the date of a tenant's default and the date of trial, the real estate market deteriorates markedly, significantly increasing the amount by which the discounted value of the contract rental stream exceeds the fair market value of the premises. In measuring the landlord's damages, should a court use the value of the premises as of the date of breach, or the lower value as of the date of trial? The court of appeals in *PRC Kentron, Inc. v. First City Center Associates, II*[121] confronted this question in interpreting a lease that stipulated that the fair market value of the premises was as of the date of the breach. The court drew a distinction between making the net present value calculation as of time of the breach and making that calculation under the conditions existing at that time.[122] It held that the calculation should be made as of the time of the breach, but under the conditions existing at the time of trial.[123] To hold otherwise, said the court, would be to require "vaticinal" foresight on the part of a tenant deciding whether to breach and on the part of a landlord making an election of remedies.[124] As a concomitant to its ruling the court noted that, if market rentals were to rise between breach and trial, the tenant should be the beneficiary of the improving market.[125]

113. Tex. S.B. 452, 71st Leg. (1989).
114. *Id.*
115. *Compare* Dillingham v. Williams, 165 S.W.2d 524, 526 (Tex. Civ. App.—El Paso 1942, writ ref'd w.o.m.) (holding that landlord had no right to declare lease forfeited on tenant's non-payment of rent because the lease failed to provide for forfeiture) *with* Hudgins v. Bowes, 110 S.W. 178, 179 (Tex. Civ. App. 1908, no writ) (allowing forfeiture upon a subletting without landlord's consent despite absence of forfeiture provision in lease).
116. 739 S.W.2d 424 (Tex. App.—San Antonio 1987, writ denied).
117. *Id.* at 433.
118. *Id.*
119. Hudgins v. Bowes, 110 S.W. 178 (Tex. Civ. App. 1908, no writ).
120. Moses v. Tucker, 87 Tex. 94, 26 S.W. 1044 (1894).
121. 762 S.W.2d 279 (Tex. App.—Dallas 1988, n.w.h.).
122. *Id.* at 288-89.
123. *Id.* at 289.
124. *Id.*
125. *Id.*

Two other cases decided during the Survey period, *Arnold v. Allen Center Company*[126] and *Lakeside Leasing Corporation v. Kirkwood Atrium Office Park Phase 3*,[127] illustrate that without carefully prepared pleadings, an aggrieved landlord can avail itself neither of favorable facts nor of unequivocal law. The *Arnold* court reversed a lower court ruling for the landlord, noting that the party sued by the landlord was not the tenant under the lease.[128] In *Lakeside Leasing* the appeals court held that pleadings that alternatively sought past due rent or future rentals did not entitle the landlord to both.[129] In each of the cases, the court overruled summary findings of damages, holding that if the plaintiff's pleadings seek unliquidated damages, then the amount of those damages cannot be determined without an evidentiary hearing.[130]

II. TITLE AND CONVEYANCE

Looming like a ponderous giant above the other Survey decisions in this area is *Alvarado v. Bolton*,[131] in which the Texas Supreme Court, over a spirited dissent by four justices,[132] held that the ancient doctrine of merger does not apply to a claim under the DTPA.[133] In *Alvarado* a landowner had entered into earnest money contracts for the sale of various parcels of his land. Some of the contracts expressly provided that the seller would retain ownership of minerals, but others were silent. Each of the deeds expressly reserved the minerals unto the landowner. After oil was discovered on the land, some of the buyers sued to reform the deeds and for damages under the DTPA for breach of an express warranty. The trial court found for the buyers and granted the requested relief.[134] The court of appeals reversed, holding that when a deed is delivered and accepted as performance of a conveyance contract, the contract merges into the deed.[135]

The Texas Supreme Court, in a breathtakingly short opinion, held that the doctrine of merger cannot apply to defeat a DTPA action for breach of an express warranty that was made in an earnest money contract and was

126. 747 S.W.2d 17 (Tex. App.—Houston [14th Dist.] 1988, writ denied).
127. 750 S.W.2d 847 (Tex. App.—Houston [14th Dist.] 1988, no writ).
128. 747 S.W.2d at 19.
129. 750 S.W.2d at 851.
130. *Arnold*, 747 S.W.2d at 19; *Lakeside Leasing*, 750 S.W.2d at 850.
131. 749 S.W.2d 47 (Tex. 1988).
132. The four dissenters were Justices Wallace, Phillips, Gonzales, and Culver.
133. TEX. BUS. & COM. CODE ANN. §§ 17.01-.826 (Vernon 1987).
134. 749 S.W.2d at 47.
135. *Id.* at 48. The doctrine of merger is set forth in Baker v. Baker, 207 S.W.2d 244 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.):

> When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. "No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio and the rights of the parties rest thereafter solely in the deed.*"

Id. at 249-50 (emphasis added) (quoting 2 DEVLIN, LAW OF DEEDS § 850a).

breached by deed.[136] The majority opinion relief chiefly on *Weitzel v. Barnes*,[137] in which the Texas Supreme Court previously held that the parol evidence rule does not prevent admissibility of oral misrepresentations that may also serve as the basis of a DTPA action.[138] Evidently, the court is prepared to justify any radical departure from settled law simply by pointing to an equally egregious departure that has already been accomplished.

The four dissenters in *Alvarado* took issue with the majority's assumption that a warranty had been breached.[139] According to the dissent, the only warranty that existed when the deed was accepted was that set forth in the deed itself.[140] The dissent reasoned that because the DTPA does not create any warranties or contract rights, the DTPA cannot add any to the deed.[141] Since the plaintiff claimed that the deed breached a previous warranty, the dissenters found that the plaintiff negated his cause of action by conceding that there was no warranty upon which to base a suit.[142]

The dissenters also took issue with the majority's reading of *Weitzel*.[143] Nothing in the *Weitzel* case, they said, suggests that a plaintiff may use parol evidence to establish an express warranty in a fully integrated contract.[144] The dissenters pointed out that the misrepresentation claims made by the plaintiff in *Weitzel* did not attempt to vary or contradict the terms of the contract, and it was for that reason that the parol evidence rule was held inapplicable.[145]

Whether *Alvarado* will prove to be but a short-lived aberration, and how much mischief it causes if it survives, remains to be seen.

A. Reformation, Revocation, and Forgery of Deeds

In contrast to the broad-brush approach of *Alvarado*, the Texas Supreme Court in *Cherokee Water Co. v. Forderhause*[146] took care to keep the reformation of deeds within settled doctrinal channels. In *Cherokee* prospective developers of a lake had promulgated a form of warranty deed to be used in their land acquisitions. The deed reserved the minerals to the grantors but allowed the developers a first refusal right in any oil and gas transaction. Sellers who executed the deeds later sought to reform them, claiming that the first refusal right resulted from mutual mistake. The sellers also presented evidence about conversations subsequent to the conveyances wherein the buyers gave assurances that the sellers were under no constraints regarding oil and gas leasing. The trial court found the sellers enti-

136. 749 S.W.2d at 48.
137. 691 S.W.2d 598 (Tex. 1985).
138. *Id.* at 600.
139. 749 S.W.2d at 48.
140. *Id.* at 49.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. 741 S.W.2d 377 (Tex. 1987).

tled to reformation, and the court of appeals affirmed.[147]

The *Cherokee* court noted that the underlying objective of reformation is to correct a mutual mistake made in the preparation of a written instrument so that the instrument truly reflects the parties' original agreement.[148] The court said that this implies an original agreement and then a subsequent mistake in reducing that agreement to writing.[149] In this case, however, the written instrument existed long before the agreement; indeed, the alleged agreement was founded in conversations that took place after the execution and delivery of the deeds.

The importance of a properly acknowledged document was underlined in *Bell v. Sharif-Munir-Davidson Development Corporation*[150] in which the son of an eccentric landowner sued the purchasers of land from his father together with every other person in the subsequent chain of title, claiming that the sale should be unwound because of fraud and forgery. The court sustained a summary judgment entered in favor of the defendants and noted that the acknowledgment on the deed refuted the forgery claim.[151] This acknowledgment constituted sufficient disinterested evidence that the claimant's father had executed the deed for the expressed consideration, even though the person taking the acknowledgment was an interested party.[152] The *Bell* court noted that the rule that makes an acknowledgment conclusive evidence of the facts recited in the instrument was formerly embodied in Texas Civil Statutes article 3723. Although a Texas Supreme Court order adopting the Texas Rules of Evidence repealed that statute effective September 1, 1983, the appeals court found that the doctrine was well-grounded in case law[153] and therefore survived the repeal.[154] Without the rule, the appeals court said titles would be clouded by doubt.[155] Even if the deed had been forged, the court said that forged deeds may be adopted by the purported grantor.[156] In this case, there was evidence of adoption because the grantor accepted the purchase consideration, invested it, paid capital gains on the transaction, and never sought to repudiate the sale during the fourteen months before he was declared *non compos mentis*.

Clark v. Snider[157] also involved a son seeking to void a deed purportedly signed by his parents and claimed by him to be forged. The appeals court affirmed a summary judgment against the claimant, noting that the forgery

147. *Id.* at 378.

148. *Id.* at 379 (citing Brinker v. Wobaco Trust Ltd., 610 S.W.2d 160, 163 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.)).

149. *Id.*

150. 738 S.W.2d 326 (Tex. App.—Dallas 1987, writ denied).

151. *Id.* at 329.

152. *Id.*

153. *See, e.g.*, Stout v. Oliveira, 153 S.W.2d 590, 596 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.) (the rule is necessary to prevent ruinous consequences resulting from doubt and uncertainty surrounding clouded titles).

154. 738 S.W.2d at 331.

155. 738 S.W.2d at 330 (quoting *Stout*, 153 S.W.2d at 597).

156. *Id.* (citing Mondragon v. Mondragon, 113 Tex. 404, 408-09, 257 S.W. 215, 217 (1923)).

