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Part I: Private Law Property

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PART I: PRIVATE LAW

PROPERTY

by

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CONTROVERSIAL arguments were offered in Texas property law during the period reviewed, notably those resting on policy grounds. Numerous approaches were also presented focusing on the fine print of contract interpretation, intention of the parties, and complications arising from the reassignment of property. Unusual trends were evident in the areas of water rights, easements, and eminent domain; but regarding landlord-tenant relations and land transactions the judgments were sound and traditional.

I. LANDLORD-TENANT

Obligations of a Landlord—Tenant's Option To Purchase. Often a tenant is granted the first option to purchase the leased property when the landlord indicates a "desire to sell or dispose of his interest." In *Draper v. Gochman*[1] an unusual twist was added to this standard option relationship when the landlord defaulted on repayment of loans secured by the leased property. A creditor bought the landlord's interest at a foreclosure sale, and the tenant alleged that he had been denied his right of first refusal. He argued that the original landlord had set in motion a chain of events indicating a "desire to sell." The court held that the involuntary sale did not ripen the tenant's preferential right to purchase because the power and right to sell were in the mortgagee or trustee. Thus the tenant's right of first refusal continued through the foreclosure and was subject to maturation whenever the new landlord desired to sell.

Contractual Obligations of Tenants and Subtenants. For implied termination of a lease contract the courts will look primarily to the intention of the parties as evidenced by their acts and conduct. Following Texas' reticence in finding implied consent, two cases are worthy of note. A state court refused to find a novation when one tenant assigned his share of the lease to his cotenant, who in turn assigned the entire lease back to the former.[2] Although all exchanging was done with the landlord's consent, the lease was not terminated. The court held that a tenant is not released from

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[1] 400 S.W.2d 545 (1966).

[2] Shooman v. McAughan, 404 S.W.2d 665 (Tex. Civ. App. 1966).

his obligation to pay rent by the fact that he assigned the lease with the lessor's consent.

A federal court interpreted Texas law in a similar vein.[3] The court turned down the defendant-tenant's arguments of implied termination of a lease and constructive eviction which were based on the landlord's attempt to find another lessee after the tenant had vacated and defaulted on payment. The court stated established Texas law that a tenant is not released from a lease unless his offer to terminate is acceptd by the landlord through some act inconsistent with the tenant's continued use. It concluded that when the landlord merely searches for a potential new purchaser or lessee, even if the old tenant is informed of such search, he has not affected the tenant's continued use.

A third case presented the problem of an implied sublease agreement.[4] No instruments of assignment had been delivered to the potential sublessee, who as defendant denied any such relationship. However, evidence of the assignment included portions of the written contract terminating business of the original tenant and a landlord's waiver and consent to assignment of the lease. The defendant's entering into possession and paying rent conclusively determined its status and resulting liability for the rent.

Removal of Improvements. The tenant is liable to his landlord for removal of improvements that he, the tenant, makes on the land when there is no provision for removal in the lease contract. But when a third party, a nephew of the landlord, came on the land and removed the property three days before termination of a lease, the tenant was not held liable.[5] The court of civil appeals emphasized that a tenant is not an insurer of all property on the leased estate in absence of an agreement making him one. Here, the landlord made the mistake of suing the wrong party, although the outcome might have been different if the landlord could have established the tenant's consent to his nephew's taking the equipment.

If the tenant contracts in the lease for the right of removal, a purchaser of the landlord's interest is also bound by that contract. In one case the purchaser-defendant's exercise of dominion over the tenant's improvements (mostly buildings and irrigation equipment) to the exclusion of the tenant made the new landlord liable as a converter.[6]

II. Conveyance of Interests in Property

Established principles of land transactions were tested and left unshaken during the period, but scrupulous care in drafting deeds was emphasized

[3] South Falls Corp. v. Kalkstein, 349 F.2d 378 (5th Cir. 1965). For further discussion see Charmatz, *Conflict of Laws*, this Survey at footnote 67.

[4] Johnson v. Golden Triangle, 404 S.W.2d 44 (Tex. Civ. App. 1966).

[5] Hoge v. Lopez, 394 S.W.2d 816 (Tex. Civ. App. 1965).

