

BOUNDARY LAW
AND
LANDOWNER DISPUTES
IN TEXAS

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BOUNDARY LAW AND LANDOWNER DISPUTES

I. TRESPASS TO TRY TITLE

A. History, Purpose And Jurisdiction

Trespass to try title has long been the method of trying title to lands, tenements and other real property in the State of Texas and, and the statutory requirements are contained in the Texas Property Code §§ 22.001-22.045 (Vernon 1984).

Specifically, the Texas Property Code carries forward the prior statutory mandate that trespass to try title is the method of determining title to lands, tenements and other real property. The purpose of the code (and the predecessor statutes) was to avoid the old English common law rules of fictitious pleading which involved actions by fictitious persons under fictitious leases, etc. *McGrady v. Clary*, 247 S.W. 1099 (Tex. Civ. App. - Amarillo 1923, writ dismissed w.o.j.).

Until the enactment of § 25.0013 of the Texas Government Code by the 70th Legislature in 1987 exclusive jurisdiction of trespass to try title suits had been in the district courts. Tex. Const. art. V, § 8. § 25.0013 provided that county civil courts at law in counties with a population of two million or more, would have concurrent jurisdiction with the district courts to determine issues of title to real property. However, the 71st Legislature, by the passage of Act of March 1, 1989, ch. 2, §8.10(c), 1989 Tex. Sess. Law Serv. 140 (Vernon) repealed Tex. Gov't Code Ann. § 25.0013.

The present grant of jurisdiction for statutory county courts to try real property cases is contained in the grant of jurisdiction to the particular courts found in Chapter 25 in Tex. Gov't. Code Ann. For example, Harris County Civil Courts at Law jurisdiction to try land suits is contained in Tex. Gov't Code Ann. § 25.1032(c) (Vernon 1988). The present grant of jurisdiction for statutory county courts at law for El Paso County is found at § 25.0732. Also, any probate court or court properly having probate jurisdiction may hear suits involving title to real property that are incident to an estate. Tex. Prob. Code Ann. § 5 (Vernon 1980); *Graham v. Graham*, 733 S.W.2d 374 (Tex. App.-Amarillo 1987, writ refused n.r.e.).

Venue in a trespass to try title suit, a partition suit or a suit to quiet title is mandatory in the county where the land or any part thereof is situated. Tex. Civ. Prac. & Rem. Code Ann. § 15.011. Thus, if you had a tract that crossed county boundary lines venue would be proper in either county.

It is not proper to bring a trespass title suit in the form of a declaratory judgment action so as to entitle the plaintiff to attorney's fees. *Kennesaw Life & Acc.Ins. Co. v. Goss*, 694 S.W.2d 115 (Tex. App. - Houston [14th Dist.] 1985, writ refused n.r.e.).

In the *Kennesaw Life* case the court dealt with the attempted use of the Declaratory Judgment Act to settle title questions rather than a trespass to try title action. On September 21, 1979, Kennesaw Life conveyed the property in dispute by general warranty deed to the Stewarts. The deed was recorded on June 17, 1981. On April 7, 1982, the Stewarts conveyed the property to the Goss, who recorded the conveyance on April 16, 1982. On July 15, 1982, Kennesaw Life conveyed the same property to Beatrice Straite, who then conveyed to defendant Wilma Straite on August 11, 1982. Wilma Straite brought a Forcible Entry and Detainer suit against the Goss' tenant, at which point the Goss brought suit against Straite and Kennesaw Life, claiming superior title to the property and seeking a declaration of the rights and liabilities of the parties to the deeds. The double conveyance by Kennesaw Life was the result of some error. Goss sought a declaration that he was the sole owner of the property, a cancellation of the deeds in defendant Straite's chain of title, damages for the dispossession of his tenant by defendant Straite, costs and reasonable attorney's fees. In a trial to the court without a jury the court entered a declaratory judgment in favor of the Goss, including an award of attorneys fees.

The court pointed out that the Uniform Declaratory Judgments Act, provides that any person interested under a deed may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status, or other legal relations thereunder. The purpose of the Act is to provide a procedural device whereby litigants can obtain a judicial determination of a controversy. If a justiciable controversy exists, the trial court has discretionary power to enter such a judgment. However, the court noted that the Act confers neither new substantive rights upon the parties nor additional jurisdiction on the courts; it merely provides a procedural device for the determination of controversies which are already within the court's jurisdiction.

An examination of the pleadings revealed that the suit was brought by Goss to remove a cloud on his title to the property. The court noted that while the Act specifically provides a procedural method for the construction or validity of deeds by those whose rights are affected by such instruments, the substantive rights of the parties are governed by the Trespass to Try Title statutes, Tex. Prop. Code Ann. §§ 22.001-.045 (Vernon 1984). The court noted that Kennesaw Life would not have been a proper defendant under these statutes since the defendant must be the person in possession of the premises or some person claiming title to the premises. Since Kennesaw Life disclaimed all interest in the property and was not in possession of the property, Goss would not have recovered any damages against

Kennesaw Life in a Trespass to Try Title action. Recall that Kennesaw Life conveyed to the Stewarts, who in turn conveyed to Goss. Here Goss sought damages against Kennesaw Life and defendant Straite and was properly awarded damages only against defendant Straite since Goss pled no specific cause of action against Kennesaw Life and Kennesaw Life disclaimed all interest in the property. Attorney's fees, which were generally pled, were assessed only against Kennesaw Life. The court concluded that it did not believe that the legislature intended the Declaratory Judgments Act to be used in this manner. The court set aside the award of attorneys fees to Goss against Kennesaw Life.

Distinction between TTT and Boundary Suit

Before discussing what must be proved in a trespass to try title suit one distinction needs to be made. There are cases which hold that in a dispute which is nothing more than a boundary dispute the plaintiff need not prove up title in the manner required in a trespass to try title suit. Usually the test is stated to be if there were no dispute as to the location of the boundary would there still be a lawsuit. Stated another way, if there would be no suit or dispute but for the question of boundary, then the suit is necessarily a boundary suit. Because the burden of proof in a TTT suit can be a substantial burden this distinction can be an important one. *Plumb v. Stuessy*, 61 S.W.2d 667 (Tex. 1981); *Van Zandt v. Holmes*, 689 S. W.2d259 (Tex.App.-Waco 1985, n.w.h.).

In the *Plumb case* cited on p. 2 of the paper, the Texas Supreme Court goes through a good discussion of the distinction between a TTT and a pure boundary suit.

Plumb:

This case involved a dispute over the correct boundary lines of an access lane owned by the Plumbs. The lane was bordered on the west by a tract owned by the other party to the suit, Stuessy. The trial court granted Stuessy an instructed verdict at the conclusion of Plumb's evidence and entered a judgment which vested title and possession of the disputed property in Stuessy. The court of civil appeals affirmed.

In December 1975 Plumb purchased a 2,887.2 acre ranch in Burnet County. Included in this purchase was Tract A containing 1.69 acres and Tract B containing 3.2 acres. These tracts were described by metes and bounds in Plumb's deed. Each tract consisted of a 30-foot-wide strip of land that ran roughly north and south for approximately a mile and one half and provides access from Highway No. 183 to Plumb's ranch. These two tracts were acquired in 1899 and 1900 respectively, by Plumb's predecessor in title, McGuire. The two tracts of land formed a lane which had been continuously used for

access purposes by McGuire and all subsequent owners of the ranch. The lane, which had been identified as McGuire's Lane was bounded by fences on the east and west and was wider than thirty feet in some places. Also, there was a jog in the lane where the two tracts join and overlap.

At the time of Plumb's acquisition, the roadway was only a rough, narrow caliche-based road which had become crooked over the years, probably as a result of mud holes and growing trees. In 1976, Plumb made extensive improvements to the roadway and lane. He graded and straightened the roadbed and paved a ten foot roadway. He also bulldozed the brush from the lane. Stuessy immediately protested the destruction of trees and brush which he said were on his land although they were east of his fence. Stuessy also commenced construction of a new fence which would partially obstruct the roadway. As a result of this controversy, at least two surveys were made of the land in an attempt to determine the correct boundary lines of McGuire Lane. A compromise was verbally agreed to between Plumb and Stuessy, but it was not consummated after Plumb's mortgage holder refused to agree. The mortgage holder refused because the owner of the property to the east of the land was not a party to the agreement. After the negotiations failed, Plumb filed this suit whereby he asserted title to Tract A and Tract B and also asserted claim under adverse possession for any other land in the lane between the two fences which was described as Tract C.

The Supreme Court noted that the crucial question in the case was what was the nature of Plumb's suit. The lower courts considered the suit as asserting only a statutory trespass to try title action and applied the settled rules relating to such a formal cause. Those rules provide that to recover in trespass to try title, the plaintiff must recover upon the strength of his own title. He may recover by (1) proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession had not been abandoned.

The trial court granted a directed verdict for Stuessy at the close of Plumb's evidence and rendered a judgment which divested Plumb of his title and right to possession of Tracts A and B, and denied his adverse possession claim to Tract C. The court of civil appeals held that Plumb had failed to establish title either from sovereignty of the soil, by a common source or by limitations and that the issue of prior possession had been waived by Plumb.

The Supreme Court concluded that the lower courts construed Plumb's cause of action too narrowly. Plumb's petition asserted more than a pure trespass to try title action. In addition to the formal trespass to try title allegations, Plumb alleged that his predecessors acquired

title to Tracts A and B and that the present fences have constituted the easterly and westerly boundaries of the roadway for over fifty years. He further alleged that Stuessy had recently commenced construction of a fence to the east of the existing fence on the west side of the roadway. Along with other relief, Plumb sought an injunction to prevent Stuessy from relocating the westerly fence of the lane. The Supreme Court concluded that these pleadings raised more than a pure trespass to try title action.

The Court recognized that a boundary disputes may be tried by a statutory action of trespass to try title, but does not have to be.

It is clear from the record that this cause was tried as a boundary suit. Plumb's title to Tracts A and B was not disputed. Although Stuessy alleged only a formal "not guilty" plea, his theory of the case was that the existing west fence of the lane was not the correct boundary line and, in fact, encroached on his land. His attorney's opening statement to the trial court made reference to the need to locate the boundary line. All witnesses were cross-examined extensively by Stuessy's attorney in an effort to establish the proper boundary lines.

The evidence established that Plumb and his predecessors had continuously used the McGuire Lane since the tracts were first acquired by McGuire as access to his ranch. There was evidence that the McGuire Lane had been fenced for more than fifty years. A locked gate had been placed at the south end of the lane by Plumb and keys were given by him to his permittees.

All the testimony developed by both parties revolved around these issues: (1) the correct location of the boundary lines of Tracts A and B; and (2) whether Plumb acquired title to the rest of McGuire Lane by adverse possession.

The Supreme Court restated the proper test for determining if the case is one of boundary is as follows: If there would have been no case but for the question of boundary, then the case is necessarily a boundary case even though it might involve questions of title. And the Supreme Court concluded that this was indeed a boundary case.

Since the case was a boundary dispute, it was not necessary for Plumb to establish his superior title to the property in question in the manner required by a formal trespass to try title action to avoid losing title to his property.

What this case illustrates is that in a pure boundary suit all that is necessary is to establish title into the parties who have the dispute, such as the respective deeds into each.

However, care must be taken because title issues can certainly be present. Moreover, in many of the cases which recite that the plaintiff in a boundary suit need not prove title as in a trespass to try title suit such proof,

some character of such proof was made. Thought should be given to narrowing the issues to boundary only by the use of requests for admissions if possible.

B. Parties And Procedure

1. Parties.

The only essential requirement of a plaintiff in a trespass to try title action is that the plaintiff be a party asserting a lawful right of possession to the property. *City and County of Dallas Levee Imp. Dist. v. Carroll*, 263 S.W.2d 307 (Tex. Civ. App. - Dallas 1953, writ ref d n.r.e.). That case was one involving land that had been included in a plan of reclamation by the City and County of Dallas - pursuant to the plan the bed of the Trinity river was diverted about a ½ mile from where it had been and certain land was thus reclaimed and filled in. The defendant went into possession of a portion of this land and for several years, without objection by the City or the County, used it for an automobile repair business. The City and County sued seeking a mandatory injunction forcing Carroll to vacate the premises. In its position, and at trial, the City and County never claimed to own title to the reclaimed land, they merely claimed possession under the plan of reclamation. The court ruled that this claim of possession only was sufficient to maintain the TTT suit.

The only necessary party defendant in a trespass to try title suit is the party in possession. Any other parties who may have or claim some right or interest and who are not made parties to the suit are simply not affected by a judgment in the suit. *Giddens v. Williams*, 265 S.W.2d 187 (Tex. Civ. App. - Texarkana 1954, writ ref d n.r.e.). The better practice is, of course, to join all parties whose interest you seek to bind by the suit. Tex. R. Civ. P. 784-785.

Tex. R. Civ. P. 783-809 govern procedure in a trespass to try title suit. These rules provide, among other things, for the requisites of a petition (783), joinder of a warrantor or landlord (786-787), a plea of "not guilty" and its effect (788-789), abstract of title (791-794), appointment of a surveyor (796-797), common source of title rule (798), judgment (804), damages (805) and claims for improvements (806-807).

2. Pleadings

Tex. R. Civ. P. 783 sets out the essential elements that must be in a petition in trespass to try title. These are the following:

- a. Real names of parties and residences, if known;
- b. Description of property;
- c. Interest claimed by plaintiff;
- d. Plaintiff was in possession and is entitled to possession;

- e. Defendant unlawfully entered and dispossessed plaintiff;
- f. If rents, profits are claimed facts supporting them;
- g. Prayer for relief.

Particular attention must be paid to the description to be placed in the petition. Rule 783(b) provides that the premises must be described "with sufficient certainty to identify the same, so that from such description possession thereof may be delivered ..." The same rule also provides that the state and county or counties where the land is situated must be stated. More about what constitutes a sufficient description is contained in the last section of this presentation.

It is recommended that the formal allegations of the plaintiff's petition as set out in Rule 783 be followed as precisely as possible. A petition which follows the manner of pleading set out in the rule permits proof of whatever title the plaintiff may have, except limitations title which must be specifically pleaded. *Doria v. Suchowolski*, 531 S.W.2d 360 (Tex. Civ. App. - San Antonio 1975, writ ref'd n.r.e.).

Doria:

In the *Doria* case cited on p. 3 of the paper there is a practical illustration of the benefit of pleading the statutory TTT action and not trying to get creative. This suit involved the north 3 feet of lots 19 and 20 in a particular subdivision in San Antonio, which were claimed to be owned by plaintiff, who owned record title to two adjoining lots. The plaintiff plead the statutory TTT but only introduced deeds from the common source to himself and his neighbor which were mere conveyances of the platted lots to the respective parties. Apparently there was a fence three feet over on the defendant's lot that plaintiff claimed was the correct boundary. Thus record title did not support the plaintiff's claim to the 3 feet. But at trial the plaintiff also contended that he could establish title to the 3 feet by proving up an oral boundary agreement. The court noted that although plaintiff did not specifically plead a boundary line agreement, under the rules applicable to trespass to try title suits, his pleadings were sufficient to permit him to introduce evidence of a boundary line agreement.

A pleading which is too specific may, in the face of proper objections, limit attempts to prove a title that varies from that specially plead. For example, pleading title specifically by virtue of a forged deed prevents the plaintiff from relying on title by a resulting or express trust. *Robbins v. Hubbard*, 108 S.W. 773 (Tex. Civ. App. 1908, no writ).

The formal answer of simply "not guilty" provided in Tex. R. Civ. P. 788 is sufficient to raise all defensive issues with the exception of limitations title or a claim for the value of good faith improvements. Tex. R. Civ. P. 789; *Brinkley v. Brinkley*, 381 S.W.2d 725 (Tex. Civ. App. - Houston 1964, no writ).

The practical problem of being able to satisfy one's burden of proof as a plaintiff in a trespass to try title suit can be an enormous one depending on where the land is located, the state of title, and particular location and description problems. In view of such burden and the fact that failure to meet it results in a take nothing judgment vesting title in the defendant (*Gillum v. Temple*, 546 S.W.2d 361 (Tex. Civ. App. -- Corpus Christi 1976, writ ref'd n.r.e.)) careful consideration must be given to the description placed in the trespass to try title petition.

The better practice is to place in issue only the land actually in controversy. If a plaintiff acquired several lots or parcels but only one is claimed by the defendant describe only that one in the petition.

There is sometimes a tendency to simply obtain a copy of the deed into your plaintiff and copy that legal description into the petition. The plaintiff's burden is so enormous and the failure to meet it so devastating that consideration should always be given to whether the suit should be filed at the particular time in question.

Absent potential limitations deadlines the plaintiff's lawyer, before filing a trespass to try title petition should thoroughly familiarize himself or herself with the chain of title and all instruments contained therein. It is sometimes possible that the adverse claimant may decide to sue first, thereby assuming the plaintiff's burden. The general tendency in lawsuits to want to be the plaintiff as opposed to the defendant, in my view, is of questionable value in a trespass to try title suit.

Rule 786 provides that a warrantor may be made a party or may join in the suit. The measure of damages against the warrantor is the purchase price paid or a part thereof depending on whether there is a total or partial failure of title. *Alvord v. Waggoner*, 88 Tex. 615, 32 S.W. 872(1895).

A cause of action for breach of warranty does not accrue until an eviction of the covenantee is shown. However, the eviction is not necessarily a matter of physical eviction. The court in *Whitaker v. Felts*, 137 Tex. 578, 155 S.W.2d 604 (Tex. Comm'n App. 1941, opinion adopted) stated that an eviction, within a breach of warranty context accrues "when the facts are such that it would be useless for the covenantee to attempt to maintain the title conveyed him, e.g., where the holder of the superior title has taken actual possession or threatens suit."

Suit on a warranty is governed by the four year limitations period set out in Tex. Civ. Prac. & Rem. Code

§ 16.051. (Vernon 1986). Since it is not necessary to implead a warrantor, i.e. warrantee may defend title and then sue warrantor if title fails, *James v. Jamison*, 198 S.W.2d 954 (Tex. Civ. App. - Texarkana 1947, no writ) the question that immediately presents itself is: should a warrantee notify and make demand upon a warrantor? There is at least one good reason why the answer ordinarily will be "yes" to that question. There is authority that if a defendant-warrantee has notified and made demand upon his warrantor and the later does not participate in the suit or defend the title the warrantor is bound by the judgment as to the question of an outstanding or paramount title; while if the warrantor is not so notified he is not bound. *Maverickv. Routh*, 7 Tex. Civ. App. 669, 26 S.W. 1008 (1894).