157. 738 S.W.2d 49 (Tex. App.—Texarkana 1987, no writ).

claim was barred by the doctrine of res judicata arising from an earlier trespass to try title suit, and that an additional fraud claim was barred by the statute of limitations.[158] The court found that the general rule, which states that a bona fide purchaser of apparent legal title defeats any claim of equitable ownership, applied in this case and justified the summary judgment.[159]

Love v. Woerndell[160] involved a new creature, the "Revocation Deed."[161] A mother filed such an instrument in 1979, purporting to revoke a deed executed by her and her husband sixteen years earlier to their daughter and son-in-law. The grantees brought suit against the mother's executrix to remove the cloud on title, and the executrix asserted counterclaims of failure of consideration, fraud, and mistake. The trial court granted summary judgment on all claims to the grantees. The court of appeals affirmed the summary judgment on the counterclaims, agreeing that the four-year statute of limitations prescribed by section 16.051 of the Texas Civil Practice and Remedies Code barred those counterclaims.[162] The court noted, however, that section 17.002 of that same Code[163] requires that in suits against the estate of a decedent involving real estate, the heirs as well as the executrix must be joined.[164] The plaintiffs in this case failed to join the heirs, and the appeals court reversed the summary judgment for plaintiffs on their suit to cancel the revocation deed.[165]

B. Recordation Generally

The Texas Property Code provides, in section 13.002, that a properly recorded instrument is notice to all persons of the instrument's existence.[166] The DTPA provides, in sections 17.50(a)(1)[167] and 17.46(b)(23),[168] that a consumer may bring an action for any failure to disclose information concerning goods or services if such failure was intended to induce the consumer into a transaction. What happens when the nondisclosed information also happens to be the subject of a properly recorded instrument? The Texas Supreme Court answered that question in *Ojeda de Toca v. Wise*,[169] reversing an appeals court decision and holding that a home seller who failed to disclose a recorded condemnation order could be sued under the DTPA.[170] The supreme court expressly disapproved *Jernigan v. Page*,[171] and cited several cases suggesting that a purchaser's failure to search the deed records

158. *Id.* at 51.
159. *Id.* at 52.
160. 737 S.W.2d 50 (Tex. App.—San Antonio 1987, writ denied).
161. *Id.* at 51.
162. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986).
163. *Id.* § 17.002.
164. 737 S.W.2d at 52.
165. *Id.*
166. TEX. PROP. CODE ANN. § 13.002 (Vernon 1984).
167. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 1987).
168. *Id.* § 17.46(b)(23).
169. 748 S.W.2d 449 (Tex. 1988).
170. *Id.* at 451.
171. 662 S.W.2d 760 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

does not bar a fraud action against his seller.[172] The court also noted that imputed notice under the real property recording statute is not among the enumerated defenses listed in the DTPA.[173]

Notwithstanding *Ojeda de Toca*, recordation remains vitally useful, as is illustrated by *Pearson v. Wicker*.[174] In *Pearson* a joint venturer recorded the venture agreement to publicize a prohibition on conveyances of venture property without the consent of both venturers. When his fellow venturer later purported to convey the venture property, the recording venturer sued the purchaser to clear title. The court of appeals affirmed a judgment in the recording partner's favor, noting that section 12.001 of the Texas Property Code allows recordation of acknowledged documents that concern real property. The venture agreement, which described with some specificity the real property owned by the venture, satisfied these requirements.[175]

C. *Earnest Money Contracts*

Birdwell v. Ferrell[176] is an example of a case in which the contract buyer's deposit of earnest money did little more than establish his initial earnestness. The contract allowed the buyer a certain time in which to conduct a feasibility study and provided that the buyer could terminate if he determined that the property was not suitable for his intended purpose. The buyer later negotiated an extension of the inspection period, and agreed in the extension agreement to file a zoning and subdivision plat on the land before the inspection period's end. Unable to secure financing, and having failed to file the plat by the required date, the buyer terminated the contract during the inspection period. The seller sued and demanded forfeiture of the earnest money. The trial court granted judgment to the seller. The court of appeals reversed.[177] The *Birdwell* court noted that liquidated damages, reasonable in amount, may permissibly be stipulated by contracting parties.[178] In this case, however, the court found that the contract simply failed to identify the earnest money as liquidated damages or to provide for its forfeiture upon default.[179] Thus the earnest money amounted to a penalty rather than liquidated damages, and the burden was on the seller to show the damages he had sustained.[180] Unfortunately for the seller, the record was devoid of any evidence of damages.[181]

In *Gunn-Olson-Stordahl Joint Venture v. The Early Bank*[182] a contract

172. 748 S.W.2d at 451 (citing Graham v. Roder, 5 Tex. 141, 147 (1849); Buchanan v. Burnett, 102 Tex. 492, 119 S.W. 1141 (1909); Boucher v. Wallis, 236 S.W.2d 519, 526 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.)).
173. *Id.*
174. 746 S.W.2d 322 (Tex. App.—Austin 1988, no writ).
175. *Id.* at 323.
176. 746 S.W.2d 338 (Tex. App.—Austin 1988, no writ).
177. *Id.* at 341.
178. *Id.* at 340.
179. *Id.* at 341.
180. *Id.*
181. *Id.*
182. 748 S.W.2d 316 (Tex. App.—Eastland 1988, writ denied).

buyer's obligation to complete a purchase was secured by a letter of credit issued by a designated bank. The letter of credit contained garden variety provisions except for the last clause, which made the credit subject to the seller's compliance with its agreement to construct roads and install utilities. When the buyer defaulted, and the seller brought suit to recover the letter of credit proceeds, the buyer defended by contending that the seller had not strictly complied with the terms of the credit. In a summary judgment proceeding, the trial court ruled based on letter of credit law. But the appeals court said that the letter of credit was not a letter of credit at all. Quoting from a Texas Supreme Court case,[183] the court noted that a true letter of credit is one in which the issuer's obligation to honor a draft depends solely upon the presentation of conforming documentation, and not at all upon assessing factual matters related to the underlying transaction.[184] Here, though, the bank's obligation depended upon a factual determination that the seller had performed its obligations.[185] The appeals court therefore remanded, holding that the credit amounted to a guaranty.[186]

A strong candidate for most bizarre case of the Survey is *Howell v. Homecraft Land Development, Inc.*[187] The plaintiff in *Howell*, recently a candidate for a Texas Supreme Court seat, arrived at the closing table to sell his land and then balked at the results of a survey determining the land's area. An escrow agreement was hastily drafted, and the buyer deposited money with a title company pending the seller's procurement of another survey. The escrow agreement did not establish a firm date for provision of the survey, and the seller did nothing. The buyer obtained another survey confirming the initial results and some months later, confronted with continued inaction by the seller, the title company released the escrow money to the buyer. Even though he still had produced no survey, the seller sued the buyer and the title company under the DTPA. The seller finally provided a survey on the eve of trial, almost twenty-nine months after the closing. The trial court granted declaratory judgment to the buyer, and awarded attorneys' fees based on the seller's bad faith filing. The appeals court concluded that since the escrow agreement failed to specify a time for performance, the seller had a reasonable time within which to procure a survey, but failed to do so within such reasonable time.[188]

Triland Investment Group Bank v. Warren[189] involved multiple parties and a complicated set of facts. After a model exercise in contract construction, the appeals court determined that the appellant was obligated to construct a roadway adjoining the appellee's property.[190] The *Triland* court

183. 748 S.W.2d at 318-19 (citing Republic Nat'l Bank v. Northwest Nat'l Bank, 578 S.W.2d 109 (Tex. 1978)).
184. 748 S.W.2d at 319.
185. *Id.* at 320.
186. *Id.*
187. 749 S.W.2d 103 (Tex. App.—Dallas 1987, writ denied).
188. *Id.* at 108 (citing Maupin v. Dunn, 678 S.W.2d 180, 183 (Tex. App.—Waco 1984, no writ)).
189. 742 S.W.2d 18 (Tex. App.—Dallas 1987, no writ).
190. *Id.* at 20.

reversed a trial court finding that the appellant had fraudulently induced another party to enter into a contract, pointing out that at the time of the alleged inducement, the contract had already been entered into, and only remained to close.[191] The court noted that section 27.01 of the Texas Business and Commerce Code, which governs fraud in real estate transactions, clearly requires that the inducement be made regarding the entering into of a contract.[192] Following the settled law of the state,[193] the *Triland* court also disallowed an award of exemplary damages on a contract claim.[194]

A final case, *Alvarez v. Union Mortgage Co.*,[195] illustrates the perils of acting as a home improvements lender under a Federal Trade Commission rule[196] that makes the holder of a consumer credit contract subject to all claims that the debtor has against the contractor. In *Alvarez* a dissatisfied homeowner sued the contractor for shoddy and unfinished work and recovered $22,000. In the same action, the mortgage company, which had purchased the contract to finance the transaction, sued the homeowner and was awarded $7,950, plus $5,000 in attorneys' fees. The homeowner contended, and the appeals court agreed, that by reason of the FTC rule, the liability of the contractor should inure to the homeowner's benefit and negate the homeowner's liability to the mortgage company. The incredulous mortgage company pointed out that the homeowner had been found guilty of fraud for having told the mortgage company at the time of the contract purchase that the work had been completed in a satisfactory manner. The *Alvarez* court agreed that any fraud liability of the homeowner would not be negated by the contractor's wrongdoing, but noted that the jury had found zero damages for the fraud.[197] The court distinguished the case relied on by the mortgage company[198] as one in which the debtor's fraud precluded it from seeking an affirmative recovery.[199] In this case, the court said, the debtor sought only to avoid the mortgage company's recovery.[200]

III. EMINENT DOMAIN

There were several cases worth noting in the area of eminent domain during the Survey period. *State v. Ralph Watson Oil Co.*[201] dealt with the admissibility of evidence concerning the sales volume of a truck stop in connection with a taking of property to widen a highway. At trial, the land-

191. *Id.* at 25.
192. TEX. BUS. & COM. CODE ANN. § 27.01(a) (Vernon Supp. 1987).
193. *See, e.g.*, Texas Nat'l Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986) (per curiam) (punitive damages cannot be awarded unless actual tort damages are sustained); Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1981) (breach of contract cannot support the recovery of exemplary damages).
194. 742 S.W.2d at 28.
195. 747 S.W.2d 484 (Tex. App.—San Antonio 1988, no writ).
196. 16 C.F.R. § 433.2 (1987).
197. 747 S.W.2d at 487.
198. Home Sav. Ass'n v. Guerra, 733 S.W.2d 134 (Tex. 1987).
199. 747 S.W.2d at 486.
200. *Id.*
201. 738 S.W.2d 25 (Tex. App.—Texarkana 1987, writ denied).

owner's expert testified that because of the taking the configuration of the remaining tract would no longer accommodate large trucks, and therefore sales from the remainder tract would be reduced. The state objected to the admission of this testimony because evidence of business profits are generally not admissible in determining condemnation damages. The court of appeals held that it was appropriate to admit evidence of sales volume, not to determine the precise amount of damages, but as relevant to determining the market value of the remaining land.[202] In upholding the jury's verdict, the court cited the proposition that a court should take into account all elements that may be relevant to arrive at a just calculation of condemnation damages.[203]

State v. Wood Oil Distributing, Inc.[204] also involved a truck stop. The question there was whether the owner would be entitled to additional damages due to impaired access resulting from the taking of property for widening a road. The owner sought to introduce evidence that the truck stop's value had been reduced by reason of more difficult access. The trial court refused to receive the evidence, and the appellate court reversed, finding that the trial court had abused its discretion.[205] In reversing the appellate court and affirming the trial court, the Texas Supreme Court relied on well-settled law that damages that result merely from traffic being required to travel a more circuitous path to reach a condemnee's property are not compensable.[206] The court noted that damages may be recoverable if there has been a substantial deprivation of access, but the determination of whether the deprivation is substantial is one of law rather than fact.[207] The Texas Supreme Court found that the trial court had correctly ruled that there was not substantial impairment in this case.[208]

In *McAshan v. Delhi Gas Pipeline Corp.*[209] the landowner sought to establish the value of a tract of land taken for a compression station by introducing evidence of the amounts paid for rental at other compression stations in the area. The condemnor objected and showed that the highest use of the land was for grazing livestock. The condemnor contended that it would be improper to determine the value of the property taken based upon use as a compression station when, in fact, that was the very use for which the property was condemned. The court of appeals first noted that in taking cases there is a presumption that may be rebutted by a showing of an imminent likely change of the use of the land.[210] The court held that the highest and best use of the land was for grazing livestock and that its marketability for use as a compression station was limited solely to the condemnor and, there-