[6] Sharkey v. Hollums, 400 S.W.2d 353 (Tex. Civ. App. 1966) *error ref. n.r.e.*

by several cases. By omission of one crucial word in a deed of mineral rights a re-grantor was deprived of his interest.[7] The court of civil appeals decided that where the grantor in an original conveyance of the fee *excepted* and *reserved* an undivided one-half interest in the minerals but the reconveyance deed merely *excepted* an undivided one-half interest in the minerals, the effect was to vest full ownership in the original grantor.[8]

In another case carelessness did not prove fatal. A court of civil appeals held that where a description of property is sufficient in a deed, even though the meets and bounds are not set out, the legal standard of proper description is met.[9] The court noted that the timberland in question was described in terms of size, survey, and county and that a surveyor could further identify it by use of deed information and other instruments in the chain of title.

Two cases discussed the elements of possession and intent as evidence of ownership. The first decision held that although the purported grantee obtained possession and control of a deed which conveyed land to him, the grantor did not intend to convey the land but rather to interest a third party in buying. The deed was held void and the cloud on the title removed.[10] In another case, actual possession of realty was held to be notice to the world that the party in possession was the owner, giving a creditor notice of ownership.[11]

Equitable grounds were used as a basis for two decisions. The first dealt with the importance of misrepresentation of water rights as grounds for rescission of a deed.[12] The court of civil appeals held that failure to inform the purchaser of land that oil companies had the right to draw an unlimited amount of water from underneath the land in question gave the landowner the right to void the transaction. In a second case equity established title in a vendee where no deed existed.[13] A cotenant contracted to sell two acres from a larger tract and the vendee went into immediate possession, paid the total price, and improved the land. Although no deed was executed and no other cotenants signed the contract, the court of civil appeals held that an equitable partition had taken place. To reach this decision the

[7] Coyne v. Butler, 396 S.W.2d 474 (Tex. Civ. App. 1965).

[8] For more discussion of this case see Flittie, *Oil and Gas*, in this Survey.

[9] Wadt v. Brockman, 404 S.W.2d 622 (Tex. Civ. App. 1966) *error ref. n.r.e.* In a description of land where there is a conflict between a course and distance description and a description by acreage, the course and distance description will prevail, Arnold v. Stanford, 398 S.W.2d 843 (Tex. Civ. App. 1966).

[10] Estes v. Reding, 398 S.W.2d 148 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[11] Long Falls Realty v. Anchor Elec., 405 S.W.2d 170 (Tex. Civ. App. 1966). In a personal property case the court also held that mere possession of chattels creates an inference that the possessor has a legal right to the property so that appellant, who did not have possession, failed to establish that he was entitled to the property, Worth Tool & Die Co. v. Atlantis Electronics Corp., 398 S.W.2d 656 (Tex. Civ. App. 1965).

[12] Daniel v. Porter, 397 S.W.2d 89 (Tex. Civ. App. 1965).

[13] Hernandez v. Dominguez, 399 S.W.2d 385 (Tex. Civ. App. 1966) *error ref. n.r.e.*

court avoided not only the deed requirement but also the requirements of three statutes[14] intended to regulate deeds.

III. Adverse Possession

Texas courts generally construe the adverse possession statutes in favor of those claiming land under them, thus supporting the policy that they are statutes of repose. One case staunchly upheld this policy. However, others involving a lack of intent to possess, cotenancy, and claims made after a foreclosure sale showed that these factors can bar claims.

In one case the plaintiff claimed adverse possession of over ten years which entitled him to ownership under article 5510. In 1916 the plaintiff had taken physical possession of 10.3 acres (the boundaries of which were shown him), and for forty-seven years he had cultivated it and paid taxes.[15] In 1940 the plaintiff received and recorded a deed which failed to describe four acres of the land which he had used and believed to be his own. In 1963, when the defendant laid claim to the four acres, the court credited the plaintiff with ten years of peaceable, open, and notorious possession despite the fact that he had not properly checked the deed recitations.

In other cases possession of the premises could not compensate for fatal flaws. A defendant who performed all other requirements to establish his claim was denied title because his statement that he never intended to take anyone else's land was held to be a judicial admission.[16] Another case demonstrated that adverse possession is more difficult to achieve when a cotenant is involved since a claimant-cotenant must prove both repudiation of the cotenancy and notice to his cotenant. The latter element may be actual notice or repudiation of such unequivocal notoriety as to charge the cotenant with notice.[17] In the instant case the claimant failed to prove that his cotenant *understood* that the cotenancy was being repudiated.