3. Demand for Abstract.

Tex. R. Civ. P. 791 provides that after answer is filed either party may make demand upon the other party for an abstract of title. The abstract thus demanded must be filed within thirty days after service of the demand, or within such other time as the court may, upon good cause, grant. The rule provides that any party who is in default of such demand may be denied the right to offer any evidence of title. The purpose of the rule permitting demands for abstracts is to enable the party serving the abstract to investigate the records and make some determination concerning the character of title asserted by the adverse party. *Corder v. Foster*, 505 S.W.2d 645 (Tex. Civ. App. - Houston [1st Dist.] 1973, writ ref'd n.r.e.).

Rule 793 specifies what has to be included in the abstract and Rule 794 provides for amendment of an abstract, but seems to require leave of court to do so.

Prior to its revision on January 1, 1988 Rule 792 had the devastating effect of automatically prohibiting any documentary evidence of title by a party who failed to timely comply with a demand for abstract. Since the almost automatic exclusion of documentary title evidence was the rule for so many years one should always strive to file a complete abstract within the time permitted by the rules so as to avoid the possibility that a Court, used to the harshness of the prior rule, might strike a late abstract. One other aspect of the new rule deserves mention.

Under the old rule a defaulting party while precluded from offering documentary evidence of title could still offer prior possession or adverse possession title evidence. The wording of the new rule provides for exclusion only after notice and hearing, may other than no evidence at all could be offered by a party who failed to properly respond to a demand for abstract.

II. PARTITION

A. Jurisdiction and Parties

The provisions for judicial proceedings to partition property are set forth at Tex. Prop. Code Ann. § 23.001 et. seq., and in Rules 756-771 of the Texas Rules of Civil Procedure.

The right of a joint owner or claimant of an interest in real property to compel a partition is established by the Texas Property Code, but there is also authority that as courts of equity, the right to a judicial partition exists independently of such statutes. *Thomas v. Southwestern Settlement & Develop. Co.*, 123 S.W.2d 290 (Tex. 1939).

Section 23.002, Tex. Prop. Code Ann. provides that jurisdiction and venue of a suit to partition real property is the district court of the county where the property or any part thereof is located. Of course the Probate Court also has jurisdiction, so long as the administration of the estate has not been closed to partition property incident to the estate.

B. Procedure

A partition suit involves a two step procedure, under which the court initially determines the extent of the interest of each of the joint owners and all other questions affecting the title which may arise. Tex. R. Civ. P. 760. It should be noted that the statutory right to partition has been held to confer an absolute right to demand segregation of the joint owner's interest from that of the other co-owners. *Moselev v. Hearrell*, 141 Tex. 280, 171 S.W.2d 337 (1943).

Moselev v. Hearrell.

The Moseley case demonstrates this principle. In that case there were co-tenants who owned the mineral interests and one of them, Moseley, sought partition. Moseley had acquired her interest from Wood, who had previously had an oral agreement with Ms. Hearrell that they would let Ms. Hearrell operate the well. Wood sold and the lower courts found that Moseley had knowledge of this oral agreement. Ms. Hearrell. It was alleged by Mrs. Hearrell that Moseley, in seeking the partition of the property, was endeavoring to acquire her interest therein; that she would be financially unable to buy in the property at a receiver's sale; and that if her interest should be sold by the receiver it would not bring its full value, and in addition she would be compelled to pay a large Federal income tax out of her receipts from the sale. These allegations were made for the purpose of showing that it would be inequitable to Mrs. Hearrell to compel partition of the property.

In rejecting this argument the Supreme Court said: That the partition statutes conferred the right to compel partition in the broadest terms. There is no requirement for the showing of equitable grounds as a prerequisite to

the exercise of the right, nor is there any provision that the right may be defeated by the showing of inequities. The court went on to say that it may sometimes be inequitable to one or more of the joint owners if another co-owner is permitted to enforce partition of the jointly owned property; but this is one of the consequences which one assumes when he becomes a co-tenant in land. If he does not provide against it by contract, he may expect his cotenant to exercise his statutory right of partition at will.

As a general rule in partition suits all owners of possessory interests in the property sought to be partitioned must be joined in the action. Since the lessor of a mineral estate retains a non-possessory reversionary interest in the minerals, which is a possibility of reverter, lessors of a mineral estate as well as royalty interest owners are not "joint owners" of the mineral leasehold estate for purposes of the partition statute and are not necessary parties. *Texas Oil & Gas Corp. v. Ostrom*, 638 S.W.2d 231 (Civ. App. - Tyler 1982, writ ref'd n.r.e.).

The partition statutes provide that a partition suit between an owner of a life estate or an estate for years and the other owners of equal or greater estates does not prejudice the rights of an owner of a reversion or remainder interest. Tex. Prop. Code Ann. §23.003. The application of this section of the law is illustrated by *Luker v. Luker*, 226 S.W.2d 482 (Tex. Civ. App. - Eastland 1949, no writ).

In *Luker* a suit was filed by a father and daughter against a brother seeking to partition 1,122 acres, all which, with the exception of 47 acres, had been the community property of the father and his deceased wife. The 47 acres had been the separate property of the deceased wife. The trial court valued the various interests and set aside a tract of 524 acres to the father, which included the 47 acre tract. The court reversed the trial court judgment noting that the one-third life estate which the father owned in the wife's separate property was a separate and distinct estate from the reversionary interest, owned equally by the daughter and son. The court noted that the ownership of an interest in one such estate, the life estate, does not entitle one to participate in the other by partition, since no higher estate can be acquired by partition. The court noted that the trial court had adjusted the value so that from a value standpoint there had been an equal or fair partition, but observed that no greater estate could be acquired by partition, irrespective of values.

The initial hearing contemplated by Tex. R.Civ. P. 760 is one that goes to the very essence and heart of partition. This particular hearing has as its object the establishment of the respective interest of the parties to the property sought to be partitioned so that in the second hearing or trial, a fair and just apportionment may be made among the respective joint owners. A judgment

affixing the respective interest and shares of the joint owners **may not be attacked** in a subsequent trespass to try title suit. *Farias v. Clements*, 99 S.W.2d 1018 (Tex. Civ. App. - San Antonio 1936, writ dismissed).

In *Farias* a husband and wife, who had nine children, owned some land in Hidalgo county and after the wife died intestate, the surviving husband and the children were parties to a partition suit involving a several hundred parties. The judgment in that partition suit partitioned to the father and 5 of the children interests in the property, and awarded nothing to the other 4 children. After the partition suit the 4 children brought a TTT action claiming that as heirs at law there were entitled to an interest in the property. The court rejected this argument and said that all the parties were parties to the partition suit, in which each was allotted specific shares in the estate partitioned. In this trespass to try title suit the 4 children, in effect, complain of the fairness and justness of that partition, claiming that they were entitled to more land, and a larger estate therein, than was allotted them. In short, the partition decree, which became final, involved the determination of the very issues which the trial court was called upon to decide in this suit, and that court properly treated that decree as a bar to a relitigation of those issues in this collateral proceeding.

Although the first hearing or decree in a partition suits sometimes referred to as interlocutory it is interlocutory only in the sense that it is intermediate in relation to a second decree. The first decree is a final and appealable judgment. *Redden v. Hickey*, 308 S.W.2d 225 (Tex. Civ. App. - Waco 1957, ref'd n.r.e.), one seeking to appeal from the first decree of partition should request findings of fact and conclusions of law, and otherwise follow the prerequisites of an appeal. Absent a cross action in trespass to try title the title will be presumed and, therefore, it is not necessary to prove title back to a common source or the sovereignty. The question is as between the parties what interest is owned by each. *Burkitt v. Broyles*, 317 S.W.2d 762 (Tex. Civ. App. - Houston 1958, ref'd n.r.e.). Tex. R. Civ. P. 777 provides that the same rules for pleading, practice and evidence which govern other civil actions shall govern in suits for partition.

Also, the constitutional right to trial by jury set forth in Tex. Const. art. I, § 15; art. V, § 10, gives the right to trial by a jury at both the first and second stages in a partition suit. *Rayson v. Johns*, 524 S.W.2d 380 (Tex. Civ. App. — Texarkana 1975, writ ref'd n.r.e.).

After the initial determination of the shares or interest of each joint owner the court is then required to determine whether the property is susceptible of partitioning in kind and, if it determines it is partitionable in kind shall proceed then to enter a decree directing such partition. Tex. R. Civ. P. 761. The right to have property

partitioned in kind is a valuable right as the law does not favor compelling an owner to sell his property against his will but prefers a division in kind when it can be fairly and equitably made. The right to trial by a jury on the question of whether property is partitionable in kind is also available. *Rayson v. Johns*, supra. In its decree directing partition if the court determines the property is capable of being partitioned in kind, the court appoints three or more competent and disinterested persons as commissioners to make such partition. If the court determines that the property is incapable of division or partition in kind the court enters an order of sale and the proceeds are thereafter distributed by the court according to the respective interests. Tex. R. Civ. P. 770.

The rules provide that the commissioners shall divide the real estate in as many shares as are persons entitled to it having due regard "in the division to the situation, quantity and advantages of each share, so that the shares may be equal in value, as nearly as may be, in proportion to the respective interest of the parties entitled." Tex. R. Civ. P. 768.

A court may award a parcel or tract to a co-owner upon which improvements have been erected by that co-owner if such allocation can be accomplished fairly. *Burton v. Williams*, 195 S.W.2d 245 (Tex. Civ. App. - Waco 1946, refd n.r.e.).

Burton v. Williams:

In this case there was involved a 61 acre tract of land on which there was a house. The parties owned 11/18s and 7/8 respectively. One group produced a lot of evidence that if the property was partitioned in kind that the value would suffer and that they would not realize their interest by later having to sell a small tract. The jury found that the property could be partitioned in kind and order it. The court recognized that the commissioners could adjust the various equities and that it was for the jury to decide whether the property could be partitioned in kind.

The court may also partition the property into shares of unequal value and by owelty fix a lien on the largest share in favor of the party receiving the smaller share in the amount equal to the difference in value. *Sayers v. Pyland*, 139 Tex. 57, 161 S.W.2d 769 (1942). When the property is of such a character that it cannot be equally divided without impairing the value of all the portions, it may be divided into shares of unequal value, and the inequality corrected by means of a charge or lien upon the more valuable parts in favor of the less valuable ones. The payment of the amount charged upon the more valuable portion, to equalize the partition, is not a condition precedent to the vesting of such portion in the party to whom it is assigned, but it creates an encumbrance in the nature of a vendor's lien, which

becomes a valid charge upon the purpart against which it was decreed, which follows the land into the hands of third parties.'

The theory is that the owelty so assessed is recognized as being in the nature of purchase money secured by a vendor's lien on the larger tract. *Moor v. Moor*, 63 S.W. 347 (Civ. App. 1901, writ refd). The payment of the amount charged as an owelty follows the land into the hands of third parties and is subject to foreclosure if not paid within the time specified in the decree.

Since the duty to preserve common property rests on all tenants in common a tenant in common who expends money preserving the common property, such as for maintenance, taxes, etc. is entitled in a judicial partition to have such expenditures charged against the interest of the other tenants in common according to the pro rata shares of each. *Gonzales v. Gonzales*, 552 S.W.2d 175 (Tex. Civ. App. - Corpus Christi 1977, refd n.r.e.).

A new provision was added to the Property Code in 2001 by the enactment of § 23.006, providing for an access easement for partitioned property. Unless waived by the parties the Commissioners must grant a non exclusive access easement on a tract for the purpose of providing reasonable ingress to and egress from an adjoining partitioned tract.

II. SUIT TO REMOVE CLOUD FROM TITLE OR QUIETING TITLE

A. History, Purpose and Jurisdiction

The distinction between a suit to remove cloud from title or a suit to quiet title and an action in trespass to try title was reviewed in *Katz v. Rodriguez*, 563 S.W.2d 627 (Tex. Civ. App. — Corpus Christi 1977, writ refd n.r.e.).

In *Katz v. Rodriguez* the court pointed out that a trespass to try title action is a statutory action according a legal remedy while a suit to remove cloud on title involves an equitable remedy. A trespass to try title action is one seeking to recover possession of land unlawfully withheld from the owner who is entitled to immediate possession, and requires the plaintiff to recover on the strength of his own title, not on the weakness of the defendant's title.

A good example of the proper use of a suit remove cloud on title or quiet title is *Mauro v. Lavlies*, 386 S. W.2d 825 (Tex. Civ. App. - Beaumont 1964, no writ) in which the plaintiff sought to remove, as clouds on their title, certain judgment liens. The basis of the suit was that property owned by the plaintiff was homestead and thus protected from any forced sale. Although there was no evidence that either of the judgment creditors had ever attempted to have the property in question sold under forced sale the trial court, nonetheless, removed the judgment liens as clouds on the plaintiff's title. In a very practical observation the court noted that "[i]t is

doubtful that a title insurance company would issue title insurance upon a piece of property where a judgment had been abstracted." Therefore, the plaintiff, in a suit to remove cloud on title must simply demonstrate that there is a claim that may cast a cloud upon the plaintiff's enjoyment of his property, and that such claim is without merit.

The most significant difference between a trespass to try title suit and a suit to remove cloud or quiet title is that it is not incumbent upon a plaintiff in the latter to trace his title either to the sovereign or to a common source, although the plaintiff must show an interest of some kind to have standing to maintain the suit,

In *Katz v. Rodriguez* the court held that evidence that the plaintiff acquired through purchase their property on February 12, 1960 and a tracing of their title back 40 years prior thereto was sufficient. In a suit to quiet title proof of a conveyance of some sort into the plaintiff ought to be enough to give standing to maintain the suit. Jurisdiction of a suit to quiet title or remove cloud on title would be the same as it would be in a trespass to try title suit.

What constitutes a cloud on title has been described as a title or encumbrance apparently valid, but in fact invalid. *Heath v. First Nat. Bank*, 32 S.W. 778 (Civ. App. 1885, no writ).

Where an instrument, valid on its face, purports to convey an interest in property but is for some reason ineffective a suit to remove cloud on title is appropriate. *DRG Financial Corp. v. Wade*, 577 S.W.2d 349 (Tex. Civ. App. ~ Houston [14th Dist.] 1979, no writ).

In the *DRG* case the plaintiff sought to cancel a trustee's deed on the basis of fraud - kind of a classic case for a suit to remove cloud on title

The setting aside of deeds or instruments never delivered by the grantor but surreptitiously acquired and filed of record by the grantee is an appropriate subject for a suit to quiet title. *Sgitcovich v. Sgitcovich*, 229 S.W.2d 183 (Tex. Civ. App. - Galveston 1950, writ ref'd n.r.e.).

It is not necessary that the instrument clouding the title actually have been filed for record — it is enough to sustain the suit to quiet title that the instrument might be filed for record or otherwise constitutes a potential cloud on title. In *Texan Development Co. v. Hodges*, 237 S.W.2d 436 (Tex. Civ. App. ~ Amarillo 1951, no writ) the court said jurisdiction was proper where the plaintiff sought to remove as a cloud on title caused by an unrecorded executory contract for the sale of land. Although there are many types of instruments that can constitute clouds on title, to maintain such a suit there must be some instrument in writing that casts a cloud on title, as opposed to mere verbal assertions of ownership or verbal claims. *Newman v. Newman*, 86 S.W. 635 (Civ. App. 1905, no writ). In that case the court held that a wife's mere assertion that two deeds regular on their

face to the wife, conveyed the property to her separate estate, rather than to the community could not support a suit to remove a cloud on title. Baseless verbal assertions, contrary to the deed will not support a suit to remove cloud on title.

A suit to remove cloud on title or to quiet title may only be maintained by a person owning an interest in the particular property. *Bell v. Ott*, 606 S.W.2d 942 (Tex. Civ. App. ~ Waco 1980, writ ref'd n.r.e.) holds that a prospective purchaser of the property who testified that "if the cloud is not removed from the title" he would not buy the tract was not a proper party plaintiff in a suit to quiet title as he owned no justiciable interest in the property.

B. Evidence in Land Suits

There is perhaps no more frequently quoted rule of land law than that the plaintiff in a trespass to try title suit must recover on the strength of his own title rather than rely on the weakness of defendant's title. *Hejl v. Wirth*, 161 Tex. 609, 343 S.W.2d 226 (1961). The same holds true if the trespass to try title suit is one involving boundaries. *Bexar-Medina-Atascosa Counties Water Improv. Dist. No. 1 v. Wallace*, 619 S.W.2d 551 (Tex. Civ. App.-San Antonio 1981, writ ref'd n.r.e.). There are four ways by which a plaintiff, in a trespass to try title suit may establish title. *Land v. Turner*, 377 S.W.2d 181 (Tex. 1964). These are the following:

- (1) Regular chain from the sovereign;
- (2) Superior title out of a common source;
- (3) Title by limitations; and
- (4) Prior possession.

Although the connecting of one's title by a regular unbroken chain back to the patent out of the sovereign is perhaps the most conclusive, from a practical standpoint, it may be the most difficult to do. In order to prevail a plaintiff must by successive conveyances link himself directly to the patentee. *Mann v. Hossack*, 96 S.W. 767 (Tex. Civ. App. 1906, writ ref'd). Given that a plaintiff must locate and describe the land claimed in a manner sufficient for the sheriff to put him in possession of it, it is necessary to show that the land sued for is included in the patent from the sovereign that forms the initial link in the chain of title. *Howland v. Hough*, 570 S.W.2d 876 (Tex. 1978); The court in *Howland* did find the plaintiff had established that the land he claimed did connect with the Patent with the aid of some interpretation rules. The first rule of construction referred to by the Court was "that where there is an evident mistake in the calls, the court must, if practicable, find out from the deed itself and correct errors so as to give effect to the deed." The court then referred to the established rule that the footsteps of the surveyor shall, if possible, be followed,

and natural or artificial monuments are to be accepted as controlling over calls for course and distance. The court also stated that is also permissible to run the calls in reverse order to ascertain the true lines and form a closure, since no greater dignity is accorded to the first call than the last.

Caution should be used however anytime you try to connect all the way back to the sovereign - frequently, you may find that there are simply too many inconsistencies and missing calls or information.

Another problem in attempting to deraign title back to the sovereign is that gaps or breaks in the chain of title may often appear, a problem present in *Howland v. Hough*.

There the court relied upon the rule of presumed grants in Texas and held that a gap of 33 years, from 1845-1878 in an otherwise regular chain was supplied by inference. The evidence that is usually held necessary to establish a presumed grant includes a long and continuous chain of title and ownership, not disturbed by any adverse claim, together with other indicia of ownership such as payment of taxes, successive conveyances, etc. However, absent circumstances establishing a presumed grant, any break in the chain is fatal to a title sought to be established back to the sovereign.