202. *Id.* at 28.
203. *Id.* (citing State v. Walker, 441 S.W.2d 168 (Tex. 1969)).
204. 751 S.W.2d 863 (Tex. 1988).
205. *Id.* at 864.
206. *Id.* at 865 (citing, among other cases, City of San Antonio v. Olivares, 505 S.W.2d 526, 529 (Tex. 1974)).
207. *Id.*
208. *Id.*
209. 739 S.W.2d 130 (Tex. App.—San Antonio 1987, no writ).
210. *Id.* at 131.

fore, the condemnor would not be required to pay enhanced value.[211]

IV. TRESPASS TO TRY TITLE—ADVERSE POSSESSION

Boyle v. Burk[212] illustrates some basic principles pertaining to the establishment of title to property by adverse possession in trespass to try title actions. The tract of land in question was a small strip between two lots that was burdened with a utility easement. The appellee claimed title to the strip by the adverse possession of him and his predecessors in title. The appellants countered that the utility easement constituted a public use that would prevent establishing title by adverse possession. The appellate court upheld the trial court's determination in favor of the appellee, explaining that Texas law recognizes that private easements may be subject to adverse possession.[213] While noting that Texas law prohibits adverse possession of a public right-of-way, the court found that a utility easement in favor of a power company did not constitute such a public use.[214] The *Boyle* court also found that adverse possession to establish title does not have to be maintained by the same person if there is privity of estate between the prior possessors.[215] The court allowed the appellant to tack his possession to that of a previous owner even though the previous owner had no knowledge that his possession was adverse.[216] Texas law does not require that an adverse claimant know that the land in question is owned by another party, but merely that the claimant thought he was the rightful owner of the land.[217] Accordingly, the court found that the appellant's possession was sufficient to establish title under the ten-year statute of limitations.[218]

Blankenship v. Carpenter[219] dealt with procedural aspects of trespass to try title actions and the type of use and possession of land necessary to establish title by adverse possession. The appellants filed suit to establish title to a ninety-nine-acre tract. The appellees claimed adverse possession and asked for judgment for title to the land. The trial evidence established that the appellees had taken possession of the property in 1957, built and maintained fences enclosing the land, grazed cattle, and exercised sufficient dominion over the property. On these facts, the *Blankenship* court found sufficient support of title by adverse possession under both the ten-year and twenty-five-year statutes.[220]

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211. *Id.*
212. 749 S.W.2d 264 (Tex. App.—Fort Worth 1988, writ denied).
213. *Id.* at 265-66 (citing Walton v. Harigel, 183 S.W. 785 (Tex. Civ. App.—Galveston 1916, no writ)).
214. 749 S.W.2d at 266. The relevant statute is TEX. CIV. PRAC. & REM. CODE ANN. § 16.030(b) (Vernon 1986)).
215. 749 S.W.2d at 266.
216. *Id.* at 267.
217. *Id.* at 266.
218. *Id.* at 267. The ten-year statute is found at TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986).
219. 741 S.W.2d 578 (Tex. App.—Waco 1987, writ denied).
220. *Id.* at 580. The ten-year statute of limitations is found at TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986). Two twenty-five year statutes are contained in *id.* §§ 16.027, .028.

In *Blankenship* the appellants also claimed that the trial court had erred by excluding the appellant's abstract of title, which would show good title in the land, and in failing to nonsuit the entire action after the trial court refused to admit the appellant's abstract of title. The court rejected both of these arguments, finding that the appellants had not complied with the provisions of rule 792 of the Texas Rules of Civil Procedure, which require that in a trespass to try title action an abstract be filed within twenty days after service of notice.[221] The *Blankenship* court also held it was not erroneous for the trial court to refuse to nonsuit the entire case because a plaintiff's claim for affirmative relief cannot be nonsuited by a defendant's unilateral action.[222]

Shouse v. Roberts[223] also raised the issue of the level of dominion over land required to sustain a title by adverse possession. The appellee brought suit claiming adverse possession of a five-acre tract, and the jury found in his favor under the ten-year limitation statute.[224] The evidence indicated that the appellee had leased the tract in question to a third-party tenant who, as required by his lease, constructed, repaired, and maintained fences, grazed cattle and horses on the property, and paid ad valorem taxes and assessments. The *Shouse* court noted that when the sole use of property is for grazing livestock, an adverse claimant must also show sufficient enclosure to maintain title by limitations.[225] The appellate court affirmed the trial court's finding that the property had been so enclosed and approved the jury instruction that grazing alone does not constitute sufficient dominion over real property unless the property has been purposefully enclosed or maintained as a designed enclosure by the adverse possessor.[226]

V. RESTRICTIVE COVENANTS

Momentum is not on the side of the Texas trailer home. Last year's Survey[227] discussed the Texas Supreme Court case of *Wilmoth v. Wilcox*[228] in which a deed restriction prohibiting house trailers was held to include double-wide mobile homes. In a case from this year's Survey, *Dempsey v. Apache Shores Property Owners Association, Inc.*,[229] a developer intent on placing double-wide trailer homes in a Travis County subdivision contended that a prohibition on mobile homes should not preclude his action. The developer argued that legislative definitions of "manufactured homes," "modular homes," and "industrialized housing" rendered the term "mobile

221. 741 S.W.2d at 580-81.
222. *Id.* at 581.
223. 737 S.W.2d 354 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).
224. *Id.* at 355 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986)).
225. 737 S.W.2d at 355-56 (citing McDonnold v. Weinacht, 465 S.W.2d 136, 141-42 (Tex. 1971)).
226. *Id.* at 357-58.
227. Weller, *Real Property, Annual Survey of Texas Law*, 42 SW. L.J. 295, 313 (1988).
228. 734 S.W.2d 656 (Tex. 1987).
229. 737 S.W.2d 589 (Tex. App.—Austin 1987, no writ).

homes" ambiguous.[230] He claimed that the modern double-wide trailer homes were larger, better built, and laden with more amenities than the flimsy mobile homes being manufactured when the covenants at issue were recorded. The court ruled that the subsequent statutory definitions were merely part of a safety regulatory scheme and did not, as a matter of law, create any ambiguity as to the meaning of "mobile homes."[231] The *Dempsey* court said that even if double-wide units fell under the definitions of manufactured, modular, or industrialized homes, they would still also fall under the definition of mobile homes.[232]

The developer also made arguments based on waiver and changed conditions. In support of its waiver argument, the developer cited evidence that eleven mobile homes had been tolerated in the subdivision, and contended that these violations met the legal test of being so extensive in scope as to reasonably lead to the conclusion that the restrictions had been abandoned.[233] The court noted that the subdivision comprised approximately 2,460 lots, 424 of which had been improved by the date of the trial, and ruled that nonconforming uses on eleven of those lots did not constitute evidence of such great weight and preponderance as to justify overturning the jury's finding.[234]

In support of his argument alleging changed conditions, the developer pointed to changes in the mobile home industry, such as the increased regulation and improvements in appearance and construction quality of mobile homes. The court found the argument to be wrongheaded.[235] The *Dempsey* court said that changed conditions must involve changes in the restricted area or the immediately surrounding area making it impossible to secure the benefits sought to be realized through the covenant.[236] Changes in the nature of mobile home construction are not the types of changes comprehended by the doctrine of changed conditions.[237]

Two of the cases from the Survey, *Hoye v. Shepherds Glen Land Co.*[238] and *Spiller v. Lyons*,[239] also involved disputes concerning the interpretation of particular language in restrictive covenants. In *Hoye* the question was whether composition shingles would be permitted in a subdivision that restricted roof materials to wood shingle, slate, or other permanent type. The complaining homeowner first relied on section 5.025 of the Texas Property Code, which makes void any provision in deed restrictions requiring the use

230. These definitions appear in the Texas Manufactured Housing Standards Act, TEX. REV. CIV. STAT. ANN. arts. 5221f, 5221f-1 (Vernon 1987 Supp. 1989).

231. 737 S.W.2d at 593.

232. TEX. REV. CIV. STAT. ANN. art. 5221f, § 3(a) (Vernon 1987).

233. *See* Zent v. Murrow, 476 S.W.2d 875, 880 (Tex. Civ. App.—Austin 1972, no writ) (violations must be shown to be so extensive and must materially affect development to lead to conclusion that restrictions have been abandoned).

234. 737 S.W.2d at 595.

235. *Id.* at 597.

236. *Id.*

237. *Id.*

238. 753 S.W.2d 226 (Tex. App.—Dallas 1988, writ denied).

239. 737 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987, no writ).

of wood shingles on residential property.[240] The homeowner contended that even though the restriction also allowed slate or other permanent type materials, the only practical economic alternative was to use wood shingled roofs, and therefore the entire provision concerning roofing materials was void. The court rejected the homeowner's argument, noting that not all the houses in subdivision had wood shingled roofs.[241] The homeowners also contended that composition shingle type roofs, which generally last longer than wood shingle roofs, constituted a permanent type of roofing material within the meaning of the restriction. The *Hoye* court, however, relied on expert testimony at trial that amply supported the finding that permanent type shingles in the roofing trade excluded composition shingles.[242]

In the rather cryptic *Spiller* case, a jury found that a proposed motel development would create a nuisance and would be violative of the plan or scheme for the use of the property that was set forth in the deed restrictions.[243] The trial court overturned the jury verdict with a judgment n.o.v. The appeals court restored the jury verdict, noting that such an n.o.v. judgment is appropriate only when there is no evidence upon which the jury could have made its findings.[244] The appeals court discussed evidence presented at trial concerning various evils that purportedly would be occasioned by the motel, including increased traffic, an influx of strangers and transients, and a strain on already taxed utilities.[245]

One of the more curious cases from this Survey, *Joe T. Garcia's Enterprises, Inc. v. Snadon*,[246] might be subtitled The Seller Who Had Second Thoughts. The appellee conveyed land in 1977 by warranty deed without any restrictive covenants. Two months later, in a "Correction Warranty Deed" signed only by the appellee, he purported to restrict the use of the same land to a modern first class restaurant, with a restriction that would purportedly expire on January 1, 1977. In 1985, the appellant acquired an option to purchase the property. Several months later, the appellee filed another warranty deed, identical in all respects to the first "correction" deed except that the conditions expired on January 1, 1997, rather than 1977. When the appellant exercised its option to purchase the property, the deed stated that appellant took title subject to the most recently recorded correction deed. The appellant sought a declaratory judgment that the restrictive covenant was invalid. The trial court granted summary judgment to the appellee.