When the five-year statute of limitations was asserted under article 5509, requiring claim under deed, a court of civil appeals held that foreclosure on the claimant's land prevented his claiming under deed as required by the statute. The court added that judgment of a foreclosure operates as a legal estoppel to a subsequent assertion of any title which might have existed previously.[18]

IV. Water Rights: Nuisance

Damage by State. Apparently ending an eight-year series of litigation, a court of civil appeals held that the state must compensate a landowner

[14] Tex. Rev. Civ. Stat. Ann. arts. 1288-90 (1962).
[15] Wells v. Harper, 394 S.W.2d 540 (Tex. Civ. App. 1965).
[16] Davis v. Breithaupt, 400 S.W.2d 390 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[17] Walton v. Hardy, 401 S.W.2d 614 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[18] Williams v. National Credit Corp., 405 S.W.2d 858 (Tex. Civ. App. 1966).

when it destroys any dam or other impounding device which is reasonably necessary to the use and enjoyment of water.[19] A 1962 supreme court case growing out of the same controversy had held that the owners had vested rights to have the waters of the San Antonio River flow in its accustomed channel.[20] The instant case backed up the supreme court decision by holding that destruction of a dam which diverted water to them damaged a servitude in the bed of the river for which the sovereign was liable to make just compensation under eminent domain.

Dams on Navigable Streams. A significant civil appeals case may have the effect of requiring destruction of many dams built on navigable streams.[21] The court disallowed a permit to impound waters from the Medina River for irrigation purposes on grounds that section 1 of article 7500a[22] does not vest title to the river beds in the adjacent landowners. Title to the beds of navigable streams remains in the state, and since the dam is therefore not on "his [the landowner's] own property" the Texas Water Commission may not grant permits to impound the waters.

Injury to Adjacent Landowners. Two cases emphasized the difficulty facing adjoining landowners who seek damages, due to the requirement in Texas that negligence and resulting damages must be shown.[23] One case held that an unprecedented rainfall causing a dam to break was an act of God,[24] and another stated that a plaintiff must show substantial damage before he can force his neighbor to remove a dike which had backed up surface water.[25] But when a company built a rendering plant near the plaintiff's property and noxious fumes were blown over the adjacent land, a court of civil appeals ruled that nuisance existed as a result of the intervention of wind and atmospheric conditions. Therefore, since it was only temporary nuisance, the statute of limitations did not begin to run at the time the plant was built.[26]

V. Easements and Dedications

Street Dedication. A case of first impression used analogy and balancing of interests to decide whether a street could be dedicated to the city.[27] At

[19] San Antonio River Authority v. Hunt, 405 S.W.2d 700 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[20] San Antonio River Authority v. Lewis, 363 S.W.2d 444 (Tex. 1962).

[21] Garrison v. Bexar-Medina-Atascosa Water Improvement Dist., 404 S.W.2d 376 (Tex. Civ. App. 1966) *error ref. n.r.e.*, 20 Sw. L.J. 938.

[22] Tex. Rev. Civ. Stat. Ann. art. 7500a, § 1 (Supp. 1966): "Anyone may construct on his own property a dam or reservoir to impound or contain not to exceed two hundred (200) acre-feet of water for domestic and livestock purposes without the necessity of securing a permit."

[23] Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936) overrules the *Rylands v. Fletcher* doctrine of strict liability in Texas.

[24] Benavides v. Gonzales, 396 S.W.2d 512 (Tex. Civ. App. 1965).

[25] Cabla v. Shockley, 402 S.W.2d 289 (Tex. Civ. App. 1966).

[26] Youngblood's, Inc. v. Goebel, 404 S.W.2d 617 (Tex. Civ. App. 1966) *error ref. n.r.e.* For further discussion see Rasor, *Torts*, this Survey at footnote 63.