C. Common Source

It is obviously much easier for a plaintiff to establish title from a common source rather than from the sovereign. This method is the subject of Rule 798, Tex. R. Civ. Proc. which provides:

It shall not be necessary for the plaintiff to deraign title beyond a common source. Proof of a common source may be made by the plaintiff by certified copies of the deeds showing a chain of title to the defendant emanating from and under such common source. Before any such certified copies shall be read in evidence, they shall be filed with the papers of the suit three days before the trial, and the adverse party served with notice of such filing as in other cases. Such certified copies shall not be evidence of title in the defendant unless offered in evidence by him. The plaintiff may make any legal objection to such certified copies, or the originals thereof, when introduced by the defendant.

Proof beyond the common source of title is not necessary because there is a presumption that the common source holds all the titles of the previous owners. *Rice v. St. Louis*, 87 Tex. 90, 26 S.W. 1047 (1894). Since a common source of title may be established by agreement

a plaintiff should consider the availability of a stipulation or on agreement as to the common source.

One pitfall that may be present in any attempt to offer up a chain of title, either from a common source or from the sovereign, is the one presented by the rule stated in *Mills v. Pitts*, 48 S.W.2d 941 (Tex. 1932).

In *Mills v. Pitts* one of the deeds in the plaintiffs chain included the not too uncommon recitation that it was a conveyance of certain lots "except such lots, tracts and parcels of land which have heretofore been conveyed by me." The Supreme Court noted that unless proof is also made that the land sued for was not included with those other conveyances then a prima facie case has not been made. Quite often a witness, either from the county clerk's office, or an expert in title examination will have to be tendered to testify that an examination has been made and the land sued for is not within any other conveyances of record. Such proof may also have to involve a surveyor as well. Where plaintiff relies on record title, either from the sovereign or from a common source, it is a good defense if the defendant shows a superior outstanding title in a third party. *Allen v. Sharp*, 233 S.W.2d 485 (Tex. Civ. App. - Fort Worth 1950, writ refd).

In this suit Allen sued claiming title under the 10 year statute of limitations. The land in controversy, a 7 acre tract was what the court called "scrap land" patented separately by the state and not covered by other patents in the area. The land was enclosed by land that was owned by the plaintiff and her brothers and sisters after the death of their parents. There was introduced in the record a quitclaim deed executed by plaintiff and several of her brothers and sisters to another sister and brother. The court noted that the plaintiff's TTT case fails because this deed showed title in several persons who were not parties to the suit.

D. Adverse Possession

The third method of establishing title to real property in a trespass to title suit is by adverse possession under the various limitations statutes. The limitations or adverse possession statutes have now been codified and appear at §§ 16.021-16.034 (Vernon 1986) Tex. Civ. Prac. & Rem. Code Ann. These various limitation periods are as follows:

1. 3-year — § 16.024 -- established by a peaceable and adverse possession under title or color of title for three years.
2. 5-year - § 16.025 ~ established by peaceable and adverse possession by:
 - (a) one who cultivates, uses or enjoys this property;
 - (b) pays applicable taxes prior to default; and

- (c) claims under a duly registered deed.
- 3. 10-year — § 16.026 -- established by peaceable and adverse possession by one who uses, cultivates or enjoys the property for 10 years.
- 4. 25-year - § 16.027 and 16.028
 - (a) established by 25 years of peaceable and adverse possession by one who cultivates, uses or enjoys the property; or
 - (b) established by 25 years of peaceable and adverse possession by one who holds the property in good faith and under a recorded deed or other instrument.

Adverse possession is defined as "actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Tex. Civ. Prac. & Rem. Code Ann. § 16.021(1).

Limitations does not run under the 3, 5 or 10 year statutes against a person under the legal disabilities of minority, unsound mind or who is serving in the armed forces of the United States during war time. Tex. Civ. Prac. & Rem. Code Ann. § 16.022.

There may be tacking of successive interests so long as there is privity of estate between each holder. Tex. Civ. Prac. & Rem. Code Ann. § 16.023. Each predecessor sought to be tacked onto must have had the type of possession and/or use that satisfied the requirements of the particular limitation statute involved. There must not be an interruption of the continuous period and the earlier possession and claim must have been transferred by agreement, gift devise or inheritance. *Dale v. Stringer*, 570 S.W.2d 414 (Tex. Civ. App. ~ Texarkana 1978, writ refiled n.r.e.).

The *Dale v. Stringer* case illustrates a problem that can be fatal when you try to tack onto prior possessor's possession. In that case the Stewarts owned a 129 acre tract of land. The land in controversy was a 3 acre tract that was under fence inclosing the Stewart's 129 acre tract, but was not actually described in their deed. In 1950 the Stewarts conveyed the land to the Veteran's Land Board and Stringer entered into a contract to purchase the land from the Veteran's Land Board. Of course, the Veteran's Land Board transaction was merely a way for Ms. Stringer to finance the purchase. In 1959 Ms. Stringer finished paying for the land and took a deed to the 129 acres from the Veteran's Land Board. From 1950, when Stringer received her contract of sale from the Veterans' Land Board, until 1959 when she placed her land in the Soil Bank program, she maintained possession of and grazed cattle upon the entire tract claimed by her. The evidence was that when Ms.

Stringer was first shown the land in 1950 all of the land under fence was pointed out as the land she was buying. The evidence also established that the Stewarts, Ms. Stringer's predecessor in title had met the requirements of the 10 year statute themselves, prior to 1950. The jury found for Ms. Stringer under an instruction and question that inquired about tacking. However the court reversed and rendered judgment against Ms. Stringer because once Ms. Stringer's predecessors, the Stewarts, had matured title by limitation, because when title by limitation has matured there is no further place for tacking.

Although the oral transfer of possession from the Stewarts to Stringer would have been sufficient to tack unmatured adverse possession, it could not be effective to transfer a Matured title which, according to the uncontroverted evidence and the jury findings, the Stewarts had already acquired in 1950. If the Stewarts' possession had been less than 10 years Ms. Stringer could have tacked and prevailed. In evaluating a potential case of tacking it is essential to know when the predecessor's adverse possession commenced.

Beyond the statutory definition of "adverse possession" there are numerous cases on the books on what character of possession is sufficient to constitute adverse possession. Possession must be exclusive. The running of stock on an open range in common with others is not sufficient possession. *Walker v. Maynard*, 31 S.W.2d 168 (Tex. Civ. App. - Austin 1930, no writ).

Possession shared with the owner does not indicate the necessary exclusivity of a claim of ownership to establish limitation title. *Rick v. Grubbs*, 214 S.W.2d 925 (Tex. 1948).

The *Rick v. Grubbs* case illustrates this exclusivity requirement. This was a dispute between Rick, the record owner of Lot 4 and Grubbs was the record owner of the adjoining Lot 5. Grubbs testified that after he purchased No. 5 he erected a fence which enclosed Lot No. 4 with Lot No. 5. Grubbs testified that he pastured cows, sheep, and horses on Lot No. 4, that he built a barn, which was partially on Lot No. 4 as well as Lot No. 5, that he pulled fig stumps on Lot No. 4 and had a garden on a part of it, that he plowed and leveled Lot No. 4 and planted it in clover and had it mowed, and that he planted trees on it. He continued to use Lot No. 4 with Lot No. 5 until he moved away in 1943. In 1946 he executed and delivered a deed to Lot No. 4 to the T. B. Jones. Grubbs testified that he did not know Rick until the present suit was filed.

However, Rick rendered Lot No. 4 for taxes and paid taxes thereon for all of the years during which Grubbs claims to have had adverse possession of it, and also that during this period Rick exercised dominion over the lot in several ways:

- (1) Rick conveyed to Gulf Pipe Line Company a right of way one hundred feet wide across Lot No. 4. The evidence shows that under this grant the pipe line company laid seven pipe lines across this lot and that one of its employees entered the enclosure to make inspection trips across the lot at least once each day. Grubbs made no protest against the construction of the pipe lines across Lot No. 4 and did not interfere with the pipe line company's employees; in fact, he testified that he agreed with the pipe line company's employees that the company could put a gate in the fence so that the inspections could be made more easily, and that this gate was constructed in the fence.
- (2) Rick sold to the State of Texas a strip of land twenty-five feet wide along one side of Lot No. 4, which was purchased for the purpose of Widening United States Highway No. 90. The fence which Grubbs had constructed along this line was torn down and moved back to the new line. Grubbs made no claim to any part of the purchase price of this strip and did not protest against the tearing down and moving of the fence. During this same time, Grubbs was engaged in a condemnation suit with Jefferson County involving a portion of Lot No. 5, which was taken for the same project, but in that lawsuit and in the settlement negotiations Grubbs asserted no claim to ownership of Lot No. 4.
- (3) Rick granted permission to a sign builder to construct and advertising sign on Lot No. 4, and under this permission a large sign was constructed on the lot within the enclosure. No protest was made by Grubbs against the construction of the sign, and it remained on the lot for over a year, until it was blown down by a storm.
- (4) In 1941 Rick gave the Army permission to maneuver over Lot No. 4, and the Army maneuvered on the land under this permission, without protest from Grubbs.

The court stated under the facts established at the trial that Grubbs did not have such adverse possession as the law requires in order to perfect limitation title. The record owner's tenants, licensees and grantees were permitted to enter and use the land freely without any protest from Grubbs. Whenever the owner undertook to exercise any control or dominion over the land, Grubbs made no effort to interfere. At most the evidence showed a claim by Grubbs to a right to use the land jointly with the record owner and those claiming under him; it

certainly did not unmistakably indicate a claim to exclusive ownership in Grubbs.

The occasional use of land for camping and fishing is not sufficient possession to mature limitations title. *W. T. Carter & Bros. v. Ruth*, 275 S.W.2d 126 (Tex. Civ. App. ~ Beaumont 1955, no writ).

Possession of a portion of a larger tract will not mature limitations beyond that area actually possessed and the location of the land possessed must be established by sufficient description evidence. *Kirby Lumber Corp. v. Lindsey*, 455 S.W.2d 733 (Tex. 1970).

A caveat to this statement is that one claiming adverse possession under a deed but in actual possession of only a part thereof, will be deemed to be in possession to the limits of the land described in his deed. *Cook v. Easterling*, 290 S.W. 731 (Tex. Comm'n App. 1927, holding approved).

Coupled with the requirement of a period of peaceable and adverse possession there must be a use, cultivation or enjoyment by the claimant for the required number of years. *Hook v. Winter*, 207 S.W. 2d 145 (Tex. Civ. App. ~ Amarillo 1947, writ *ref'd* n.r.e.). The use required to satisfy a limitations claim has been held to be only such use as the land is naturally adapted for. *Nona Mills Co. v. Wright*, 101 Tex. 14, 102 S.W. 1118 (Tex. 1907).

In cases involving a claim that the grazing of livestock constitutes adverse possession the law is well settled in Texas that the land claimed and used for grazing must be enclosed. However, the enclosing of land that is a result of being fenced out by surrounding owners may be casual or incidental enclosing and does not suffice as the character of actual and visible appropriation within the meaning of the 10-year statute.

Anyone faced with possession by virtue of grazing should carefully consider the casual enclosure cases and the rules relating thereto. A good discussion is found in the Supreme Court's opinion in *McDonald v. Weinacht*, 465 S.W.2d 136 (Tex. 1971).

Enclosing land by what are sometimes termed "convenient fences" are not such an appropriation or adverse claim so as to satisfy the statute. For example the placing of a fence on one side of a creek, out of physical necessity will not let the person on the other side of the creek commence a limitations claim. *Cox v. Olivard*, 482 S.W.2d 682 (Tex. Civ. App. - Dallas 1972, writ *ref'd* n.r.e.).

The requirement under the 5-year statute that the claimant must claim the property under a "duly registered deed" has been held to require that the deed must convey or purport to convey the property, as opposed to a deed which merely conveys the grantor's right, title and interest in the property. *Porter v. Wilson*, 389 S.W.2d 650 (Tex. 1965). Thus, a claim under a quitclaim deed

will not be sufficient to commence limitations under the 5-year statute.

Where one is claiming adverse possession under or through the possession of a tenant the rule is firmly established that the relationship of landlord and tenant, once established, attaches to all who may succeed the tenant until a positive repudiation of the tenancy is brought to the knowledge of the landlord. *Houk v. Kirby Petroleum Co.*, 65 S.W.2d 496 (Tex. Comm'n App. 1933, holding approved). In a similar vein, the rule is that before one co-tenant is permitted to claim the protection of the limitations statutes it must clearly appear that he has repudiated the title of this co-tenant and is holding adversely to it. *Todd v. Bruner*, 365 S.W.2d. 155 (Tex. 1963).

In *Todd* the court stated the rule that It is the settled law in this state that the possession of a cotenant or tenant in common will be presumed to be in right of the common title. He will not be permitted to claim the protection of the statute of limitations unless it clearly appears that he has repudiated the title of his cotenant and is holding adversely to it.

It has been held that mere possession, coupled with the payment of taxes, is not sufficient notice to a cotenant of a repudiation of the co-tenancy, *Stiles v. Hawkins*, 207 S.W. 89 (Tex. Comm'n App. 1918, judgment adopted). The cutting of timber, in and of itself, is not sufficient notice of the repudiation of a co-tenant's title. *Kirby Lumber Co. v. Temple Lumber Co.*, 125 Tex. 284, 83 S.W.2d 638 (1935). However, where one tenant in common executes a deed purporting to convey the entire premises to a third person, and the third person enters into possession thereof, this will constitute such a repudiation as to satisfy the limitation statutes. *McBurney v. Knox*, 273 S.W. 819 (Tex. Comm'n App. 1925, judgment adopted).

The accrual of a cause of action against an adverse claimant begins at the time when suit could be brought against such claimant. *Starr v. Dunbar*, 69 S.W.2d 816 (Tex. Civ. App. - Texarkana 1934, writ refd).

As against a lienholder limitations does not begin to run, and thus no cause of action accrues, until the lienholder could have filed suit for foreclosure. *White v. Pingenot*, 90 S.W. 672 (Tex. Civ. App. 1905, writ refd).

Limitations does not run against remaindermen so long as the life tenant has full right to possession. *Gibbs v. Barkley*, 242 S.W. 462 (Tex. Comm'n App. 1922, holding approved). Tex. Prac. & Rem. Code Ann. § 16.023 provides that the absence of a person from the state against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of such person's absence. However, this protection has been held to apply only to residents of the state who are temporarily out of the state, as opposed to non-residents. *Wilson v. Daggett*, 88 Tex. 375, 31 S.W. 618 (1895).

It would also appear that in the event of the death of the adverse claimant or the owner that an additional year should be added to the applicable limitation period by virtue of Tex. Civ. Prac & Rem. Code Ann. § 16.062.

A title perfected through adverse possession is stated in the statute to be a "full title, precluding all claims", Tex. Civ. Prac. & Rem. Code Ann. § 16.030, and has been held to be the perfection of a full fee simple title. Since the recording statutes do not apply to a perfected limitations title, *Bryan v. Rouse*, 214 S.W. 524 (Tex. Civ. App. - Amarillo 1919) affd, 247 S.W. 276 (Tex. Comm'n App. 1923), one cannot be a bona fide purchaser for value of a record title where a perfected limitations title has matured.

E. Prior Possession

The final method of establishing title in a trespass to try title suit is under the doctrine of prior possession. An excellent discussion of the evolution of and reasons for the doctrine of prior possession is contained in the court's opinion in *Reiter v. Coastal States Gas Producing Co.*, 382 S.W.2d 243 (Tex. 1964). The court noted that there were inconsistencies in Texas decisions relating to the doctrine of prior possession arising from statements by prior courts that the rule of prior possession was one of evidence and not of property.

In *Land v. Turner*, 377 S.W. 2d 181 (Tex. 1964), the Supreme Court reserved the question of whether a defendant could defeat the prima facie case made out by prior possession by showing title outstanding in a third person. This question was, however, resolved by the Supreme Court later that same year in *Reiter v. Coastal States Gas Producing Co.*, where it noted the general American and English rule as quoted by the United States Supreme Court in *Bradley v. Ashley*, 180 U.S. 59, 21 S.Ct. 297, 45 L.Ed. 423 (1901) that proof of title in some third person by a defendant should not defeat the presumption of title arising from prior possession. The Texas Supreme Court in *Reiter* concluded with approval the following rule announced in *Bradshaw v. Ashley*:

"[T]he presumption of title arises from the possession and, unless the defendant prove a better title, he must himself be ousted. Although he proves that some third person, with whom he in no manner connects himself, has title, this does him no good, because the prior possession of the plaintiff was sufficient to authorize him to maintain it as against a trespasser, and the defendant, being himself without title, and not connecting himself with any title, cannot justify an ouster of the plaintiff."

Prior possession, of course, is limited to situations when the defendant in essence is nothing more than a mere

trespasser. The doctrine or rule of prior possession is particularly helpful to a plaintiff in a trespass to try title suit in the event there is some defect or break in record title proof that might be fatal under either title from a common source or from the sovereign.

F. Damages - Good Faith Improvements.

Tex. R. Civ. P. 805 provides for the recovery of damages in a trespass to try title suit for the use and occupation of the premises possessed by the adverse party. Damages for use and occupation are ordinarily established by the fair market value of the property. *Anderson v. Bundick*, 245 S.W.2d 318 (Tex. Civ. App. - Eastland 1951, writ refd n.r.e.).

The Texas Property Code now provides that a claim for damages for use is to be valued "for the time before the date the action was filed that the defendant was in possession". Tex. Prop. Code Ann. § 22.021(b)(2). The Code further sets forth a 2 year statute of limitations period. Tex. Prop. Code Ann. § 22.021(d).

In order for a defendant to have a successful claim for improvements the possession of the property must have been in good faith and he must have made permanent and valuable improvements. In the event the value of such improvements exceeds the value of defendant's use and occupation the defendant is entitled to recover the difference. Improvements are valued at the time of trial but only to the extent they increase the value of the property. Also contained in the Property Code are specified pleading requirements for the defendant claiming good faith improvements.

The defendant who makes a claim for improvements must plead:

- (1) that the defendant and those under whom the defendant claims have had good faith adverse possession of the property in controversy for at least one year before the date the action began;
- (2) that they or the defendant made permanent and valuable improvements to the property while in possession;
- (3) the grounds for the claim;
- (4) the identity of the improvements; and
- (5) the value of each improvement.