The appeals court reversed.[247] It rejected the characterization of the sub-

240. TEX. PROP. CODE ANN. § 5.025 (Vernon 1984).
241. 753 S.W.2d at 228.
242. *Id.*
243. The opinion does not quote from the restrictive covenants at issue; presumably, they prohibit the creation of nuisances.
244. 737 S.W.2d at 30.
245. If the town in question, Hitchcock, has a Chamber of Commerce, it must be a rather unusual one; the court also pointed to evidence that there were no businesses, activities, or attractions in Hitchcock that would draw potential motel customers.
246. 751 S.W.2d 914 (Tex. App.—Dallas 1988, no writ).
247. *Id.* at 917.

sequent filings as correction deeds, noting that a correction deed "is executed and recorded for the unique purpose of correcting a scrivener's error in the *description* of the property."[248] The *Garcia's* court relied on the common law doctrine that a grantor who has not conveyed the title in the way in which he intended may not correct his mistake by filing a subsequent instrument.[249] Moreover, the *Garcia's* court found that the subsequent filings were outside the chain of title, and therefore the appellant was not bound to inquire whether the appellee had filed any additional deeds.[250] Finally, the court held that the "subject to" language in the correction deeds merely served to acknowledge that the restrictions were of record, but did not in any way ratify the binding nature of the subsequent filings.[251]

Another pair of Survey cases, *Traeger v. Lorenz*[252] and *Buzbee v. Castlewood Civic Club*,[253] considered the conditions under which restrictive covenants become ineffective. In *Traeger* a property owner who was also a developer sued to have restrictive covenants declared invalid on two grounds. First, the developer contended that there had been such a change of conditions in the restricted area that it was no longer possible substantially to secure the benefits intended by the covenants. Second, the developer alleged that there were such substantial violations within the restricted area as to amount to an abandonment of the covenant or a waiver of the right to enforce the covenant. After a trial verdict rejecting the change of conditions claim and upholding the covenants, the developer appealed, contending that the trial court should have submitted a separate question to the jury on the abandonment and waiver claim as well. The homeowners, citing *Lebo v. Johnson*,[254] maintained that the developer was not entitled to such a separate question since the violations complained of existed at the time the developer bought his property.

The appeals court held for the developer.[255] The *Traeger* court said that *Lebo* stands for the proposition that a homeowner may not complain of any change of conditions that occurred before it purchased.[256] The abandonment and waiver theory, however, is separate from that of change of conditions.[257] Because there was evidence in the record of abandonment and waiver, the separate issue should have been submitted.[258]

In *Buzbee* homeowners sued the owners of several commercially zoned lots, contending that those owners were using their property to operate a junkyard in violation of the restrictive covenants. The commercial lot own-

248. *Id.* at 916.
249. *Id.* (citing 26 C.J.S. *Deeds*, § 31).
250. *Id.* at 917.
251. *Id.* at 916 (citing Stout v. Rhodes, 373 S.W.2d 94 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.)).
252. 749 S.W.2d 249 (Tex. App.—San Antonio 1988, no writ).
253. 737 S.W.2d 366 (Tex. App.—Houston [14th Dist.] 1987, no writ).
254. 349 S.W.2d 744 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).
255. 749 S.W.2d at 251.
256. *Id.* at 250.
257. *Id.*
258. *Id.* at 251.

ers contended that the four-year statute of limitations barred the suit because they had begun operating their business in 1977 and the suit was not filed until 1984.[259] The appeals court rejected the defense, sustaining a trial court finding that the character of the lot owners' business had changed in 1982, and that the change in character—from permitted uses to junkyard uses—tolled the statute of limitations.[260] The lot owners also claimed that the doctrine of laches estopped the homeowners. The appeals court held that when a cause of action comes within any specific provision of the statute of limitations, the equitable defense of laches applies only when extraordinary circumstances are present.[261] The *Buzbee* court found no extraordinary circumstances to sustain the defense of laches.[262]

Finally, *Ball v. Farm & Home Savings Association*[263] illustrates the use of a class action under rule 42 of the Texas Rules of Civil Procedure to resolve a dispute involving restrictive covenants in a subdivision with hundreds of lot owners. In *Ball* a dissatisfied homeowner challenged the entry of an agreed judgment achieved by representatives of the removal class, enforcement class, and lienholder class after six years of negotiations. The appeals court rejected the challenges, noting that the theory of virtual representation underlying the class action does not require that all affected parties agree, and finding that the settlement reflected in the agreed judgment was fundamentally fair, adequate, and reasonable.[264] The *Ball* court also rejected a claim that the trial court erred by imposing additional restrictive covenants as part of the settlement.[265] The appeals court noted that to amend restrictions, the instrument creating the restrictions must establish a right to amend and a means of doing so, that any amendments must be in the nature of corrections or improvements rather than destruction of the restrictive scheme, and that the amendments may not be illegal or violative of public policy.[266] The court ruled that the covenants at issue included an amendment provision and the changes made were not illegal or violative of public policy.[267] The court acknowledged that the requisite number of homeowners had not directly approved the amendments. Nevertheless, the homeowners were bound by the agreed judgment by reason of their virtual representation in the class suit.[268]

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259. *See, e.g.*, Hidden Valley Civic Club v. Brown, 702 S.W.2d 665, 668 (Tex. App.—Houston [14th Dist.] 1985, no writ) (four-year statute of limitations is controlling in suits to enforce restrictive covenants).

260. 737 S.W.2d at 368-69.

261. *Id.* at 369-70.

262. *Id.* at 370.

263. 747 S.W.2d 420 (Tex. App.—Fort Worth 1988, writ denied).

264. *Id.* at 423 (citing *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 207 (5th Cir. 1981)).

265. *Id.* at 426.

266. *Id.* (citing Hanchett v. East Sunnyside Civic League, 696 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)).

267. *Id.*

268. *Id.* at 426-27.

VI. EASEMENTS AND ROADS

Access to lakes was a common issue in cases in this area during the Survey period. *Barstow v. State*[269] dealt with the establishment of a road easement by prescription or by an implied or common law dedication. The appellant was the owner of a lot adjoining another parcel of land owned by the Lower Colorado River Authority. When high water made the River Authority's lot inaccessible, the River Authority cut a road across the appellant's lot and sued to establish an easement for the roadway either by prescription or by an implied or common law dedication. In reversing the trial court's judgment in favor of the state, the appeals court discussed both theories.

The appellant's first contention in seeking to avoid the establishment of an easement by prescription was to plead the effect of the Soldier's and Sailor's Civil Relief Act.[270] The *Barstow* court interpreted the plain language of the statute and found that the time period during which the appellant's predecessor in title was in the military service would have to be excluded in determining whether open and adverse possession had been held for the requisite period.[271] The court declined to create an exception to the statute for a career serviceman.[272] The *Barstow* court then determined that the state had failed to meet its burden of proving adverse possession throughout the requisite ten-year period.[273] The court also noted, however, that under a claim by prescription there must be a showing that there is possession adverse and hostile to the property owner.[274] The evidence at trial did not reflect sufficient activity to give constructive notice that the public use of the property was under a claim of right opposed to that of the landowner.[275] The court therefore found the evidence insufficient to support a determination that the state obtained an easement by prescription.[276]

The court next turned to the theory of an implied or common law dedication, noting that the state would need to establish that a prior landowner had intended to dedicate an easement to the public and that the public had accepted the same.[277] The court stated the general rule that the donative intent of a property owner may not be inferred solely from evidence that there

269. 742 S.W.2d 495 (Tex. App.—Austin 1987, writ denied).

270. *Id.* at 499. The Soldier's and Sailor's Civil Relief Act is found at 50 U.S.C. § 525 (1982). The relevant provision of the statute provides:

> The period of military service shall not be included in computing any period . . . for the bringing of any action . . . in any court . . . by . . . any person in military service or by . . . his heirs, executors, administrators, or assigns, whether such cause of action . . . shall have accrued prior to or during the period of such service . . . .

Id.

271. 742 S.W.2d at 499-500.

272. *Id.* at 500.

273. *Id.* at 503.

274. *Id.* at 504.

275. *Id.* at 502. The testimony of ten witnesses merely indicated that they had made use of the road in the past.

276. *Id.* at 504.

277. *Id.*

had been public use without protest or dispute.[278] The court noted that to support a common law or implied dedication, there must be some affirmative evidence showing an intention of the owner to make a donation—something more than a mere omission or failure to act.[279] Reviewing the trial record, the *Barstow* court determined that there was no such evidence on the part of the appellant's predecessors in title.[280]

Issues of easement by prescription as well as by necessity and estoppel were also raised in *Wilson v. McGuffin*.[281] Appellee owned a peninsula surrounded on three sides by water and accessible only by a road crossing the appellant's tract. After the appellant closed the road, the appellee obtained a judgment establishing an easement and right-of-way under theories of necessity, prescription, and estoppel. On appeal, the court first dealt with the claim that an easement existed by necessity. The court noted that three elements are necessary to establish such an easement: unity of ownership prior to separation, necessity of access being more than mere convenience, and existence of the necessity at the time of the severance.[282] The parcels in question had last been commonly owned in 1901, and since the appellee introduced no evidence at trial about access at the time that the parcels were split, the third element of the test was not satisfied.[283]

Turning to the claim of an easement by prescription, the court noted that to establish an easement in this manner the use must be "open, notorious, continuous, exclusive, and adverse for the requisite period of time."[284] The court found that the requirement of exclusivity was not satisfied since both the appellee and appellant had used the roadway.[285]

Finally, turning to the argument of easement by estoppel, the *Wilson* court noted that while easement by estoppel is not a clearly defined doctrine, the essential requirements include a misrepresentation relied upon by an innocent party.[286] Since there was no evidence that the appellant had misrepresented the nature of the road, the appellee argued that there had been a duty to speak about the exclusivity. The appellee pointed out that several tenants of the appellant had built cottages on the peninsula adjoining the lake and their sole right of access was across the road in question. The *Wilson* court noted, though, that the appellant had filed affidavits concerning the ownership and use of the road in question and had granted written consent to the appellee to install cattle guards in the road, referring in that consent to the affidavits.[287] Based on these findings, the court determined that there was

278. *Id.* at 506.

279. *Id.* at 506 (citing Greenway Parks Home Owners Ass'n v. City of Dallas, 159 Tex. 46, 312 S.W.2d 235 (Tex. 1958)).

280. 742 S.W.2d at 507.

281. 749 S.W.2d 606 (Tex. App.—Corpus Christi 1988, writ denied).

282. *Id.* at 609.

283. *Id.*

284. *Id.* at 610.

285. *Id.* One wonders why this argument was not also made in the *Barstow* case. For a discussion of *Barstow*, see text accompanying notes 269-280.

286. 749 S.W.2d at 610 (citing Storms v. Tuck, 579 S.W.2d 447 (Tex. 1979)).

287. 749 S.W.2d at 611.

neither a misrepresentation nor a failure to honor any duty to speak, found that an easement had not been established by estoppel, and reversed and rendered judgment in favor of the appellant.[288]

Lakeside Launches, Inc. v. Austin Yacht Club, Inc.[289] discussed the exact scope of a grant of an "easement and right-of-way." The appellant, having been enjoined from crossing below the 670-foot contour line of Lake Travis to anchor and operate a commercial boat dock, argued on appeal that the reasonable reading of the language of the easement[290] indicated a right to use all of the area covered by the easement. The appellee argued that it should be limited to a right of ingress and egress.