[27] Palafox v. Boyd, 400 S.W.2d 946 (Tex. Civ. App. 1966).

issue was whether a developer, having sold land to two purchasers who expected to live on a dead-end street, could dedicate adjoining property without their approval. The court ruled affirmatively, that any injury was *damnum absque injuria.* By analogy to deed restrictions, it reasoned that the developer could dedicate unsold building lots to be used as streets subsequent to the filing of the original plat and added that it would be impractical to require a developer to obtain permission of all interested persons before making the dedication.

Implied Easements. Bickler v. Bickler[28] followed the rules of implied easements, that use must be apparent, continuous, and necessary. In the case the Texas Supreme Court rejected a claim that the landowner had another driveway easement by way of an adjoining piece of land which he owned. The court held that this alternate easement was to be used only in connection with the adjoining lot and that it would abuse this easement to impose upon it traffic coming from the lot in question. The court noted that the driveway easement to the adjoining lot did not specify that the easement could be used for access to other lots, suggesting that where there is an express easement the terms will be strictly construed.

Use of Easements. Two courts of civil appeals construed easement contracts strictly, limiting liability for a legitimate use in one and constricting use in another. The first opinion showed a tendency to protect a grantee by limiting his liability to a tenant. The landloard gave an oil company a pipeline right-of-way, expressly releasing the company from liability for damages except those caused by negligence. The tenant on the land consented to the easement on condition that the company pay for any crop damage. In a suit by the tenant against the company to recover damages other than to crops, the court refused relief because, "Every easement carries with it the right to do such things as are reasonably necessary for the full enjoyment of the easement."[29] There are limits to that enjoyment, however, as indicated by another case. There, an express easement permitted the grantee "to use the railroad switch track and grounds" and expired when the track was closed. The court held that the grantee could not retain the easement in order to accommodate truck traffic because when an easement is granted for a special purpose the grantee is restricted to such purpose, without the necessity for specific negation in the grant of all other purposes.[30]

VI. Land Utilization

Zoning. The conclusive effect of a zoning board's decision was highlighted in a civil appeals case where the court held that only in cases of

[28] 403 S.W.2d 354 (Tex. 1966).
[29] Phillips Petroleum Co. v. Terrel, 404 S.W.2d 927 (Tex. Civ. App. 1966).
[30] Kearney & Son v. Fancher, 401 S.W.2d 897 (Tex. Civ. App. 1966) *error ref. n.r.e.*

"clear abuse of municipal discretion" may a court upset such a board's decision. Otherwise, the courts will not substitute themselves as the triers of facts.[31]

Two other civil appeals cases were significant, one dealing with notice of zoning hearings and the other with judicial relief from adverse zoning regulation. The plaintiffs in the first case[32] alleged that two notice statutes did not provide due process and that under one statute the requirements were not strictly met. The court denied both of these arguments. The court said that article 1011d, permitting notice by publication for hearings to amend zoning regulations, and 1011f, requiring notice to those persons listed on the latest approved city tax rolls for zoning commission hearings, met constitutional standards. The court took the pragmatic view that stricter notice requirements would be impractical. The second allegation, regarding article 1011f, was discarded because the plaintiffs, even though they owned property within 200 feet of the area involved and would have received individual notice under the statute, were not listed in the latest approved city tax rolls as owners of the property.

The second case[33] permitted the owner of a slaughterhouse to obtain injunctive relief against the city's order that such use be terminated without the plaintiff having to first obtain a fact determination from a board of adjustment. The court held that the injunction could be based upon implied facts and that it is within the trial court's discretion to order the injunction. The court held that the trial judge did not abuse his discretion because the city was threatening criminal action against the plaintiff which would have damaged him.

Restrictive Covenants, Subdivisions and Injunctions. Restrictive covenants as a private method of controlling land use were tested in several cases, and the results indicate that property owners and developers may restrict their neighbor's use of property with covenants almost as effectively as the public can through zoning. One court restated the rule that when restrictive covenants are placed in all deeds, every purchaser in a subdivision is bound by them and is able to enjoy their benefits. And since the rule against perpetuities does not affect restrictive covenants, there is no time limit on their existence.[34]

A case with a peculiar fact situation permitted a neighbor to enforce a covenant restricting obstructions to access and enjoyment of lake facilities.[35] A fence built on dry land was later inundated when the lake rose

[31] Frost v. Village of Hilshire, 403 S.W.2d 836 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[32] Lawson v. City of Austin, 404 S.W.2d 648 (Tex. Civ. App. 1966). For further discussion see FitzGerald, *Administrative Law*, this Survey at footnote 35.