The rule as to whether one is in good faith is that one must have made the improvements believing himself to be the owner. Such belief must be reasonable when tested by what one of ordinary intelligence would believe. *Van Valkenburg v. Ruby*, 68 Tex. 139, 3 S.W. 746 (1887). However, once a claim has been asserted one with knowledge of the claim cannot thereafter claim to have made improvements in good faith under the statute.

One should note the requirements of Rule 807, Tex. R. Civ. P. which requires that certain specific findings

and recitations be included in the judgment in the event of a successful claim for improvements is made, including , a statement of the estimated value of the premises without the improvements,

G. Documentary Evidence.

Virtually every trespass to try title suit, even those concerning limitations title, involve the introduction into evidence of copies of public records, generally from the real property records.

Rule 902(4) Tex. R. Evid. provides that extrinsic evidence of the authenticity of a copy of any official record or document "authorized by law to be recorded or filed and actually recorded or filed in a public office" need not be required as a condition precedent to admissibility. The effect of this rule is that certified copies are now self authenticating.

Rule 798 states that before certified copies of deeds showing common source title can be read into evidence they must be filed three days before trial. This apparently is a remnant of the old reading from the record statute, Tex. Rev. Civ. Stat. Ann. art. 3726 (Vernon 1926), but probably would not preclude the introduction in evidence of properly certified copies, which had not been filed 3 days, as opposed to simply reading those documents into the record.

It is always important to keep in mind that not every document that is actually recorded is "a document authorized by law to be recorded".

The significance of whether a document actually recorded was one authorized to be recorded is that only those instruments that are required or affirmatively permitted by law to be recorded constitute constructive notice to a subsequent purchaser or lender under the recording statute. *Smalley v. Octagon Oil Co.*, 82 S.W.2d 1049 (Tex. Civ. App. - Waco 1935, writ dismissed).

A case arising under the Property Code is *Pearson v. Wicker*, 746 S.W.2d 322 (Tex. Civ. App. ~ Austin 1988, no writ) in which it was held that a joint venture agreement was within the purview of the statute and, thus, constituted constructive notice of its contents. The Property Code provides that an instrument "concerning real property" may be recorded. Under the prior statute, Tex. Rev. Civ. Stat. Ann. art. 6626, affidavits of heirship were held to be instruments and thus constituting constructive notice. *Turrentine v. Lasane*, 389 S.W.2d 336 (Tex. Civ. App. - Waco 1965, no writ).

However, an ex parte affidavit stating that an interest in an oil and gas lease was held in trust for the affiant was held not be an instrument required or affirmatively permitted by law to be recorded and the record thereof did not constitute constructive notice to a subsequent assignee of an interest in the lease. *Smalley v. Octagon Oil Co.*, 82 S.W.2d 1049 (Tex. Civ. App. - Waco 1935, writ dismissed).

IV. PROPERTY DESCRIPTION

A. Sufficiency of Description

The test or rule of whether a particular legal description is sufficient is often framed in terms of whether a surveyor, with such description would be able to locate and identify the lands attempted to be described. *Harris v. Iglehart*, 113 S.W. 170 (Civ. App. 1908, no writ).

Because it is rare that the legal descriptions of land are identical in various conveyances down through the years it is often important to offer extrinsic evidence to show that different legal descriptions in the same chain of title do in fact pertain to the same land or a portion thereof.

This problem is illustrated by the evidence adduced in *Butler v. Brown*, 11 Tex. 342, 14 S.W. 136 (1890) where the court held the plaintiff had not sustained his burden of proof. The patent did not, on its face describe the same land conveyed by a deed to the plaintiff and the plaintiff offered no evidence to connect the description in the patented land with that in his conveyance other than a certified copy of the field notes of the land in controversy from the surveyor's office of Tom Green County. The court noted that "[i]f this evidence was offered for the purpose of identifying the land included in the patent with that conveyed by the deed to Hall and others, it entirely failed to have that effect. Such evidence of identity doubtless can be, and if it can be should be, produced. Unless this is done ... [the] plaintiff cannot recover."

To the same effect is *Johnson v. Johnson*, 275 S.W.2d 146 (Tex. Civ. App. -- Texarkana 1955, writ refused n.r.e.) a case involving a claim to superior title emanating from a common source. The plaintiffs in that case introduced an 1870 deed as the common source but described the land differently, and perhaps more accurately in their pleadings.

In affirming an instructed verdict in favor of the defendant the court related that the plaintiffs having plead a more accurate description of the tract contained in the common source deed, never located the land sued for by extrinsic evidence, or otherwise and that "[t]he issue of location being an issue of title in such cases, the burden was upon plaintiffs to locate the land upon the ground." The requirement to sufficiently locate and identify the land sued for applies equally to adverse possession and prior possession cases, as it does in cases where plaintiff is relying upon a chain of title. *Giddings v. Fischer*, 97 Tex. 184, 77 S.W. 209 (Tex., 1903); *Cunningham v. Settegast*, 24 S. W.2d 520 (Tex. Civ. App. ~ Beaumont 1930, no writ).

Separate and distinct from the question of whether various descriptions in a chain can be harmonized and shown to apply to the land sued for is the question of whether a particular description in a particular instrument is sufficient. It has long been held that the provisions of

our conveyancing statute (now codified as Tex. Prop. Code Ann. § 5.021) and the Statute of Frauds (now Tex. Bus. & Comm. Code Ann. § 26.01 (Vernon 1968)) renders void an instrument containing a description of land which either on the face of the instrument, or by use of extrinsic evidence, cannot be identified with reasonable certainty. *Grear v. Grear*, 144 Tex. 528, 191 S.W.2d 848 (1946).

Descriptions which convey all lands owned by a grantor in a particular state or county have been held to be sufficient because one could with reasonable inquiry, learn what property was owned by the grantor. *Texas Consolidated Oils v. Bartels*, 270 S.W.2d 708 (Tex. 1954).

The test frequently has been stated to be that the writing must furnish within itself, or by reference to some other existing writing the means or data by which the particular land may be identified with reasonable certainty. *Morrow v. Shotwell*, All S.W.2d 538 (Tex. 1972).

In *Morrow*, John A. Morrow, purchaser, brought suit against E. F. Shotwell, seller, for specific performance of a contract for the sale of two tracts of land. The trial court rendered judgment for the plaintiff, Morrow. The court of civil appeals affirmed the trial court's judgment as to one tract; but as to the other, the court reversed and rendered a take-nothing judgment.

The issue on appeal was the sufficiency of the second tract described as follows:

"SECOND TRACT: The North acreage (to be determined by a survey) out of 145.8 acre tract of the Jefferson McGrew Survey No. 245, which acreage lies North of a line beginning at the Northeast corner of the First Tract above described and running North 75 East to a point in the West Boundary Line of Public Highway No. 277, commonly known as the Anson-Hawley-Abilene Highway, Jones County, Texas."

The court started by referring to the rule that to be sufficient, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty. The Court then noted that the description of Second Tract did not refer to any other existing writing. The court's problem, then, was to analyze the description to see if it furnishes, within itself, the means or data by which the tract may be identified with reasonable certainty.

If we look only to the metes and bounds description of the tract, we find no means or data by which the tract may be identified. We are told only that it is acreage which lies north of a line running on a course of north 75

east from the northeast corner of First Tract to the west boundary line of public highway no. 277. A surveyor would have no difficulty locating this line since the contract gives him adequate means for locating the northeast corner of First Tract, but there are no means or data in the description to tell a surveyor on what courses or for what distances he will run after intersecting the west boundary of highway no. 277. The description is just as deficient if we assume that the entire tract lies west of the highway. Assuming that the east line of the tract is coincident with the west boundary line of the highway and runs northerly or northwesterly along that line, there is yet no distance call. Neither are we told the course and distance of the north or west lines of the tract, nor the acreage contained in the tract. Quite obviously, the metes and bounds description, standing alone, is not sufficient to meet the requirements of the Statute of Frauds. There is, however, additional descriptive language.

The acreage is said to be, 'The north acreage . . . out of 145.8 acre tract of the Jefferson McGrew Survey No. 245' in Jones County, Texas. We are unable to see how this additional language furnishes the means or data by which the tract may be identified with reasonable certainty. No doubt a surveyor could locate the Jefferson McGrew Survey No. 245, but there is nothing in the added language to assist one in locating the 145.8 acre tract. Describing land to be conveyed in this manner has often been held to be insufficient to meet the requirements of the Statute of Frauds.

The record leaves little doubt that the parties knew and understood what property was intended to be conveyed as Second Tract. Moreover, a surveyor, by a search of abstract records and on directions given by an attorney, located the property on the ground and made a plat which was introduced in evidence and shows its location and boundaries. However, the knowledge and intent of the parties will not give validity to the contract, *Rowson v. Rowson*, 154 Tex. 216, 275 S.W.2d 468, 470 (1955); and neither will a plat made from extrinsic evidence. *Matney v. Odom*, 147 Tex. 26, 210 S.W.2d 980, 984 (1948). The correct rule relating to admissibility of parol evidence to aid descriptions in contracts for the conveyance of land is thus stated in *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (1945):

'The certainty of the contract may be aided by parol only with certain limitations. The essential elements may never be supplied by parol. The details which merely explain or clarify the essential terms appearing in the instrument may ordinarily be shown by parol. But the parol must not constitute the framework or skeleton of the agreement. That must be contained in the writing. Thus, resort

to extrinsic evidence, where proper at all, is not for the purpose of supplying the location or description of the land, but only for the purpose of identifying it with reasonable certainty from the data in the memorandum. *O'Herin v. Neal*, Tex.Civ.App., 56 S.W.2d 1105, writ refused. (Emphasis ours.)

Petitioner Morrow points to one other provision in the contract which he suggests refers to a writing giving data for adequately describing the tract. The contract states: '. . . the conveyance herein shall be subject to its sharing its proportionate share of a Federal Land Bank Note covering the tract of which tract no. 2 is a part and the amount of said payments, if made by the purchaser, shall be deducted from the principal of the note herein described.' The simple answer to this contention is that no evidence which describes the tract covered by the Federal Land Bank note was introduced on the trial.

Our holding that the description of Second Tract is insufficient to meet the requirements of the Statute of Frauds would ordinarily lead to an affirmance of the judgment of the court of civil appeals. As indicated earlier in the opinion, that judgment as to Second Tract is that the plaintiff Morrow take nothing. There is in the record strong evidence that the parties intended to describe a particular and identified tract of 12.375 acres in their contract, and that they were mutually mistaken in the belief that the description used was legally sufficient for that purpose. If that be a fact, Morrow would have been entitled to reformation of the contract had he sought it.

We see no compelling reason at this late hour to recant our holdings in the cited cases; accordingly, we have concluded that this cause should be remanded to the trial court so that Morrow may, if he wishes, amend his pleadings and try his case on a different theory."

The use of extrinsic evidence to identify land with reasonable certainty has limitations. Extrinsic evidence as to the knowledge and intent of the parties will not give validity to an otherwise insufficient description. Nor may missing elements be supplied by parol evidence. *Morrow v. Shotwell*, 447 S.W.2d 538 (Tex. 1972).

In *National Credit Corporation v. Mays*, 355 S.W.2d 557 (Tex. Civ. App. - Fort Worth 1962, writ ref'dn.r.e.) the legal description in question was "Lot #2, Block 4A M. Lynch Adtn., Abstract #953, Route 1, Box 662". There was no M. Lynch addition, although the plaintiffs surveyor did testify that there was an M. Lynch survey and that by knowing that and searching the tax assessor collector records of Tarrant County and by making certain assumptions that he would be able to

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locate the property on the ground. The surveyor acknowledged, that he could not locate the property on the ground if one were confined to the description records of the county clerk. The court held that this type of resort to extrinsic evidence would necessarily be had so as to supply the location or description as opposed to merely identifying land from the data within the instrument. Parol evidence is not admissible to supply the description of property in a deed signed and delivered in blank. *Republic Nat. Bank of Dallas v. Eiring*, 240 S.W.2d 414 (Tex. Civ. App. - Amarillo 1951, no writ).

Extrinsic evidence is admissible to show evident mistakes in the description. *Turner v. Sawyer*, 271 S.W.2d 119 (Tex. Civ. App. - Eastland 1954, writ refd n.r.e.). The deed in *Turner* stated that it was conveying 80 acres out of the W. A. Chambers survey but recited that it began on the southeast corner of the Martindale survey. By using this beginning reference the land was not located in the Chambers survey. The court recited that the description contained in the deed indicated the 80 acres was out of the W. A. Chambers survey and that by looking at that 160 acre Chambers survey patent it was thus evident that the Chambers survey adjoined the Martindale survey in such a manner that revealed the obvious mistake in referring to the beginning point of the southeast corner of the Martindale rather than the northeast which the court concluded was intended.

B. Priority of Calls

In those instances when applying the calls in a description on the ground results in inconsistency with other calls or leads to confusion there are certain rules which govern the actions of the court and jury with respect to the character and weight of evidence to be considered by them in fixing and establishing the correct boundaries. The controlling effect is usually given to the calls that are considered to be the most reliable, material and certain. *Sweats v. Southern Pine Lumber Co.*, 361 S.W.2d 214 (Tex. Civ. App. - Houston 1962, writ refd n.r.e.). The order of priority ordinarily given is the following:

- (1) calls for natural objects such as rivers, creeks, trees, etc.;
- (2) calls for artificial or man made objects such as monuments, fences, marks on trees, etc.;
- (3) calls for course in distance; and
- (4) calls for quantity of acreage.

Stafford v. King, 30 Tex. 250 (1867)

Conveyances that refer to and purport to convey a part of a larger tract without locating where within the larger tract the particular acreage is are void. *Smith v. Sorelle*, 87 S.W.2d 703 (Tex. 1935).

In *Smith v. Sorelle*, Smith and wife executed a contract on February 5, 1931 conveying to one Busby an undivided one-quarter of the royalty on "100 acres out of Blocks 8 and 9 of the subdivision of Jose Maria Pineda Survey". The grantor, Smith after discovering a delivery in violation of certain instructions prepared an affidavit purporting to set out those facts and filed it of record on March 7, 1931. In that affidavit the 100 acres was correctly and adequately described. The court, in holding the description of February 5, 1931 void for lack of sufficiency stated that since the affidavit of March 7, 1931 was not in existence at the time of the original conveyance it could not be referred to or considered as extrinsic evidence.

Descriptions which refer to acreage either out of a corner or off the side of a particular survey will generally be located by lines drawn parallel to the designated line or lines of the larger tract. *Woods v. Selby Oil & Gas Co.*, 12 S.W.2d 994 (Tex. Comm'n App. 1929).

It is important to remember that the entire instrument can be looked to as a means of identifying land, not just particular descriptions or particular metes and bounds descriptions. For example, documents purporting to convey that part of a certain tract which is owned or claimed by the grantor are not void upon their face since it may be shown by extrinsic evidence, the particular tract so owned or claimed. *Heirs, etc. of Barrow v. Champion Paper & Fiber Co.*, 327 S.W.2d (Tex. Civ. App. ~ Beaumont 1959, writ refd n.r.e.).

References to homesteads or a particular tract "where we now live" have been held to be sufficient if by extrinsic evidence they can be located. *Scott v. Washburn*, 324 S.W.2d 957 (Tex. Civ. App. --Waco 1959, writ refd n.r.e.); *Ehlers v. Delphi-Taylor Oil Corp.*, 350 S.W.2d 567 (Tex. Civ. App. ~ San Antonio 1961, no writ hist).

The Supreme Court has stated that it is a "familiar rule" that even if a description, standing alone would be insufficient "if it refers to another instrument which contains a proper description of the property, such other instrument may be looked to in aid of the description." *Maupin v. Chaney*, 139 Tex. 426 163 S.W.2d 380 (1942).

In this case a deed conveying "Lot 28, Block A", could be looked to to supply the correct description for a subsequent deed of trust describing "Lot 8 in Block A". This was so even though the reference in the subsequent deed of trust contained an erroneous description of the date of the prior deed. While a map or plat may be used as parol evidence the rule is that the map or plat must be somehow referred to in the instrument, otherwise the map or plat would be supplying the description rather than simply rendering sufficient what would otherwise be an insufficient description. *Dunlap V. Swain Tire Co. v. Simmons*, 450 S.W.2d 378 (Tex. Civ. App. - Dallas 1970, refd n.r.e.). Reference to and incorporation by

reference probate records have been held sufficient to describe the interest conveyed. *Haile v. Holtzclaw*, 414 S.W.2d 916 (Tex. 1967).

V. LITIGATING BOUNDARY DISPUTES

A. *E.H. Brainard, II, et al. vs. The State of Texas*, 12 S.W.3d 6 (Tex. 1999).

With legislative authorization, landowners sued state and General Land Office (GLO) to determine location of boundary between state's riverbed and landowners' riparian tracts. The 100th Judicial District Court, Collingsworth County, M. Kent Sims, J., rendered summary judgment for landowners, establishing boundary as depicted in landowner's survey, and pursuant to jury verdict, awarded landowners surveyor fees, attorney fees, and costs. State appealed. The Amarillo Court of Appeals, 968 S.W.2d 403, reversed and remanded. Both parties petitioned for review. The Supreme Court, Hankinson, J., held that: (1) the effect of a government-built dam located 15 to 45 miles upstream from disputed land resulted in changes that were not inherently influenced by artificial means; (2) landowners' survey, and not state's survey, established the boundary; (3) landowners' survey comported with the gradient boundary methodology as adopted in *Motl v. Boyd*, and thus was properly relied on; and (4) landowners' action against state was not declaratory judgment action, and thus, legislative resolution that neither mentioned the Declaratory Judgments Act nor authorized a suit that necessarily invoked its operation did not unconstitutionally bar the recovery of attorney fees under the Act.

B. Adverse Possession — Hostile claim.

Several cases demonstrate the difficulty encountered when attempting to litigate boundary disputes involving small discrepancies or areas along boundary lines. One such problem is that often there may be a fence along what adjoining land owners assume is the correct boundary line. Then, for some reason, one of them obtains a survey and discovers that they actually have fenced in a portion of their neighbors land, perhaps for many years. The first reaction is often to claim limitations title to the portion inside the fence.

Recall that adverse possession under the ten-year statute of limitations requires "an actual and visible appropriation of real property that is hostile to the claim of another person". *McAllister v. Samuels*, 857 S.W.2d 768, 776 (Tex. App. ~ Houston [14th Dist.] 1993, no writ)(emphasis supplied by the court).