The appeals court found the easement unambiguous and construed the language, "easement and right-of-way," as delineating the scope and purpose of the grant of easement for one of ingress and egress over the dominant estate.[291] The court said that the operation of a commercial boat dock extended beyond reasonable access for ingress and egress.[292] Turning to the appellant's alternate claim of easement by estoppel, the *Lakeside* court stated that the necessary elements constituting an easement by estoppel include a representation that is communicated and that is believed and relied upon.[293] Since there was no evidence that anyone had communicated any representations concerning the easement to the appellant and since there was no duty to speak, the requisite elements were not established.[294]

VII. HOMESTEADS

Three cases decided during the Survey period make clear that the Texas homestead exemption remains a sacrosanct relic on the altar of real property law, unstained even by the misrepresentations or inconsistent claims of its holder.

In *Hruska v. First State Bank*[295] the landowners sought financing for the construction of a house on a five-acre tract. The landowners represented to the lender that they would cause the necessary mechanic's and materialman's contract to be prepared. When construction neared completion, the lender discovered that no such contract existed. The landowners' attorney prepared a contract, backdated it to a date prior to construction, and, included the landowners' and their contractors' signatures. The landowners defaulted on the construction note and the lender filed suit seeking to establish and foreclose an equitable lien against the homestead.

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288. *Id.*
289. 750 S.W.2d 868 (Tex. App.—Austin 1988, writ denied).
290. *Id.* at 870 ("an easement and right-of-way over and across all of the land lying between the above-described 670-foot-contour line and the waters of Lake Travis, irrespective of any variances in the water level which may occur from time to time").
291. *Id.* at 871.
292. *Id.*
293. *Id.* at 872.
294. *Id.* at 872-73. This court was much more definitive about the requisites for an easement by estoppel than the court in Wilson v. McGuffin. For a discussion of *Wilson*, see text accompanying notes 281-288.
295. 747 S.W.2d 783 (Tex. 1988).

The Texas Supreme Court noted that the Texas Constitution clearly provides that a mechanic's and materialman's contract is valid only if executed before the materials are furnished and the improvements constructed.[296] The court said a lien could not be estopped into existence.[297] The supreme court distinguished the decision relied on by the lender[298] as establishing only that, in certain circumstances, a homestead claimant may be estopped to deny the validity of an *existing* lien.[299]

For more than a century the Texas Constitution has distinguished between a rural homestead "not in a town or city," and an urban homestead "in a city, town or village." Does this mean that land within the corporate limits of a town or city cannot be part of a rural homestead? Evidently not; there are a number of decisions that breeze by that constitutional language as if it were not there,[300] and to those decisions may now be added *Fajkus v. First National Bank*.[301] In *Fajkus* the landowner sought to overturn the foreclosure of a 206-acre ranch by asserting that the ranch tract was part of her rural homestead, which also purportedly included a 60-acre tract containing her home. The landowner's late husband had mortgaged the 206-acre ranch tract without either her signature or knowledge.

The lender urged that the 100-acre home tract was an urban homestead because it was located within the corporate limits of a town. While the lender acknowledged that a homestead may comprise separate tracts, the lender contended that one may have an urban homestead or a rural homestead, but never both. The trial court held for the lender, overturning a jury finding that the home tract constituted part of a rural homestead.

The court of appeals disagreed.[302] The court said that although the location of land within an incorporated town is a factor to be considered in distinguishing urban and rural homesteads, it is not dispositive.[303] The court noted that the home tract contained 100 acres, that the home tract was located near the 206-acre ranch tract, which was used by the landowner in a rural manner, that the home tract was on a rural mail route, and that the mail box was one-half mile from the house.[304] The *Fajkus* court said that all of these factors are pertinent to the determination that a homestead is rural in character,[305] and that all of them supported the jury's conclusion.[306]

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296. *Id.* at 784 (citing TEX. CONST. art. XVI, § 50).

297. *Id.* at 785.

298. Lincoln v. Bennett, 156 S.W.2d 504 (Tex. 1941).

299. It is clear that *Hruska* does not represent the outer bounds of borrower misbehavior that will be tolerated in face of a lender's attempt to impose an equitable lien on homestead property. *In re* Niland, 825 F.2d 801 (5th Cir. 1987), discussed in last year's Survey (Weller, *Real Property, Annual Survey of Texas Law*, 42 SW. L.J. 295, 309-10 (1988)), upheld a homestead claim despite the fact that the claimant had committed actual fraud, including the execution of false affidavits and the bribery of a bank officer.

300. *See, e.g.*, Jones v. First Nat'l Bank, 259 S.W. 157 (Tex. 1924); Iken & Co. v. Olenick, 42 Tex. 195 (1875); Roberts v. Cawthon, 26 Tex. Civ. App. 477, 63 S.W. 332 (1901, no writ).

301. 735 S.W.2d 882 (Tex. App.—Austin 1987, writ denied).

302. *Id.* at 884.

303. *Id.*

304. *Id.* at 885.

305. *Id.*; *see* Iken & Co. v. Olenick, 42 Tex. 195 (1875) (quantity of land is relevant in

All else having failed, the lender sought to levy on the 100 acres in excess of the landowner's 206-acre rural homestead rights. But the court said the lender had failed affirmatively to plead its right to levy on such excess acreage, and was therefore barred.[307] Moreover, because such a levy was a compulsory counterclaim under rule 97(a) of the Texas Rules of Civil Procedure,[308] the lender's original failure barred its claim forever.[309]

Finally, here is an easy case[310] for a lender. The borrower seeks to set aside a foreclosure of a seventeen-acre tract by contending that the property is her rural homestead. The lender moves for summary judgment, noting that when the deed of trust was executed, the borrower had established an urban residential homestead by signing and recording an exemption application. Further, at the time of the foreclosure, the borrower and her son lived in a two-bedroom house on the urban property, and enjoyed the house's full utilities and other amenities such as a dishwasher and garbage disposal. Moreover, the borrower's address in the phone directory, in church records, and in other records was indicated as the urban address.

Summary judgment for the lender? Of course not. The borrower alleged in an affidavit that she had orally made known to the lender her intention to make the rural tract her homestead. She alleged further that she had spent about twenty nights on the rural tract in her car, had cooked on a campfire there, and had invited friends to see the property and drink beer.

The appeals court noted that a homestead exemption may be established upon unoccupied land if the owner presently intends to occupy and use the premises within a reasonable and definite time in the future, and has made preparations toward actual occupancy that have proceeded to such an extent as to manifest beyond doubt the intention to complete the improvements and reside upon the place as a home.[311] The court acknowledged that a homestead claimant cannot claim both an urban and a rural homestead.[312] The court found, however, that the lender's evidence did not decisively show that the urban property was the borrower's urban homestead and that mere occupancy of property does not automatically make the property a homestead.[313] The court said that the prime factor in securing the benefits of the homestead exemption is a good faith intention to occupy collaborated by preparatory

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determining whether land's use is urban or rural); Jones v. Monroe, 288 S.W. 802, 804 (Tex. 1926) (the character and use of surrounding property is relevant in distinguishing urban from rural land); First State Bank v. Brown, 490 S.W.2d 248, 250 (Tex. Civ. App.—1973, no writ) (evidence that the mail was delivered on a rural route and that a house was 1,000 feet from the road tended to prove the rural character of property).

306. 735 S.W.2d at 885.

307. *Id.* at 887 (citing O'Neil v. Mack Trucks, Inc., 542 S.W.2d 112 (Tex. 1976)).

308. TEX. R. CIV. P. 97(a).

309. 735 S.W.2d at 887.

310. Farrington v. First Nat'l Bank, 753 S.W.2d 248 (Tex. App.—Houston [1st Dist.] 1988, no writ).

311. *Id.* at 250 (citing Lilly v. Lewis, 249 S.W. 1095, 1096 (Tex. Civ. App.—San Antonio 1923, no writ); Simank v. Alford, 441 S.W.2d 234 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.)).

312. *Id.* at 251.

313. *Id.*

acts.[314] The court found that the borrower's affidavit was sufficient to raise a fact question on this issue, thereby precluding summary judgment.[315]

One judge dissented, noting that the cases relied on by the majority required a manifestation of intent *beyond doubt* to make the property a residential homestead.[316] The dissenter found that the overt acts alleged by the borrower were insufficient to show that the land was being prepared and improved for future occupancy.[317]

VIII. BROKERS

As usual, the real estate brokerage community spawned some interesting case law during the Survey period. *Beard v. Russell*[318] dealt with the real estate recovery fund established by the Texas Real Estate License Act.[319] The appellant recovered a judgment against a licensed broker and sought recovery from that fund. The Texas Real Estate Commission did not deny liability, but because there existed other pending claims against the broker that triggered relevant statutory provisions, the commission requested the court to consider all pending claims rather than paying the appellant's judgment in full, so that the maximum statutory award could be apportioned among all of the claimants.[320] The trial court agreed with the commission. The appellant then brought an action for mandamus seeking to enforce payment of the judgment. Although the appeals court was sympathetic to the commission's position, it chose not to rewrite the legislation simply because the commission's position seemed more equitable.[321] Relying on the plain language of the statute, the court conditionally granted a writ of mandamus that the appellant recover the full judgment from the fund.[322]

The strict application of the Texas Real Estate License Act arguably led to a very harsh result in *Schmidt v. Matise*.[323] The appellant, a licensed real estate sales agent, initially contacted the ultimate purchaser of a tract of land on February 3, 1986. On that date the agent was sponsored by a broker who asserted a co-ownership interest in the tract in question. The appellee, an-

314. *Id.* (citing Cameron v. Gebhard, 85 Tex. 610, 22 S.W. 1033 (1893)).

315. *Id.*

316. *Id.* (citing Lilly v. Lewis, 249 S.W. 1095, 1096 (Tex. Civ. App.—San Antonio 1923, no writ)).

317. *Id.* at 252.

318. 740 S.W.2d 111 (Tex. App.—Austin 1987, no writ).

319. The recovery fund is provided for at TEX. REV. CIV. STAT. ANN. art. 6537a, § 8 (Vernon Supp. 1989). The statute expressly provides in pertinent part "The court shall make an order directed to the commission requiring payment from the Real Estate Recovery Fund of whatever sum it finds to be payable on the claim, pursuant to and in accordance with the limitations contained in this section . . . ." *Id.*

320. 740 S.W.2d at 111-12. The relevant provisions of TEX. REV. CIV. STAT. ANN. art. 6573a, § 8 (Vernon Supp. 1989) limit to $20,000 the maximum claim that can be recovered out of the fund by one claimant arising out of a single transaction and further limit the total amount of all claims based on judgments against one licensed broker or salesman to $50,000.

321. 740 S.W.2d at 113.

322. *Id.* It should be noted that there were pending claims against the broker in question involving 44 consumers with damages in excess of $400,000—legislative revision might well be in order here.