[33] Allums v. City of Carthage, 398 S.W.2d 798 (Tex. Civ. App. 1966).

[34] Cornett v. City of Houston, 404 S.W.2d 602 (Tex. Civ. App. 1966).

[35] Shepler v. Falk, 398 S.W.2d 151 (Tex. Civ. App. 1966) *error ref. n.r.e.*

and the court held that it then became an obstruction to use and enjoyment.

One case outlined the rules concerning residential and commercial use of land.[36] A lot owner in a residential subdivision converted her garage into a beauty parlor. She did not advertise or block streets and only three or four customers a day came to the shop. In construing two clauses of the deed restriction, one prohibiting "noxious and offensive activities" and another permitting use for residential purposes only, the court held that the beauty parlor was commercial in nature. The court did, however, note several exceptions, under the test that business uses "clearly incidental" to the use of the house as a residence are permitted. Examples include the following: professional men seeing clients at home, business men working or entertaining for business purposes, or salesmen keeping samples at home.

In two cases involving a conflict between private landowners and public interest, the latter was given priority. A developer sought to dedicate a street to the city, although landowners in the subdivision purchased with the expectation that there would be no such dedication as indicated by a filed plat. The court permitted the dedication for the public's benefit.[37] Another landowner who had an expensive residential house in a rural area sought an injunction against construction of an automobile race track and a drag strip. The court denied the injunction regarding the race track because there was sufficient evidence of the recreational and economic value to the public. However, the court granted the injunction against the drag strip.[38]

VII. Eminent Domain

The right of the state to enforce its rights of eminent domain was generally uncontested during the period, but several cases discussed guidelines in appraisal of condemned land. In *Texas v. Meyer* the strategy of a landowner in a condemnation suit—waiving all damages to the uncondemned part of his land and asking for compensation only for the land actually taken—met with success in the form of a $1,000,000 recovery.[39] Because of the waiver, the trial court refused to permit the state to reveal to the jury that the condemned land was part of a much larger piece of land, the access to which would be *improved* by building the road. On appeal the supreme court stated that the appraiser of condemned land must determine the following two factors: (1) the fair market value of the strip actually taken, regardless of any benefits derived from the improvements contemplated by the condemnee, and (2) damages for any diminution in value of the land-

[36] Vaccaro v. Rougeou, 397 S.W.2d 501 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[37] Palafox v. Boyd, 400 S.W.2d 946 (Tex. Civ. App. 1966).
[38] Lee v. Bowles, 397 S.W.2d 923 (Tex. Civ. App. 1965).
[39] 403 S.W.2d 366 (Tex. 1966).

owner's remaining property by virtue of the severance, or the use to which the strip taken is to be put. Such diminution may be offset by increased value of the remaining land by reason of the improvement to be constructed on the land taken. Therefore, the court held that any possible improvement in access to the remainder could be considered only in connection with diminution of value of the remaining land. Since the landowner waived damages to the remainder, improved access did not come into question.

A second major appraisal principle was stated by the court in the same case. It refused to permit the state's appraisers to suggest an average price per acre of the entire tract and then apply a uniform rate per acre to the entire acreage including the front-lying acreage which was actually taken. In making this decision the court disapproved a prior line of Texas cases.[40] It reasoned that since no damage to the remainder was claimed by the landowner, its evaluation was not necessary.

In measuring damages for condemnation one court of appeals expressly restricted the "cost to cure" formula to temporary damage.[41] Moreover, the court found the damage to be permanent even though there was some evidence that it could have been cured. Finally, a federal case dealt with the question of who must bear the cost of a survey needed to determine the amount of land being condemned. Construing Texas law, the court held that reimbursement for a special survey to replace the government's inadequate one is the obligation of the condemning authority and part of just compensation.[42]

VIII. Public Lands

Two cases construed article 5421c dealing with vacant public school lands. A court of civil appeals considered the issue of whether previously submerged lands along the Gulf of Mexico, which due to accretion had become exposed and were vacant lands, were subject to claim by the upland owners.[43] After reviewing the statutory history for claiming vacant, unpatented lands the opinion noted the strong Texas public policy that courts have "zealously guarded . . . the rights of this State to the public lands." The court then held that these mud flats could not be claimed as vacant and unsurveyed public school lands under the statute.