In *McAllister*, the McAllisters sued the Samuels claiming ownership of a strip of land by adverse possession. The Samuels desired to replace an old fence that was erected in the 1940's, many years before the Samuels and the McAllisters purchased their respective lots. Therefore, the Samuels had a survey completed

which showed that the old fence was on their lot approximately 9 inches in from the property line. The McAllisters had their own survey done which agreed with the Samuels' survey. Nevertheless, the McAllisters filed suit claiming they acquired the 9 inch strip by adverse possession. The trial court granted summary judgment in favor of the Samuels and against the McAllisters because the McAllister's possession of the 9 inch strip was not the visible, hostile appropriation contemplated by the adverse possession statutes, such as the ten-year statute of limitations. On appeal, the McAllister's contended that a fact issue existed as to their hostile possession because they maintained the old fence and picked up leaves and trash from the 9 inch strip. The court of appeals disagreed and affirmed the trial court's summary judgment stating the following:

"We find that the McAllisters' possession of the nine-inch strip was not the visible, hostile appropriation contemplated by the adverse possession statutes. The Samuels have disproved as a matter of law an essential element of the McAllisters' adverse possession claim under the ten-year statute."

C. Adverse Possession - Character of Use

Likewise, the Texas Supreme Court has noted that mowing the grass, planting flowers and maintaining a hedge does not constitute a hostile character of possession sufficient to give notice of adverse possession. *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985).

Similarly, in *Miller v. Fitzpatrick*, 418 S.W.2d 884, 888 (Tex. Civ. App. - Corpus Christi 1967, writ ref'd n.r.e.), Fitzpatrick sued his neighbor, Miller, claiming title to a disputed strip running between their lots based upon adverse possession for a period of ten years. The evidence showed that when Miller purchased his lot, he believed the disputed area was part of his purchase. Therefore, he fertilized and mowed the grass, cut the weeds, planted flowers and shrubs and installed an underground drainage or irrigation system. In rejecting the adverse possession claim, the court of appeals stated:

"The acts of mowing the grass, planting flowers and keeping the land in dispute in the condition in which his grantor kept it did not constitute the character of possession [so as to give] notice of an exclusive adverse possession hostile to the claims of all others."

D. *Terrill v. Tuckness*, 985 S.W.2d 97 (Tex.App.-San Antonio 1998, n.w.h.).

This case illustrates and number of the land title litigation principles in the context of a boundary dispute along a creek. The competing chains of title had for

many years been the owners of tracts of land on either side of Crabapple Creek in Gillespie County. The tracts had been part of a larger tract that had the Creek running through it until 1881 when the land was divided. From that time up until 1941 the two chains of title, one on the east and one on the west of the creek, had unambiguously established that the tracts were separated by Crabapple Creek. At some point a fence was erected to the east of and parallel to the creek, up to the high bank. It is the land that is west of the fence to the center of the creek that is in dispute, some 2.2 acres.

In 1941 the owner on the east, the side with the fence between the middle of the creek and the high bank, conveyed the land to her daughter. For some unexplained reason this deed did not call to the middle of the creek, as all prior deed had done. Rather, the deed called to the eastern bank of the creek, then north to a fence corner. In 1979 the daughter conveyed the land and a survey was prepared for the purchaser. The purchaser requested that the land "under fence", i.e., the 2.2 acres between the fence and the creek, the rocky creek bank, be surveyed separately from the remainder of the tract that was east of the fence. In addition to conveying the land east of the fence by general warranty deed, the daughter also executed a quitclaim to the purchaser of the 2.2 acres in dispute. Three years later there was another conveyance to the Terrills of the acreage east of the fence and a quitclaim to the 2.2 acres. The Terrills used the property next to the creek, the 2.2 acres periodically for recreational purposes, including hiking, taking their children and grandchildren swimming and shooting off fireworks on July 4. In 1986 the Terrills put up a gate, to make this 2.2 acres more accessible. It was at that point that the owner on the west, the Tucknesses, boarded up the gate and erected a No Trespassing sign. The Terrills then sued to establish title to the 2.2 acres, that is the land west of the fence to the middle of the creek.

The trial court let the jury decide a number of issues, including whether there was any ambiguity in the 1941 deed on the east and a 1943 deed to the property on the west. The jury resolved all issues in favor of the Tucknesses, the owners on the west, including adverse possession findings. The Terrills, the owners on the east, appealed and the Court of Appeals reversed and rendered in favor of the Terrills.

In arguing ambiguity the owners on the west first argued that there was what the court called an 'impossible call', that is a call of 388 varas in the 1941 deed that read as follows:

THENCE West 388 varas to the East bank of Crabapple creek; THENCE down said creek with the meanders of its East bank . . . to a fence corner.

The surveyor called as an expert witness by the Tucknesses, the owners on the west, testified that following that call actually takes you across the creek and onto the west bank, and therefore the call is ambiguous. The court disagreed and stated that the rule is that the surveyor is to prefer calls to natural monuments over metes and bounds or course and distance calls. Therefore, the surveyor in attempting to retract the steps of the 1941 measurements should stop at the bank of the creek.

The surveyor, who did the 1979 survey, also testified that if you substituted 288 varas in place of 388 varas called for in the 1941 deed, it would almost match up with the next call, which was to the fence corner. The court rejected this testimony because it viewed this as simply substituting one ambiguity for another, "while pulling a number that happens to work for the defendants from the air." In addition, the court noted that since the surveyor had actually been instructed to survey the land under fence separately, the 2.2 acres, he was attempting to reconcile fence corners, rather than retracing the steps of the prior surveyor, which would, under the rules of construction, have had him stop at the bank of the creek.

The reference "to a fence corner" at the end of the above call was argued by the Tucknesses to also create an ambiguity. The court noted that there was no fence corner where one would hope to find one from the call, in the middle of or on the bank of the creek. The court rejected this argument and in favor of the natural boundary, because a surveyor cannot go into a stream in order to make a corner, he makes the corner on the bank of the stream. Thus, according to the court, a call that goes "along a bank" actually sets the creek as the boundary. The court recognized that in addition to the impracticality of setting stakes in the middle of streams, it is unreasonable to assume grantors would intend to reserve narrow strips of land, particularly when it ceases to be of use to him. The court observed that the 1941 deed from a mother to a daughter clearly intended to pass title to the 2.2 acre strip, even though it was done by quitclaim. Another rule of construction the court mentioned was that there is a presumption favoring grantees, rather than grantors in construing deeds.

The Tucknesses claimed that because a 26.6 vara call contained in a 1943 deed in their chain of title (on the west) was not contained in the 1941 deed that is in the chain of title on the east, that an ambiguity was created, which was appropriate for the jury to resolve. The court rejected this argument by stating that ordinarily one instrument may not be used to create an ambiguity in another deed. Although the court recognized that there are a couple of exceptions to that rule, the exceptions did not apply in this case.

The 1943 deed in the Tucknesses chain contained the following language:

"It being intended to hereby convey all of the lands under fence which embrace the farming and ranching lands *owned by* William V. Hohmann and wife, Janie Hohmann at the time of the death of Wm. V. Hohmann ..."

The Tucknesses argued that this also created an ambiguity and that this made it clear that the property all the way to the fence was meant to be in their chain of title. The court rejected this argument by again stating that the 1943 deed could not be used to create any ambiguity in the 1941 deed. The court also noted that since the language referred to the land "owned by . . . Hohmann" that limited the description and the deed could not convey more land than Hohmann owned. The court also noted that the 1943 deed to the western tract called to the northwest corner of the eastern land and thence up the creek with the meanders of its east bank. The court noted that under Texas law a call to the bank of a creek is a call to the middle of the creek and establishes the creek as the proper boundary.

Finally, the Tucknesses argued that even if the deed ambiguity findings of the jury that were favorable to them were disregarded they established title by limitations. The court rejected any 3, 5 or 25 year limitations because the Tucknesses were not "under color of title" as is required by Sections 16.024, 16.025 and 16.028, *Texas Civil Practices & Remedies Code*. The court, in deciding the 10 year limitations claim noted that the Tucknesses could not demonstrate the purpose of the fence, which had been constructed long before they took possession of the land and let cattle run on it. Thus, the court held the fence to be a 'casual fence', which will not support a limitations claim under the 10 year statute. The court also noted that the Tucknesses could not demonstrate that their possession was hostile because although they let their cattle roam the 2.2 acres, the Terrills let their children and grandchildren swim in the creek. The court noted that adverse possession is not about who used the property more or for better purposes; rather it is about whether one party ousts another from his land.

E. *Garza v. Maddux*, 988 S.W.2d 280 (Tex.App.-Corpus Christi 1999, n.w.h.)

This case involves the application of the doctrine of recognition and acquiescence to a boundary dispute. When there is uncertainty about the true location of a boundary line, it can be shown by express agreement of the adjoining landowners, or by implied agreement. Implied agreements usually based on evidence of acts of acquiescence or recognition of adjoining landowners. This case involved the true boundary line between two tracts of land in Hidalgo County. In 1920 one Schunior, the common source of title acquired land that he platted as the Schunior Subdivision designating the lots or tracts

as 'Shares'. The plat showed the boundary line separating Share 15 on the north side of Share 13. Share 15 was shown on the plat, and in all the conveyances from Schunior to be comprised of 1840 acres of land. Share 13 was shown on the plat to be comprised of 1266 acres. The Share 13 owners contended that the true boundary line was not as was reflected on the plat, but by a fence located inside the plat boundary of Share 15. The land in dispute, between the plat boundary of Share 13 and the fence on the plat boundary of Share 15 was 108 acres. The owners of Share 13 sought to bind the owners of Share 15 by virtue of a 1982 and a 1986 mineral deed, which recited that the 108 acres was within the boundary of Share 13. The court rejected the argument by saying that superior title could not be established as against the owners of Share 15, by the mineral deeds, without them being a party thereto. The court rejected the application of the recognition and acquiescence doctrine because there was no uncertainty about the location of the boundary between Share 13 and Share 15, as shown on the plat. Absent doubt as to the true location of the boundary line, the doctrine does not apply, even if the parties acquiesced in an erroneous line.

F. *John G. and Stella Kenedy Memorial Foundation v. Dewhurst*, 994 S.W.2d 285 (Tex.App.-Austin 1999, n.w.h.)

This case involves the continuing saga of who owns land along the Texas shoreline, or as in this case, the minerals under such land. This case involves title to about 35,000 acres of coastal mud flats that are intermittently inundated by the waters of the Laguna Madre. Following a jury trial, the district court rendered judgment for the State. The mud flats in dispute lie along the Texas coast south of Corpus Christi. The disputed mud flats are to the west of the intracoastal waterway, on the margin between the Laguna Madre and the mainland. The flats are sometimes dry and sometimes covered by water. This case involved the application of the principles set out in *Luttet v. State*, 159 Tex. 500, 324 S.W.2d 167 (Tex. 1958).

Luttet established a general rule that the shoreline for land-grants made by Spain or Mexico is the mean higher high tide line ("MHHT") as defined by tide gauges. *Id.* at 192. The MHHT is found essentially by computing the mean of all the daily tides recorded in an 18.6-year tidal cycle, with the lower disregarded if there are two high tides in a day.

The Austin Court of Appeals held that the exception to the general presumption of mean higher high tide, that of landmarks, delineated the boundary in this case.

G. *Wall v. Carrell*, 894 S.W.2d 788 (Tex. App.-Tyler 1995, writ denied)

This suit involved title to a portion of the George Wilson survey in St. Augustine County. This survey,

which had been patented to George Wilson in 1879, contained 160 acres. In 1916 Wilson conveyed the south portion of the Wilson survey to Beck. At the same time Beck conveyed the north portion to Wilson, in what the court stated was "an effort to partition an undivided interest." Each of these deeds described, by metes and bounds, tracts that comprised 80 acres. The deeds had identical calls for the corners and "witness trees" on the western and eastern end of the boundary line between them. The question involved the southwestern and southeastern corners of the north tract. In 1949 Wall's father, the owner of the north tract employed a surveyor to plat and prepare field notes for the north tract. The surveyor, who testified at trial, indicated that using the 1916 description and attempting to follow the course and distance of the original surveyor, prevented him from finding the witness trees at the 700 vara point where they were expected. Rather, by walking exactly 100 varas further he found what appeared to be the originally described trees. The surveyor was convinced that a "chaining error" had been made by the original 1916 surveyor. The 1949 re-survey increased the size of the north tract from 80 acres to 111.4 acres, yielding the 31.4 acres in dispute.

Wall, the owner of the north tract filed a trespass to try title suit seeking a declaration that he owned the 31.4 acres in question. In addition to the surveyor who had done the 1949 survey, Wall also called as an expert witness another surveyor, who also testified to what he considered a chaining error. The owner of the south tract also had a surveyor as an expert witness who countered the plaintiff's experts by concluding that the chaining error conclusion would presuppose a two-chain error on both the eastern and western sides of the north tract. This surveyor also testified that any such chaining error would likely have been found in 1948 when 48 acres of the south tract was surveyed and sold. The defendant's surveyor concluded that these factors, as well as what appeared to be the intent of the 1916 deeds to effect an equal partition, led to the ultimate conclusion that the correct boundary was indeed midway between the 160 acre Wilson Survey. Bolstering this conclusion was a reference to a portion of the 1916 south tract deed which read "the N./ half of a partition deed."

The court, in affirming the trial court's finding of the boundary line to be between two 80 acre tracts, emphasized that the primary focus was "on determining the intent of the parties, not the intention of the surveyor. . ." The court reasoned that given the fact that the 1916 surveyor described the original monuments with such particularity that it would be just as reasonable to conclude that the original monuments were no longer there 32 years later when the property was re-surveyed, rather than conclude that the original surveyor made an error.

H. *Mohnke v. Greenwood*, 915 S.W.2d 585 (Tex.App. - Hou[14th Dist.] 1996, n.w.h.).

This is another case that involves the question of acquiescence and adverse possession. In 1967, the Mohnkes purchased a 99 acre tract of land, which had a barbed wire fence surrounding the property. The fence was put up in 1961 to replace a fence that had been there since before 1930. In connection with their purchase, the Mohnkes hired a surveyor to prepare a survey. The survey set the boundary of the property at the fence line. The Mohnkes used the land to graze cattle. In the late 1960's the Mohnkes planted pines inside the perimeter of the barbed wire fence.

In 1988, Greenwood purchased a 5.5 acre tract that abutted the Mohnkes' land to the east. In connection with her purchase Greenwood, also had the land surveyed. Greenwood's surveyor, marked a different boundary, which showed that the barbed wire fence was encroaching onto the Greenwood property. Greenwood tore down that part of the barbed wire fence that encroached on her land, and constructed a wooden fence approximately eight feet to the west of where the barbed wire fence had stood.

The Mohnkes brought suit against Greenwood to establish the correct boundary and for adverse possession. They also claimed the boundary was established by acquiescence. After a trial to the bench, the court rendered judgment in favor of Greenwood.

The trial court concluded that the Mohnkes failed to meet their burden of proof of establishing the true boundary of the property in dispute. The court noted the priority or dignity of calls in Texas as follows: in the following order: (1) natural objects; (2) artificial objects; (3) course; and (4) distance. The Mohnkes contended that they should prevail because the Greenwood's surveyor did not follow the dignity of calls rule. This contention was premised on the assumption that the barbed wire fence was an "artificial object" that should have been given preference. The court noted that Greenwood's surveyor testified that fences are artificial objects for preference purposes only insofar as they may be used to set corners. He further testified that fences themselves are not artificial objects themselves because they tend to wander. Both surveyors agreed on the fence point for a particular corner, but they differed on the degree of tapering of that line from that point.

Greenwood's expert witness called the Mohnkes survey merely a fence survey. After noting that both surveyors relied on prior deeds that referenced no artificial objects the court said the dignity of calls rule was immaterial. Since the court recognized that there was evidence as to the accuracy of both surveys. However, since the trial court ruled in favor of the Greenwoods that ruling was supported by the evidence.

The issue of adverse possession was again decided on the basis of the casual fence doctrine and adverse

possession was denied to Mohnke. The court rejected the boundary by acquiescence because there was no evidence of uncertainty, doubt or dispute between the parties and known to them. The court noted that merely because you had conflicting surveys at trial, this fact alone, does not suffice.

I. McAllister v. Samuels, 857 S.W.2d 768 (Tex. App. -Houston [14th] 1993, n.w.h.).

In *McAllister*, the McAllisters sued the Samuels claiming ownership of a strip of land by adverse possession. The Samuels desired to replace an old fence that was erected in the 1940's, many years before the Samuels and the McAllisters purchased their respective lots. Therefore, the Samuels had a survey completed which showed that the old fence was on their lot approximately 9 inches in from the property line. The McAllisters had their own survey done which agreed with the Samuels' survey. Nevertheless, the McAllisters filed suit claiming they acquired the 9 inch strip by adverse possession. The trial court granted summary judgment in favor of the Samuels and against the McAllisters because the McAllister's possession of the 9 inch strip was not the visible, hostile appropriation contemplated by the adverse possession statutes, such as the ten-year statute of limitations. On appeal, the McAllister's contended that a fact issue existed as to their hostile possession because they maintained the old fence and picked up leaves and trash from the 9 inch strip. The court of appeals disagreed and affirmed the trial court's summary judgment stating the following:

"We find that the McAllisters' possession of the nine-inch strip was not the visible, hostile appropriation contemplated by the adverse possession statutes. The Samuels have disproved as a matter of law an essential element of the McAllisters' adverse possession claim under the ten-year statute."

As is often the case with boundary disputes in platted subdivisions with fences, a claim is made that mowing grass, etc constitutes sufficient use under the adverse possession statutes. The Texas Supreme Court has noted that mowing the grass, planting flowers and maintaining a hedge does not constitute a hostile character of possession sufficient to give notice of adverse possession. *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985). Similarly, in *Miller v. Fitzpatrick*, 418 S. W.2d 884, 888 (Tex. Civ. App. - Corpus Christi 1967, writ refd n.r.e.), Fitzpatrick sued his neighbor, Miller, claiming title to a disputed strip running between their lots based upon adverse possession for a period of ten years. The evidence showed that when Miller purchased his lot, he believed the disputed area was part of his purchase. Therefore, he fertilized and mowed the grass,

cut the weeds, planted flowers and shrubs and installed an underground drainage or irrigation system. In rejecting the adverse possession claim, the court of appeals stated:

"The acts of mowing the grass, planting flowers and keeping the land in dispute in the condition in which his grantor kept it did not constitute the character of possession [so as to give] notice of an exclusive adverse possession hostile to the claims of all others."

VI. EXPERT TESTIMONY - TEXAS

A. Texas Rules of Evidence.

1. Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

3. Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

4. Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

- (a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
- (b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the

opinion is based. This examination shall be conducted out of the hearing of the jury.