323. 747 S.W.2d 883 (Tex. App.—Dallas 1988, writ denied).

other broker involved in the transaction, objected to the first broker being named in the final purchase contract. The resilient sales agent formed a corporation to be her new sponsoring broker. The agent's corporation was granted a brokerage license on February 7, 1986. On that date a purchase contract was executed naming the two brokers in question and dividing the commission equally. The other broker, who had objected to the sales agent's first sponsoring broker, then disputed the right of the new brokerage company to receive any part of the commission. The trial court granted summary judgment denying the newly formed corporation and the sales agent any part of the commission.[324] The court of appeals strictly construed the Real Estate License Act and affirmed the summary judgment.[325] Even though the sales agent was at all times sponsored by a duly licensed broker, the *Schmidt* court found that the new brokerage company had not been formed at the time the services were performed.[326] The court indicated that had the agent's first sponsoring broker assigned its rights under the contract to the company, the result might have been different.[327]

In *Kinnard v. Homann*[328] a homeowner signed a listing agreement with the appellee brokers, and then became delinquent in her mortgage, thereby triggering a foreclosure. The brokers were aware of the foreclosure proceeding, but did not notify the homeowner until the foreclosure occurred. The homeowner sued the brokers, claiming violations of the DTPA, negligence, gross negligence, failure to disclose facts, breach of fiduciary duty, and other typical plaintiff's claims. The homeowner asserted that the brokers had a duty to inform the homeowner of the pending foreclosure, and pointed to provisions in the Texas Administrative Code dealing with brokers.[329] The *Kinnard* court found this argument persuasive, relying on the law that the Texas Real Estate Commission's regulations become a part of the contract,[330] and on the law that a broker has a duty to inform its client of all information that might affect the client's decision about the listed property.[331] The *Kinnard* court neglected to discuss the homeowner's reasons for failing to make the payments, her lack of knowledge that she had not made the payments, on her failure to provide notice to her mortgageholder of a new address after moving.

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324. *Id.* at 884-85. Section 20(a) of the Texas Real Estate License Act (TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1989) provides that a person may not bring or maintain an action for compensation for services within the scope of the Act without proving that "the person performing the brokerage service was a duly licensed real estate broker or salesman at the time the alleged services were commenced."

325. 747 S.W.2d at 884-85.

326. *Id.* at 885.

327. *Id.*

328. 750 S.W.2d 30 (Tex. App.—Austin 1988, writ denied).

329. *Id.* (citing Tex. Real Estate Comm'n, 22 TEX. ADMIN. CODE § 535.1(f) (Jan. 1, 1976)). This provision states: "A real estate broker owes the very highest fiduciary obligation to his principal and is obliged to convey to his principal all information of which the agent has knowledge and which may affect the principal's decision." One wonders if the principal's decision in this case would be to forego making mortgage payments or to make them in the future to avoid foreclosure.

330. *Id.* (citing Langeur v. Miller, 124 Tex. 80, 76 S.W.2d 1025 (1934)).

331. *Id.* at 32.

IX. MECHANIC'S AND OTHER LIENS

A. Mechanic's Liens

The complexities of the Texas mechanic's lien statutes continue to generate ample litigation. In *Palomita, Inc. v. Medley*[332] the appellant, an unpaid contractor, filed an affidavit claiming a mechanic's lien under chapter 53 of the Texas Property Code.[333] The appellee objected that the affidavit did not describe an identifiable tract of land as required by statute.[334] The *Palomita* court, consistent with a Texas court tradition of sympathy for mechanic's lien claimants, agreed that the property description was inadequate, but held that the statement in the affidavit of the owner's name was sufficient to support the trial court's judgment.[335] The court presumed that there must have been evidence that the owner owned no other parcel fitting the general description.[336]

St. Paul Fire & Marine Insurance Co. v. Vulcraft[337] considered the rather confusing provisions of the Texas Property Code dealing with the time in which contractors and subcontractors must file mechanic's lien affidavits. The case presented a typical fact situation in which a general contractor contracted with a subcontractor for steel work and the first-tier subcontractor (who subsequently went bankrupt) contracted with the appellee to furnish fabricated steel. The appellee delivered the steel on three separate dates in late December 1983 and early january 1984, and after nonpayment filed a lien affidavit in April of 1984. The appellant argued that the appellee subcontractor was required to give notice both under section 53.058 of the Texas Property Code, which requires notice within thirty-six days after the tenth day of the month following the month in which the order was accepted, and under section 53.056 of the Texas Property Code, which requires notice not later than the thirty-sixth day following the tenth day of the month following each month in which all or part of the work was performed or material delivered.[338] The court found that since the subcontractor actually delivered the steel, it was not required to give the type of notice described in section 53.058.[339] The *Vulcraft* court then addressed the failure to give the warning required under section 53.056(d) of the Texas Property

332. 747 S.W.2d 575 (Tex. App.—Corpus Christi 1988, no writ).

333. TEX. PROP. CODE ANN. § 53.054(a)(6) (Vernon 1984).

334. Section 53.054 of the Texas Property Code delineates the requisites for a mechanic's lien affidavit. Subsection (a)(6) requires that there be "a description, legally sufficient for identification, of the property sought to be charged with the lien." *Id.*

335. 747 S.W.2d at 578.

336. *Id.* at 576-77. The court cited Pickett v. Bishop, 148 Tex. 207, 223 S.W.2d 222, 223 (1949), wherein a similar description of a quantity of land out of a larger tract was found sufficient where extrinsic evidence showed that the grantor owned only one piece of land that could fit the description. From there the court presumed in the absence of a complete statement of facts, that there was evidence to support the trial court's judgment. 747 S.W.2d at 577.

337. 748 S.W.2d 290 (Tex. App.—Tyler 1988, no writ).

338. TEX. PROP. CODE ANN. §§ 53.056, .058 (Vernon 1984). *Id.* § 53.058(f) plainly states that the lien of a claimant who accepts an order but fails to give notice under the section is valid as to delivered items if notice is given under § 53.056.

339. 748 S.W.2d at 295.

Code to the effect that the owner may be personally liable and its property may be subjected to lien if payments are not withheld from the general contractor. The court found that the failure to include that notice did not invalidate the lien, although it would bring about a reduction in the lien claim in the amount of the sums advanced by the owner following receipt of the defective notice.[340] The court, however, went on to hold that since the claim in question had been bonded by an indemnity bond with the general contractor as principal, the failure to provide the owner with the notice was harmless.[341] The court said that the bond relieved the owner from liability and there was no prejudice to the owner's rights.[342]

Hunt County Lumber v. Hunt-Collin Elec. Coop., Inc.[343] provides an interesting interpretation of the Texas retainage statutes. The owner entered into a contract for foundation work with the general contractor who, in turn, contracted with the appellant subcontractor to supply certain materials. When the general contractor failed to pay, the subcontractor sent notice of the unpaid balance to the owner and demanded payment. The owner refused, noting that the subcontractor filed its lien claim after the expiration of the thirty-day retainage requirement period. The owner also alleged that the money was not payable to the general contractor because of an alleged failure to perform under the contract, even though the owner had accepted the work in question. The appeals court reversed the trial court's holding in favor of the owner, finding that the amount withheld by the owner was not statutory retainage in accordance with the Texas Property Code.[344] The court characterized the amount withheld as a reduction in the contract price for substandard work, thus reducing the value of the contract to $25,515.[345] The *Hunt Lumber* court then noted that there was no agreement whereby the owner reserved the right to withhold ten percent of either the contract amount or the value of the work for thirty days following completion of the general contractor's work.[346] The court held that the Property Code does not require filing of a lien within thirty days after completion of the work where the owner has failed to comply with the retainage requirements.[347] Further, the court held that the subcontractor could, on proper showing at trial, obtain a lien for up to ten percent of the reduced contract.[348]

B. Other Liens

Citicorp Real Estate, Inc. v. Banque Arabe Internationale

340. *Id.*
341. *Id.* at 296.
342. *Id.* The court cited the Texas Supreme Court's decision in Industrial Indem. Co. v. Zack Burkett Co., 677 S.W.2d 493 (Tex. 1984), noting that requiring warning to an owner who is relieved of liability would be a "meaningless exercise." *Id.*
343. 749 S.W.2d 179 (Tex. App.—Dallas 1988, writ denied).
344. *Id.* at 182; *see* TEX. PROP. CODE ANN. § 53.101 (Vernon 1984).
345. 749 S.W.2d at 182.
346. *Id.*
347. *Id.*
348. *Id.*

D'Investissement[349] points out the necessity for foreign judgment holders to comply strictly with the Texas statutes concerning abstracts of judgments in order to perfect their lien rights. The dispute concerned the priority of judgment liens held by four different lenders, all seeking to enforce claims against property owned in Dallas County by Clint W. Murchison, Jr. The appellant lienholder complained that the abstracts of judgment of two of the other lienholders were insufficient to create valid liens because those abstracts failed to specify the debtor's address, citation information, the number of the suit in which judgment was rendered, and the date of judgment. Moreover, one of the abstracts failed to set forth the name of all defendants, one included a nonparty defendant, one failed to index the names of all defendants, and another indexed the name of a defendant not a party to the judgment.

The court of appeals agreed with the appellant's contention, noting that under Texas law a judgment alone, without the corresponding statutory requisites, does not create a lien.[350] The other lienholders sought to show that the information omitted, although required by statute, was not of a substantial nature, that the affidavits substantially complied with the statutes, that the appellant lienholder had knowledge of the omitted information, and that the notoriety of the particular debtor made inclusion of the omitted information unnecessary.[351] The *Citicorp* court said that the cases relied upon by the other lienholders condoned only minor deficiencies in the abstract, while the abstracts in question completely omitted a statutorily required provision.[352] The court then noted that the appellant lienholder's actual or constructive knowledge of the foreign judgments and abstracts was irrelevant to the determination of whether they created valid liens.[353]

While not strictly a lien case, *Security State Bank v. Valley Wide Electric Supply Co.*[354] touches on construction loan administration and provides warning to lenders. A general contractor awarded a subcontract for electrical work to a subcontractor indebted to the appellant bank. The bank agreed to extend credit to the subcontractor and took an assignment of its construction contract. The evidence showed that the general contractor was led to understand that payments would be made jointly to the bank and the subcontractor and that the bank would then disburse funds to the subcontractor to pay its second-tier subcontractors and materialmen. After funds

349. 747 S.W.2d 926 (Tex. App.—Dallas 1988, writ denied).

350. *Id.* at 929. The relevant statutory provisions are found at chapter 52 of the Texas Property Code; Section 52.001 of the Texas Property Code specifically sets out the filing requirement. TEX. PROP. CODE ANN. § 52.001 (Vernon 1984 & Supp. 1989).

351. 747 S.W.2d at 930. The requisites for the abstract are set out at section 52.003 of the Texas Property Code which provides that an abstract must show: (1) the names of the plaintiff and defendant; (2) the birth date and driver's license number of the defendant, if available to the clerk or justice; (3) the number of the suit in which the judgment was rendered; (4) the defendant's address, or if the address is not shown in the suit, the nature of the citation and the date and place of service of citation; (5) the date on which the judgment was rendered; (6) the amount for which the judgment was rendered and the balance due; and (7) the rate of interest specified in the judgment. TEX. PROP. CODE ANN. § 52.003 (Vernon 1984 & Supp. 1989).

352. 747 S.W.2d at 930-31.

353. *Id.* at 931.

354. 752 S.W.2d 661 (Tex. App.—Corpus Christi 1988, no writ).

were deposited in the subcontractor's account, however, the bank offset the account to pay the subcontractor's outstanding indebtedness to the bank. In upholding a judgment for damages and punitive damages against the bank, the court of appeals noted that a bank can be found guilty of conversion if it has knowledge that funds are held in trust for specific purposes and nonetheless applies those funds to reduce a debt owed to it.[355] Accordingly, practitioners advising banks entering into this sort of arrangement would be well-advised to delineate the exact nature of any agreement the bank may have concerning application of funds received from a party who may think that the funds are disbursable to pay other subcontractors, employees, and materialmen.