Uncertainty in Spanish land grants of 1769, which allegedly left unpatented land between portions granted, was the subject of a suit by a claim-

[40] McFaddin v. State, 373 S.W.2d 259 (Tex. Civ. App. 1963) *error ref. n.r.e.*; Harris County Flood Control Dist. v. Hill, 348 S.W.2d 806 (Tex. Civ. App. 1961).

[41] San Antonio River Authority v. Hunt, 405 S.W.2d 700 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[42] United States v. Lee, 360 F.2d 449 (5th Cir. 1966).

[43] Butler v. Sadler, 399 S.W.2d 411 (Tex. Civ. App. 1966) *error ref. n.r.e.*

ant who sought to have the land declared vacant.[44] The court of civil appeals held that the original grant was intended to be joined, leaving no gaps of untitled land, and that when two tracts have a common boundary the state cannot pull them apart. Due to this presumption and the fact that the land had been occupied and used in the past under claim of ownership, there was no title in the state which would permit a claim under article 5421c. Since the state had no claim and the plaintiff had no claim superior to that of the possessor, the allegation failed.

IX. Mortgages and Liens

Chattel Mortgages. A warning to automobile and house trailer financers was issued in two cases where the Certificate of Title Act,[45] a penal statute, proved to be an insuperable barrier to recovery by a later mortgagee. Both cases, in the Amarillo and the Fort Worth courts of civil appeal, involved the same parties and similar fact situations, but the attacks dealt with different sections of the act. In the Amarillo case[46] a mobile home dealer sold trailers to purchasers whose notes and chattel mortgages were assigned to a bank. Upon default by the purchasers the dealer repossessed and resold the trailers but this time assigned a new set of notes and mortgages to the plaintiff. The bank, which did not receive the payments from plaintiff to wipe out its lien, took possession of the trailers and resold them. The plaintiff claimed that its lien had priority because (1) the plaintiff had not had actual knowledge of the bank's prior lien, and (2) the bank had consented to the resale and thereby had waived its lien. The court dismissed precedent involving waiver in a similar situation,[47] stating that the Certificate of Title Act superceded former chattel mortgage registration statutes in regard to motor vehicles and house trailers. Since the act's requirements[48] were not met there was no waiver. The court charged the plaintiff with knowledge of the bank's lien and declared the plaintiff's lien void.

Under similar facts, with the addition of a forgery by the dealer of one of the documents required under the act to acquire title, the Fort Worth court held that the bank could not be deprived of its pre-existent lien when it did not participate in or consent to the forgery.[49] It added that even when spurious documents are presented to acquire title, a state agency may not destroy the rights of an innocent mortgagee. Another civil appeals case, dealing with different sections of the penal code, permitted the acts of state

[44] Strong v. Delhi-Taylor Oil Corp., 405 S.W.2d 351 (Tex. Civ. App. 1966).

[45] Tex. Pen. Code Ann. art. 1436-1 (1953). For a commentary on the act, see Couch, *The Texas Certificate of Title Law*, 3 Vernon's Penal Code Ann. XIII (1953).

[46] Associates Inv. Co. v. Galloway, 403 S.W.2d 542 (Tex. Civ. App. 1966).

[47] Seichrist-Hall Co. v. Harlingen Nat'l Bank, 368 S.W.2d 155 (Tex. Civ. App. 1963) *error ref. n.r.e.*

[48] Tex. Pen. Code Ann. art. 52-53 (1953).

[49] Associates Inv. Co. v. Michigan Nat'l Bank, 397 S.W.2d 552 (Tex. Civ. App. 1965).

agents acting under statute to destroy the rights of an innocent mortgagee who did not participate in or consent to the wrongful acts of the possessor of the chattels.[50] The penal code requires seizure and destruction of equipment used for gambling.[51] Here a billiard hall operator was using mortgaged pool tables and equipment for gambling. The court held that seizure by the authorities extinguished the mortgagee's rights to foreclosure under the terms of the pertinent statutes.