- (c) Admissibility of Opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.
- (d) Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

5. Rule 195.2. Schedule for Designating Experts

Unless otherwise ordered by the court, a party must designate experts~that is, furnish information requested under Rule 194.2(f)~by the later of the following two dates: 30 days after the request is served, or-

- (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;
- (b) with regard to all other experts, 60 days before the end of the discovery period.

Rule 193.5. Amending or Supplementing Responses to Written Discovery

- (a) Duty to Amend or Supplement. If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:
 - (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and
 - (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.
- (b) Time and Form of Amended or Supplemental Response. An amended or supplemental response must be made reasonably promptly

after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.

VII. EASEMENTS

An easement is the right in favor of one person to use the land of another person. Easements are of two types: "affirmative" and "negative" easements. Some characteristics of an affirmative easement are: it is an interest in land, covered by the statute of frauds; it is a right that attaches to the estate itself; it gives the owner thereof (dominant estate owner) the right to use the servient estate for some purpose. *Miller v. Babb*, 263 S.W. 253 (Tex. Comm'n App. 1924, judgment adopted)

The Restatement defines an easement as follows:

"An easement is an interest in land in the possession of another which:

- a. entitles *the owner* of such interest to a limited use or enjoyment of the land in which the interest exists;
- b. entitles him to protection as against third persons from interference in such use or enjoyment;
- c. is not subject to the will of the possessor of tile land;
- d. is not a normal incident of the possession of any land possessed by the owner of the interest; and
- e. is capable of creation by conveyance." Restatement of the Law of Property. Section 450(1944)

A. Appurtenant or In Gross:

An easement is a right attached to a greater right in land. The easement appurtenant does not exist apart from the land to which it is attached. *Brown v. Woods*, 300 S.W.2d 364 (Tex. Civ. App. - Waco 1957, no writ); *McWhorter v. City of Jacksonville*, 694 S. W.2d 182 (Tex. App. - Tyler 1985, no writ) Whether an easement is

appurtenant or in gross is determined by an interpretation of the grant or reservation, aided, if necessary by the situation of the property and the surrounding circumstances. An easement appurtenant is conveyed with the land, regardless of whether it is described in the conveyance. *Walschshouser v. Hyde*, 890 S.W. 2d 171 (Tex. App. - Ft Worth 1994, writ denied). An easement is never presumed to be in gross if it can fairly be construed to be appurtenant. *McDaniel v. Calvert*, 875 S.W.2d 482 (Tex. App.-Ft. Worth 1994, no writ)

An easement in gross is a mere personal right or interest to use of the land of another. *Alley v. Carleton*, 29 Tex. 74(1867)

An easement appurtenant passes with title to the dominant estate which it benefits; a separate conveyance is not necessary since the appurtenant easement cannot be separately conveyed. *McWhorter v. City of Jacksonville*, 694 S.W.2d 182 (Tex. App.-Tyler 1985, no writ). An easement is never presumed to be an easement in gross if it can be fairly construed to be an appurtenant easement. *Ginther v. Bammel*, 336 S.W.2d 759 (Tex. Civ. App.-Waco 1960, no writ)

Easements in gross are personal easements not benefiting specific tract of land and are generally not assignable, but the parties may create an assignable easement by an express provision to such effect. *Farmers Marine Copper Works, Inc. v. City of Galveston*, 757 S.W.2d 148 (Tex. App.-Houston [1st Dist.] 1988, no writ); *Strauch v. Coastal States Crude Gathering Co.*, 424 S.W.2d 677 (Tex. Civ. App.-Corpus Christi 1968, writ dismissed). An easement in gross such as a pipeline easement allowing multiple lines may be partially assignable or divisible. *Orange County v. Citgo Pipeline Co.*, 934 S.W.2d 472 (Tex. App.-Beaumont 1996, writ denied) (such easement is partially assignable if the assignment does not overburden the easement, such as where it allows multiple lines for additional consideration). An example of a statutorily created and recognized easement in gross is the "conservation" easement to restrict land to open space use or to preserve certain historical, cultural, architectural or archeological aspects of real estate. Tex. Nat. Res. Code sec. 183.001

B. Licenses:

A license is generally a personal, revocable and nonassignable privilege to do acts on the land of another without possessing an estate or interest in the land. It may be conferred in writing or by parol. An admission ticket (i.e., to a racetrack) is a revocable license because it conveys no right in property. A license, coupled with an interest, is not revocable at the will of the licensor; for example, if one sells someone farm equipment they may enter onto the property to pick it up. A license is not subject to the Statute of Frauds. A license remains irrevocable only so long as necessary by its nature. An agreement to lease space, but not designating particular

space, is a license, not a lease, and is revocable and not binding on a later owner. *Kwik Wash Laundries, Inc. v. Alexander House, Ltd.* 1996 Tex. App. LEXIS 1433 (Tex. App. -Houston [1st Dist.] April 1996); *op. withdrawn, appeal dismissed, reh'g denied*, 1996 Tex. App. LEXIS 3663. A license is a privilege or authorization to do acts on property of another, but is not an estate or interest in land. A license is generally a personal, revocable and nonassignable privilege created in parol or in writing. In some cases, licenses will not be revocable at will if expenditures have been made in reliance on the license. *Joseph v. Sheriff's Assoc.*, 430 S.W.2d 700 (Tex. Civ. App. - Austin 1968, no writ); *Digby v. Hatley*, 574 S. W.2d 186 (Tex. Civ. App. - San Antonio 1978, no writ (a license not supported by consideration is revocable at will); *Ethan 's Glen Comm. Assoc. v. Kearney*, 667 S.W.2d 287 (Tex. App. - Houston [1stDist.] 1974, no writ) (irrevocability did not result from expenditures due to prior extended period of enjoyment of license).

C. Easement or Fee - Distinctions:

One should never accept the caption or designation of an instrument in the chain of title as final authority as to whether it conveys an easement or the fee simple title to a tract of land.

A deed purporting to "dedicate" rather than "grant" or "convey" may be considered as a conveyance of "fee simple." *Russell v. City of Bryan*, 919 S.W.2d 698 (Tex. App. - Houston [14th Dist.] 1996, writ denied) (deed did not use word "easement" and warranty indicate intent to transfer fee simple). The rules of construction for determining whether a fee title is conveyed, or merely an easement, have long been clearly enunciated by the Texas Supreme Court. The Court, in *Reiter v. Coastal States Gas Producing Co.*, 382 S.W.2d 243 (Tex. 1964) reiterated the rules as follows (quoting from earlier Texas Supreme Court authority):

'Generally stated, the rules announced by these decisions are: First, that, as in the Right of Way Oil Company case, a deed which by the terms of the granting clause grants, sells and conveys to the grantee a 'right of way' in or over a tract of land conveys only an easement; and second, that, as in the Calcasieu Lumber Company case and in the Brightwell case, *a deed which in the granting clause grants, sells and conveys a tract or strip of land conveys the title in fee, even though in a subsequent clause or paragraph of the deed the land conveyed is referred to as a right of way.*' (Emphasis added)

If the instrument conveys the land itself, as distinguished from the right-of-way over the land, it passes fee simple

title, even though subsequent recitals in the instrument attempt to limit the use of the land for easement purposes. *Texas Electric Railway Co. v. Neale*, 151 Tex. 526, 252 S.W.2d 451 (1952). It is necessary to examine the granting clause to ascertain the nature of the conveyance. For example, a deed that conveys "a right-of-way in and over the following described property and premises" conveys only an easement. *Right of Way Oil Co. v. Gladys City Oil, Gas & Manufacturing Co.*, 106 Tex. 94, 157 S.W. 737(1913).

A deed under which an irrigation district acquired its canals reading "also the canals, laterals, and flumes, and rights of way therefor, now existing and on the following lands, and also further rights of way that my be acquired, etc." conveyed an easement only as distinguished from fee title. *Reiter v. Coastal States Gas Producing Co.*, 382 S.W.2d 243 (Tex. 1964).

A deed with a granting clause conveying a "right-of-way" and describing three tracts with the second and third tract referring to "the following" described land, transfers an easement only over the three tracts and not the fee to the latter two tracts. *Rio Bravo Oil Co. v. Hunt Petroleum Corp.*, 455 S.W.2d 722 (Tex. 1970). A deed that conveys "the following described tract of land," and which is later referred to as a right-of-way conveys a fee title. *Calcasieu Lumber Co. v. Harris*, 11 Tex. 18, 13 S.W. 453 (1890).

A conveyance of a "land forty feet wide" conveys the fee simple, not simply an easement. *Rod v. Champion*, 464 S. W.2d 922 (Tex. Civ. App. - Austin 1971, no writ). Where a railroad conveyed land by metes and bounds and reserves "the 100-foot right-of-way," the fee title was reserved. The court distinguished the previous authorities on the ground that the strip in question was owned in fee by the railroad at the time of the deed and the reservation of the right-of-way must be taken to refer to the land itself. *S. H. Oil & Royalty Co. v. Texas & New Orleans Railroad Co.*, 295 S.W.2d 227 (Tex. Civ. App. - Beaumont 1956, writ ref'd n.r.e.).

However an instrument, which conveys land definitely described and then excepts from the conveyance a road right-of-way leaving the remaining acreage conveyed, passes the fee to the property which is subject to the easements. *Haines v. McLean*, 154 Tex. 272, 276 S.W.2d 777 (1955). A deed conveying "a strip of 200 feet in width of land" over the tract referred to in the deed was held to convey a fee title. Later recitations in the deed characterized the strip as a right of way. *Brightwell v. International-Great Northern Railroad Co.*, 121 Tex. 338, 49 S.W.2d 437 (1932). A deed, which in the granting clause conveyed a "tract of land," referred to in the description clause as a right-of-way, conveyed fee simple title. Emphasis was laced on reference in the habendum and warranty clauses to the "Land," as well as to the rule that the granting clause controls over subsequent recitations. *Hidalgo County v. Pate*, 443

S. W.2d 80 (Tex. Civ. App. - Corpus Christi 1969, writ ref'd n.r.e.).

D. Maintenance:

The easement holder must maintain the easement and the owner of the servient estate must not interfere with the dominant estate. *Reginal v. Ayco Development Corp.*, 788 S.W.2d 722 (Tex. Civ. App.-- Austin 1990, writ denied).

Creation of Easements

E. In General - Express Grant:

An easement by express grant is an interest in land which is subject to the Statute of Frauds. *Anderson v. Tall Timbers Corp.*, 378 S.W.2d 16, 24 (Tex. 1964). It must follow the normal formalities of real estate instruments: it must be written, it must be properly subscribed by the party to be charged, it must manifest the grantor's intent, and, insofar as the property description is concerned, it must furnish within itself or by reference to other identified writings then in existence, the means or data by which the particular land to be conveyed may be identified with certainty. *Pick v. Bartel*, 659 S.W.2d 636 (Tex. 1983).

Because an easement is an interest, in land, the instrument creating the easement must be in writing, except where the easement arises by implication, estoppel, or prescription. The writings must meet the rules applicable to the conveyance of fee simple title. 31 Tex. Jur.3d *Easements* sec. 22. A transfer of land that states that it "dedicates" the land does not, as a matter of law, convey the fee simple. *Russell v. City of Bryan*, 797 S.W.2d 112 (Tex. App.-Houston [14th Dist.] 1990, writ denied). Because the description of an easement in a deed was held deficient in every respect, the Texas Supreme Court found it unnecessary to reach the issue of whether the words "we guarantee" in the deed were sufficient words of grant to convey an easement. However, the appellate court stated: "The term 'guarantee' is not a word of grant in the traditional sense of conveyance of interests in property." The grant must furnish, within itself or by reference to other identified writings then in existence, means or data by which servient estate may be identified with certainty. *Bartel v. Pick*, 643 S.W.2d 224. (Tex. App.-Fort Worth 1982), aff d *Pick v. Bartel*, 659 S.W.2d 636 (Tex. 1983).

In *Preston Del Norte Villas Association v. Copper Mill Apartments. Ltd.*, 579 S.W.2d 267 (Tex. Civ. App.- Dallas 1978, writ ref'd n.r.e.), the Declaration of the condominium project reserved an easement across its development "regardless of whether [the undeveloped lands] become a part of the condominium project...or some other condominium project." *Preston Del Norte Villas Assoc. v. Copper Mill Apts. Ltd.*, 579 S.W.2d 267, 269 (Tex. Civ. App.-Dallas 1978, writ. refd n.r.e.).

When the land was used for an apartment project instead of a condominium project, the condominium association was unable to restrict access of the easement to the lessees of the apartment owner because the express reservation was read broadly to permit the successors-in-interest of the grantor to use the easement. This broad interpretation was based on the unreasonableness of supposing that the developer of the condo association intended to leave the land without access if the land were developed in another manner. *Preston Del Norte Villas Assoc. v. Copper Mill Apts. Ltd.*, 579 S.W.2d 267, 269 (Tex. Civ. App.-Dallas 1978, writ. ref'd n.r.e.).

The creation of an easement contemplates a future use consistent with the grant, enabling the easement owner to carry out the object for which the easement was granted. This is true even under conditions different from those existing at the time of the conveyance. *Johnson v. Southwestern Public Service Co.*, 688 S.W.2d 653 (Tex. App.-Amarillo 1985, no writ). An easement may be granted or reserved in a deed of trust. All cotenants must join in creation of an easement; otherwise, the easement may not bind a successor who acquires full title. The grantor in a deed of the dominant estate reserves an easement unto himself or herself to access a contiguous parcel. For example, the owner of a tract of land may be willing to sell his frontage, but he or she will reserve and retain an easement across the parcel conveyed to access remaining property. see *McWhorter v. City of Jacksonville*, 694 S. W.2d 182 (Tex. App.-Tyler 1985, no writ). A reservation in favor of a stranger to a conveyance is inoperative and cannot function as a conveyance to the stranger. *MGJ Corp. v. City of Houston*, 544 S.W.2d 171 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.) (The easement was granted to the named grantee and to "other purchasers and their tenants of property located within said community center"). A reservation cannot be made by the owner of both the dominant and servient tenement. *Preston Del Norte Villas Assoc. v. Pepper Mill Apts.*, 579 S.W.2d 267 (Tex. Civ. App.-Dallas 1978, writ ref'd n.r.e.) (The condominium declarant provided for a reservation of an easement to the benefit of its adjoining property but its later conveyance of condominiums subject to the provisions of the declaration operated to reserve the easement). An easement is expressly limited by the granting clause that creates the easement. *Marcus Cable Associates, L.P. v. Krohn*, 90 S.W.3d 697 (Tex. 2002).

F. Implication:

An easement may be vested in a grantee by implied grant or created in favor of a grantor by implied reservation. Generally, where one person owns an entire tract of land, there is no necessity for creation of an easement on one part of the land for the benefit of another part of the land during its ownership. However, there may be in existence roads or ways by which the

land is traversed or other uses of the land in the nature of easements. Where an owner sells land with full covenants of warranty and the deed contains no express reservation, there will be no reservation by implication unless the use is necessary.

There must be no other reasonable means of enjoying the dominant tenement without the easement. However, when one conveys several parcels of land, there may be an implied grant or reservation of all apparent and continuous easements created or used by the vendor. There may be uses in the nature of easements imposed by an owner on parts of a tract for the benefit of other parts. Upon severance of title, the easement may impliedly arise by grant or reservation. To be recognized the use must be apparent at the time of the transfer, it must be continuous; it must be necessary for the dominant estate; and there must be unity of title of the dominant and servient estates at the time of the transfer. *Ortiz v. Spann*, 671 S.W.2d 909 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). *North Clear Lake Development Corp. v. Blackstock*, 450 S.W.2d 678 (Tex. Civ. App.-Houston [14th Dist.] 1970, writ ref'd n.r.e.); *Getz v. Boston Sea Party of Houston, Inc.*, 573 S.W.2d 836 (Tex. Civ. App.-Houston [1st Dist.] 1978, no writ); *Beck v. Mills*, 616 S.W.2d 353 (Tex. Civ. App.-Houston [14th Dist.] 1981, writ ref'd) *Holmstrom v. Lee*, 26 S.W.3d 526 (Tex. App. - Austin 2000, no writ). If the use does not exist until after the transfer, an implied easement will not be recognized. *Stark v. Morgan*, 602 S.W.2d 298 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.); *Holman v. Patterson*, 34 Tex. Civ. App. 344, 78 S.W. 989 (1904, writ ref'd); *Scarborough v. Anderson Brothers Construction Co.*, 90 S.W.2d 305 (Tex. Civ. App.-El Paso 1936, writ dism'd); *Zapata County v. Llanos*, 239 S.W.2d 699 (Tex. Civ. App.-San Antonio 1951, writ ref'd n.r.e.); *Miles v. Bodenheim*, 193 S.W. 693 (Tex. Civ.App.-Texarkana 1917, writ ref'd).

The elements of an implied easement appurtenant are: (1) original unity of ownership of the dominant and servient estate, (2) apparent use at the time of the grant, (3) continuous use of the easement until the time of the grant (with conspicuousness indicating permanence), and (4) reasonable necessity or strict necessity of the easement for the fair and enjoyable use of the dominant estate. *Payne v. Edmonson*, 712 S.W.2d 793 (Tex. App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Sorrell v. Gengo*, 49 S.W.3d 627 (Tex. App. - Beaumont 2001, no writ). In order to be continuous, no act of human must be necessary to complete the easement (such as pumping of water at a well and conveying water by hand). *Howell v. Estes*, 71 Tex. 690, 12 S.W. 62 91888 (easement of necessity was continuous where applicable to access by stairway to adjoining building). In order for the use to be apparent, same does not have to be visible. It may be considered apparent as long as there are signs by a careful inspection to the person ordinarily

conversant with subject. Such use would exist where sewer lines served the vendee's adjoining lot and there was no sewer in the street adjacent to the grantee at the time. *Westbrook v. Wright*, 477 S.W.2d 663 (Tex. Civ. App.-Houston [14th Dist.] 1972, no writ).

If the grantor held a fee interest in the dominant estate but only a life estate in the servient estate, she never had sufficient unity of title in order to create an implied easement that survived her life estate. *First Nat'l Bank of Amarillo v. Amarillo Nat'l Bank*, 531 S.W.2d 905 (Tex. Civ. App.-1975, no writ). In connection with a deed in lieu of foreclosure (and perhaps a trustee's deed), the test of whether the implied easement exists depends upon the circumstances at the time the title is conveyed, not the time the lien was created. *Neilon v. Texas Trust & Security Co.*, 147 S.W.2d 321 (Tex. Civ. App.-Austin 1940, writ dismissed judgment corrected). An implied easement may be created by a partition between adjoining owners, provided the use is existent at the time of the partition. *Zapata County v. Llanos*, 239 S.W.2d 699 (Tex. Civ. App.-San Antonio 1951, writ refused n.r.e.).