X. MORTGAGES

"There is no such deed as a deed in lieu of foreclosure," announced the Texas Supreme Court in *Flag-Redfern Oil Co. v. Humble Exploration Co.*[356] In response to which pronouncement, real estate practitioners might be tempted to recall the story of the Appalachian octogenarian who, when asked by visiting sociologists whether he believed in infant baptism, answered, "Believe in it? Why, I *seen* it."

In *Flag-Redfern* a landowner executed a deed of trust to secure debt, then made a conveyance of a mineral interest from the same land to Flag-Redfern, and finally conveyed the land together with all minerals to the noteholder when unable to satisfy the original debt. A subsequent owner of the land claiming under the noteholder brought suit for declaratory judgment to determine ownership of the mineral interest being claimed by Flag-Redfern. The supreme court emphasized that under the lien theory of mortgages adopted by Texas, the original landowner retained legal title to the land and therefore had the power to convey legal title to Flag-Redfern.[357] The court said that when the landowner then purported to convey the entire legal interest in the land to the noteholder, it was attempting to convey a legal interest it never owned.[358] Therefore, while a foreclosure by the noteholder would have gathered in Flag-Redfern's interest, nothing short of a foreclosure proceeding would suffice.[359] The court rejected an argument that the legal and equitable estates merged when the landowner conveyed the property to his creditor because no merger occurs when there is an intervening estate.[360] The court also distinguished a line of cases[361] holding that a vol-

355. *Id.* at 665 (citing Houston Nat'l Bank v. Biber, 613 S.W.2d 771, 774-75 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)).

356. 744 S.W.2d 6, 8 (Tex. 1988).

357. *Id.* at 8-9.

358. *Id.*

359. *Id.* at 8 (citing Bradford v. Knowles, 25 S.W. 1117 (Tex. 1894)).

360. *Id.* at 9 (citing Silliman v. Gammage, 55 Tex. 365 (1881)). In *Silliman* the supreme court held that an intervening purchaser at an execution sale possesses title superior to that of the mortgagee, where the mortgagee has accepted a deed from the mortgagor in satisfaction of the debt. The court held, however, that the intervening purchaser's superior title was subject to the equitable interest still owned by the mortgagee. The court in *Flag-Redfern* likewise acknowledged that Flag-Redfern's mineral interest, while superior to the interest of the note-

untary reconveyance operates as a foreclosure for the mortgagee. The court said that those cases involve vendor's liens rather than mortgages, and involve intervening creditors (who receive only an equitable interest) rather than an intervening purchaser (who receives a legal interest).[362] Additionally, the *Flag-Redfern* court held that to countenance the existence of deeds-in-lieu would be unfair because it would deprive intervening purchasers of the right to bid at foreclosure sales, to redeem their interests, to insist on a marshalling of assets, or to assert affirmative defenses such as merger or extinguishment of the debt.[363]

The court's opinion, while reaching the right result, is unpersuasive in its reasoning. To begin with, there is no basis in Texas law for distinguishing between a deed of trust and a vendor's lien based on notions of legal and equitable title. If the noteholder in *Flag-Redfern* really had all of the land's equitable title, then Flag-Redfern received no equitable title to the minerals. For a court that purports to be eager to abandon feudal notions of property law in favor of more modern solutions,[364] the resort to notions of legal and equitable title seems curiously atavistic.

Moreover, the parade of horribles that the court imagines will attend a sanctioning of deeds-in-lieu is more a parade of clowns. Deed-in-lieu transactions do not deprive intervening purchasers or lienholders of the right to bid at foreclosure sales; the transferee takes subject to those intervening holders, and the transferee must still instigate foreclosure proceedings to cut off the intervening holders' junior interests. All that the modern deed-in-lieu transaction does is to make clear that in reconveying property to a senior mortgagee, the transferor and mortgagee intend for no merger of title to take place. The same crocodile tears should be shed about the junior lienholder's alleged loss of the right to redeem his interest; he can still redeem that interest at the foreclosure sale by bidding in an amount sufficient to satisfy the senior debt. As for the right to insist on a marshalling of assets, junior lienholders have no such right. And the court's concern about the ability of junior lienholders to assert defenses such as merger or extinguishment of the debt begs the question of whether courts should honor the clearly expressed intention of parties to a deed-in-lieu transaction to effect no merger of

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holder and its assigns, remains "subject to the equitable interest held under the deed of trust." 744 S.W.2d at 9. This qualification leaves open the possibility that the holder of a deed of trust who receives the mortgaged property by deed-in-lieu can later foreclose under the deed of trust and cut off intervening purchasers. Presumably, the mortgagor would have to avoid discharging the debt evidenced by the note while still giving the debtor comfort that no deficiency judgment will be sought, and in accepting the deed-in-lieu would have to disclaim any intention of merging the legal and equitable estates, and in later foreclosing would have to act within the applicable statute of limitations.

361. Jones v. Ford, 583 S.W.2d 821 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.), and cases cited therein.

362. 744 S.W.2d at 9.

363. *Id.*

364. Brown v. Republic Bank First Nat'l Midland, 31 Tex. Sup. Ct. J. 525, 528 (June 22, 1988) (Kilgarlin, J., concurring); Davidow v. Inwood N. Professional Group—Phase I, 747 S.W.2d 373, 375 (Tex. 1988).

estates.[365]

In *Flag-Redfern* the mortgagee made no inquiry about who any intervening claimants might be until years after the deed-in-lieu transaction. Therefore, in that case, the mortgagee acted at its peril and would have been precluded from foreclosing by reason of the expiration of the statute of limitations, and the case's outcome thus seems just. It is unfortunate, however, that the high court made a Sherman's march through deed-in-lieu doctrine to reach the correct result.

A. Duties and Liabilities of Mortgagees

A potential new source of liability for mortgagors was suggested but not quite realized in *Holland Mortgage & Investment Corp. v. Bone*[366] in which the purchaser of a defective home, after finding the builder judgment-proof, sought to hold the mortgagee liable under the (DTPA). The purchaser pointed to a provision in the earnest money contract providing for an inspection by the mortgagee and contended that the mortgagee's inspection was tantamount to a representation to the buyer that the house had been constructed in accordance with good building practices. The mortgagee's first defense was that the homeowner was not a "consumer" under the DTPA because it had not purchased or leased any "goods or services" from the mortgagee,[367] but rather had received a loan of money. The homeowner countered by noting that his objective in borrowing the money was to purchase a house, which is sufficient to qualify as a consumer under a line of Texas Supreme Court cases culminating with *Flenniken v. Longview Bank & Trust Co.*[368] The appeals court agreed, noting that the Texas Supreme Court has been especially quick to designate aggrieved purchasers as consumers where the lender and seller are inextricably intertwined.[369] Indeed, in *Holland* the builder recommended the mortgage company to the homebuyer.

The mortgagee next contended that it had made no false representations. The *Holland* court agreed, noting that the buyer was not even aware that the inspection had taken place and never requested or received results of the inspection.[370] Moreover, the mortgagee was not a party to the earnest money contract. The court concluded with the no longer obvious proposition that a mortgagee has no duty to disclose information of which it is unaware.[371]

Two years ago the Beaumont court of appeals announced that it would

365. The law in Texas had long been that such intent would not only be honored, but would be presumed when not expressly set forth. North Texas Bldg. & Loan Ass'n v. Overton, 86 S.W.2d 738, 740 (Tex. Comm'n App. 1935, opinion adopted) ("[I]t is presumed, as a matter of law, that [the mortgagee in deed-in-lieu transaction] intended to keep the estates separate, if that course is essential to maintain his priority over a junior incumbrancer.").

366. 751 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1987, no writ).

367. TEX. BUS. & COM. CODE ANN. § 17.45(c) (Vernon Supp. 1989).

368. 661 S.W.2d 705 (Tex. 1983).

369. 751 S.W.2d at 518 (quoting from Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 389 (Tex. 1982)).

370. *Id.* at 521.

371. *Id.*.

entertain challenges to the adequacy of consideration received at foreclosure sales. The court was particularly interested in cases in which the borrower showed that the property had been purchased by the lender or its surrogate and that there was a probable significant disparity between the foreclosure sale price and the property's fair market value.[372] The same court affirmed the vitality of that doctrine in *Halter v. Allied Merchants Bank*,[373] which arose out of a foreclosure at which the lender purchased for an amount that the borrower alleged was one-third the property's fair market value. Notwithstanding the summary judgment evidence of value disparity, the appeals court noted that there was no summary judgment evidence that the lender had been the purchaser at foreclosure, and therefore upheld the trial court's ruling in favor of the lender.[374] A dissenting opinion argued that the paramount issue in a case where adequacy of consideration is in question is the amount of the deficiency judgment.[375] The dissent found sufficient evidence by the nonmovant to justify reversing the summary judgment.[376]

B. Wraparound Mortgages

There is nothing in real estate so like a hall of mirrors as a long chain of wraparound mortgages. In two decisions from the Survey period, *Consolidated Capital Special Trust v. Summers*[377] and *Lee v. O'Leary*,[378] Texas courts emphatically announced that they would not immerse themselves in the delicious complexities of the wraparounds when calculating who owes whom what after the dominos fall. Rather, the courts will look solely to the contractual provisions.

In *Consolidated Capital* the holder of a fifth lien wraparound mortgage foreclosed, purchased at the foreclosure sale, and used some of the sales proceeds to pay off the holder of the fourth lien note, which was due on the same date as the defaulted fifth lien note. Beyond doubt, the fifth lienholder would have bid less for the property had not the fourth lien note been due. The maker of the fifth lien note sued for excess proceeds, arguing that in calculating the amount due on the fifth lien note, the amount of fourth lien debt should have been credited along with the amounts of the first three lien debts, which were not yet payable. The fifth lienholder protested vigorously, arguing that it was contractually obligated to satisfy the fourth lien debt. The court observed that the notice of trustee's sale and the trustee's deed

372. Lee v. Sabine Bank, 708 S.W.2d 581, 582 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

373. 751 S.W.2d 286 (Tex. App.—Beaumont 1988, no writ). Neither *Lee* or *Halter* suggests that inadequacy of consideration received at a foreclosure is grounds for setting the foreclosure aside. Indeed, it is solidly settled that inadequacy of consideration alone, absent evidence of an irregularity that caused or contributed to a grossly inadequate sales price, is not sufficient to set aside a foreclosure sale. *See* American Sav. and Loan Ass'n v. Musick, 531 S.W.2d 581 (Tex. 1975), and cases cited therein.

374. 751 S.W.2d at 288.

375. *Id.*

376. *Id.* at 288-89.

377. 737 S.W.2d 327 (Tex. App.—Houston [14th Dist.] 1987, writ granted).