Mechanics' and Materialmen's Liens. Whether a recorded mechanics' and materialmen's lien to secure a building contract has priority over a later affidavit lien for labor and materials was decided in a civil appeals case. Although the primary contractor's lien was recorded, the court held that this lien had no priority over the affidavit liens because both types of lien relate back to the date of the original contract under which work was done or material furnished.[52]

Two lien holders failed in attempts to attach property, apparently through a misreading of the statutes regarding what property is subject to the liens. In one case a construction company failed to enforce its mechanics' lien on furnishings which were installed by another company because the latter had not subordinated its rights to those of the construction company.[53] In another, a subcontractor was denied recovery against an owner, for whom the entire contract was performed, when the primary contractor failed to pay the subcontractor.[54] Since the subcontractor had not complied strictly with the statutory requirements[55] the owner was not personally liable and the owner's property could not be taken.

The holder of a mechanics' or materialmen's lien for improvements to realty can foreclose on the realty itself. Such foreclosure will of course be subject to the rights of prior lienholders. In one civil appeals case the issue was whether a reconveyance to the original owner and cancellation of notes secured by a vendor's lien merged title in the original owner. The reconveyance was followed by another conveyance of the property to a third person. Merger would have made the plaintiff's materialmen's and mechanics' lien for a pump and repairs he had provided superior over the original owner's vendor's lien. Denying the plaintiff's claim of priority, the court allowed use of a presumption of law that the vendor intended to keep the estates separate since this was essential to maintaining his priority over any junior incumbrance.[56] This presumption was allowed to stand despite a pro-

[50] City of Dallas v. Yarbrough, 399 S.W.2d 938 (Tex. Civ. App. 1966).
[51] TEX. CODE CRIM. PROC. ANN. arts. 636-38 (1952).
[52] Lubbock Nat'l Bank v. Hinkle, 397 S.W.2d 285 (Tex. Civ. App. 1965) *error ref. n.r.e.*
[53] National Educator's Life Ins. Co. v. Master Video Sys., 398 S.W.2d 358 (Tex. Civ. App. 1965) *error ref. n.r.e.*
[54] Texas No. R.R. v. Logwood, 401 S.W.2d 886 (Tex. Civ. App. 1966).
[55] TEX. REV. CIV. STAT. ANN. art. 5454 (Supp. 1966).
[56] Baker v. Marable, 396 S.W.2d 222 (Tex. Civ. App. 1965).

vision in the reconveyance subjecting the reconveyance to the indebtedness on the pump owing to the plaintiff. The court also held that the plaintiff's equity of redemption was waived because he knew of the reconveyance and did not assert his rights at that time.

Deeds of Trust. To what extent is a senior mortgagee able to enlarge his priority rights over junior mortgagees? This issue was decided in a case where a bank loaned $125,000 on realty and received a promissory note and deed of trust, which by its terms were to include all later loans that might be advanced by the bank to the borrower. The borrower also borrowed $50,000 on the same property, giving a second mortgage. The bank later purchased an unsecured note against the borrower and, at a foreclosure sale, sought to include this note within its first priority rights. In *Wood v. Parker Square State Bank*[57] the court sustained the second mortgagee's claim that when parties to a secured loan do not intend property to be security for other than the lender's loans, the lender may not extend his priority rights to the realty by purchasing unsecured indebtedness of the borrower.

In another case involving a bank carelessness opened the door to needless litigation. Here, certain property owners borrowed against realty, giving a promissory note and deed of trust, in which the trustee's name was copied incorrectly. Upon default the bank attempted to foreclose, but this was denied under the court's reasoning that this defect may have deterred some buyers who had misread the recorded deed of trust. However, the court provided the bank relief in further judicial proceedings to reform the deed of trust.[58]

Lis Pendens. A plaintiff sought to insure future payment of a potential judgment by giving *lis pendens* notice affecting the defendant's realty. The court of appeals decided that no statute or case law permits *lis pendens* to be used to secure an unliquidated claim against realty and refused to create a lien on the defendant's realty.[59]

[57] 400 S.W.2d 898 (1966), 20 Sw. L.J. 423

[58] Kimberly Dev. Corp. v. First State Bank, 404 S.W.2d 631 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[59] Lane v. Fritz, 404 S.W.2d 100 (Tex. Civ. App. 1966).