An implied easement may be created by reservation even though the grantor's deed warrants that the servient estate is free of encumbrances. *Mitchell v. Castellan*, 151 Tex. 56, 246 S.W.2d 163 (1952). It appears that for the implied easement to be created by reservation the use must be strictly necessary, but if the implied easement is created by a grant, then the use only need be reasonably necessary. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196 (Tex. 1962); *Mitchell v. Castellan*, 151 Tex. 56, 246 S.W.2d 163 (1952); *Beck v. Mills*, 616 S.W.2d 353 (Tex. Civ. App.-Houston [14th Dist.] 1981, writ refused). The implied easement will cease upon termination of the necessity. *Johnson v. Faulk*, 470 S.W.2d 144 (Tex. Civ. App.-Tyler 1971, no writ). The implied easement has been considered under varying circumstances such as the following: (1) An implied easement was recognized in connection with underground gas mains, water and sewer pipes crossing grantor's land; *Pokorny v. Yudin*, 188 S.W.2d 185 (Tex. Civ. App.-El Paso 1945, no writ). (2) the Supreme Court has refused to recognize implied easements for novelty, pleasure or recreation purposes such as studying nature, picnicking, hiking, riding horseback, and bird watching; *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196 (Tex. 1962); (3) the Supreme Court refused to recognize a reservation of an implied easement where the watershed of a gas station of the grantor encroached onto the adjoining conveyed land since it could be easily altered; *Mitchell v. Castellan*, 151 Tex. 56, 246 S.W.2d 163 (1952); (4) under various circumstances, roads have been recognized as implied easements such as where crossing unfenced prairie lines or where furnishing substantially more direct access than the other access afforded the tract; *Zapata County v. Llanos*, 239 S.W.2d 669 (Tex. Civ. App.-San Antonio 1951, writ refused n.r.e.); *Fender v. Schaded*, 420 S.W.2d

468 (Tex. Civ. App.-Tyler 1967, writ refused n.r.e.); (5) an implied easement was recognized for rear access to garages where the way was the only means of vehicular access to the garages and to the rear entrances. *Neilon v. Texas Trust & Security Co.*, 147 S.W.2d 321 (Tex. Civ. App.-Austin 1940, writ dismissed judgment corrected).

Easements in party walls are sometimes explained on the theories of necessity or estoppel. A party wall is a wall that is located on or at the division line between adjoining parcels of land owned by different landowners and used or intended to be used by both owners in the construction or maintenance of improvements on their respective properties. In the absence of an agreement to the contrary, a party wall means a solid wall without windows. *Everly v. Driskill*, 24 Tex. Civ. App. 413, 58 S.W. 1046 (1900, writ refused). Either owner of a party wall has the right to raise the wall if it is strong enough and will not interfere with the other owner's rights. *Dauenhauer v. Devine*, 51 Tex. 480 (1879); *Witte v. Schasse*, 54 S.W. 275 (Tex. Civ. App. 1889, no writ)

A party wall also refers to a wall dividing two buildings, used equally as an exterior wall by the owners of each, without any exclusive use by either. *Dauenhauer v. Devine*, 51 Tex. 480 (1879). It is not necessary that the wall stand equally on the adjoining parcels of land; it may rest wholly on one lot. *Fewell v. Kinsella*, 144 S.W. 1174 (Tex. Civ. App.-San Antonio 1912, writ refused). A city council has the power to regulate and prescribe the manner of, and to order the building of parapet and party walls. Tex. Local Gov't. Code Sec. 342.003(a)(10). The soil of each landowner, together with the wall belonging to each landowner, is subject to an easement in favor of the landowner for the continued support and maintenance of the party wall. When the party wall is destroyed, intentionally or unintentionally, the mutual easements cease to exist. *Fewell v. Kinsella*, 144 S.W. 1174 (Tex. Civ. App.-San Antonio 1912, writ refused); *McCormick v. Stoneheart*, 195 S.W. 883 (Tex. Civ. App.-Amarillo 1917, writ refused); *First Nat'l Bank v. Zundelowitz*, 168 S.W. 40 (Tex. Civ. App.-Amarillo 1914, no writ). An adjoining owner who makes use of a wall standing partly on its land does not render itself liable for any part of the cost of the wall, where it was not a party to an agreement under which the wall was erected and there was nothing of record that would put it on notice that it was expected to pay for the use thereof. However, an oral agreement to share the cost of construction of a party wall is otherwise enforceable. *Jones v. Monroe*, 285 S.W. 1055 (Tex. Comm'n App. 1926) *aff'd on rehearing*, 288 S.W. 802 (Tex. Comm'n App. 1926). An oral agreement for payment of costs incurred for use of the wall may operate as a covenant running with the land, but will not bind a bona fide purchaser. *Whittenburg v. J. C. Penny Co.*, 139 Tex. 15, 161 S.W.2d 447 (1942). Neither adjoining landowner has any right to destroy a party wall unless it has the consent of the other. However, a party wall that

is destroyed by fire, lapse of time, or otherwise, in the absence of a contract for rebuilding it, terminates the easement. *Fewell v. Kinsella*, 144 S.W. 1174 (Tex. Civ. App. - San Antonio 1912, writ ref'd).

A person buying a lot by reference to a plat or map showing an abutting easement acquires a private easement regardless of whether the way is opened or dedicated to the public or the plat is recorded. *Ford v. Moren*, 592 S.W.2d 385 (Tex. Civ. App.-Texarkana 1979, writ ref'd n.r.e.); *Dallas Cotton Mills v. Industrial Co.*, 296 S.W. 503 (Tex. Comm'n App. 1927, opinion adopted); *Sherman Slaughtering & Rendering Co. v. Texas Nursery Co.*, 224 S.W. 478 (Tex. Civ.App.-Amarillo 1920, writ dism'd); *Home v. Ross*, 777 S.W.2d 755 (Tex. App.-San Antonio 1989, no writ). The creation of private easements by sales by reference to unrecorded maps shown to the purchaser does not result in a public dedication of the streets. *Ward v. Rice*, 239 S.W.2d 823 (Tex. Civ. App.-San Antonio 1951, writ ref'd n.r.e.). The private easement acquired by a conveyance with reference to the map or plat survives a vacation or abandonment of the street. However, the party will not be entitled to damages by the street vacation if the closing only renders its access less convenient. *City of San Antonio v. Olivares*, 505 S.W.2d 526 (Tex. 1974).

An implied easement appurtenant may be established by proof of a driveway as the only means of access to a tract used continuously for many years. The elements in such case would be that the use was apparent, continuous and necessary. *Bickler v. Bickler*, 403 S.W.2d 354 (Tex. 1966).

Under the strict necessity standard, use of the easement must be economically or physically necessary and not just merely desirable. The person seeking to establish an implied reservation of an easement over a roadway must prove that there was no other way of ingress and egress. *Payne v. Edmonson*, 712 S.W.2d 793 (Tex. App.-Houston [1st Dist] 1986, ref. n.r.e.); *Machala v. Weems*, 56 S.W.3d 748 (Tex. App. - Texarkana 2001, n.w.h.). The fact that there was another means of ingress and egress, even though costly and dangerous, defeated the claim of an implied reserved easement.

G. Way of Necessity:

This type of implied easement may extend to the grantee over the grantor's lands or to the grantor over the grantee's lands. If a grantor conveys a tract and retains lands surrounded partly by the land conveyed and the remainder by land of strangers, an implied reservation of the right-of-way by necessity over the land conveyed arises where and as long as there is no other means of ingress and egress. *Parker v. Bains*, 194 S.W.2d 569 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.); *Bains v. Parker*, 143 Tex. 57, 182 S.W.2d 397 (1944);

Meredith v. Eddy, 616 S.W.2d 235, (Tex. Civ.App.-Houston [1st Dist] 1981, no writ).

A claimant must establish (1) unity of ownership of the dominant and servient estates before severance; (2) necessity of a roadway; and (3) necessity existed at time of severance. *Koonce v. Brite Estate*, 663 S.W. 451 (Tex. 1984). The way of necessity to which the party is entitled is only a convenient way to give reasonable access. The easement will be recognized even though the party does not thereby secure direct access to a public right of way, but only to permissive access over a third party's land and thereby to a public right of way. *Parshall v. Crabtree*, 516 S.W.2d (Tex. Civ. App.-San Antonio 1974, writ ref'd n.r.e.). Although the easement must be necessary at the time of the conveyance and separation of ownership of adjoining tracts and will be recognized only so long as it continues to be necessary, the easement for access need not be in use at the time of such conveyance as must other easements by implication. *Parker v. Bains*, 194 S.W.2d 569 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.); *Johnsn v. Faulk*, 470 S.W.2d 144 (Tex. Civ. App.-Tyler 1971, no writ).

The way of necessity will be recognized only if the two parcels had been owned as a single tract and if lack of access existed at time of severance. *Koonce v. J.E. Brite Estate*, 663 S.W.2d 451 (Tex. 1984). It appears that a way of necessity will not be granted where unity rests solely on ownership by the sovereign. *Weingarten Realty Investors v. Universal Serv. Co.*, 1997 Tex. App. Lexis 5518 (Tex. App.-Houston [1st Dist] rev. denied; October 23, 1997, Case no. 01-96-001400-cv).

H. Prescription or Limitations:

The 10-year statute of limitations on land is the time required for prescriptive rights. *Ortiz v. Spann*, 671 S.W.2d 909 (Tex. Civ. App.-Corpus Christi 1984, writ ref'd n.r.e.). The elements of an easement by prescription are: (1) possession of the land, (2) use and enjoyment, (3) adverse or hostile claim, (4) dominion and appropriation for use, and (5) use for more than 10 years. *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120 (Tex. App.-Corpus Christi 1986, no writ); *Suarez v. Jordan*, 35 S.W.3d 268 (Tex. App. - Houston [14th Dist] 2000, no writ). Hostile or adverse use will be lacking if the owner consented to the use, expressly or impliedly, or if the owner also used the way. *Vrazel v. Skrabanek*, 725 S.W.2d 709 (Tex. 1987); *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622 (1950); *Stallman v. Newman*, 9 S.W.2d 243 (Tex. App. - Houston [14th Dist.] 1999, rev. denied). Prescriptive use may exist even though joint use exists if the claimant establishes that the owner was aware of its adverse claim. *Scott v. Cannon*, 959 S.W.2d 712 (Tex. App.-Austin 1998, rev. denied). The use must be without permission and exclusive. *Vrazel v. Skrabanek*, 725 S.W.2d 709 (Tex. 1987); *Mack v. Landry*, 22 S.W.3d 524, (Tex. App. - Houston [14th

Dist.] 2000, no writ). The easement claimed must be defined. If the claim is made to a way over an open prairie with no well-defined lines, the prescriptive right will be denied, or if the use is made of unfenced land solely for recreational and pleasure purposes and not for general travel, the easement will be denied. *Fannin v. Somervell County*, 450 S.W.2d 933 (Tex. Civ. App.-Waco 1970, no writ). However, an easement for flooding may be acquired by continuous use of a dam and consequent flooding. *First National Bank v. Beavers*, 602 S.W.2d 327 (Tex. Civ. App.-Texarkana 1980, no writ). Mere use alone is insufficient, such as when the claimed easement is also used by the owner of the land, since the use is not inconsistent with a license from the owner and is not adverse. *Austin v. Hall*, 93 Tex. 591, 57 S.W. 563 (1900); *Hollingsworth v. Willilamson*, 300 S.W.2d 194 (Tex. Civ. App.-Waco 1957, writ ref'd n.r.e.); 4 Lange Texas Land Titles Sec. 376 (Tex. Practice 1981); *Brooks v. Jones*, 578 S.W.2d 669 (Tex. 1979); *Eastex Wildlife Conservation Association v. Jasper*, 450 S.W.2d 904 (Tex. Civ. App.-Beaumont 1970, writ ref'd n.r.e.); *Johnson v. Faulk*, 470 S.W.2d 144 (Tex. Civ. App.-Tyler 1971, no writ); *Dailey v. Alarid*, 486 S.W.2d 620 (Tex. Civ. App.-Tyler 1972, writ ref'd n.r.e.). The right to an access easement by a prescription is not limited to the beaten path used, but will include sufficient land, where available, for drainage ditches, repairs, and convenience of the traveling public. *Allen v. Keeling*, 613 S.W.2d 253 (Tex. 1981).

I. Ancient Lights:

The English rule of "ancient lights" is not recognized in Texas. *Ft. Worth & D.C. Ry. v. Ayers*, 149 S.W. 1068 (Tex. Civ. App.-Amarillo 1912, no writ). A landowner may erect a building, wall, fence, or other obstruction on the landowner's land as an incident of fee simple ownership in the absence of building restrictions, even though it obstructs a neighbor's light, air, and vision, or depreciates the value of a neighbor's property, or was constructed because of malice or ill will. *Scharlack v. Gulf Oil Corp.*, 368 S.W.2d 705, 706-07 (Tex. Civ. App.-San Antonio 1963, no writ); *Harrison v. Langlinais*, 312 S.W.2d 286 (Tex. Civ. App.-San Antonio 1958, no writ); *Klein v. Gehrung*, 25 Tex. 232 (1860).

J. Estoppel:

In order to create an easement appurtenant by estoppel, three elements must occur: (1) a representation; (2) a belief in the representation; and (3) reliance on the representation. *Lake Meredith Dev. Co. v. Fritch*, 564 S.W.2d 427 (Tex. Civ. App.-Amarillo 1978, no writ); *Doss v. Blackstock*, 466 S.W.2d 59 (Tex. Civ. App.-Austin 1971, writ ref'd n.r.e.).

In order to establish estoppel, expenditures by the owner of the dominant estate are not necessary to show

reliance. *Payne v. Edmonson*, 712 S.W.2d 793 (Tex. App.-Houston [1st Dist] 1986, writ ref'd n.r.e.). Estoppel by silence occurs when a person under a duty to another **to speak leads the other** to act in reliance or a mistaken understanding of the facts by refraining from speaking. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868 (Tex. App.-Austin 1988, writ denied).

Generally, the doctrine of easement by estoppel or estoppel in pais holds that an owner of property may be estopped to deny the existence of an easement by making a representation that has been acted upon by a party to his or her detriment. The elements of an easement by estoppel are a representation communicated to the promisee, the communication is believed, and there is reliance upon the communication. Failure to speak constitutes a representation if there is a duty to speak and the failure leads another to believe in the existence of a state of facts and in reliance upon which a person acts to his prejudice. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868 (Tex. App.-Austin 1988, writ denied). A verbal agreement for an easement together with payment of consideration and the making of permanent improvements will be sufficient to create a permanent easement by estoppel in pais. *Carleton v. Dierks*, 203 S.W.2d 552 (Tex. Civ. App.-Austin 1947, writ ref'd n.r.e.). Estoppel in pais is not dependent upon dedication. It has been applied if the purchaser spends money on the servient tract and if the seller allows this expenditure. The courts are reluctant to recognize novelty easements as easements by estoppel since the easements for such enjoyment and use of the property are generally indefinite and difficult of enforcement (for example, due to issues of repair). *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196 (Tex. 1962). However, although a novelty easement may not be recognized by estoppel, a more limited easement of access may be so recognized. *Forister v. Coleman*, 418 S.W.2d 550 (Tex. Civ. App.-Austin 1967), writ ref'd n.r.e., 431 S.W.2d 2 (Tex. 1968).

The representation may consist of exhibited maps or plats reflecting the streets and other easements. The purchaser buys believing the matters shown by the plat and in reliance thereon. The conveyance need not refer to the map or plat. *Barron v. Phillips*, 544 S.W.2d 752 (Tex. Civ. App.-Texarkana 1976, no writ). The private easement created is not dependent upon public dedication of the easement and survives vacation or abandonment of the street or alley by the public authorities. *Hicks v. City of Houston*, 524 S.W.2d 539 (Tex. Civ. App.-Houston [1st Dist.] 1975, writ ref'd n.r.e.). Even though a street is abandoned, or the plat vacated, a subsequent reference to the plat may constitute a rededication of the easements shown. *Waterbury v. City of Katy*, 541 S.W.2d 654 (Tex. Civ. App.-Eastland 1976, no writ). The representation may be words or conduct upon which the buyer relies.

Forister v. Coleman, 418 S.W.2d 550 (Tex. Civ. App.-Austin 1967, writ refd n.r.e., 431 S.W.2d 2 (1968)).

K. Custom:

An easement may be recognized by custom: the public use must be ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law. Custom is an ancient common law doctrine. The doctrine of custom has been relied upon to recognize the open beaches easement. *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App.-Austin 1986, writ refd n.r.e.) Cert. Denied 481 U.S. 1024 (1987).

Pursuant to the Open Beaches Act, the public generally has an easement in and to areas along the beach. Tex. Nat. Res. Code Sec. 61.001 *Et Seq* . The right of the public extends by dedication, prescription, estoppel or custom over land bordering the Gulf from the line of mean low tide to the line of vegetation. Local governments shall submit proposed beach access and use plans to the commissioner. Tex. Nat. Res. Code sec 61.015. The Commissioner shall promulgate rules concerning construction on land adjacent to public beaches and to within 1,000 feet of mean high tide or to the first public road that may affect public access to the beach. Tex. Nat. Res. Code sec. 61.011. If there is no clearly established marked line of vegetation, then the line will extend not more than 200 feet inland from the line of mean low tide. Tex. Nat. Res. Code sec. 61.016. A showing that the area is located in the area from mean low tide to the line of vegetation is prima facie evidence of the common law easement in favor of the public. Tex. Nat. Res. Code sec. 61.020. However, such right will not extend to inaccessible areas. Tex. Nat. Res. Code sec. 61.021. The Open Beaches Easement rolls with the line of the mean low tide and vegetation even if a change occurs by avulsive means (such as a hurricane). *Feinman v. State*, 717 S.W.2d 106 (Tex. App.-Houston [1st Dist.] 1986, writ refd n.r.e.); *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App.-Austin 1986, writ refd n.r.e.) cert. denied 481 U.S. 1024(1987).