378. 742 S.W.2d 28 (Tex. App.—Amarillo 1987, writ granted).

were both expressly subject to the prior liens, including the fourth lien.[379] The court pointed out that the deed of trust itself wrapped, but did not assume payment of, the four prior notes and liens, and provided that proceeds of a foreclosure sale would be applied first to the debt owed to the fifth lienholder with any excess to be paid to the property owners.[380] The court found no language in any of the instruments that expressly or impliedly empowered the fifth lienholder to retire the fourth lien debt with foreclosure proceeds.[381] To be sure, the deed of trust obligated the payee to make payments on the prior notes out of payments made on the fifth lien note.[382] But that obligation was subject to a crucial proviso: "so long as there is no default under the terms of the [fifth lien] note."[383] The court said that there assuredly was a default under the fifth lien note.[384]

Lee involved a chain of six notes and liens. A default by the property owner triggered a series of other defaults, resulting in a foreclosure by the third lienholder and attendant suits by the subsequent lienholders against one another. The question before the court was whether the proper credit in calculating a deficiency was the bid price at the foreclosure sale or the unpaid balance on a note wrapped by a mortgage. Expressly refusing to enmesh itself in equitable arguments, the *Lee* court chose to cut the Gordian knot of wraparound mortgages with the sword of contract law. The court noted that language from the pertinent documents indicated that the senior indebtedness had been wrapped and taken subject to, but had not been assumed.[385] Therefore, it said, the trial court had correctly credited the balances of the unpaid wrapped notes.[386]

C. Effect on Leases

It has long been clear in Texas that, following a foreclosure, the purchaser at the trustee's sale is free to terminate leases of tenants whose estates arose after the mortgage's recordation, absent any recognition agreement to the contrary.[387] In light of *United General Insurance Agency of Midland, Inc. v. American National Insurance Co.*,[388] it is now also clear that the tenant has a reciprocal right of termination. In *United General* a tenant ceased paying rent after a foreclosure, instead seeking a declaratory judgment that it was no longer bound by the lease. The trial court held that the mortgagee had the sole option of terminating the lease. The appeals court, however, found that for a lease to exist, there must be an agreement to pay rent joined by

379. 737 S.W.2d at 330.
380. *Id.*
381. *Id.*
382. *Id.* at 331.
383. *Id.*
384. *Id.*
385. 742 S.W.2d at 32.
386. *Id.*
387. *See* Peck & Hills Furniture Co. v. Long, 68 S.W.2d 288 (Tex. Civ. App.—Fort Worth 1934, no writ).
388. 740 S.W.2d 885 (Tex. App.—El Paso 1987, no writ).

both purchaser and tenant.[389] The *United General* court reasoned that had rent been tendered and accepted, then both tenant and purchaser would impliedly be bound under the lease.[390] Absent such tender and acceptance, however, neither party is bound.[391] The court acknowledged that the tenant seeking termination would be liable for the reasonable rental value of the premises during the contest of the issue.[392] In light of *United General* it would seem that mortgagees will be more eager to execute nondisturbance and attornment agreements with new tenants.

D. TROs and Bankruptcy

As if there were not already enough new law invented by Texas courts during the Survey period, the San Antonio court of appeals weighed in with *Green Oaks, Ltd. v. Cannan*,[393] which goes where no court has gone before to create a private right of action for violation of a temporary restraining order (TRO). In *Green Oaks* the mortgagee posted for foreclosure of an apartment complex after a default by the complex's owner, who had filed a petition in bankruptcy court. When the bankruptcy court refused to issue a TRO to block the proposed sale, the debtor next went to federal district court seeking ex parte relief. The district court refused to grant the TRO, instead setting a hearing for the morning before the foreclosure. Before the hearing took place, the debtor went to a state district court, which finally granted the TRO. The next morning at the federal court hearing, the debtor's attorneys informed the mortgagee's counsel about the state court TRO, but the mortgagee proceeded with the foreclosure all the same. Presumably because it had no meritorious case for wrongful foreclosure, the debtor sued the mortgagee for damages resulting from a violation of the TRO. The trial court dismissed the claim.

The court of appeals, however, reinstated the cause of action.[394] The court acknowledged that private civil suits arising out of TRO violations are rare, but found that the minor penalties imposed by the Texas Government Code provide inadequate incentive for compliance.[395]

A dissenting judge argued that the two cases cited by the majority, *Edrington v. Pridham*[396] and *Beverly v. Roberts*,[397] stand only for the proposition that a person injured by a contempt may file a civil suit separate from the contempt proceedings.[398] The dissenter emphasized that contempt has historically been viewed as an act that affronts the dignity and authority of the court, and has not been punishable through private damages.[399]

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389. *Id.* at 887.
390. *Id.*.
391. *Id.*
392. *Id.*
393. 749 S.W.2d 128 (Tex. App.—San Antonio 1988, writ denied).
394. *Id.* at 131.
395. *Id.*; *see* TEX. GOV'T CODE ANN. § 21.002 (Vernon 1987).
396. 65 Tex. 612 (1886).
397. 215 S.W. 975 (Tex. Civ. App.—Amarillo 1919, no writ).
398. 749 S.W.2d at 133.
399. *Id.* (citing *Ex parte* Werblud, 536 S.W.2d 542 (Tex. 1976).

Two other Survey cases, *Home Savings of America v. Van Cleave Development Co.*[400] and *Seaborg Jackson Partners v. Beverly Hills Savings*,[401] discuss the requisites for obtaining a TRO. The two cases suggest that real estate foreclosures are generally strong candidates for injunctive relief because the uniqueness of each piece of real estate militates in favor of a finding of irreparable injury. In *Home Savings* additional factors said to make injunctive relief proper were the allegations by the debtor that foreclosure would destroy his credit rating, injure his reputation, and compromise a large real estate development.[402] In *Seaborg Jackson*, where the property to be foreclosed had been certified by the U.S. Department of the Interior as an historical structure, the court was particularly impressed with the uniqueness of the real estate, and additionally influenced by a dispute concerning whether an exhibit was properly held to be incorporated into an agreement to which it was attached.[403] In both cases, the element of probability of recovery on the merits was given relatively short shrift.

Goswami v. Metropolitan Savings & Loan Association[404] and *Huddleston v. Texas Commerce Bank-Dallas*,[405] affirmed the principle that, unless later validated by the court, a foreclosure that occurs during a bankruptcy stay is void. *Goswami*, decided by the Texas Supreme Court, is also noteworthy for its holding that a tenant with an option to purchase the leased property has standing to challenge a foreclosure sale.[406] In *Huddleston* the debtor filed an eleventh-hour bankruptcy on the eve of foreclosure without notice to the mortgagee, which proceeded to foreclose. Upon learning of the bankruptcy filing, the mortgagee petitioned the bankruptcy court to lift the stay, again made demand, and again foreclosed. The debtor contended that the second demand was usurious because it failed to credit amounts received at the first foreclosure sale. The court reminded the debtor of the well-worn rule that unless a bankruptcy court retroactively validates actions taken in violation of a stay, those actions are void.[407] The debtor further argued that the mortgagee was estopped to deny the validity of the first sale because of a recital in the first trustee's deed to the effect that a foreclosure had taken place. Because the debtor failed to plead this argument at trial, the appeals courts refused to consider it.[408] Finally, the debtor argued that the mortgagee failed to honor a duty to conduct the foreclosure sale in a commercially reasonable manner. The court noted that the Texas Uniform Commercial Code does create such a duty, but that the statutory provision is expressly

400. 737 S.W.2d 58 (Tex. App.—San Antonio 1987, no writ).
401. 753 S.W.2d 242 (Tex. App.—Dallas 1988, no writ).
402. 737 S.W.2d at 59-60.
403. 753 S.W.2d at 243-44.
404. 751 S.W.2d 487 (Tex. 1988).
405. 756 S.W.2d 343 (Tex. App.—Dallas 1988, writ denied).
406. 751 S.W.2d at 489 (citing American Sav. & Loan Ass'n v. Musick, 531 S.W.2d 581, 586 (Tex. 1975), for the proposition that when a third party has a property interest, whether legal or equitable, that will be affected by a foreclosure sale, then that party has standing to challenge the sale to the extent its rights will be affected).
407. 756 S.W.2d at 345.
408. *Id.*

inapplicable to the creation or transfer of an interest in or lien on real estate.[409]

E. Miscellaneous Decisions

At issue in *Stricklin v. Levine*[410] was whether the debtor had effectively waived notice of an intent to accelerate. The *Stricklin* court pointed to language in the promissory note waiving demand, presentment for payment, notice of nonpayment, protest, and notice of protest. The court additionally pointed to language in the deed of trust expressly waiving any demand or notice of acceleration of the note following a default.[411] The court said that the language of the note and deed of trust sufficed to excuse the mortgagee from any duty to notify the debtor of his intention to accelerate.[412]

In *Stille v. Colborn*[413] the question was whether a mortgagee who was party to a lawsuit arising out of the mortgage debt could, during the pendency of that suit, institute nonjudicial foreclosure proceedings. The court answered affirmatively, reasoning that to hold otherwise would deprive the mortgagee of his right to elect his remedy.[414] The court relied on language from the deed of trust at issue, which allowed the mortgagee to seek either judicial or nonjudicial foreclosure or commence with one and, before completion, switch to the other.[415]

The Texas Supreme Court decided to give the doctrine of collateral estoppel a little breathing room in *Tarter v. Metropolitan Savings & Loan Association*.[416] In *Tarter* a mortgagee sold its note on the eve of foreclosure, and the transferee proceeded to conduct the foreclosure sale, which gave rise to a wrongful foreclosure suit against the transferee by the debtor. Judgment was ultimately rendered in favor of the transferee. The debtor then filed suit against the original mortgagee, alleging that the mortgagee had orally agreed to permit cure and reinstatement, but had breached that contract and violated the DTPA. Appealing from an adverse jury verdict, the original mortgagee contended that the debtor's claims should have been raised in the suit against the transferee, and that collateral estoppel precluded any litigation of them. The Texas Supreme Court found that the ultimate issues in the second round of litigation were whether the original mortgagee had breached a contract or committed a deceptive trade practice.[417] The supreme court said that these issues were sufficiently unrelated to the question of the validity of the foreclosure sale to make collateral estoppel inapplicable.[418]

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409. *Id.* at 347; *see* TEX. BUS. & COM. CODE ANN. § 9.104(10) (Tex. UCC) (Vernon Supp. 1989).
410. 750 S.W.2d 814 (Tex. App.—Dallas 1988, writ dism'd).
411. *Id.* at 815 (quoting from loan documents at issue).
412. *Id.* at 816.
413. 740 S.W.2d 42 (Tex. App.—San Antonio 1987, writ denied).
414. *Id.* at 44.
415. *Id.*
416. 744 S.W.2d 926 (Tex. 1988).
417. *Id.* at 928.
418. *Id.*

In *Straite v. Krisman*[419] the court said that a "deed" may in fact be a deed, or it may be a mortgage, but it may not be neither. In *Straite* the jury's answers to special issues resulted in a finding that a purported deed of a property worth approximately $50,000 given in exchange for a loan of $15,000 was no deed at all. The jury also answered that there was no loan. The appeals court said that these answers were in such fatal conflict as to require a new trial.[420]

419. 737 S.W.2d 80 (Tex. App.—Houston [14th Dist.] 1987, no writ).
420. *Id.* at 83-84.