L. Use of Easement:

The general rule is that the easement owner is entitled to exclusive use of the easement for the purposes of the easement. *Gulfview Courts, Inc. V. Galveston County*, 150 S.W.2d 872 (Tex. Civ. App.-Galveston 1941, writ refd). An easement holder has such rights as are incidental or necessary to its reasonable enjoyment. The dominant tenant must not unreasonably interfere with the rights of the servient tenant. *Williams v. Thompson*, 152 Tex. 270, 256 S.W.2d 399 (1953); *Pokorny v. Yudin*, 188 S.W.2d 185 (Tex. Civ. App.-El Paso, no writ); *Forister*, 514 S.W.2d at 899; *Stout v. Christian*, 593 S.W.2d 146 (Tex. Civ. App.-Austin

1980, no writ). However, the reasonable enjoyment of the easement includes the right to prepare, maintain, and improve it to the extent reasonably calculated to promote the purposes for which it was created. *Sun Pipe Line Co. v. Kirkpatrick*, 514 S.W.2d 789 (Tex. Civ. App.-Beaumont 1974, writ refd n.r.e.),

M. No Additional Burden:

No additional burden may be imposed on a granted easement where the grant of the easement was to a pipeline company and expressly authorized telephone lines on the right-of-way, it was held that the erection of telephone lines and the use by the power company was not an additional burden, so long as such lines were used in the maintenance and operation of the pipeline. *Cantu v. Central Power & Light Co.*, 38 S. W.2d 876 (Tex. Civ. App.-San Antonio 1931, writ refd).

N. Location:

The general rule is that, if an easement is not located, the servient tenant can locate the easement if such location is reasonable. Lack of definite location will not make the easement description fatally defective under the statute of frauds, since it is possible to subsequently specifically locate same. *Preston Del Norte Villas Association v. Pepper Mill Apartments, Ltd.*, 579 S. W.2d 267 (Tex. Civ. App.-Dallas 1978, writ refd n.r.e.); *Elliot v. Elliot*, 597 S.W.2d 795 (Tex. Civ. App.-Corpus Christi 1980, no writ). An established easement may be relocated only with consent of the parties. *Sisco v. Hereford*, 694 S.W.2d 3 (Tex. Civ. App.-San Antonio 1984, writ refd n.r.e.).

O. Width:

The mere failure to mention the width of the right-of-way does not render an instrument ambiguous and justify introduction of parol evidence. In such case; the grantee is entitled to a reasonable width dependent upon all facts and circumstances. *Crawford v. Tennessee Gas Transmission Co.*, 250 S.W.2d 237 (Tex. Civ. App.-Beaumont 1952, writ refd). If, however, a grant is for a roadway "as at the present located approximately 20 feet in width" and the road at such time as actually 14-1/2 feet, the width will be limited to that in use. *Jackson v. Richards*, 157 S.W.2d 982 (Tex. Civ. App.-El Paso 1941, writ refd).

P. Termination of Easements By Operation of Law:

If there is a foreclosure under a deed of trust created prior to the easement, the grantee at the trustee's sale takes free of the easement. *Henderson v. Le Duke*, 218 S.W. 655 (Tex. Civ. App.-Texarkana 1920, writ dism'd); *Cousins v. Sperry*, 139 S.W.2d 665 (Tex. Civ. App.-Beaumont 1940, no writ). However, the mortgagee may be estopped to deny or may be deemed to have ratified the dedication of the public easement

shown on a plat by its knowledge of the sale of and partial releases of platted lots. This may not be true though, particularly where the subdivision is unimproved, if the lender simply executes partial releases. *Johnson v. Ferguson*, 329 Mo. 363, 44 S.W.2d 650 (1931); *Weills v. Vero Beach*, 96 Fla. 818, 119 So. 330 (1928); *Pry v. Mankedick*, 172 Pa. 535, 34A. 46 (1896); 23 Am. Jr.2d *Dedication* sec. 12 (1983); *City of Fort Worth v. Cetti*, 38 Tex. Civ. App. 117, 85 S.W. 826 (1905, no writ); *Adouie & Lobit v. Town of La Porte*, 58 Tex. Civ. App. 206, 124 S.W. 134 (Tex. Civ. App. 1909, writ ref'd).

Q. Merger:

In order to constitute an easement, the dominant and servient estates must be held by different owners. If the owner of the easement acquires title to the servient estate, there is a merger and extinguishment of the easement. *Parker v. Bains*, 194 S.W.2d 569 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.). A terminated easement is not revived by subsequent separation of ownership of the former dominant and servient estates. *Long Island Owner's Assoc. v. Davidson*, 965 S.W.2d 674 (Tex. App.-Corpus Christi 1998, petition for review filed).

R. Limitations:

An easement may be extinguished by virtue of adverse possession by another, but all elements must be proved by the adverse possessor. *Jamail v. Gene Naumann Real Estate*, 680 S.W.2d 621 (Tex. Civ. App. - Austin 1984, writ ref'd n.r.e.). An easement may be lost by adverse possession of the servient estate for such use as is inconsistent with the continued use of the easement (such as where improvements, including stables and fences and gardens, precluded use of the easement). *City of Houston v. Williams*, 69 Tex. 449, 6 S.W. 860 (1888) (in this case, the five-year statute was also applicable due to a conveyance); *Walton v. Harigel*, 183 S.W. 785 (Tex. Civ. App.-Galveston 1916, no writ); *Chenoweth Bros. v. Magnolia Petroleum Co.*, 129 S. W.2d 446 (Tex. Civ. App.-Dallas 1939, writ dism'd judgment cor.) (Apparently, an implied easement such as a way of necessity could also be lost by adverse possession). In the case of *Robinson Water Co. v. Seay*, 545 S. W.2d 253 (Civ. App.-- Waco 1976, no writ) the owners of a tract of land fenced and used a portion of the roadway easement adversely, openly, peaceably, and continuously against all for 12 years. The portion of the easement inside the fence was extinguished. A government right of action is not barred by limitation periods. Tex. Civ. Prac. & Rem. Code sec. 16.061; Tex. Civ. Prac. & Rem. Code sec. 16.030 (prescribes acquisitions through adverse possession of any right or title to real property dedicated to public use).

S. Abandonment:

If the purposes for which the easement was granted cease, the easement terminates. For example, under a deed conveying a building to the county and reserving a right to use the second floor in favor of certain lodges, such rights cease upon abandonment of the defined purpose of occupancy. *Woodmen of the World Camp No. 1772 v. Goodman*, 193 S.W.2d 739 (Tex. Civ. App.-Dallas 1945, no writ). An easement owner is ordinarily free to abandon the easement, but in doing so he or she cannot prevent others from taking advantage of the benefits to which they are legally entitled by the easement grant and by their rights as owners of the freehold estate.

In *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985), the easement owner was liable to freeholders for removal of culvert he had permanently embedded in the land and for resulting destruction of roadway he had built over the easement. The private easement which a purchaser acquires by implication upon purchase with reference to a map showing an abutting street or alley survives vacation or abandonment of the street by a public authority. *Hicks v. City of Houston*, 524 S.W.2d 539 (Tex. Civ. App.-Houston [1st Dist.] 1975, writ ref'd n.r.e.).

The mere nonuse of an easement will not extinguish it. Intention to abandon an easement must be shown by clear and satisfactory evidence. There must be additional elements, such as the use becoming impossible of execution or failure of the object of the use or the substitution of new property for the old for a certain use. *Griffith v. Allison*, 128 Tex. 86, 96 S.W.2d 74 (1936); *Adams v. Rowles*, 149 Tex. 52, 228 S.W.2d 849 (1950).

Intention to abandon an easement is not manifested by the condemnation of said easement by a public authority. *City of San Antonio v. Ruble*, 453 S.W.2d 280 (Tex. 1970). The dominant owner has the duty to maintain, improve, or repair the easement at no expense to the servient owner. *Sisco v. Hereford*, 694 S.W.2d 3, 7 (Tex. App.-San Antonio 1984, writ ref'd n.r.e.); *Cozby v. Armstrong*, 205 S.W.2d 403, 408 (Tex. Civ. App.-Fort Worth 1947, writ ref'd n.r.e.).

It is extremely difficult to prove that a city or other public body has abandoned an easement or part thereof.

In *Roberts v. Bailey*, 748 S.W.2d 577 (Tex. App.-Beaumont 1988, no writ), the court did not apply the abandonment doctrine. In this case a deed granting a public easement of a street to the city was never accepted by the city council. At no time did the city maintain this thoroughfare. Therefore, the question of abandonment never arose. Whenever a county road has been enclosed under fence by the adjoining owner for more than twenty years, the road shall be deemed abandoned, provided same is not reasonably necessary to reach adjoining land. Tex. Transp. Code sec. 251.057; Op. Tex. Att'y Gen. No. H-111 (1975); *Aransas County v. Reif*, 532 S.W.2d 131

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(Tex. Civ. App.-Corpus Christi 1975, writ ref'd n.r.e.); *County of Calhoun v. Wilson*, 425 S. W.2d 846 (Tex. Civ. App.-Corpus Christi 1968, writ ref'd n.r.e.).

T. Expiration:

If an easement is designed by its terms to last for a specified period, then it will terminate upon the happening of a designated event. *Powell on Real Property*, Section 422. An easement created for a particular purpose will terminate as soon as the purpose ceases to exist, when it is fulfilled, or rendered impossible to accomplish. *Shaw v. Williams*, 332 S. W.2d 797 (Tex. Civ. App.-Eastland 1960, writ ref'd n.r.e.).

U. Strips and Gores:

The general rule is that as a matter of public policy, one conveying a tract of land adjoined by an easement strip is presumed to have conveyed to the center of the easement in the absence of specific reservation. This is commonly referred to as the doctrine of "strips and gores." *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S.W.2d 1080 (1932); *State v. Fuller*, 407 S.W.2d 215 (Tex. 1966); *Cantley v. Gulf Production Co.*, 135 Tex. 339, 143 S.W.2d 912 (1940). An instrument which conveys land and then excepts to a road, railroad right of way, etc., that occupies a mere easement over the land, conveys fee to the entire tract and the exception merely makes the conveyance subject to the easement. *Haines v. McLean*, 154 Tex. 272, 276 S.W.2d 777 (1955). The presumption does not apply if the grantor owns land abutting both sides of the strip or if the strip is larger and more valuable than the conveyed tract. *Krenek v. Texstar North America, Inc.*, 787 S. W.2d 566 (Tex. App.-Corpus Christi 1990, writ denied).

V. Easement - Abandonment - Title:

Where land adjacent to a railroad right-of-way is conveyed, the deed, in the absence of express reservation, conveys the fee burdened by the easement to the adjacent one-half of the railroad. Upon abandonment of the right-of-way, full fee title to such adjacent strip is then vested in such adjacent owner. *State v. Fuller*, 407 S.W.2d 215 (Tex. 1966).

W. Roads and Streets - State Highway - Abandonment:

The title to an abandoned State Highway may be divested out of the State upon the concurrence of four conditions, namely:

1. the Texas Transportation Commission must find the property no longer needed for highway purposes;
2. the Commission must so recommend to the Governor advising as to value; and

3. the Governor must execute a deed. Tex. Transp. Code sec. 202.021, 202.030.

If the State conveys its interest, the conveyance is subject to continued right of any public utility or common carrier. Tex. Transp. Code sec. 202.029. The Attorney General must approve the transfer. Tex. Transp. Code sec. 202.030.

X. Roads and Streets - County - Abandonment:

The Commissioners Court may reflect abandonment of a right-of-way by a resolution entered in the court minutes declaring the property abandoned and may then appoint a Commissioner to sell the property at public auction (or to an adjoining owner) after proper notice. The sales price for the right-of-way shall not be less than the fair market value as declared by appraisal, and shall be approved by the Commissioners Court. Tex. Local Gov't Code sec. 263.002; Tex. Att'y Gen.No. M-339 (1969). Title to the center of an abandoned road vests in each abutting landowner. Tex. Transp. Code § 251.058. Abandonment of a county road occurs when its use becomes so infrequent that one or more adjoining property owners have enclosed the road with a fence continuously for 20 years. A county road abandoned in this fashion may be reestablished as a public road only in the manner provided for establishing a new road. Tex. Transp. Code § 251.057.

Y. Overburdening and Unreasonable Use:

Use of an easement to benefit land other than the dominant estate is an improper overburden of the servient estate. *Jordan v. Rush*, 745 S.W.2d 549 (Tex. App. - Waco 1988, no writ). Unless the easement provides otherwise, the easement is apportionable among the owners of a subdivided dominant estate. The modern view of commercial (in gross) easements is that an easement is partially assignable if it does not burden the underlying land beyond the contemplation of the original easement grant. *Orange County v. Cigto Pipeline Co.*, 934 S.W.2d 472 (Tex. App.-Beaumont 1996, writ denied).

The ownership of an easement carries the right to use it in a manner which is reasonably necessary for the full enjoyment of the easement. *Knox v. Pioneer Natural Gas Co.*, 32i S.W.2d 596 (Tex. Civ. App.-El Paso 1959, writ ref'd n.r.e.). However, the owner of the dominant estate must use the easement so as not to interfere unreasonably with the servient tenement's ability to use the land. *Lamar County Electric Co-op v. Bryant*, 770 S.W.2d 921 (Tex. App.-Texarkana 1989, no writ) (cutting of trees was unnecessary where trimming would have been sufficient to prevent interference with power lines). A grant of an easement gives no exclusive easement over the land unnecessary to the use of the easement. *Stout v. Christian*, 593 S.W.2d 146 (Tex. Civ.

App.-Austin 1980, no writ) (court allowed locking of gates). Where the grant of the easement is general as to the burden, the exercise and the acquiescence of the parties in a particular manner fixes the rights and limits it to a particular course. *Pioneer Natural Gas Co. v. Russell*, 453 S.W.2d 882 (Tex. Civ. App.-Amarillo 1970, writ *ref'd n.r.e.*) (court narrowly construed a grant of right to parallel pipelines since there were no parallel lines laid initially and distinguish the *Knox* case which allowed by express provision the laying of additional lines in the future). However, where the grant of the easement does not state the width of the right-of-way, the grantee is entitled to suitable and convenient way sufficient to afford ingress and egress. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868 (Tex. App.-Austin 1988, writ denied). The court will not restrict a pipeline right-of-way to a 30 foot width where there is no width specified and there is an express right granted to lay future additional lines. *Lone Star Gas Co. v. Childress*, 187 S.W.2d 936 (Tex. Civ. App.-Waco 1945, no writ). The grant of a right-of-way to at any time lay and maintain additional pipelines along the initial line is not a mere optional right to acquire in the future but is an expansible easement which is not affected by the rule against perpetuities. *Strauch v. Coastal States Crude Gathering Co.*, 424 S.W.2d 677 (Tex. Civ. App.-Corpus Christi 1968, writ *dism'd*). Where an easement has been granted without definite location, the right to locate the easement belongs to the servient tenement but must be exercised in a reasonable manner. If there already is a way in existence, it will be held to be the location of the easement. *Cozby v. Armstrong*, 205 S.W.2d 403 (Tex. Civ. App.-Ft. Worth 1947, writ *ref'd n.r.e.*); *Elliott v. Elliott*, 597 S.W.2d 795 (Tex. Civ. App.-Corpus Christi 1980, no writ) (selection by grantee); *Grobe v. Ottmers*, 224 S.W.2d 487 (Tex. Civ. App.-San Antonio 1949, writ *ref'd n.r.e.*) (way of necessity could be located by the servient tenement).

A location of an easement generally cannot be changed without the consent of both parties even if the way becomes detrimental to the servient tenement. *Cozby v. Armstrong*, 205 S.W.2d 403 (Tex. Civ. App.-Fort Worth 1947 writ *ref'd n.r.e.*). However, it can be changed by mutual consent or by judgment of the court in equity where justice and equity require that the right be changed. *Sisco v. Hereford*, 694 S.W.2d 3 (Tex. App.-San Antonio 1984, writ *ref'd n.r.e.*). Misuse of an easement will not justify termination of the easement unless the use for which the easement was granted becomes impossible of execution. *Perry v. City of Gainesville*, 267 S.W.2d 270 (Tex. Civ. App.-Ft. Worth 1954, writ *ref'd n.r.e.*); *Reynolds v. City of Alice*, 150 S.W.2d 455 (Tex. Civ. App.-El Paso 1940, no writ).

No intent to create an exclusive easement will be imputed in the absence of a clear indication of such intent. The servient tenement may transfer his right to

use the land if it will not interfere unreasonably with the easement previously granted; he can thereby grant a second easement subject to the initial grant. *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 110 P.2d 983 (1941). The current owner can use a roadway easement in a manner not inconsistent with the dominant owner's reasonable enjoyment of the easement. *City of Corsicana v. Herod*, 768 S.W.2d 805 (Tex. App.-Waco 1989, no writ). If an exclusive easement is granted, then the grantee is entitled to free and undisturbed use of the land. *MGJ Corp. v. City of Houston*, 544 S.W.2d 171 (Tex. Civ. App.-Houston [1st Dist] 1976, writ *ref'd n.r.e.*).

The holder of an easement appurtenant to a specific tract of land cannot use that way to reach another tract of land owned by the owner of the easement for which the way is not appurtenant. *Jordan v. Rush*, 745 S.W.2d 549 (Tex. App.-Waco 1988, no writ).

VIII. MARKETABLE TITLE

What constitutes unmarketable title in Texas has been the subject of a fair amount of litigation. Of course, the existence of some defect rendering the title unmarketable may, and often times does, present a defect coming within the insuring clause of the policy. *Smith v. Herco, Inc.* 900 S.W.2d 852 (Tex. App. - Corpus Christi 1995 n.w.h.) *Smith v. Herco, Inc.* 900 S.W.2d 852 (Tex. App. ~ Corpus Christi 1995 n.w.h.). Smith purchased Unit 13 of the Brandy wine Townhomes in Corpus Christi from Herco (Hershey Corporation) for \$64,000. At the closing Smith received a general warranty deed from Herco as well as a survey indicating there were no encroachments. Herco sales person had represented that Smith would own all of the interior to half-way through the walls of the unit.

When Smith's employer transferred him and offered to purchase his house the employer's representative noted a discrepancy between his own measurements and those contained on the survey provided at closing. The discrepancy was that the survey failed to show that the northeast corner of the unit extended approximately four feet over the building line into the development's common area. After being unable to convey the property because of this problem and unable to maintain two house payments the property was foreclosed. Smith sued Herco and the surveyor and based on the failure to deliver "good and marketable title" was awarded damages.

In *Medallion Homes, Inc. v. Thermar Investments*, 698 S.W.2d 400 (Tex. App. ~ Houston [14th Dist.] 1985, no writ) *Medallion Homes, Inc. v. Thermar Investments*, 698 S.W.2d 400 (Tex. App. - Houston [14th Dist.] 1985, no writ). This case represented a suit to recover damages allegedly resulting from a breach of contract to sell real estate and involved a number of lots in a subdivision